CA before Sir Andrew Morritt VC; Chadwick LJ; Rix LJ. 23rd January 2001

RIX LJ

1. This appeal raises three issues familiar to shipping law: (1) Are the bills of lading in question owners' bills or charterers' bills? (2) If they are charterers' bills, can the owner of the vessel that performed the carriage be sued in tort? (3) If the owner can be sued in tort, to what extent can it be protected by the *Himalaya* clause contained in the bills of lading?

2. The novelty in the first issue is the presence of a demise clause in the printed terms of the bills of lading combined with a signature for a liner company described as the "carrier". The novelty in the second issue is the transfer of title in the goods while they are still afloat and the occurrence of damage both before and after the transfer of title. The novelty in the third issue is the reliance placed by a third party to the bill of lading on the opening words of the *Himalaya* clause, which have not been previously invoked as operating to the benefit of third parties as distinct from the carrier itself.

3. In his judgment below, Colman J held that the bills were charterers' bills, that the owner could be sued in tort, and that it was entitled under the *Himalaya* clause to the same protection as was available to the carrier under the bills, but no further. On the facts, therefore, he held that the claimants, who were purchasers and receivers of various consignments of timber and plywood, shipped on the defendant's vessel ***Starsin*** from three ports in Malaysia to Antwerp and Avonmouth, could recover from the owner in tort, for the owner's negligence in stowing the cargo at shipment, in respect of damage which he found had occurred after title in the goods had passed to the claimants from their respective sellers. His judgment is reported at [2000] 1 Lloyd's Rep 88.

4. The owner now appeals from that judgment, and the claimants cross-appeal.

5. On behalf of the owner, Mr Steven Berry submits that there can be no liability in the tort of negligence by a shipowner to a future cargo owner, even one who suffers damage to his goods while they are still afloat, because no duty of care was owed to that future owner at the time of the negligent act (at shipment). He also submits that, properly understood, the judge's findings concerning damage were that no new damage occurred after title in the goods had passed to the claimants other than was merely a continuation to that which was already in progress before such passing of title. He therefore submits that the claim in tort must fail at the outset, and as a matter of principle. If, however, the claim is actionable, it must fail because of the opening wording of the *Himalaya* clause, to the protection of which the owner is entitled, which says that no independent contractor (viz the owner, on the hypothesis of charterers' bills) shall be under any liability whatsoever to a shipper. He also seeks to support the judge's holding that the bills are charterers' bills. Therefore, he submits, the owner is liable to the claimants neither in contract nor in tort.

6. On behalf of the claimants, Mr Nigel Jacobs on the other hand submits that the judge was wrong to hold that the bills were charterers' rather than owners' bills. On that basis the owner is liable in contract under its own bills, and all further questions fall away. It is irrelevant whether the damage occurred before or after passing of title, because on negotiation of the bills all rights of action in contract, going back to shipment, pass to the claimants by reason of the operation of the Carriage of Goods by Sea Act 1992. Even if the bills are charterers' bills, however, the judge was right to hold that there was liability in tort, for, seeing that a duty of care is owed to buyers to whom title passes while the goods are still afloat, the critical factor is that the damage occurred after title had passed. As for the judge's findings about the damage, properly interpreted they were to the effect that wholly new damage, to distinct parcels of timber or plywood, occurred after the change of title. As for the opening wording of the *Himalaya* clause, this did not operate to the benefit of third parties, but only to the benefit of the contractual carrier under the bill of lading: it was subsequent wording in the clause which protected third parties, and that did so only on the same terms as applied to the carrier. Therefore the owner was primarily liable in contract, under its own bills, but if not liable in contract, was liable in tort in circumstances where the protection of the *Himalaya* clause did not excuse negligence in the stowage of cargo.

7. In these circumstances, it is convenient to take the owners' or charterers' bills issue first, because, if the judge were mistaken as to that, all other questions are of secondary importance. It was for that reason that Mr Jacobs was asked by the court to open his cross-appeal on that issue first.

The facts

8. There are three separate actions. Under 1996 Folio 237 the claimants are (1) Makros Hout BV, who sues in respect of plywood shipped from Kuching to Antwerp under six bills of lading and Fetim BV who sues in respect of plywood and timber panels shipped from Port Klang to Avonmouth under a further five bills (the Makros Hout and Fetim bills respectively). Under 1997 Folio 93 the claimant is Homburg Houtimport BV, who sues in respect of yellow Balau timber shipped from Belawan to Antwerp under four bills (the Homburg bills). Under 1997 Folio 92 the claimant is Hunter Timber Group Ltd, who sues in respect of plywood shipped from Port Klang to Avonmouth under two bills (the Hunter bills). Each of the claimants was named in their respective bills as the notify party and each was either a cif (or c&f) buyer of the timber identified in the respective bills, or, in the case of Fetim an fob buyer whose seller retained a *ius disponendi* pending payment. In other words none of the buyers obtained title to their respective consignments until payment.

9. Thus there were three loading ports, Kuching, Belawan and Port Klang. The vessel completed loading at the third of those ports on 8 December 1995 and sailed for Antwerp.

10. The dates of the respective bills were as follows. The Makros Hout bills were dated 10 November 1995 at Kuching. The Homburg bills were dated 14, 21 and 23 November 1995 at Belawan. The Fetim bills were dated 28 November 1995 at Port Klang. And the Hunter bills were dated 4 December 1995 at Port Klang.

11. The judge found that all these bills (other than the Hunter bills) had been ante-dated, that is to say that they were given a date earlier than the actual date of shipment of the respective goods. Thus the Makros Hout goods were shipped on 14, not 10 November 1995; the Fetim goods were shipped on 7 December, not 28 November 1995; and the Homburg bills (with the exception of that numbered 062) were also dated earlier than the relevant mate's receipts.

12. Moreover, although all the bills of lading were clean shipped on board bills, the mate's receipts contained endorsements to the effect that the Makros Hout goods (loaded at Kuching) suffered various defects including "discolouration wet/wetting from rain", and that the Homburg goods (loaded at Belawan) were "All bundles partly wet before shipment". The judge therefore found as a fact that part of the Makros Hout goods loaded at Kuching and part of the Homburg goods loaded at Belawan were affected by wet damage before shipment, and he also found that the same was true of the cargo loaded at Port Klang (at 106).

13. The claimants obtained title to their purchases on various dates following loading. Thus Makros Hout obtained title on 27 November, Fetim on 11 December, and Homburg on 15 December (as to two bills), 21 December (as to another two) and 23 December 1995 (as to the fifth). Hunter was unable to show at what date it obtained title to its goods. The obtaining of title by Makros Hout needs to be observed, for it was at an earlier stage than the other claimants. Thus in its case (Folio 237) title was obtained before the ocean voyage proper got under way on 8 December, and before any of the condensation damage was found to have occurred (see below). In this respect Makros Hout is in an exceptional position.

14. For the purpose of the claimants' claim in tort, it was necessary for them to prove what damage had been suffered by their goods after each had obtained title to them. There was no submission that in tort they were entitled to recover in respect of any damage suffered prior to the passing of title to the respective claimant. Because Hunter was unable to prove when it had obtained title, it followed that, at any rate in tort, its claim failed altogether. Thus when I refer below to the "three claimants" or to the claimants in tort, I am speaking of Makros Hout, Fetim and Homburg.

15. So far as these three claimants, the judge reasoned and found as follows. There was some pre-shipment rain damage to the goods of each of them. Upon shipment, the stowage was performed negligently: that was common ground. There was inadequate dunnage and inadequate ventilation due to tightness of the stow. Ventilation was further decreased by use of plastic or polythene rather than permeable sheeting. It was also negligent, in the absence of much better ventilation, to stow air dried timber or wet-damaged timber in the same compartment as kiln-dried timber or plywood. This was apparently because air dried timber, and of course wet-damaged timber, contained higher moisture than the (sound) kiln-dried timber or plywood, causing condensation.

16. On outturn widespread damage by wetting was found. The surveyors assessed the damaged parcels and agreed a level of depreciation in respect of each of them. The damage was to be attributed in part to the initial pre-shipment rain damage but mostly to condensation damage occurring during the voyage.

17. How much damage was attributable to each mechanism, rain and condensation, and in particular how much damage had occurred before each relevant change of title to the goods and how much had occurred after such change of title?

18. The judge considered that the voyage proper got under way on 8 December 1995, on leaving Port Klang, and lasted 42 days until arrival at Antwerp on 19 January 1996. On 8 January the vessel entered cooler waters. The judge found that condensation would be more prevalent after entry into cooler waters, and thus assessed the incidence of physical damage by condensation during the last 11 days of the voyage at 40% of the total (representing an enhanced damage rate during that period), but that otherwise before and after 8 January such damage occurred at a lineal rate. He also found that the financial depreciation of the whole cargo would have proceeded at the same rate as the physical damage (at 106/7). He continued: "*The financial consequences of these conclusions can be calculated by the parties. That should not be difficult as they are agreed as to the total (100 per cent.) losses attributable to each parcel . . .*"

19. But for the rain damage pre shipment, the exercise contemplated by the judge would, I think, be this: taking any damaged parcel, its damage, expressed as a percentage of its sound value, could be divided as to 60% pre 8 January and 40% on or post 8 January. Since the 60% of damage which occurred pre 8 January occurred at a lineal rate from 8 December onwards, the amount of damage which had occurred (a) before and (b) after title had passed in the case of any parcel (the dates of which were also established by the judgment) could be worked out arithmetically. The relevant claimant could claim (in tort) for the latter damage (b), but not for the former damage (a).

20. The incidence of pre shipment damage, however, complicated things somewhat, for the 60% – 40% split was a division of condensation damage occurring on the voyage and did not take account of rain damage which had occurred even before shipment. This additional factor was therefore dealt with by a further finding made by the judge, to the effect that such damage "did not exceed 15 per cent" of the total damage found (at 106). The judge expressed his finding in terms of "did not exceed" the 15% figure, because of the submission that had been made to him that plywood in particular has a tendency to delaminate when wet, thereby substantially

depreciating its value, so that, so it was argued, most of the damage could be ascribed to the initial pre shipment wetting, for which the owner could not on any view be liable, rather than to condensation caused by negligent stowage (paragraph (vii) at 105). The judge agreed with this submission up to a point, for he said (at 106): "*I further find that* in so far as *the pre-shipment wetting affected plywood, there would have been a very substantial depreciation in value due to delamination.*" (emphasis added)

21. Mr Berry relied in this court on that finding to submit that in any event most or a very large part of the damage in financial terms would have to be ascribed to a time not only before title had passed, but even to a time before shipment. In my judgment, however, Colman J was limiting his finding to such part of the cargo as had been affected by rain damage prior to shipment, hence the words which I have emphasised in the above citation. For he immediately went on to ask, how much cargo had been affected by rain damage, and to conclude that such rain damage could be expressed in terms of not more than 15% of the total damage suffered. Thus (at 106): "*It is therefore necessary to ask whether it is possible to be sufficiently confident of the probabilities to apportion the physical damage due to bad stowage at any particular level . . .*"

22. He then examined the evidence and probabilities, gave his reasons for concluding that the rain damage was relatively limited over the cargo as a whole, and continued: "*In all the circumstances, it can in my judgment confidently be inferred that the pre-shipment physical damage did not exceed 15 per cent of the total damage found and that the balance of the physical damage was caused by condensation due to bad stowage. As to the plywood cargo, I am not persuaded on the slender evidence before me that rain damage would have been more likely to cause delamination than condensation damage. I therefore conclude that the financial damage attributable to all cargo affected by rain was an equivalent proportion of the total damage to such cargo to that proportion of physical damage caused by rain, namely 15 per cent. That proportion of the physical damage to cargo which was caused by condensation was 85 per cent and I conclude that condensation accounts for 85 per cent of the depreciation in value.*"

23. It is not entirely clear to me whether in this passage the judge is saying that *each parcel* of damaged cargo was damaged as to 15% by rain damage and as to 85% by condensation damage, or whether he is saying that the total of *all* the outturn damage caused by rain was 15%, and the rest was condensation damage. Mr Jacobs and Mr Berry differed as to the interpretation of his findings, for reasons which, as I hope will become clearer, are inherent in the judgment and were more than merely forensic. Taking this passage by itself, however, I am inclined to think that the judge was here saying that the rain damage was no more than 15% of all the outturn damage. Since he accepted that only part of the cargo was rain damaged, it ought to follow that he cannot be saying that *every* parcel which outturned damaged was damaged by rain to the extent of 15%.

24. Nevertheless, following his judgment the parties agreed, and the judge endorsed their agreement in his order, that the effect of his judgment was that the 15%/85% split between rain damage and condensation damage was applicable to every damaged parcel. On this basis the arithmetic exercise contemplated by the judge and the parties was as follows. Where, in the case of any parcel, the depreciation found is, say, *d* and title was transferred, say, exactly half way between 8 December and 19 January, the damage suffered by that buyer after title was transferred can be expressed as; 85% of *d* – 30% [half of 60%] of 85% of *d* = 59.5% of *d*.

That is, schematically, what the parties agreed was the effect of the judge's judgment, as demonstrated in an exchange of letters between their solicitors, the financial consequences of which were incorporated in a schedule annexed to the judge's order dated 16 July 1999.

25. If, however, I am right in thinking that the 15% figure applied to the *total* damage suffered over the cargo as a whole, it becomes apparent that it is impossible in the case of any one parcel to say whether it suffered no rain damage and 100% condensation damage, or 15% rain damage and 85% condensation damage, or some other apportionment eg 30% rain damage and 70% condensation damage. If all the cargo had belonged to one claimant, it would not matter: but where the cargo belongs to different claimants, it does. Thus in theory most of the rain damaged parcels belonging to one claimant could have suffered (say) 30% rain damage and 70% condensation damage: that claimant's claim would be correspondingly reduced. It would be different if each of the claimants suffered rain damage proportionately to each other, so that the 15% average applies equally to each of them as it does to the total cargo. That is perhaps how, in effect, the parties agreed to read the judgment.

26. Similarly, rain damage apart, the question remains whether all damaged parcels suffered progressive condensation damage from 8 December onwards, or whether individual parcels or groups of parcels were attacked by condensation damage at different times. The approach here by the judge was, I think, to assume that all parcels suffered condensation damage from 8 December onwards, and it is this approach which has helped to pull the 15%/85% split into the same calculation.

