JUDGMENT : Mr Justice Moore-Bick: Commercial Court. 25th June 2003

1. The claimants are Swedish companies which produce sawn timber for the construction industry. They export considerable quantities of timber to foreign destinations including the United Kingdom. Between June and December 2001 the claimants shipped various parcels of timber from Sweden to Chatham on three vessels, the *Arosita*, the *Lady Bos* and the *Aldebaran*, all of which were operated by Siöwalls AB, a company which ran a liner service between ports in Sweden and the U.K. The goods were all shipped under Siöwalls' standard form of bill of lading.

2. The defendants, Convoys Ltd, carry on business as stevedores and wharfingers at Chatham and were employed by Siöwalls to handle cargoes carried on board its vessels. Towards the end of 2001 Siöwalls fell into severe financial difficulties and went into administration under the supervision of the Swedish courts with a view to reconstruction. As a result it ceased to pay its debts as they fell due. Unfortunately the administrator was unable restore the company to financial health and on 10th January 2002 it went into liquidation owing Convoys £118,732.61. Convoys immediately placed a lien on all goods in their possession that had been carried in Siöwalls' vessels in an attempt to obtain payment of the amount remaining due to them.

3. The claimants had sold the timber to buyers in this country and both they and their buyers disputed Convoys' right to exercise a lien in respect of sums owed by Siöwalls. The claimants bought the timber back from their customers and took assignments of their rights in relation to it so as to be able to contest the detention of the goods and recover damages for its wrongful detention in their own right. Other purchasers of timber whose goods were also held under lien paid Convoys a little over £48,000 to obtain the release of their goods and on 12th August 2002 the present claimants between them paid into court the sum of £78,000 as security in order to obtain the release of their goods. They brought this action seeking delivery up of the goods and damages for wrongful interference. Convoys rely in their defence on the terms of the contracts of carriage and their own terms of business which they contend entitle them to exercise a lien on the goods for any amounts owed to them by Siöwalls.

The contracts of carriage

4. Contracts of carriage between the claimants and Siöwalls were made through freight brokers who also acted as shipping agents for Siöwalls. They were evidenced first by booking notes, which were issued by the brokers when making arrangements for the shipment of individual parcels, and subsequently by bills of lading. Few of the booking notes relating to the parcels with which these proceedings are concerned have survived. However, those issued by Becoship AB, the brokers who handled shipments made by Viking Timber, contain a printed clause to the effect that the goods were accepted for shipment on Siöwalls' standard terms of carriage and Mr. Samuelsson of Johan Nilsson & Co AB, the brokers who handled shipments made by Jarl Trä, confirmed that booking notes issued by his company contained a similar provision. That is only to be expected and it is more likely than not that booking notes issued by Jönsson Novabolagen AB, the brokers who handled shipments made by Ingvar Wilhelmsson, did the same.

5. All the bills of lading were issued on Siöwalls' standard form. This did not contain the usual mass of clauses printed in small type on the reverse. Instead it contained the following clause in legible print on its face:
"A copy of the Carrier's Standard Conditions of Carriage applicable hereto (which are, as regards the performance of the Contract and basic liability with respect to combined transport, based on Combiconbill adopted by BIMCO in January 1971 as revised 1995) may be inspected or will be supplied on request . . . . . "

6. The brokers all had copies of Siöwalls' standard terms in their offices and there would have been no difficulty in making a copy available to any shipper who asked for one. Representatives of the three claimants gave evidence: Mr. Jarl on behalf of Jarl Trä, Mr. Wilhelmsson on behalf of Ingvar Wilhelmsson and Mr. Gustavsson on behalf of Viking Timber. None of them could remember ever having seen a copy of Siöwalls' terms, although one would expect the brokers to have sent copies to their clients in the ordinary course of business. Mr. Samuelsson said that he had sent a copy to Jarl Trä at the time when Siöwalls changed to a *'blank-backed'* bill of lading, that is a bill of lading which did not set out the terms of carriage in full on the reverse. Mr. Hillermark of Becoship was uncertain whether he had sent a copy to Viking or not. Mr. Svenson of Jönsson Novabolagen AB did not give evidence in person, but in his written statement he said that he had not given Ingvar Wilhelmsson a copy of the conditions.

7. I am satisfied that a copy of Siöwalls' conditions was sent to Jarl Trä and also to Viking, but I am sure that no one at either company sat down and scrutinised them carefully. There is insufficient evidence to persuade me that a copy was sent to Wilhelmsson, but even if it had been I do not think that it would have received any greater attention. However, whether the details of Siöwalls' conditions was specifically drawn to the claimants' attention is not in my view the important question. All three claimants had been doing business with Siöwalls for many years. Throughout that period booking notes had been issued stating that cargoes were carried on Siöwalls' standard conditions and for much of it the conditions themselves had been printed on the reverse of bills of lading that were issued to them. No doubt those terms were revised in minor respects from time to time, but I do not think that any of the claimants can have been in any doubt that Siöwalls was only willing to carry goods on the terms of its standard conditions of contract as they existed from time to time. If they had wanted to know the details of those conditions, they could easily have obtained copies. The fact is that they assumed that they contained clauses typical of those to be found in liner bills, as in fact they did, and were prepared to ship their goods with Siöwalls on that basis.

8. It is common in the timber trade to sell goods on F.O.M. (free on motor) and F.B.Y. (free buyer's yard) terms. Siöwalls was willing to enter into contracts of carriage on the same terms which meant that it had to arrange for the handling and storage of the goods at the port of discharge, for the loading of the consignees' lorries in the case of shipments on F.O.M. terms and, in the case of shipments on F.B.Y. terms, for road haulage to the final destination. These were all services which Siöwalls, as a liner operator, could be expected to sub-contract to third parties. This goes a long way to explaining the reason for some of Siöwalls' standard terms.

9. Siöwalls' conditions of carriage provided as follows:

"Scope of application

The provisions set out and referred to in these Standard Conditions shall apply to every contract of carriage concluded with the Carrier for the performance of the entire transport as undertaken by the Carrier, whether evidenced by the issuance of a bill of lading or similar document of title or non-negotiable sea waybill or whether the contract be in writing or not. The provisions set out and referred to in this document shall apply both to Combined Transports and Port-to-Port shipments.

