Tradigrain SA v King Diamond Marine Ltd "The Spiros C" [2000] Int.Com.L.R. 07/13

CA on appeal from Commercial Court (Mr Justice Colman) before Henry LJ; Brooke LJ; Rix LJ. 13th July 2000.

LORD JUSTICE RIX:

1. Is a shipper liable under his bill of lading contract with a shipowner to pay that owner freight "*payable as per*" a charter when freight under that charter has already been paid by the time when the shipowner demands payment to himself?

2. Is a shipowner entitled to demand payment to himself of freight under his bill of lading when that contract stipulates for payment to another party?

3. Is there an implied term in every bill of lading, in the absence of contrary provision, that the shipper will discharge the goods and will do so in a reasonable time?

4. These are the three questions which arise on the present appeal from the judgment of Mr Justice Colman. They raise some old problems in novel settings.

The parties and their contracts

5. The shipowner, King Diamond Marine Limited, is the owner of the vessel *Spiros* C and the defendant in these proceedings (the "owner"). By a time charter fixture made on 18 February 1998 incorporating the terms of an earlier time charter dated 18 December 1997 the owner let its vessel to Mercator Marine for a period of 6 to 8 months commencing on the day of the fixture. I shall call this fixture the "*time charter*" and the time charterer *"Mercator*". The time charter was on the NYPE form, clause 18 of which grants to the owner the familiar "*lien upon all cargoes, and all sub-freights, for any amounts due under this Charter"*. Unfortunately Mercator subsequently became insolvent and the time charter came to an end with outstanding hire payments due from Mercator to the owner.

6. In the meantime, on 26 February 1998 Mercator entered into a voyage charter with Tradigrain Shipping SA, the third claimant, for a voyage from Rumania to Morocco (the *"sub-charter*"). This was on the Synacomex 90 form. It contained clauses concerning the payment of freight (clauses 4 and 46), loading and discharging, laytime and demurrage (clauses 5, 8, 9 and 49) and a lien on cargo for freight, deadfreight and demurrage (clause 21). I shall cite the relevant clauses below. For the present, it may be noted that the freight was expressed at a rate per tonne "free in/out", that is to say free of expense to the vessel (clause 5); the freight was payable to a nominated bank and account in the name of a third party "*International Navigation Corp"* ("INC") and was payable less three itemised deductions (viz, "*commissions, loading despatch, and [Mercator's] contribution to extra insurance",* clause 46); and the loading and discharging, laytime and demurrage clauses said that the vessel was to be loaded at the expense and risk of "Shippers/Charterers" and discharged at the expense and risk of "*Receivers/ Charterers"* (clause 5), at the stipulated laytime rates (that for discharge being contained in clause 49), and the demurrage was payable "by Charterers" (clause 9, which also stipulated the demurrage rate of $4,200 per day).

7. The sub-charter contemplated that two parcels of grain would be loaded, a parcel of 3,800/4,000 tonnes at Constantza and a parcel of 11,000 tonnes at Nikolaiev.

8. The smaller parcel, which was of wheat, was loaded by 4 March 1998. Its shipper was Tradigrain SA, the first claimant, presumably an associate company of the sub-charterer, Tradigrain Shipping. The wheat bill of lading was on the Congenbill form. It named the shipper, the consignee box stated simply "to order", but a notify address was given in Casablanca. The port of discharge was given simply as Maroc. The bill stated in three places on its front that freight was payable as per charter party. It was common ground (after an initial dispute at the time of loading, which had to be resolved by an application to the court) that the charter party referred to in this and the other bills of lading issued in respect of the larger parcel, which was of corn, was the sub-charter. The front of the bill referred to Conditions of Carriage overleaf, and clause 1 of those Conditions of Carriage provided, in familiar terms, that -

   "1. All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

9. The corn parcel was also loaded in the event at Constantza, and two further bills of lading were issued, dated 16 March 1998. These bills named consignees and gave Casablanca as the port of discharge. Save for such details as were specific to the cargo loaded, these bills were in the same form as the wheat parcel bill. However, the shipper of the corn parcel was the second claimant, Finagrain Compagnie Commerciale Agricole et Financiere SA ("Finagrain").

The claims

10. Difficulties were experienced at an early stage. Mercator failed, owing hire to the owner, who sought to exercise his time charter lien over sub-freights by notice given to Tradigrain dated 13 March 1998. That was while the vessel was still at Constantza, loading the corn parcel. There is an issue as to whether that notice was in time to intercept the payment of freight under the Tradigrain bill of lading in respect of the wheat parcel. There is no freight issue concerning Finagrain and the corn parcel.

11. It should be emphasised that the freight claim made by the owner in these proceedings is against Tradigrain and is to bill of lading freight, and is not a claim against Tradigrain Shipping to freight under the sub-charter. In theory the claim could have been put forward in the alternative, against Tradigrain as a direct claim under the bill of lading, and against Tradigrain Shipping as a claim to enforce the time charter lien for sub-freights. It is

well established that a lien over sub-freights gives to the shipowner a right, where his time-charterer has defaulted, to step in and claim payment of such sub-freights to himself, provided that they have not already been paid: ***Tagart, Beaton & Co v. James Fisher & Sons*** [1903] 1 KB 391, ***Wehner v. Dene Steamship Co*** [1905] 2 KB 92, ***Molthes Rederi Aktieselskabet v. Ellerman's Wilson Line Limited*** [1927] 1 KB 710. The nature of such right is thought to be an equitable assignment by the time charterer to the shipowner by way of security: see ***Care Shipping Corporation v. Latin American Shipping Corporation (The Cebu)*** [1983] 1 Lloyd's Rep 302 and the other cases cited by **SCRUTTON on Charterparties**, 20th Edition, 1996 at 354, footnote 45. The shipowner perfects his right of lien by giving notice to the debtor: if the notice is in time to pre-empt payment of the relevant sub-freight, then the shipowner is entitled to payment from the debtor, even though he otherwise has no direct contractual relationship with him. But if the shipowner's notice to pay comes too late, and the sub-freight has already been paid, then the lien fails to bite on anything. In the present case, however, whatever may have been the original terms of the owner's notice to pay, the claim before the court is not to a lien over the sub-charter freight, but a direct claim under the bill of lading against the shipper, Tradigrain.

12. The distinction between the nature of the two claims is referred to by Mr Justice Greer in ***Molthes Rederi v. Ellerman's*** at 716/7: *"It is difficult to understand how a shipowner can be said to have a lien on that which, ex hypothesi, is his own property, and which he is entitled to because it is his own. A lien is a claim by a person in possession of the property of another who has the right to keep possession until the owner pays the debt in respect of which the possessor is entitled to the lien. It seems a misuse of words to say that a shipowner has a lien on the debt due to him under the contract made with him by the bill of lading. The lien clause in the charterparty is needed to give the owner a lien in those cases where the sub-freight is due to the charterer and not to the owner, as where goods are carried on a sub-charter without any bill of lading. In such a case the owner could only become entitled to the sub-freight by virtue of the lien clause, and it would be too late to exercise this lien after the debt had been paid to and received by the charterer or through his agent."*

13. The forensic reason on the part of the owner for this choice, to claim directly under the bill of lading rather than by virtue of clause 18 of the time charter, is because by 13 March 1998, when the owner gave his notice that freight should be paid to him, the sub-charter freight on Tradigrain's wheat parcel had already been paid. The owner however submits, and Mr Justice Colman held below, that it had been paid in such a way as not to amount to payment of the bill of lading freight, even though the bill of lading freight was expressed to be "freight payable as per charter party" ie as per the sub-charter, and despite the general incorporation of the sub-charter into the bill of lading.

