East West Corporation v DKBS 1912 [2002] Int.Com.L.R. 02/07

JUDGMENT : Mr Justice Thomas : Commercial Court. 7th February 2002

Introduction

1. Goods shipped by the claimants in Hong Kong in containers were carried to Chile on the defendants' liner services; they were cleared through customs and delivered to a person not entitled to the goods without presentation of the bills of lading. To such a claim, a shipowner would normally have no defence, but the circumstances in this case are said by the defendants to provide them with a defence on several cumulative and alternative grounds. The issues give rise to points on the Carriage of Goods by Sea Act 1992, the delivery obligations under bills of lading and the law of Chile, including an issue on the scope of Article 4 of the Hamburg Rules which are in force in Chile.

2. The facts can for most purposes be briefly stated.

The facts

3. The claimants are related companies and carry on in Hong Kong a business of exporting goods manufactured in China to other countries in the world. For some time they had been selling goods to Gold Crown, a company based in Santiago, Chile. In 1998 they agreed to sell further consignments to them on terms of cash against delivery. The claimants shipped goods at Hong Kong in containers on liner services for delivery in Chile. Those that were carried by the defendants in the first action (Maersk) were shipped between 22 September 1998 and 19 October 1998 and those carried by the defendants in the second action (P&O) were shipped on 5 February 1999.

4. The claimants had made arrangements with their bankers for the shipping documents to be remitted to banks in Chile so that the documents would only be released on payment. Liner bills of lading were duly issued for each of the nine shipments and delivered to the claimants. The claimants were named as the shippers in each bill of lading and the notify party was Gold Crown. The goods were consigned to the order of named Chilean Banks in all the Bills of Lading, save one of the Maersk bills where the goods were simply consigned to a named Chilean bank and not to its order; these banks were to act as the correspondents of the claimant's bankers to obtain payment from Gold Crown in return for the bills of lading.

5. The bills of lading were endorsed by the claimants and sent by the claimants' bankers to their correspondent bankers in Chile for them to obtain payment. There were some transfers between the banks in Chile to which it will be necessary to refer.

6. The containers carried by Maersk arrived at San Antonio, Chile between the end of October and November 1998; those carried by P&O (on a chartered vessel) arrived at San Antonio and were discharged from the vessel on 10 March 1999. The bills of lading issued by P&O provided for them to be shipped to Valparaiso, but no point arose on this for various reasons which it is not necessary to set out. In accordance with the Customs laws of Chile, as duty had not been paid in advance, the containers had to be placed on arrival in a licensed Customs warehouse:
   - The goods carried by Maersk were placed by their agents AJ Broom in a Customs warehouse operated by Seaport SA at San Antonio;
   - those carried by P&O were placed by the ship's agents, Agencias Universales SA, first in a container yard and then moved to a licensed customs warehouse operated by Empressa Porturia de Chile de San Antonio at San Antonio.

   It will be necessary to examine in more detail the detailed provisions of these laws and the arrangements for the operation of licensed warehouses and Customs clearance.

7. Customs duty was paid on the goods and the goods in the containers were released to the Customs agent of Gold Crown without presentation of the original bills of lading and handed over to Gold Crown. Four of the seven containers carried by Maersk were released in November 1998, two after 19 January 1999 and one at an unknown date. Those carried by P&O were released on 15 March 1999.

8. Although Gold Crown made some payments to the claimants, they did not pay for the goods in two of the containers carried by P&O and seven of the containers carried by Maersk. The banks were requested to return the bills of lading to the claimants which they did without endorsing them back.

9. Each of the bills of Lading contained a clause subjecting the contract to English law and jurisdiction. The claimants commenced proceedings in this court against P&O and Maersk on the basis that they had delivered the cargo without presentation of the bills of lading. They claimed $134,807.40 against Maersk and $95,147.20 against P&O.

10. In the ordinary case, a carrier would have no defence to such a claim properly made by a person entitled to bring a claim under the bill of lading. However, Maersk and P&O have raised a number of defences:
    i) The claimants had no title to sue.
    ii) Under the law of Chile carriers were required to deliver the goods to the licensed Customs warehouse. Once they had delivered the goods to licensed Customs warehouse which they had to do without presentation of the bills of lading, they had discharged their obligations and the contract of carriage came to an end. Furthermore the Hamburg Rules were in force in Chile; under Article 4 of the Hamburg Rules, Maersk and P&O were discharged from responsibility in such circumstances. As they had acted in accordance with the law of Chile, they were not liable for delivery without presentation of the bills of lading.

iii) If they were not correct in their contentions as to the law of Chile, the express terms of the bills of lading exempted them from liabilty.

iv) They were not negligent in delivering the goods without production of the bills of lading.

11. At an earlier stage, Maersk and P&O both contended that the claimants had not properly mitigated their loss, but at the conclusion of the evidence that allegation was quite properly abandoned.

12. It is convenient to consider the issues that arise under four main headings – (1) title to sue, (2) the delivery obligation, (3) the exceptions in the bill of lading and (4) the claim in negligence. I was greatly assisted by the very thorough and detailed research and submissions made by counsel for the parties.

Issue 1: Do the claimants have title to sue?

13. The claimants contended that they had title to sue on a number of different bases:

i) They had retained their rights of suit as shippers and these had not transferred to the Chilean banks even though the banks were named as consignees and the banks had obtained physical possession of the bills of lading.

ii) If the rights of suit had been transferred to the Chilean banks, the claimants had title to sue as undisclosed principals of the Chilean banks named as consignees.

iii) If they had lost their rights of suit and did not have them as undisclosed principals of the Chilean banks, the rights of suits had been transferred back to them.

iv) They had, in any event, title to sue in bailment.

v) They had the right to sue in negligence for the loss of their proprietary interest.

Before considering each of these contentions, it is necessary to set out my further findings of fact.

Further findings of fact

14. It was quite clear on the evidence that the capacity in which the claimants' own bankers in Hong Kong acted was to put in place arrangements for payment to be made by Gold Crown to the correspondent bank before the bills of lading were transferred to Gold Crown. The correspondent banks in Chile which were named as the consignees were appointed only for the purpose of collecting the price from the buyers as the agents (or sub-agents) of the claimants. The goods remained in the ownership of the claimants and neither their bankers in Hong Kong nor the correspondent bankers in Chile obtained any security or other interest in them. As between the banks in Chile and the claimants, the banks had no right to take delivery from the carrier.

15. That was all clear both from the documents and from the evidence of Mr Deepak Balani, a director and principal in the claimants, which I accept; he was an honest and clear witness. His evidence was that the claimants had named the banks as consignees as that was their practice. Their own bankers wanted this done so that the payments were routed through their correspondent banks in Chile.

16. I am also satisfied on his evidence and from the documents that the claimants retained full control over the documents, as the banks at all times held them to the order and direction of the claimants. The clearest proof of this was the transfers of the documents between banks in Chile to which I briefly referred at paragraph 5. For example, one of the Maersk bills for goods which the claimants intended to sell to Gold Crown was issued with the Banco Credito e Inversiones as consignee; the claimants decided to sell the goods to another buyer and recalled the bills from that bank. The claimants then asked Maersk to issue new bills naming Banco de Chile as consignee and the new buyer as the notify party. Maersk issued a new bill. All of this was done on the instructions of the claimants; it was a clear illustration of the fact that they exercised control over the bills, even though the banks were the named consignees and the bills were in the possession of the banks. At the time the goods were delivered to Gold Crown, five of the seven Maersk bills were in the hands of a bank other than the bank named in the bill of lading as the consignee.

(i) Did the claimants lose their rights of suit?

17. The position was agreed to be the same for all the bills of lading, save for the Maersk bill of lading no 4 where the goods were consigned simply to a bank in Chile and not to its order. It is therefore convenient to consider first all the bills of lading except no 4.

18. It is clear that the Chilean banks were named as the consignees in the bills of lading, the bills of lading were endorsed by the claimants to them and they obtained physical possession of the bills of lading. Maersk and P&O contended that on these facts and by reason of the provisions of Carriage of Goods by Sea Act 1992 (the 1992 Act), the Chilean banks became the persons entitled to sue and the claimants lost their rights of suit.

19. Under s. 2(1) of the 1992 Act, the lawful holder of a bill of lading, by virtue of becoming the lawful holder of the bill of lading, has transferred to him and vested in him all rights of suit under the contract of carriage. A holder of a bill of lading includes, under s. 5(2)(a) of the 1992 Act:

"a person with possession of the bill, who by virtue of being identified in the bill, is the consignee of the goods to which the bill relates"

S. 2(5) provides for the extinguishment of the shippers' rights:

"Where rights are transferred by the operation of subsection (1) above in relation to any document, the transfer for which the subsection provides shall extinguish any entitlement to those rights which derives-

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; "

20. The submission of Maersk and P&O was that on an ordinary reading of the 1992 Act, the Chilean banks to which the bills of lading were originally endorsed and transferred became the lawful holder of those bills of lading as they obtained possession of the bills in which they were the named consignees. These banks therefore obtained the rights of suit and those of the claimants as the shippers were extinguished.

21. The claimants' submission was more complex:
   - S 2(1) and s 5(2)(a) of the 1992 Act [as defined in para. 18] should not be read in the way suggested by Maersk and P&O. These provisions were only intended to apply where the person who became the lawful holder was not only in physical possession of the bill and the named consignee, but was also in fact in control of the goods and the bills and entitled to take delivery of the goods. Where the person was not entitled to take delivery of the goods, such a person was not in truth the consignee. It was not enough that he was named on the face of the bill as consignee; the true position had to be ascertained. If the person named as consignee did not have authority to take delivery, then he should not be treated as a "consignee" of the bill for the purposes of s 5(2)(a) and hence was not a holder.
   - S. 2(1) and s. 5(2)(a) did not apply where the shipper still retained constructive possession of the bills and the physical possession was held by a person acting in a ministerial capacity.
   - In this case, control remained in the claimants and the banks never treated their physical possession of the bills as giving them a right to possess the goods. The claimants as shippers had retained constructive possession of the bills, as they had complete control over them.

22. Although the claimants' submission was complex, there is, in my view, a short answer, as the issue depends upon the construction of the 1992 Act. It is clear, in my judgment, that the Chilean banks to whom the bills of lading were sent initially were the consignees identified in the bills of lading within the ordinary meaning of those words in the 1992 Act. I cannot see that it is possible to give the word *"consignee"* any other construction. When they received the bills, they held possession of them. They therefore fulfilled the definition set out in s.5(2)(a) and became the lawful holders. In my view it is not appropriate to go behind the facts as they would appear from the face of the bill of lading. As the Law Commission pointed out in their joint Report with the Scottish Law Commission which led to the passing of the 1992 Act, *"Rights of Suit in respect of Carriage of Goods by Sea"*, under the law as it then stood a carrier was bound to make delivery against presentation of the bill of lading without enquiry as to the way in which he had acquired the property in the goods; the object of the change was to simplify the law. The construction advanced by the claimants would return a substantial degree of complexity. For example if the claimants were correct, there would need to be an enquiry into the question as to whether the consignee named on the face of the bill of lading had, as between the shipper and the person named as consignee, an entitlement to delivery. It would in another guise re-open the enquiry into the contractual arrangements that the reform brought about by the 1992 Act sought to remove. It will be necessary to consider whether the Chilean banks held them as agents and other issues raised by the claimants, but as regards this first question, the answer is in my view clear.

Maersk bill of lading no. 4

23. Maersk bill of lading no. 4 was, it seems, originally issued as a bill of lading where the goods were consigned to the order of the Banco de Credito e Inversiones. The claimants wanted it amended to the order of the Banco de Chile; a new bill of lading was issued with the consignee named as the Banco de Chile, but the words "or order" omitted, in error. Maersk decided to make no claim to rectify this bill of lading.