. . . . . .

7. ***Subcontracting***

The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any or all duties whatsoever undertaken by the Carrier in relation to the Goods.

. . . . . .

18. Defences and Limits for the Carrier and Servants

1) The defences and limits of liability provided for in these Standard Conditions shall apply in any action against the Carrier for loss of or damage to the Goods whether the action be founded in contract or in tort.

. . . . . .

3) The Merchant undertakes that no claim shall be made against any servant, agent or other person whose services the Carrier has used in order to perform this Contract and if any claim should nevertheless be made, to indemnify the Carrier against all consequences thereof.

4) However, the provisions of these Standard Conditions apply whenever claims relating to the performance of the contract of carriage are made against any servant, agent or other person whose services the Carrier has used in order to perform this Contract, whether such claims are founded in contract or in tort. In entering into this Contract the Carrier, to the extent of such provisions, does so not only on his own behalf but also as agent or trustee for such persons. . . . .

. . . . . .

22. Lien

The Carrier shall have a lien on the Goods and the right to sell the same by public auction or otherwise at his discretion for all freight charges and expenses of whatever kind and nature due to the Carrier under the Contract of Carriage and also in respect of any previously unsatisfied amounts of the same nature and for the costs and expenses of exercising such lien and such sale.

. . . . . .

30. United Kingdom

. . . . . below conditions shall apply for the Carrier or his agents or sub-contractors when acting as a) forwarder – the Standard Trading Conditions 1989 of the British International Freight Association (BIFA); b) warehouse keepers – the Conditions of the United Kingdom Warehousing Association 1994; c) hauliers – the 1991 Conditions of Carriage of the Road Haulage Association."

Convoys' terms of business

10. In January 1995 when Siöwalls began operating into Chatham handling, storage and forwarding services at the port were provided by Crescent Wharves Ltd. Crescent quoted for Siöwalls' business on terms which included its own form of wharfingers clause in relation to handling, the United Kingdom Warehousing Association 1994 ("UKWA 1994") conditions in relation to storage and the Conditions of Carriage 1991 of the Road Haulage Association ("RHA 1991") for road haulage. Following a meeting at Chatham Siöwalls engaged Crescent to discharge and handle cargoes on their behalf. The letter which Siöwalls wrote to Crescent confirming the terms agreed between them made no reference to Crescent's wharfingers clause or the trade association terms on the basis of which Crescent had offered to provide its services. Accordingly, although Mr. Alm, who until January 2002 was Siöwalls' liner manager, accepted that those terms did form part of the contract, that might have been a matter of debate if there had been no further exchanges between the parties. However, between November 1995 and June 2000 when it was bought by Convoys Crescent provided many quotations for handling and storing goods of all kinds. In each case the quotation was based on the application of the Crescent wharfingers clause, the UKWA 1994 conditions (or its predecessor, the National Association of Wareousekeepers conditions) and the RHA conditions and after Convoys took over the business they continued to provide quotations on the same terms. Many of the quotations were addressed to Mr. Alm who accepted that by the spring of 2000, if not a good deal earlier, Siöwalls was well aware that those terms applied to any business it conducted with Convoys. In the light of that evidence Mr. Macey-Dare for the claimants accepted, quite rightly in my view, that by that time Crescent's terms applied to all operations carried out by it for Siöwalls in relation to timber cargoes.

11. For about a year after the purchase Convoys continued to carry on the business at Chatham through Crescent, gradually absorbing the administration of its operations into their own business. There seems to have been no formal transfer of the undertaking, but from around the middle of 2001 the business was conducted entirely in the name of Convoys. From about that time quotes for new business were provided on Convoys' standard terms. These were very similar to Crescent's terms, but differed from them in some respects.

12. Mr. Mel Peacock, one of Convoys' directors, accepted that it was possible that during the transition period there may have been some inconsistency in the terms on which business was undertaken. Some documents might have been sent out bearing Crescent's terms and some bearing Convoy's terms. In the light of that evidence Mr. Macey-Dare submitted that it was impossible to identify with any confidence the terms on which Convoys handled timber cargoes for Siöwalls from the middle of 2001 onwards.

13. I am unable to accept that submission. The terms on which Crescent agreed to handle timber cargoes for Siöwalls were clearly established by the time the company was taken over by Convoys in 2000. Variations were agreed from time to time, for example in relation to the rates charged for different aspects of the service, but the fundamental terms remained unchanged. When Convoys began to operate the business in their own name they were anxious to ensure a seamless transition. There is nothing to suggest that the basic terms for handling timber were re-negotiated or even discussed. All the indications are that it was a case of 'business as usual' and that both sides were happy to continue on the same terms. Quotations for new business were made on Convoys' terms and as time went on it would have become clear to Siöwalls that when taking on new business Convoys intended to contract on their own terms. However, as far as the handling of timber was concerned, I do not think that Convoys' terms of business had supplanted Crescent's terms, nor can I accept the suggestion that Crescent's terms had been discarded without having been replaced by Convoy's terms or any others. That in my view is quite inconsistent with the parties' approach to this long-established business. In my view handling and distribution of timber during the latter part of 2001 and early 2002 was still being conducted by Convoys on what had originally been Crescent's standard terms of business.

14. Crescent's standard terms of business provided as follows:

"CONDITIONS

(a) All handling undertaken subject to Crescent Wharves Ltd Wharfingers Clause (1989).

(b) All storage undertaken subject to the Conditions of the United Kingdom Warehousing Association (1994).

(c) All road haulage undertaken subject to Conditions of Carriage 1991 of the Road Haulage Association Ltd."

15. Paragraph 12.d of the Crescent Wharves Ltd Wharfingers Clause (1989) provided as follows:

"All goods the subject of the operations will be subject to a lien for all monies due to the Company whether in respect of storage expenses incurred in connection with such goods or charges or otherwise and subject also to a general lien for all monies due to the Company from the Customer upon any account whatsoever . . . . . ."

16. The United Kingdom Warehousing Association Conditions of Contract 1994 provide as follows:

"CUSTOMER'S UNDERTAKINGS

2. (i) . . . . . .