14. The facts regarding such payment were these. Clause 46, the freight payment clause of the sub-charter provided as follows: "*95% of freight, less commissions, loading despatch, Owners' contribution to extra insurance, is payable within 3 banking days from signing / releasing `Clean' Bills of Lading marked `Freight payable as per Charter-Party' or `Freight Prepaid' in Charterers' option.*"

    The freight on the wheat parcel amounted to $51,401.25, 95% of which was $48,831.25. On 6 March 1998, when payment of this freight was effected, Tradigrain Shipping took deductions not only for $ 6,927.56 in respect of the three matters mentioned in clause 46 (there is an outstanding dispute as to whether the deduction of $5,000 in respect of Mercator's contribution to extra insurance was justified) but also for two further items not mentioned in clause 46, namely an advance on account of disbursements at Constantza in the sum of $25,931.59, and an advance of cash to the master in the sum of $10,000. It had been agreed between Tradigrain Shipping and Mercator that both of those advances could be deducted from the freight, and those agreements are recorded respectively in a telex dated 26 February 1998, the date of the sub-charter itself, so far as the loading port disbursements are concerned, and in a telex dated 4 March 1998, so far as the cash to master is concerned. In the result, a balance of only $5,962.04 was derived, and this was paid on 6 May to the account nominated under clause 46 in the name of INC. The freight account drawn up by Tradigrain Shipping on that day clearly showed each item of the calculation.

15. Thus the claim made by the owner against Tradigrain in these proceedings was for $48,831.25. That claim arose by way of counterclaim in the case commenced by the claimants. The owner sought summary judgment of that amount of freight. Under his judgment below Mr Justice Colman awarded $35,931.59 to the owner, being the total of the two deductions taken in respect of the disbursements and the cash to master. He held that to this extent the freight had not been paid under the bill of lading, since these two deductions were not expressly allowed under the sub-charter terms incorporated in the bill of lading. In respect of the balance of the claim, permission to defend was allowed, on the basis that that part of the freight had been paid prior to the owner's notice of 13 March 1998.

16. The other claim argued below, pursuant to the claimants' application under RSC Order 14A, was with respect to the owner's further counterclaim, this time against both shippers, Tradigrain and Finagrain, under their respective bills of lading, for discharge port demurrage. In connection with this claim, the shippers sought in effect a declaration that they were under no liability under their bills of lading and that the relative paragraphs of claim in the counterclaim should therefore be struck out. Mr Justice Colman decided this issue against the shippers and in favour of the owner, on the ground that, even though the sub-charter's discharging, laytime and demurrage provisions were not incorporated into the bills of lading, nevertheless the bills contained an implied term that the shippers would discharge the vessel and would do so in a reasonable time.

The judgment below

17. As for the claim to freight, the owner submitted two reasons why it might be said to have remained outstanding, in whole or part, as at 13 March 1998. The first was that, because the wheat parcel freight had been paid too early, the payment only constituted an advance on freight rather than payment of freight itself. The Judge rejected that submission, holding that there was nothing in the bill of lading and the sub-charter terms incorporated in it to prevent early payment. That submission has not been resurrected on this appeal.

18. The second was the submission which succeeded below, namely that there had been no payment of that part of the bill of lading freight represented by the two deductions not mentioned in the sub-charter. The Judge reasoned (at [1999] 2 Lloyd's Rep 91 at 96) that - *"Once the bill of lading contract has been entered into and it has incorporated the freight provisions of the charter, it is not open to the shipper unilaterally to alter the payment terms of that contract to accommodate collateral arrangements he may have made with the disponent owner for deductions from the sub-charter freight*."

    In this connection he acknowledged that there was no authority of which he was aware and sought to approach the matter on the basis of principle. However, he derived support for his conclusion from a rule that a transferee of a bill of lading is subject only to the obligations which appear in the bill of lading itself but not to any merely collateral terms (see ***Leduc v. Ward*** [1888] 20 QBD 475), and from the extension of that reasoning, in the case of a bill of lading which incorporates the terms of a charterparty, which HH Judge Diamond QC formulated in ***The Heidberg*** [1994] 1 Lloyd's Rep 287 at 310/311, to the effect that a transferee of a such a bill should not be affected by oral terms not contained in either of the two documents.

19. A third issue was raised before Mr Justice Colman by Tradigrain's submission that no freight was due to the owner in any event, because by reason of the terms of the incorporated clause 46 of the sub-charter the freight was payable not to the owner, nor even to Mercator, but to INC. However, the judge rejected that submission, reasoning that the authorities which permitted the interception of bill of lading freight by timely notice to the shipper in cases where that freight was payable to a time charterer in Mercator's position necessarily also covered the case where such freight was payable to a third party such as INC.

20. He was therefore prepared to give summary judgment to the owner in the sum of $35,931.59.

21. As for the demurrage claim, the judge acknowledged the trenchant reasoning of Lord Diplock in ***Miramar Maritime Corporation v. Holborn Oil Trading (The Miramar)*** [1984] AC 676 (concerning the unlikelihood of sensible businessmen entering into obligations to pay demurrage over which they have no control) as militating against the manipulation of the wording of the sub-charter clauses dealing with discharge, laytime and demurrage so as to impose those obligations on a shipper, when the clauses refer instead to receiver and/or charterer, and only refer to shipper in the context of loading. It was conceded by the owner that the demurrage clause with its reference to demurrage being paid by "Charterers" (clause 9, referred to in error as clause 8 in the judgment below) should not be manipulated so as to refer to shippers; and it was held by the judge that clause 49, with its laytime code for discharging, should not be incorporated either, inter alia because of its introduction in clause 5, which referred to cargo being discharged at the risk and expense of "Receivers/Charterers" as distinct from shippers. Nevertheless, the judge accepted the owner's alternative submission that the court of appeal decision in ***Fowler v. Knoop*** (1878) 4 QBD 299 was determinative in imposing upon a shipper an implied term to discharge and to do so within a reasonable time. He reasoned as follows (at 99/100):

    *"Nothing in **Miramar Maritime Corporation v. Holborn Oil Trading**, sup., can have disturbed this authority which has stood unchallenged for over 120 years and is binding in this Court. The 11th ed. of Scrutton on Charterparties - the last for which Lord Justice Scrutton was responsible - states at page 362 that "there is contained in every bill of lading an implied contract by the consignor to unload the goods in a reasonable time". The text is to that extent unchanged in the 20th ed. - the most recent (20th ed. page 319) - for which Lord Mustill was jointly responsible.*

    "The Miramar was concerned not with the question whether the bill of lading contract included any term which imposed on the consignees an obligation to take delivery from the shipowners, but whether the consignees were liable for demurrage as specified in the voyage charter if there was a failure to take delivery of the whole cargo within the laytime specified in that charter. There was no consideration of the question whether they were under any obligation to take delivery of the cargo covered under the bill of lading contract within a reasonable time.

    "The implied term that the shipper should unload the cargo shipped by him within a reasonable time is, in my judgment, soundly based as a matter of principle.

    "Given that there is a binding contract of carriage between the shipowner and the shipper on the terms of the bill of lading, and that at the end of the sea passage, the cargo is to be discharged or at least received overboard by the shippers or the receivers as indorsees of the bills of lading, the time within which the shippers or receivers are to procure that this exercise is to be completed, in the absence of any more specific provision, must in principle be a reasonable time. The shipper or receiver cannot have an entitlement to keep the ship waiting for an unlimited time."

    He therefore granted a declaration that each of the shippers was under an obligation to procure discharge of its respective cargo within a reasonable time and that the discharge obligation was not subject to clause 49.

22. I now turn to consider the submissions made on appeal, beginning with the issue regarding the use of the advances in respect of disbursements and cash to master in payment of sub-charter freight.

Can Tradigrain rely on the advances in respect of disbursements and cash to master for the purpose of effecting freight under the bill of lading?