27. This review of the judge's findings as to the damage to the goods indicates that, while for very understandable reasons he sought to make an assessment of loss which would enable the claimants to prove what damage they had suffered to their goods after title had passed to them respectively (experiencing failure in the case of Hunter only because it could not even prove when it obtained title), nevertheless the logic of his approach swung uneasily between two methods of assessment. On the one hand, he viewed or ultimately was treated (and treated himself) as viewing *every* parcel of timber which out-turned damaged as having suffered two types of loss which could be viewed separately – rain water damage and condensation damage; and also *each* such parcel as having suffered from an "on-going process" of condensation damage from first (8 December) to last (arrival). On the

other hand, he elsewhere recognised that not *all* the damaged parcels were rain damaged (see at 105, para (i): "there was some wet damage to some of the cargo prior to loading on board"; and see at 106: *"part of the cargo loaded at Kuching . . . and part of the cargo loaded at Belawan . . . was affected by wet-damage . . . part of the cargo loaded at Port Klang was also wet-damaged before shipment"),*

and also that the effect of condensation damage was not only an "on-going process" (sc within any particular parcel) but may also have caused damage to hitherto sound cargo at different times (see at 100 his recording of the claimants' allegations inter alia that there was a migration of moisture from wetter cargo to drier cargo (paras (i) and (ii)), and that condensation ran down the sides of the holds on to the timber (para (iii)). For the sake of ease of exposition I shall call the former method of assessment as the "across the board" method in the sense that it is based on a view of the mechanism of damage as being that all the damaged parcels were damaged by rain water before shipment and thereafter by condensation at a lineal rate; and I shall call the latter method of assessment as the "parcel to parcel" method in the sense that it is based on a view of the mechanism of damage as being that not all the damaged parcels were rain damaged before shipment and that condensation damage during the voyage moved from parcel to parcel or block to block at various times.

28. A number of things will be readily apparent from this analysis. The first is, that if a choice has to be made as to which method of assessment was ultimately adopted by the judge, the answer has I think to be, particularly in the light of his acceptance of the parties' calculations, that it is what I have called the across the board method: for no other method would enable him to provide an assessment of damage which could be applied in favour of the three individual claimants who in his judgment succeeded in proving their damage. Secondly, however, he adopted this method despite express findings that not all the relevant cargo was rain damaged before shipment, and despite what I would view as the inherent probabilities of things, which, on the case propounded by the claimants themselves, must have favoured the parcel to parcel mechanism of damage. Thirdly, if the parcel to parcel method had been adopted, then the judge could not have answered the question which he set himself to answer, which was how much damage each claimant had suffered after it had obtained title to the relevant parcels of timber. This point can be appreciated if one asks how in any case, under the parcel to parcel method, it can be known if or how much a particular parcel was damaged before shipment, or when a particular damaged parcel began to suffer condensation damage. Fourthly, the across the board method could be supported in a case where there is only one claimant, on the basis that it does not prejudice the owner. But fifthly, where as here there are different claimants who obtain title at different times, and uncertainty as to how much pre-shipment damage any particular parcel suffered or when a particular parcel began to suffer condensation damage, the across the board method could only be fair if either that is the way it happened, or at any rate the parties agreed to resolve the difficulties of assessment in this way.

29. In these circumstances, Mr Jacobs' submission that the judge adopted the parcel to parcel method makes it impossible to see how the individual claimants can prove their loss; whereas adoption of the across the board method makes it impossible to say that the damage occurring *after* the transfer of title is in any sense a *new* incidence of damage. It is not a case of fresh damage occurring to new parcels. It is quite unlike heavy seas entering hatch no 1 on day 10 of a voyage and damaging the goods in that hold and then entering hatch no 2 on day 20 of a voyage and damaging the quite separate goods in that hold as well. Rather the damage is inherent in each parcel of damaged cargo from the very beginning of the voyage: it was "an on-going process that would have started, albeit slowly, at the early part of the voyage" (at 106). Moreover it was common ground between the parties before Colman J and this court that when once the cargo was totally stowed and the ocean voyage begun, there was no way to prevent the damage occurring – without diverting to a port where the cargo could be restowed, an expedient which had never been suggested as being feasible.

30. The case of Makros Hout, however, is exceptional, as I have already mentioned above, because its title was obtained on 27 November, well in advance of the commencement of the ocean voyage on 8 December. Therefore in its case all the condensation damage occurred after it had title. Seeing that Colman J regarded the voyage proper as having commenced only after the shipment of cargo at all of the three loading ports, there is room to doubt whether the relevant breach of duty is to be regarded as having only occurred upon loading at each port, or also upon completion of loading at all ports and commencement of the ocean voyage. For instance, it is not clear whether the stowage at the second and third ports impacted on the stowage at Kuching. The fact that Colman J did not address the exceptional position of Makros Hout might suggest that he regarded it no differently from the other claimants, as a cargo-owner whose title was perfected only after the relevant breach of duty had already taken place. The fact is, however, that Makros Hout was in any event in an exceptional position, because all the condensation damage occurred after it had obtained title – and yet Colman J did not draw attention to that fact. Even in this court, the significance of the dates in the case of Makros Hout was only highlighted at a late stage of the argument. Therefore it might have escaped attention below. When Mr Jacobs did point it out, Mr Berry conceded the point, without seeking to say that it still made no impact on the argument in tort because no duty was owed to Makros Hout as of the time of loading at Kuching. It seems to me that this concession was well founded, because ultimately I read the judgment below as premised on the fact that the vice of the stowage, and thus the breach of duty involved, did not become effective or at any rate complete until the completion of the stowage as a whole and the commencement of the ocean voyage. This would accord with his finding that there was no condensation damage until 8 December, and would also accord with the doctrine of stages, whereby a vessel need only be seaworthy as appropriate for each stage of the voyage. Bad stowage is not necessarily the same as unseaworthiness (in the absence of any effect on the seaworthiness of the vessel), but I

do not see why by analogy the doctrine of stages should not also apply to the former. This reading of the judgment below is also consistent with the position adopted in this court as a matter of common ground, that once the ocean voyage got under way there was no opportunity to avoid the defective stowage.

31. None of this matters if a good claim can be framed against the owner in contract. It will be seen, however, that when the claim is considered in tort, it becomes impossible to say (unless resort is had to the parcel to parcel interpretation, which has its own difficulties for the claimants) that the development of the damage after the transfer of title is anything but the development of the seeds of damage, depreciation and loss which were already inherent in the cargo from day one. I will revert to this below. In the meantime, I shall consider the claimants' (for these purposes all four claimants') case that the bills of lading are owners' bills and that the owner is therefore responsible for at any rate 85% of all the loss, irrespective of the particular dates on which title was transferred. It was in fact common ground that, if liable at all, in contract the owner would be liable for 100% of the loss, because clean bills had been issued to the shippers and the claimants were third party transferees of them.

The bills of lading

32. The bills of lading were all on the same "liner bill of lading" form prominently bearing the emblem and name of "Continental Pacific Shipping". Continental Pacific Shipping Ltd ("CPS") were the charterers of the ***Starsin*** under a time charter on the NYPE form dated 3 October 1995 made with the vessel's owners, there given as Oreanda Shipping Ltd of Monrovia ("Oreanda"). In due course, when litigation commenced, Makros Hout and Fetim in Folio 237 brought an action in rem against "The owners and/or demise charterers" of the ***Starsin***, whereas the other claimants in Folios 92 and 93 brought in personam actions against (1) Agrosin Private Ltd, a Singapore company ("Agrosin"), (2) Oreanda, and (3) CPS. If Oreanda were the vessel's owners, and CPS were her charterers, I am not sure who Agrosin were, but it may be that they were demise charterers (or perhaps Agrosin were the registered owners and Oreanda were the demise charterers). At any rate the litigation has gone forward on the basis that Agrosin and/or Oreanda were owners (the "owner"), and CPS charterers, and the first question which arises in connection with the bills of lading is whether they are owners' bills or charterers' bills.

33. For the purposes of that question it is necessary to set out the following provisions of the bills of lading. On the front of the bills among the normal boxes was one dealing with the vessel, which was filled in "M.V **STARSIN** V.CP144". That reference was to CPS's voyage number. Further down the page was what has been called the attestation clause, which read as follows: "*IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.*"

In the bottom left hand corner of the front of the bills was the signature box, in which the only printed word was "Signature". I shall refer to how the signature box was filled in below.

34. On the back of the bills in typical small print appeared the following clauses:

"*1. DEFINITIONS In this Bill of Lading on the front and on the back the following expressions shall have the meanings hereby assigned to them . . .*

(c) 'Carrier' means the party on whose behalf this Bill of Lading has been signed.

2. BASIS OF CONTRACT This Bill of Lading shall have effect subject to the provisions of Articles I to VIII of the International Convention for the Unification of certain Rules relating to Bills of Lading at Brussels on August 25, 1924 (hereinafter called the Hague Rules) unless otherwise provided for in this Bill of Lading . . .

3. PERIOD OF RESPONSIBILITY The responsibility of the carrier whether as carrier or as custodian or as a bailee of the goods shall be deemed to commence only when the goods are loaded on the ocean vessel . . .

33. IDENTITY OF CARRIER The contract evidenced by this Bill of Lading is between the merchant and the owner of the vessel named herein or substitute and it is therefore agreed that said ship owner only shall be liable for any damage or loss billed to any breach or non performance of any obligation arising out of the contract of carriage whether or not relating to the vessel seaworthiness. If despite the foregoing it is adjudged that any other is the carrier and/or bailee of the goods ship here under, or limitation of, and exoneration from liabilities provided for by law or by this Bill of Lading shall be available to such other. It is further understood and agreed that as a line, company or agent who has executed this Bill of Lading for and on behalf of master is not a principal in the transaction and the said line. Company or agent shall not be under any liabilities arising out of the contract of carriage, nor as a carrier nor bailee of the goods.

35. If the ocean vessel is not owned by or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case not withstanding anything that appeared to the contrary). This Bill of Lading shall take effect only as a contract of carriage with the owner or demise chartered as the case may be as principal made through the agency of the said company or line who act solely as agent and shall be under no personal liability whatsoever in respect thereof."

35. It will be observed that the language, syntax and spelling of these clauses are somewhat mangled, and I have (sought to) set them out exactly as they appear in the bills of lading. Nevertheless, clauses 33 and 35 are essentially in common form with like clauses found in many types of bills of lading, and it was not in issue that they could be read in cleaned up form, for instance that the parenthesis in clause 35 ended with the words "appeared

to the contrary)" and that the sentence continued without a full stop "this Bill of Lading . . ." Thus clause 35 could be restated as follows:

> "*35. If the ocean vessel is not owned by or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appeared to the contrary) this Bill of Lading shall take effect only as a contract of carriage with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act solely as agent and shall be under no personal liability whatsoever in respect thereof.*"

Clause 35 is not named in the bills, but it is a clause which is commonly known as the "Demise Clause".

36. There is no need to set out the terms of the bills of lading in extenso to demonstrate that the word "carrier" is used throughout them to indicate the party who bears the responsibility of performing the contract of carriage, consistently with the definition of carrier in clause 1(c) as the party on whose behalf the bill of lading has been signed. Thus, merely by way of example, clause 3 talks in terms of the period of responsibility of the carrier as carrier. Moreover, "carrier" is something of a term of art in the shipping world, in that the Hague Rules (which are themselves incorporated into the bills of lading by clause 2) themselves define "Carrier" as including "the owner or charterer who enters into a contract of carriage with the shipper" (see art I(a)).

37. The signature boxes on the front of the bills with which these actions are concerned contained slight variations, but it was not suggested that the differences were significant. Thus the Makros Hout bills signed at Kuching were signed by what appear to be two signatures over the stamp of the signing company – United Pansar Sdn Bhd – which lies below these typed words:

"As Agent for Continental Pacific Shipping (The Carrier)"

38. The Fetim and Hunter bills signed at Port Klang were signed by a single signature within a stamp which read as follows
"Multiport Sdn Bhd
As agents
for Continental Pacific Shipping
As Carrier"

39. The Homburg bills signed at Belawan were signed by a single signature over the seal of what is probably an agency company (the seal reads "P T Karama Line * Cabang Medan*") above the following typed words:
"As agents
for the carrier Continental
Pacific Shipping"
The signature boxes would in each case appear to identify CPS as the "carrier".

40. Other bills, with which these three actions are not concerned, but issued at Belawan on the same voyage on the identical form, to different shippers but by the same Belawan agents (P T Karama Line), stating Fetim to be the notify party, were simply signed by the agents "As Agents Only".

41. The bills also contained, in clause 34, an English law and jurisdiction clause.

Issue 1: Owners' bills or charterers' bills?

42. Colman J defined the issue as whether the effect of the words in the signature box is to identify CPS as the party bound by the bill of lading contract notwithstanding clauses 33 and 35. He first considered that issue as a matter of principle, attaching particular importance to the qualification of the signature, both because of what was said in that connection in the House of Lords in ***Universal Steam Navigation Company Ltd v James McKelvie & Co*** [1923] AC 492 (see eg Lord Sumner at 500 speaking of its "preponderant importance"), but also because of the well known maxim of construction that written, stamped or typed words which are inconsistent with printed terms usually take effect by superseding the latter. He then turned to the authorities, and in particular those especially relied on by the parties, such as (on the part of the claimants) ***Fetim BV v Oceanspeed Shipping Ltd (The Flecha)*** [1999] 1 Lloyd's Rep 612 and ***MB Pyramid Sound MV v Briese Schiffahrts GmbH (The Ines)*** [1995] 2 Lloyd's Rep 144, and (on the part of the owners) ***Sunrise Maritime Inc v Uvisco Ltd (The Hector)*** [1998] 2 Lloyd's Rep 287.

