CA on appeal from Commercial Court (Thomas J) before Brooke LJ; Laws LJ; Mance LJ. 12th February 2003.

Lord Justice Mance:

Introduction

1. On 7th February 2002 Thomas J gave judgment for the claimants (respondents before us) in two sets of proceedings which he had tried together, and as a result he made orders holding the appellants liable to the respondents for sums of respectively $134,807.41 and $95,147.20, together with interest and costs. The claims related to alleged losses of goods in containers cleared through customs and delivered to a Chilean company, Gold Crown, without presentation of bills of lading in San Antonio, Chile in, respectively, late 1998 and early 1999. The appellants are (1) Dampskibsselskabet AF, 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg, trading as Maersk Line, and (2) P & O Nedlloyd BV, by whose liner services the container loads of goods were carried from Hong Kong to San Antonio. The respondents, East West Corporation and Utaniko Limited, are related companies, which had shipped the container loads at Hong Kong for delivery up in Chile. The first shipment was made by East West Corporation using the services of Maersk Line, and the carrying vessel arrived in San Antonio between late October and late November 1998. The second was by Utaniko Limited, using the services of P & O, and the sub-chartered carrying vessel arrived in San Antonio on or about 10th March 1999.

2. Under Chilean customs law, since duty had not been paid in advance, the goods had to be placed on arrival in a licensed customs warehouse. The agents for Maersk Line, A J Broom, arranged for the container loads carried by Maersk Line to be placed in a customs warehouse operated by a private warehouse operator, Seaport SA. The local agents for the carrying vessel, Agencias Universales SA, arranged for the container loads carried by P&O's services to be placed in a customs warehouse operated by a state controlled company, Empressa Portuaria de Chile de San Antonio ("Emporchi de San Antonio"). Gold Crown's customs agent then paid the customs duty. Not long afterwards, the container loads were released to or to the order of the customs agent, without presentation of the relevant bills of lading. Gold Crown made some payments to the respondents, but none whatever in respect of seven of the Maersk Line container loads and two of the P&O container loads.

3. The bills of lading, issued by the appellants, named the respondents as shippers. Under all of them as originally issued, Gold Crown was named as the notify party, and the goods were consigned to the order of Chilean banks - Banco Credito e Inversiones in the case of the Maersk bills and Banco de Chile in the case of the P&O bills. However (following a decision by the respondents to sell to a company other than Gold Crown) Maersk bill no. 4, which was originally made out to the order of Banco Credito, was replaced by a bill under which the goods were consigned to Banco de Chile (or, by virtue of the bill's printed terms, that bank's assigns) and the new buyer, IMP Maxsonic Corp Ltd, now appeared as notify party. It is, in this court, common ground that all the relevant bills were in these circumstances capable of transfer by indorsement, within the meaning of the Carriage of Goods by Sea Act 1992, s.1(2)(a). The respondents had arranged with their Hong Kong bankers to pass the bills of lading to Banco Credito and Banco de Chile, for them (as the respondents' agents or sub-agents) to collect the price due to the respondents from Gold Crown. The bills were endorsed by the respondents and sent by the respondents' Hong Kong bankers to the Chilean banks accordingly. The goods remained at all times the respondents' property. Neither the respondents' Hong Kong bankers nor Banco Credito or Banco de Chile ever had a security interest in them. The judge held that the respondents "*retained full control over the documents, as the banks at all times held them to the order and direction of the claimants*". Ultimately, at the respondents' request, the bills were redelivered, (but, presumably because the potential significance of this was not appreciated, not endorsed) back by the banks to the respondents. The absence of an endorsements back is said now to be fatal to the respondents' present claims. The bills of lading were all expressly subject to English law and jurisdiction.

4. To ascertain the procedure for delivery in Chile, the judge heard expert evidence about Chilean customs law and practice. In the case of goods not cleared through customs in advance, a sea carrier was obliged to deliver the cargo manifest to customs and to deliver the goods to a warehouse subject to customs' "*jurisdiction*". This could be either inside or outside the port limits. Until December 1997 the only warehouse operator had been Emporchi Porturia de Chile. A law no. 19542 of 19 December 1997 divided this company into ten separate companies, one of them being Emporchi de San Antonio, and it also permitted private warehouse operators. The law permitted sea carriers to make contracts with any of the new warehouse operators, state- or privately-owned. Maersk Line had a contract with Seaport, providing for Seaport to "*deliver the cargo to the consignee or its representative after the consignee has completed all Customs clearing procedures involved*". Emporchi de San Antonio and Seaport delivered to, respectively, P&O and Maersk a document, described as a Documento Portuario Unico ("DPU"), recording the time and date of receipt of the goods and their condition.

5. The practice was for consignees in Chilean ports to engage a customs agent licensed to act as such by the National Director for Customs, and to endorse the bills of lading to the customs agent as his authority to collect the goods. It was a customs agent's duty to verify to Customs that his principal was entitled to the goods, and to keep the relevant documents for five years. To obtain release of goods from warehouse a customs agent would present to the warehouse operator a Customs Destination Document, normally an import declaration, legalised by Customs with a voucher showing payment of the relevant duty.

6. Where, as here, goods were containerised, their release could in practice be obtained by a different route. The Chilean agents of shipping lines, who were AJ Broom in the case of Maersk Line and Sudamericanan Agencias Aereas y Maritimas SA ("SAAM") in the case of P&O, commonly acted as "c*ontainer operators*" under a Customs Regulation No. 2808 of 12 April 1995. As such they were authorised to issue to consignees' customs agents a

TATC ("*Title for the Temporary Admission of Containers*"). Once legalised by Customs, this could be presented to the warehouse operator to obtain release of the relevant container from Customs' jurisdiction. Strictly this release was on a temporary basis and applied only to the container. But in practice, assuming that the goods were not unloaded from their container in the warehouse, it enabled the goods to be removed from Customs' jurisdiction to or to the order of the customs agent who held and presented the TATC.

7. In the instant cases, the customs agent used by Gold Crown obtained TATCs, paid the relevant customs duties, had the TATCS legalised by Customs, presented the TATCs and obtained the release of the containers with the goods inside them, without at any time having or being asked to present the relevant original bills of lading. The goods thus passed into Gold Crown's physical possession.

The judgment

8. Thomas J identified and considered four main issues. He summarised them under the heads of (1) title to sue, (2) the delivery obligation, (3) the exceptions in the bills of lading and (4) the claim in negligence. Under head (1) (title to sue) he held, firstly, that (leaving aside the position under bill no. 4, which, as is now accepted, was negotiable like the other bills) the respondents, by identifying the Chilean banks as consignees in the bills and by delivering such bills to the Chilean banks for collection of the price on their behalf, parted with all contractual rights of suit to the Chilean banks. This conclusion was founded upon the terms of ss.2 and 5 of the Carriage of Goods by Sea Act 1992. The judge held that the respondents had no rights of suit as "*principals*" of the Chilean banks, and that they had, in the absence of any endorsement of the bills, acquired no rights of suit by virtue of the redelivery to them of the bills by the Chilean banks. Secondly, he held that, as a result of the transfer of the bills to the Chilean banks, the respondents had also parted with any right to immediate possession of the goods, and had thereafter no rights in bailment as against the appellants or any other bailees of the goods. However, he held, thirdly, that the respondents, although they had no immediate right to possess as against the appellants or other bailees, could as proprietors of the goods claim, not just for any physical damage to the goods (of which there was here none), but for the effective permanent deprivation of their proprietary interest, which had occurred as a result of the delivery of the goods to Gold Crown.

9. In relation to issue (2) (the obligation to deliver), the judge held, having regard to article 10 of the Rome Convention and to the fact that the bills of lading were expressly subject to English law, that English law governed the substance of the obligation to deliver arising in relation to each bill of lading, while the mode, or manner and method, of performance were governed by the law of Chile as the place of performance. The substance of the obligation was to deliver only against presentation of an original bill of lading. As to Chilean law and practice, there was conflicting expert evidence from Mr Sahurie, called by the respondents, and Mr Tomasello, called by the appellants. But the judge preferred and accepted unequivocally the evidence given by Mr Sahurie. On that basis he found that, although the goods in their containers were after discharge in Chile within Customs' "jurisdiction" until their release to the consignee's customs agent, they remained in the physical possession of the shipping line or their warehouse operators; they were not in these circumstances to be regarded as having been *"delivered"* by the shipping lines within the meaning of article 4(2)(b)(i) of the Hamburg Rules, incorporated as article 983(c) of the Chilean Code of Commerce. While it was common ground that Chilean law required a customs agent to have and retain all three original bills of lading, the judge further found that there was no impediment under Chilean law or practice to prevent warehouse operators, or to prevent shipping line agents acting as container operators, from insisting upon the presentation by a consignee's customs agent of an original bill of lading for their inspection, before they agreed to release goods or to issue a TATC for that purpose. Nor was there any impediment to the appellant shipping lines contracting with the warehouse operators and local agents, of whose services they made use, for such presentation to be made before release of any goods or of the containers holding them. The judge further found that there was no custom or usage in Chilean ports for warehouse operators and shipping line agents to make or permit such deliveries without presentation of original bills of lading. It was unnecessary for him to consider the respondents' further submission that any such custom or usage would have been unenforceable as being unreasonable.

10. Under the third head (the exceptions in the bills of lading), the appellants had sought to rely upon bill of lading clauses exempting them from liability for loss or damage to goods after discharge from the carrying vessel. The respondents argued in response, firstly, that both the Maersk and the P&O bills were completed in a way making them into "combined transport" bills, so that, they submitted, the exceptions clauses did not apply; and, secondly, that, even if the relevant clauses applied, they did not cover misdelivery without presentation of the relevant bills of lading. The judge was attracted by the respondents' first argument in the case of the Maersk bills and accepted it in the case of the P&O bills. He accepted the respondents' second argument in the case of both sets of bills of lading. He did not expressly address the question whether it was necessary for him to consider the third issue at all, once he had labelled the claim as lying in tort, rather than contract or bailment. He did not express any view as to whether such a claim might, in any or what circumstances, be subject to exceptions such as those relied upon by the appellants in the bills of lading.

11. The judge gave a short answer to the fourth and last issue (the claims in negligence). He held that the appellants were "*clearly negligent*", both in failing "*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*" and in failing to *"instruct their port agents to demand sight of an original bill of lading before issuing the TATC form as Container Operators"*. He commented that "*Neither shipping line appears to have taken up to date advice on this important issue*" and that "*There were clearly carriers who did give such instructions or enter into such contracts and this was*

clearly the prudent practice". He held that, had such contracts been made or such instructions given, then *"on a balance of probabilities these losses would not have occurred"*, in particular because the goods would not have been delivered to Gold Crown. On this basis, the claims succeeded.

The issues on appeal

12. Bearing in mind their significant success on many issues decided by the judge, the appellants confine their appeal to two main points. These are the judge's conclusions that they owed any duty of care to the respondents, and that they were in breach of any duty of care that they did owe. Their notice of appeal and skeleton also contend that the judge was wrong in his conclusions regarding the application and scope of the exceptions clauses in the bills of lading. However, Mr Hamblen QC for the appellants was minded to concede that, even if the judge was wrong, the exceptions clauses could not be relevant to any purely tortious claims that the respondents were able to bring. I shall consider later whether this would be a correct concession.