23. On behalf of Tradigrain Mr Stephen Males QC submitted that Mr Justice Colman was in error in his conclusion that such advances could not count towards the freight, even though they were dealt with by Tradigrain Shipping and Mercator as freight. Such a result would be unreasonable and contrary to the expectations of the parties. If, as was accepted, there was no surviving lien over the sub-charter freight, it was equally too late to seek to intercept the bill of lading freight, for there was no difference between the two. The principle of ***Leduc v. Ward*** did not assist since in any event it was necessary to look outside the terms of the written documents to discover the answer to the question whether the sub-charter or bill of lading freight had been paid. The extension of that principle in ***The Heidberg*** to the case of bills of lading which incorporate charterparties was of dubious validity, since at the time when such bills of lading are issued it is just as likely as not that no charterparty document will as yet have been drawn up. In any event, whatever may have been the position merely by reason of the collateral agreements to permit deductions against freight for the two advances, once there had been a settling of accounts on 6 March 1998 and the two advances had been specifically set off against the liability for freight, there was no further freight due under the sub-charter, and it followed there could be no further freight due under the bill of lading.

24. On behalf of the owner Mr Nigel Meeson supported the reasoning of Mr Justice Colman. He emphasised that although the bill of lading incorporated the freight (and other) terms of the sub-charter, they were different contracts and collateral amendments to the latter were not automatically incorporated into the former. The reference to the sub-charter was a reference to its written form. It is therefore necessary to clear with the owner as well as the time charterer any such collateral amendments, even a change of the time charterer's bank account to which payment is to be directed, if the shipper is to be protected against the danger that he may be called upon to pay freight to the owner under the bill of lading even after the sub-charter freight has already been paid to the time charterer. This may be rigid, but it reflects the shipping world and the need for formality in the identification of what it is that is transferred to the transferee of a bill of lading whose rights and obligations will be affected by such transfer.

25. It is tempting to think that the simple answer to this problem is Mr Males' fall-back position that, whatever be the effect of the collateral agreements for the deduction from freight of the two advances, nevertheless once the set-offs had actually been carried out, as they were on 6 March, the position is just as though those advances had been repaid to Tradigrain Shipping and then immediately paid back again specifically in the form of freight. They were then "*specifically designated as freight in respect of the chartered voyage",* to pick up a requirement imposed by Mr Justice Colman for the effective payment of freight at a time earlier than that contractually required (see at 97).

26. In my judgment, however, this solution does not meet the issue raised by Mr Meeson's submissions, for, if it be the case that the mode of payment laid down in the sub-charter cannot be departed from without it being said that bill of lading freight had not to that extent been paid, then it would be equally open to complaint that freight paid by means of the set-off of other debts owed by the sub-charterer to the time charterer was not a payment of freight under the original terms of the sub-charter incorporated into the bill of lading. This can perhaps be seen more clearly by realising that the set-off effected on 6 March 1998 had the consequence that some 60% of the freight was not paid into the designated account but dealt with outside that account by taking a set-off for advances made for other purposes to other persons on other occasions. Mr Males' fall-back position therefore is no different from saying that the owner under the bill of lading is to be regarded as having to give his shipper a discharge for bill of lading freight in respect of freight paid under the sub-charter to other than the designated account and (as would at any rate nominally be the case under clause 46) to other than the designated payee.

27. It seems to me therefore that the basic argument has to be met head-on. Is a shipowner entitled to say that bill of lading freight "*payable as per charterparty*" has not been paid in circumstances where that charterparty's freight has been paid (as is conceded) albeit in a manner or mode somewhat different from that specifically laid down in the original terms of that charterparty?

28. Mr Justice Colman remarked on the fact that he knew of no authority on this point and therefore had to approach the problem on the basis of principle. No new authority has emerged at this appeal hearing, and so my approach must be the same. Looking at the problem as a matter of principle, I would have thought that the solution ought to be found by resolving, if that is possible, the competing demands of promoting certainty in the identification of rights and obligations in a business environment where bills of lading may be negotiated to third party transferees, and on the other hand avoiding excessive rigidity in a situation where a shipowner is content, subject to the solvency of his time charterer, to allow his time charterer to dictate both the amount of his bill of lading freight and the manner of its payment. If those competing interests cannot be resolved, then a choice will have to be made between them. Looking at the problem as a matter of construction, the question might be put in these terms: Does the incorporation in a bill of lading of a sub-charter's freight provisions ("freight payable as per charterparty dated" such and such) forbid the amendment without the shipowner's express permission of any part of such provisions, or is there on the other hand standing authority from the shipowner for changes, or is the incorporation perhaps to be construed as referring to the identified charterparty together with its amendments?

29. I shall begin with ***Leduc v. Ward.*** That concerned an action brought by a consignee against a shipowner whose ship had been lost together with the consignee's cargo during a deviation to Glasgow from the contractual

voyage stipulated in the bill of lading. The shipowner raised by way of defence the allegation that the shipper had known at the time when the bill of lading was issued that the ship was intended to proceed via Glasgow. It was held that such evidence was not admissible to vary the terms of the bill of lading. Lord Esher MR expressed the general principle in terms of a contemporary restatement of the parol evidence rule as follows (at 480):

"...and then the general doctrine of law is applicable, by which, where the contract has been reduced into a writing which is intended to constitute the contract, parol evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract, except where there is some usage so well established and generally known that it must be taken to be incorporated with the contract."

Lord Justice Lopes spoke to the same effect (at 485). Lord Justice Fry, however, went further and said this (at 484/5):

"...but I prefer to rest my judgment on the view that the provision of the statute making the contract contained in the bill of lading assignable is inconsistent with the idea that anything that took place between the shipper and shipowner, not embodied in the bill of lading, could affect the contract."

It is for Lord Justice Fry's ratio that the case has become known as authority that the consignee of a bill of lading is not affected by any parol understanding between shipper and shipowner: see ***The Ardennes*** [1951] 1 KB 55 at 60 per Lord Goddard LCJ. None of that, however, means that there is anything to prevent a shipper and shipowner varying their contract in any way in which contracts may be varied, even if such variation may not affect a consignee.

30. Where a bill of lading incorporates the terms of a charterparty, however, the matter becomes more complicated, for in such a case the terms of the bill of lading are not to be found, or not all to be found, in the bill of lading itself. It therefore becomes an interesting and difficult question as to whether a shipper let alone a consignee is to be affected by any alteration in the terms of the incorporated charterparty. In ***The Heidberg*** the somewhat different issue arose as to whether a consignee was bound by a charterparty arbitration clause purportedly incorporated into a bill of lading in circumstances where the charterparty fixture had been agreed orally over the telephone and that oral fixture itself incorporated the terms of a previous charterparty. At the time of issue of the bill of lading, the oral fixture, although evidenced by a "recap" telex, had not been drawn up into an executed charterparty. This is by no means an uncommon feature of such fixtures. The charterparty itself may not be drawn up for some time. When it is, the charterparty will be given the date of the fixture. Such fixtures may, as in the case of ***The Heidberg*** itself, have been negotiated orally, or may have been made partly orally and partly in writing, or may have been negotiated entirely in writing. In any such case, a recap document is quite likely, and it is this which evidences the contract and thus the fixture, pending the execution of the more formal charterparty. It will often be the case that the charterparty will not have been drawn up and executed by the time shipment occurs and a bill of lading which purports to incorporate the charterparty comes to be issued. Judge Diamond's solution to this problem, drawing on the rule derived from ***Leduc v. Ward,*** appears to have been that such incorporation fails where the charterparty has not been executed by the time of the issue of the bill of lading. Thus at 311 he said:

"It would in my view be detrimental to the transferability of bills of lading and to their use in international trade to hold that an incorporation clause in a bill of lading is capable of incorporating a charter-party which has not been reduced into writing. Such a decision would involve that the transferee would be affected by collateral oral terms which do not appear in any document...