43. In one sense the previous authority closest to the present case is ***The Flecha,*** where Moore-Bick J considered the identical bill of lading form (issued by CPS, containing both an identity of carrier clause and a demise clause, and, as it happened, sued on by Fetim itself) and concluded that the bill was an owners' bill. Nevertheless in his final analysis Colman J followed the approach of *The Hector* because, as I read his judgment, that authority gave particular consideration to the significance of the fact that in the bill's terms as a whole the word "carrier" (which in the present case appears in the signature boxes as identifying the role of CPS) is used to identify the party which bears the responsibility of performing the bill of lading contract. Thus he concluded (at 93):

> "*If the shipper were to ask the question what is the identity of the carrier in this case, that is to say the person undertaking the obligation of carriage, the answer would surely be: the shipowner, unless the bill of lading stated that some other person was to be treated as the carrier. The shipper would then look at the face of the bill to see whether any other person was described as the carrier. There he would find the contents of the signature box and there he would find the description of the line as the carrier written on to the printed document. That seems to me to leave it in no doubt the signatory was representing to the shipper not merely that the line had procured carriage but that it was undertaking responsibility for that carriage. In other words, "Carrier" was used so as to indicate the same meaning as*

that word is given throughout the reverse-side clauses. There could, in my judgment, simply be no other purpose in inserting the word "Carrier". The shipper must necessarily already know at least that Continental was the line that procured shipment so he did not need to be told that they were involved with the carriage. There is therefore the very strong inference that he would understand "Carrier" as representing that not only was the line involved to that limited extent but that the agents wished him to know that Continental was to accept the obligations of, and enjoy the exceptions available to, "the Carrier" as indicated on the reverse-side of the bill. Above all, no shipper reading the contents of the signature box would assume either that the bill had been signed by the master, as stated in the attestation box, or that the agents had signed on behalf of Continental acting in turn on behalf of the carrier. By the words used the agents had represented that Continental was content that it could be treated as the carrier whenever that word appeared in the reverse-side terms."

44. In ***The Hector*** at 294/6 I sought to examine the recent authorities of ***The Venezuela*** [1980] 1 Lloyd's Rep 393 and ***MB Pyramid Sound NV v Briese Schiffahrts GmbH and Co KG MS "Sina" and Latvian Shipping Association Ltd (The "Ines")*** [1995] 2 Lloyd's Rep 144. There is no need to set out that analysis again. I would merely observe that in *The Venezuela*, where Sheen J held that the bill was a charterers' bill, the bill was signed for the master, but the identity of carrier clause referred to CAVN (who was the charterer) as carrier. The point there was that even a signature for the master (which is not present in this case) did not prevent the bill taking effect as a charterers' bill where on a construction of the bill as a whole CAVN was identified as the carrier and there was nothing to indicate that CAVN was not the owner. As for *The Ines*, where Clarke J held on balance that the bill was an owners' bill, he did so essentially by construing the signature, and, in an ambiguous situation, he just preferred, with the assistance of the attestation clause and a responsibility clause which he regarded as a typical demise clause, to regard the signature ("signed for the carrier Maras Linja pp EIMSKIP – Rotterdam as agents only") as meaning: "signed by Eimskip for Maras Linja as agents for the carrier" rather than "signed by Eimskip as agents for the carrier, namely Maras Linja". In both cases it was the identity of the "carrier", in the one case as CAVN, in the other case as the shipowner, that was determinative.

45. There are, however, three new factors in the present case. The first is that ***The Flecha*** was not cited in *The Hector* – it had been decided earlier but was only reported subsequently. Secondly, the CPS form of bill of lading, which was considered in ***The Flecha*** and falls again for consideration in this appeal, contains a demise clause (which was not present in ***The Hector***) in addition to an identity of carrier clause (which was there present). And thirdly, a point which does not appear to have been raised before Colman J, it was submitted that the demise clause, and in particular the words there found in parenthesis, on its true construction is intended to be paramount, even where the signature box would otherwise lead a court to conclude that the bill had been issued on behalf of someone other than the owner, viz in this case CPS. It is therefore necessary to consider each of these three points.

46. In ***The Flecha*** there were again three variants of signature (at 614) viz, *"as agents for [CPS] as carriers"*, *"as agents for the carrier [CPS]"*, and *"as agent for the carrier [CPS]"*. (In truth the second and third variants are in fact only one.) Thus the signature of the bills in that case was very close to the form of signature in the case of the **Fetim/Hunter** and ***Homburg*** bills here. Moore-Bick J referred to ***The Ines***, then to the attestation clause, clauses 33 and 35 and continued (at 618/9) as follows:

"In these circumstances, it is plain that the terms of the bill of lading as a whole contemplate a contract of carriage between the owners of the vessel and the owners of the goods. Indeed, Mr. Baker accepts that that is so and that it requires some positive indication that the charterers are undertaking a personal liability in contradiction to that which appears from these various parts of the bills of lading. He submits that there is a sufficient indication of that to be found in the description of the charterers as carriers in the various forms of signature to which I have referred. I am not satisfied that that is so. Indeed, it seems to me that if it were the intention of the shipping line to undertake personal liability for the carriage of the goods in contradiction to what is stated in the bill of lading terms something far clearer would be required in order to bring that about. It seems to me that the forms of signature in this case, while they raise questions as to the purpose of describing Continental Pacific as carriers, do not go far enough to make it clear that the parties intended that Continental Pacific Shipping were contracting in place of the owners contrary to all the terms of the bill of lading to which I have referred.

Ultimately, this is a short point and little is gained from seeking to elaborate it. One has to read the document as a whole and seek to determine whether it was the intention of the parties that the charterers or the owners should undertake responsibility for the carriage of the goods. In my judgment the terms of the bill of lading are abundantly clear and the form in which they were signed is not sufficiently clear to demonstrate a contrary intention. I am fortified in that conclusion by the fact that Mr Baker has accepted that if the bills of lading had been signed by Continental Pacific apparently in the character of carriers but without the words 'as carriers' specifically being used it would be beyond argument that the demise clause and identity of the carrier clause would operate to bring about a contract between the shippers and the owners of the vessel. It seems to me that to describe a liner company loosely as a 'carrier' is not unusual or surprising and for the reasons I have given is insufficient of itself to displace the clear terms of the bill of lading."

47. It may be observed that clause 35, the so called demise clause, did not play a paramount role in the reasoning of Moore-Bick J; that, unlike Clarke J in ***The Ines***, he was not able to say that the signature should be construed to mean *"for CPS as agents for the carrier"*; and that ultimately the critical ground on which he held that the bills were owners' bills was that the word "carrier" was used loosely to describe CPS as a liner company rather than as the person who undertook the responsibility of performing the contract under the bill of lading. In that

connection, however, it is to be noted that there is no sign in the judgment that any point was made before him that the word "carrier" was defined in clause 1(c) of the bill, whether found on the front or the back of the bill, to mean "*the party on whose behalf this Bill of Lading has been signed*". It is of course possible that the CPS form of bill in that case differed from the form in this case: but be that so or not, there is no sign in ***The Flecha*** that any attention was given to that definition, and certainly clause 1(c) was not cited at 614 with the other citations from the bill. In the circumstances, whereas I would pay genuine respect to the judgment of Moore-Bick J, I do not think, for all that it was dealing with the self-same form of bill of lading, that its reasoning should be particularly influential.

48. The second additional consideration to focus on more closely is the demise clause, clause 35, itself. I will consider its status as a paramount clause below. But if I assume for the moment that it is not paramount, then it does not to my mind go, to any critical degree, further than clause 33 in emphasising that the contract evidenced by the bill of lading is with the owner and not with any "line, company or agent" who executes the bill on behalf of the master. What it does do is to emphasise two additional aspects of the matter, neither of which is a critical advance on clause 33: first, that a *demise charterer* is in the same position as the registered owner of the vessel; and secondly, that a mere "company or line" who executes the bill without being the owner or demise charterer of the vessel does so as agent only and therefore is under no liability. It is of course standard law that a demise charterer, unlike a mere time charterer, is in complete possession of the vessel, employs the master and crew, and is an owner, as the old phrase goes, *pro hac vice*. It is also standard law that a person who executes a contract as an agent only bears no liability under that instrument. Nevertheless, on the continuing assumption that clause 35 is not a paramount clause, clauses 33 and 35 in combination still recognise the possibility, expressly found in clause 33, that someone other than the owner may be adjudged the carrier or bailee of the goods; and still make plain that the basis on which the contract evidenced by the bill of lading is with the owner (or demise charterer) rather than with a "line, company or agent who has executed this bill" (clause 33) or with the "company or line by whom this bill is issued" (clause 35) is that the execution of the bill has been "on behalf of the master" or that the issuer of the bill has acted "solely as agents" (clause 35).

49. All of that still leaves open the question: "*Yes, but what if the company or line makes it plain, in issuing and executing the bill, that it* does not act as an agent only*, or that it does not sign for the master, but* signs as 'the carrier'*?*"

There is no statute that a charterer cannot be the contracting party under a bill of lading, even if it has been the normal rule in English law to construe a bill signed for the master as an owners' bill. It may be, against the background of the general preference in English law for owners' bills or against the background of clauses such as a clause 33 and/or a clause 35, that a court will want to be careful about the construction of the bill's signature, in effect putting an onus on that signature to take itself clearly out of the general rule or the background clauses, if it is to impose liability on a charterer rather than an owner for the performance of the contract of carriage. If, however, the qualification of the signature on its true construction is that the charterer accepts the liability of a principal, the liability of the carrier, the liability of the party which performs the contract of carriage, there is, it seems to me no reason why effect should not be given to that signature.

50. On the contrary, in my judgment Colman J was right to accord considerable weight to the teaching of ***Universal Steam Navigation v McKelvie*** that the construction of the signature is of particular importance. It accords with, but does not depend on, the general rule that, on a printed form, special weight will be accorded to anything written, stamped or typed upon it. Many instances of that general rule could be given. In ***McKelvie,*** which was a charterparty case, McKelvie were described in the body of the charter as "Charterers", but in the signature "(as Agents)". In that case neither entry was printed, so the choice did not depend on the rule about writing. McKelvie were fob sellers, acting as agents in the chartering of the vessel on behalf of their buyer. The owner of the vessel knew that that was so, but the fact does not appear to have been of any particular importance. Lord Cave LC said (at 495): "*If the respondents had signed the charterparty without qualification, they would of course have been personally liable to the shipowners; but by adding to their signature the words 'as agents' they indicated clearly that they were signing only as agents for others and had no intention of being personally bound as principals. I can imagine no other purpose for which these words could have been added; and unless they had that meaning, they appear to me to have no sense or meaning at all.*"

51. If that reasoning were applied, mutatis mutandis, to this case and to the words (for instance) "as carrier", then I cannot imagine for what purpose those words were added unless to indicate clearly that CPS were *not* signing as agents but so as to undertake the liability of a principal under the contract of carriage. Lord Cave also cited James LJ in ***Gadd v Houghton*** (1876) 1 Ex 357, pointing out (at 496) that: "*James LJ said that he could not conceive that the words 'as agents' could be properly understood as implying merely a description, adding, 'the word 'as' seems to exclude that idea'.*"

Lord Shaw put the matter in this way (at 499): "*But I desire to say that in my opinion the appending of the word 'agents' to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of principal and agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by an effort of the imagination be figured, but, apart from that, the appending of the word 'agent' to the signature is a conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party.*"

52. Lord Sumner (with whom Lord Birkenhead agreed, see at 497) would not go as far as Atkin LJ had below in saying that where the words "as agent" qualify the signature "nothing more matters". He explained (at 499/500): "*My Lords, for myself, I can hardly go as far as this. I agree that for many years past it has, I believe, been generally understood in business, that to add 'as agents' to the signature is all that is necessary to save a party, signing for a principal, from personal liability on the contract, and I agree also that, even as a matter of construction, when a signature so qualified is attached to a general printed form with blanks filled in ad hoc, preponderant importance attaches to the qualification in comparison with printed clauses or even with manuscript insertions in the form. It still, however, remains true that the qualifying words 'as agents' are a part of the contract and must be construed with the rest of it.*"

53. Thus both Lord Shaw and Lord Sumner spoke in turn of the qualification of the signature by the words "*as agent*" as a "*dominating factor*" or a matter of "*preponderant importance*", albeit as something which ultimately would have to be construed as part of the contract as a whole.

54. It may be that by common usage the words "as agent" applied to a signature have a particular significance which this authority to some extent reflects. Nevertheless, the question whether anyone other than the owner (or his servant the master) signs a bill of lading as agent or principal is the critical question for the purposes of the contract of carriage found in such a bill, and in that context, even apart from clause 1(c), the expression "carrier" or "as carrier" hardly has less familiarity or less importance than the expression "agent" or "as agent".

55. In these circumstances it must be remembered that a shipper who deals with a liner company such as CPS will have no idea (without checking a register of shipowners) who the owner or demise charterer of a vessel is. It is the liner service which attracts his custom. For all the shipper knows, the liner company is the owner or demise charterer of the vessel. If, therefore, the liner company signs as "carrier", the shipper does not even know that there may be a conflict between that signature and clauses 33 or 35 which say that the contract is with the owner or demise charterer. And even if he did happen to know that there was a conflict, the signature still tells him that the contract is with the named carrier (the only such named carrier identified anywhere in the bill of lading). If moreover he were to be a lawyer as well as a shipper (or he were to consult a lawyer), he would also recognise or be advised that the qualification of the signature is of particular importance and weight, and that written, stamped or typed words are prima facie to be given a superseding effect as against printed words.

56. It is against this background that I come to the submission that clause 35 is a form of paramount clause. There is no reason in principle why even a printed clause cannot, by reason of its effect as a paramount clause, be given priority over written, stamped or typed clauses inconsistent with it. In *Halsbury's Laws of England*, 4th Edition Reissue, vol 9(1), 1998, at para 774, in a paragraph headed "Construction of the contract as a whole" appears the following: "*Where the parties utilise a written standard form, to which is then added written words or clauses, prima facie the actual words written or spoken have greater effect than the printed ones; but the parties may stipulate in the standard form that the written words are not to override the printed words . . .*"

57. *Chitty on Contracts*, 28th ed, 1999, vol I, at para 12-068, is to similar effect. The cases cited are building cases concerned with the RIBA contract form.