(ii) . . . . . if there is a breach of Contract by the Customer, the Customer . . . . . will pay all costs and expenses (including professional fees) incurred in, and the Company's reasonable charges for, dealing with the breach and its consequences . . . . .

. . . . . .

CHARGES, PAYMENTS AND LIEN

6. . . . . the Company shall have on the Goods a particular lien, as well as general lien entitling it to retain the Goods as security for payment of all sums due from the customer on any account (relating to the Goods or not). Storage charges shall continue to accrue on any goods detained under lien."

17. Throughout the period with which I am concerned Convoys' charge for handling timber was £3.50 a cubic metre which included 60 days storage in the open. Thereafter storage was charged at 30p per cubic metre per week.

Did Convoys' conditions entitle them to exercise a lien?

18. On 9th January 2002 Siöwalls informed Convoys that it was bankrupt; the formal resolution putting the company into liquidation was passed on 10th January. Since Siöwalls owed them a substantial amount of money for services provided in relation to timber landed at Chatham over the previous months Convoys immediately decided to impose a lien on all the timber in their possession which they had discharged from Siöwalls' vessels. That included the various parcels of timber shipped by the claimants which are the subject of these proceedings.

19. In each case the timber had been sold by the claimants to buyers in this country under contracts incorporating the 'Albion' terms 1982 which provide for property to pass to the buyers when the goods are shipped. Having bought the goods back from their customers and having taken assignments of their rights against Convoys, the claimants became entitled to demand delivery of the goods, subject only to any right Convoys might have to exercise a lien on them. Mr. Chambers' primary submission was that Convoys were entitled to exercise a lien on the timber by virtue of paragraph 12.d of the Crescent wharfingers clause and clause 6 of the UKWA 1994 conditions, both of which formed part of the terms on which they had agreed to handle the goods.

20. Convoys were sub-bailees of the goods from Siöwalls and were not in direct contractual relations with the claimants. The question whether, and if so under what circumstances, a sub-bailee can rely on the terms of the sub-

bailment against the bailor was considered by the Privy Council in *The Pioneer Container* [1994] 2 A.C. 324. In that case the owners of cargo carried on the *K. H. Enterprise* brought an action in rem against her sister ship, the *Pioneer Container*, claiming damages for the loss of their goods following the sinking of the vessel due to a collision off the coast of Taiwan. Some of the plaintiffs had shipped their goods in the United States for carriage to Hong Kong under bills of lading issued by Hanjin Container Lines which contained a liberty to subcontract "on any terms". Hanjin sub-contracted the last stage of the voyage from Taiwan to Hong Kong to the owners of the *K. H. Enterprise* who issued a single bill of lading covering all the Hanjin cargo. Another group of claimants shipped cargo on board the *K. H. Enterprise* at Taiwan under a contract with Scandutch I/S for carriage to Middle Eastern and European ports. In each case the contract of carriage contained a clause allowing the shipowner to sub-contract the performance of his obligations "on any terms". Scandutch sub-contracted the first leg of the voyage to the owners of the *K. H. Enterprise* who issued a single bill of lading in respect of all the cargo.

21. In each case the bill of lading issued by the owners of the *K. H. Enterprise* provided that the contract was to be governed by Chinese law and that disputes were to be determined at Taipei. The central question for determination was whether as against the cargo owners the owners of the *K. H. Enterprise* could rely on the exclusive jurisdiction clauses in their bills of lading.

22. Their Lordships began by examining the nature of the relationships created when goods bailed to one person are sub-bailed by him to another. They held that if the bailee sub-bails the goods with the authority of the owner to a person who voluntarily accepts delivery of them knowing that they belong to someone other than the bailee, a relationship of bailment arises between the owner and the sub-bailee. As to the sub-bailee's right to rely as against the owner on the terms of the sub-bailment, Lord Goff, delivering the opinion of the Board, said at page 339

". . . . if the effect of the sub-bailment is that the sub-bailee voluntarily receives into his custody the goods of the owner and so assumes towards the owner the responsibility of a bailee, then to the extent that the terms of the sub-bailment are consented to by the owner, it can properly be said that the owner has authorised the bailee so to regulate the duties of the sub-bailee in respect of the goods entrusted to him, not only towards the bailee but also towards the owner."

23. The critical question in the present case, therefore, is whether the claimants consented to the terms on which Siöwalls sub-bailed the goods to Convoys.

24. Mr. Chambers submitted that since clause 7 of Siöwalls' standard conditions allowed it to sub-contract the performance of any of its duties under the contract of carriage *"on any terms"*, the claimants had consented to the sub-bailment of the goods to Convoys on terms which included the Crescent wharfingers clause and the UKWA 1994 conditions. Mr. Macey-Dare submitted, however, that the provisions allowing Convoys to exercise a general lien for its charges on all goods delivered to it by Siöwalls was so unreasonable or so onerous in its effect that the claimants could not be taken to have consented to it, despite the apparently wide wording of clause 7.

25. In ***The Pioneer Container*** the bills of lading issued by the primary carriers also permitted them to sub-contract "on any terms". The Privy Council expressed the view that in such a case

". . . . . only terms which are so unusual or so unreasonable that they could not reasonably be understood to fall within such consent are likely to be held to be excluded."

26. The representatives of the claimants said that they were unfamiliar with the concept of a general lien and would never have thought that in circumstances such as those that have arisen in the present case a wharfinger might be able to exercise a lien on their goods for charges owed to him by the carrier in respect of goods belonging to other people. However, the scope of the claimants' consent in the present case has to be determined not by reference to what these particular shippers had in contemplation but by reference to the wording of clause 7 of Siöwalls' conditions and the terms on which the carriage, handling and storage of goods is generally conducted. The fact is that it is by no means uncommon for those whose business involves the handling and storage of goods, such as carriers, wharfingers, warehouse keepers and freight forwarders, to include in their terms of business a right to exercise a lien for their charges on goods delivered into their possession. Indeed, one might almost say that it is more common than not to find in such terms of business a clause providing for a lien of some description. Clause 22 of Siöwalls' conditions itself provides one example; others can be found in the RHA conditions, the UKWA conditions and the London Wharfingers' Clause which have been referred to in this case. These are only examples, but the first two are of particular relevance because clause 30 of Siöwalls' conditions specifically provides that the UKWA and RHA conditions shall apply to any warehousing and road haulage operations carried out under the contract. Sometimes the contract provides for a particular lien, but often it provides for a general lien which entitles the bailee to retain possession of any of his customer's goods until payment of any amounts outstanding from him, the customer being the person who deposits the goods with him and incurs his charges. I do not think, therefore, that a term entitling a wharfinger to exercise a general lien is so unusual that it could not reasonably be understood to fall within the scope of the shipper's consent.

