CA on appeal from the Commercial Court (Mr Justice Aikens) before Tuckey LJ; Longmore LJ; Lloyd LJ. 27th July 2007

Lord Justice Longmore:

1. Introduction

This is a case in which cargo-owners have sued shipowners for conversion and breach of contract in relation to a consignment of copper stowed in 18 containers shipped at Durban for delivery in Shanghai. Fraudsters arranged to create and present a false bill of lading against which the shipowners gave a delivery order entitling the fraudsters to delivery from the Hudong Container Terminal warehouse, in which the goods had been stored after arrival. Customs at Shanghai will not permit cargo to be taken out of the container terminal in the port without payment of customs duty and VAT and production of a delivery order stating that payment has been so made. The fraudsters have paid the customs duty and their delivery order has been endorsed by Customs to that effect. Only a day later the cargo-owners presented their (genuine) bill of lading and the shipowners were able to ensure that delivery to the fraudster did not take place. Although the shipowners gave another delivery order to the cargo-owners, that delivery order has not been stamped with any record of duty having been paid and the cargo-owners cannot therefore obtain delivery from the warehouse. This impasse has continued and still exists. In these circumstances the cargo-owners have sued the shipowners and have obtained an order from Aikens J ordering the shipowner to deliver the cargo or pay the full value of the cargo. From that order the shipowners now appeal contending that their liability is only a limited one. This depends on whether the shipowners' liability is governed by the Hague Rules or the Hague-Visby Rules or the terms contained in the bill of lading.

2. The facts are fully and lucidly set out by the judge in his judgment [2007] EWHC 944 (Comm), [2007] 2 All ER (Comm) 149. All that I need to add is that the cargo was discharged in Shanghai on 23rd October 2005, that it was on 24th October 2005 that the shipowners gave the fraudsters the first delivery order and on 25th October 2005 that the cargo-owners presented the true bill of lading against which the shipowners were unable to deliver the goods. The cargo-owners do not say that the shipowners were themselves negligent in any way although they point out that the judge found employees of the ship's agents in Durban were likely to have been parties to the fraud; conversely the shipowners have never alleged that there were any steps which the cargo-owners could or should have taken to mitigate their loss.

3. In these circumstances the judge isolated five issues:-

(1) On the true construction of clause 1(a) of the bill of lading terms, do the Hague Rules ("HR") or the Hague-Visby Rules ("HVR") apply to the bill of lading contract? If the HVR apply do they do so by contract or the force of law?

(2) On the true construction of the bill of lading terms, in particular clauses 4, 7 and 22, do the HR or the HVR apply to the period after the cargo had been discharged from the ship but whilst the containers remained in the container terminal to the order of the shipowners ("the post-discharge period")?

(3) If the HR, alternatively HVR, do apply to the post-discharge period, then, on the true construction of Article IV(5) of the HR or the HVR (whichever is applicable), are the shipowners entitled to limit their monetary liability for conversion of the cargo during the post-discharge period? If so, to what amount?

(4) If the HR, alternatively HVR, do not apply to the post-discharge period, then does clause 22 of the bill of lading exclude or limit any monetary liability of the shipowners if they convert the cargo during the post-discharge period?

(5) If the HR, alternatively HVR, do not apply to the post-discharge period and the shipowners cannot exclude or limit their monetary liability for conversion of the cargo by virtue of the terms of the bill of lading, then what is the proper measure of damages for conversion of the cargo on the facts of this case? In particular: (a) are the cargo-owners entitled to claim damages based on the value of the cargo at the time of judgment or is that claim limited to the value of the cargo at the time of conversion (ie, 24th or 25th October 2005); and (b) are the cargo-owners entitled to recover, in addition to the value of the cargo, any of their "hedging losses"?

The answers which the judge gave to these questions were:-
(1) HVR as a matter of contract;
(2) No;
(3) Inapplicable, but the HVR limit;
(4) No;
(5) (a) Value at time of judgment and (b) no.

4. Issue One: Hague Rules v Hague-Visby Rules?

The bill of lading relevantly provides:-

"(a) For all trades, except for goods shipped to and from the United States of America, this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX, or, if compulsorily applicable, subject to the 1968 Protocol (Hague –Visby) or any compulsory legislation based on the Hague Rules and/or the said Protocols. Where Hague-Visby or similar legislation is compulsorily applicable, the Hague-Visby 1979 Protocol ("SDR" Protocol) shall also apply whether or not mandatory."

Thus for the voyage from Durban in South Africa to Shanghai in China at least the 1924 Hague Rules will apply. The question is whether for that trade the Hague-Visby Rules (or as they are called in the clause "the 1968 Protocol") apply. They will only apply if:-

(1) they are "compulsorily applicable"; or (2) there is "compulsory legislation" based on Hague-Visby Rules.