58. Thus in what was then condition 10 of the RIBA form, the following appeared: "*. . . but save as aforesaid nothing contained in the said bills of quantities shall override, modify or affect in any way whatsoever the application or interpretation of that which is contained in these conditions . . .*"

59. This court in ***Gold v Patman & Fotheringham Ltd*** 1958] 2 All ER 497, [1958] 1 WLR 697 at 701, of the latter report, said that condition 10 overrode a provision in the bills of quantities which was inconsistent with the insurance provisions contained in condition 15 of the RIBA form. Similarly, in ***N W Metropolitan Regional Hospital Board v T A Bickerton & Son Ltd*** [1970] 1 All ER 1039, [1970] 1 WLR 607 at 617, of the latter report, Lord Hodson pointed out that what had by now become condition 12 of the RIBA form had a similar effect. Then in ***English Industrial Estates Corporation v George Wimpey & Co Ltd*** [1973] 1 Lloyd's Rep 118 the same condition 12 was used to exclude reference to provisions in the bills of quantities as an aid to the construction of a RIBA condition. Stephenson LJ said (at 127): "*To apply the general principle that type should prevail over print seems to me to contradict the express provision of clause 12 that the reverse is to be true of this particular contract: the special conditions in type are to give way to the general conditions in print.*"

60. So the question arises whether the provisions of clause 35 in this case, and in particular the words in parenthesis "(*as may be the case notwithstanding anything that appeared to the contrary*"), were similarly intended to override anything in the execution of the bill which purported to make a liner company liable as a principal contracting party to the bill as distinct from being merely an agent only. In other words, were the provisions of clause 35, which insisted that only an owner or demise charterer of the vessel could be a principal to the contract of carriage evidenced by the bill, paramount over whatever might be written in the signature box?

61. In my judgment, however, clause 35 is not analogous to the RIBA condition. Clause 35 does not say that the bill of lading contract shall take effect as a contract between the owner or demise charterer of the vessel whatever may be said in the signature box, eg "notwithstanding anything that appeared to the contrary in the execution or signature of this bill of lading". The words in parenthesis do not apply to the making of the contract, but to the possibility that the vessel is not owned by or demise chartered to the liner company which issues the bill. The vessel may well appear to be owned or demise chartered by the liner company which issues the bill, eg because that company's name or insignia are on the vessel, or because the vessel is advertised in connection with that

company's liner services: but the shipper is told that even so, the bill of lading contract is to take effect as one made with the owner/demise charterer as principal albeit through the agency of the liner company "who act solely as agent". In the normal case, where the liner company or its agent merely signs the bill of lading contract in the ordinary way, for the master, that may well be the case. But where the liner company makes it clear that it does *not* "act solely as agent" but issues and executes the bill as "carrier", what is there in clause 35 which demands that the adoption by the liner company of personal liability as the shipper's contract party should simply be ignored? If that liner company were to be sued on its signature of such a bill of lading, how could it say that it had not accepted personal liability as carrier on the bill of lading contract? How could it say that clause 35 overrode its express adoption of personal liability in fact, just because the clause assumed that it would be acting solely as an agent?

62. This answer is to my mind consistent with, rather than contrary to the purpose of the demise clause itself. Colman J pointed out (at 89) that the demise clause: *"has survived from the era when a time charterer who was party to a bill of lading contract as carrier was not entitled to limit his liability under the Merchant Shipping Act. It was therefore necessary, particularly for liner companies who issued bills, to avoid being held liable as carriers. Since the enactment into English law of art 1.2 of the Convention on Limitation of Liability for Maritime Claims, 1976 by s 186 of the Merchant Shipping Act, 1995 such precautions have become unnecessary."*

The extension of the right to limitation to a time charterer in fact first entered English law under s 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958.

63. See also *Scrutton on Charterparties*, 20th ed, 1996, at 82 to the same effect. In other words, the demise clause was there to protect a time charterer who did *not* want to accept the liability of a carrier, and who therefore cautiously sought to ensure that the mere issue of a bill of lading by himself or his agent would not have that effect. It was not, however, intended to ensure that a time charterer who *did* want to undertake the liability of a carrier and signed as such could not do so.

64. Consistently with that conclusion, no case on the demise clause has been brought to the court's attention, in which the clause has been viewed as some form of paramount provision. Thus in ***The Berkshire*** [1974] 1 Lloyd's Rep 185 the bill of lading was signed by the time charterer's agents "as agents". There was no difficulty in that case in simply applying the demise clause according to its terms (at 188). In ***W & R Fletcher (New Zealand) Ltd and others v Sigurd Haavik Aksjeselskap and others (The Vikfrost)*** [1980] 1 Lloyd's Rep 560 the same situation obtained: the bill of lading was signed by the sub time charterer's agents "(for the master) . . . As Agents" (at 563). There was no reason why the demise clause should not have been given its straightforward effect. The real issue in the case was as to the authority given to the sub-charterer to issue bills on behalf of the owner. In ***NGO Chew Hong Edible Oil PTE Ltd v Scindia Navigation Co Ltd (The Jalamohan)*** [1988] 1 Lloyd's Rep 443 the bills were again signed by the sub time charterer's agents "as agents" (at 445). The owners, who disputed liability under the bills, did so on the basis that the shipper's fixture note had named the sub time charterer as the carrier (at 446). Again, there was nothing surprising in the fact that the bills were treated as owners' bills. I have already dealt with *The Flecha*, where the demise clause was certainly not viewed as having some kind of paramount effect. If it had done, any consideration of the signature of the bills would have been unnecessary.

65 Mr Jacobs nevertheless submitted that Colman J's decision in this case failed to reflect "the commercial importance" of the demise clause, which he argued served many purposes, viz the promotion of commercial certainty, the ability to identify the proper defendant with reasonable certainty and speed, the avoidance of any need to construe the precise form of the signature (which he characterised as "unnecessary and uncommercial"), and the promotion of cargo owners' right to obtain security for their claims by the arrest of the vessel.

66 These considerations, however, are not in my judgment persuasive. It is true of course that cargo owners are assisted by having a cause of action against the owner of a vessel in support of a right of arrest. However, quite apart from the possibility that there may be other causes of action that a cargo owner may have, outside contract, which will support a right of arrest, the logic of the submission assumes that the demise clause is a cargo owners' clause, on a cargo owners' form. Neither is true: the form is that of the liner company, and the demise clause is, as explained above, a liner company's clause whose purpose is to prevent itself being found to be the carrier when it does not wish to be. Moreover, the virtues of commercial certainty and the ease of identification of the carrier are only achieved if the demise clause is viewed as a paramount clause, which no case has ever considered it to be and which I have given my reasons for not construing it to be. Such a paramount clause, if it was so wished, could be drafted so as to explain that, however the bill was executed, it was to take effect only as a contract solely with the owner; but that is not what the demise clause says. Given that in practice a demise clause is printed in tiny print on the back of a form, and in the present case is not even identified by any title, I do not see that commercial certainty or honesty is promoted by the submission that the form of signature, which on a bill of lading is on the front of the form, and which in mercantile contracts generally, including bills of lading, has always been a focus of attention, should be ignored.

67 It is true that the tendency in English law is to find an owners' bill, particularly where (but not in this case) the bill is signed by or for the master. But there are many examples to the contrary, going back at least as far as ***Samuel v West Hartlepool Steam Navigation Co*** (1906) 11 Com Cas 115.

68 There was also a submission that the attestation clause ("In witness whereof the Master . . . has signed") indicates that the bills were signed for the master, and therefore for his employer, the owner. But they were neither signed

by the master (even though the printed clause suggested they would be) nor *for* the master (as to which the clause said nothing). They were in fact signed by agents of CPS for CPS as carrier. A carrier cannot sign for the master. In such circumstances the attestation clause is merely an inaccurate statement. In any event, unless the shipper knows that the vessel is not owned by or demise chartered to CPS, as to which there is no evidence at all, there is no inconsistency between a bill signed by a master and a bill signed by or for a "carrier".

69 For these reasons, if the choice is the straightforward one presented between owners' bills or charterers' bills, I am bound to conclude that the bills in question are charterers' bills.

Another possibility: owners liable as well as charterers?

70 Nevertheless, I raised in argument the possibility that there did not have to be a black and white choice between owners' bills and charterers' bills and that the true analysis in such a case may well be that the owners as well as the charterers are liable on the bills. I do not think that any case has so decided, but the possibility has been recognised. Thus *Scrutton* at 81 states: "*If in form a bill of lading only constitutes a contract with the charterer, but in fact, as between charterer and shipowner, the charterer has authority to contract on behalf of the shipowner, it may be that the holder of the bill of lading can sue the shipowner upon it as an undisclosed principal*."

That statement has been there at least since the eighteenth edition in 1974.

71 In earlier times the possibility that an agent might be liable on his principal's contract in addition to his principal was not perhaps properly recognised: see *Bowstead & Reynolds on Agency*, 16th ed, 1996, at 552. But nowadays at any rate there is no difficulty in the concept, especially where a principal is known to exist but is unnamed: *ibid* at art 100 in general and see especially para 9-014. In ***Universal Steam Navigation v McKelvie*** Lord Shaw spoke doubtfully of the possibility that an agent might contract with the liability of a principal (at 498), but others of their Lordships were less sceptical (Viscount Cave at 495, Lord Sumner at 501, Lord Parmoor at 504) and the possibility is certainly now recognised: see eg ***Bridges & Salmon Ltd v The "Swan" (Owner), Marine Diesel Service (Grimsby) Ltd v Sam***e [1968] 1 Lloyd's Rep 5 or ***Stag Line Ltd v Tyne Shiprepair Group Ltd and others (The "Zinnia")*** [1984] 2 Lloyd's Rep 211 at 216. In truth, since in ***McKelvie*** it was found that McKelvie were in fact acting as agents for their buyers, it follows that if perchance McKelvie had been held liable on the charterparty, eg because they had omitted to qualify their signature "as agents", it would have been a case where they would have been liable as principals, albeit really agents, in addition to the liability of their own principals, the buyers.

72 In the present case, CPS were in fact authorised, as charterers normally are, under their time charter to issue bills of lading on behalf of the owner. In addition there were letters of authority issued by the master of the ***Starsin***. The matter was extensively discussed below by Colman J, because of the owner's alternative submission that even if the bills were owners' bills, nevertheless some of those bills were not binding on it as being issued outside the authority granted: see at 93/ 98. The argument was that those bills which were ante-dated, or failed to reflect the damaged condition of the goods stated in mates' receipts, were unauthorised. The argument proceeded on the hypothetical basis (contrary to the judge's first holding) that the bills were, as a matter of construction, owners' bills. In such circumstances the owner had the burden of showing that there was neither actual nor ostensible authority for the bills (at 93). The question of actual authority was bypassed, perhaps assumed in the owner's favour, and the discussion below concerned ostensible authority alone. The judge's conclusion was that there was ostensible authority to bind the owner to bills in the form actually issued even though there was no actual authority to issue them in precisely the terms in which they were issued. There has been no appeal from that part of the judge's judgment.

73 What is the significance of that argument and conclusion for present purposes? Mr Berry submitted that (i) the bills were in fact unauthorised, inter alia because the authority given under clause 33 of the time charter was for CPS or their agents to sign bills on the master's behalf ("on his behalf"), which was not done; (ii) the signatures were in fact for CPS as carrier and therefore there was nothing to bind the owners; (iii) the express terms of the contract, such as clauses 1(c), 33 and 35 themselves, all contemplated only one carrier; and (iv) the point was novel and inconsistent with the settled expectation of the shipping trade.

74 I can visualise the argument that when CPS (in fact their agents) signed the bills for their own account as carriers, in circumstances where they were in fact also the agents of the owner to issue bills of lading on the owner's behalf, as recognised not only by the authority in fact granted to them and the ostensible authority found by Colman J (see at 96) but also by the express language of clauses 33 and 35, they created a contract in respect of which both they and their principal, the owner, had rights and liabilities. If that argument were correct, points (ii) and (iii) might be thought to present no greater difficulty than in the standard case where an agent enters into a contract which names himself as the buyer or charterer, when he is in fact acting for a principal. The fact that a contract contemplates only one buyer does not mean that both the signatory to the contract and his principal may not have rights and liabilities under it. After all, just because clause 35 fails of its purpose where a liner company deliberately contracts for its personal liability, so that the contract does not take effect "only as a contract with the owner . . .", does not have to mean that the contract does not take effect as a contract with the owner at all.

75 Points (i) and (iv), however, present more substantial food for argument and thought. In the circumstances, where the point was never addressed below, is not part of the formal appeal, has arisen merely from an enquiry from the bench, and has had no real opportunity for debate, I would for myself be reluctant to make or take a decision based upon it. It seems to me that there is no unfairness in that hesitancy. The parties have taken their stand on the traditional approach of finding in these bills either an owners' or a charterers' liability, but not both.

On the contrary, I fear that if the alternative possibility which I raised were made the subject of decision, there would be scope for unfairness or error or both.

76 In the circumstances the decision on the question of contractual liability must, in my judgment, be answered on the basis that the bills in question are charterers' bills.

Issue 2: Can the owner be sued in tort?

77 The traditional view is that a shipowner can only be sued in tort by a cargo owner whose cargo has suffered damage while on board the vessel by reason of a breach of duty owed to that cargo owner. Thus damage done to a future owner of the damaged cargo, before the passing of title to that owner, will not give him a cause of action in tort. See ***Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The Wear Breeze)*** [1969] 1 QB 219, [1967] 3 All ER 775 and ***Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)*** [1986] 1 AC 785, [1986] 2 All ER 145.