13. In response to the appeal, there is a respondents' notice which brings back into the arena all the issues of title to sue that the judge decided against the respondents. It is contended, in particular, that they can sue (i) as shippers whose rights of suit had not been extinguished under s.2(5) of the 1992 Act, (ii) as undisclosed principals of the Chilean banks, (iii) as a result of a transfer back to them (by redelivery of the bills) of the contractual rights of suit and (iv) in bailment. Under the last heading, the respondents' case has expanded to include a submission that the judge ought, if necessary, to have found that the appellants were liable for conversion by misdelivery through the local warehouse operators and/or port agents whose services they engaged. I consider this submission under the head of *"The respondents' claims*" in paragraphs 65-67 below.

Title to sue

14. It is appropriate to take together all the issues which arise under the appeal and respondents' notice with regard to the respondents' title to sue. Prior to the 1992 Act, the position would have been clear. The respondents retained the property in the goods throughout. Accordingly, their endorsement and delivery of the bills to the Chilean banks could not have transferred to such banks any right of suit. Under s.1 of the Bills of Lading Act 1855, any such transfer of rights or liabilities would have required (i) the passing of property in the goods (ii) occurring, "*upon or by reason of such …. endorsement*".

15. The 1992 Act introduces a completely different position. By s.2(1) of the 1992 Act:

> *"2.(1) Subject to the following provisions of this section, a person who becomes—*
>
> *(a) the lawful holder of a bill of lading; …..*
>
> *shall (by virtue of becoming the holder of the bill ….) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract. (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 such a right to possession ceased to attach to possession of the bill; or*
>
> *(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements. ….*
>
> *(4) Where, in the case of any document to which this Act applies—*
>
> *(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but*
>
> *(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,*
>
> *the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised. …*
>
> *3.(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—*
>
> *(a) takes or demands delivery from the carrier of any of the goods to which the document relates;*
>
> *(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or*
>
> *(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,*
>
> *that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract. ….*
>
> *5.(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—*
>
> *(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;*
>
> *(b) 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;*

(c) 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;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith."

(a) The holders of the bills

16. The respondents' first submission is that, since the Chilean banks were acting as their agents, the respondents retained possession of the bills through the Chilean banks, and remained holders for the purposes of s.5(2) of the 1992 Act. The respondents refer to Carver on Bills of Lading (2001), paragraph 5-017, where the authors, Sir Gunther Treitel QC and Francis Reynolds QC, point out that there can be little doubt that a person receiving a bill in a purely ministerial capacity (e.g. a member of the buyer's staff) will be regarded as acquiring possession for his employer. The authors go on to say that *"it is less clear who is the 'holder' of a bill which is transferred to an agent who has been engaged as an independent contractor by the buyer for the purpose of taking delivery of the goods from the ship"*. They submit that *"possession"* is *"a sufficiently flexible concept to allow for the possibility of actual possession being held by one person and constructive possession being held, at least for some purposes, by another"*. I do not find it necessary at this point to express any view on that suggestion because the authors continue with this passage:

"Where, indeed, the bill bears a personal indorsement to, and is in the possession of, the agent, then the principal could not be a 'holder' of it for the purposes of the Act; but the same is not necessarily true where the bill which has been delivered to the agent is a bearer bill, or one that has been indorsed in blank".

The present circumstances seem to me directly analogous to those covered by the first part of this passage. The express consignment of the goods under the bills to the Chilean banks or order, followed by the delivery of such bills to such banks by or under the authority of the respondents, equates with a personal indorsement.

17. It is clear that the 1992 Act contemplates that rights of suit may be transferred to persons who are vis-à-vis the shippers acting as agents. S.2(4), giving such persons the right to sue for loss or damage suffered by their principals by reason of any breach of the bill of lading contract, caters for such a situation. The Law Commission on whose report and draft bill (Rights of Suit in respect of Carriage of Goods by Sea: Law Com. No. 196) the 1992 Act was based, expressly contemplated at paragraphs 2.24-2.27 that rights of suit would vest in forwarding agents or banks to whom goods were consigned under a bill of lading, and that s.2(4) would cater for the consequences. I therefore agree with the judge that the respondents' rights of suit under the contracts of carriage were transferred to the Chilean banks when they became holders of the bills delivered to them by or with the authority of the respondents.

(b) The respondents' claim as "undisclosed principals" of the holders

18. The respondents submit that there is, however, nothing in the 1992 Act to exclude the doctrine enabling an undisclosed principal to sue on a contract made by his agent; and that they can therefore sue as principals of the Chilean banks. The first part of this proposition is not in issue. But the second does not follow. The respondents are not seeking to intervene on a contract made for them by an agent. They are seeking to *"intervene"* by pursuing contractual rights under a contract which they made on their own behalf, which rights have by statute been transferred to the banks, although the banks hold such rights as agents vis-à-vis the respondents. This is a situation outside the scope of the English law of contract and agency. There is nothing in the statutory scheme of the 1992 Act to lend any support to the idea that, after a statutory transfer of contractual rights by a principal to its agent, the principal can still sue in contract in its own name. S.2(4) and the Law Commission's report paragraphs 2.24-2.27 here militate against any such idea. I therefore agree with the judge in rejecting the second alternative ground on which the respondents seek to establish title to sue.

(c) The claim founded on redelivery of the bills

19. The respondents did not pursue before us in their skeleton or oral submissions the third contention in their respondents' notice, that they could found title on a transfer back to them (by redelivery of the bills) of the contractual rights of suit. The judge rejected this submission on the ground that, at the time when the bills were redelivered to the respondents by the Chilean banks, possession of the bills continued to give a right (as against the carriers) to possession of the goods to which the bills related. This was on the basis of well-established authority that such a right continues so long as complete delivery of possession of the goods has not been made to some person having the right to claim under the bills: see e.g. ***Barber v. Meyerstein*** (1870) L.R. 4 H.L. 317; and ***Borealis AB v. Stargas Ltd. (The Berge Sisar)*** [2002] 2 AC 205, 224D per Lord Hobhouse.

(d) The claim in bailment and/or as reversionary owners

20. The respondents' fourth alternative basis for submitting that they had title to sue is bailment. But it is appropriate to consider this together with the basis upon which the judge held that the respondents had title to sue, that is in negligence by virtue of a reversionary proprietary interest. A large part of the appellants' appeal was devoted to the suggestion that the judge's decision in the respondents' favour involved recognising a tortious duty to take care to avoid loss or third party theft. This, in the appellants' submission, runs counter to the general principle that no such duty will be recognised in tort, save in exceptional circumstances (in support of which the appellants invoked cases such as ***Deyong v. Shenburn*** [1946] KB 227 and ***Edwards v. West Herts Group Management Committee*** [1957] 1 WLR 415). Perhaps to underline this submission, the appellants appeared ready to concede

that, if the judge was right, then the duty in negligence that he recognised would escape the ambit of the doctrine of bailment on terms (cf paragraph 12 above). These submissions call for close scrutiny, and we requested further submissions on the scope of liability in bailment and the inter-relationship of claims based on possession or the right to possession with claims based on a reversionary proprietary interest. The latter only become material, when the need for possession or an immediate right to possession as a pre-condition of a cause of action such as conversion or negligence may lead to injustice. One might therefore expect any reversionary claim to be closely aligned to the possessory claim which it was supplementing, albeit subject to stricter pre-conditions (such as the requirement for proof of actual and permanent injury to the reversionary proprietary interest).

21. The judge acknowledged that rights in bailment can exist independent of contract. The judge also acknowledged that, as between the respondents and the Chilean banks, the respondents remained at all times the party entitled to delivery. Nevertheless he concluded that in the present cases the rights as between bailor and bailee were the same as, and inseparable from, those existing under the bills of lading contracts. The obligation to deliver under the bailment was, in his view, transferred along with those contracts to the Chilean banks. Just as the respondents could not intervene as undisclosed principals to exercise the contractual rights, so, he said, the rights in bailment "*could not have been acquired by [the banks] in their capacity as agents*".

22. The appellants in support of this reasoning refer to the principles on which a bailee (such as a warehouseman) may by attornment accept responsibility towards a new bailor, as explained in the speeches in ***Dublin City Distillery (Great Brunswick Street, Dublin) Ltd. v. Doherty*** [1914] AC 823, 847, 852, 862-3 and 864. They accept that claims may lie in bailment at the suit of a person in or entitled to immediate possession, but they submit that the consignment of the goods and delivery of the relevant bills to the Chilean banks transferred any such right to the Chilean banks. The most that the respondents could thereafter assert is, in their submission, some form of tortious claim, and this (they submit) was excluded by the general principle, to which I have referred, that no such duty will be recognised, save in exceptional circumstances.

23. The respondents, in challenging the judge's reasoning, submit (i) that they were the original bailors, (ii) that whether or not their delivery of the bills to the Chilean banks transferred any right to immediate possession of the goods depended at common law upon their and the banks' intention and that there was no such intention to transfer any such right, (iii) that there is nothing in the 1992 Act to alter this position or to transfer their rights in bailment to the Chilean banks, and (iv) that the fact that the banks at all times held the bills for the respondents enabled the respondents to sue in bailment as the banks' principals. In the alternative they support the judge's conclusion that they had title to sue by virtue of their residuary proprietary interest. In response to the court's request for submissions on the inter-relationship between their bailment claim and their claim by virtue of their residual proprietary interest, they submit that the latter can itself be regarded as a type of a claim in bailment.

24. I start by seeking to identify some basic principles. First, it is now well established that the existence of claims in bailment does not depend on contract. What is fundamental is not contract, but the *bailee's* consent. The duties of a bailee arise out of the voluntary assumption of possession of another's goods in a manner analysed at pp.64-71 in Palmer on Bailment (2nd Ed.)(1991), pp. 64-71, a work which contains much useful material. More recently, the Privy Council's advice in ***The Pioneer Container*** [1994] 2 AC 324, approving ***Morris v. C. W. Martin & Sons Ltd.*** [1966] 1 QB 716 (CA), provides support at the highest level for the proposition that it is the voluntary taking of another's goods into custody that constitutes the person taking such custody a bailee towards that other person (the owner): see especially at pp.341A and 324A-B, per Lord Goff.

25. Secondly, a bailee may owe duties not merely to his bailor, but to a third party owner. The classic example, provided by the cases just cited, is the case of a sub-bailee. He owes duties in bailment, not merely to his immediate bailor, but also to an owner and head bailor of the goods. How far it is necessary for the bailee to have notice that someone other than his immediate bailor may have an interest in the goods is considered by Professor Palmer at pp.1315-1320, and was touched on, more recently, in ***The Pioneer Container*** at pp.342C-E. But it is a point which cannot in this case arise. It could not reasonably have been suggested by the shipping lines (and has not been) that they thought that the Chilean banks were the only persons likely to be interested in or at risk in respect of the goods. It is also irrelevant to consider situations where an owner is unaware that his goods are or may be sub-bailed. Professor Palmer analyses them, to my mind convincingly, at pp.35-37 as involving a species of bailment. But they are irrelevant here, since the respondents were themselves responsible for the appellants' involvement.

26. Thirdly, as a matter of principle and because the essence of bailment is the bailee's voluntary possession of another's goods, an owner's remedies cannot necessarily be confined to situations involving either a direct bailment or a sub-bailment. A's goods may come into the possession of B as a voluntary bailee in other circumstances. Professor Palmer considers such cases under the heading of *"The Springing or Substitutional bailment"* at pp.1285 et seq. His treatment of them as within the framework of bailment is consistent with his treatment of bailment by finding at pp.32 and 1465 et seq. When ascertaining the scope of bailment in contemporary legal conditions, there is general wisdom in Professor Palmer's observation at p.1285 that:

    "The important question is not the literal meaning of bailment but the circle of relationships within which its characteristic duties will apply. For most practical purposes, any person who comes knowingly into the possession of another's goods is, prima facie, a bailee."