24. The claimants contended that in these circumstances the bill of lading was therefore a *"straight"* or *"non-negotiable"* bill – whatever is the appropriate terminology in English law: see *Carver on Bills of Lading* at paragraph 1-007; that therefore the claimants' rights had not been extinguished by the provisions of the 1992 Act. The position under such a bill of lading is summarised in *Carver on Bills of Lading* at paragraph 6-007. The bill is not a document of title at common law, the transfer does not operate as a transfer of constructive possession; the carrier is bound to deliver to the consignee without presentation of the bill.

25. The effect of s 2(5) of the 1992 Act in such circumstances is not to extinguish the rights of the claimants as the original party to this bill of lading, as Maersk accepted would follow if they did not seek to rectify this bill of lading. The claimants are therefore entitled to maintain their claim in respect of this bill as the shippers.

(ii) Were the claimants the undisclosed principals of the banks named as consignees and therefore had title to sue in that capacity?

26. The first alternative case of the claimants was that, if the rights of suit were transferred to the Chilean banks as consignees, they were transferred to those banks in their capacity as agents for the claimants who were their undisclosed principals. They submitted that at all times the Chilean banks were doing no more than acting as agents for the claimants; had the Chilean banks been asked whether rights should vest in the banks or in the claimants, they would have said that they should vest in the claimants. Thus the necessary intention that the banks should act as agents could easily be inferred. They relied on this argument only in relation to the banks named as consignees and where transferring possession to those banks had the effect of extinguishing the rights of the claimants as shippers under the original contract. They did not seek to contend that the banks to which the bills were subsequently transferred at the claimants' direction were such agents for the purposes of this argument.

27. The claimants contended that in so far as the effect of the 1992 Act was to create rights in contract between the carrier and the holder of the bill, there was no reason why the undisclosed principal could not sue under such a

contract just as in any other contract. Similarly, there was no reason why in so far as the rights of suit were transferred, they could not be transferred to the banks as agents for the claimants as undisclosed principals.

28. They contended that the same policy considerations that enabled the principal of a consignee or a consignor to sue under an air waybill under the provisions of the Warsaw and Guadalajara Conventions should apply; they relied particularly on the judgment of Mance LJ in ***Western Digital v BA*** [2000] 2 Lloyd's Rep 142 at paragraphs 43, 44 and 81.

29. It is suggested in *Carver on Bills of Lading* at paragraph 5-017, that where a bearer bill of lading is delivered to an agent, then it may be the case that the principal can be the holder for the purposes of the Act; it seems to me that this must be so, for in such a case the real question which arises is who is in possession as the actual holder. For example, if a bearer bill (or a bill endorsed in blank) is received by an employee of a company, the answer to the question is simple. The employee is not in possession; he can be described as having custody. His employer is in possession and is the holder. It does not seem to me that there can be any material distinction between such a person and any other agent. The agent holds custody of the bill for his principal and it is the principal who has possession and is the holder for the purposes of the 1992 Act; P&O and Maersk did not seek to contend to the contrary.

30. Where, however, under s 5(2)(a) of the 1992 Act, the person who becomes the holder is the named consignee, is that right personal to him as the person upon whom the 1992 Act confers the right? It is clear that there is scope for the operation of the doctrine of undisclosed principals in relation to rights of suit under bills of lading at common law: see for example the speech of Lord Blackburn in *Sewell v Burdick* (1884) 10 App Cas 74 at 90-1. It is also the case that the policy considerations referred to in the cases on air waybills may also be applicable in certain circumstances. For example in *Gatewhite v Iberia Airlines* [1989] 1 Lloyd's Rep 160, Gatehouse J referred to the curious position that could arise if the right of suit depended on the willingness of the consignee to sue, as in such cases he might have little incentive being a customs agent or forwarding agent or bank; the same point was made by the Hong Kong Court of Appeal in ***Regaalite International Limited v Air Cargo Consolidation Service (UK) Ltd.*** [1966] 3 HKLR 453 and by Pritchard J in ***Tasman Pulp & Paper Co v Brambles*** [1981] 2 NZLR 225.

31. However the scheme of the Conventions governing carriage by air is very different; serious practical problems would, as the judgment of Mance LJ in *Western Digital* demonstrates, arise if the rights of suit in carriage by air were confined to the actual consignee or the consignor and their principals were excluded. The Conventions contain no definition of consignor or consignee; often in air transport, the consignee named in the air way bill is purely nominal. However both the scheme of the 1992 Act and the practice as to the naming of the shipper and the consignee are very different. The 1992 Act provides a detailed scheme for the transfer of the bill of lading and clear definitions as to the parties involved. There can be no difficulty in identifying the holder in the case of a consignee who becomes the lawful holder under s.5(2)(a); he is the person who by virtue of being identified in the bill is the consignee. The legal regime relating to airway bills is very different. I can see no reason for overriding what are in my view clear statutory definitions.

(iii) Were the rights of suit transferred back to the claimants?

32. Although the bills of lading were delivered back to the claimants, they were never endorsed by the banks to them. Was endorsement necessary? The issue turned substantially upon the meaning of the definitions of holder in s 5(2)(b) and (c) of the 1992 Act.

33. The simple contention advanced by Maersk and P&O was that by reason of s. 5(2)(b) of the 1992 Act, the rights of suit could only be transferred back by endorsement. This sets out the second definition of a holder as:

" a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill, or in the case of a bearer bill, of any other transfer of the bill "

There had been no endorsement back; therefore, as the claimants accepted, they could not establish title to sue on this basis. Maersk and P&O stressed that the simple step of endorsement back could have been taken and there was no need to attempt to complicate the simple scheme of the 1992 Act.

34. The claimants contended that endorsement was unnecessary because by the time of the return of the bills of lading to the claimants, the goods had been delivered and the bills of lading therefore no longer gave a right to possess as against the carrier. If the goods had not been delivered, then the bills would have been endorsed back to the claimants to enable them to take delivery of them. The claimants were therefore holders of the bills under s. 5(2)(c) of the 1992 Act and rights of suit vested in them; s.5(2)(c) sets out the third definition of a holder as:

"a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates. "

They contended that once the cargo had been discharged, the bill of lading no longer gave a right to possession, only to a claim for damages; they relied on a series of decisions to which I refer at paragraph 35 and following. As holders they were entitled to bring a claim under s.2(2):

"Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill-

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when the right to possession ceased to attach to the bill … "

35. The first question which arises is whether there was a right to possess as against the carrier after the goods had been wrongly delivered to Gold Crown. There are a number of cases prior to the 1992 Act where the courts considered the circumstances in which a bill of lading is discharged or spent. In ***Barclays Bank v Commissioners of Customs and Excise*** [1963] 1 Lloyd's Rep 81, Diplock LJ summarised the general rule at p 89*:*

"The contract for the carriage of goods by sea is a combined contract of bailment and transportation … Such a contract is not discharged by performance until the shipowner has actually surrendered possession (that is divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them"

36. The specific issue, however, is whether the contract of carriage is discharged if the goods are delivered to a person other than the person entitled under the bill of lading. In *Glynn Mills v The East & West India Dock Co* (1882) 7 App Cas 600, Willes J said in the Court of Common pleas:

"I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim under it. I believe that will be found not only to be the law but also to be in accordance with the convenience and practice of carriers and merchants."

In the House of Lords, Lord Hatherly LC agreeing with this went on to state:

"When they have arrived at the dock, until they are delivered to some person who has the right to hold them, the bill of lading remains the only symbol that can be dealt with by way of assignment, or mortgage or otherwise…Until that time bills of lading are effective representations of the ownership of the goods, and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having the right to demand it."

In ***London Joint Stock Bank v British Amsterdam Maritime Agency*** (1910) 16 Com Cas 102, Channell J observed that the question as to whether the bill of Lading was discharged depended upon whether the person who took delivery was entitled to delivery.

37. Although Diplock LJ left the question open in ***Barclays Bank v Customs and Excise***, in ***The Delfini*** [1988] 2 Lloyd's Rep 599, the correctness of the observations of Channell J was accepted by the parties. In that case, it was contended that a bill of lading for 24,540 mt of oil remained in force because 275.79 mt had been short delivered; the bill of lading would only be discharged upon delivery of the full cargo. Phillips J rejected that argument; after analysing the cases to which I have referred, he added at p 608:

"So *long as the contract is not discharged, the bill of lading in my view, remains a document of title by endorsement and delivery of which the rights of property in the goods can be transferred…*

The discharge of the contract referred to by Diplock J occurs, in my view, when the primary obligations of the contract of carriage come to an end, notwithstanding that the carrier may have incurred secondary obligations as a consequence of the breach of those primary obligations. In this case, once the Delfini had arrived at [the discharge port], discharged the vast majority of the cargo loaded … and sailed away, the contract of carriage was discharged by performance. Thereafter any remedy against the defendants lay in a claim for damages for breach"

In the Court of Appeal [1990] 1 Lloyd's Rep 252, the court did not find it necessary to deal with the issue as to whether the bills of lading were discharged.

38. In **the *Future Express*** [1992] 2 Lloyd's Rep 79, the cargo was delivered against an indemnity to a person who did not have a right to delivery under the bill of lading; one of the many issues that arose was whether the bill of lading was spent. Judge Diamond QC held, following the passage from the judgment of Willes J, that the bill of lading had not become spent, as the goods had not been delivered to a person who had a right to demand delivery or was entitled to them. He went on to observe that it was a difficult question as to whether the bill of lading was spent as a document of title, if the cargo was delivered against an indemnity to a person authorised to receive delivery; he said:

"To hold that a bill of lading becomes spent when goods are delivered against an indemnity would greatly detract from the value of bills of lading as documents of title to goods, would diminish their value to bankers and other persons who have to rely upon them for security and would facilitate fraud."

He held that it was not necessary to decide the question, in view of the fact that the bill was not in any event spent as delivery had not been made to the person entitled. In the Court of Appeal [1993] 2 Lloyd's Rep 542, the decision was affirmed on grounds which made it unnecessary for the Court of Appeal to decide the issue on whether the bill of lading was spent.

39. As Gold Crown had no right to take delivery, it is my view that the bills of lading were not spent when the goods were delivered to them. It is clear on the basis of the long accepted dictum of Willes J that a bill of lading remains in force even if the goods are misdelivered to a person not entitled to them. The reason is clear. At or after the time of misdelivery to a person not entitled, the bill of lading may be being negotiated between banks on the basis that it is still a valid document of title. In short haul bulk trades, it is not uncommon that the cargo arrives at the port of destination whilst the documents are still being negotiated (see for example the practice in the European oil trade described by Staughton J **in *The Sagona*** [1984] 1 Lloyd's Rep 194 at 200). Until the goods are delivered to the person actually entitled, the bill of lading must remain the document of title to the goods. Although there may be a debate as to whether a bill is or is not spent when the goods are delivered against an indemnity to a person entitled to them (cf *Carver on Bills of Lading* at para 6-009), there can be no doubt that they are not spent when the goods are delivered to a person not entitled.

40. But even if the bill of lading is not in these circumstances spent and thus remains the document of title to the goods, can it be said that there is still a right to possess as against the carrier within the meaning of the 1992 Act, when the carrier no longer has the goods? The claimants contended that there was no right to possess, as there could not be a right to posses that which the carrier did not have; there only existed a secondary right to damages. I do not agree. It seems to me clear from the 1992 Act that the reference to the right to possess is a reference to one of the primary rights emanating from the bill of lading's function as a document of title. Even if it were not clear from the wording of the 1992 Act, the explanatory notes to s. 2(2) and s. 5(2) make it clear that the references are to circumstances where the bill of lading has ceased to be a transferable document of title; the note also refers to paragraphs 2.43-2.44 of the Law Commissions Report which also makes this clear.