5. Since the Hague-Visby Rules are part of directly enacted statute law in the United Kingdom in respect of carriage from any Contracting State (Carriage of Goods by Sea Act 1971) and they are also part of directly enacted statute law of the Republic of South Africa in respect of carriage from South Africa (Carriage of Goods by Sea Act 1986), a commercial man might not be surprised to be told that the contract of carriage contained in the bill of lading issued by or on behalf of the shipowners was subject to the Hague-Visby Rules. Unfortunately it is not as simple as that.

6. Mr Parsons QC for the shipowners fastens on the words "compulsorily" and "compulsory" and submits that the Hague-Visby Rules can only apply if it is "compulsory" to apply them. It can only be "compulsory" to apply the Rules if it is a relevant law that "compels" that application. The only possible laws to which it is necessary (or indeed possible) to look are the law which governs the contract of carriage (English law by virtue of clause 2(a) of the bill of lading) or the lex fori (the law of the place in which the litigation is taking place, also (here) English law). He then says that as a matter of substantive English law the Hague-Visby Rules only apply if:-

(a) the bill of lading is issued in a "contracting State"; or

(b) the carriage is from a "contracting State"; or

(c) the contract contained in or evidenced by the bill of lading provides that the Hague-Visby Rules are to govern the contract.

He then submits that none of these conditions are satisfied because (1) although South Africa has enacted the Hague-Visby Rules it has never signed the 1968 Protocol and is, therefore, not a "contracting State" and (2) the bill of lading has not provided that the Hague-Visby Rules are to govern the contract but only that they are to govern the contract if compulsorily applicable which, as a matter of English law, they are not.

7. The material provisions of the English Carriage of Goods by Sea Act 1971 as amended are:-

"1.(1) In this Act, "the Rules" means the International Convention of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968 and by the Protocol signed at Brussels on 21 December 1979.

(2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law. …….

(6) Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to–

(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, ……..

Schedule. The Hague Rules as amended by the Brussels Protocol 1968. ……..

Article X

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if

(a) the bill of lading is issued in a contracting State; or

(b) the carriage is from a contracting State; or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person."

8. Mr Kendrick QC for the cargo-owners accepts that South Africa is not a *"contracting State"* and that neither Article X(a) nor X(b) can apply. He submits however that the words "*compulsorily applicable*" indicated that the Hague-Visby Rules were intended to apply if they were applicable by the law in force at the port of shipment. On this point the judge found in his favour. He also submitted (by respondent's notice) that he could rely on the third phrase of the bill of lading clause, *"any compulsory legislation based on"* the Hague-Visby Rules, since the South African enactment of those Rules constituted "*compulsory legislation*" based on the Hague-Visby Rules for the purposes of the clause. On this point the judge held that he was wrong.

9. For the purposes of analysis it is useful to break the clause down into its constituent parts:-

(1) Agreement that for all trades (apart from voyages to and from the USA) bills of lading are to have effect subject to the Hague Rules 1924. This can be called the default position and is the state of affairs for which the shipowners contend since that applies the low limit of £100 per package or unit (Article IV rule 5);

(2) Agreement that the bills of lading are to have effect subject to the 1968 Protocol (otherwise the Hague-Visby Rules (the "HVR")) if the HVR are compulsorily applicable;

(3) Agreement that bills of lading are to have effect subject to any compulsory legislation based on the HVR (emphasis is supplied to show that the distinction between (2) and (3) is between application of the HVR as such and legislation which is based on the HVR rather than legislation which enacts the ipsissima verba of the Rules).

For my part I cannot see any distinction between the Rules being "*compulsorily applicable* " and the legislation based on the Rules being *"compulsory";* moreover the last sentence of the clause providing for the application of the SDR protocol of 1979 uses the one phrase "*compulsorily applicable"* to embrace both parts (2) and (3) of the clause.

10. The judge observed that the most obvious way the HVR would be compulsorily applicable according to English statute law (granted that neither Article X(a) nor Article X(b) could apply) would be if Article X(c) were to apply. He then said (correctly) that the bill of lading did not provide that the Rules applied since it only provided that

they applied if they were compulsorily applicable which still left open the question whether they were in fact compulsorily applicable. He then considered the second part of Article X(c) and asked whether the bill of lading provided that the legislation of any State giving effect to the HVR was to govern the contract. He held (again correctly) that it was not enough for the bill of lading to provide generally that the legislation of any State giving effect to the HVR was to govern the contract; it had to identify the legislation of a particular State. Otherwise one could not know which legislation was applicable in any particular case. The position would no doubt be different if the bill of lading had provided that the HVR "as enacted in the country of shipment" were to apply but this bill of lading does, of course, not do so. The judge's conclusion that English statute law does not render the HVR compulsorily applicable is thus unassailably correct.