    The same theme is reflected by Lord Pearson in the advice of the Privy Council in ***Gilchrist Watt and Sanderson Pty. Ltd. v. York Products Pty. Ltd.*** [1970] 1 WLR 1262, 1270, a passage quoted by Lord Goff in ***The Pioneer***

Container at p.337F, Lord Pearson spoke of the obligation towards cargo-interests of the stevedores engaged by the shipowners as

"at any rate the same as that of a bailee whether or not it can with strict accuracy be described as being the obligation of a bailee".

27. Fourthly, the appellants accept that not only possession, but the immediate right to possession can give rise to claims in bailment. This was accepted, and relevant authority cited, in ***Transcontainer Express Ltd. v. Custodian Security Ltd.*** [1988] 1 Ll.R. 128, 134, per Slade LJ. The plaintiffs there were international carriers who had sub-contracted the United Kingdom leg to another carrier. The argument that they wished to advance was that the sub-contract involved a bailment determinable at will, so that their own right to immediate possession at all times remained. It is of some interest that the primary issue was not whether an immediate right to possession of this nature would suffice, but whether the plaintiffs could, and should be permitted to seek to, establish such a right for the first time on appeal. The authority cited included ***The Okehampton*** [1913] P.173, where the plaintiff sub-charterers of the Okehampton had issued bills of lading in their own name. They sought to recover their loss of freight from the defendant owners of a third party vessel which by negligence had sunk the Okehampton. The Court of Appeal held that they had a sufficient possessory interest in the Okehampton to do this. Hamilton LJ said this:

"I think that it may be inferred as a matter of fact that the goods were in the possession of the [plaintiffs], the contracting carriers, performing their contract by means of a hired ship, so long as they were discharging their obligation with regard to the payment of hire; but the passage cited from Pollock and Wright on Possession in the Common Law, at p.166 par.4 is, I think quite sufficient authority for saying that even if the shipowners had possession so as to make them sub-bailees to [the plaintiffs], such bailment was revocable at pleasure, and there was no adverse right in the shipowners, so long as the time-hire was paid by [the head charterers]. Accordingly, there was interest enough in the plaintiffs to entitle them to bring this action."

The passage from Pollock and Wright was identified in ***Transcontainer*** as a passage reading:

"The remedies of the bailee are not always exclusive, for the bailor by reason of his right to possession may retain concurrently with him a sufficient right to maintain trespass and theft against strangers … This seems to be the case where the bailment is revocable by the bailor at his pleasure either unconditionally or upon a condition which he may satisfy at will."

28. Fifthly, as Diplock LJ stated in ***Morris v. Martin*** at p.731G:

"the nature of those legal duties [i.e. those owed by a bailee of goods], in particular as to the degree of care which the bailee is bound to exercise in the custody of goods and as to his duty to redeliver them, varies according to the circumstances in which and purposes for which the goods are delivered to the bailee".

However there is a general duty not to convert the goods, i.e. "*not to do intentionally in relation to the goods an act inconsistent with the bailor's right of property therein*", in addition to the "*independent and additional …. duty of a bailee for reward to take reasonable care of his bailor's goods*": see ***Morris v. Martin***, per Diplock LJ at pp.731G and 732D-E. One specific aspect of the latter duty is the bailee for reward's well-established duty to protect goods against theft: see e.g. ***Morris v. Martin*** at pp.726D-F, 732F and 740B-E, per Lord Denning MR and Diplock and Salmon LJJ; ***British Road Services Ltd. v. Arthur V. Crutchley & Co. Ltd.*** [1968] 1 Ll.R. 271; 1 AER 811 (CA); and Palmer at pp.47-48. Further, in the event of loss of or damage to goods in his possession, a bailee is liable unless he can prove that such loss or damage occurred without fault on his part: ***Morris v Martin*** at p.729D per Lord Denning; ***British Road Services Ltd. v Arthur V. Crutchley & Co. Ltd.*** [1968 1 AER 811, 822, per Sachs LJ; and cf Palmer at pp. 49-53.

29. Sixthly, it is clear that responsibility for performance of these duties cannot be avoided by their delegation to servants or agents in the case of a contractual bailee for reward: ***British Road Services Ltd. v. Arthur V. Crutchley & Co. Ltd.*** (above); Palmer at pp. 1282 and 1346-7; and cf ***Morris v. Martin*** at p.728A-D (where, as Lord Denning MR made clear at p.728C and D-E, he was addressing the situation under a direct bailment for reward between A and B) and ***Gallagher Ltd. v. B.R.S. Ltd*** [1974] 2 Ll.R. 440, 451. A case adopting a similar approach to a claim in conversion is ***Sze Hai Tong Bank Ltd. v. Rambler Cycle Ltd.*** [1959] AC 576. The textbooks suggest that the same position should apply in relation to any bailee for reward, even though not in any direct contractual relationship with the owner/head bailor claiming against him: see Clerk & Lindsell (18th ed. 2000) paragraph 5-60 and Palmer pp.48 and 1347-8. In my opinion that suggestion raises more complex issues, which for the moment I shall leave on one side. It is however clear that a sub-bailee is responsible for the acts of any servants whose services he engages to fulfil his duties as bailee, that being the ground of decision in ***Morris v. Martin*** itself.

30. Seventhly, the non-contractual liability of a bailee may be modified by the doctrine of bailment on terms, which was asserted by Lord Denning and favoured tentatively by Salmon LJ in ***Morris v. Martin*** and has now been accepted by the Privy Council in ***The Pioneer Container.*** Under this doctrine, a bailee may, in answer to the owner's non-contractual claim for loss of or damage to goods, rely upon the terms on which he voluntarily accepted the goods from his immediate bailor, if the head owner expressly or impliedly consented to the goods being bailed to the bailee on such terms.

31. Finally, I revert to the inter-relationship of claims based on possession or the right to possession with claims based on a reversionary proprietary interest (see paragraph 20 above). In ***Leigh & Sillivan Ltd. v. Aliakmon Ltd. (The Aliakmon)*** [1986] AC 785, 809 Lord Brandon was able to state that:

"….there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it."

It is notable that Lord Brandon spoke of "*either the legal ownership or a possessory title to the property concerned at the time when the loss or damage occurred*" as sufficient to enable a claim in negligence for loss of or damage to property. In ***Morris v. Martin*** Lord Denning at pp.728F-729A also clearly intended to assimilate (a) the liability of a bailee to an owner with an immediate right to possession to (b) his liability to an owner with no right to immediate possession for any permanent injury to, or loss of, the goods. ***Mears v. London & South Western Railway Co.*** (1862) 11 CBNS 850, to which he referred in the latter context, was not a case of liability in bailment; the plaintiff barge owner had let out his barge, so as to have no immediate right to possession, and it was damaged by a third party. But the reference to *Mears* was part of the background to a general statement of a sub-bailee's responsibility, and there can be little doubt that Lord Denning had here in mind responsibility towards *both* owners with the right to immediate possession *and* owners with no such right whose property had nonetheless been permanently injured or lost. Relying on ***Morris v. Martin***, in ***Moukataff v. B.O.A.C.*** [1967] 1 Ll.R. 396, Browne J held, in my view correctly, at p.415 that an original bailor has a right of action against a sub-bailee for breach of duty "*if he has the right to immediate possession of the goods or if the goods are permanently injured or lost*", and at p.416 that the particular plaintiff, although he had no right to immediate possession, could nonetheless recover for the theft of bank-notes by B.O.A.C's baggage handler, because *"all the notes except those which had already been recovered had [by the date of issue of the writ] been permanently lost, in the sense that there was no reasonable prospect of any further recovery"*.

32. In a helpful article entitled Reversionary Damage to Chattels in [1994] CLJ 326, Andrew Tettenborn observes that the concept of reversionary damage to chattels *"arose piecemeal as an answer to the inadequacy of, and by way of extension of, three separate torts – trespass to goods, conversion, and negligence"*. The author suggests that the differences between the nature and level of the liability in each context remain highly relevant, and that liability for reversionary damage "*will arise if, and only if, the defendant's act would on the facts have made him liable in conversion or negligence or trespass proper*". Any claim for reversionary injury must, in effect, be treated as ancillary or parasitical to the principal tort to which it relates. That in my view applies as much to a claim by an owner to hold a person liable as bailee, in circumstances where the owner cannot assert a right to immediate possession, as it does to any other reversionary claim. There are both benefits and disadvantages for an owner in this approach. He can rely upon the reversal of the onus of proof that requires a bailee, in the case of loss or damage to goods in his possession, to show that such loss or damage occurred without his fault or that of his servants, if he wishes to avoid liability. But the owner may also find himself bound by limiting or excluding terms, under the doctrine of bailment on terms.

33. It will be apparent that I do not find myself entirely in agreement with the scheme of the submissions presented below and, in the first instance, before us. Having said that, I shall also attempt to address such submissions more particularly in the order in which they were presented (cf paragraph 23 above).

34. In relation to the respondents' submission (i), that the respondents were the original bailors, the appellants rely upon a dictum of Lord Hobhouse in ***The Berge Sisar*** at para. 18, in a passage headed "*The 1992 Act: its genesis*":

"The bill of lading acknowledges the receipt of the goods from the shipper for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee as bailor".

This was said in a context where the named consignees were FOB buyers (cf paras. 7 and 10). In such a context, a shipper may readily, indeed normally, be regarded as acting as agent for a named consignee in making the relevant bill of lading contract: cf *Albacruz v. Albazero (The Albazero)* [1977] AC 774, 786A-B, per Brandon J. The goods will then have been from the outset bailed by the consignee (acting through the agency of the consignor) to the carrier. But this is only the first of three categories identified by Brandon J in a close analysis of the authorities, which later received approval in the House of Lords: see [1977] AC 774, 842H per Lord Diplock, with whose speech all other members of the House agreed. The other categories were: (2) cases where the consignor in delivering the goods to the carrier was acting as principal on his own account, with property and risk remaining in him during the carriage; and (3) cases where the consignor was held entitled to sue, whether or not the property and risk in the goods was in him at any material time, on the ground that the consignor had made a *"special contract*" with the carrier, and that, because of this, the carrier could not dispute the consignors' title to sue. In the House of Lords in ***The Albazero***, Lord Diplock said at p.842A of the situation where consignor and consignee were different persons that:

"In such a case the presumption was that the bailor was the person named as consignee and that in delivering possession of the goods to the carrier the consignor was acting and purporting to act as agent only for a designated principal – the consignee".