27. Is the effect of such a term in circumstances such as the present so unreasonable, however, that the shipper should be taken not to have consented to it? It cannot possibly be said that a general lien is inherently so unreasonable that a bailor could not be taken to have consented to it. Businessmen contract on such terms every day, as the clauses mentioned earlier show, and indeed clause 22 of Siöwalls' conditions itself provides for just such a lien. However, when the goods are sub-bailed on terms that give the sub-bailee a general lien over the goods of his customer, the fact that his customer is himself a bailee rather than the owner of the goods means that if the clause

is effective the sub-bailee obtains a lien over goods owned by one person in respect of debts owed by another. Those debts may have nothing at all to do with the goods over which the lien is exercised.

28. A similar situation arose for consideration in ***Chellaram & Sons (London) Ltd v Butlers Warehousing & Distribution Ltd*** [1978] 2 Lloyd's Rep. 412. In that case the defendants had undertaken the consolidation of goods into containers for shipment on behalf of a shipping line. Their terms of business included the conditions of the National Association of Warehousekeepers which included the following provisions:

"8. The Warehouse Keeper shall have a lien on all goods for all money due to him for storage or carriage of and other charges or expenses in connection with such goods and shall also have a general lien on all goods for any money due to him from the Customer or the owners of such goods upon any account whatsoever . . . . "

29. The plaintiffs sent goods to the shipping line for carriage to West Africa and the shipping line sent them on to the defendants for packing. The line went into liquidation and the defendants exercised a lien on the plaintiffs' goods for their outstanding charges. Mocatta J. held that the defendants were entitled to exercise a lien on the plaintiffs' goods. The contract with the line did not contain any express power to sub-contract, but he found that the plaintiffs through their forwarding agents had been aware that it would, or might, sub-contract the packing of the goods to the defendants and that the defendants would only undertake the work on the terms of the National Association of Warehousekeepers. He held, in other words, that the plaintiffs had consented to the delivery of their goods to the defendants on those terms.

30. The Court of Appeal reversed Mocatta J.'s decision on the grounds that there was no basis for the finding of fact that the plaintiffs knew that the packing would be carried out by the defendants and that even if they had realised that it might be, the defendants would have had to show that, if it were, the plaintiffs knew that they would insist on clause 8. The court was unable to accept that that was the case and accordingly did not accept that the plaintiffs had consented to the delivery of their goods to the defendants on such terms. The defendants case therefore failed on that ground. Mr. Macey-Dare, however, relied on the decision mainly for the following passage in the judgment of Megaw L.J. in which he commented as follows on the consequences of the defendants' argument:

"We have already said that at first sight the consequences of the defendants' submissions, if right, appeared to us to be startling. We remain of that view, despite Mr. Evans's suggestions as to the business desirability, or necessity, of such a lien from the point of view of the defendants. If the defendants were right, the plaintiffs, and others in their position, would be committing themselves to have all their goods which are at any time in the possession of the defendants withheld, and, after notice, sold by the defendants, in order to provide repayment of the whole amount of the indebtedness which the defendants had allowed their operators to incur towards them in respect of their work as consolidators: indebtedness of which persons in the position of the plaintiffs would have no knowledge and no means of control."

He submitted that it provided support for the conclusion that the clauses on which Convoys seek to rely in the present case were so onerous and unreasonable that the claimants could not be taken to have consented to them.

31. The effect of a general lien exercisable by a sub-bailee in respect of all charges owed to him by his customer can undoubtedly be very onerous, but it is important to recognise that in *Chellaram v Butlers* the defendants failed because they could not satisfy the court that the plaintiffs, who themselves had no knowledge of how the packing was carried out, had consented to a bailment on their terms of business. In the present case, by contrast, the claimants expressly agreed that Siöwalls could sub-contract the performance of the contract on *any* terms, an expression which is apt to cover any terms of a kind not unusual in the trade concerned. Mr. Macey-Dare's argument comes close to saying that if in any given case a particular term in the sub-contract operates in a very onerous way the shipper cannot be taken to have consented to it, but I do not think that the matter can be judged retrospectively in that way. The question is whether the term is one whose effects are likely to be such that no shipper could reasonably be taken to have consented to them. Since clause 7 was part of Siöwalls' standard conditions of carriage it is obvious that, if it did sub-contract any of its obligations, goods belonging to several different shippers would be likely to come into the hands of the same sub-contractor, such as a stevedore or wharfinger. Once it is recognised, as I think it must be, that many sub-contractors of that kind do business on terms which include a general lien in respect of charges due from their own customers, the risk that they may be entitled to exercise a lien on one person's goods to obtain payment of a debt due from another is one that must be accepted as arising in the ordinary course of business. I am unable, therefore, to accept that the inclusion of a general lien in Convoys' terms was so onerous or unreasonable that it cannot be understood as falling within the scope of the claimants' consent.

32. Two other points raised by Mr. Macey-Dare must be mentioned. The first was that if the effect of clause 7 of Siöwalls' conditions is to entitle Convoys to exercise a lien over the claimants' goods for any charges owed to them by Siöwalls, that was not drawn to the claimants' attention with sufficient clarity to enable the lien to be enforced against them.