"I therefore consider that, as a matter of the construction of the bill of lading, it does not incorporate the terms of a charter-party which, at the date the bill of lading is issued, has not been reduced to writing. For the reasons given earlier an oral contract, evidenced only by a recap telex, does not seem to me to qualify for this purpose..."

31. Mr Justice Colman drew on Judge Diamond's reasoning for his own conclusion that a bill of lading which incorporates the terms of a charterparty is not affected by collateral variations of the charterparty. I do not think it is necessary to decide whether Judge Diamond's solution is correct, for it was based on concern for the position of a transferee rather than the original parties to the bill of lading contract. It is axiomatic, however, that the position of a shipper and of a consignee may differ. Nevertheless, his conclusion that the issue is ultimately a matter of construction is, it seems to me, correct, as is his insight that this question of construction needs to be answered with an eye to the broader context.

32. Thus, in the present case, the question of construction might be expressed by asking, as I have done above, whether the original parties to the bill of lading contract intended their contract to incorporate the freight provisions of the sub-charter as it might be varied, at any rate so far as the mode of payment is concerned.

33. In this connection there is one authority which is of some assistance and that is ***Fidelitas Shipping Company Ltd v. V/O Exportchleb*** [1963] 1 Lloyd's Rep 246 (Mr Justice Megaw), [1963] 2 Lloyd's Rep 113 (CA). There a bill of lading incorporated a charterparty which had been amended (as to the time for the commencement of lay-days) prior to issue of the bill. Mr Justice Megaw held that "*as per charter-party*" meant "*as per the charter-party as it stands (at least in documentary form) at the date of the issue of the bill of lading*" (at 253). In the Court of Appeal, Lord Justice Harman, with whom Lord Justice Pearson and Mr Justice Ungoed-Thomas agreed, said this (at 120):

"If one asked what at the date of the bill of lading, that is to say Oct 23, 1960, was the contract of carriage between these parties, it seems to me clear that it was the charter-party of Oct 6, as amended by the letter of Oct 12, and that any receiver of the goods who asked what the charter-party was must have been shown those two documents."

In that case the letter of 12 October was expressed as a formal Addendum.

34. In the present case, the correspondence which evidences the agreements to allow deductions of the two disbursements from freight are not formal addenda to the sub-charter. Nevertheless, that correspondence had been brought into existence on 26 February and 4 March 1998 respectively: the first date was certainly before the issue of the bill of lading, and the second date was the same day as completion of the loading of the wheat parcel and the date of its bill of lading: however, the actual day of issue of the bill of lading was delayed because of the dispute as to which charterparty it should refer to.

35. There were, however, no submissions regarding the significance of this chronology. For that reason, and also because of the lack of formality in the documents which evidence the agreed manner in which freight came to be paid, I will assume without deciding that the ***Fidelitas*** solution cannot be applied to the present case.

36. Nevertheless, just as it is necessary to take into consideration the fact that a bill of lading is a negotiable instrument and will in due course come into the hands of a transferee, so also in my judgment it is necessary to give weight to the circumstances and context in which a shipowner typically allows his bill of lading freight to be negotiated by and paid to his time charterer. The classic exposition is that of Mr Justice Channell in ***Wehner v. Dene*** [1905] 2 KB 92 at 99:

"Now, although the owner has the right to demand the bill of lading freight from the holder of the bill of lading because the contract is the owner's contract, yet the owner has also, of course contracted by the charterparty that for the use of his ship he will be satisfied with a different sum, which will also in the great majority of cases be less than the total amount of the bills of lading freights; and, therefore, if the owner were himself to demand and receive the bills of lading freight as he might do if he chose, he would still have to account to the charterer or the sub-charterer, as the case may be, for the surplus remaining in his hands after deducting the amount due for hire of the ship under the charterparty. Of course, in practice an agent is usually appointed to receive the bill of lading freight, though not necessarily, because the captain may receive it himself; and under this charterparty the captain has to appoint as agent any person whom the charterers may select, which is a very reasonable arrangement, because if the business goes smoothly and the charterparty hire is duly paid, the charterers are the persons really interested in receiving the bill of lading freight. But, if I am right as to the bill of lading contract being with the owner, then it seems to me to follow that the agent appointed to receive the bill of lading freight becomes by the very act of appointment the agent of the shipowner to receive the freight for him, and the agent's receipt binds the shipowner."

37. Now, since those days, the collection of freight is for the most part of course no longer carried out by the master, or by agents at the port, but by direct payments between banks, and charterparties typically contain provisions relating to the bank account to which payment should be made. If Mr Meeson's submissions on this issue are correct, then a shipper could not pay a time charterer, even at his express request, at any different account other than that stipulated in the charterparty, without being in breach of his bill of lading contract with the shipowner. In such a case, the shipper could pay the correct amount of freight to the right party, viz the time charterer, but because he had paid to an account different from that stipulated in the bill of lading he would be at risk of having to pay all over again to the shipowner. Or take this very case: the owner requests of his time charterer a payment of cash to master; under clause 5 of the time charter, such cash advances "*shall be deducted from the hire*". So the owner, pro tanto that $10,000 advance, has already been paid his outstanding hire. In fact, the $10,000 request has been passed down the line by the time charterer to Tradigrain Shipping, on the express agreement that the advance could be deducted from the freight. There was no obligation on Tradigrain Shipping to provide such an advance, in the absence of such an agreement. Yet under the judgment under appeal, Tradigrain must pay that $10,000 again to the owner, on the basis that there was no agreement within the sub-charter document itself for such a deduction.

38. Such a result combines inflexibility, uncommerciality, and injustice, against the background where the owner has been prepared to leave all matters relating to the freight to his time charterer, at any rate as long as the time charter hire payments are kept up, and where the risk of non-payment of that hire rests on the owner and no one else. The courts often have to decide which of two innocent parties have to pay for the default of a third. In the present context, that problem is resolved by saying that the owner can intervene and demand that bill of lading freight be paid to himself, but only if that freight has not already been paid. The rule is designed to ensure that the shipper does not have to pay twice. Mr Meeson's submission amounts to saying that freight has not been paid, when in truth it has, because it has been paid in a mode slightly different from that contemplated by the original sub-charter. It would be a matter for regret if legal analysis could not find a solution to that submission.

39. In my judgment, when a shipowner contracts that his freight should be payable as per a charterparty, he intends, and it is common ground with his shipper that he does so, that, at any rate until he steps in to claim his freight upon the failure of his time charterer, the whole manner or mode of the collection of the freight should be delegated to the time charterer. If the time charterer changes his bank, or bank account, and asks his sub-charterer to pay freight to a different account from that mentioned in the sub-charter, it is of no interest to the shipowner. If the time charterer is willing to accept freight not only in the form of a direct payment to the nominated account, but also, for his convenience, in the form of cash disbursements to his shipping agents, or to the master, then I see no reason why the shipowner should consider that such arrangements, even if they are different from that contemplated in the original charterparty, are outside the scope of his delegated authority to his time charterer.

40. Is there anything in the contractual structure, or in the need to have regard for the position of the transferee of a negotiable instrument, or in legal principle, or in authority, which is against that solution? In my judgment, no.

41. As for the contractual structure, the owner is a party to two contracts, the time charter and the bill of lading. It is well established, see ***Wehner v. Dehn,*** that the time charter represents the shipowner's real interest in the venture. His interest in time charter hire is secured by his lien on cargoes and sub-freights "for any amounts due under this Charter" (clause 18). The issue of bills of lading is left to the time charterer, subject to any specific directions. There is an express provision that bills of lading are to be marked "freight payable as per Charter-Party" (clause 30), which indicates that the freight terms of bills of lading are to be left entirely to the time charterer's agreement with his sub-charterers. The bill of lading ultimately issued was in conformity with that direction. The other party to that bill of lading, Tradigrain, by contracting that its freight is to be governed by the sub-charter, also indicates that it is prepared to have its responsibilities governed by the terms of another contract and by performance under it.