11. The judge nevertheless held that the HVR applied as a matter of contract because in the context of the clause (particularly the use of the words "For . . . trades") the phrase "compulsorily applicable" included the concept of compulsory application at the port of shipment.

12. I do not agree with that conclusion for three reasons. In the first place it seems to me inconsistent with the judge's own reasoning for rejecting the application of the second part of article X(c) as a matter of the application of English statute law. If the words "legislation of any State" require the legislation of a particular state to be specified, why does the same not apply to a clause of a bill of lading which likewise refers to "legislation based on" the HVR. The bill of lading does, of course, state that such legislation is to be "compulsory" but, if any legislation will do, one will again not know what legislation is applicable in any particular case. The fact that the phrase "for . . . trades" is used does not, in my view, help. A trade does, of course, start from a particular port but it also goes to a particular port. If (as is usual) those ports are in different countries, one will still not know whether it is the country of shipment or the country of destination whose application of the Rules is to be regarded as "compulsory". One still has to ask 'compulsory according to which system of law?' The only sensible answer is compulsory by the proper law of the contract. It is fair to say that the lex fori will also have to be considered but that is incidental. If the law of the place where the action is brought compels the application of the HVR that will be the end of the matter merely because the relevant court happens to be sitting where the HVR compulsorily apply. But that incidental fact cannot afford a complete answer. The judge has correctly held that English statute law does not make the HVR applicable but they could still be compulsorily applicable if the proper law of the contract so required. Here it does not.

13. Secondly the words "compulsorily applicable" have consistently, as a matter of English law, been given the meaning of "applicable according to the proper law of contract". It may be said that this is a matter of assumption rather than direct decision at the level of this court but it is only necessary to refer to ***Holland Colombo Trading Society Ltd v Alawdeen & ors*** [1954] 2 Lloyds Rep 45 at page 53, **Nea Agrex SA v Baltic Shipping Co Ltd** [1976] QB 968 D-H per Goff LJ, ***The Komninos S*** [1991] 1 Lloyds Rep 370 (where, although there was no reference to compulsory applicability, a reference to English law was held to be insufficient to incorporate the HVR) and ***The Happy Ranger*** [2001] 2 Lloyds Rep 530, 540 para. 34 per Tomlinson J and [2002] EWCA Civ 694, [2002] 2 Lloyds Rep 357, 361-2, para. 20 per Tuckey LJ. It would not be right for this court to depart from this frequently expressed view held by the courts unless the clause clearly requires some other view to be taken as a matter of construction. The addition of the word "For . . . . trades" is not enough for the purpose.

14. Thirdly, although the judge claimed to derive support from the judgment of Rix LJ in ***The Happy Ranger***, that support is illusory. It is true that Rix LJ relied on the words "In trades" or the phrase "*In trades where . . . . the Hague-Visby Rules – apply compulsorily"* to reach his conclusion that the HVR could, with manipulation, apply to a contract which looked more like a charterparty than a bill of lading. But in the first place his judgment was a dissenting one on this particular point and in the second place he still accepted that the application of the HVR had to be compulsory. That compulsion was present by virtue of Article X(b) of the Rules because Italy (where the goods were shipped) was a contracting State. That element of compulsion is not present in our case since South Africa is not a contracting State.

15. In his authorial capacity the judge has described the ratio of Rix LJ in the ***Happy Ranger*** as being that on the wording of the particular clause in that case any construction, other than that the parties intended the HVR to apply, made no commercial sense and he does not disguise his preference for the judgment of Rix LJ to that of the majority, see Aikens, Bills of Lading (2006) para. 10.39. But for the reasons I have given, I do not consider that this approach is open to this court in the present case.

16. I, therefore, agree with Mr Parsons that the scheme of the bill of lading in the present case is that the Owners, as a matter of contract, accept Hague Rules (1924) obligations but only accept HVR obligations if they are forced to do so. They can only be forced to do so if the proper law of the contract compels it (or, if the place where the cargo-owners choose to sue them, compels it). Neither law compels it on the facts of the present case and they are not contractually obliged further than the law compels. Whether that is an attractive way for a shipowner to do business 40 years after the Hague-Visby Protocol was internationally agreed is a different matter and cannot be of any relevance to the construction of this contract of carriage.