35. A rebuttable presumption is not an inflexible rule. It is clear both from Lord Brandon's definition of the three categories and from Lord Diplock's speech at pp.842C-843A that (a) whether a consignor has contracted with the carrier on behalf of an named consignee or on his own behalf (i.e. whether the case falls within the first or second category) depends upon an analysis of the terms, e.g. of any contract for sale, agreed between the consignor

and consignee, which would normally be quite unknown to the carrier, while (b) the question whether the case falls within the third category (i.e. is one where, whatever the position regarding property and risk, the consignor has made a "*special contract*" with the carrier) involves an analysis of the relationship between the consignor and carrier. Thus, in circumstances where a consignor was acting on his own behalf in shipping the goods or at all events reserving the right vis-à-vis the consignees to deal with and redirect the goods, Lord Brandon's analysis in ***The Aliakmon*** at page 818 was that "*The only bailment of the goods was one by the sellers to the shipowners*". See also Carver on Bills of Lading at para. 7-038 footnote 47 and Benjamin on Sale of Goods (6th Ed.) 18-0057. The present case falls clearly within Lord Brandon's second category. The respondents were at all times acting for themselves, and the Chilean banks were merely their agents. There is no basis for treating the respondents as shipping the goods or taking the bills of lading *on behalf of* Chilean banks. The right analysis is that the respondents were the original bailors of the goods to the appellants under the bills.

36. The respondents' submission (ii) raises the question whether, at common law, the delivery to the Chilean banks of the bills in which such banks were named as consignees transferred to the banks any possessory interest in the goods, so as to disentitle the respondents from bringing any suit against the appellants (apart from any justified by their reversionary interest). The authorities cited to us all appear to me to concern the right of the transferees of bills of lading to hold the shipowners issuing the bills liable for loss of or damage to goods, rather than the different question whether the transferor could sue in bailment. When Lord Hobhouse in ***The Berge Sisar*** referred at para. 18 to "delivery of the bill of lading as capable of transferring the endorser's right to the possession of the goods to the endorsee", it was, I think, with the transferee's consequential right to hold the vessel responsible that he was concerned. Likewise, in ***The Future Express*** [1992] 2 Ll.R.79, 94-96; [1992] 2 Ll.R. 542 (CA), 547 and ***The Aliakmon,*** the courts were concerned with the issue whether the transferee had acquired any right of suit against the ship.

37. These cases do not therefore appear to me necessarily to assist on the question whether, assuming that a transferee has acquired a sufficient possessory interest as against the shipowners, a transferor, who retains not just ownership but an immediate right to possession as against the transferee, also has a sufficient immediate right to possession to bring a suit against the shipowners in bailment, even if he cannot show loss of or damage to his reversionary proprietary interest. In neither ***Morris v. Martin*** nor ***The Pioneer Container*** did the fact that there is a chain of contracts leading to a sub-bailment, and a series of attornments by each successive bailee to his immediate bailor, exclude the ultimate bailee's potential liability in bailment towards the head owner. In ***The Pioneer Container*** the Hanjin plaintiffs had shipped goods from the United States to Hong Kong under bills of lading authorising the shipowners to sub-contract. The shipowners sub-contracted the final Taiwan to Hong Kong leg to the defendants, who issued them with feeder bills of lading containing, inter alia, a Taiwan jurisdiction clause. No-one suggested that the existence of the feeder bills of lading in favour of the shipowners, to which the Hanjin plaintiffs had consented although they were not party thereto, deprived the Hanjin plaintiffs of the immediate right of possession of the goods or of any claim in bailment. Their action in Hong Kong was however stayed, applying the doctrine of bailment on terms, under the Taiwan jurisdiction clause in the feeder bills.

38. Where goods are entrusted to carriers, the general presumption is that the bailment is revocable at will, so that the bailor retains an immediate right to the possession of the goods sufficient to entitle him to pursue possessory remedies against persons injuring or interfering with the goods: see ***the Transcontainer*** case and paragraph 27 above. The present case is not one of bailment and sub-bailment, at least of the container loads of goods. There was in respect of each consignment of goods only one original bailment. In relation to the shipping documents themselves, the Chilean banks were, on the face of it, bailees, but, even assuming that the delivery to them of the bills of lading passed to them a constructive or symbolic possessory interest in the goods vis-à-vis the shipping lines, the Chilean banks cannot realistically be viewed as bailees of the goods vis-à-vis the respondents. However, it would be paradoxical if the fact that the Chilean banks stood as regards the goods in the position of agents, not bailees, to the respondents undermined rather than strengthened the respondents' title to claim against the appellants.

39. On the view I take therefore a relationship of bailment continued in existence between the respondents and the shipping line, despite the respondents' transfer of the bills of lading and of the attendant contractual rights to the Chilean banks as the respondents' agents, and whether or not the effect of that transfer was to confer on the Chilean banks a sufficient possessory interest for them to pursue claims in bailment.

40. I shall, nevertheless, address this last issue, to which considerable attention was given before us - namely, in what circumstances a transferee acquires a sufficient possessory interest to claim against the shipowners. I accept the respondents' analysis of the authorities as showing that this depends at common law on the parties' intentions inter se. Thus, in ***The Aliakmon*** the goods were at the risk of the buyers, who were named as consignees in the bill of lading. The buyers were however unable to pay for them, and it was agreed with the sellers that, although the bill of lading would be delivered to the buyers for them to present to the ship and to take delivery of the goods at the discharge port, the buyers were to receive the bill and to take delivery of and thereafter to store the goods not as principals on their own account, but solely as agents for the sellers. Owing to poor stowage, the goods were damaged during the sea carriage. The buyers were held by the majority in the Court of Appeal to have no title to sue in contract or in tort. The appeal to the House of Lords on the tortious claim (based on the goods being at the buyers' risk) failed. It is implicit in the way the case was presented by experienced counsel and on that basis decided that the delivery to the buyers of a bill under which they were named consignees, with the intention that they should present and take delivery under it, did not confer on them any possessory title to the goods. Lord Brandon could thus start at p.809 with the proposition that I have already quoted at paragraph 31 above.

41. ***The Future Express*** confirms that the passing of a possessory interest at common law depends just as much upon the parties' intentions (to be objectively ascertained) as does the passing of any fuller proprietary interest. The case concerned shipments of wheat under sale contracts between Tradax Ocean Transportation SA and a company of which a Mr Dalali was the principal, acting for the Yemeni Republic. Under three bills of lading dated from January to March 1995 the wheat was duly consigned to the order of the Yemen Bank for Reconstruction and Development or their assigns. The Yemen Bank had, on Dalali's instructions, opened a letter of credit in favour of Tradax. But Tradax and Dalali agreed between themselves that Tradax would not present the bills under the credit, and that the wheat would be discharged without presentation of the bills against an indemnity provided to the ship by Tradax. The Yemen Bank knew of these matters by December 1995. The bills were eventually presented and paid for under the credit in March 1996, and the Yemen Bank then demanded delivery up by the shipowners of the goods or their value. The claim was based on their alleged possessory interest as pledgees. It failed at both instances. In the court of appeal, Lloyd LJ, giving the sole reasoned judgment, held that it failed on two grounds deployed by the shipowners: (a) first, neither Tradax nor Dalali had at the time when the bills transferred to the bank any possessory interest capable of being transferred by the bills (they having long since agreed and made delivery by a different route), and (b) second,

    "just as the transfer of a bill of lading only operates to pass the general property in the goods if that is the intention of the transferor, so it only operates to pass the special property when the transferor so intends. Here both Tradax and Dalali knew and intended from the moment the wheat was shipped that property and the right to possession would pass independently of the letter of credit. It is quite obvious therefore that Tradax cannot have intended to pass the special property in the goods when transferring the bills of lading to the plaintiffs."

    When in ***The Berge Sisar*** Lord Hobhouse referred in paragraph 18 to "delivery of the bill of lading as capable of transferring the endorser's right to the possession of the goods to the endorsee", the question did not arise under what conditions it is so capable.

42. Both ***The Aliakmon*** and ***The Future Express*** were acknowledged by the courts deciding them as unusual cases. However, that was in a context where either the general or a possessory title would, normally, have passed, in the one case to buyers, in the other to the bank as pledgees. In the present case, leaving aside the effect of the 1992 Act, the Chilean banks were named as consignees, and the bills were transferred to them, not as pledgees, but simply for convenience, so that they could freely use them to collect the price for the respondents. They were to hold them (and if it ever became material, the goods which they represented or symbolised) for the respondents. I do not accept the appellants' proposition that the Chilean banks must themselves have had the sole or any right to immediate possession in order to be able to pass on such a right by endorsing and delivering the bills to the intended receivers against payment of the price. An authorised agent can transfer a right belonging to his principal, and so *a fortiori* can an agent who appears from the language and his physical possession of the bill to be the person entitled thereto. Although the Chilean banks had physical possession of the bills, I would therefore doubt that they thereby acquired at common law a sufficient possessory title in respect of the goods to sue in tort for loss of or damage to the goods. It may however be that the delivery of each bill of lading by the respondents to the relevant Chilean banks carried with it a transferable attornment by the shipping line (cf ***The Berge Sisar*** per Lord Hobhouse at para. 18). That is a difficult area, as witness the authorities and discussion in Carver on Bills of Lading, paragraphs 7-037 to 7-042 - cf also ***The Captain Gregos*** [1990] 2 Ll.R. 395, 404 (right) referring to ***The Aliakmon***. But, even assuming that each bill carried with it a transferable attornment, I would see no difficulty in concluding that the beneficiary of any such attornment would, at common law and apart from the 1992 Act, at least include the respondent shippers, in circumstances where the Chilean banks took the transfers and held the bills as agents only. I also refer in this connection to the reasoning of the Court of Appeal of New South Wales in ***Maynegrain Pty Ltd. v. Compafina Bank*** [1982] 2 NSWLR 141; [1984] 58 AJLR 389.

43. The respondents' submission (iii) raises the question whether the 1992 Act has changed the position in bailment. Prior to the 1992 Act, the right to possession of goods and the contractual rights under a bill of lading could be held in different hands (cf ***The Berge Sisar,*** para. 19) - although in the situation there postulated the separation arose from the transfer of the bill *ahead* of any transfer of contractual rights. The appellants submit that the effect of the 1992 Act is to ensure that the two are held in the same hands. The contractual right to delivery vests in a holder of the bill under s.2(1). The right to immediate possession which suffices to found a claim in bailment must, they submit, vest in the (sole) person having the contractual right to delivery. They point out that Lord Hobhouse in ***The Berge Sisar*** said at para. 31 that it was the contractual rights, not the proprietary rights (be they general or special) that were, under the Act, to be relevant. That is no doubt so, wherever there is an overlap. But it does not answer the question whether or when contractual and proprietary or possessory rights do overlap.

44. The first observation to be made on the appellants' submission is that the 1992 Act does not expressly modify any rights other than contractual rights. The definition of a holder is in terms of possession of the bill, not in terms of any possessory right in respect of the goods that such possession may bring with it. However, s.2(2) refers to the possibility of a person becoming the holder of a bill at a time "*when …. possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates*", and to *"the time when such a right to possession ceased to attach to possession of the goods"*. Whilst this assumes a linkage between possession of the bill and possession of the goods, the subsection's purpose is no more than to regulate the passing of contractual rights in circumstances when a bill of lading would at common law be regarded as 'spent'. The mischief at which the 1992 Act was aimed was that rights under the bill of lading contract could remain vested in persons other than those having the property or risk in the goods. This might occur either because the general property did not

pass at all, or because it did not pass upon or by reason of the endorsement of the bill, so that the 1855 Act was of no assistance. The remedy adopted by the 1992 Act was to transfer contractual rights to any holder of the bill, as defined in s.5(2). The result is, however, to create a new class of cases in which the bill of lading contract may be vested in a person other than the person at risk. The pendulum has thus swung.