33. This argument, which derives its support from a line of authority stretching from ***Parker v South Eastern Railway Co*** (1877) 2 C.P.D. 416 via ***Thornton v Shoe Lane Parking Ltd*** [1971] 2 Q.B. 163 to ***Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*** [1989] Q.B. 433, is in my view simply another way of addressing the question of consent. The cases proceed on the footing that a person cannot be taken to have agreed to an onerous obligation if adequate steps have not been taken to draw it to his attention. In the present case it is not said that the claimants were not made sufficiently aware of clause 7 of Siöwalls' conditions. What is said is that they were not

made sufficiently aware of its effect in combination with a general lien clause in the sub-contractors' terms of business. However, that is only to raise in different terms the question posed in *The Pioneer Container*, namely, whether the term of the sub-contract relied on is so onerous or unreasonable that it cannot reasonably be understood to fall within the scope of the claimants' consent. I do not, therefore, think that this way of putting the case really adds anything.

34. The other point arises out of a notice sent by Convoys to Jarl Trä's customer, Nordic Forest, by fax on 9th January 2002 listing the timber discharged from Siöwalls' vessels held in stock for its account. In order to enable Nordic Forest to supply timber promptly to its own customers Jarl Trä had begun producing timber in packs of standard sizes which could be held in readiness and drawn on as demand required. As a result, various quantities of timber remained in the possession of Convoys pending instructions from Nordic Forest for delivery and since individual packs of timber of any given dimensions were indistinguishable, stock was not always drawn in the order of its arrival. It was therefore possible for some timber to remain in Convoys' possession for several weeks. All this timber was stored in the open.

35. Mr. Macey-Dare submitted that this notice evidenced an attornment by Convoys to Nordic Forest in relation to the timber held for its account with the result that a new relationship of bailor and bailee arose between them. There was no evidence, he submitted, of the terms governing that relationship, but even if their standard terms of business applied, Convoys could only exercise a lien for charges owed by Nordic Forest itself.

36. Mr. Chambers submitted that the fax of 9th January was nothing more than a report from Convoys to Nordic Forest showing how much timber remained on the wharf. He pointed out that there was no evidence of the relationship between Nordic Forest and Convoys for the very good reason that it had never been in issue. He also submitted that, because the contract of carriage provided for delivery F.O.M. Chatham or F.B.Y., it was not completed until the goods had been put on to a lorry or delivered to the buyer, as the case may be. Unless there was an agreement between Siöwalls and Nordic Forest to take delivery at an earlier point (of which there was no evidence), Convoys remained in possession of the goods as agents for Siöwalls under the contract of carriage.

37. The fact that there is no evidence of any agreement between Nordic Forest and either Siöwalls or Convoys for the goods to be delivered on the wharf at Chatham and then, in effect, re-delivered by Nordic Forest to Convoys for storage is fatal to Mr. Macey-Dare's argument. No doubt the practice of stockpiling cargo at Chatham resulted in some parcels remaining on the wharf longer than had originally been contemplated, but all concerned seem to have treated that as part and parcel of the performance of the contract of carriage. No one contemplated that the timber would be discharged directly on to lorries at the quay, so some handling and a period of temporary storage were inevitable incidents of the contract of carriage. All that appears to have happened in the case of Nordic Forest is that the period of storage was longer in the case of some parcels than might have been expected. Although Convoys charged Nordic Forest direct for storage beyond the free 60 day period included in the handling charge, that appears to have been done as a matter of practical convenience. At any rate, there is no evidence of any separate agreement for storage between Nordic Forest and Convoys.

38. Mr. Chambers submitted that all the work undertaken by Convoys was subject to the UKWA 1994 conditions because the introduction to those Conditions states that
". . . . . the company undertakes all services subject solely to the following conditions . . . . . ".

However, I do not think that is right because the contract between Convoys and Siöwalls draws a clear distinction between 'handling', which was undertaken on the terms of the Crescent Wharves Ltd Wharfingers Clause, and 'storage', which was undertaken on the UKWA (1994) terms. As I have just indicated, I do not think that this question can be viewed in isolation from the contract of carriage. Mr. Peacock expressed the view that the whole of the operation from discharge over the ship's rail to loading on to lorry was part of 'handling' and even in the case of stockpiled timber loading onto lorries, whenever that occurred, had already been paid for in the handling charge. The terms on which handling was undertaken contemplated that the goods might remain in Convoys' hands for more than 60 days and in the absence of any separate agreement for storage between Convoys and either Siöwalls or Nordic Forest, I think that the storage in this case must be regarded as part and parcel of the operation of handling. In my judgment, therefore, the UKWA (1994) conditions have no application.

39. It follows that in my view all the timber in question was held by Convoys as agents and sub-bailees of Siöwalls on terms which included a right to exercise a general lien under the Crescent wharfingers clause for charges owed to them by Siöwalls.

40. This makes it unnecessary for me to consider Mr. Chambers' alternative argument that Convoys were entitled to rely on the lien contained in clause 22 of Siöwalls' standard conditions of carriage through the operation of clause 18(4), but since the point was fully argued I think it right to express my view on it.

The effect of clause 18(4)

41. Mr. Chambers submitted that, since a right of lien operates as a defence to a claim for delivery up of the goods, clause 18(4) of Siöwalls' conditions enabled Convoys to rely on clause 22 by way of defence to the present claim.

42. Although it is true that a right of lien, when properly exercised, does provide a defence to a claim for delivery up of goods, it is more than simply a defence. In ***Tappenden v Artus*** [1964] 2 Q.B. 185 Diplock L.J. reviewed the origin and nature of the artificer's lien at common law. He described it as a remedy of self-help which he likened to "*other primitive remedies such as abatement of nuisance, self-defence or ejection of trespassers to land*". The

artificer's lien arises by operation of law, whereas the rights of lien with which I am concerned arise under contract. However, the nature of the right is essentially the same in each case, that is, to exercise a remedy of self-help by retaining possession of goods until payment of sums owing. In the case of clause 22 that right is coupled with a right to sell the goods in order to raise the amount needed to pay off the debt.

43. Clause 18 forms part of Section III of the Conditions dealing with the carrier's liability. It follows one well-established pattern of Himalaya clause in that paragraph (3) contains a positive undertaking from the *"Merchant"* (which includes the shipper, receiver, consignee and owner of the goods) not to make any claim against servants, agents or other persons employed by the carrier to perform the contract and paragraph (4) extends to such persons the benefit of the Standard Conditions if claims are nonetheless made against them. For that purpose the carrier contracts as agent or trustee on their behalf.