17. Mr Kendrick developed an argument to the effect that the bill of lading should, as a matter of contract, be construed to apply to the HVR if compulsorily applied by the law of the country of shipment, because that was the only way in which the shipowners could preserve their (ex hypothesi desirable) exclusive choice of English law and jurisdiction. He pointed out that a particular feature of the HVR (at any rate as enacted in England) was their mandatory effect. If a claim was brought in England but the proper law of the contract applied a less favourable

limit than the HVR (eg the Hague Rules limit) any choice of jurisdiction for the courts which applied the proper law would be defeated by the requirement of the lex fori that the Rules be mandatorily applied. This was made clear in ***The Hollandia*** [1983] 1 AC 565 where the English courts refused to stay an action brought in England even though the parties had agreed Dutch law and jurisdiction because a claim brought in Holland would have been subject to the Hague Rules 1924 limit and not the HVR limit. So, argued Mr Kendrick, any bill of lading subject to English law should be construed, if possible, to provide for the application of the HVR.

18. This argument puts the contractual cart before the legal horse. If a set of Rules is applicable only if compulsorily applicable one has to look to the proper law of the contract to determine if they are applicable. One cannot say that the proper law of the contract would apply the Rules compulsorily if a claim were brought in England and then say that the Rules must therefore apply contractually if the fact of the matter is that the Rules are not compulsorily applicable. The only reason why the Rules are not compulsorily applicable is that, although South Africa has enacted the Rules, it is for some reason not a "contracting State". The reason for this is puzzling but irrelevant. The fact is that the HVR are not compulsorily applicable and that is the end of the matter. Of course if the claim had been brought in South Africa and if South African law were the same as that declared by the House of Lords in ***The Hollandia,*** then the South African courts might not have stayed any action brought by the claimants, on the ground that English law would not apply the HVR and that would be contrary to the mandatory provisions of South African law. But that would be a different case, not this case.

19. The Respondent's Notice

Lastly, under this head, Mr Kendrick argued that on any view the HVR were applicable under the last part of the first sentence of the clause because the South African legislation was at least based on the HVR. But, as I have already said, the contrast between the second and third parts of the clause is the contrast between (1) enacting the Rules as national law in the very words of the Rules and (2) enacting legislation which is merely based on the Rules. In either case the legislation has to be compulsory. In this case the legislation is not compulsory for the purpose of either the second or the third parts of the clause. On this point the judge was right.

20. Issue Two: Application of either set of Rules after discharge?

The shipowners submitted that the Rules (as they would correctly say the 1924 Rules) applied after discharge so that they were entitled to limit the claim to £100 per package or unit. The cargo-owners submitted that the Hague Rules (in whichever version), if one looked at the Rules themselves, only applied for the period between loading and discharge. The period after discharge was therefore governed by the terms of the bill of lading. Although the parties could agree that the Rules applied to any part of the shipowners' obligation that occurred before loading and after discharge, they had not so agreed in this case. The judge accepted the cargo-owners' submissions.

21. Articles II and III rule 2 of the Hague Rules (as also of HVR) provide as follows:-

"Article II

. . . . under every contract of carriage of goods by sea the carrier in relation to the loading , handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth . . . .

Article III rule 2

Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

22. Shortly after the Carriage of Goods by Sea Act 1924 was enacted in the United Kingdom, Wright J in ***Gosse Millard v Canadian Government Merchant Marine Ltd*** [1927] 2 KB 432 said of the Hague Rules (page 434):-

"These Rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions."

He then said that under the Rules these liabilities rights and immunities were precisely determined and, after quoting Article III rule 2, said:-

"The word "discharge" is used, I think, in place of the word "deliver", because the period of responsibility to which the Act and Rules apply (Art I (e)) ends when they are discharged from the ship."

This was echoed in the famous dictum of Devlin J in ***Pyrene Co v Scindia Navigation Co*** [1954] 2 QB 402, 408 that the object of the Hague Rules:-

"is to define not the scope of the contract service but the terms on which that service is to be performed."

This is now accepted doctrine, see ***The Arawa*** [1977] 2 Lloyds Rep 416, 424-5 per Brandon J and ***The Captain Gregos*** [1990] 1 Lloyds Rep 310, 311 per Bingham LJ.

23. It must follow from this that the parties are free to agree on terms other than the Hague Rules (or the HVR) for periods outside the actual period of the carriage. No doubt if no agreement is made for the period after discharge, it might be easy to say that the parties have impliedly agreed that the obligations and immunities contained in the Hague Rules continue after actual discharge until the goods are taken into the custody of the receiver. That is the view expressed by Carver on Bills of Lading, 2nd edition (2005) by Sir Guenther Treitel QC

and Professor Francis Reynolds QC, para. 9-130 and Mr Parsons submits that that should be the position in this case.