42. As for the position of the transferee and the principle in ***Leduc v. Ward ,*** I would have thought that those interests are promoted rather than compromised by the consideration that a bill of lading marked freight payable as per charterparty is consistent with and expressive of a delegated authority to perform the freight obligation in a manner agreeable to time charterer and sub-charterer, even if somewhat different from the mode set out in the relevant charterparty itself. In this respect, the consignee's concern is whether he is still liable to the owner to pay bill of lading freight, or whether it has already been paid by the shipper (or by a sub-charterer, where, as in this case, the shipper and the sub-charterer are different persons). He might in theory be exposed to a claim for freight from the shipowner in two circumstances: either by reason of the lien over sub-freights or by reason of a direct claim for bill of lading freight. In either event, he would have to investigate whether and to what extent freight had already been paid. To do this, he would not be able to confine himself to an examination of the contractual documents, which would of course include the bill of lading but would also (subject to the reasoning in ***The Heidberg***) extend to the incorporated charterparty and, where appropriate, to any amendments to it made before the issue of the bill of lading within the rule in ***Fidelitas.*** But he would also have to investigate the facts on the ground : Has freight been paid? All of it or some of it? By what date? Before or after the notice from the shipowner to pay freight to him? In other words, there is no avoiding the need to investigate the facts, as well as the basic contractual documents. But Mr Meeson's submission requires the examination of the facts to be all the more meticulous: a consignee could no longer merely ask whether the time charterer had been paid his freight, and when. He would also have to know whether the freight had been paid to the right account, and by means of the right deductions, and so forth. Once he had investigated all that, he would or ought to be in any event in a position to know whether any variation in the mode of payment from that laid down in the incorporated charterparty had been agreed. Having investigated the matter, he would learn, in a case like the present, if Mr Meeson's submission were correct, that although he was not susceptible to a lien on sub-freights, nevertheless he was liable to a direct claim to bill of lading freight. None of this in my judgment is necessary to promote the principle in ***Leduc v. Ward*** and the interests of the transferee. On the contrary, Mr Meeson's submission, if correct, would leave the consignee exposed in circumstances where he would not otherwise be exposed; and would require him to make more extensive investigations of the facts than he would otherwise be likely to have to carry out.

43. As for authority, there is none contrary to the solution I have suggested above. But, if Mr Meeson's submission were correct, there must have been many occasions over the last century when his point could have been taken. The fact that it would appear not to have been taken provides me with some comfort that my analysis is correct.

44. I therefore conclude that the deductions agreed with the time charterer in this case, by means of which the sub-charter freight was pro tanto paid prior to the owner's intervention, as is accepted by the owner, were a legitimate mode of performing the bill of lading freight obligation and were within the authority delegated by the owner (and the shipper) to the parties to the incorporated sub-charter to vary the mode of payment.

45. Since the owner's claim to bill of lading freight is a claim to summary judgment, it would have been sufficient to say that there is quite enough in Tradigrain's opposition to it to entitle Tradigrain to unconditional leave to defend - in which case my judgment could have been shorter. However, as the issue has been fully argued before this court, and both parties have treated the matter as though it fell for decision under RSC Order 14A as well as Order 14, I would conclude that the owner's claim for freight in the sum of the two deductions totalling $35,931.59 fails.

46. Mr Meeson did not complain that the vice of the agreed deductions was that the effect of them was that the freight pro tanto was paid to the time charterer rather than to INC, the nominated payee under clause 46. On the contrary, it was Mr Males who sought to find in the agreement to pay a third party, INC, a further reason why the owner's claim to freight under the bill of lading must fail. It is to that issue that I now turn.

Is a shipowner entitled to maintain a claim for bill of lading freight when the incorporated sub-charter stipulates for payment to a third party?

47. Mr Males submitted that because the owner had agreed that his bill of lading freight was to be paid to INC, he no longer had a right to claim for it in debt in his own name. He could seek specific performance of the promise to pay INC, or he could claim damages for the failure to pay INC (see ***Beswick v. Beswick*** [1968] AC 58 and CHITTY on Contracts, 28th Edition, 1999, Vol I at 19-044), but he had no claim in debt.

48. Mr Meeson submitted, in support of the judgment below on this point, that it was well established that a shipowner could intervene, if he was in time, to claim payment to himself, even of freight prima facie payable to a time charterer, and that for these purposes it made no difference in principle whether the freight was payable to a time charterer or to a total stranger.

49. Nothing is known about INC. It could in theory be an associate company or indeed a total stranger. It could be a mere nominee for Mercator. It could be a total stranger with some kind of security interest in the sub-charter freight. If this was a final trial, then in the absence of any evidence about the status of INC, one might infer that it was a mere nominee. But in the circumstances it would not be right to do so.

50. If INC were a mere nominee, then the fact that payment was to be made to it would be the same as stipulating for payment to Mercator. But Mr Males submits that even the promise to pay Mercator prevents the owner suing for bill of lading freight in debt for his own benefit.

51. It is again necessary to distinguish between a claim for bill of lading freight and a claim to a lien over the sub-freight payable under the sub-charter. For the latter purposes, it does not of course matter that the sub-freight in question is payable to a third party such as the time charterer, since the shipowner enforcing his lien stands in the shoes of the time charterer. (For that very reason, however, there might be a problem about enforcing a lien over a sub-freight payable not to the time charterer but to a total stranger.)

52. Mr Males submitted that in his judgment below Mr Justice Colman failed to distinguish between the case of the direct claim to bill of lading freight and the claim to lien, and that it was that failure which led him to hold that the owner could directly enforce a freight payable to INC. Thus Mr Justice Colman said (at 96):

"Any shipper and sub-charterer entering into a bill of lading contract with the shipowner knows that, as an everyday incident of international commerce, if a disponent owner defaults under the head charter the freight identified in the bill of lading may be intercepted at any time before it has been paid in accordance with the sub-charter. Until such payment has been made, the shipper's obligation to the shipowner is to pay the freight to him upon notice to do so having been properly given. Whether or not it has been properly given depends as between the shipowner and the disponent owner upon whether the shipowner is entitled to exercise his so-called lien on sub-freights under the head charter. That being the contractual regime involved, I conclude it can make no difference in principle whether the payee designated under the sub-charter is the disponent owner or some other party."

I do not agree that Mr Justice Colman was there confusing the direct claim with the claim by way of lien: but he was seeking to demonstrate the regime under one by analogy with the other, and the question is whether that is legitimate. He was right of course to say that it has long been established and recognised that a shipowner can intercept to claim his freight directly from the shipper at any time before it has been paid. Although the word "intercept" is perhaps more redolent of a claim by way of lien, it, or its equivalent "intervene" has traditionally been used to describe the direct claim as well: see ***Molthes Rederi v. Ellerman's***. In that case Mr Justice Greer said this (at 715):

"That he can intervene successfully before receipt of the freight by the agent seems to me to be the necessary consequence of holding as Channell J did in the case cited, that the bill of lading contract is a contract between the shipowner and the shipper, and not a contract between the charterers and the shipper. If this be so, the legal right to the freight is in the owner and not in the charterer, and the former can intervene at any time before the agent has received the freight, and say to him, "I am no longer content that the charterer should collect the freight. If you collect it at all, you must collect it for me.""