44. Although the opening words of paragraph (4) refer in general terms to *"the provisions of these Standard Conditions",* I do not think that the parties can have intended that servants, agents or sub-contractors were to have the benefit of all the conditions, some of which have no relevance to their position. Paragraph (4) must be read in the context of the rest of clause 18 which must itself be read in the context of the conditions as a whole. Paragraph (1) sets out the principle underlying clause 18 as a whole, namely, that *the "defences and limits of liability"* provided for in the conditions shall apply in any action for loss of or damage to the goods and this sets the context in which paragraph (4) must be read. Moreover, paragraph (4) itself applies *"whenever claims relating to the performance of the contract of carriage are made against any servant, agent or other person"*. I think it is clear, therefore, that the intention of the parties was to extend, as far as possible, the benefit of defences and limits of liability to the carrier's servants and agents.

45. In my judgment the right of lien given by clause 22 is not a *"defence"* within the meaning of paragraph (1) of clause 18 and is not one of the conditions from which the parties intended servants or agents of the carrier to benefit directly. It is expressed to be a lien for freight and other charges due to the carrier and as such has no relevance to the position of servants or agents. Considerable manipulation would be required in order to make this clause applicable even to sub-contractors and it is difficult to see how it could apply at all to servants or agents. More significantly, however, the fact that it is coupled with a right of sale means that it is far more than a mere defence to a claim for delivery of the goods: in both commercial and legal terms clause 22 gives the carrier a positive right that he can exercise against the owner of the goods. I think it likely that servants, agents or sub-contractors could rely on the existence of clause 22 in answer to a claim by the consignee if they were holding goods on behalf of Siöwalls in the exercise of its own lien because in that case it could be said that the existence of the lien provided them with a defence to the claim. However, I am unable to accept that Convoys obtained an independent right of lien exercisable against Siöwalls, among others, through the operation of Siöwalls' conditions of carriage.

Did Convoys waive their right of lien?

46. On 14th December the managing director of Siöwalls, Mr. Per Bjurström, informed the company's creditors that it had resolved to suspend payments with effect from 17th December 2001 with a view to implementing a plan for restructuring. Mr. Alm said that he spoke to Mr. Peacock soon after Siöwalls' administration became public because it had a vessel on the way to Chatham and he needed to know where it stood. He said that he raised with Mr. Peacock the position of cargoes shipped into Chatham and that Mr. Peacock made it clear to him that there would be no problems provided Siöwalls paid Convoys' charges in advance. Mr. Alm said that he had deliberately involved Mr. Bjurström in these discussions at an early stage and that Mr. Bjurström had received a similar assurance. They therefore decided that they could give the booking agents the assurances they needed to enable them to continue loading cargoes.

47. Mr. Peacock said that he did not think that he had spoken to Mr. Alm about this matter but he agreed that he had discussed it with Mr. Bjurström and a reference to their conversation appears in a letter written by Mr. Bjurström on 18th December telling Convoys that the company had applied for protection under legislation similar to the well-known Chapter 11 procedure in the United States. Mr. Peacock was emphatic, however, that at no time during his telephone conversation with Mr. Bjurström had he given an unqualified undertaking that the goods would be delivered if charges were paid in advance because he would have felt obliged to honour such an undertaking even if Siöwalls were to go into liquidation. As far as he was concerned, he had only given an assurance that Convoys would continue to handle goods for Siöwalls on the basis of payment in advance while it was in the course of administration.

48. Mr. Bjurström's letter of 18th December included the following passages:

"As I mentioned to you we have in Siöwalls Rederi AB filed for protection in a similar way as the famous Chapter 11. This means that we with immediate effect are moving over to cash payments while we are reconstructing the Company. This restructuring will involve new partners, new cash and a new organisation. . . . . . .

I would be grateful if you could confirm that we for the time being can continue business as usual as long as we are prepaying the total expenses for our port calls."

49. At some point in the course of these exchanges Mr. Peacock sent an e-mail to Mr. Bjurström confirming that Convoys would continue to do business with Siöwalls on the basis of payment in advance. Unfortunately that document has been lost, but on 21st December he sent a fax to Mr. Bjurström confirming Convoys' position in which he said this:

"As explained in my e-mail to you we will continue to support you on the basis of any service subsequent to 17th December 2001 will be carried out on a cash in advance basis according to the "Chapter 11" situation you are currently in. The handling charges for the vessels to date I understand do not come into this ruling however we also provide a further service to you after the vessel which is distribution of the timber. I therefore believe that as we are carrying out that operation after the date of 17th December the relevant invoices require payment in advance to comply with your rules. . . . . "

50. On 21st December the vessel *Arosita* was at Kalmar waiting to load a cargo of timber for Jarl Trä. She was then due to call at Karlshamn to load a parcel of timber for Viking. At some time during that day Siöwalls' administrator sent copies of Mr. Peacock's letter by fax to the brokers handling these shipments. In his covering message he said that he had received an assurance from Convoys that none of the goods discharged from the *Arosita* would be stopped provided the charges on them had been paid in advance.

51. Mr. Ulf Gumbricht of Johan Nilsson who had arranged the shipment at Kalmar spoke to Mr. Peacock by telephone on 21st December to obtain confirmation that the goods would not be held up due to Siöwalls' difficulties. Mr. Gumbricht confirmed that a copy of Mr. Peacock's fax of 21st December was sent to Johan Nilsson and I think it likely that it was received before this telephone conversation took place. At any rate, Mr. Gumbricht accepted that he was aware that Convoys were only willing to continue providing services for which they were paid in advance.

52. Convoys were due to arrange for the distribution of the timber shipped at Kalmar and Karlshamn after its arrival at Chatham, but they declined to undertake that part of the service pending payment by Siöwalls. As a result Mr. Gumbricht and Mr. Alm both sent faxes to Mr. Peacock on 8th January protesting that he had given a guarantee that there would be no problem with that specific shipment. As it happened, Convoys had received payment from Siöwalls that very morning and as a result the goods had been released. Mr. Peacock wrote a note to that effect on the bottom of each fax which he then sent back by way of reply.