78 In the present case, the breach of duty occurred on loading or at latest on completion of loading on 8 December in the form of negligent stowage at a time when other than in the case of Makros Hout the shippers and not the claimants owned the cargo. The damage caused by that negligence was progressive throughout the voyage and throughout the damaged parcels: it was also inevitable in that it was common ground that there was nothing that could be done to mitigate the effects of the initial breach. The claimants make no claim in respect of the damage which had occurred before they obtained title respectively to their goods, only in respect of the continuing damage which occurred after title had passed. The judge was able, at any rate on the across the board interpretation of his judgment, to determine the respective percentage of the damage which had occurred before and after the passing of title. He held that a duty of care was owed at the time of loading to all those, such as the claimants, who would become owners of the cargo during the course of the voyage, that there was a breach of that duty at the outset, and that the cause of action in tort was completed when once further damage had occurred after the transfer of title to each claimant in respect of their goods. He reasoned as follows (at 102):

"*Accordingly, in principle, the duty of care owed by the shipowners in respect of the cargo in their possession is engendered by the proximity of the shipowners to the goods in their possession and to those who presently have title to such cargo or who may acquire title in the course of the voyage and while the goods remain in their possession. Since the cause of action in negligence is not complete until breach of duty of care has caused physical loss or damage to the goods, it must logically follow that only the person with title to the goods when that loss or damage occurs can sue in respect of it. However, since the duty of care is engendered by the present relationship of the shipowners to the goods together with the reasonable foreseeability that title to them may pass from the bailors to others in the course of the voyage, the fact that as early as before title passes the breach of duty has already set in motion a course of events leading immediately to damage cannot logically prevent the accrual of the cause of action for the benefit of the party who has acquired title by the time when the damage occurs.*

The position is analogous to that arising from the negligent construction of a house by a building contractor. If due to the latent faulty construction it subsequently collapses on a person who did not own the house when it was built, thereby causing him physical injury or damaging his moveable property, the contractor will be liable on general Donoghue v Stevenson *principles and it is nothing to the point that at the time of the contractor's negligent acts the injured house owner had title neither to the house nor to the property subsequently damaged: see* **D & F Estates Ltd v Church Commissioners for England***, [1989] A.C. 177 per Lord Bridge at page 206B-G. Indeed, the whole basis of the liability in negligence of the manufacturer of defective products rests on the continual effect of the relationship between the manufacturer of the product and reasonable foreseeability of loss or damage that may be caused by a defect in that product to a person who is a subsequent user, even though at the time of the negligence that person had no relationship with the product whatsoever."*

79 In ***The Wear Breeze*** and again in ***The Aliakmon*** the plaintiff cargo owners never obtained title to the goods until after discharge from the vessels concerned. There never was in those cases any damage caused on board the vessels after title had passed to the purchasers. Nor of course was there any breach by the shipowners of any duty of care at a time when the plaintiffs were owners of cargo on the vessels. Therefore the precise point which has arisen in the present case was never in issue there. The difficulty which has now arisen is to determine whether the rule laid down in those cases was to require both breach of duty and damage to occur at a time when the claimants had title, or whether it is sufficient that damage occurs after the claimants have gained title albeit in respect of a breach of duty which predates the transfer of title. Or to put the matter in another way: is Colman J right to say that those cases contemplate that a duty can be owed, and thus broken, to future owners of cargo, or only to those who are owners at the time of breach?

80 One difficulty in answering this problem is that by and large in ***The Wear Breeze*** Roskill J spoke in terms of the time when the negligence occurred, whereas in *The Aliakmon* Lord Brandon of Oakbrook spoke in terms of the time when the damage occurred. If the latter formulation is the correct rule, as Mr Jacobs submits, then it admits of the possibility of Colman J's conclusion; whereas if the former formulation is correct, as Mr Berry submits – and ***The Wear Breeze*** was approved by Lord Brandon – then it is hard to see how Colman J's solution can be accepted.

81 In ***The Wear Breeze*** the negligence was in failing to clean and fumigate the vessel's holds prior to loading. The cargo of copra was later damaged during the voyage by an infestation of cockroaches. Roskill J emphasised at the outset that the plaintiffs had title neither at the time of damage nor "at the time of the act or acts of negligence complained of" (at 228). The question then posed was whether such plaintiffs could sue in tort for

damage done by negligence "*when admittedly at the time of the negligent acts the plaintiffs were not the owners . . .*" (at 228). However, a little later (at 232) the question was posed in terms of the time of damage: can such plaintiffs sue in tort for damage caused to goods: "*which, though not the property of the plaintiffs at the time they were damaged, were ultimately delivered damaged by the ship to the plaintiffs?*"

Next, the submission of the defendant shipowner was related in terms of the time of damage: a claimant in tort must prove "that he was, at the time when the damage was suffered by the negligence complained of, the owner of those goods" (at 233). The submission for the plaintiffs, however, was that the foreseeability principle extended the duty of care to "those who would be likely to buy the goods afloat on board that defendant's ship, or if the goods were bought before they were afloat, if the goods afloat were subsequently appropriated to a sale and purchase contract" (at 234). A little later, however, the submission of the defendant shipowner was restated in terms of the need for title both "at the moment when the negligence occurred and the damage sustained" (at 235).

82 After considering the authorities Roskill J concluded (at 241) as follows: "*What is plain is that all this long line of cases in the nineteenth century and before show that, whatever the precise nature of the plaintiff's cause of action and whether it was in what nowadays would be called contract or what nowadays would be called tort, it was an essential prerequisite of the plaintiff's right to succeed that he was at the material time the owner of the goods, of the loss of or damage to which he complained, and, if the plaintiff could not show that, then, in the absence of what was sometimes called a special contract, his claim failed.*"

Roskill J did not in that passage define "*the material time*"; and even though a few pages on (at 244) he again mentioned "*the material time*" and glossed it as "*the time when the tort was committed*", uncertainty at that stage remains as to whether he was thinking of the time when the shipowner was negligent or the time when the tort is completed by the incidence of damage. Similar uncertainty hangs over the phrase (at 250) "the time of the tort complained of".

83 Roskill J next moved to what was at that time a recent and leading case on economic loss, ***Weller & Co v Foot and Mouth Disease Research Institute*** [1966] 1 QB 569, [1965] 3 All ER 560. There Widgery J, after quoting from Lord Devlin in ***Hedley Byrne & Co v Heller & Partners Ltd*** [1964] AC 465, [1963] 2 All ER 575 said (at 587 of the former report): "*In my judgment, the plaintiff's failure in these earlier cases was not because this truth to which Lord Devlin refers had escaped the eminent judges who decided those cases, but because the plaintiff was regarded as being outside the scope of the defendant's duty to take care . . .*"

84 Roskill J commented (at 251F) that he agreed with every word of Widgery J's judgment and adopted it and its reasoning as part of his own judgment. It would seem that he was thereby ruling that no duty of care was owed by the shipowner to other than the person or persons who were the current owners of the goods shipped. But what Roskill J immediately went on to say did not go as far as that, for he said (at 251G/252A): "*It is true that the goods which the plaintiffs ultimately acquired were delivered to them damaged, but they were not the plaintiffs' goods at the time when they were damaged and, in my judgment at least, the defendants owed no duty to the plaintiffs at the time when those goods were damaged.*"

85 In the last page of his judgment, however, Roskill J broadened his ruling, for he finally put the matter thus (at 254A/E): "*The truth is that English law does not recognise and never has recognised a duty of care upon a shipowner to anyone who was not the owner of the goods at the time when the tort was committed . . . I hold that as the law stands in circumstances such as those in the present case there is no direct cause of action in tort by a person such as the plaintiffs who only acquire title to goods after they have been discharged from the ship against the shipowner in respect of negligence which was committed either before the goods were loaded on board or at least not later than the time of loading.*"

In that passage, Roskill J seems, ultimately, to have required that for a cargo owner to be within the scope of a shipowner's duty of care the claimant has to be an owner (or at least entitled to the possession of the goods) at the time of the negligence concerned. There is no passage in his judgment which is inconsistent with that ruling, and it reverts to the factual considerations highlighted by him at the outset. Consistently with that view of things, the headnote in ***The Wear Breeze*** states (at 220C): "Held, *(1) that it was essential to support such a claim by showing that the plaintiffs were owners, or entitled to the possession, of the goods at the time when the negligence occurred, and that since the plaintiffs had no title at that time the action was not sustainable.*"

86 Before turning to ***The Aliakmon***, I will briefly mention two cases which were decided after ***The Wear Breeze*** but were overruled or disapproved in ***The Aliakmon***.

87 In ***The Irene's Success*** [1982] QB 481, [1982] 1 All ER 218, cif buyers only obtained title to goods after the completion of a voyage in the course of which the goods were damaged by seawater. The factual situation, therefore, was very similar to that of *The Wear Breeze*. Lloyd J declined to follow ***The Wear Breeze***, however, on the ground that later cases culminating in ***Anns v Merton London Borough Council*** [1978] AC 728, [1977] 2 All ER 492, had entitled him to find that a duty of care was owed to a future owner of cargo, at any rate if as cif buyer he was already or would be at risk of damage on the voyage.

88 Then in ***The Nea Tyhi*** [1982] 1 Lloyd's Rep 606 Sheen J was able to decide the case before him in contract, but went on to say that if he had had to consider the claim in tort, he would hold that he would prefer to follow the reasoning of ***The Irene's Success*** to that of ***The Wear Breeze***. He went on to give a practical reason, relevant to the facts of the present case, for his preference (at 612): "*I feel compelled to add that that is a conclusion which I find*

attractive because in many cases it would remove an obstacle which might otherwise block the path of justice . . . [T]here are many cases in which cargo is being damaged over a long period. Damage may be done to cargo by leakage of oil or water, or by inadequate ventilation, or by overheating or by seawater taken aboard during heavy weather. In the majority of such cases the plaintiffs can rely upon their contractual rights, but when they are unable to rely upon their contract of carriage I can see no merit in legal principle which entitles the receiver of the cargo who has bought the cargo during the voyage to recover damages in respect of that damage which occurred after he bought the cargo but not in respect of damage which occurred earlier in the voyage."

89 In ***The Aliakmon*** [1986] 1 AC 785, [1986] 2 All ER 145 the c&f buyers once again obtained title to the goods only after the voyage had ended; the goods were damaged by bad stowage, which resulted both in condensation and therefore rusting, and in crushing of the cargo. Their claim failed both in contract and in tort. *The Wear Breeze* was approved. Lord Brandon gave the only speech, with which the rest of their Lordships agreed. He began by stating that there was 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 of or damage to property, he must have had either the legal ownership or a possessory title to the property concerned "at the time when the loss or damage occurred" (at 809F). He then referred to *The Wear Breeze* as being founded largely on that line of authority (at 810E). The submission of the claimants was, however, that *The Wear Breeze* should be overruled, essentially for the reasons adopted by Lloyd J in *The Irene's Success*. However, Lord Brandon rejected the test of Lord Wilberforce in *Anns v Merton LBC* as providing the platform for that submission: he pointed out first, that it did not provide a universally applicable test of the existence and scope of a duty of care in the law of negligence, and secondly, that Lord Wilberforce did not in any event suggest that the same approach should be adopted to the existence of a duty of care "in a factual situation in which the existence of such a duty had repeatedly been held not to exist" (815C/F). Lord Brandon next relied on the recent rejection by the Privy Council in ***The Mineral Transporter*** [1986] 1 AC 1, [1985] 2 All ER 935 of the idea that a duty of care was owed to those who lacked proprietary or possessory title to the property damaged (the claim there was by a time charterer whose chartered ship had been damaged in a collision), even though the Privy Council was content to test the existence of a duty of care by Lord Wilberforce's test in ***Anns'*** case. Nor was Lord Brandon prepared to make a limited exception in favour of a duty of care owed by shipowners to the cif or c&f buyers of goods carried on their ships: on the basis that such an exception would be extended, and that the law should not allow special pleading, otherwise the certainty of the present rule would be undermined. He continued (at 817B):

"*Yet certainty of the law is of the utmost importance, especially but by no means only, in commercial matters. I therefore think that the general rule, reaffirmed as it has been so recently by the Privy Council in* The Mineral Transporter *. . . ought to apply to a case like the present one, and that there is nothing in what Lord Wilberforce said in* Anns' *case . . . which would compel a different conclusion.*"

90 Lord Brandon then went on to consider other submissions, including the plea that a rational system of law required the rule contended for: but he rejected them all, stating that there was no lacuna in English law which was not made good by a claim in contract under the bill of lading. Ultimately he expressed himself thus (at 820H): "*My Lords, I have now examined and rejected all the five grounds on which Mr Clarke relied in support of his contention that* The Wear Breeze *. . . was either wrongly decided at the time, or at any rate should be regarded as wrongly decided today, and should accordingly be overruled. The conclusion that I have reached is that* The Wear Breeze *was good law at the time when it was decided and remains good law today. It follows that I consider that the decision of Lloyd J in* ***The Irene's Success . . .*** *, which even Mr Clarke did not seek to support in its entirety, was wrong, and should be overruled, and the observations of Sheen J with regard to it in* ***The Nea Tyhi*** *. . . should be disapproved.*"

91 Although Lord Brandon began by referring to the long line of authority requiring legal ownership or possessory title "at the time when the loss or damage occurred" (and the headnote refers to this requirement at 785H), there is no subsequent reference to that definition of the rule, and Mr Berry's submission before this court, that the logic of Lord Brandon's reasoning (concerned as it is with the non-existence of a duty of care other than to those with title) supports his own reading of *The Wear Breeze*, has force. Moreover, the disapproval of what Sheen J said in ***The Nea Tyhi*** (quoted above and referred to by Lord Brandon at 815A), very arguably embraces the facts of this particular case.

92 Mr Berry also criticised Colman J's reasoning below. Thus at 102, having stated that the foundation of liability in negligence must depend on general proximity principles and the existence of a duty of care owed by shipowners not only to shippers "but to all those who might acquire title to the cargo while it remained stowed on board their vessel", Colman J went on to observe that nothing in ***The Aliakmon*** was inconsistent with the existence of such a duty, but on the contrary "it is implicit in that decision that such a duty would exist". Mr Berry submitted, with some justification as it seems to me, that it is hard to derive anything of positive assistance to the claimants from Lord Brandon's reasoning.

93 Mr Jacobs on the other hand, while relying on those passages in ***The Wear Breeze*** and ***The Aliakmon*** which defined the issue in terms of whether the claimant had title at the time of loss or damage, and also emphasising that in both cases, and in *The Irene's Success*, the claimants had never even acquired title while the goods were still on board the vessel, submitted that Colman J was right to rely on the principle that it was no part of the law of negligence that the negligent act could not precede (and sometimes long precede) the loss or damage which completes the tort, as illustrated by ***Donaghue v Stevenson*** itself. Moreover, ***D & F Estates Ltd v Church Commissioners for England*** [1989] 1 AC 177, [1988] 2 All ER 992 a case cited by Colman J, although decided

against the claimant on its own facts, is said to illustrate the possibility that it is unnecessary for the existence of a duty of care, which later ripens into a liability in tort once damage is suffered, for the claimant to have title at the time of the negligent act, as long as he has title at the time of loss, and as long as the future property owner, like the future purchaser of a bottle of ginger beer, comes within the general principles of proximity.