53. It is not clear from the facts of that case whether the bill of lading there provided for freight to be payable as per charterparty, or whether it was simply the practice of the shipowner to allow the sub-charter freight to be paid in the ordinary way to the time charterer. There is a similar uncertainty about the facts in ***Wehner v. Dene.*** In *India Steamship Co v. Louis Dreyfus Sugar Ltd (The Indian Reliance)* [1997] 1 Lloyd's Rep 52, however, I had to consider a case where the bill of lading did state that freight was payable as per charterparty. That charterparty nominated an account of the time charterer (Cosemar) for payment of the freight. I said this (at 57/58):

"In my judgment the expression "Freight payable as per charterparty" did incorporate cl.9 of the sub-charter, so as to make freight payable to the nominated account. Whether that is to be treated as a payment due to Cosemar, or due to the owners but payable to Cosemar does not, I think, for present purposes matter, but I would be inclined to say the latter."

54. Mr Justice Colman relied on that passage in the present case to conclude that payment to a third party, whether the time charterer or some other third party, did not prevent the shipowner's intervention, if it be in time.

55. If that is the law, and I think that it has been believed to be the law for a long time, the analysis needs some clarification. As I suggested above, the direct claim cannot just be conflated with the claim by way of lien, because in the latter case, unlike the former, the freight is due to the time charterer but (as authority suggests) is assigned to the shipowner. In the former case, however, the freight is the shipowner's freight, but directed to be paid to a third party. In ***The Indian Reliance*** I did not need to determine the question whether a shipowner could make a direct claim to freight which under the bill of lading was payable to the time charterer, because I found that the freight in question had already been paid at the time of the shipowner's intervention. I expressed the tentative view, however, that the bill of lading's incorporation of the voyage charter's freight terms meant that the

payment of freight was to be treated as due to the shipowner but payable to the time charterer. I did not need to take the analysis further in that case.

56. In the present case, however, the argument has been squarely taken by Mr Males that a debt payable to a third party cannot be sued for as a debt by the promisee. Prima facie that might seem to be correct, but as CHITTY remarks in the passage at 19-044 cited by Mr Males -

"The objection loses much of its force if the promisor would not in fact be prejudiced by having to pay the promisee rather than the third party."

There is then a reference in footnote 97 to para 19-060, where the following appears:

"But the question whether the promisee [the owner] can unilaterally (ie without the consent of the promisor) [Tradigrain] demand that payment be made to himself depends once again on the construction of the contract. If the contract can be construed as one to pay the third party "or as the promisee shall direct" then the promisee is entitled to demand payment to himself."

57. In my judgment the typical case of the bill of lading in which freight is payable as per charterparty is probably such a contract. The freight is due to the shipowner, as his consideration for the agreed carriage, but the shipowner directs that it be paid in the manner set out in the sub-charter. The construction which I propose would also be entirely consistent with the regime under the time charter, under which the lien over sub-freights indicates that the sub-charter freight is, in the event of a default under the time charter, to be subject to the shipowner's claim. In such circumstances, it would seem to make no difference whether the payee under the time charter is the time charterer himself, or some other third person, unless perhaps that third person has been given a secured right to the freight which clashes with the time charterer's and shipowner's rights. If that had happened in the present case, however, it might seem likely that INC would have come onto the scene.

58. I have expressed these views in deference to the submissions which have been addressed to the court. In circumstances, however, where the answer on the first issue relating to the deductions resolves Tradigrain's appeal in respect of the claim to freight, I would prefer to rest my decision on that first issue.

Is there an implied term in every bill of lading, in the absence of contrary provision, that a shipper will discharge the goods and will do so in a reasonable time?

59. The sub-charter's laytime and demurrage regime is set out principally in the following clauses:

"5. Cargo shall be loaded, spout-trimmed and/or stowed at the expense and risk of Shippers/Charterers at the average rate of 2,250 metric tons per weather working day of 24 consecutive hours or prorata, Saturdays, Sundays and Holidays excepted, even if used. See cl no 8.

"Cargo shall be discharged at the expense and risk of Receivers/Charterers at the average rate of See clause no 49."

(Clause 8 contains a detailed laytime clause which I need not set out, not least because it says "For discharge, see clause 49.")

"9. Demurrage is payable by Charterers at the rate of USD 4,200...per day of 24 consecutive hours or pro rata. Owners shall pay to Charterers despatch money for working laytime saved in loading/discharging at the rate of USD 2,100...per day of 24 consecutive hours or pro rata.

"49. Discharging terms:

(a) Vessel to be discharged at the average rate of 2,000 metric tons per weather working day of 24 consecutive hours, Saturday noon, Sundays and Holidays excepted, even if used.

(b) Time from Saturday noon or from 5 pm on days preceding a Holiday until Monday 8 am or next working day at 8 am not to count even if used, unless vessel already on demurrage.

(c) Notice of Readiness to be tendered by cable only during official working hours and laytime shall start to count at 08:00 hours next Working day following presentation of Notice of Readiness, whether in berth or not, whether in port or not, whether in free pratique or not, whether custom cleared or not."

60. In ***The Miramar*** [1984] AC 676 the House of Lords had to consider whether the incorporation of a charterparty in a bill of lading was effective to incorporate laytime and discharging provisions which made demurrage payable by the "Charterer". If the incorporation of such clauses was to be effective, then the word "Charterer" would have to be manipulated so as to read "bill of lading holder". In declining to manipulate this language and thus to give effect to the incorporation of such provisions, Lord Diplock said this (at 685):

"My Lords, I venture to assert that no business man who had not taken leave of his senses would intentionally enter into a contract which exposed him to a potential liability of this kind; and this, in itself, I find to be an overwhelming reason for not indulging in verbal manipulation of the actual contractual words used in the charterparty so as to give to them this effect when they are treated as incorporated in the bill of lading. I may add that to do so would raise a whole host of questions as to how the liability is to operate as between different consignees of different parts of the cargo, to which questions no attempt has been made to vouchsafe any answer, let alone a plausible one. To give some examples: is any personal liability for demurrage incurred by consignees of cargo which has been discharged before the expiry of laytime? If the discharge of a consignee's cargo takes place after the vessel is on demurrage is his liability to pay demurrage limited to the amount of demurrage accrued after the expiry of laytime and up to the time when the discharge of his part of the cargo is complete? Is each consignee liable for all demurrage accrued while his cargo remains on board? Is the liability of each consignee to pay demurrage several? If the shipowner chooses to sue

one consignee of part of the cargo for the full amount of demurrage has that consignee any right of contribution against consignees of other parts of the cargo and, if so, against which of them and upon what basis?"

61. Although the laytime and demurrage provisions of that charterparty and the sub-charter in the present case are not identical, enough of what Lord Diplock there said is applicable to make it sensible to ask whether the shippers in this case can as reasonable businessmen be thought of as intending to enter into obligations to discharge in accordance with the sub-charter terms in circumstances where it could be contemplated that they, as distinct from their receivers, would have no control over such discharge, and where the sub-charter itself refers to the charterer, or the receiver/charterer, as being responsible, but not the shipper (see clauses 5 and 9). It was for such reasons that Mr Justice Colman held that such terms were not to be incorporated into the bill of lading. I do not dissent from that view, but an alternative possibility might well be that the sub-charter's laytime and demurrage code is incorporated into the bill of lading, with the effect that shippers (and the sub-charterer Tradigrain Shipping) are to be responsible for laytime and demurrage in loading and receivers (and the sub-charterer) are to be responsible accordingly in discharge. In that case, the only manipulation necessary would be for "Charterers" in clause 9 to be read as meaning "Charterers and Shippers or Receivers as the case may be", which would perhaps not be difficult.

62. However, it seems to me to be unnecessary to choose between these alternatives. In any event, the shippers would not be responsible under the terms of the incorporated sub-charter for demurrage at discharge.