45. The question is whether the statutory transfer carries with it anything more than purely contractual rights. Again, it seems to me that this may be a false question. Even if the Act were treated as giving the transferee of contractual rights a sufficient possessory interest to hold the shipowners responsible, in circumstances where none was intended or could, therefore, prior to the Act have passed, it does not follow that the transferor loses all right to immediate possession or, therefore, all right of suit in bailment. If it were necessary, however, I would conclude that the sole effect of the 1992 Act is on contractual rights, and, where there is no intention to pass any possessory right, possessory rights sounding in bailment remain unaffected. But in my view it is unnecessary even to reach any such conclusion. Whatever the position in that regard, I do not consider that the 1992 Act can be treated as working an automatic transfer of any rights in bailment, so that they enure *exclusively* to the person entitled under its provisions to exercise the contractual rights. Were that the case, it would simply increase the difficulties that the Law Commission recognised might arise from creating a new class of cases in which the bill of lading contract is vested in someone other than the person at risk.

46. Not only is there nothing express in the 1992 Act to that effect, but the Law Commission clearly did not contemplate it. Their report at paragraphs 2.39 said this:

"Even in those ex ship or arrival contracts where the seller retains risk and property during transit, and yet transfers the bill of lading to someone who has no interest in suing having suffered no loss, there would be nothing in our recommendations to prevent the seller suing in tort by reason of being the owner of the goods, which he can do under the present law."

In paragraphs 2.45 and 5.24 the report explained the Law Commission's decision not to recommend any exclusion of the right of an owner to sue in tort. It referred to ***Obestain Inc. v. National Mineral Development Corp. Ltd. (The Sanix Ace)*** [1987] 1 Ll.R. 465, where Hobhouse J (as he then was) at p.468 affirmed an owner's right to recover damages (in full) in respect of loss or damage to goods, subject to the one qualification that "his claim may be defeated if his right is a bare proprietary one and did not include any right to possession of the goods". The report also referred to the pragmatic reasoning adopted by Gatehouse J in ***Gatewhite Ltd. v. Iberia Lineas Aereas de Espana SA*** [1990] 1 QB 326, where he held that references to a consignor's and a consignee's rights of suit in the Warsaw Convention governing carriage by air were insufficient to exclude the common law right of suit of an owner of goods, and observed that it would be unfortunate if the right of suit were to depend on the ability or willingness of a consignee, who might be no more than a customs clearing agent, forwarding agent or bank, to take action. That decision and reasoning has since been followed in this court in ***Western Digital Corp. v. British Airways plc*** [2000] 1 Ll.R. 142. So it is clear that the Law Commission contemplated that claims by owners against carriers as bailees would remain possible and in some circumstances counterbalance the automatic transfer of contractual rights instituted by the Act. The Law Commission cannot have thought that the 1992 Act would itself frustrate such claims, by working an automatic transfer of any immediate right of possession necessary to found such a claim. On the contrary, the Law Commission regarded claims in bailment by goods owners as some mitigation of the transfer of all contractual rights to persons who could in some cases have no conceivable interest in pursuing them. Such persons could indeed in some circumstances have a very considerable disincentive to the pursuit of any claim – for example where a claim against shipowners for cargo lost by sinking might elicit a counterclaim that the ship sank because the cargo was dangerous and caught fire, so that the claimant should indemnify the shipowners for the loss of their ship.

47. I see nothing impossible or surprising in the idea that one party should, as a result of the statutory transfer, possess the contractual right to delivery against the contracting carrier, while another person, the real owner and party at risk, should possess a right of suit in bailment against anyone, including the carrier, for loss or damage caused by their negligence as bailees in possession of the goods. It does not mean that the shipping lines were exposed to conflicting claims, since they were entitled and bound to deliver against an original bill of lading (***Barber v. Meyerstein,*** above, and ***Glyn Mills v. The East and West India Dock Co.*** (1882) L.R. 7 A.C. 591). Like the judge, I would also question whether it would be any justification for delivery to someone, who was not entitled to the goods and did not present such a bill, that those making such delivery thought reasonably that the recipient was the person entitled, and had received an apparently reasonable explanation for the absence of the bill (cf ***The Sormorksy 3068*** [1994] 2 Ll.R.266, ***Motis Exports Ltd. v. Dampskibsselskabet AF 1912*** [1999] 1 Ll.R. 837; [2000] 1 Ll.R. 213). Quite apart from this, there are certain cases in which two different persons, such as an owner entitled to immediate possession and an immediate bailor or person in possession, are both entitled to pursue claims for the same loss or damage, with no major practical problems arising for reasons identified in Palmer at pp.335 and 354 et seq.

48. The appellants' case could, on the other hand, lead to some surprising consequences. If an owner loses any immediate right of possession of the goods, together with any right of suit in bailment, as soon as the bill of lading and contractual rights pass to a holder under the 1992 Act, even though the holder is no more than an agent, the owner must, on the appellants' case, be unable to sue *anyone* in bailment. If the disability derives from a deemed transfer of the immediate right to possession as soon as there is any transfer of contractual rights, there is no obvious basis to limit it. So, on the appellants' case, the effect of the 1992 Act must have been to preclude actions

in bailment not merely against the contracting carrier, but also against any sub-contractor or bailee who loses or damages the goods.

49. I can summarise my conclusions as follows:

i) The appellants were under the bills of lading the original bailors of the containerloads of goods to the respondents: paragraphs 34-35 above.

ii) That bailment continued despite the delivery of the bills of lading to the Chilean banks named in them as consignees, and despite the transfer of contractual rights under the bills to such banks under the 1992 Act: paragraphs 36-39.

iii) Whether or not the Chilean banks themselves acquired sufficient possessory title to pursue claims in bailment is not the critical issue: paragraphs 27, 37-38 and 45. Having said that:

a) In my view, they did not: paragraphs 42 and 45.

b) But, assuming that they did, they were never more than agents at will in relation to the respondents, who retained a sufficient immediate right to possession throughout to enable them to pursue claims in bailment: paragraphs 38 and 44-48.

c) Even if that were wrong, the respondents could claim for any loss of or damage to their reversionary proprietary interest, and any such claim would (contrary to the appellants' apparent concession) constitute a claim in or to be determined by the same principles as govern a claim in bailment: paragraphs 31-32.

50. In these circumstances, it is unnecessary to examine the authorities and arguments deployed for and against the proposition that, if the appellants had no other potential responsibility towards the respondents, they must at least be regarded as owing the respondents an ordinary duty of care. ***The Aliakmon*** rejected such a proposition in a case where the buyer at risk was attempting to hold the carriers responsible in negligence, without having any proprietary or possessory basis for so doing. The House of Lords was unable to understand how any purely tortious duty of care could be treated as modified so to equate with the intricate blend of responsibilities and liabilities constituted by the Hague Rules, which governed the shipowners' bill of lading liability (p.818). Similar considerations would have presented a formidable impediment to the recognition of any purely tortious duty, if I had not concluded that the appellants owed duties towards the respondents in or paralleling those owed in bailment, notwithstanding the delivery to the Chilean banks of the bills of lading. On that basis, well-recognised duties exist in law and the doctrine of bailment on terms is potentially available as a controlling mechanism. So it is unnecessary for me to consider further whether the impediment would have been insuperable. It simply does not arise.

The respondents' claims

(a) Negligence

51. The respondents' claims were put before the judge under the heads of bailment, conversion and negligence, although the judge only found it necessary to consider the last head. I have set out his conclusions on it in paragraph 11 above. The negligence he found related to the basis on which the appellants contracted with (a) the Customs warehouse operators and (b) their port agents who under local practice also acted as container operators in issuing TATCs. It consisted of failure to instruct those operators and agents to insist upon presentation of an original bill of lading as a precondition to, respectively, the delivery up of the goods and the issue of TATCs enabling the containers to be removed. Had such instructions been given, the judge was, on the balance of probabilities, satisfied that the goods would not have been removed and the losses would have been avoided. While the judge expressed his conclusions in these positive terms, I note that, in view of my conclusions regarding bailment, the onus of disproving negligence and causation also rested in law on the appellants: see paragraph 28 above. However, I do not regard that as critical in this case.

52. The appellants complain about the way in which the issue of negligence was allowed to enter the trial and become decisive. We were shown the pleadings, skeletons and passages from the transcripts. The appellants pleaded in their defence that the containers were after discharge in the possession of the warehouse operators. The respondents' plea in reply in July 2000 was that the appellants could both have contracted with the warehouse operators on terms requiring them to insist upon presentation of original bills of lading, and have ensured through their port agents that the receivers' customs agents presented such bills. A list of issues prepared in November 2000 reflected this plea. The respondents' written opening submissions also reflected it under the heading of bailment, as a reason why the appellants could not disprove fault. The appellants' closing submissions of 8th October 2001 addressed the same point. During oral final submissions on 9th October 2001, counsel for the appellants objected, however, to any case that the practice in Chile was negligent and that the appellants were responsible. He later submitted that any such case involved the difficulty that it had not been properly explored, but he went on to accept that the point was open to the respondents, while submitting that it could only be "put at the very lowest level". In this regard, he suggested that there had been no proper investigation of the point with, for example, Mr Parra and that it would also have been necessary to investigate whether the appellants' understanding of Chilean law was a reasonable one, even if it was wrong.

53. Mr Parra was P&O's local cargo claim representative. His statement addressed Chilean procedures and expressed his understanding of Chilean law, although it does not appear that he had any personal role in relation to the arrangements governing the discharge of the goods the subject of this litigation. Both in his statement and in cross-examination he acknowledged that there was nothing to stop a shipping line like P&O from instructing their port agents not to issue a TATC without seeing an original bill of lading and that they either "often" (his statement)

or *"sometimes"* (his oral evidence before being reminded of his statement) did so request, in order to ensure that the right person received the container. However, he suggested that there was no obligation on a customs agent under Chilean law to comply with any such request.

54. The appellants' pleaded case was that under Chilean law they delivered the goods under the bills of lading by delivering them into the possession of the warehouse operators. They called evidence to support this and also to support the proposition that neither a warehouse operator nor a port agent acting as container operator had any right to insist upon presentation of an original bill of lading by a customs agent seeking delivery of a container-load of goods. Mr Tomasello gave evidence on these points of law, which the judge rejected. Mr Tomasello was called as an independent expert, and there was no evidence and nothing to suggest that his view reflected the appellants' view or had been communicated to them, prior to the events of late 1998/early 1999 with which this litigation was concerned.

55. If the appellants were going to advance a positive case that, even if they were wrong about Chilean law, nonetheless they were at all material times acting under a reasonable belief that Chilean law was as they said, and that they were on this basis excused from taking any steps to ensure that the warehouse operators or port agents who they instructed only delivered up container loads against presentation of original bills, they should have pleaded and supported it. It would then no doubt have been the subject of closer investigation and attention. As it is, it was not and is not suggested that the respondents' contrary case was not open to them, if they proved right on Chilean law. That being so, the judge had to do the best he could on the material before him. This was so, whether the issue arose under the heading of bailment, conversion or negligence. For completeness, I add that I would not accept that the appellants suffered any significant prejudice, even if it be the right analysis that the issue was at first only clearly raised under one of such heads, but was later relied upon under all of them. In fact, it appears at least to have been raised under the heading of bailment, which is in my opinion ultimately the critical head.

56. The appellants emphasised before us that they parted with possession of the container loads to their warehouse operators. They submit that there was thereafter no basis for holding them responsible. They submit that the duties of a bailee, towards an owner or person entitled to immediate possession of the goods with whom he has no contractual relationship, are limited to the period until he delivers up actual possession of the goods. This, they submit, is in contradistinction to the duties owed by a contractual bailee whose characteristic responsibility it is to answer under the contract not merely for himself and his servants but also for his agents or sub-contractors: see paragraph 29 above.