41. I therefore conclude that the s.2(2) was not applicable, as the bills of lading still gave a right to possession of the goods as against the carrier. If, contrary to that view, I had concluded that s.2(2) was applicable, then I would have been satisfied that there were arrangements in force from the outset of the transaction under which the Chilean banks would return the documents to the claimants in the event that they were not taken up by Gold Crown. This seems to me to have been implicit in the way in which the Chilean banks were retained in this case to collect payment from Gold Crown.

(iv) Did the claimants have rights of suit in bailment?

42. The claimants contended that rights of suit in bailment subsisted, even if they had no rights of suit under the bill of lading contract because of the provisions of the 1992 Act. As bailors they were entitled to sue Maersk and P&O in conversion.

43. The principal question to which the submission gave rise was whether the claimants retained an immediate right as against Maersk and P&O as carriers to possess the goods. It was common ground that the claimants could only claim in bailment, if they were at all times entitled to immediate possession of the goods.

44. Maersk and P&O contended that as the Chilean banks became the lawful holders of the bills under the provisions of the 1992 Act, they became the parties entitled to immediate possession. The claimants could not therefore be entitled to immediate possession.

45. The claimants' answer to this short contention was as follows:
   - A bailment arose on shipment between the claimants as shippers and the carriers (Maersk and P&O).
   - At common law the transfer of a bill of lading to another did not transfer constructive possession unless that was the intention of the parties; they relied on the judgment of Lloyd LJ in **the *Future Express*** in the Court of Appeal [1993] 2 Lloyd's Rep 542 at p 547.
   - There had been no such intention, as the claimants intended to retain control over the goods. There was also no attornment as there was no intention to transfer title to the goods; the claimants relied on the judgment of Judge Diamond QC in ***The Federal Express*** [1992] 2 Lloyd's Rep 79 at 95 and a passage in the speech of Lord Brandon of Oakbrook in ***The Aliakmon*** [1986] 2 Lloyd's Rep 1 at 10.
   - The 1992 Act did not affect that position; the Act only transferred rights in contract and not in bailment. Furthermore the only rights of suit transferred in contract were "rights of suit" and not primary rights such as the right to possess.
   - As between the Chilean Banks and the claimants, it was the claimants as the owners of the goods and the persons entitled to them who were entitled to immediate possession of the goods; Maersk and P&O would have been bound to deliver to the claimants as the true owners, if the claimants had sought delivery.
   - The Chilean banks had at most a contractual right to possession under the bills of lading. A mere contractual right to possession was not sufficient to found a right to sue in conversion: ***Jarvis v Williams*** [1955] 1 WLR 71; ***International Factors v Rodriguez*** [1979] QB 351 at 357.
   - If, contrary to their submissions, the Chilean banks had a right to immediate possession, they had a right to do so only as agents of the claimants.

   It is necessary to examine each stage of this argument, beginning with the position at common law.

46. At common law, the right to possession under the bailment created on the issue of the bill of lading was, by mercantile custom, capable of transfer by endorsement of the bill of lading; the indorsement and delivery of the bill of lading were capable of transferring the endorser's right to possession of the goods to the endorsee. What effect that had on rights of property depended on the intention of the parties. A special or general property in goods was only passed if that was the intention; as Lord Bramwell said in ***Sewell v Burdick*** (1884) 10 App Cas 74 at 105: "*..the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made*". For example, if the bill was endorsed to an agent to enable him to sell the goods, no property would pass to the agent: see *Scrutton (20th edition):* Article 104(3) and the old cases of ***Waring v Cox*** (1808) 1 Camp 369 and ***Patten v Thompson*** (1816) 5 M&S 350 (which explains this partly on the grounds that no consideration or value was given for the transfer). The position was summarised by Lloyd LJ in *The Future Express* in accepting the correctness of counsel's submission that

   "*… just as the transfer of the bill of lading only operates to transfer the general property in the goods if that is the intention of the parties, so it only operates to transfer the special property when the transferor so intends.*"

47. Contractual rights were not transferred by mercantile custom and so the transferee of the bill of lading could not sue under the contract of carriage contained in the bill of lading; the purpose of the Bills of Lading Act 1855 was

to remedy this in situations where the common law had been unable to provide a remedy – see the analysis of Lord Hobhouse of Woodborough in ***The Berge Sisar*** [2001] 2 WLR 1118 at paragraphs 18 to 21. Under the law prior to the 1855 Act, the rights and obligations in contract could become separated from the right of the endorsee to the possession, and to demand delivery, of the goods: (see paragraph 19 of his speech). The 1855 Act, however, only transferred the rights under the contract contained in the bill of lading when the property in the goods passed upon or by reason of the consignment or endorsement; this gave rise to difficulties where the property did not pass in such circumstances.

48. The intention and effect of the 1992 Act was to sever the link between the transfer of rights under the contract of carriage and the passing of property which the Law Commission considered had caused the difficulties. The effect of the 1992 Act was, however, only on the contract of carriage. This was made clear by Lord Hobhouse of Woodborough in ***The Berge Sisar.*** After referring to the Report of the Law Commission, he stated at p 1134:

" But it must be observed that all these statements in the report, like the terminology used in the Act are expressed in terms which refer explicitly to "the contract of carriage" and not to the right of the holder of the endorsed bill of lading to possession of the goods as against the bailee. It is thus categorising the delivery up of the goods in this context as the performance of a contractual obligation and not a bailment obligation. This is not objectionable since where there is a contract of carriage, the contract certainly includes a contractual obligation to deliver the goods. …the bailment is a contractual bailment. The relationship of the original parties to the contract of carriage is a contractually mutual relationship, each having contractual rights against the other. The important point which is demonstrated by this part of the report, and carried through into the Act is that the contractual rights, not the proprietary rights (be they special or general), that are to be relevant. The relevant consideration is the mutuality of the contractual relationship transferred to the endorsee and the reciprocal contractual rights and obligations that arise from that relationship."

49. Thus rights are acquired under the 1992 Act irrespective of the contractual provisions as to the passing of property between the shipper and the person who becomes the holder.

50. The rights transferred to the lawful holder under the 1992 Act are the *"rights of suit";* this phrase was taken from the 1855 Act. Although "*rights of suit*" have been described as rights of *"suing upon the contract*" (as in ***The Freedom*** (1871)LR 3 PC 594 at 599), the phrase was not used to distinguish *"rights of suit*" from *"rights under the contract"*. It is clear, in my view, that the phrase refers not merely to the right to sue, but the rights under the contract. These include the contractual right as against the carrier to demand delivery against presentation of the bill of lading and hence the right to possess. Not only is the language of the 1992 Act clear, but it is also clear from the Law Commission Report and in particular paragraphs 2.34 and 3.13-3.21 that it was intended that *"rights of suit"* include the right to demand delivery. It would make no sense to the scheme of the 1992 Act if the contractual right to demand delivery from the carrier was excluded from the rights transferred.

51. The 1992 Act does not in terms affect rights in bailment: see the Report of the Law Commission and the speech of Lord Hobhouse to which I have referred. But the question arises as to whether there are rights in bailment to immediate possession independent of the contract contained in the bill of lading. Rights in bailment subsist in many cases independent of a contract, as the obligations between bailor and bailee arise out of the bailment and are not dependent on there being a contract. I accept that the analysis of Professor Palmer in *Bailment* can apply in such cases and the duties of the bailor can be seen as arising out of the voluntary assumption of possession of another's goods.

52. However, the rights as between bailor and bailee are often governed by a contract; where there is a contract, the contract may modify or define the obligations in bailment. In the present case, the right to possess the goods entrusted to the carrier was governed by the contract contained in the bill of lading; it was not independent of it. As between the carriers (P&O and Maersk) and the claimants as shippers, there was no agreement as to the terms of the bailment other than the terms set out in the bill of lading. Under the terms of the contract contained in the bill of lading, the goods were to be delivered against presentation of the bill of lading (as I subsequently discuss at paragraphs 120 to 129 where I accept the submissions of the claimants on that issue). There was no separate agreement with the claimants as shippers that the rights of the consignees or holders of the bill of lading should be other than those set out in the bill of lading. When these contractual rights were transferred by s.2(1) of the 1992 Act to the Chilean Banks, the claimants lost their contractual right to immediate possession under s.2(5) of the Act for the reasons set out. As between themselves and the carriers (Maersk and P&O) their rights in bailment and their rights under the contract were the same; there were no separate rights. It was only as between the claimants and the Chilean banks that the rights were different, but the position under the arrangements between the Chilean banks and the claimants did not affect the contractual rights under the bills of lading between the carriers and the Chilean banks.

53. The lawful holder of a bill of lading clearly cannot acquire under the 1992 Act rights which the tranferor did not have (see the discussion of ***Finlay v The Liverpool and Great Western Steamship Co*** (1870) 23 LT 251 at paragraph 5-027 of *Carver on Bills of Lading* and at p 578 of "*The Bill of Lading as a Document of Title*" at chapter 22 of *Palmer & McKendrick: Interests in Goods)*. Therefore as between the carrier and the lawful holder of the bill of lading, the right of the lawful holder to immediate possession of the goods can be defeated where the transferor to him did not have the right to transfer the bill. However, if the shipper was the true owner of the goods and had the right to immediate possession under the bill of lading, then by operation of the 1992 Act that contractual right to immediate possession is transferred, even if the shipper remained as between the shipper and the transferee

the party entitled to delivery. The rights under the bill of lading operate independently of the arrangements under the banking relationships.

54. The right so transferred is not a "*mere contractual*" right to possession of the goods of the kind discussed in ***Jarvis v Williams*** and ***International Factors v Rodriguez.*** The contractual rights that are transferred by transfer of the bill of lading include the obligation to delivery under the bailment. Though the rights under the contract and possessory rights can be separated, they are not separated in these circumstances for the reasons I have given.

55. Thus I have reached the view that there were no separate rights in bailment that were retained by the claimants. But the question remains as to whether the Chilean banks acquired the rights as agents for the claimants? It seems clear that if an agent has a right to possession for an undisclosed principal that right can in many circumstances be exercised by the principal: see the judgment of Hope JA in ***Maynegrain Pty Ltd v Compafina Bank*** [1982] 2 NSWLR 141. However in this case the rights so obtained were obtained by the Chilean banks as consignees under the 1992 Act and for the reasons given in paragraph 31, they could not have been acquired by them in their capacity as agents.

(v) A claim in negligence

56. As a final alternative, the claimants contended that they could maintain a claim for negligence against Maersk and P&O based on their possessory and proprietary interest in the goods.

57. For the reasons given, I have concluded that the claimants did not have any possessory rights. However, the claimants relied on the fact that a claim for negligence could be brought by a person who only had a proprietary right without the immediate right to possess.

58. Maersk and P&O accepted that there could be a claim if the goods had been damaged or destroyed (by, for example being thrown overboard); in such a case there would have been damage to that bare proprietary right and if negligent, there would have been a claim. They also accepted that there could be a claim for negligent damage to a proprietary interest, provided there was damage to that interest by physical damage to the property or through the extinguishment of the claimant's proprietary interest through transfer of title to a third party. They contended that as the goods carried by them were only in the hands of a person not entitled to them, then there was no damage to the claimants' proprietary rights. The claimants still owned the goods as Gold Crown had no proper title to them; they were not physically damaged and the claimants' title was not extinguished. The actual claim of the claimants was damage to their possessory rights and not to their proprietary rights as those had not been interfered with.

59. The circumstances in which a claim lies in negligence for damage to a proprietary interest are set out in *Clerk & Lindsell on Torts* (18th edition) at paragraph 14-142 and the cases there referred to, in particular ***Mears v L&SWR*** (1862) 11 CBNS 850. The claimants must prove that the negligence of Maersk and P&O deprived them of their interest in circumstances in which the goods could not be recovered. At one stage in the proceedings it was suggested that the claimants should have sued to recover the goods from Gold Crown, but quite rightly that was not pursued. I am quite satisfied that it was wholly impracticable for the claimants to have sought to recover the goods from Gold Crown in Chile; thus they were permanently deprived of their proprietary interest and thus they can maintain this claim against Maersk and P&O.