63. Nevertheless, Mr Justice Colman decided that a term should be implied that the shippers would discharge the vessel in a reasonable time. I agree that if a term is to be implied making the shippers responsible for discharge, then it would also have to be implied that such discharge should be performed in a reasonable time. But the question is whether the responsibility of discharging the wheat and corn parcels is to be imposed on the respective shipper.

64. In one sense it might be said in the abstract that a shipper ought to undertake to discharge a ship which he has loaded. In another sense, it might be thought to be unreasonable for him to undertake a liability over which he has no control, and to be unnecessary if the correct implication is that the receiver will discharge. It is classic law that no term should be implied which is not both reasonable and necessary. If therefore any term is to be implied, then it might seem preferable to formulate it in terms that the receiver would discharge in a reasonable time; alternatively that the ship would be discharged in a reasonable time by the holder of the bill of lading, be he shipper or receiver.

65. In this connection it is worth considering what other remedies a shipowner has in relation to discharge. Where at any rate the ship is under charter, the shipowner's principal remedy is under his charterparty. Such a charterparty, where it is a voyage charter, will be able to make detailed provisions for laytime and the calculation and payment of demurrage both at loading and discharge, and such provisions are commonly incorporated into bills of lading - even if ***The Miramar*** has now indicated limits to the incorporation of inappropriately drafted clauses. Even where the bill of lading does not incorporate the voyage charter demurrage provisions, the shipowner will still have an equivalent remedy to enforce payment of demurrage from the bill of lading holder in the form of a lien on the cargo for demurrage: ***The Miramar*** at first instance and in the court of appeal (the point was no longer live in the House of Lords) demonstrates that the voyage charter's lien clause will be incorporated even where its demurrage provisions are not, see at [1983] 2 Lloyd's Rep 319 at 324/5 per Mr Justice Mustill and [1984] 1 Lloyd's Rep 142 at 144 per Sir John Donaldson MR. Mr Justice Mustill said (at 324) that

"It has been a feature of shipping practice for many years that the shipowner looks primarily to his lien in case of dispute, and no doubt has ever been raised about the acceptability of a situation where the lien is more extensive as against consignees than their own direct personal liability..."

Where, on the other hand, as in the present case the voyage charter is a sub-charter, the shipowner has no charter claim for demurrage, and therefore no lien for demurrage under the incorporated lien clause, unless he has a direct claim for demurrage under the incorporated provisions of his bill of lading. Nevertheless, he has chosen to trust to his time charterer under his time charter, under which the expenses of discharge will be imposed on his time charterer and he will be compensated for delay at the discharge port in the form of daily hire.

66. In these circumstances, where the risk of delay at discharge is typically provided for either under specific fixed laytime and demurrage provisions or in the form of time charter hire, the imprecision of a demurrage term based on a reasonable time seems to have an old-fashioned ring. SCRUTTON comments (at footnote 57 on page 317) that it is now "*extremely rare*" for (voyage) charters not to make specific provision as to the time for loading and unloading. The reason is that where laytime is fixed, the risk of delay from any cause (typically congestion) is on the charterer/consignee, absent agreed exceptions. Where, however, the laytime is not fixed but the test is that of a reasonable time, the risk of delay, other than that caused by the charterer/consignee is, broadly speaking, on the shipowner. That is why provisions for a fixed laytime have almost entirely superseded the former regime. It follows that where a liability for demurrage has to be found by way of implication, although there is nothing whatsoever strange in principle with the implication of a reasonable time, for that is the classic implication where the time for performance is left at large, it results in a situation which is at odds both with modern shipping practice and also with the demurrage calculations which will otherwise be made at the discharge port under the voyage charter.

67. Mr Meeson nevertheless submits, and it is true, that an obligation to discharge within a reasonable time avoids the most perverse of the effects to which Lord Diplock drew attention in ***The Miramar***. Moreover Mr Meeson points out that in the ordinary case the liability for discharge will in any event fall on the receiver, but still contends that that is no reason why there should not also be a residual liability on the shipper, who remains liable even after transfer of the bill of lading. The shipper, he further submits, will have his remedy against the receiver, his buyer, under his sale contract.

68. Mr Meeson also complains that part at least of the reason for the delay in discharge of the vessel in the present case was that there was (at any rate for a time) no receiver for the wheat parcel. The evidence concerning such matters is not before the court. The fact is, however, that the Congenbill form contemplates that there will be a consignee. Moreover, the implication of the term found by Mr Justice Colman was derived as a matter of general principle, and was not ad casum. Nor is the owner's case based on an allegation that Tradigrain was the receiver, or still the holder of the wheat bill of lading at any relevant time. On the contrary, Mr Meeson was at pains to emphasise that under the terms of the Carriage of Goods by Sea Act 1992 a shipper remains liable for his obligations even after transfer of the bill: see section 3(3). Thus it is that the owner seeks the same implied term against both shippers, Tradigrain and Finagrain, irrespective of particular circumstances relating to any dealing with the bills of lading or difficulties at the discharging port.

69. The real basis of Mr Justice Colman's implied term was the authority of ***Fowler v. Knoop*** and SCRUTTON. I have cited the relevant passage of his judgment above.

70. Mr Males submits, however, that ***Fowler v. Knoop*** is not authority for Mr Justice Colman's holding, and that the entry in **SCRUTTON** is in error, even though it originates in an edition for which Lord Justice Scrutton had responsibility.

71. In ***Fowler v. Knoop*** the plaintiff owner sued the consignee for demurrage at the discharging port. There is nothing in the facts to suggest that the terms of a charterparty were incorporated in the bill of lading, other than as to freight ("they paying freight for the goods as per charterparty"). Nevertheless the consignee sought to derive advantage from the charterparty provision that the cargo was to be discharged "as fast as the custom of the port will allow": he submitted that this superseded the implied contract in the bill of lading to deliver the cargo within a reasonable time. It appears that it was common ground that the bill of lading contract contained such an implied obligation. The jury had found, however, that there was no custom of the port. The court of appeal therefore held that it need not decide on the consignee's contention, since there was nothing in the charterparty ("even under the charterparty, reasonable despatch should be used" (at 304)) to vary the implied bill of lading contract. It may be said therefore that the case is an authority for nothing, since the only point in dispute was made redundant by the jury's finding. At most the case demonstrates that the court was prepared to sanction the common ground position that the bill of lading contained an implied contract to take delivery of the cargo within a reasonable time. Since, however, the defendant was a consignee, not a shipper, it is not clear that the implied contract would embrace the shipper. It is true that the implied contract was expressed in the passive, without reference to party ("The implied contract is that the ship shall be discharged within a reasonable time..." , at 304), but the position remains that the effect of this implication on a shipper never had to be considered.

72. Nevertheless, the case of ***Fowler v. Knoop*** led **SCRUTTON** to say, as it has done from the time when it was edited by Lord Justice Scrutton down to the present day, that "There is contained in every bill of lading an implied contract by the *consignor* to unload the goods in a reasonable time" (emphasis added). Apart from ***Fowler v. Knoop*** two other authorities are mentioned at footnote 73 on page 319 of the current edition (20th Edition, 1996) in support of that proposition. The first, ***The Clan Macdonald*** (1883) 8 PD 178, is principally a case on section 67 of the Merchant Shipping Amendment Act, 1862, and to that extent has little to do with the issue under discussion. However, at page 184 and again at page 185 Sir James Hannen remarked that it was the duty of the consignees to take delivery of their goods within a reasonable time after they were on notice that they could receive them. That again takes the matter no further, especially as under the express terms of the bills of lading (see at 179) the obligation of discharge was upon the consignee. The third of the authorities cited at footnote 73 is ***Tillett v. Cwm Avon*** (1886) 2 TLR 675. That was again a case involving consignees. As in ***Fowler v. Knoop***, none of the provisions of a charterparty had been incorporated save as to freight. The shipowner contended that the consignees were under an implied obligation to discharge within a reasonable time; the consignees did not dispute that proposition, but denied that there had been any delay. The court disagreed, and Manisty J with whom Hawkins J agreed said that there was a "*general principle of law that where a person undertook to discharge a vessel he must do so within a reasonable time*". Again, nothing was in dispute but the facts. The nature of these cases support the concept that, where there is an obligation to discharge, there is an obligation to discharge within a reasonable time. The question remains as to who has (implicitly) the obligation to discharge. Mr Justice Colman spoke (at 100) of "shippers or receivers", but that may be said to leave the question unanswered. Of course, if the shipper is also the receiver, so that the bill of lading is never transferred, then the obligation will fall on him in any event.