57. I said in paragraph 29 that it appeared to me a complex issue whether (as the textbooks suggest) there may be bailments for reward under which responsibility exists towards persons with whom the bailee is not in contractual relations for the acts of agents as well as servants. It is an issue which was not fully argued before us, and I prefer not to decide it in a case where it is unnecessary to do so. I merely content myself with the comment that, since the appellants were both direct and, initially, contractual bailees from the respondents, a submission that they should answer in bailment for agents or sub-contractors as well as servants, even after the statutory assignments worked by the 1992 Act, might seem to have particular force. In what follows, it is sufficient for present purposes to accept, without deciding, that there is the general distinction between contractual and non-contractual bailment which the appellants suggest.

58. It is clear in principle that, even in circumstances where a bailee is authorised to sub-contract on the basis that he will thereafter have no further personal responsibility for the goods, the cessation of his responsibility may depend not merely upon his making a sub-contract of the authorised kind but also upon his exercising due care in the selection of the sub-contractor: see Palmer p.1346 at footnote 19 and p.1291. By parity of reasoning, I consider that where a bailee or sub-bailee sub-contracts part of the functions that he has undertaken towards his immediate bailor, his duties as bailee towards persons with whom he had no contract, must extend to (a) ensuring that any sub-bailment that he arranges respects the basis of the bailment relationship which he has, by voluntarily taking possession, himself accepted vis-à-vis both the persons entitled to immediate possession and, as regards the protection of their reversionary proprietary interests, the owners even if not entitled to immediate possession; he must *"not …. do intentionally in relation to the goods an act inconsistent with the bailor's right of property therein"*: see paragraph 28 above; and (b) taking reasonable care to protect their interests, which involves taking care that any sub-bailment involves a competent and appropriate sub-bailee: see ***Garnham Harris and Elton Ltd. v. Alfred W. Ellis Ltd.*** [1967] 2 Ll.R. 22 and ***James Buchanan & Co. Ltd. v. Hay's Transport Services Ltd.*** [1972] 2 Ll.R. 535 (although a simpler route to holding the second defendants liable towards the plaintiffs in that case would, since ***British Road Services v. Arthur V. Crutchley,*** have been non-delegable responsibility for the first defendants' negligence); and cf Palmer pp.1345-6.

59. While the duties of a sub-bailee towards an owner or other person may often be expressed as being to take reasonable care not to convert, lose or damage the goods *while in the sub-bailee's possession*, this cannot be understood in a narrow sense. Taking care of goods while in your possession is no licence to deliver them up deliberately or even carelessly to a stranger. It is fundamental to any bailment that the bailee is looking after the goods of others, in their interests, and must redeliver them to those entitled having regard to the nature of the particular bailment which he has voluntarily accepted. Where a bailee has - as here under the bills of lading, having regard the judge's findings on Chilean law – accepted responsibility as bailee in respect of the whole period until delivery up of the container loads ex warehouse in San Antonio, it is the bailee's duty, if he entrusts

warehousing of the goods in San Antonio to a third party, to ensure that he does so on a basis consistent with the bailment that he himself has undertaken.

60. In the present shipping context, that means taking steps to ensure, by making arrangements with the warehouse operators or others, that delivery is only made against an original bill of lading. There may be cases where a bailee has undertaken some special obligation, to his immediate bailor or to a party with whom he is in immediate contractual relations, that goes beyond any duty that he can as bailee be taken to owe to an owner or person entitled to immediate possession with whom he has no contractual relationship. But the present is not such a case. The taking of steps to ensure that goods are delivered up against presentation of original bills of lading reflects a fundamental aspect of the duties of a carrier by sea. The duty to deliver against an original bill was owed in this case under the bills of lading, and it was of obvious importance in relation to anyone who was the owner or entitled to immediate possession of the goods. The intentional delivery up of goods without production of a bill of lading would commonly involve their conversion. But even if one only analyses the duty as an aspect of a bailee's duty regarding redelivery (deriving, in Diplock LJ's words in ***Morris v Martin,*** from the circumstances and purposes of the bailment) or as an aspect of his duty to take reasonable care, it was a fundamental aspect of that duty.

61. The judge found that the appellants failed to exercise reasonable care towards the respondents, by failing to contract for or insist upon presentation of original bills of lading prior to delivery by the warehouse operators and port agents who the appellants engaged. As a matter of law, that amounts in my view to a finding that the appellants were in breach of duty towards the respondents as owners or persons entitled to immediate possession of the goods, in parting with possession of the goods to the warehouse on a basis which facilitated their abstraction from the warehouse by persons with no entitlement to receive them. The judge's findings regarding the power to instruct port agents meant that the absence of appropriate contractual arrangements with or instructions to the warehouse operators would not necessarily have exposed the goods to illegitimate abstraction, if the appellants had instructed their port agents to insist upon seeing original bills before issuing any TATC. But the appellants did not give such instructions to their port agents. The upshot is that the appellants parted with possession of the goods, but only on a basis that exposed the goods to abstraction by persons with no entitlement. That constituted just as much a breach of the duties the appellants owed as bailees in possession, as if they had left them unattended during a period when they were in actual possession.

62. I turn to three specific aspects of the judge's findings of fact with which the appellants take issue. First, there is a submission which (as I understood it) only applies if (contrary to my earlier conclusions) the respondents had no right to immediate possession and are only entitled to sue for loss of or damage to their reversionary title as owners. The appellants suggest that there was no such loss or damage, because the delivery of the goods to Gold Crown cannot have had any effect on the respondents' ownership. The suggestion was neither abandoned nor stressed before us. It involves too narrow a view of loss of or damage to an owner's reversionary interest. To be effectively deprived of property is a loss. The goods in issue in this case consisted of watches, clocks, radios, earphones, hair clippers, keychains, toys and many other miscellaneous goods. The judge was satisfied that it was wholly impracticable for the respondents to have sought to recover these goods in Chile from Gold Crown. Very speedily no doubt, the goods also passed into the possession of any number of different local purchasers. Assuming that the property in the goods remained or even now remains in the respondents, it is arid to suggest that the respondents as owners have not suffered permanent loss of or damage to their reversionary interest. The judge's conclusion to this effect was consistent with that reached by Browne J. in ***Moukataff,*** and in my view clearly correct.

63. Secondly, the appellants submit, in relation to the judge's conclusion that the appellants should have contracted with or given instructions to the warehouse operators and port agents for delivery to be made only against presentation of an original bill of lading, that there was no evidence that this was not anyway the duty of the warehouse operators and port agents. That represents a *volte face* from the case advanced below, which was that any such contract and instructions would have been ineffective under Chilean law. For this point to be open to the appellants, there would have had to be, in answer to the respondents' reply, a plea or at least notice that the appellants' case was that they *did* contract with or give instructions to the warehouse operators or port agents for delivery to be made only against presentation of original bills of lading. The one contract the terms of which the judge did record merely provided for Seaport to *"deliver the cargo to the consignee or its representative after the consignee has completed all Customs clearing procedures involved"*. Further, even if there had been any allegation below that the warehouse operators and port agents did as a matter of Chilean law undertake the suggested duties, it does not appear that the shipping lines could when engaging them have been entitled to rely upon them to perform such duties. The farthest the evidence went was to show that port agents *"often"* or *"sometimes"* asked to see original bills. It would appear to have been less common for warehouse operators to make any such requests.

64. Thirdly, the appellants submit that there was no basis for the judge's findings of negligence. I do not accept the submission. There was evidence that some carriers used to insist that their port agents saw original bills before issuing TATCs. It is true that the warehousing market had only been opened up to private operators and to private contractual arrangements, and that Emporchi had only been split up, in late 1997. However, Mr Sahurie said that the only reason why it was not more common for shipping lines to instruct their warehouse operators to insist on seeing original bills was probably that sufficient protection was in practice obtained by insisting on port agents seeing them. Either course would in the present case have sufficed to avoid the loss on the judge's findings. Mr Parra in a frank answer in re-examination also shed some light on the reality of the situation. He gave evidence that some customs agents used their ability to obtain release of goods without having or presenting an original bill of lading as a marketing tool to get clients. That undermines the submission that the appellants cannot

be regarded as negligent, since customs agents could be assumed to be persons of integrity and/or would not be prepared to risk either withdrawal of their licences or fines.

(b) Conversion

65. I can return, briefly, at this point to the respondents' further submission, that, quite apart from bailment or tort, the judge ought to have held the appellants liable in conversion, or (if it had been material) the ancillary tort for which a reversionary owner may sue. The respondents rely on ***Sze Hai Tong Bank Ltd. v. Rambler Cycle Ltd.*** [1959] AC 576, where a shipowner, whose agents had released goods to intended buyers against an indemnity without production of a bill of lading, were held liable to the unpaid sellers who continued to hold the bill of lading. The Privy Council held the shipowner liable for breach of contract and conversion and rejected its reliance on an exemption clause as a matter of construction and because it considered that the action of the shipping agents who "*deliberately disregarded one of the prime obligations of the contract*" could properly be treated not merely as making the shipowner vicariously liable, but as the action of the shipowner itself; "their state of mind can properly be regarded as the state of mind of the shipping company itself"; see pp.587-588, per Lord Denning.

66. The approach adopted in ***Sze Hai Tong*** was heavily influenced by the direct contractual relationship that there existed between the shipowner and the plaintiff. In the present case, there is no such continuing relationship between the respondents and the appellants. The respondents' claim has to depend upon the responsibilities undertaken by the appellants in bailment. There was no reason why the appellants could not delegate such duties to others, provided that the arrangements they made appropriately reflected the bailment that they had themselves voluntarily undertaken. The judge's findings, adverse to the appellants, were that the arrangements that they made were inappropriate. Further, for present purposes, I am continuing to assume without deciding that their responsibility as bailees would not extend to the conduct of authorised agents or sub-contractors (cf paragraph 57 above). On this basis, there is no parallel with the situation in ***Sze Hai Tong,*** where the appellants were held answerable for the acts of the warehouse operators or port agents who they engaged, as if *their* state of mind were the appellants' state of mind. The respondents' case depends upon the fact that the warehouse operators and port agents were *not* obliged or instructed to insist on the presentation of original bills. The criticism they direct is not so much at the acts or state of mind of the warehouse operators or port agents, as at the acts and state of mind of the appellants, who failed to make appropriate arrangements when sub-contracting with the warehouse operators and/or port agents.

67. An unauthorised sub-bailment may in some circumstances constitute a deviation and conversion: see e.g. the **Garnham Harris** case, cited above; and Palmer pp.238 and 1346. But that is not how the respondents have put their case in conversion. It may also be arguable that, whatever the general position may be (cf paragraph 57 above), a bailee for reward, who parts with possession on terms which fail appropriately to reflect or protect the interests of other persons owning or entitled to immediate possession of the goods, should be treated as having a continuing vicarious responsibility for the conduct of those to whom he has parted with possession, at least in those areas where the arrangements made fail to reflect or protect such interests. On that particular basis, it might, perhaps, then be possible to treat the appellants as having intentionally done in relation to the goods acts inconsistent with the respondents' possessory and proprietary rights. On the facts of this case, any such argument can add nothing, having regard to the judge's findings regarding negligence and causation. I prefer to say no more about it. Again, it seems to me that it would merit fuller submissions.