60. This claim based on their proprietary rights is outside the scope of and independent of the 1992 Act.

Conclusion on title to sue

61. I have therefore come to the view that the claimants can maintain a claim on one of the grounds they have advanced on all the bills of lading and also a claim under Maersk bill no. 4 on a further ground.

Issue 2: The obligation to deliver

62. The bills of lading were governed by an express choice of English law. Under Article 10 of the Rome Convention, English law therefore applied to the performance of the contract, though by Article 10(2)

"*in relation to the manner of performance and the steps to be taken in the event of defective performance, regard is to be had to the law of the country where performance is to take place.*"

63. The claimants contended that the obligation to deliver was governed entirely by English law and that Maersk and P&O were in breach by delivering without presentation of the bill of lading. Maersk and P&O denied that they were in breach as a matter of English law, but also contended that under the law of Chile which was material to the performance of that obligation they were plainly not in breach. Three questions therefore arose:

i) Was the law of Chile relevant to the delivery obligation?

ii) If it was, what were its provisions and were the carriers discharged from responsibility under that law?

iii) What were the consequences under the terms of the bills of lading which were governed by English law ?

64. The effect of Article 10 of the Rome Convention is to maintain a distinction between the substance of the obligation which is governed by the proper law (in this case English law) and the mode (or manner and method) of performance which is governed by the law of the place of performance – Chile. Before considering this distinction, it is necessary first to set out my findings in relation to the law of Chile.

The provisions of the law of Chile relating to delivery: the Customs laws

65. Maersk and P&O accepted that there was no provision in the Commercial Code of Chile that expressly relieved a carrier of any obligation to deliver goods otherwise than against presentation of an original bill of lading. However,

they contended that it was the inevitable result of Chilean customs law and procedure that they were obliged to deliver the goods without presentation to them of an original bill of lading. They submitted that under the Customs law of Chile a carrier was obliged to deliver goods on which duty had not been paid to the Customs Authority; the carrier lost all control over the goods and the Customs determined who had the right to take delivery of the cargo. Furthermore under the Hamburg Rules this constituted good delivery under the bill of lading.

66. Before considering the Hamburg Rules, it is necessary first to consider the Customs law of Chile. There was a difference between the parties as to that law. Each adduced expert evidence to assist the Court in making its findings on that law in accordance with the observations of Scott LJ in *A/S* ***Tallinna Laevauhisus v Estonian State Shipping Line*** (1946) 80 Lloyd's Rep 99 at 107.

The experts

67. The experts called were well qualified to give evidence on Chilean law:
   - The claimants called Mr Sahurie; he had studied law at Valparaiso and Yale Universities and had practised law for several years, specialising in commercial and international law.
   - Maersk and P&O called Mr Tomasello; he had specialised in maritime law in Chile since 1970 and lectured at a University since 1966 in civil law and since 1995 in maritime law. He had written several works on Chilean law.

   Both witnesses were plainly expert in the field of maritime and customs law; they were both of unquestioned integrity and did their utmost to help the court.

68. I considered, however, that Mr Sahurie was clearly the more objective and reliable witness; Mr Tomasello identified himself through his enthusiasm far too closely with the case of Maersk and P&O for evidence to be considered objective; Mr Tomasello's practice involved the representation of shipowners and P&I clubs and he did not act for cargo. He saw matters through the eyes of shipowners and that, in my view, affected the objectivity of his evidence. In contrast, Mr Sahurie gave his evidence in an objective manner; his evidence was broadly coherent and consistent and, against an examination of the materials before me on Chilean law, the more logically compelling. Wherever their view differed in relation to the construction of the law relating to Customs, I preferred the evidence of Mr Sahurie.

The general provisions of the Customs laws and the areas of dispute

69. The general provisions of the Customs laws and procedures were not in dispute and must briefly be described. The provisions of Chilean Customs law are primarily contained in the Customs Ordinance; the version before the court was one promulgated in 1998 which came into force on 17 January 1999; it was common ground that there was no material distinction with the version which was in force in 1998 when some of the goods arrived in Chile.

70. The procedure for dealing with goods imported into Chile depended upon whether goods had been cleared through Customs in advance (*retiro directo*) or not (*retiro indirecto*). The goods shipped by the claimants had not been cleared through Customs in advance and therefore it is necessary only to consider the law and procedure applicable to such goods (*retiro indirecto*).

71. The normal procedure was a two stage one. First the cargo manifest had to be submitted and "presented" to Customs by the carrier (Articles 35 and 37 of the Customs Ordinance). Second, the carrier was also obliged to deliver the goods to a warehouse subject to the jurisdiction of the Customs – the Customs primary zone (Articles 16, 34, 44 and 46). Warehouse facilities were operated by the state corporation, Empressa Porturia de Chile (Emporchi) or private companies licensed by Customs to operate Customs warehouses. Until December 1997, Emporchi operated the ports in Chile as a single state corporation. It was then divided into ten separate companies including Empressa Porturia de Chile de San Antonio (Emporchi de San Antonio). Article 9 of the law which effected this change (Law 19542 of 19 December 1997) permitted the new entities to enter into contracts with others which were to be governed by private law. Customs warehouses were either within the limits of the port or could be outside them; wherever they were, they were within the jurisdiction of the Customs and within the Customs primary zone; their operation was governed by the Customs Ordinance (in particular Articles 44, 45, 56, 57 and 60). Regulations provided that cargo had to be delivered to the warehouse within 24 hours of unloading (Article 2.3 of the Customs Compendium and Article 9 of Presidential Decree 298 of 24 March 1999).

72. In this particular case the warehousing of the goods, as summarised in paragraph 6 was:
   - The goods carried by Maersk were placed in a warehouse operated by Seaport SA, a private operator licensed by Customs; on 19 January 1999 (before 2 out of the 7 consignments carried were released to Gold Crown), Maersk entered into a service agreement with Seaport; this provided by clause 6 for Seaport to take custody of cargo until the consignee withdrew the cargo. Under appendix 1 to this agreement entitled "*Reception and Storage of Import Cargo*", Seaport agreed to:

     "deliver the cargo to the consignee or its representative after the consignee has completed all Customs clearing procedures involved. "
   - The goods carried by P&O were placed by the ship's agents, Agencias Universales SA, in a warehouse operated by Emporchi de San Antonio.

73. Upon receipt of the goods, the operator of the warehouse issued a "*Documento Portuario Unico*" (DPU) which operated for the carrier or his agent as a receipt of the goods received into the warehouse; it recorded matters such as the time and date of receipt and the condition of the goods.

74. The goods then had to remain "under jurisdiction [control] in the authorised premises" or "in the Customs depots" until they were withdrawn (Articles 45 and 56 of the Customs Ordinance). Goods in practice remained in the warehouses until Customs clearance was obtained and the warehouse provider was paid for its services. This was done by the consignee's Customs agent.

75. A Customs agent (who acted for the consignee) was licensed by the National Director for Customs; regulations govern what he could do. The usual practice was for the consignee to endorse the bill of lading to the customs agent (see Article 222); this constituted his authority. The Customs agent also had a duty to verify to the Customs that his principal was entitled to the goods. The Customs agent was a *ministro de fe* –an "*attesting witness*" or "*attesting judge*"; thus he could certify photocopies of documents used in Customs procedures. Other duties were imposed on him such as keeping the documents for 5 years (Article 77).

76. The normal practice was for the Customs agent to present to the warehouse operator the appropriate documentation – a Customs Destination Document legalised by the Customs, normally a Import Declaration. The Compendium of Customs Regulations provided that the Import Declaration was to be drawn up on the basis of various documents, including the original bill of lading (Article 5.1). The Import Declaration duly legalised by the Customs and the payment voucher in respect of Customs duty were presented to the warehouse operator prior to release of the goods.

77. There were some differences in procedure in the case of containers. Because of the increase in container traffic, administrative functions relating to Customs were transferred to persons known as "Container Operators" in 1995 under Regulation made under Customs Resolution No 2808 of 12 April 1995. It was very common for the agent of the carrier to act as a Container Operator. Container Operators were authorised to issue a form called a TATC (Title for the Temporary Admission of Containers). The form enabled the container, once the form was legalised by Customs and had been presented to the warehouse operator, to leave the Customs primary zone on a temporary basis. Strictly the TATC applied only to the container.

78. In this particular case,
    - Maersk's agent, AJ Broom, were also licensed Container Operators and by an agreement with Maersk made in 1994 were remunerated for issuing TATC forms.
    - In the case of P&O, its contract for the period 1 January 1997 to 31 December 1999 with its agents in Chile, Sudamericanan Agencias Aereas Y Maritimas SA (SAAM) provided that SAAM, as a licensed Container Operator, should provide a service in respect of container discharge and should issue TATC forms; SAAM was to be responsible for "whole containers TATC processes which include all diligences related with matter according to Customs Services rules." SAAM issued the TATC form for the goods carried by P&O on 15 March 1999.

    Neither Container Operator asked for an original bill of lading before allowing the goods to be taken by Gold Crown's agent.

79. The main dispute between the experts related to the questions as to (a) whether receipt into the Customs warehouse constituted delivery by the carrier to Customs and the end of the carrier's responsibility, (b) whether the warehouse had to accept the statement of the Customs agent that a copy bill of lading was sufficient and (c) whether the carrier could ask the warehouse to demand an original bill of lading or ensure that under the TATC procedure the Container Operator asked for presentation of an original bill of lading.

80. It was, in summary, the evidence of Mr Sahurie:
    - The carrier was not obliged to deliver the cargo to Customs; the duty to "*present*" was the duty to place the goods under the jurisdiction of the customs authorities so that they could collect the duty. Goods were not received by the Customs into their possession; they merely came within their jurisdiction.
    - It was possible for the carrier to enter into contracts with warehouses on terms which enabled the carrier to insist on the presentation of original bills of lading. Even if there was no such contract, nothing prevented the carrier instructing the warehouse to withhold delivery of the goods unless an original bill of lading was presented.
    - There was nothing that prevented the warehouse checking the authority of the Customs agent to withdraw the goods.
    - In the case of containers, it was a matter for the carrier's agent as Container Operator to refuse to issue the TATC without presentation of the original bill of lading; in his experience the refusal to issue the TATC was used to ensure freight was collected. Although technically the TATC might only apply to the container itself, the goods within the container and the container were an indivisible unit for the purposes of withdrawing the goods from the primary zone.
    - Whilst it was rare in Chile for the Customs agent to be asked for the original bill of lading (as the warehouse normally relied on the Customs Destination Document), any interested party could require presentation of the bill of lading.

81. Mr Tomasello's evidence, in summary, was that:
    - There was nothing that obliged a carrier to deliver at all if he did not want to and wished to keep the cargo aboard the vessel, though he might be in breach of his contract of carriage.