53. Mr. Gumbricht said that in the course of their telephone conversation on 21st December Mr. Peacock had given him his word that there would be no problems with the cargo if the charges were paid in advance and that his understanding had been confirmed by the exchange on 8th January. He agreed that nothing had been said at any stage about a lien; he simply understood that if the charges were paid the cargo would be handled and released. Other witnesses gave evidence to a similar effect, but they were unable to shed any additional light on the question because their understanding was in each case ultimately derived from information received, directly or indirectly, from Siöwalls or Mr. Gumbricht.

54. I think there must have been a conversation between Mr. Peacock and Mr. Alm on or around 17th December, both because the two of them spoke to each other frequently in the ordinary course of business and would be likely to have wanted to discuss a development of this kind, and because Mr. Peacock confirmed that Mr. Alm had asked him to speak to Mr. Bjurström. I also accept Mr. Gumbricht's account of his conversation with Mr. Peacock on 21st December. There is no reason to think that when Mr. Peacock wrote to Siöwalls on 21st December setting out Convoys' position he intended to modify in any significant way the position which he had taken in his telephone conversation with Mr. Bjurström or that which he adopted a little later in his conversation with Mr. Gumbricht. I think that that letter is, therefore, a broadly accurate reflection of what passed between them during those conversations, save that it does not reflect as clearly as it might Mr. Peacock's acceptance that goods would not be detained if the charges relating to them had been paid in advance. That that was indeed Mr. Peacock's position is made clear not only by his response to Mr. Gumbricht's fax on 8th January but by his own evidence at the trial.

55. While accepting that Mr. Peacock did give Siöwalls an assurance of some kind, Mr. Chambers submitted that it amounted to no more than confirmation that while Siöwalls remained in administration Convoys would continue to handle and deliver goods provided payment had been made in advance. Once Siöwalls went into liquidation the position changed fundamentally and the assurance no longer applied.

56. As soon as Siöwalls disclosed that it was applying for administration all those involved realised that it was in serious financial difficulties and that the reconstruction might or might not succeed. The possibility that it might go into liquidation must therefore have been at the back of everyone's mind. Mr. Peacock agreed that when he spoke to Mr. Bjurström he did not have in mind the possibility of exercising a lien and it was not mentioned during their conversation. I accept Mr. Peacock's evidence that he did not intend to give what he would describe as a *'guarantee',* that is, an undertaking that goods in respect of which charges had been paid in advance would not be detained under any circumstances. I also accept that he did not in terms say that. Nonetheless, it is necessary to consider how the assurance that he did give would be understood by a reasonable person in the position of Mr. Bjurström and the shippers to whom Mr. Peacock must have realised his comments would be relayed.

57. Although the immediate background to the discussions, as well as to the fax of 21st December, was the decision to put Siöwalls into administration, what lay behind that was the company's financial crisis. I am not persuaded that in his conversation with Mr. Bjurström, any more than in his fax, Mr. Peacock made it clear that Convoys' agreement to handle goods against payment in advance was strictly limited, even in respect of goods for which payment had already been made, to the duration of the formal process of administration. Siöwalls needed an assurance that Convoys would continue to handle goods freely because without it they were likely to have difficulty in persuading shippers to provide cargoes, and without cargoes the business would founder. Equally,

shippers wanted to know that if they paid in advance their cargoes would not be detained because of problems over Siöwalls' solvency. In these circumstances I think Mr. Bjurström would have been very surprised indeed if Mr. Peacock had told him at the end of their conversation that, notwithstanding what had just been agreed, if Siöwalls were to go into liquidation, Convoys would be entitled to exercise a lien on cargoes in respect of which charges had already been paid. Nor do I think that a reservation of that kind can be found in Mr. Peacock's fax of 21st December. I am satisfied, therefore, that Siöwalls, and through it the claimants, could and did reasonably understand Mr. Peacock to be giving them an assurance that Convoys would provide services for which it was paid in advance and would not detain any goods in respect of which payment in advance had been made. Accordingly, insofar as goods were shipped or charges paid in advance in reliance on that assurance, Convoys were not entitled to exercise a lien on the goods concerned.

The timber cargoes

58. When Convoys purported to exercise a lien on 11th January 2002 they had in their possession various parcels of timber shipped at different times by different shippers. Most of it had been shipped by Jarl Trä at various times between 8th June and 21st December 2001, the last shipment having been made on board the *Arosita* on 21st December. One parcel had been shipped by Wilhelmsson on the *Lady Bos* on 13th December and one by Viking on the *Arosita* on 22nd December.

59. The shipments made on 21st and 22nd December were clearly subject to the assurance given on 17th December, but Mr. Chambers submitted that the earlier shipments necessarily fell outside its terms. I cannot accept that. Although it is true that the timber shipped earlier in the year had come into Convoys' possession before 17th December, the substance of the assurance, as one can see from the fax of 21st December, was that further services that were paid for in advance would be performed. It would make no sense for Siöwalls or their customers to make payments in advance for any further services such as distribution unless those services would be performed.

60. The parcel that had been shipped by Wilhelmsson on 13th December was to be delivered to the buyer's yard in Dorset. The handling charges were paid on 21st December and the haulage charges on 22nd December. It follows that Convoys were bound to carry out the haulage and were not entitled to exercise a lien on those goods.

61. The charges on the parcel shipped by Jarl Trä on the *Arosita* in December 2001 were paid at the latest by 8th January when the exchange of faxes between Mr. Gumbricht and Mr. Peacock took place. It follows therefore that Convoys were not entitled to exercise a lien over those parcels.

62. However, much of the timber shipped by Jarl Trä had been discharged and stockpiled well before 17th December and the bulk of the handling charges had been incurred by that date. Mr. Peacock's fax clearly relates only to further services performed after 17th December and there is nothing in the evidence of the conversations that took place between him and Mr. Bjurström and Mr. Gumbricht to suggest the contrary. Accordingly, Convoys were in my view entitled to exercise a lien over those goods.