68. In summary, I see no basis for disturbing the judge's findings on negligence (the onus of disproving which was, as I have noted, actually on the appellants):

    i) The appellants as, or as persons under the same responsibilities as, bailees made arrangements with (a) the Customs warehouse operators and (b) their port agents who under local practice also acted as container operators in issuing TATCs on a basis that failed appropriately to reflect the bailment that they themselves had voluntarily undertaken to respect the possessory or proprietary interests of the appellants: paragraph 61. Had appropriate arrangements been made or instructions given, the judge was, on the balance of probabilities, satisfied that the goods would not have been removed and the losses would have been avoided: paragraph 11. Even if (contrary to my views) the respondents' title to sue rests only on their reversionary proprietary interest, that was on the judge's findings also effectively lost: paragraph 62 above.

    ii) It is in these circumstances unnecessary further to address the issue of conversion: paragraphs 65-67 above.

(a) Bailment on terms

69. I have concluded that the respondents have title to pursue claims in or on the same principles as govern claims in bailment. In my judgment, on whichever basis set out in paragraph 49(iii) above the respondents' claims are founded, such claims are subject to the terms of the bills of lading on which the goods were originally bailed by the respondents themselves to the appellant shipping lines. The doctrine of bailment on terms (cf paragraph 30 above) is not, and could not sensibly be, restricted to the narrow context of an authorised sub-bailment. Its rationale exists in the voluntary taking into possession of another's goods on terms qualifying the taker's responsibility towards the owner or other person entitled to immediate possession, to which such owner or other person has consented: cf ***The Pioneer Container,*** at p.342A-B per Lord Goff; and see also at pp.339E-340B Lord Goff's discussion of ***Elder, Dempster & Co. Ltd v Paterson Zochonis & Co. Ltd.*** [1924] AC 522, although there the terms on which the owners took possession from the shippers consisted in a charterers' bill. Where, as here, a shipper bails goods to a shipping line on the terms of the shipping line's bill, and the contractual aspects of their relationship are by statute transferred to a third party, any rights that the shipper may (as owner, person entitled

to immediate possession or simply bailor) continue to enjoy against the shipping line arising from the line's possession of the goods as bailees must continue to be subject to the same terms.

(b) The effect of the completion of the bills as "combined transport" bills

70. The next question is whether in the present cases the bill of lading terms include any relevant qualifications or exemptions of responsibility, protecting the appellants against the respondents' claims. I take first the respondents' submission that both the Maersk and the P&O bills were completed in a way making them into "*combined transport*" bills, so that, they submit, the exceptions clauses do not apply. I start with the P&O bills. On the face of these bills, there are boxes headed Port of Loading and Port of Discharge, which were completed in the present case with the names of the load and discharge ports. To their right are somewhat larger boxes headed Place of Receipt and Place of Delivery. These latter boxes contain the notation: "(*Applicable only when this document is used as a Combined Transport Bill of Lading)"*. They were completed in the case of the Place of Receipt with the words "*Hong Kong/CY*" [i.e. container yard] and in the case of the Place of Delivery with the name of the discharge port.

71. According to clause 1 of P&O's terms on the reverse of their bills:

"*'Combined Transport' arises if the Place of Receipt and/or Place of Delivery are indicated on the face hereof in the relevant spaces".*

Clauses 5 and 6 of the terms deal with P&O's responsibility for, respectively, *"Port-to-Port Shipment"* and *"Combined Transport*". Clause 5 (headed Port-to-Port Shipment) incorporates the Hague Rules, but goes on to provide:

"The Carrier shall be under no liability whatsoever for loss of or damage to the Goods, howsoever occurring, if such loss or damage arises prior to loading onto or subsequent to discharge from the vessel. …."

Clause 6 (headed Combined Transport) provides that

"…. the carrier undertakes to perform and/or in his own name to procure performance of the Carriage from the Place of Receipt …. to the …. Place of Delivery …. and, save as otherwise provided for in this Bill of Lading, the Carrier shall be liable for loss or damage during the Carriage only to the extent set out below".

72. Clause 6(1) and (2) then deal with situations where "*the stage of the Carriage during which loss or damage occurred is not*" and "*is"* known. Their general scheme is, under clause 6(1) which applies where the stage during which loss or damage occurred is *not* known, to relieve P&O of liability for causes which are the responsibility of cargo-interests (e.g. cargo-interests' act or omission, defective packing, inherent vice) or of third parties (strike, etc., nuclear incident or compliance with the instructions of a person entitled to give them) or any other cause or event which P&O could not avoid or any act or omission the consequences of which P&O could not foresee. Where the stage *is* known, clause 6(2) makes the basic measure of P&O's liability that provided by the Hague Rules either where these are compulsorily applicable or, if these are not compulsorily applicable, then in respect of loss or damage during waterborne carriage. In other cases where the stage is known, responsibility is governed by clause 6(1). It will at once be observed that this is a carefully constructed and generous scheme of responsibility, which affords cargo-interests a substantial measure of protection throughout all stages when P&O is in charge. No doubt this is attractive to P&O's customers, and good for P&O's business. No doubt P&O charge or could charge appropriate rates to cover any extra exposure.

73. Clause 6(3) continues:

"(3) <u>If the Place of Receipt or Place of Delivery is not named on the face hereof</u>

Subject to clause 5:

(a) If the Place of Receipt is not named on the face hereof , the Carrier shall be under no liability whatsoever for loss of or damage to the Goods, howsoever occurring, if such loss or damage arises prior to loading onto the vessel.

(b) If the Place of Delivery is not named on the face hereof , the Carrier shall be under no liability whatsoever for loss of or damage to the Goods, howsoever occurring, if such loss or damage arises subsequent to discharge from the vessel."

74. The appellants' submission is that the way in which the P&O bills were completed must have been mistaken or over-zealous, since there is no indication that even the shortest transport leg was in any case intended, at least outside the immediate port area, under P&O's aegis; and that the bills must really be regarded as being port-to-port. That was the view taken by the Court of Appeal of New South Wales in ***Glebe Island Terminals Pty. Ltd. v. Continental Seagram Pty. Ltd. (The Antwerpen)*** [1994] 1 Ll.R. 213. But the terms of the bill of lading there were different from the present in potentially important respects. The first two boxes were headed Port of Loading (Ocean Vessel) and Port of Discharge (Ocean Vessel), while the additional two boxes headed Place of Acceptance and Place of Delivery contained notations reading:

"Applicable only when document used as combined transport B/L. Place of acceptance/delivery always to be an address".

The load and discharge ports Felixstowe and Sydney were entered in the first two boxes. Felixstowe was also entered in the box Place of Acceptance. The box Place of Delivery was left blank. The court held that the insertion of Felixstowe in the Place of Acceptance box was "a patent error" and should be ignored. There was nothing to indicate that any carriage other than sea carriage was contemplated, and the absence of an address was, in the

court's view, probably not an oversight, but rather the consequence of the fact that no inland carriage was contemplated.

75. Each case must be decided upon its own facts, and in the light of the terms of the particular bill, construed against the background of any relevant surrounding circumstances. The terms of the present P & O bills are in significant, some might say striking, contrast with those of the Maersk bill in ***The Antwerpen***. It is true that there is no sign of any inland transport, outside the short (though, in terms of loss and damage, often important) period of movement and warehousing within the container-port area. But the P&O terms go out of their way to explain and stress the significance attaching to the completion or non-completion of the boxes headed Place of Receipt and Place of Delivery by the entry of names, and they contain no requirement that these should be addresses. A main difference between port-to-port and combined transport is the extent of the carrier's responsibility. P&O's terms offer a carefully constructed and generous package in the case of combined transport. Treating the present bills of lading as combined transport bills makes perfect sense. The effect is that P&O undertook liability throughout the period when the goods were under its aegis, by itself or by any contractors whom it engaged. Loss or damage to goods in the port area before and after discharge are a known peril of sea carriage. This peril has over the years led to many disputes and much aggravation. It is not difficult to see why a shipping line like P&O, particularly one handling container traffic, might decide that everyone's commercial interests would be served by offering an alternative scheme. There seems to me no reason not to take the language of P&O's bills at its face value.

76. Whether a transport operation is or is not combined transport thus depends upon how the bill of lading boxes are completed. We have no information as to whether or not the way in which they were completed here attracted a higher rate, to compensate for P&O's greater level of exposure. We have no information about the terms of any booking that preceded the completion and issue of the bills. But it seems to me that it would be for P&O to call evidence to establish any background or surrounding circumstances that might arguably have assisted its case. It did not do so, and so the merits or demerits of any argument based on them were never investigated. Suffice it to say therefore that I do not consider that there is any basis in this case for taking the P&O bills of lading as anything other than the combined transport bills that they were on their face, as completed and issued by P&O. I agree with the judge on this point. I would only add that we were, without objection by the appellants, shown a copy of the Millennium Edition of The Merchants Guide issued by P&O, which was put before the judge by the respondents' final reply submissions. I cannot see how this document (in an edition post-dating the relevant events) can have relevance to the construction of the present bills of lading. However, it offers some comfort that P&O's combined transport form of bill is intended to achieve the transfer of risk to P&O throughout that I have already concluded that the present bills do achieve.

77. I turn to the Maersk bills of lading. Again, the bills have small spaces for the Port of Loading and Port of Discharge, filled out in this case with the names Hong Kong and San Antonio respectively. But in this case they have equally small spaces headed Place of Receipt and Place of Delivery. These spaces were too small generally for anything other than a place-name. These were again filled out with the names Hong Kong and San Antonio respectively. An asterisk appears against each of the last two headings, which refers to a footnote stating: *"Applicable only when document used as a Combined Transport Bill of Lading*". This might at first glance surprise, when the bill is headed in large letters "*COMBINED TRANSPORT BILL OF LADING*". That point has however been addressed by the draftsmen of Maersk's terms which start as follows:

"BILL OF LADING ….

Notwithstanding the heading "Combined Transport Bill of Lading, the provisions set out and referred to in this document shall also apply if the transport is described on the reverse side of this Bill of Lading is performed by only one mode of transport only."

78. The further provisions of Maersk's terms include the following:

"4. DELIVERY OF CARGO BEYOND PORT OF DISCHARGE OR PLACE OF DELIVERY

In the event that Consignees/Receivers of cargo require the Carrier to deliver cargo at a port or place beyond the place of delivery originally designated in this Bill of Lading and the Carrier in its absolute discretion agrees to such further carriage, such further carriage will be undertaken on the basis that the Bill of Lading terms and conditions are to apply to such carriage as if the ultimate destination agreed with Consignees/Receivers had been included in the description the transport on the reverse side of this Bill of Lading.

5. CARRIERS' 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 as follows:

1. If it can be proved that the loss or damage occurred while the Goods were in custody of an inland carrier the liability of the Carrier and limitation thereof shall be determined in accordance with the inland carrier's contract of carriage or tariffs, or in the absence of such contract or tariff, in accordance with the internal law of the state where the loss or damage occurred provided that where such contract or tariff does not exist the limit shall be as set out in Clause 6.