94 These are interesting submissions. When all is said and done, it remains true that in ***The Wear Breeze***, ***The Irene's Success*** and ***The Aliakmon*** the precise issue did not arise because the claimants there never obtained title while the goods were on board the vessel or before all relevant loss had already been suffered. It is also perhaps arguable that, even if it may be said that both Roskill J and Lord Brandon considered that no duty of care was owed to the claimants in those cases, they simply did not have in mind the case of a claimant who had actually suffered damage to his goods during the voyage, and after they had become his goods on the voyage. The contrary argument is that there is a firm and well-known rule applying to the carriage of goods, that any difficulties in that rule in this context are dealt with in contract by the exceptional statutory effect given to the transfer of a bill of lading, and that it is not necessary or desirable to forego the certainty and simplicity of the old rule to cover exceptional cases where a claimant either has never taken a transfer of the bill of lading or wants to have his own independent remedies against the shipowner in tort as well as against his contract partner under the bill of lading.

95 In my judgment, however, it is not necessary to resolve this point, for in the present case all the damaged goods were treated as having already suffered condensation damage before the transfer of title in them took place (Makros Hout is now revealed as an exception) and in respect of negligence which had already occurred by at latest the start of the voyage. All subsequent condensation damage continuing beyond the transfer of title in the respective parcels was merely the continuation and progression of the damage already suffered. No new negligence, no new mechanism of damage, postdated the transfer of title. It was not submitted that the negligent act of stowage was a continuing breach, merely that the fresh damage which occurred after the claimants had each acquired title created new causes of action in the hands of each new owner of cargo. (If on the other hand the parcel to parcel interpretation is adopted, then the claimants, including Makros Hout itself, simply cannot prove their loss.)

96 In my judgment, however, the cause of action in respect of the negligent stowage was in the present circumstances completed once and for all when more than insignificant damage was caused by that negligence to the respective parcels of timber. On Colman J's findings that would have been not long after the voyage began. That cause of action was possessed by the then owners of that cargo, the shippers or Makros Hout. The principle in question was laid down in ***Cartledge v E Jopling & Sons Ltd*** [1963] AC 758, [1963] 1 All ER 341 in the case of personal injury, and in ***Pirelli General Cable Works Ltd v Oscar Faber & Partners*** [1983] 2 AC 1, [1983] 1 All ER 65 in the case of damage to property.

97 In ***Cartledge v Jopling*** it was held that the cause of action for the negligent causing of pneumoconiosis arose as soon as more than insignificant damage had been done by the inhalation of asbestosis dust, even though that was long before any knowledge of the damage being done by the slow progression of the disease, and even though the victim may have thus become time-barred before he even knew of his injury or rights. As Lord Reid said (at 771/2): "*It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer,* and that further injury arising from the same act at a later date does not give rise to a further cause of action" (emphasis added)

98 In ***Pirelli v Oscar Faber*** unsuitable material was used to construct a chimney. Within a year cracks had developed, but were not discovered for more than another 7 years, by which time the plaintiffs were time barred. ***Cartledge v Jopling*** was applied. Lord Fraser of Tullybelton said (at 14C/F):

"*Although* **Cartledge v E Jopling & Sons Ltd** *[1963] AC 758 was a case of personal injuries, the respondents did not dispute that the principle of the decision was applicable in the present case . . . Moreover, Lord Pearce seems to have regarded the two types of claim as being subject to the same rules. In the course of his speech at page 780, he relied upon the observations of Lord Halsbury* ***in*** **Darley Main Colliery Co v Mitchell** *(1886) 11 App Cas 127, 132, as follows:*

'No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged nonetheless [then] to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so for the more complex mechanism of the human frame, the damage is done in a railway accident, and the whole machinery is injured. though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the [original] damage done, and consequent upon the injury originally sustained'."

At 18E/F Lord Fraser also said: "*I think the true view is that the duty of the builder and of the local authority is owed to owners of the property as a class, and that if time runs against one owner, it also runs against all his successors in title. No owner in the chain can have a better claim than his predecessor in title. The position of successive owners of property is, in my opinion, to be contrasted with that of workers in a case such as* **Davie v New Merton Board Mills Ltd** *[1959] AC 604, where a separate duty of care is owed by the maker of a machine to each worker who uses it, and a new worker is not a successor in title to a former holder of his job.*"

99 Nevertheless, Mr Jacobs submitted that each new piece of damage created a new cause of action. For this submission, he relied on ***The Darley Main Colliery Company v Mitchell*** [1886] AC 127 and what was said about it in ***Cartledge v Jopling*** itself. He also submitted that causes of action run with people, not property, so that provided there was identifiably fresh damage after a change of ownership, a new cause of action can always spring up in the hands of the new owner. As for *Pirelli v Oscar Faber*, that was not concerned with fresh or different damage occurring at different stages, and so was of no assistance.

100 ***Darley Main Colliery*** was concerned with subsidence caused by coal mining. In 1868 subsidence occurred, which caused damage to houses built on the land. The damage was compensated. There was no further working of the mines, but 14 years later in 1882 further subsidence occurred causing further damage. The plaintiff succeeded. Lord Halsbury distinguished between once and for all recovery for all damage which had occurred at any one time, even if it only manifested itself by stages, and entirely new damage. He said (at 133): "*I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered.*"

101 Lord Bramwell distinguished between personal injury (at any rate where the act is wrongful in itself) and damage to property. He said (at 144/5): "*It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, and future, certain and contingent . . . I now come to the case of where the wrong is not actionable in itself, is only an injuria, but causes a damnum. In such a case it would seem that as the action was only maintainable in respect of the damage, or not maintainable till the damage, an action should lie every time a damage accrued from the wrongful act.*"

He continued (at 146): "*Now apply this reasoning to the present case. There are by the admission of the parties two separate and distinct damages caused to the plaintiff by the acts, including in that word omissions, of the defendants. One a removal of coal and non-providing of supports, which caused a subsidence in 1868. A cause of action accrued then. Another cause of action is the removal of coal, including perhaps the coal which caused the first subsidence . . . and the non-providing of the consequences; which, when the adjoining owner to the defendants removed his coal, as he lawfully might (though I think that immaterial), caused a creep in the defendants' land, which in time caused the further subsidence. I think this gives a second cause of action . . .*"

And he added a little further: "*The Attorney-General, as I have said, denied that there could be two causes of action if two different parts of the plaintiff's land subsided at two different times. But surely there must be. Suppose the two pieces belonged to different owners, as I have suggested.*"

102 Lord Fitzgerald put the matter thus (at 151): "*There was a complete cause of action in 1868, in respect of which compensation was given, but there was liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action.*"

103 In ***Cartledge v Johnson*** Lord Evershed regarded the cause of action in personal injury cases, as in damage to property cases alike, to accrue only "*when the damage – that is, real damage as distinct from purely minimal damage – is suffered*" (at 774). Lord Pearce, with whose speech their other Lordships agreed, also pointed out that damage is the gist of the action for negligence in personal injury cases (at 783/4) and rejected the submission that an analogy could be drawn in favour of the plaintiff from the subsidence cases such as ***Darley Main Colliery***. He said (at 780): "*The law as it has developed in subsidence cases cannot be extended to cover the present case. In cases of personal injury the law is clear and has been settled for many years. Although two separate actions may be brought, one for personal injury and one for damage to property, both being caused by the same negligence (***Brunsden v Humphrey***), only one action may be brought in respect of all the damage from personal injury.*"

104 In ***Pirelli v Oscar Faber*** it was held that there was no relevant distinction between personal injury and damage to property and Lord Fraser pointed out that in ***Cartledge v Jopling*** Lord Pearce had regarded the two types of claim as having been subject to the same rules (at 14C/D). Therefore the distinction drawn by Lord Bramwell in *Darley Main Colliery*, who seems there to have treated personal injury as though it was a wrong in itself, has not born fruit. There was no express discussion as to whether the cracking, which it was found as a fact had occurred by April 1970, had extended in later years, but it seems likely that it was regarded as having done so, since it was also found that the cracking could not have been discovered until October 1972 but then could have been. There is no sign that the only sense in which ***Cartledge v Jopling*** was applied was that the cause of action ran from the date of damage rather than from the date of discoverability, as distinct from the other aspect of the earlier decision, namely that the progression of damage did not create a new cause of action at a later date. Thus Lord Reid's dictum at 771, set out above, was cited by Lord Fraser at 13E in full, including the final clause – "and that further injury arising from the same act at a later date does not give rise to a further cause of action".

105 In my judgment Mr Berry is right in his submission that the subsidence line of cases exemplified **by *Darley Main Colliery*** is the exception rather than the rule. In the light of ***Cartledge v Johnson*** and its application in ***Pirelli v Oscar Faber*** the standard rule for both personal injury and damage to property is that progressive damage originating from one act or omission creates a single cause of action. The reason why the subsidence line of cases is different is probably because the cause of action in those cases is a continuing cause of action. It is so treated in *Salmond & Heuston, The Law of Torts*, 21st ed, 1996, at 551/2, together with the torts of nuisance and trespass. This appears

to be recognised in the speeches of Lord Bramwell (who defined the cause of action as depending on not merely the removal of support but "the non-providing against the consequences" at 146) and Lord Fitzgerald (who emphasised that the colliery "permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury" at 151). Since the act of excavation is lawful in itself, it is the continuing failure to provide against the consequences, which provides the basis of the wrong once damage occurs. Moreover, in the case of progressive damage, I would not agree with Mr Jacobs that a new cause of action is created each time the object suffering damage comes into the hands of a new owner. Even if the new owner is within the class of those to whom the tortfeasor owes a duty, then, as Lord Fraser said in ***Pirelli v Oscar Faber*** "*if time runs against one owner, it also runs against all his successors in title*" (at 18E). That shows that there is only one cause of action, which arises when (more than negligible) damage is first caused. It is not open, therefore, to a new owner to say, as Mr Jacobs seeks to submit, that a *new* cause of action, in respect of *further* (albeit progressive) damage which has developed *after* the transfer of title, has come into being in favour of the transferee. It may be different where entirely different damage is done on different occasions by reason of a different defect, as where, owing to defective hatch covers, one hold is flooded on one day and another hold is flooded on a different day: but that is for another occasion. In my judgment, however, the progressive damage done in this case does not create new causes of action in respect of the later stages of the same progressive damage, even in the hands of a new cargo owner and even upon the assumption that the new cargo owner was always within the scope of the shipowner's duty of care. Thus even if the underlying reasoning of Colman J on this aspect of the case is correct, further consideration of the nature of the damage and the cause of action in question prevents recovery.

106 That is on the basis that ultimately the proper way to interpret Colman J's findings on damage is on the across the board principle, which is how the parties did by agreement so interpret them, and how the judge's order gave practical effect to his judgment. If on the other hand, as Mr Jacobs wished to submit, the parcel to parcel interpretation is adopted, then the claimants simply cannot prove their loss.

107 Mr Jacobs also submitted that in the case of Fetim, where the transfer of title occurred only 3 days after 8 December, the condensation damage prior to transfer was too negligible to give rise to any cause of action at that time. The parties' own calculation was that loss of something over 5% of the cargo's value occurred in those 3 days. In my judgment, that is more than negligible.

108 It follows that, with the exception of Makros Hout in Folio 237, the claims in tort must in my judgment fail. I am prepared to uphold the claim of Makros Hout in tort, subject to the third issue, on the basis that ultimately the across the board interpretation of Colman J's findings is the correct one to apply. It represents the agreement of the parties, as sanctioned by the judge's order, and also reflects Mr Berry's primary submission to this court, and so works no injustice to the owner.

109 It is next necessary to go on to consider the *Himalaya* clause issue. So far as Fetim and Homburg are concerned, the matter is moot. So far as Makros Hout is concerned, however, its claim in tort depends on upholding Colman J's decision on this third issue.

Issue 3: Is the shipowner nevertheless protected against liability in tort by reason of the Himalaya clause?

110 On the basis that the bills of lading are charterers' bills, then the owner is a third party to the contract of carriage who nevertheless performs the carriage and is prima facie entitled to the benefit of the protection afforded by the *Himalaya* clause contained in those bills, by way of a separate contract with their holders: see ***New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon)*** [1975] AC 154, [1974] 1 All ER 1015, ***Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The New York Star)*** [1980] 3 All ER 257, [1981] 1 WLR 138, ***The Makhutai*** [1996] AC 650, [1996] 3 All ER 502. That the owner in this case is so entitled is common ground, subject only to one submission made by Mr Jacobs, to the effect that the owner does not fall within any of the categories of third parties designated by the *Himalaya* clause. Subject only to that submission, it is, as I have said, common ground that the *Himalaya* clause protects the owner, and the remaining issue is the extent of that protection. If, as Mr Berry submits, the clause gives to the owner a complete exemption from all liability, then the three claimants' claims in tort could not succeed in any event, and Makros Hout's claim, which would otherwise in my judgment succeed, would ultimately fail on this ground alone. If, however, as Mr Jacobs submits, the *Himalaya* clause only protects third parties to the extent of the carrier's own protection under the bills of lading, then the clause does not avail the owner, for it is common ground that there is no exemption for the carrier against negligent stowage.

111 The *Himalaya* clause is contained in clause 5 of the bills of lading, which provides as follows:

> "*[1] It is hereby expressly agreed that no servant or agent of the carrier including any person who performs work on behalf of the vessel on which the goods are carried or any of the other vessels of the carrier, their cargo, their passenger or their baggage, including towage of and assurance and repairs to the vessel and including every independent contractor from time to time employed by the carrier shall in any circumstance whatsoever be under any liability whatsoever to the shipper, for any loss or damage or delay of whatsoever kind arising or resulting directly from any neglect or default on his part or acting in the course of or in connection with his employment.*
>
> *[2] and, without prejudice to the generality of the provisions in this Bill of Lading, every exception limitation , condition and liberty herein contained and every right exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available to and shall extend to protect every such servant or agent of the carrier (who) is or shall be deemed to be acting on*

behalf of and for the benefit of all persons who are or might be his servants or agents including any persons who performs works on behalf of the vessel on which the goods are carried or of any other vessels of the carrier, their cargo, their passenger, or their baggage, including towage of and assistance and repairs to the vessels and including every independent contractor from time to time employed by the carrier employed by the carrier.

[3] and all such persons shall to this extent be deemed to the (sic) parties to the contract in or evidenced by this Bill of lading.

[4] The (shipper) shall indemnify the carrier against any claim by third parties against whom the carrier cannot rely on these conditions, in as far as the carrier's liability would be accepted if said parties over (sic) bound by these conditions."