24. Like the judge I consider that this submission is inconsistent with the express terms of the bill of lading. This has to be ascertained from what Wright J might have called "elaborate and mostly illegible conditions" but their elaborateness and illegibility does not mean that it is appropriate to ignore them if they do indeed provide that the obligations and immunities of the Hague Rules do not apply after discharge of the goods carried. Clauses 4(ii) and (iii) provide:-

> *"(ii) The responsibility of the Carrier is limited to that part of the Carriage from and during loading onto the vessel up to and including discharge from the vessel and the Carrier shall not be liable for loss of or damage to the goods during the period before loading onto and the period after discharging from the vessel, howsoever such loss or damage may arise. Loading and discharge take place when the goods pass the vessel's rail or ramp.*
>
> *(iii) When the goods are in the custody of the Carrier and/or his subcontractors before loading and after discharge, whether being forwarded to or from the vessel or whether awaiting shipment landed or stored, or put into hulk or craft belonging to the Carrier, or pending transhipment, they are in such custody for the risk and account of the Merchant without any liability of the Carrier."*

Clause 7 provides, inter alia:-

"The vessel may commence discharging immediately on arrival without notice to the consignee or any other party . . . . on to quay or into shed, warehouse, depot, ... vehicle, vessel or craft as the Carrier or his agents may determine. Such discharge shall constitute due delivery of the goods under this Bill of Lading . . . . Whether the vessel's tackles or shore cranes or other means be employed in the course of delivery onto Quay or otherwise, any loss of, of damage to the goods . . . shall, after the end of the Hague Rules period, be at the sole risk of the consignee in every respect whatsoever . . . ."

These clauses make it clear to my mind that the parties did not intend the Hague Rules to apply after discharge from the vessel. The fact that clause 7 refers to loss "after the end of the Hague Rules period" shows that there is to be a period when the Hague Rules do not apply but which will otherwise be a time when the Owners may still have the obligations of a bailee in respect of the goods and can agree that the terms of that bailment are not to be those of the Hague Rules. The Owners' purported disclaimer of liability for what happens after discharge does not make any difference to that intention.

25. Mr Parsons emphasised the words "in any event" in Article IV rule 5 as being apt to extend the Hague Rules period in respect of the package limitation. Article IV rule 5 begins with the words:-

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in any amount exceeding £100 per package or unit".

But that is to put too much emphasis on the words "in any event"; they are part of the Hague Rules obligation but if those obligations, by agreement, cease on discharge of the goods, the concept of "in any event" must also cease.

26. On this issue I agree with the judge.

27. Issue 3: Limit if HR or HVR apply

The judge concluded that, although misdelivery of the goods is about as serious a breach of duty as there could be, the Hague Rules or HVR limitation would nevertheless apply if it was agreed that the Rules should continue to apply after discharge but before the receiver obtained custody of the goods. Since he had held that the Rules did not apply, these expressions of view were obiter. The judge's view, of course, deserves great respect. Nevertheless since it is not relevant to the ultimate outcome of the case, I would prefer to express no views on this matter. These days a misdelivery of the kind which occurred in this case is unlikely to occur during the Hague Rules period, if not extended by agreement. I would prefer to leave this not entirely easy question to be decided against the background of a concrete set of facts which specifically raises the question for decision.

28. Issue 4: The contractual position after discharge

I have already set out the provisions of clauses 4(ii) and (iii) and clause 7. They purport to exclude all liability of the Owners after the goods have been discharged. On their face, therefore, it would appear that the cargo-owners' claim must fail.

29. Mr Parsons accepts, however, that the exclusions contained in these clauses do not apply to the misdelivery which occurred in this case whether such misdelivery is constituted by the wrongful giving of a delivery order to the fraudsters or by the refusal to hand over the goods on production of an original, genuine, bill of lading. The reason why he accepts this is that there is a long line of authority which says that very clear words are required to exclude such a serious breach of duty. The importance of the obligation to deliver the goods against an original bill of lading stems from the negotiable nature of a bill of lading. It is itself a document of title, indorsement and transfer of which operates to pass title in the goods to which it relates.

30. Two 19th century cases in this long line of authority are ***Glyn, Mills Currie & Co v East and West India Dock Co*** (1882) 7 App Cas 591 and ***The Stettin*** (1889) 14 PD 142. ***Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*** [1959] AC 576 is a famous 20th century example. In that case a manufacturer shipped bicycle parts under a bill of lading which required the goods to be delivered "*unto order or his or their assigns*" and also provided that "*the responsibility of the carrier . . . . shall be deemed . . . . to cease absolutely after the goods are discharged*". After

discharge the shipowners' agent released the bicycle parts to the consignee without production of the bill of lading but obtained a letter of indemnity against any liability from the consignee's bank. The consignee never paid and the manufacturer sued the shipowners for breach of contract and conversion. The shipowner relied on the exclusion clause. Lord Denning, delivering the advice of the Judicial Committee, said (pp 526-7):-

*"The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: "**Of course not**." There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it: and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.*

But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company, *"unto order or his or their assigns*," against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see ***Glynn v. Margetson & Co; G. H. Renton & Co Ltd v. Palmyra Trading Corporation of Panama***."