2. <u>Carriage to and from the USA</u>

Where loss or damage has occurred between the time of receipt of the Goods by the Carrier at the port of loading and the time of delivery by the Carrier at the port of discharge, or during any port or subsequent period of carriage by water, the liability of the Carrier shall be determined in accordance with the "US Carriage of Goods by Sea Act 1936" (COGSA). At all times that the carrier has responsibility for the goods,

the carrier shall be entitled to the full benefit of and the right to all limitations of or exemptions from the liability authorized by any provision of Section 4281 to 4289 of the Revised Statutes of the United States of America and the amendments thereto and to any provisions of the laws of the United States or any other country whose laws may apply. Nothing in the Bill of Lading, express or implied, shall be deemed to waive or operate to deprive the carrier, or lessen the benefits of any such rights, immunities, limitations, exemptions.

3. *Carriage to and from Countries other than the USA*

   a. *Subject to sub-paragraph b of this Clause where the loss or damage has occurred between the time of receipt of the goods by the carrier at the port of loading and the time of delivery by the Carrier at the port of discharge, or during any prior or subsequent period of carriage by water, the liability of the carrier shall be determined in accordance with either the Hague Visby Rules where these are compulsorily applicable at the place of receipt or the port of loading where the first sea carriage in the transportation is on board the ocean vessel, or in all other cases in accordance with the International Convention for the Unification of Certain Rules relating to Bills of Lading dated 25th August, 1924 (the Hague Rules) (with the exception that Article 9 shall not apply and the limit of liability in Article 4 Rule 5 shall be set out as in Clause 6 below)"*

   b. *Where the carriage called for commences at the port of loading and /or 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 ships rail, or if applicable, on the ships ramp, however caused.*

4. *Where the place where the loss or damage occurred cannot be established, the loss or damages shall be presumed to have occurred during the ocean voyage and the Carrier's liability shall be determined in accordance with either sub-paragraph 2 above or sub-paragraph 3 above as appropriate."*

79. The intended effect of clause 5 is not easy to grasp. Clause 5(1) deals with one aspect of combined transport. Clauses 5(2) and (3) embrace other aspects. Their references to "*loss or damage between the time of receipt of the Goods by the Carrier at the port of loading and the time of delivery by the Carrier at the port of discharge, or during any prior [not port] or subsequent period of carriage by water*" appear to include situations of combined transport, where there is carriage by water between a place of receipt and the port of loading named in the bill or between the port of discharge and a place of delivery named in the bill of lading. That this is so is also suggested by the reference half way through clause 5(3)(a) to the possibility of the Hague Visby Rules being "*compulsory [sic] applicable at the place of receipt or the port of loading*". There may be several sea carriage legs in cases within clauses 5(2) and(3) - between a place of receipt and the port of loading, and/or the port of discharge and a place of delivery. A possible alternative construction is that the words quoted refer back to further carriage of the type covered by clause 4. But clause 4 only contemplates on-carriage beyond the port of discharge or place of delivery, so this seems unlikely. On this basis, it appears that, in the case of combined transport, Maersk is to remain liable in one way or another, either as a sea carrier or as an inland carrier between any named place of receipt and any named place of delivery. However, both clauses 5(2) and 5(3)(a) must, when referring to "*loss or damage between the time of receipt of the Goods by the Carrier at the port of loading and the time of delivery by the Carrier at the port of discharge*", also embrace carriage where there is no named place of receipt or place of delivery and so no combined transport carriage. Otherwise there would be nothing in clause 5 to regulate and restrict Maersk's liability in such cases.

80. What therefore is the effect of the proviso to clause 5(3)(a) – "*Subject to sub-paragraph b of this Clause*" – and of that sub-paragraph itself? On its face, clause 5(3)(b) applies most easily to situations where there is no combined transport, and the only entries on the bill are of the port of loading and port of discharge. The proviso to clause 5(3)(a) does not necessarily mean that it has any wider application, since clause 5(3)(a) itself applies to both combined and other transport, as I have pointed out in the preceding paragraph. Clause 5(3)(b) clearly cannot apply in relation to the combined transport part of carriage involving a named place of receipt prior to the load port or a named place of delivery subsequent to the discharge port. The critical question appears to be whether clause 5(3)(b) adopts a contractual or a factual approach, when it speaks of cases "*where the carriage called for commences at the port of loading and/or finishes at the port of discharge*". The insertion of the phrase "*called for*" tends to favour a contractual test. In many, if not most combined transport cases, the question whether clause 5(3)(a) applied could also no doubt be answered by looking at the face of the bill. If a place of receipt or a place of delivery was entered, the carriage called for would necessarily commence or finish other than at the load or discharge port, as the case might be. Does it make any difference that here the places of receipt and delivery entered in the bills were in fact identical with the load and discharge ports? Is that sufficient to move the carriage out of the more generous regime of liability existing under the Hague or Hague Visby Rules throughout the period of Maersk's responsibility (except insofar as they answer instead as inland carriers under clause 5(1)), into the less generous regime of liability existing only between the times when the goods swing over or back across the ship's rail? I have come to the conclusion on balance that it cannot be sufficient. It seems to me that the Maersk bill resembles the P&O bill in offering two different regimes, the distinction between which depends upon how the bills are completed and issued by Maersk. Clause 5(3) is a clause which applies where one regime is chosen. It is designed to cater for situations where the bill is not used as a combined transport bill at one or both ends, so that the carriage "called for" simply commences at the named port of loading or simply finishes at the named port of discharge, or does both. This was also the conclusion that the judge favoured.

81. On that basis, neither clause 5 of the P&O bill nor clause 5(3) of the Maersk bill applied to the carriage of the present container loads. It follows that, although P&O and Maersk are in principle able to take advantage of any protecting clauses pursuant to the doctrine of bailment in terms, there are none that can assist either P&O or Maersk in this case. It also follows that they have no defence to these claims, and that I would uphold the judge's judgments in favour of the respondents, albeit in certain respects by different reasoning.

(c) The scope of the exceptions clauses, when applicable

82. I will nonetheless briefly consider the scope of clause 5 of the P&O bill and clause 5(3)(b) of the Maersk bill, had they applied. I take first clause 5(3)(b) of the Maersk bill, since this was considered in ***Motis Exports***. It was held there, in a dispute between the parties to the bill of lading contract, that the clause could not protect against misdelivery against a document that the shipping line, or presumably its local agents, took to be a genuine bill, but which was in fact a plausible forgery. The clause was focussed upon responsibility for physical perils associated with the period following discharge, rather than upon the obligation to deliver against an original bill of lading. A shipping line's obligations in that regard do not depend upon the physical location of the goods. If delivery was made over the ship's rail or ramp or ex hold (or perhaps at a port between the load and discharge port, although the language of the clause is uncertain in its application to such a case) without presentation of a bill of lading, clause 5(3)(b) could not protect the line. There is no reason why the fact that the goods sit on the quayside or in a warehouse for a short period before such a misdelivery should make all the difference. Like reasoning had previously been adopted by Clarke J. in relation to a similar though not identical clause, in ***The Ines*** [1995] 2 Ll.R.144, 152 (and cf p.158 regarding clause 14).

83. We have to consider the application of the clause from a somewhat different angle. We are concerned with a claim that cannot be advanced in contract, or therefore on the simple basis that the shipping line was itself or through its agent contractually responsible for the actual misdelivery without presentation of an original bill of lading. It is argued, accordingly, that the claim must be viewed as a simple claim for loss caused by failure to take reasonable care, and that the clause embraces it. However, it remains relevant in my view to construe the clause in the contractual framework in which it is set, and to consider in that light whether it applies to a default of the particular nature that here occurred. That is the exercise which was undertaken in ***Morris v. Martin***. Although the present claim cannot be advanced contractually, it still relates to the line's responsibilities as a continuing bailee regarding delivery up. It was the line's responsibility either itself to deliver up against an original bill, or, if it parted with possession to others, to do so on a basis that meant that they would do so. Like ***Motis Exports,*** the case is not concerned with any physical peril associated with the period post-discharge, but with the basic issue of delivery up to the right person against the proper document. I would share the judge's view that the loss which occurred fell outside clause 5(3)(b).

84. By parity of reasoning, I would reach the same conclusion in relation to clause 5 of the P&O bill. The clause "*howsoever occurring*" addresses the causation, not the type of loss. Clause 5 of the P&O bill is reinforced by clause 7(5)(b), which reads:

"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 of delay, howsoever occurring and whether the action be founded in contract or in tort, negligence or fundamental breach of contract."

A similar, though less comprehensive, version of this clause was considered in ***The Antwerpen,*** where the majority held that it embraced theft or conversion of goods by third parties in conjunction with the employees of the terminal acting for the line. That is a different situation from the present, which is directly concerned with the obligation to deliver up or to make arrangements for delivery up to the person entitled, by requiring presentation of an original bill of lading. I would therefore agree with the judge that clause 7(5)(b) is designed to reinforce the scope of existing exclusions, rather than to extend their scope to different kinds of loss; and that it does not expand the ambit of protection offered by clause 5, so as to cover the present circumstances.

85. It follows that, even if I had concluded (contrary to paragraph 81 above) that clause 5 of the P & O bill and clause 5(3) of the Maersk bill had applied to the carriage of the present container loads, these clauses would not have been apt to protect the appellants against the present claims.

Conclusions

86. In summary:

i) The respondents are unable to claim in contract, whether as original parties or as principals of the Chilean banks, or on any other basis: paragraph 16 above.

ii) The respondents retained the right to immediate possession of the goods at all material times, and were on that basis entitled to hold the appellants responsible in bailment for any loss or damage resulting from breach by the appellants of duty as bailees: paragraphs 49(i), (ii) and (iii)(b).

iii) Even if that was not so, the respondents would have been entitled by virtue of their reversionary proprietary interest as owners to hold the appellants responsible in or on a basis analogous to bailment for any loss or damage caused to such respondents' interest: paragraph 49(iii)(c).

iv) The appellants were in breach of duty in bailment, or alternatively on a basis analogous to bailment, by virtue of their failure either to deliver up the goods to a person entitled to them against presentation of an original bill of lading or, when they parted with possession of the goods to third parties, to arrange for such third parties to be under any similar obligation regarding delivery up; and such breach was causative of the loss by the respondents of their goods: paragraph 68.

v) The doctrine of bailment on terms applies to afford the appellants with the benefit, in relation to the respondents, of any relevant exemptions or protective conditions in the terms of the appellants' bills of lading: paragraph 69.

vi) Upon the true construction of such bills of lading, there are no relevant exemptions or protective conditions, because:

a) The bills fall to be treated as combined transport bills, under which the conditions relied upon by the appellants have no relevant application: paragraph 81.

b) If that had not been so, I would have concluded that the conditions relied upon were not in any event apt to apply to the particular breaches of duty found by the judge, involving failures by the appellants to make arrangements with their sub-contractors for delivery up to be made against presentation of original bills of lading, in a manner reflecting the appellants' own obligations as bailees and the interests of those entitled to the goods: paragraph 85.

vii) Both appellants' appeals therefore fail. The judge's judgment and orders are upheld, although by reasoning which differs in certain respects from that which he adopted.

Lord Justice Laws:

87. I agree.

Lord Justice Brooke:

88. I also agree.

Order: Appeal dismissed. So far as the costs below are concerned, we consider it appropriate to reduce the amount to five percent, taking into account the amount of time spent arguing the contract point. We make the order for payment on account which the parties have agreed. In relation to the question whether the costs of this court should be on a standard basis or indemnity bases we will make the judgment available in the usual way. (Order does not form part of the approved judgment)

Nicholas Hamblen QC & Michael Davey (instructed by Stallard and Hill Taylor Dickinson) for the Appellants
Stephen Males QC & Richard Waller (instructed by Clyde & Co.) for the Respondents