The clause is in fact set out in the bills of lading in a single long paragraph, and must be construed as so set out; but I have divided it up into four parts for the sake of convenience of exposition of the submissions which I must deal with below.

112 Mr Jacobs' threshold submission is that the owner of *The **Starsin*** is not *an "independent contractor . . . employed by the carrier"* within the meaning of Pts 1 or 2 of the clause. In this respect he prayed in aid the support of the Court of Appeal of Hong Kong in ***The Makhutai*** [1993] 2 HKC 71 (on a point which on further appeal the Privy Council left open, at 665E), where Litton JA held that the shipowner was not the charterer's "subcontractor" for the purpose of discharging the former's obligations as carrier under the contract of carriage, saying that it would be "highly artificial" so to regard the former. Colman J, however, disagreed. He said (at 99):

"Ordinarily understood the word 'independent contractor' in the context of a head contract means a third party with whom a party to the contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party had undertaken to perform under the head contract, in other words, a sub-contractor. Where a carrier has chartered a vessel to perform the sea carriage which that carrier has contracted with the shipper to perform, he has in effect employed the shipowners to carry out the substantial part of his own contractual obligations. He has therefore employed the shipowner as an independent contractor just as if he had employed a stevedore to carry out the handling of the goods at the port of loading. Accordingly, unless the construction of cl 5 requires it to be given some restricted meaning excluding the owners of a chartered ship, the defendants are independent contractors in this case . . .

In my judgment, there is no reason for according to 'independent contractor' a meaning restricted in this way. Unlike the members of the Court of Appeal of Hong Kong, I do not find the wider construction artificial . . . Once it had been decided that they were charterer's bills and that the shippers had contracted with the charterers as carriers it was (and is) open to the Court to treat the shipowners as sub-contractors for the carriage of the cargo and independent contractors on behalf of the charterers."

113 It is sufficient to say that I agree with Colman J and his reasons. In my judgment, the owner was indeed an independent contractor employed by CPS to perform its own contractual obligations.

114 I turn therefore to Mr Berry's submission that Pt 1 of the clause provides the owner, qua independent contractor, with a complete exemption from all liability whatsoever. In short, he submits that Pt 1's complete exemption applies to all third parties within the purview of the clause; that Pt 2's more limited exemption, granting to such third parties the carrier's rights and defences under the bill, if indeed more limited, is without prejudice to the complete exemption already granted under Pt 1, as indicated by the words introducing Pt 2 "without prejudice to the generality of the provisions in this Bill of Lading"; that in any event the word "right" found among the list of nouns at the beginning of Pt 2 brings into play and extends to such third parties the carrier's right to enforce the complete exemption of such third parties under Pt 1; and that such a construction is confirmed by the language of Pt 2 whereby the carrier is said to be "deemed to be acting on behalf of and for the benefit of all" such third parties and by the language of Pt 3 whereby such third parties are "to this extent", ie to the extent of the clause as a whole, deemed to be parties to the bill of lading contract.

115 Mr Jacobs on behalf of the claimants, on the other hand, submits that Pt 1 of the clause applies only to the carrier, who alone is entitled to enforce by means of this provision a total prohibition on any collateral attack on him by means of any suit by the shipper against third parties; that it is only Pt 2 with its more limited exemption that applies to such third parties and that the introductory words are intended to signify the insulation of Pt 2 from Pt 1; that the words of Pt 3 look back ("to this extent") to the words of Pt 2 and not to the clause as a whole; and that, in accordance with the purpose of the clause as a whole, which is to extend to third parties the protection enjoyed by the carrier under the bill of lading, no less and no more, the Hague Rules paramount provision contained in art III, r 8, incorporated with the rest of the Hague Rules, ensures that third parties, like the carrier itself, cannot enjoy a blanket exclusion of liability.

116 Colman J preferred the submissions of the claimants to those of the owner (see at 99/100) and I agree. The essence of the matter is that Pt 1 of the clause does not give to the carrier a personal blanket exemption of liability, which is then extended to third parties within the clause, but is only concerned with granting to the carrier an exceptional right, not granted to any other party, to enforce, if necessary by injunction, a complete prohibition on any suit by holders of the bill against third parties within the clause: see ***Nippon Yusen Kaisha v International Import & Export Co Ltd (The Elbe Maru)*** [1978] 1 Lloyd's Rep 206. I do not think I can put the various considerations better than Colman J has put them himself, but I would seek to refer to them briefly as follows.

(1) There is no sign in the leading cases on the *Himalaya* clause, ***The Eurymedon, The New York Star***, and ***The Makhutai***, each of them in the Privy Council, of any reliance on Pt 1 of the clause or of finding there a complete exemption of liability for the benefit of third parties. Mr Berry submits that that is not surprising in that at any rate the first two of those cases relied on the bills' Hague Rules one year time bar – and that a time bar is as good as a blanket exemption, so that there was no need to raise an additional point under Pt 1 of the clause. That may be so, but it does not explain why the additional point was not taken, if there to be taken, nor why in ***The New York Star*** at 142E/F and again at 143E/F Lord Wilberforce explained the function of the *Himalaya* clause, which was present there in very similar (albeit not identical terms) to clause 5 here, as being, for instance, to extend: *"the benefit of defences and immunities conferred by the bill of lading upon the carrier to independent contractors employed by the carrier";*

nor why in ***The Makhutai,*** where again the clause was similar but not identical, and where the issue was whether an exclusive jurisdiction clause was available for the benefit of the shipowner, the shipowner did not simply apply to strike out the claim as a whole. There it was this time Lord Goff of Chieveley who described the function of the *Himalaya* clause (at 666G) as: *"to prevent cargo owners from avoiding the contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf."*

(2) In ***The Elbe Maru***, the clause read: *"The Merchant undertakes that no claim or allegation shall be made against any servant, agent or sub-contractor of the Carrier which imposes or attempts to impose . . . any liability whatsoever . . . and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof."*

That may be a clause which states the obligation not to sue third parties more clearly than the wording of clause 5: but I am not concerned with the effectiveness of Pt 1 as a promise not to sue, and it will be seen that in essence Pts 1 and 4 of clause 5 amount or are intended to amount to the same promise given to the carrier by the shipper not to impose any liability whatsoever on the carrier's servants or agents. Thus Pt 4 is a promise by the shipper to the carrier to indemnify the carrier against any claim by parties against whom the carrier cannot rely on "these conditions . . .". It will be seen moreover that Pt 1 of the clause taken by itself is not extended to benefit third parties, unlike Pt 2, and that this emphasises that the function of Pt 1 is to benefit the carrier itself rather than its servants or agents.

(3) If Pt 1 had the effect contended for by Mr Berry, then Pt 2 would be redundant and unnecessary. The argument against surplusage may not be the strongest of weapons, but it is certainly an unsatisfactory and dangerous way of drafting for a blanket exception to go on in Pt 2 to provide third parties the merely inferior protection of the benefit of the carrier's own protection, if they had already been granted a complete exemption, beyond the carrier's own protection, under Pt 1 of the clause. Moreover the link words between Pt 1 and Pt 2 ("without prejudice" etc) do not say "without prejudice to the foregoing", which is how Mr Berry would wish to read them, but look forward rather than back.

(4) While it is true that the word "right" appears among the other nouns in Pt 2, nothing in its surrounding context suggests that it looks backwards to the right of the carrier under Pt 1 to have its servants and agents exonerated of all liability whatsoever. Surrounded as it is by words of exemption, defence, immunity and so on, the word "right" must rather refer to rights which go to protect the carrier itself, such as a right for instance to commence a limitation action. Mr Berry concedes that "right" cannot be given its natural meaning to include all rights given to a carrier under its bill of lading contract, because it is accepted that the function of the *Himalaya* clause is not to transfer to third parties the carrier's rights, eg to freight or other payments, but only its defences.

(5) The words in Pt 3 "to this extent" do not apply to the whole of the preceding clause, but naturally look back to the words in Pt 2 "shall extend to protect every such person".

(6) Article III, r 8 of the Hague Rules is incompatible with the idea that third parties to whom the benefit of the carrier's defences are extended, should have a blanket exemption from liability.

117 For these reasons, I consider, in agreement with Colman J, that clause 5 only protects the owner to the same extent as the carrier is itself protected by the bill of lading provisions under its contract of carriage. Since the carrier would have no exemption for negligent stowage, it follows that its independent contractor, typically a stevedore but here the shipowner itself, can have no exemption either.

118 It follows that Makros Hout is entitled to uphold judgment in its favour in tort. The sum agreed below was US$ 9,066.73 and NLG 4,654.81, including interest up to 16 July 1999.

The Latent Damage Act 1986

119 Finally, a point arises, by reference to the Latent Damage Act 1986 (the "Act"), as to whether the claimants ought to have been given permission to amend their points of claim to include reliance in the alternative on the statutory cause of action provided under s 3(1) of that Act.

120 It is sufficient to set out s 3(1) of the Act. Sub-sections (2), (5) and (6) can be found set out at 107 of the judgment below. Section 3(1) provides:

"(1) Where – (a) a cause of action ("the original cause of action") has accrued to any person in respect of any negligence to which damage to any property in which he has an interest is attributable (in whole or in part); and

(b) another person acquires an interest in that property after the date on which the original cause of action accrued but before the material facts about the damage have become known to any person who, at the time when he first has knowledge of those facts, has any interest in the property; a fresh cause of action in respect of that negligence shall accrue to that other person on the date on which he acquires his interest in the property."

121 The point first arose during the course of the trial before Colman J, when it was mentioned during Mr Jacobs' opening, but it was not addressed in any detail until final submissions after the close of the taking of evidence. At that time Mr Jacobs submitted that the point did not need to be pleaded, but if it did, a draft amendment was proffered. In the circumstances, the point could not be addressed, no doubt in fairness to Mr Berry, during final submissions themselves and was left to the exchange of written submissions after the close of the hearing. The point was dealt with by Colman J as part of his judgment at 107/8. He held that a claim under the Act did need to be pleaded, and that he would refuse permission to introduce it by amendment at such a late stage of the proceedings. In this court it is no longer submitted that there was no need for amendment, and the appeal on this point is limited to whether the judge erred in refusing permission to amend.

122 Colman J held that it would not be possible to deal with the alternative claim without an adjournment to allow for further investigation, both of the question of the shippers' involvement with and therefore knowledge of the stowage at the time of loading, and of the existence of a similar cause of action under Malaysian law for the purpose of the double actionability rule. He pointed out that the statutory cause of action under s 3(1) differed from the cause of action at common law hitherto pursued by the claimants, in that the former involved a claim in respect of the total damage suffered both by the shippers and following the transfer of title to the claimants, whereas the latter claim was confined to damage following such transfer. In the circumstances he held that the necessary adjournment, to deal with an entirely new claim of this kind, which after all could always have been pleaded from the outset, would be unfairly prejudicial and unjust to the owner, and that it would be wrong in principle, even with special protection as to costs, to disrupt the course of the trial (at 108).

123 Mr Jacobs recognised that he would be unable to question the judge's decision as a matter of pure discretion and therefore placed in the forefront of his argument the consideration that the judge was simply wrong to have concluded that there would have been need for any further investigation of the facts or of Malaysian law. In other words, his submission was that the judge could have dealt with the new point as a pure point of law, at the trial itself, and without any need for any adjournment.

124 The first matter on which he said that the judge was wrong to have foreseen the possibility of further investigation or evidence was that of the shippers' involvement in and knowledge of the stowage. He was unable to submit, however, that this was in theory irrelevant, for the statute makes it relevant under s 3(1)(b) with its reference, in effect, to the question of the shippers' prior knowledge of the material facts about the damage: subsections (5) and (6) go on to give statutory definitions of "material facts" and "knowledge" for the purposes of the section. Mr Jacobs was therefore reduced to the submission that in the particular circumstances of the trial to date the owner had already demonstrated that it had no case to make about such matters. This was possibly a bold submission to make of a new claim, involving a new statutory cause of action, but was premised on the fact that the pleadings had always contained a plea by the owner that the damage was caused by the shippers' own acts or omissions in shipping wet cargo and occurred without the owner's actual fault or privity or the fault or neglect of its servants (see paras 8.3 and 9.3 of the owner's points of defence). In my judgment, however, Colman J was right to say that that plea did not go to the shippers' involvement in the stowage itself. He had already pointed out that it appeared from the master's evidence that the shippers had been present during loading, and therefore it was possible that they had knowledge of and may even have assented to the methods of stowage adopted. It is true, therefore, that the owner always could have, but had not, pleaded that the shippers had assented to the stowage: such a plea would have been relevant to the claim in contract, but not to the claim in tort in the absence of reliance on the Act. However, as the judge remarked, it is one thing to forego that possible line of defence in the absence of reliance on the Act, and another thing to do so if the statutory cause of action had always been in issue. I do not think that the judge's reasoning can be faulted in principle in this respect.

125 The other matter on which Mr Jacobs submitted that the judge had erred was in his reference to the need for investigation of Malaysian law in connection with the doctrine of double actionability. Mr Jacobs said that the underlying common law claim in tort had always involved a question of actionability under Malaysian law, but the owner had throughout been prepared to proceed on the basis that Malaysian law was identical to English law. In any event, the statutory cause of action was binding on the English court without need for any reference to Malaysian law. Mr Berry took issue with both aspects of this submission. He said that the claimants had to prove that the statutory cause of action was reflected in some form or other in Malaysian law, and that whereas it had been perfectly sensible for the owner to assume that the common law of tort in Malaysia and England was the same, the owner would have been bound to have wanted to investigate the existence of some parallel in Malaysian law to the statutory cause of action, had that been originally pleaded. Colman J accepted both these points, again in my judgment rightly. The Act does not purport to say anything about a tort claim which has to be made good under Malaysian law, and therefore the owner would have been entitled to say that no such cause of action exists as a matter of that law.

126 In such circumstances the attack on the judge's exercise of his discretion is bound to fail, and Mr Jacobs did not suggest otherwise.