73. Mr Meeson did not disagree that there was little or nothing in those three authorities to support the implied term spoken to by ***SCRUTTON,*** but submitted that the term was nevertheless well founded. He sought to support it on the basis of a further authority in the form of ***Cawthron v. Trickett*** (1864) 15 CB (NS) 754, since that case concerned a shipper: but the decision turned on an express term in the bill of lading that "*the vessel to take her*

regular turn in unloading", and the court not surprisingly read that as a "*contract on the consignor's part that the ship shall take her regular turn in unloading*" (per Erle CJ at 758).

74. Thus far I would conclude that an implied term binding the shipper is not impossible, but that there is no authority (other than ***SCRUTTON's)*** to support it. I would agree with Mr Justice Colman that there is nothing in ***The Miramar*** that deals directly with the question of such an implied term. But equally there is no support there for the suggestion that such an implied term underlies a failed attempt to incorporate a charterparty's demurrage provisions into a bill of lading; and the discussion focuses generally on the unreasonable results that may occur if a party is held responsible for activities at a port where it has no business.

75. I would be inclined to say that the most that could be implied into a bill of lading which was otherwise silent as to the matter of discharge is that the holder of the bill of lading who presents the bill of lading in order to obtain delivery of the cargo is responsible, irrespective of whether that is the shipper or receiver: see, for instance, Blackburn J in ***Ford v. Cotesworth*** (1868) LR 4 QB 127 at 137, a case which, although not mentioned in the judgment in ***Fowler v. Knoop,*** was cited to the court (see at 303). But that is not the implied term for which Mr Meeson has contended.

76. Be that as it may, and even if **SCRUTTON's** implied term does bind the shipper, its implication has to be capable of surviving the incorporation of the sub-charter terms. Mr Justice Colman held that the sub-charter's laytime and demurrage provisions were not effectively incorporated, and that that left the implied term in place. I do not see, however, how clause 5, with its division of responsibility for loading and discharging the vessel between shipper and receiver respectively, can be used as a reason for refusing to incorporate the sub-charter's discharging provisions into the bill of lading and yet disregarded for the purpose of implying a term that the shipper, as distinct from the receiver, is to be liable for discharge of the vessel. There is no discussion in the judgment below of the effect of the sub-charter terms on the implication in the bill of lading of a term relating to discharge by the shipper.

77. Mr Meeson submitted that it was illegitimate to look at the non-incorporated terms of the sub-charter in order to construe the bill of lading. He says that such terms are *res inter alios acta* and irrelevant. He cited no authority for that proposition.

78. In my judgment his submission is not well founded. The first rule relating to the incorporation of one document's terms into another document is to construe the incorporating clause in order to decide on the width of the incorporation. Thus in the shipping context it is now well established that a general incorporation of a charterparty's terms into a bill of lading is only apt to incorporate terms relating to the shipment, carriage and discharge of the cargo, and not other terms, of which (in the absence of express provision) a famous example is the arbitration clause: see ***T W Thomas & Co Ltd v. Portsea Steamship Co Ltd*** [1912] AC 1. A second rule, however, is to read the incorporated wording into the host document in extenso to see if, in that setting, some parts of the incorporated wording nevertheless have to be rejected as inconsistent or insensible when read in their new context: see eg ***Porteus v. Watney*** (1878) 3 QBD 534 at 542, per Brett LJ:

"But then there is another rule which applies, which is, that if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and inapplicable, they must be struck out as insensible; not because they are not introduced, but because being introduced they are impossible of application."

79. Sometimes the two rules have been read together, as in ***Hamilton & Co v. Mackie & Sons*** (1889) 5 TLR 667, but more recently they have been recognised as distinct approaches, see ***Skips A/S Nordheim v. Syrian Petroleum Co (The Varenna)*** [1984] 1 QB 599. In determining that second question, the court has to have regard to the wording of both documents, to the extent that the charterparty is prima facie incorporated. In such circumstances if a demurrage regime which would put the responsibility of discharging upon a shipper has to be first considered and then rejected, as it was below, inter alia because of a clause (clause 5) which would place such responsibility only upon a receiver or charterer and not upon a shipper, I do not see what room there remains for implying a clause which would make a shipper liable for discharge. The discharge regime of the incorporated sub-charter, although (or even if) ineffective in the bill of lading and thus ultimately discarded, sufficiently negatives the implication in the bill of lading of a liability for discharging which is to rest on the shipper. It would after all be entirely anomalous if a shipowner, who was content to leave his bill of lading terms to be defined by his time charterer's sub-charter, should be able to say that it was necessary and reasonable to imply into his bill of lading a term which ran counter to the structure of that sub-charter. I know of no case in which a term relating to discharge port demurrage has been implied into a bill of lading which has sought to incorporate in general the terms of a charterparty.

80. On the contrary, in ***SA Sucre Export v. Northern River Shipping Ltd (The Sormovskiy 3068)*** [1994] 2 Lloyd's Rep 266 at 285/6 Mr Justice Clarke considered a somewhat similar question. There a shipowner was claiming discharge port demurrage from a receiver under a bill of lading with a general charterparty incorporation clause. As in this case the charterparty provisions imposed liability upon the charterer but otherwise divided responsibility for loading and discharge between shipper and receiver. However, in the critical demurrage clause, mention was only made of the charterer and the form's reference to "*receivers at discharging port*" had been deleted. Mr Justice Clarke therefore held that the clauses, which he seems prima facie to have considered to have been incorporated, did not make the receiver liable for demurrage; alternatively, he held that the laytime and demurrage provisions were not incorporated (at 286). It is true that there was no further argument by the shipowner in favour of an implied term, but that case would seem to illustrate how the idea of such an implication

is absent from the situation there, as here, under consideration. It also demonstrates how the difference between ultimate incorporation and rejection may be a fine one.

81. For these reasons, I conclude that even if a term that a shipper is responsible for discharging can be implied into a standard bill of lading, it is not to be implied in a bill of lading which seeks to incorporate, albeit ineffectively, a regime which would excuse a shipper from liability for discharge and place it solely on a receiver or charterer.

Conclusion

82. In conclusion, the shippers' appeal succeeds. The owner's claim to freight fails as to the $35,931.59 paid by way of set off of the advances made by Tradigrain Shipping on Mercator's express agreement to permit such advances to be deducted from freight. Moreover, there is no liability on the shippers to discharge the vessel within a reasonable or any other time. It follows that the owner's counterclaim for discharge port demurrage against the shipper must fail.

Lord Justice Brooke:

83. I agree.

Lord Justice Henry:

84. I also agree.

Order: Appeal allowed. Claimant's costs summarily assessed in the sum of £32, 00. Orders made under paragraphs 2 & 3 of minute of order. Application for permission to appeal to the House of Lords refused. (Order does not form part of approved judgment.)

Stephen Males QC (instructed by Messrs Richards Butler, London E3 for the Appellant)
Nigel Meeson (instructed by Messrs Hill Dickinson, Liverpool for the Respondent)