31. In ***Motis v Dampskibsselskabet af 1912*** [2000] 1 Lloyds Rep 211 a fraudster had presented forged bills of lading (as in the present case) and the shipowners or their agents had issued delivery orders on presentation of the forged bills. There was a similarly wide exemption clause "*for loss or damage . . . . however caused*" on which the shipowners relied, saying that the events should be categorised as theft without negligence on their part and so should fall within the clause. Stuart-Smith LJ said (page 216):-

"A forged bill of lading is in the eyes of the law a nullity; it is simply a piece of paper with writing on it, which has no effect whatever. That being so delivery of the goods, or in this case the delivery order which was tantamount to the delivery of the goods, was not in exchange for the original bill of lading but for a worthless piece of paper. No doubt so far as the owner of the goods is concerned there is little difference between theft of the goods by taking them without consent of the bailee and delivery with his consent where the consent is obtained by fraud. Mr. Dunning, adopting the colourful phrase sometimes used of a bill of lading, that it is the key to the floating warehouse, or in this case the container yard, said that it made no difference whether the thief used a duplicate key to break in and steal or a forged metaphorical key. But one cannot take the metaphor too far. In my judgment cl 5(3)(b) is not apt on its natural meaning to cover delivery by the carrier or his agent, albeit the delivery was obtained by fraud. I also agree with the Judge that even if the language was apt to cover such a case, it is not a construction which should be adopted, involving as it does excuse from performing an obligation of such fundamental importance. As a matter of construction the Courts lean against such a result if adequate content can be given to the clause. In my view it can, as I have indicated in para. 13; it is wide enough also to cover loss caused by negligence, provided the loss is of the appropriate kind."

32. If, therefore, the only relevant clauses of the bill of lading were clause 4(ii) and (iii) and 7, there can be no doubt that they would not suffice to excuse the shipowners from their act of conversion and their breach of contract in issuing delivery orders to the fraudsters without the production of the bill of lading. That is all the more the case when one reads the last provision on the front page of the bill of lading which states that 3 original bills of lading covering the cargo have been issued and then provides that if the bill of lading is negotiable (which it was)

". . . . the goods will only be delivered if one original bill of lading, properly endorsed by the shippers and/or the Bank concerned (and not by the Notify Party) is surrendered the others being considered null and void."

Thus in the present case the basic obligation to deliver against an issued (genuine) bill of lading is given its own prominence on the very front of the bill.

33. It is in these circumstances that Mr Parsons seeks to rely on another clause of the bill of lading altogether. Again it is elaborate and scarcely legible. It provides:-

*"22. **CLAIMS VALUATION, PACKAGE LIMITAT-ION TIME-BAR**. The indemnity payable by the Carrier for non-delivery of the cargo in whole or in part is calculated at the option of the Carrier on the basis of the invoice value or on the basis of market values at destination, less duties and expenses saved due to the shortage, except in USA jurisdiction where the sound market value at destination shall be considered. In any event the Carrier's liability shall not exceed the usual sound market value of the goods at the time and place of shipment. However, should the invoice value of the goods be lower than the usual sound market value at the time and place of shipment, the Carrier will only pay the invoice value. For lack of any usual sound market value or invoice value, this provision shall apply to the common value accordingly. Neither the Carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding the limitation allowed under the Hague Rules or the Hague-Visby Rules/SDR limitation or the COGSA limitation, depending on which of these is contractually or compulsorily applicable, per package or unit, unless the nature and the value of such goods have been declared by the Merchant before shipment and inserted in the Bill of Lading. However, declaration of value for the purpose of calculation of*