- If the carrier did discharge the cargo, he had to "present" the cargo directly to the Customs at the warehouse without presentation of a bill of lading; once he had done that his responsibility was at an end and he had lost control over and possession of the cargo. His action in presenting was a delivery to the Customs; he relied particularly on Article 16 of the Customs Ordinance. Thereafter it was the responsibility of Customs to determine who had the right to collect the cargo
- It was accepted by Maersk and P&O that the warehouse operator was not acting as agent of the consignee and delivery to the warehouse was not delivery to the consignee. I did not understand Mr Tomasello's evidence to be to the contrary.
- The carrier had no dealings with the Customs agent of the consignee, as it was the responsibility of the Customs agent to obtain delivery from the warehouse operator. He relied heavily on a decision of the Court of Appeal of Valparaiso dated 7 December 1972 in which the court stated:

  " In Chile, there is no direct or immediate relationship between [the ocean carrier] and the consignee of the cargo, but there is an intermediary who receives the goods and keeps them on deposit until corresponding customs formalities and requirements are fulfilled. This intermediary is Emporchi to whom the law has entrusted the reception of the goods that are in the possession of the [ocean carrier] who deposits them in their warehouses … until the entire customs procedure of revision and cataloguing of the goods, determination of their origin and their import, … is fulfilled. [Emporchi] are a corporate body of public law which has been created precisely for the purpose of receiving the goods in possession [of the ocean carrier] and subsequently delivering them to the consignee. "

  Although since that decision Emporchi had been broken into 10 separate companies and private warehouses also operated, all of these new companies fulfilled precisely the same functions as Emporchi had done. In 1981 the rule that required the Customs agent to obtain the approval of the vessel's agents for the cargo to be withdrawn from the warehouse had been abolished.
- When the original bill of lading was not available to the Customs agent when he completed the Customs declaration, a copy could take its place if that was authorised by the carrier and the copy annotated to the effect that it replaced the original for all legal purposes. The Customs agent was then obliged to keep the copy until the original bill of lading was provided. It was the responsibility of the Customs Service to verify the entitlement of the consignee to the cargo, but they relied heavily on the status of the customs agent as an "*attesting judge*" or "*attesting witness*". Once the Import Declaration was legalised by the Customs, the Customs warehouse operator was not entitled to question the right of the Customs agent to collect the goods on behalf of the consignee. The warehouse operator had no right to demand to see the original bill of lading. The entitlement of the Customs agent to obtain the cargo could only be challenged by the Customs.
- It was not permissible for the operator of a Customs warehouse to enter into a contract incompatible with its status in performing its public duty; in particular, a contractual obligation could not entitle the warehouse operator to question the authority of the Customs agent to withdraw the goods.
- The TATC was issued by the Container Operator in his capacity as Container Operator and not as agent for the carrier. As such he was performing a public function and could not demand sight of an original bill of lading as a condition of issuing a TATC.

(a) The effect of delivery to the Customs warehouse

82. The first question to consider is the effect under Chilean Customs law of the requirement that the goods be delivered to the Customs warehouse. I have come to the clear view that, under the law of Chile, delivery by a carrier to the Customs warehouse was not a delivery to Customs and was not a delivery of the goods in the sense that this relinquished the carrier's control over them.

83. In considering the effect and meaning of the Customs Ordinance, it is necessary as a matter of the law of Chile to consider the purpose of that Ordinance as set out in Article 1.2. That Article provided that the role of the Customs was to watch over and supervise the passage of merchandise through the coastlines and frontiers of Chile for purposes of collecting Customs duty and for producing statistics.

84. In my view Mr Sahurie was right in the distinction he drew under the Ordinance construed in the light of Article 1.2 between on the one hand delivery to the Customs of Chile and on the other hand delivery to a Customs warehouse licensed by Customs and operated either by Emporchi or by a private operator. In my view he was correct in his opinion that goods never came into the physical possession of the Customs; they only came under its jurisdiction. The goods were to be physically delivered to and received by the Customs warehouse operator; the Customs warehouse operator then became responsible for them if they were damaged or lost. Two key articles were Articles 16 and 17:

    "Article 16

    The goods which must enter or leave through the ports of other authorised places, shall be delivered to Customs at the point of its primary zone indicated by its administrator or Head, at the request of the consignee without further formality.

    This article has to be understood as covering the two stage process that customs clearance involves - first the presentation of the manifest and the subsequent delivery to the Customs warehouse operator. The same is the case in Article 46 which uses similar words.

    Article 17

While within the primary zone of jurisdiction and without prejudice to the attributions of the competent authorities, all vehicles, their vehicles, their passengers and their cargoes, shall be submitted to the authority of the respective Customs, but the latter shall only respond [have responsibility for damage to] for the goods after having been checked and finally received by them."

I accept the evidence of Mr Sahurie that Article 17 means that the goods come under the power or jurisdiction of the Customs; but, as the Customs never take possession of the goods, they did not become responsible for the goods. It was the warehouse operator that was responsible. Mr Sahurie's evidence (which I accept) was that many years ago the Customs authorities actually received the goods themselves; the system had then changed to a mixed system. From the 1980s or 1990s, the goods were received by Customs warehouses; in so doing the Customs warehouses were not carrying out a delegated function of the state of Chile. The system had changed. It was entities such as Emporchi against whom claims were made, as they were in physical possession of the goods. There is a clear distinction drawn between the warehouses being within and subject to the jurisdiction of Customs and the warehouses being treated as if they were part of the Customs. In performing their functions, the warehouse operators were not carrying out any delegated function of the state save in relation to obligations owed to Customs such as the collection of taxes.

85. I also accept the evidence of Mr Sahurie that the decision of the Valparaiso Court of Appeal of 7 September 1972 (to which I referred in summarising the evidence of Mr Tomasello at paragraph 81) was not determinative of the position in Chile in 1998/9. Mr Sahurie accepted in oral evidence that this decision represented the law of Chile at the time it was given; Emporchi then was the state monopoly which arranged the warehousing of all imports into Chile. However, the position had changed in many respects, including the incorporation of the Hamburg Rules, Chile's adherence to the UN Convention on the sale of goods and changes in Emporchi and to practice. The position was very different to what had been the case in 1972. Emporchi has been broken into 10 companies and there were also the private warehouse operators. Carriers were in a position to enter into contracts with them in relation to delivery to the consignee, as I discuss below at paragraph 98.

86. There are two further factors which support this view. First, in the event of misdelivery, if the carrier's responsibility had terminated on delivery to the Customs, the only claim would be that of an unsecured claim against the Customs agent. That can hardly have been intended. In view of the provisions of Article 97, it seems unlikely that a claim against the Customs would be successful. Mr Tomasello initially stated that a claim could not be made against the Customs agent because he was part of the state, but later suggested that he could be sued and the bond the Customs agent provided would amount to security. I accept that there might be a claim against the Customs agent, but the bond would not respond under the terms of Article 230. Second, as bills of lading continue to play an essential role in the financing of international trade by sea, I have no doubt that a Chilean Court would prefer a construction of the Customs Ordinance which protected the security of banks; that could only be achieved, given the changes that had occurred, by holding that delivery to the Customs warehouse did not mean that the responsibility of the carrier was at an end.

(b) The effect of the demand of the Customs agent

87. The second question is whether the operator of the Customs warehouse had to accept the entitlement of the Customs agent to obtain the delivery of the goods and could not require the presentation of an original bill of lading.

88. Mr Tomasello relied on Articles 56 and 104 of the Customs Ordinance. However, all that Article 56 provided was that the goods had to remain in the Customs warehouse until they were withdrawn for import or export or to be sent to another Customs destination; it did not deal with the question as to the terms upon which goods were to be withdrawn. Article 104 provided:

"*The declaration duly processed and the payment voucher as may be the case shall entitle the interested party to withdraw goods from the Customs depot*"

This meant no more than, as far as Customs were concerned that, when Customs duty was paid, goods could be withdrawn from the Customs warehouse and from the jurisdiction of Customs. It obliged the warehouse operator, so far as Customs were concerned, to release the goods to an interested party which presented the appropriate documentation to show the goods had been cleared through Customs. It had no other consequence. I accept the evidence of Mr Sahurie to this effect; he was correct in my view in stating that although normally a warehouse operator would accept the legalised Import Declaration as sufficient, trusting that the Customs agent had done his work properly, and not ask to see the original bill of lading, he was entitled to ask for it to satisfy himself that the goods were, after Customs clearance, being delivered to the person entitled under the bill of lading.

89. Nor does Article 220 assist Maersk and P&O. This Article provides, in part,:

"*The Customs agent is a professional assistant or auxiliary to the Customs public function and his license enables him before Customs to render services to third parties as a representative when obtaining clearance of the goods.*

These Customs agent shall have the capacity as Ministros de fe in so far that Customs may consider as a true fact that the data requested in the declarations contained in the relevant dispatch documents, including the liquidation of Customs duties are in accordance with the antecedents which legally must serve as a basis. The above is without prejudice to the checking which may be undertaken by Customs public officials in any moment in order to verify that the statement/certificate is correct.

…….."

90. There was a dispute as to the correct translation of *Ministros de fe;* Mr Sahurie considered that it meant qualified attesting witness, Mr Tomasello that it meant "attesting judge". It may not matter which was correct; it is clear that the function was one of certifying the fact that a copy was a true copy or that a fact stated was true. I accept Mr Sahurie's evidence that the certification of a document by the customs agent in his capacity of "*Ministero de Fe*" only entitled him to certify as true copies, the documents he had in his file.

91. The creation of and terms of the mandate of the Customs agent was governed by Article 222; its opening phrase was:

"The act by means of which the owner, consignor or consignee entrusts the clearance of his goods to a Customs agent who accepts this job is a mandate ruled by the provisions of this Ordinance .. and, alternatively by the provisions of the Civil Code."

92. Reading these Articles together and taking account of Article 1.2, it is clear that the mandate of the Customs agent under the Ordinance was for the purpose of clearing the goods through Customs; Mr Tomasello accepted that the passage from Article 220 which I have quoted referred to "clearance" and not "delivery". The Customs agent's function under that Ordinance (in attesting that the copies were true and the truth of which could not then be challenged) was a function in that capacity. For Customs purposes he authenticated copies and for that purpose and third parties were not entitled to question for Customs purposes what he stated, but that did not mean that they were authenticated for other purposes. It did not mean that they had to be accepted for other purposes. I accept the evidence of Mr Sahurie to that effect. Furthermore Mr Tomasello accepted that although Customs had to accept the truth of what was stated in the declaration, there was only a presumption to that effect in respect of others. Maersk and P&O relied upon a letter written by the Inspection sub-Directorate of the National Customs Office to a judge of the Criminal Court in Valparaiso about the events in this case; the letter concluded that the Customs agent had been guilty of a serious breach of the Customs Ordinance and of the trust placed in him. Part of the letter stated:

"At the time when the goods are withdrawn from deposit premises, presentation of the relevant bill of lading is not required. The Customs agent signing the Customs delivery statements must have prepared it in accordance with … the original bill of lading… It is necessary to notify you that the Service only inspects delivery statements selectively…. "

This letter did not detract at all from Mr Sahurie's evidence; it was looking at the issue from the perspective of Customs and did not deal with the distinction drawn by Mr Sahurie.

93. It was common ground that the Customs agent had to retain all three original bills of lading; he could not surrender one to the carrier for the carrier to keep. However I accept the evidence of Mr Sahurie that this did not mean that the original bill of lading did not have to be produced and shown before the goods were released.

94. Nor do I consider that legal report 009 of 26 February 1986 assists. In that report the Head of the Customs Legal Department advised that the Customs had no right to retain goods until security was provided for contributions in general average; their powers were restricted to the collection of duties as set out in Article 1 of the Customs Ordinance; they were not entitled to use their powers for other purposes by intervening in a private dispute. This was simply, as Mr Sahurie stated, a report concerned with the powers of Customs and had no bearing on the entitlement to demand presentation of an original bill of lading. Furthermore, I accept the evidence of Mr Sahurie that the law of Chile has changed. At the time of the report, a carrier had to go to court to obtain an order entitling him to retain the goods; by express provision under Article 1114 of the Code of Commerce, the carrier has since 1988 been entitled to retain the goods until general average is paid or secured.

95. Under the law of Chile, I accept the evidence of Mr Sahurie that there was nothing that precludes the warehouse operator from requesting sight of an original bill of lading before the goods were released. Indeed the evidence of Mr Parra, P&O's cargo claims representative for Latin America based in Santiago Chile, was to the effect that, although the carrier's agents acted on the basis of the Customs agent's statements, they could ask for the original bill of lading; the Customs agent would in effect be bound to produce it as otherwise he would be denounced to Customs who would then check his file to see if it contained the original.