Claims and counterclaims

(a) The principal sum outstanding

63. There is a small point of difference between the parties in relation to the amount due from Siöwalls to Convoys on 10th January 2002. On 19th December Convoys sent Siöwalls an invoice for handling charges in respect of the cargo due to be carried on the *Arosita* arriving in Chatham on 24th December. Since the cargo had yet to be loaded the invoice was based on an estimated volume of 1,800m^3. Siöwalls paid the invoice on 21st December. In the event the cargo was slightly larger than had been estimated and a further sum of £299.03 became due in respect of handling charges on the claimants' goods. It was not invoiced until 22nd January.

64. Mr. Chambers submitted that the fact that this sum of £299.03 was not paid in advance was sufficient to take the cargo as a whole outside the terms of the assurance given by Mr. Peacock, but I cannot accept that. By rendering their invoice, albeit on an estimated or "approximate" basis, Convoys were in effect telling Siöwalls how much they required by way of the payment in advance for their handling services. Once that invoice had been paid Convoys were obliged to provide the services for the whole of the cargo. No doubt they could demand payment of any additional amount immediately it had been ascertained, but it was not open to them to exercise a lien over any part of that shipment on the grounds that an additional amount had subsequently been found to be due which had not been paid in advance.

65. Mr. Macey-Dare, on the other hand, submitted that the sum of £299.03 did not become due at all until Convoys rendered their invoice. I do not think that is right either. The cargo was shipped on the *Arosita* pursuant to an agreement between Convoys and Siöwalls that services would be paid for in advance. Whatever may have been the position prior to that agreement, I have no doubt that under it handling charges became due as soon as the services were rendered, even if payment had not already been made for them. The additional sum of £299.03 had therefore fallen due by 10th January.

66. Insofar as Convoys were entitled to exercise a lien they were entitled to do so in support of their claim for all the charges due to them from Siöwalls. It was agreed that after allowing for sums received from other parties the principal sum stands at £70,041.21 if one includes the sum of £299.03 mentioned earlier. In my view that sum should be included; it remains part of the outstanding debt despite the fact that Convoys were not entitled to exercise a lien for it on the particular goods in respect of which it was incurred.

(b) Storage charges

67. Convoys also seek to exercise a lien in support of a claim for storage charges in respect of the period during which they were holding the goods, but their right to do so depends on their being able to show, first, that they did in fact have a right to exercise a lien and, secondly, that the terms of their contract with Siöwalls allowed them to charge for storage while they did so. Since the exercise of a lien results in the goods remaining in the bailee's hands contrary to the wishes of the bailor, it cannot be assumed that the bailee is entitled to charge the bailor for the privilege. He can only do so if the terms of the contract allow it.

68. I have already held that Convoys were only entitled to exercise a lien on the timber shipped by Jarl Trä that had already been discharged at Chatham at the time when Siöwalls went into administration. For reasons I have already given I consider that those goods were being held by Convoys under the terms of the Crescent Wharves Ltd Wharfingers Clause, paragraph 12.d of which provided as follows:

". . . . . and if any such lien is not satisfied within seven days from the date upon which the Company shall give notice to the Customer requiring the payment of any monies due to the Company as aforesaid, then the goods may be sold by the Company by auction or otherwise as the Company shall think fit at the expense of the Customer and the goods and or the proceeds of sale shall be applied in or towards satisfaction of every such lien and of all expenses and charges incurred by the Company in so doing."

69. Although this provision gives the company the right to recover from the customer any expenses and charges incurred in selling the goods, it does not deal with storage charges while the goods are being held under lien. Although there may be a cost to the company in retaining goods in its possession, it is unlikely to equate to the storage charge agreed with the customer, but apart from that, the expenses and charges to which the clause refers are those incurred by the company in selling the goods, not simply in asserting a lien. Accordingly, in my view Convoys cannot include in the amount for which they are entitled to exercise a lien storage charges in respect of the period after the date on which Nordic Forest or Jarl Trä demanded delivery up of the timber.

(c) Interest and costs

70. Convoys also seek to include in the sum for which they are entitled to exercise a lien interest on the amount outstanding from Siöwalls from time to time and also their solicitors' fees relating to these proceedings which they say are part of their costs of exercising the lien. However, any right to do so can only arise under clauses 6 and 2(ii) respectively of the UKWA (1994) conditions and since I have held that those conditions do not apply, this part of their claim must fail. However, that does not prevent Convoys from seeking an award of costs in the exercise of the court's discretion.

(d) Sums paid into court by the claimants

71. Since Convoys were not entitled to exercise a lien over the timber shipped by Wilhelmsson or Viking, each of those companies is entitled to recover the money it paid into court to obtain the release of its goods. Part of the amount paid into court by Jarl Trä was to obtain the release of the goods shipped on the *Arosita* in December 2001 and part to obtain the release of goods that had been discharged at Chatham on previous occasions. Since the money paid into court was intended to reflect the value of the goods it replaced, Jarl Trä is in my view entitled to recover that proportion of it which the value of the goods shipped on the *Arosita* represents of the whole. Convoys is entitled to retain the balance.

(f) Damages for detention

72. In addition each of the claimants is entitled to recover damages for wrongful interference with the goods unlawfully detained representing the loss of use of the timber during the period of its detention. The parties have agreed that in this case damages should take the form of interest on the sale price of the timber over the period of its detention.

73. Wilhelmsson and Viking also seek to recover damages in respect of the fall in the value of sterling against the Swedish Kröner during the period the goods were detained. In my view this claim cannot succeed. The claimants sold the goods to their customers in this country and received payment in the ordinary course of events. They subsequently bought the goods back and at the same time took an assignment of the buyers' rights in order to enable them to prosecute in full the claims they have pursued in these proceedings. Insofar as they seek to recover the goods themselves they claim in their own right as owners, but insofar as they claim damages for detention their claim is, at least in part, that of the original buyers. The fact is, however, that neither the claimants nor their customers have suffered a loss of the kind which they seek to recover as a result of Convoys' action. If the claimants have suffered an exchange loss as a result of buying back the timber in order to pursue these claims and maintain good relations with their customers, that is not a loss that flows from the wrongful withholding of the goods and does not give rise to a claim in damages against Convoys.

74. I will hear counsel further on the appropriate form of order to give effect to my judgment.

Mr. Thomas Macey-Dare (instructed by Burges Salmon) for the claimants
Mr. Jonathan Chambers (instructed by Aaron & Partners) for the defendants