freight shall not be considered a declaration in the above sense. This limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes. In so far as goods are shipped to or from the United States, the Carrier's liability shall be limited to $500 per package or customary freight unless excess value is inserted on the face hereof and extra charge paid. The words "customary freight unit" shall mean (under COGSA) the unit of weight or measurement customarily used to calculate freight. Where the goods have been packed into sealed containers by or on behalf of the Merchant, it is expressly agreed that each container shall constitute one package for the purpose of application of limitation of the Carrier's liability, since the Carrier cannot verify its contents. If the Merchant has a shortage in goods or numbers shipped under a Bill of Lading, the Carrier shall have the option to deliver as substitute any surplus goods of similar kind or quality. Notice in writing of loss or damage must be given to the Carrier's Agent at the Port of Discharge or Final Destination, promptly after delivery of the goods, and in any case within 3 running days from the date of delivery as defined in Clause 7, and the Carrier to be invited to participate, at his option, in a joint survey. The cargo is otherwise prima facie considered delivered by the Carrier in the same condition as described in the B/L. Claims are to be addressed to the MSC Agent supported by, at least, the following documents: claim narrative identifying clearly the claimant and providing evidence on his title to sue, Original B/L Commercial Invoice of damaged goods, Letter of Subrogation, if any, survey reports. In any event, the Carrier shall be discharged from all liability if suit is not commenced within one year after delivery of the goods or the date that the goods should have been delivered, for claim related to loss or damage during the carriage by sea and nine months for claims related to loss or damage during non-water inland port [sic: probably "non-water transport" is intended]. Agreed claims will be settled by the carrier only once with one of the parties that is entitled to sue, i.e. with the Shippers POL or with the Consignees at the POD, but not with both. Settlement of an agreed claim by the Carrier with either of the above discharges the Carrier from all and any liability for the same loss or damage under this B/L."

34. I have set out the entirety of the clause so that the reader can see its full import. In fact Mr Parsons only relies on the 5th and 7th sentences but that immediately raises the question whether it was likely to have been the intention of the parties that liability for failure to perform obligations of such importance as the obligation to deliver the goods against presentation of a properly indorsed original bill of lading should be limited by sentences buried within a clause of such length and complexity.

35. It is, in my view, so unlikely as not to be the case. At first sight the clause seems to be concerned with the quantum of non-delivery (not misdelivery) claims. The first sentence says that the carrier has the option of limiting such claims to the invoice value, except in the United States of America. The second sentence limits that figure by reference to the sound market value at the place and time of shipment. The third sentence then says that the invoice value is to prevail if lower than the sound market value. The fourth sentence is almost incomprehensible but still applies to the quantification of claims for non-delivery. Then, without any reference to misdelivery, the clause continues in its fifth sentence by providing for the Hague (or Hague/Visby) package limitation "in any event". The natural reading is to apply that to non-delivery as with the previous 4 sentences. The sixth sentence relates to declaration of value for the purpose of calculating freight. The seventh sentence then provides for the package limitation to apply *"to all contractual claims as well as to any claims arising from other causes"*.

There is then a special provision for United States cargo in the eighth sentence. The ninth sentence is irrelevant for present purposes but the tenth sentence provides that a container is to constitute one package, however many packages there may be inside the container. If the shipowner can rely on the fifth and seventh sentences, therefore, they will be able to limit their liability for breach of this highly important obligation to £1,800 in all. The eleventh sentence is irrelevant. The twelfth sentence requires notice in writing of loss or damage to be given within 3 days of the date of delivery as defined in clause 7 otherwise according to the thirteenth sentence the delivered condition of the goods is prima facie assumed to be the condition as stated in the bill of lading. The fourteenth sentence specifies the documentation required in support of any claim. There is then an important fifteenth sentence which provides that the carrier is in any event to be discharged from all liability if suit is not commenced within one year *"for claims related to loss or damage during the carriage by sea"*.

This time limit provision, therefore, only relates to loss during the carriage and cannot apply to a claim for failure to deliver against production of the bill of lading once the sea carriage is over. That would make it all the more surprising if the package limitation provision was intended to apply to such claims. One may note with a certain sense of exhaustion that the sixteenth and seventeenth sentences of the clause need no examination.

36. Mr Kendrick went so far as to submit that the entirety of clause 22 was intended to apply only to claims that arose between loading and discharge which could be categorised as arising "during the carriage". The fifteenth sentence is a good indicator that that could be the case. The judge seems to have agreed with the submission since he held that, since all liability had been excluded after discharge by clause 4 and since discharge was deemed to be delivery under clause 7, there could not have been any intention to limit liability for claims which arose after discharge had taken place. This is a neat way of disposing of the clause. But I consider it goes too far. If the Hague Rules apply to the actual carriage up to and including discharge, clause 22 must be intended to deal with matters arising before or after the Hague Rules period save where (as in the case of the time-bar) it expressly provides otherwise.

37. Nevertheless this mélée (or perhaps congeries) of provisions contained in clause 22 is not, in my judgment, apt to limit liability for the essential obligation to deliver against original bills of lading. Any exemption or limitation of liability for such a breach has to be clearly expressed and clause 22 does not clearly do so. (It may be noted that the exception clause in ***The New York Star*** [1981] 1 WLR 138, 146G expressly referred to "misdelivery".)