96. There is one further matter. After the conclusion of the evidence and the hearing, I allowed the parties further time to make and respond in writing to submissions of law, given the number of legal issues that had arisen and the wish of the court and the parties not to prolong the oral hearing. During the course of those responses, P&O sought to adduce further evidence; although initially they sought to put several further documents before the court, they confined their final application to a letter dated 5 October 2001 from Emporchi Valparaiso to P&O. The last paragraph of the letter stated:

"*The withdrawal of goods from the warehouse limits is authorised by our Company in its capacity as a Warehouse only upon presentation of the legalised entry declaration (DI) and upon payment of duties (where appropriate). Consequently, it is not for us under any circumstances to require the original bill of lading as a requirement for delivery of the cargo, as this is not a function of this Company, given that this is a power only given to the National Customs Directorate*"

97. I am prepared to admit this document as evidence from Emporchi Valparaiso, but its weight must be affected by the fact that it was not available to be put to Mr Sahurie at trial, that it was produced after a meeting between P&O and Emporchi, Valparaiso in circumstances which are not clear and that it deals essentially with a legal issue. The letter did not address the distinction which Mr Sahurie drew between the duties of a warehouse operator in respect of Customs and other duties that he could assume under contract with the shipowner. Although the letter

stated that Emporchi Valparaiso could not require the original bill of lading in " any circumstances", it addressed only their relationship with Customs in the letter and not their ability to assume by contract the kind of duty about which Mr Sahurie gave evidence. I therefore found it of little assistance.

(c) Could the owner contract with the warehouse operator on terms requiring him to release only on presentation of the original bill of lading and use the TATC procedure for the same purpose?

98. It was common ground that a carrier could enter into a contract with a Customs warehouse operator or container operator provided that it was not inconsistent with their public duties. This had been so for the new Emporchi companies since the 1997 law to which I referred at paragraph 71.

99. Article 1 of Resolution No. 05274 of 13 November 1987 promulgated by the Customs stated that goods within the confines of Customs areas managed by private enterprises had to be carried out in accordance with the rules promulgated. However, there was nothing express in the Rules or elsewhere that prevented the warehouse operator asking for an original bill of lading.

100. I have set out above my acceptance of the evidence of Mr Sahurie that under the law of Chile goods were not delivered to Customs; that there was nothing in the status of the Customs agent that obliged a Customs warehouse operator to accept his entitlement to demand the goods without presentation of an original bill of lading. I have also considered Article 104 at paragraph 88; that Article imposed a public duty on the warehouse operator. However, I accept the clear distinction drawn by Mr Sahurie between the public duties of a warehouse operator and other duties; the public duties were those that related to the discharge of his Customs function. Although the warehouse operator could not be given instructions that contradicted the public duty under Article 104 entitling the Customs agent to withdraw the goods once the Customs requirements were complied with, that only applied to the duties of the warehouse operator as regards Customs. It did not affect obligations that arose under the contract of carriage and instructions could be given as regards obligations under the contract of carriage not inconsistent with that public duty. It is clear therefore that there was nothing in the law of Chile which made it inconsistent with the public duties of a Customs warehouse operator for that operator to be required by private contract between him and the carrier to demand presentation of an original bill of lading before delivering the goods after they had been cleared through Customs; I accept the evidence of Mr Sahurie there was nothing to prevent, and in particular nothing in Article 104 to prevent, a carrier asking for the presentation of an original bill of lading as envisaged by Article 977 of the Chilean Commercial Code, referred to at paragraph 112 below.

101. In 1981 the rule that required the Customs agent to obtain the approval of the vessel's agents for the cargo to be withdrawn from the warehouse was abrogated. That, however, pertained before the changes to status of Emporchi; at that time, there was no need for the Customs agent to obtain approval as the carrier was protected by the then status of Emporchi. The change in 1981 had no bearing on this issue as the position had changed and it did not affect the contractual position between the warehouse operator and the carrier.

102. I am satisfied on the basis of Mr Sahurie's evidence that, although cargo imported into Chile subject to the *retiro indirecto* system had to be delivered into Customs warehouses, the carrier could choose the Customs warehouse to which the goods were to be delivered and contract with that warehouse operator on terms that delivery of the goods should only be delivered against presentation of a bill of lading. Furthermore a prudent carrier should do so to fulfil his obligation under the bill of lading only to deliver to the holder of the bill of lading. Mr Sahurie accepted that in 1998 and 1999 some carriers did not enter into contracts with warehouse operators on terms that required warehouse operators only to deliver against presentation of an original bill of lading, though some did. Those who had not done this, acted as they did because of the historical position of Emporchi; they wanted to avoid a grey area and the cost of assuring goods were delivered correctly. The position had changed and many carriers were instructing their agents and the warehouse operators to ensure that the person withdrawing the goods had the original bill of lading.

103. As I have mentioned at paragraph 77, the procedure for containers differed; the carrier's agent would commonly act as a Container Operator under a special licence from Customs and issue the TATC form; this was the case for both Maersk and P&O. Mr Sahurie was correct in my view in saying that when the carrier's agent issued TATC forms he was acting as a Container Operator; in that capacity he was performing an obligation under private law and not a public law function. He was performing a function of facilitating paperwork and his responsibility to Customs was for any Customs duty that was not paid if the container was not re-exported. I reject the evidence of Mr Tomasello to the contrary; there is nothing to support his evidence that the function in issuing the form was a public one. Mr Sahurie was correct in saying this was essentially a paper work function.

104. It was clear that a Container Operator could demand to see an original bill of lading before the TATC was issued. On 29 December 1987, the head of the legal department of the Customs issued report no 74 which stated that it was in order for the container operator to demand the original bill of lading before issuing the TATC; if the original was not available, then a non negotiable copy certified by the bank which was the consignee could be used. The report observed:

"… *the general rule when clearing goods from customs is that the consignment be established in the original B/L or an equivalent document which complies, amongst others, with the function of entitling the consignee in respect of the goods, being generally transferable by a simple endorsement all of which justify this requirement in full.* "

This report was confirmed by the National Director of Customs by resolution 284 of 1987. The arguments and conclusion of this report also support the evidence of Mr Sahurie in relation to the right of the warehouse operator to demand an original bill of lading.

105. I do not accept Mr Tomasello's evidence to the contrary; in his expert report, Mr Tomasello made a number of criticisms of report no 74, but I do not accept them. For example, I have already set out my conclusion as to why a statement of a Customs agent can be questioned; nor is there a duty to issue a TATC, only a right to do so. Furthermore, it is in my view of no significance that the ruling is not mentioned in the regulations made under Resolution 2808 of 12 April 1995; these regulations deal with matters that concern the Customs, not the obligations of the carrier to the consignee.

106. Mr Parra accepted that a container operator could demand to see an original bill of lading before the TATC was issued and said that container operators often asked to see such documents to ensure that the container was delivered to the person entitled. Although Mr Parra said subsequently in his evidence that there was no obligation on a Customs agent to comply with the request other than by producing a copy certified by the Customs agent himself, he was unaware of report No 74 and wrong about the ability of carriers to enter into contracts with Emporchi and Seaport. Furthermore, as I have set out at paragraph 95, it was also Mr Parra's evidence that if the original was not produced, the Customs agent could be reported to Customs. I therefore do not accept him as an altogether reliable witness and reject the subsequent qualification that he gave to his earlier evidence that a Container Operator could and did demand sight of an original bill of lading. The practice of AJ Broom, according to the written evidence of Mr Malinarich, their operations manager, was not to ask for the original bill of lading before issuing the TATC, though in his written evidence he accepted that it had become the practice of some, though by no means all, container operators to demand sight of a bill of lading or a copy before issuing the TATC. He also stated that it was only the Customs who could ask to see the original bill of lading and it was impossible to ask to see the TATC. He was not cross examined and his evidence is inconsistent with the practice of other operators and with report no 74. I therefore attach little weight to it.

Conclusion on the Customs law

107. I am satisfied that:
   - An ocean carrier carrying goods to Chile was not obliged, as a matter of the Customs law of Chile to deliver goods to the physical possession of Customs, but only to a Customs warehouse licensed by Customs and subject to the jurisdiction of Customs. Customs did not deliver the goods.
   - Ocean carriers were not precluded from entering into contracts requiring the Customs warehouse operator to deliver against presentation of an original bill of lading.
   - Neither the carrier nor the Customs warehouse keeper nor the Container Operator had to accept the entitlement of the Customs' agent to possession of the goods without presentation of an original bill of lading.

108. I am therefore satisfied that Maersk and P&O were able to enter into contracts with both Customs warehouse operators and with Container Operators on terms that required them to deliver or issue a TATC only against presentation of a bill of lading. They had undertaken in the contract contained in the bill of lading that delivery should be against presentation of an original bill of lading and they should have ensured that they could discharge that obligation by an appropriate contract with Customs warehouse operators and Container Operators.

Was there a custom or usage of the ports in Chile that cargo could be delivered without presentation of a bill of lading?

109. It was also contended by Maersk and P&O that there was a custom at the ports in Chile to the effect that carriers delivered goods to a Customs warehouse without presentation of an original bill of lading and the warehouse then delivered without presentation. They relied on the evidence of Mr Parra and Mr Marlinarich.

110. I do not consider that their evidence established any such custom. I have referred at paragraph 106 to some of their evidence and the weight of their evidence. In my view there was clearly no custom of the ports of Chile that cargoes could be delivered to Customs warehouses in discharge of the carrier's delivery obligations or could be delivered without presentation of a bill of lading. I have already referred to the evidence of Mr Sahurie, the ability of carriers to enter into agreements with Customs warehouse operators and Container Operators, the changes that have taken place in Chile and the practice of agents and container operators. I am therefore quite satisfied that there was no such custom or usage for which Maersk and P&O contended. It is not necessary therefore to consider the further submissions of the claimants that any such custom would have been unreasonable.

The Hamburg Rules

111. Chile incorporated the Hamburg Rules into its Code of Commerce in 1988. Article 1.7 of the Hamburg Rules provides:

   "The bill of lading is a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking. "

112. It was common ground that this was the basis of Article 977 of the Chilean Code of Commerce:

   "The bill of lading is a document which establishes the existence of a contract of maritime transport and verifies that the carrier has taken charge of or has loaded the goods and has undertaken to deliver them against the presentation of that document to a determined person to his order or to the bearer"

113. Article 4 of the Hamburg Rules is entitled "*period of responsibility*"; it provides:

"*1. The responsibility of the carrier for the goods under this [Convention] covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.*

The equivalent provision of the Chilean Code of Commerce is Article 982 which provides:

"The liability of the carrier for the cargo comprises the period during which it is under his custody, be this ashore or during its actual transport"

Article 4 of the Hamburg Rules continues:

2. For the purposes of para 1. of the Article, the carrier is deemed to be in charge of the goods ......

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or ...

(iii) by handing over the goods to an authority or other third party to whom, pursuant to the contract of carriage or with the law or with the usage of the particular trade applicable at the port of discharge, the goods must be handed over".

There was some dispute between the experts over the precise translation of the Spanish text in the equivalent Article of the Chilean Commercial Code (Article 983) and in particular as to whether the Spanish text " *the goods must be handed over*" should read "*may be handed over*". The text is identical to the text of the Hamburg Rules in all material respects; I therefore consider it correct to use the official language version of the Article contained in the Hamburg Rules, even though Mr Sahurie considered that the translation "may be handed over" was the preferred translation.

114. Article 5 of the Hamburg Rules (Article 984 of the Chilean Code of Commerce) is entitled "basis of liability"; it provides that:

"*1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence took place while the goods were in his charge as defined in art.4., unless the carrier proves that he his servants or agents took all measures that could reasonably be required to avoid the occurrence or its consequences.*

3. The person entitled to make a claim for the loss of the goods may treat the goods as lost if they have not been delivered as required by art. 4 within 60 consecutive days ....."

115. P&O and Maersk contended (supported by the evidence of Mr Tomasello) that under the Hamburg Rules, if the carrier was obliged to deliver to the Customs, that constituted due delivery under the contract. The claimants (supported by Mr Sahurie) contended that Article 4 did not stipulate what constituted good delivery, only when the responsibility for loss or damage ended, though Mr Sahurie accepted that, if the carrier was obliged to deliver to Customs, then Article 4.2(b) (iii) (Article 983(c) of the Chilean Code) would be satisfied for the purposes of establishing the period of custody.

116. For the reasons I have given I am satisfied that a carrier was not obliged to hand over the goods to Customs; he did not deliver them to Customs, but placed them with a Customs warehouse operator subject to the jurisdiction of Customs. He could enter into a contract with that operator that the goods should not be released without presentation of the bill of lading. Thus in my view the carrier could not rely on Article 4.2(c) (Article 983 (c) of the Chilean Code of Commerce).

117. If, however, I had concluded that the carrier was obliged to make a delivery to Customs, then I would have found it difficult to accept the distinction that the claimants sought to make between the end of the carrier's period of responsibility and custody for the purposes of a claim for loss or damage of the goods and the carrier's continuing responsibility to deliver only against presentation of a bill of lading. The purpose of Article 4.2 (b) (iii) was in my view accurately stated in a report of the UNCTAD secretariat entitled "*The economic and commercial implications of the entry into force of the Hamburg Rules*" (December 1987) at p 36:

"These provisions concern port authorities and other third parties to whom the goods must be handed over before shipment or after discharge in accordance with the laws or regulations of the loading or discharge ports. National laws or regulations frequently grant monopolies to State-owned or private warehouses or docks for handling and storage of goods, particularly in connection with Customs procedures. The policy of these provisions is that if the carrier is not free to chose such a facility, he should not be liable for damage to the goods caused by the facility. Article 4.2(b) (iii) states that he is not in charge of the goods in those circumstances"

118. Although it is not necessary for me to express a concluded view on this issue, it is difficult to see what proper distinction can be made on the basis of the policy of the Hamburg Rules between damage to the goods by a warehouse the carrier is forced to use to and misdelivery of the goods by the warehouse. The loss has occurred when the goods are not in the carrier's custody as a result of the action of a person which the carrier was not free to chose.

119. There is one further issue. If contrary to the clear view I have formed, the delivery to the Customs warehouse was delivery to the Customs, then the claimants accepted that on the terms of the P&O bills of Lading that constituted due delivery under the contracts. This was because clause 20 (6) provided:

"If the carrier is obliged to hand over the goods into the custody of a Customs, port of other authority, such hand over shall constitute due delivery to the Merchant under the bill of lading"

The obligation under English law to deliver under the bills of lading

120. It has been made clear in decisions of the highest authority that a carrier must under the usual terms of a bill of lading deliver the goods only against presentation of an original bill of lading; the case most commonly cited is ***Sze Hai Tong Bank v Rambler Cycle Co*** [1959] AC 576. In ***The Houda*** [1994] 2 Lloyd's Rep 541, Leggatt LJ expressed the position in this way:

" Under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession… "

There is no need to rehearse the importance to international commerce of this obligation under a bill of lading.

121. Furthermore the contract of carriage generally continues and the bill of lading remains effective, as set out in paragraphs 35 to 38 above, until the goods are delivered to the person entitled under the bill of lading.

122. The bills of lading contained express terms which Maersk and P&O contended modified that usual obligation. Maersk relied on the following provisions of their bills of lading:

The face of the bill of lading

"…. for delivery unto the Consignee mentioned herein or to his or their assigns, where the Carrier's responsibilities shall in all cases and in all circumstances finally cease… In witness whereof the number of original bills of lading stated on this side, one of which being accomplished, the other(s) to be void.

Clause 17: METHODS AND ROUTES OF TRANSPORTATION

1.The carrier may at any time

(e): comply with any orders or recommendations given by any government or authority or …

2.Anything done or not done in accordance with this provision is deemed to be within the contractual carriage and shall not be a deviation"

P&O relied on the following provisions of their bills of lading (and clause 20(6) in respect of which I have set out the concession of the claimants at paragraph 119):

The face of the bill of lading

"…If the Carrier so requires, before he arranges delivery of the goods one Original bill of lading, duly endorsed, must be surrendered by the Merchant to the Carrier at the Port of Discharge or at some other location acceptable to the carrier "

The bills of lading also contained provisions identical to clause 17 of the Maersk bills.

123. First it was contended that under the terms of the P&O bills of lading, the presentation of an original was only the carrier's prerogative rather than his obligation, in view of the words "if he so requires". I do not accept that contention. Clear language would be needed to discharge the carrier from his obligation to deliver in accordance with the bill of lading; this clause does not contain any such language.

124. Second, it was contended that clause 17.1(e) in the Maersk bill and the identical clause in the P&O bill entitled the carrier to comply with any government order; on the findings I have made in relation to the law of Chile, there was no such order.

125. In my view therefore there was no relevant qualification to the usual delivery obligation by reason of the clauses in the bill of lading.

126. Maersk and P&O next contended that there was an implied term of the bill of lading that entitled them to deliver without presentation of a bill of lading in circumstances where there was a reasonable explanation of its absence. They relied on a short passage in the judgment of Clarke J in ***The Sormovskiy*** *3068* [1994] 2 Lloyd's Rep 266. Goods were delivered at Vyborg by the defendant carrier without seeking presentation of the bills of lading. The carrier contended that he was not liable because he had delivered the goods in accordance with the practice and custom of the port of Vyborg and he had delivered to the plaintiff's agents. Clarke J held that the although the carrier was generally obliged to deliver only against presentation of an original bill of lading, there were circumstances where the carrier was entitled to deliver other than against presentation. After a review of the authorities, Clarke J concluded that there were two such circumstances – where there was a reasonable explanation for the non availability of the bill of lading and where the law or custom of the port required such delivery. It is convenient to deal subsequently with the position relating to the law and custom of the port of delivery. As regards a reasonable explanation for the absence of the bill of lading, Clarke J said at 274:

"In trades where it is difficult or impossible for bills of lading to arrive in the discharge port on time, the problem is met by including a contractual term requiring the master to deliver against a letter of indemnity or a bank guarantee. That is common place and indeed there was a provision to that effect here. The simple rule to which I referred does require some exceptions because the bill of lading might have been lost or stolen. In order to cater for that problem it is no doubt necessary to imply a term that the master must deliver cargo without production of an original bill of lading in circumstances where it is proved to his reasonable satisfaction both that the person seeking delivery of the goods is entitled to possession and what has become of the bills of lading. The precise nature of the exceptions will no doubt require further consideration on the future."

127. In ***Motis Exports v Dkbs*** *1912* [1999] 1 Lloyd's Rep 837, Rix J took a contrary view. He had to consider as a preliminary issue the liability of Maersk line for the loss of goods after discharge where forged bills of lading were used to obtain delivery orders for the goods at the port of discharge. One of the arguments made was that there was an exception to the rule that a shipowner must deliver against presentation of a bill of lading where the carrier was deceived without fault into parting with the goods; the carrier relied upon the passage in the judgment of Clarke J in ***The Sormovskiy 3068*** which I have set out in paragraph 126. After referring to ***the Houda*** and noting that ***The Sormovskiy 3068*** did not appear to have been cited to the Court of Appeal in that case, Rix J expressed the view that the exception which the carrier sought to derive from the ***The Sormovskiy*** *3068* did not exist; the remedy in circumstances where the original bill of lading could not be produced was to persuade the carrier to accept an indemnity or go to Court. In the Court of Appeal, the argument on this point was not pursued by the carrier [2000] 1 Lloyd's Rep 211 at 213, para 7.

128. I agree with the views of Rix J. Furthermore if the carrier is not protected by a reasonable belief in the genuineness of the bill presented (as was held in ***Motis Exports***), it is difficult to see how he can be protected in the circumstances suggested by Clarke J: see *Carver on Bills of Lading,* paragraph 6-005. Moreover the exception suggested by Clarke J was by way of implied term. But, in my view, no such implied term could ever be said to be necessary; on the contrary the right of the carrier to deliver where he had a reasonable explanation as to the absence of the bill and reasonable evidence of the entitlement of the person seeking delivery to delivery would undermine the security of the bill of lading. The position of the consignee and the shipowner can and should in the circumstances envisaged by Clarke J be protected by an indemnity or an application to court as is made clear in the judgments in the Court of Appeal in ***The Houda .*** There are occasions, for example in the short haul trades, where the bills usually do not reach the port of discharge until after the ship has discharged; the documents have usually pointed to the consignee being entitled to delivery. However, in my experience, in such circumstances, although there rarely is a problem, there have been occasions where insolvency has supervened in the contractual chain and banks have exercised their rights under the bills of lading. It is for that reason it has been the practice of P&I clubs to insist an indemnity always be provided where a bill of lading is not available even in the most plausible of circumstances and have generally excluded insurance cover for a carrier who delivers in such circumstances without obtaining an indemnity or court order.

129. Even if, contrary to my view there was such an exception, I do not consider it would avail the carriers in the present case. They received no explanation of the whereabouts of the original bills of lading and a copy of a bill of lading produced by Gold Crown's Customs agent was not reasonable evidence of entitlement to possession. No one questioned whether the Customs agent had the original.

The obligation under the bills of lading and the law and custom at the port of discharge in Chile

130. Thus as a matter of English law, I am satisfied that the obligation in bailment and contract upon P&O and Maersk was only to deliver against presentation of an original bill of lading. However, these carriers relied on the distinction under Article 10 of the Rome Convention between the substance of that obligation and the manner and mode of its performance to which I referred at paragraph 64.

131. To the extent that the law of Chile contained provisions specifying the manner in which cargo in Chile had to be delivered, then in my view it must be correct to have regard to the law of Chile under Article 10. Thus, for example, under the law of Chile, as set out in paragraph 75, the original bills of lading had to be retained by the Customs agent. They could only therefore be presented to the carrier and had to be returned (marked if necessary to show delivery had been made); to that extent the obligations under the bill of lading are modified by the law of Chile.

132. A similar result to that to which I referred in paragraph 131 is reached on the basis of another part of the decision in ***The Sormovskiy 3068*** relating to the law and custom at the port of discharge. Clarke J said at 275:

"If it were a requirement of the law of the place of performance that the cargo must be delivered to the [the Commercial Sea Port at Vyborg] as agent of the plaintiffs without presentation of an original bill of lading the defendants would in my judgment have performed their obligations under the contract of carriage. Any other conclusion would mean that the contract could not lawfully be performed, which could not have been intended by the parties.

Equally if there was a custom….However, custom in this context means custom in its strict sense… It would not however, in my judgment, be good performance of the defendants' obligations under the contract if it were mere practice…"

133. I agree with the views of Clarke J; they seem to me to accord entirely with the authorities to which he refers and with the broader principle of Article 10 of the Rome Convention.

134. I accept that the obligation under the bills of lading in English law contemplated the bill being surrendered to the carrier and kept by him, but either under the principle in ***The Sormovskiy 3068*** or under Article 10, I consider that the modification in the manner of the discharge of that obligation set out in paragraph 131 is permissible and is in no way inconsistent with the basic obligation under these bills of lading in English law to deliver against presentation of the bill of lading.