There are other obligations to which the fifth and seventh provisions can apply, particularly if one were to conclude that the exclusion in clauses 4 and 7 were not apt to exclude cases where a claimant could show that the shipowners had been negligent. In these circumstances the shipowners' construction of the clause would (to use the words of Mance LJ in para. 8 of his judgment in Motis) "appear to undervalue the importance which both parties must be taken to have attached to the ship's obligation to deliver against presentation of original bills of lading". On this part of the case I agree with the conclusions of the judge.

38. Issue 5: Value at date of breach not date of judgment

A considerable part of the judgement relates to the way in which the cargo-owners have sought to deal with the problems facing them as a result of the non-receipt of the cargo and, in particular, the losses they have incurred in keeping an open position in relation to the copper which they obtained from their purchaser. The judge held that hedging losses as such were not foreseeable by the shipowners and were thus not recoverable. The form of judgment given against the shipowners provides that, if the shipowners do not deliver the cargo, they are to be liable to pay the value of that cargo at the date of judgment. The judge considered that this was the figure which would most fairly compensate the cargo-owners for their loss as a result of the shipowners' conversion of the goods. He gave four reasons for so holding, and I agree with those reasons.

39. Mr Parsons submitted that this judgment effectively gives the cargo-owners their hedging losses under the guise of the value of the cargo at the date of judgment and that, for this reason, it is not right to award the judgment value. I do not agree. The hedging losses claimed which the judge held to be too remote for recovery have no relevance to the question whether the claimants are more fairly compensated for their loss by reference to the date of conversion (24th or 25th October 2005) or the value at the date of judgment (26th April 2007). The issue is an important one since the value of copper has risen steadily since the date of conversion. But it seems to me that the judge was, in principle, correct. The figures are somewhat stark because of the inevitable delay before the judgement of the court was given but the starkness of the figures cannot influence the decision on this issue.

40. If the events of which the claimant cargo-owners complain had all happened in England, an order would probably have been made for the sale of the cargo pendente lite and no doubt judgment would have been given for the figure fetched at the time of sale (together with interest). The fact that such an arrangement has not occurred in China and that the goods cannot, apparently, be released until a decision of the Chinese court is obtained (facilitated or otherwise by the judgment in these English proceedings) is not suggested to be the fault of the claimants. Indeed no suggestion has ever been made that the claimants have failed to mitigate their loss whatever that loss may have been. Once judgment is satisfied, the shipowners will have title to the goods and can sell them to the fraudsters or any one else and they will no doubt obtain the value at the time of that sale. In these circumstances I agree with the judge that the fairest way to compensate the claimants is to award them the value of the cargo at the time when he gave his judgment.

41. Even if the judge had awarded damages based on the value of the cargo at the date of conversion, he would have been able to award the difference in value between the date of conversion and the date of judgment as loss consequential on the shipowners' breach of duty. This is expressly authorised by section 3(2)(b) of the 1977 Act. It is true that, as the judge remarked, the statute does not elaborate on the expression "consequential damages" in the sub-section but it is the sort of loss which the common law contemplated in ***Sachs v Miklos*** [1948] 2 KB 23 and there is no reason to think that the statute has changed the position. This consequential loss could equally be described as damages for loss of use of copper between the date of conversion and the date of judgment and ought to be recoverable as such, provided that there is no allegation that the claimants have failed to mitigate their loss.

42. On top of this the judge also awarded the claimants interest on the invoice value of the goods between the date of conversion and the date of judgment on the basis that, for that period, the claimants had been out of their money.

43. I cannot think that that is right because that will give the claimants a double benefit. The basis of an award of the value of the goods at the date of judgment is that, although the claimants did not have the money when they expected to have it, they will be compensated for that by the increase in the value of the copper cargo.

44. There is, as it seems to me, a compelling analogy with cases about damages for the loss of use of a chattel or of land. It would be surprising for a claimant to be able both to recover damages for not having had the use of a chattel or the use of land and to recover interest for not having had the money which represents the value of the chattel or the land. It was on this basis that Chitty J declined to award interest on damages which he gave for the wrongful use of land in ***Whitman v Westminster Brymbo Co*** [1896] 1 Ch 894, 899, see McGregor Damages 17th ed (2003) para 15-037 note 78. I consider that the same principle is applicable where a court awards the value of chattels at the date of judgment and I would therefore delete the first two and a half lines of paragraph 3 of the judge's order of 26th April 2007.

45. Conclusion

Subject to that minor variation of the judgment, I would dismiss this appeal.

Lord Justice Lloyd: I agree

Lord Justice Tuckey: I also agree

Luke Parsons Q.C. and Chirag Karia (instructed by Messrs Hill Dickinson LLP) for the Appellant
Dominic Kendrick Q.C. and Charles Holroyd (instructed by Reed Smith Richards Butler LLP) for the Respondents