135. If under the law of Chile I had concluded that Maersk and P&O were under an obligation to deliver the cargo to a Customs warehouse without presentation of a bill of lading and that discharged their delivery obligations, that would have given rise to more difficult questions as to the scope of the principle in ***The Sormovskiy 3068*** and of

Article 10. It was contended by the claimants that the exception in *The Sormovskiy 3068* did not apply because the basis of such an exception was the intention of the parties and such an exception could not be implied because of the terms of the bills of lading. Article 10 did not assist Maersk and P&O as the substance of the obligation was the obligation to deliver against presentation of the bill of lading. Furthermore the claimants did not know of the law of Chile and therefore Maersk and P&O could not rely on the provisions of that law; there was no supervening illegality. Maersk and P&O contended that the exception in ***The Sormovskiy 3068*** was of wide application and consistent with cases such as ***Petrocochino v Bott*** (1874) LR 9CP 355 and ***The Asiatic Prince*** 108 Fed Rep 287 (1901, CA, 2nd Cir). It was consistent with the principle, set out for example by Staughton J in ***Libyan Arab Bank v Bankers Trust*** [1989] QB 728 that performance was excused if the act required was necessarily unlawful in the place of performance and therefore performance was discharged by illegality. In view of the conclusion to which I have come on the law of Chile, it is not necessary for me to lengthen this judgment by a consideration of these conflicting arguments.

A collateral contract?

136. The claimants, had I reached a different conclusion on the law of Chile would have sought to argue that in the case of the Maersk bills (where there was an express obligation to deliver against presentation of the bill of lading) that there was a collateral warranty that performance in that way could be carried out lawfully in Chile: they relied on *Walton* ***(Grain and Sipping) Ltd v British Italian Trading Co*** [1959] 1 Lloyd's Rep 223 and ***Pagnan v Tradax*** [1987] 2 All ER 565. In view of the conclusions to which I have come, it is not necessary for me to decide this still further issue. I am, however, very doubtful whether such a claim could have succeeded; I am satisfied that Mr Balani was not unfamiliar with the position in Chile. It was accepted that such a claim could not succeed against P&O because of the express provision in clause 20(6) of the P&O bill of lading (see paragraph 119). The claimants had a further alternative submission not only against Maersk and also P&O in the event that I had found that although the carriers had to deliver to Customs they were not precluded from demanding presentation of a bill of lading; this faced similar difficulties and the fact that it had not been pleaded. It is again unnecessary for me to deal with this issue on the findings I have made.

Issue 3: The exceptions in the bill of lading

137. Although the terms of the Maersk and P&O bills of lading were similar (as is to be expected as each company operates a liner service) and both bills could be used either as port to port bill or combined transport bill, it is necessary to consider them separately.

The terms of the Maersk bills

138. Maersk relied first on clause 5:

"CARRIER'S RESPONSIBILITY

The carrier undertakes responsibility from the place of receipt if named herein or from the port of loading to the port of discharge or the place of delivery if named herein.

3. Carriage to and from Countries other than the USA

b. Where the carriage called for commences at the port of loading and finishes at the port of discharge, the Carrier shall have no liability whatsoever for any loss or damage to the goods while in its actual or constructive possession before loading or after discharge over the ship's rail, or if applicable over the ship's ramp, however caused."

139. The claimants first submitted that the clause did not in any event apply as the carriage was not port to port. On the face of the bill of lading, the spaces for port of loading and for place of receipt were each filled in as "Hong Kong" and the spaces for port of discharge and place of delivery were also filled in. The spaces for place of receipt and place of delivery were marked "Only applicable when the document used as a combined transport bill". It would seem therefore that this was not carriage that finished within the terms of clause 5.3.b at the port of discharge; it finished only at the place of delivery. But it is not necessary to consider this at length, as I am satisfied that in any event that the clause is inapplicable on the basis of the claimants' second submission relying on ***Motis Exports v Dkbs*** *1912*.

140. In ***Motis Exports v Dkbs.*** *1912,* Rix J and the Court of Appeal held that clause 5.3.b did not cover misdelivery without presentation of a bill of lading. Stuart Smith LJ said at paragraph 20:

"Clause 5(3)(b) is not apt on its natural meaning to cover delivery by the carrier or his agent, albeit the delivery was obtained by fraud"

Mance LJ said at paragraph 5

"The natural subject matter of clause 5(3)(b) is consists in loss or damage caused to the goods while in the carrier's custody, but not deliberate delivery up of the goods, whether without any bill of lading or against a forged and therefore nul document believed to be a bill of lading. "

141. Maersk argued that the facts of the present case were different; Maersk had not handed over the goods to the wrong person, but the wrong person had obtained the goods without the consent of the carrier as in the case of theft. In the case of theft, it was accepted in ***Motis Exports*** that the clause would apply (see also ***The Ines*** [1995] 2 Lloyd's Rep 144). In my view this was not a case of theft; it was a simple case of misdelivery without presentation of a bill of lading and to persons, Gold Crown, who were not in any event entitled. Maersk were under an obligation to deliver to the person who presented a bill of lading; this they did not do.

142. Maersk next relied on the Hague-Visby Rules. It was accepted by the Claimants that the Hague-Visby Rules applied by reason of clause 5.3.a. Maersk contended that the Hague-Visby Rules exceptions in Article IV Rule 2 (g) and (q) provided them with a defence. Assuming that these exceptions applied to misdelivery (though the claimants contended that they only applied to physical loss and damage), they do not assist Maersk. There was no restraint of princes (on the law of Chile as I have found it to be) and the loss did not occur without their fault or privity (for the reasons given in paragraphs 148 to 149 in relation to negligence). Maersk did not seek to rely on the package limitation as it was greater than the amount claimed.

The terms of the P&O bills

143. P&O relied on clause 5 of their bills:

"5. CARRIER'S RESPONSIBILITY

Port to Port Shipment

….

The carrier shall be under no liability whatsoever for loss or damage to the Goods, howsoever occurring, if such loss or damage arises prior to loading onto or subsequent to discharge from the vessel. Nothwithstanding the above, in case and to the extent that any applicable law provides for any additional period of responsibility, the carrier shall be entitled to every … limitation and liberty in the Hague Rules, notwithstanding that the loss or damage did not occur at sea"

144. It was the claimant's case that clause 5 did not apply as the carriage under the bills of lading was not port to port. Under the terms of the definition clause, a bill of lading was port to port if it was not combined transport; a bill was a combined transport bill if the "*place of receipt*" and/or "*the place of delivery*" were so indicated on the face of the bill in the relevant spaces. On face of the bills the space for "*place of receipt*" was filled in "*Hong Kong Cy",* and the "*place of delivery*" filled in "V*alparaiso*". The space for the port of loading was filled in as "Hong Kong" and the space for the port of discharge "*Valparaiso"*. The spaces for "*place of delivery*" and "*place of discharge*" were marked "*applicable only when this document is used as a combined transport bill of lading"*. The claimants therefore contended that, as the spaces had been filled in, clause 5 did not apply. P&O contended that even though the spaces had been filled in, this did not make the carriage combined transport as it was necessary for the place of receipt and the place of delivery to be different to the places loading and discharge. I do not accept P&O's argument. There may be many reasons why the combined transport provisions were chosen even if the places were the same; as the provision in clause 6 dealing with combined transport makes clear (and as is emphasised in P&O's guide) this makes the carrier liable throughout the carriage; the combined transport provisions also extends the period of responsibility beyond discharge from the vessel to storage at the place of delivery until collection. Thus there are sensible reasons why the parties might have filled the spaces in; they did so in this case and in my view, these bills of lading were not port to port. P&O also contended that even if the carriage was combined transport, clause 5(b) applied by reason of clause 6(3)(b); I cannot accept that argument, on the terms of the clause, given the way the face of the bill of lading was completed .

145. But even if clause 5(b) applied, I do not consider it would assist P&O. The clause is in most respects similar to clause 5.3.b in the Maersk bill; the difference between the phraseology is in my view immaterial. However, the P&O bill contains clause 7(5)(b) which provides:

"7. SUNDRY LIABILITY PROVISIONS

(5) Scope of application

(b) The rights, defences, limitations and liberties of whatsoever nature provided for in this Bill of Lading shall apply in any action against the carrier for loss or damage or delay, howsoever occurring and whether the action be founded in contract or in tort and even if the loss or damage or delay arose as a result of unseaworthiness, negligence or fundamental breach of contract."

P&O relied on the judgment of Shellier JA (with whom Cripps JA agreed) in the New South Wales Court of Appeal in ***The Antwerpen*** [1994] 1 Lloyd's Rep 213. In that case, containers were stolen from the container port with the connivance of employees of the terminal operator. Shellier JA held that, although the loss was not within the terms of a clause that exempted the carrier from liability for loss or damage howsoever caused after discharge, it was within a clause similar to clause 7(5)(b) in the P&O bills which applied the exemption clause to fundamental breach of contract. This was because connivance in the theft by the employees of the container operator was a fundamental breach of contract. Handley JA dissented on the basis that the clauses had sufficient scope without applying them to deliberate conversion. This is entirely consistent with the decisions in ***The Ines*** and ***Motis Exports***. I am satisfied that the wording of the clause can be given sufficient content by not applying it to delivery without presentation of a bill of lading; it deals with loss or damage and not delivery without presentation of a bill of lading.

146. P&O also relied on clause 6(1)(a) which excluded their liability in the case of

" (vii) any cause or event which the carrier could not avoid and the consequence of wherof he could not prevent by the exercise of reasonable diligence.

(ix) compliance with the instructions of any Person entitled to give them "

Assuming that the clause applies, however, these clauses do not assist P&O, as P&O were not complying with instructions of a person entitled to give them (on the findings I have made in relation to the law of Chile) and the loss could have been avoided by the exercise of due diligence (for the reasons given in my findings in relation to

negligence at paragraphs 148 to149). The issue raised on the validity of the special monetary limit in clause 6(1)(c) therefore does not arise.

147. P&O also relied on the Hague-Visby and Hague Rules exceptions. For the reasons given in respect of Maersk, I do not consider they assist P&O. They also relied on clause 7(2) which applied a limit of £100 sterling per package or unit if the Hague Rules were applicable other than by national law. There are a number of reasons why this does not assist P&O; the clause applying the Hague Rules only applied to port to port bills and in any event the applicable limit would be the Hague-Visby limits which do not assist P&O.

Issue 4: The claim in negligence

148. Both P&O and Maersk contended that there could be no claim in conversion or negligence because they had delivered the goods to the custody of the Customs and that was not an act inconsistent with the title of the claimants; furthermore it was the Customs service or the Customs warehouse operator who had released the goods and that was not an act attributable to them. Both of these contentions were based on their case as to the law of Chile. In view of the findings I have made, neither of these arguments can succeed. They had not delivered the goods to the Customs and they could and should have ensured that the Customs warehouse only delivered against presentation of an original bill of lading or that the TATC form was only issued after presentation of an original bill of lading.

149. Under the law of Chile as I have found it to be, it was open to a carrier to contract with a Customs warehouse operator on terms (or give instructions) that an original bill of lading was to be presented prior to the release of the cargo; similarly they could have instructed their port agents to demand sight of an original bill of lading before issuing the TATC form as Container Operators. P&O and Maersk did neither. In my view they were both clearly negligent in these respects, particularly as regards instructions in respect of issuing TATCs only after presentation of an original bill of lading; it was not suggested that as regards negligence the law of Chile was different to the law of this jurisdiction. Neither shipping line appears to have taken up to date advice on this important issue; they seem to have assumed that the position remained as it had in earlier years and not tested the position. There clearly were carriers who did give such instructions or enter into such contracts and this was clearly the prudent practice. If contracts of the kind described had been made or instructions given, I am satisfied that on a balance of probabilities these losses would not have occurred; in particular I am satisfied that if Maersk had instructed AJ Broom and P&O had instructed SAAM only to issue TATC forms against presentation of original bills of lading (or copies certified by a bank), then the goods would not have been delivered to Gold Crown and the losses would not have occurred. It is clear that there was no impediment to Maersk and P&O giving such instructions to their agents in their capacity as Container Operators; ordinary prudence and proper commercial practice made it obvious that they should have done so.

Conclusion

150. I therefore hold that the Claimants succeed in their claims for $134,807.40 against Maersk and for $95,147.20 against P&O.

Richard Waller(instructed by Clyde & Co) for the Claimants
Michael Davey (instructed by Hill Taylor Dickinson and Hardwick Stallards) for the Defendants