127 There was also a submission by Mr Berry that there was in any event no permission to appeal what was in effect an interlocutory point of mere case management, even though it had been decided at trial; and that the permission to appeal granted by Colman J under his order of 16 July 1999 did not embrace the point presently under discussion. Mr Jacobs however submitted that that permission to appeal was general and unlimited and that he needed nothing further. The order said nothing about the claimants' application to amend their pleadings or its refusal. In such circumstances I am inclined to the view that strictly speaking the judge's refusal of the application to amend should have been specifically addressed in an order. If it had been contained in the same order as the permission to appeal, then I would be inclined to say that the permission to appeal would cover the point; if it had been contained in a separate order, then the question of specific permission to appeal would have had to have been addressed in that order. In the circumstances prevailing, where there is no specific mention of the refusal of permission to amend the pleadings in any order, I would not be inclined to construe the permission to appeal that has been granted as covering the point. As it is, I am content to decide the point on its merits.

128 I would also observe that, if permission to amend had been given, it would strictly have been necessary to amend the claim forms as well.

Conclusion

129 It follows that, for my part, I would uphold the judgment below as to the owner not being liable in contract under the bills of lading and dismiss the claimants' cross-appeal in that respect; and allow the owner's appeal in relation to its liability in tort so far as Homburg and Fetim are concerned, but not so far as Makros Hout is concerned. I would also dismiss the appeal with respect to the *Himalaya* clause and the cross-appeal with respect to the question of amendment to plead the Latent Damage Act.

130 In sum, I would uphold the outcome below so far only as Makros Hout is concerned, on the basis that all the claims in contract fail, and that only Makros Hout's claim in tort succeeds, and does so because Makros Hout, alone of the four claimants, had title to its cargo at the completion of loading at the third port, at the outset of the ocean voyage and before any of the condensation damage occurred.

CHADWICK LJ

131 The first issue raised by this appeal and cross appeal is whether the shipowner is liable in contract as parties to the bills of lading. The judge held that it was not. Rix LJ has reached the same conclusion. For the reasons that I set out in this judgment I am persuaded that that conclusion is incorrect. It follows that I would allow the appeal on that issue.

132 In those circumstances I do not find it necessary to deliver a judgment of my own on the second of the three issues which Rix LJ has identified. It is enough to say that I agree with his view that, whether or not a claim in tort in respect of goods damaged at sea might lie against the shipowner at the suit of a person who became entitled to those goods after the voyage has commenced but before the goods have been damaged, that is not a claim which (save at the suit of the claimant Makros Hout BV) could succeed on the facts in this case – for the reasons which Rix LJ has given.

133 I agree, also, with the conclusion reached by Rix LJ on the third issue: that the *Himalaya* clause contained in the bills of lading provides no defence to the shipowner against a claim in tort. But, as the point may be of some general importance, I have included some observations of my own at the end of this judgment.

134 In the circumstances that I would allow the claims in contract, I take the view that it is unnecessary to consider the application to amend in order to raise claims under s 3(1) of the Latent Damage Act 1986. But, in agreement with Rix LJ, I am not persuaded that the judge was wrong to take the view that those claims could not properly be adjudicated upon without an adjournment to allow further investigation of the facts and of the relevant law applicable in Malaysia. Given that the judge was entitled to take that view, an attack on his decision (as a matter of discretion) to refuse the application to amend could not succeed.

The claims in contract

135 The contracts under which the relevant goods were shipped are to be found in the respective bills of lading. Each bill of lading is on the same printed form. The printed form is described, on its face, as a "liner bill of lading". It appears, at first sight, to have been issued by "Continental Pacific Shipping" whose name and emblem appear in a prominent position.

136 Each bill of lading bears a distinctive serial number. The shipper, the consignee, the notify address, the vessel (and the voyage number), the port of loading and the port of discharge (or final destination) are all identified on the face of the bill. So, also, are the goods to which the particular bill relates. Those goods are described as: *"Shipped on Board in apparent good order and condition, . . . etc . . . for carriage to the Port of Discharge . . . to be delivered in the like good order and condition . . . unto the Consignees or their Assigns . . ."*

The operative clause continues:
"In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed, stamped or otherwise incorporated, as fully as if they were signed by the Merchant.
One original Bill of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.
IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void."

137 That clause contains two features which are of importance in the present context. First, the clause makes it clear that the bill of lading has to be read and construed as a whole. Any doubt as to that is removed by the words: "In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, . . .". In particular, the bill of lading has to be read and construed so as to give effect to the provisions in conditions 33 and 35 which Rix LJ has set out. Second, the clause provides for the bill of lading to be signed by the master of the vessel. That is the plain purpose and intent of the words of attestation: "IN WITNESS whereof the Master of the Vessel has signed . . ."

138 There is no doubt that, in the ordinary case where a bill of lading is signed by the master of the vessel, with the authority of the owner of the vessel, the contract of carriage is made with the ship owner; notwithstanding that, at the time of signature, the vessel is subject to a charterparty. As Rix LJ (when sitting, as Rix J, as a judge of the Commercial Court) pointed out in ***Sunrise Maritime Inc v Uvisco Ltd (The "Hector")*** [1998] 2 Lloyd's Rep 287, at page 293, that has been understood to be the position since (at the latest) the decision of Channell J in ***Wehner v Dene Steamship Co*** [1905] 2 KB 92, at page 98: "*In ordinary cases, where the charterparty does not amount to a demise of the ship, and where possession of the ship is not given to the charterer, the rule is that the contract contained in the bill of lading is made, not with the charterer, but with the owner . . .*"

139 That general rule was approved by this Court in ***The Rewia*** [1991] 2 Lloyd's Rep 325, at page 333. It can be seen that, as expressed by Channell J, the rule has two limbs; which complement each other. The first limb of the rule – that the contract of carriage is made with the ship owner – is reflected in the opening words of condition 33 of the printed form used in the present case: "*IDENTITY OF CARRIER The contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) . . .*"

The other limb of the rule – that the contract is not made with the charterer – is reflected in the words immediately following: "*. . . and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage whether or not relating to the vessel's seaworthiness.*"

140 Further, where the bill of lading includes an identity of carrier clause in the form of condition 33, it is, plainly, the intention of the parties that the general rule shall apply notwithstanding that the bill is signed for and on behalf of the master by the charterer or by the charterer's agent; provided, of course, that the person signing the bill for and on behalf of the master has the authority of the ship owner to do so. That is made clear by the final sentence of condition 33: "*It is further understood and agreed that the Line, Company or Agents who has executed this bill of lading for and on behalf of the master is not a principal in the transaction and the said Line or Company or Agents shall not be under any liability arising out of the contract of carriage, nor a carrier or bailee of the goods.*"

141 To state the obvious, the ship owner cannot be bound to a contract made by an agent without his authority, actual or ostensible. But the charterer's authority to sign bills of lading for and on behalf of the master, so as to bind the ship owner, will usually be found in the charterparty (actual authority) or in the circumstances in which the charterer has been placed by the shipowner (ostensible authority). As Moore-Bick J observed in ***Fetim BV and others v Oceanspeed Shipping Ltd (The "Flecha")*** [1999] 1 Lloyd's Rep 612, at page 618: "*. . . it [the charterparty] contemplated that the time charterers could, and probably would, bring into existence bill of lading contracts which bound the owners of the vessel and that is reflected in turn in the terms of the bills of lading. That is something which in my judgment is sufficiently common practice to be well known to those who regularly ship goods by lines of this kind.*"

142 It is to meet the case – commonly found in practice – where the bill of lading is signed by the charterer or the charterer's agent for and on behalf of the master of the vessel, in circumstances authorised by the shipowner, that the terms of the bill of lading contain a provision which (in the form used in the present case) is found in the final sentence of condition 33.

143 The problem in the present case arises because of the form in which the bills of lading were signed. I have already set out the terms of the operative clause, which appears on the face of the bills of lading in the present case. Below that clause, on the face of each bill, there are boxes for the insertion of "Place and date of issue" and "Number of original Bs/L"; and there is a box for "signature".

144 The bills fall into four groups, which may conveniently be identified by reference to the name of the respective consignee. The four groups are: (i) the Makros Hout bills (KCH/ROT-001(A)/(F)) issued at Kuching on 10 November 1995; (ii) the Homburg bills (BLWRT-006/7, 057 and 062) issued at Belawan on 14, 21 and 23 November 1995; (iii) the Fetim bills (CP/PK/ROT-9/13) issued at Port Klang on 28 November 1995; and (iv) the Hunter bills (CP/PK/TIL-28/29) issued at Port Klang on 4 December 1995.

145 The signature box on each of the six Makros Hout bills contains two signatures over the typed words "As Agent for Continental Pacific Shipping (The Carrier) UNITED PANSAR SDN. BHD." The signature box on each of the four Homburg bills contains a single signature over the circular stamp or "chop" of "P.T.Karama Line – Cabang Medan" and the typed words "AS AGENTS FOR THE CARRIER CONTINENTAL PACIFIC SHIPPING". The signature box on each of the four Fetim bills and the two Hunter bills contains a single signature against the typed words "MULTIPORT SDN BHD. *As Agents* for CONTINENTAL PACIFIC SHIPPING *AS CARRIER*". It has not been suggested that there is any material difference between those three versions in the signature box. The common features are that, in each case, the bill is signed by the port agent (United Pansar Sdn Bhd, PT Karama Line or Mulitiport Sdn

Bhd, as the case may be) as agent for Continental Pacific Shipping ("CPS") and, in each case, CPS is described as the "Carrier".

146 In that context, as in the bill of lading as a whole, "Carrier" is a defined term. Condition 1 of the "Company's Standard Conditions", printed on the reverse side of each bill, is in these terms, so far as material:

"*1. DEFINITIONS In this Bill of Lading both on the front and on the back the following expressions shall have the meanings hereby assigned to them respectively, that is to say*

(a) . . .

(b) . . .

(c) "Carrier" means the party on whose behalf this Bill of Lading has been signed."

147 Thus far "the Merchant", to whom reference is made on the face of the bill, could be in no doubt that CPS was the "Carrier"; and, as such, was the person who had accepted responsibility for the performance of the contract of carriage, the person in relation to whom the provisions in the Hague Rules affecting the Carrier were applicable (see condition 2 of the bill), and the person on whom primary immunities were conferred by condition 5 (the "*Himalaya*" clause). But, equally (if he did not know otherwise), the Merchant would be led to think that CPS was the owner of the vessel. The bill of lading has to be read and construed as a whole; and the opening words of condition 33 are explicit: *"IDENTITY OF CARRIER The contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein . . .*". If effect is to be given to the description of CPS in the signature box, the definition of "Carrier" in condition 1(c) and the opening words of condition 33, the conclusion that CPS is the owner of vessel is inescapable. The problem, of course, is that when the full facts are known it can be seen that that conclusion is wrong. CPS is not the owner of the vessel: it is the time charterer. CPS had the shipowner's authority to sign bills of lading for and on behalf of the master (so as to bind the shipowner); but the bills were not signed in that form. Is it right, in those circumstances, to treat the bills as charterer's bills – thereby giving effect to the description in the signature box, but giving no effect to the opening words of condition 33? Or is it right to treat the bills as owner's bills – thereby giving effect to the opening words of condition 33, but disregarding the description of CPS (as carrier) in the signature box? How is the inconsistency to be resolved?

148 At the risk of repetition, it is convenient to set out the full text of condition 33 (in what Rix LJ has described as its "cleaned up" form):

"*33. IDENTITY OF CARRIER The contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If despite the foregoing it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from liability provided by law or by this Bill of Lading shall be available to such other. It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction and the said Line, Company or Agents shall not be under any liabilities arising out of the contract of carriage, nor as Carrier nor bailee of the goods.*"

149 As I have already pointed out, the first of the three sentences which make up condition 33 is in two parts: (i) a representation or warranty that the contract evidenced by the bill is made between the merchant and the shipowner; and (ii) an agreement that "therefore" it is the shipowner (and no-one else) who shall be liable as contracting party for any breach of the contract of carriage. The first sentence is reinforced by the third sentence. Where the bill has not been signed by the Master himself, but has been signed by someone ("the Line, Company or Agents") on behalf of the Master, the person signing is not a principal and shall not be liable as a principal. But the second sentence, as it seems to me, is directed to a different point. It contemplates that, despite the parties' endeavour to prevent anyone other than the shipowner from being treated as the "Carrier" under the contract, a court may hold otherwise. That is to say, the court may hold that the bill of lading has been signed by or on behalf of someone other than the shipowner. An obvious example of a case in which the court might reach that conclusion is one in which the person signing the bill of lading had no authority to sign it for and on behalf of the master of the vessel; or did not purport to do so. In such a case the shipowner could not be held to be the "Carrier" under the bill; and it would be necessary to consider whether, by signing the bill, the person who did so intended to make himself liable as principal. If he did so, then he would be the "Carrier". In such circumstances the parties (of which, on that hypothesis, he would be one) have agreed that he is to have the benefit of the immunities which the contract and the general law – for example the Hague Rules – confer on the carrier.

150 In ***Sunrise Maritime Inc v Uvisco Ltd (The "Hector")*** [1998] 2 Lloyd's Rep 287 Rix J (as he then was) considered the effect of an identity of carrier clause (in terms indistinguishable from those contained in condition 33 in the present case) in a liner bill of lading – that is to say, a bill which was described as such on its face and which appeared, on its face, to have been issued by the liner company whose name it bore. The plaintiff was the ship owner. The vessel was chartered by the plaintiff owner to the liner company, U S Express Lines ("USEL"), under a time charter. USEL sub-chartered the vessel to the defendant ("Uvisco") for the carriage of a cargo of rolled steel billets from a Russian port, Tuapse, to Guatemala. The vessel completed loading at Tuapse on 8 February 1998; but was delayed in that port. On 11 February 1998 an instalment of hire under the time charter fell due and was not paid by USEL. On 18 February 1998 the owner withdrew the vessel from the time charter. On the following day it learned of the existence of a bill of lading, signed by agents "for and on behalf of the Master" and dated 5 February 1998, three days before the completion of loading, in which Uvisco was named as shipper. The bill was

in standard "shipped" bill form and stated that freight was to be prepaid. In a prominent position on the face of the bill there appeared the typed words "CARRIER: US EXPRESS LINES". The identity of carrier clause appeared in the bill as clause 17. The proceedings, in which the ship owner sought a declaration that the bill of lading did not contain or evidence a contract between itself and Uvisco, were commenced on 23 February 1998. They were heard by Rix J some three weeks later.

151 It is, to my mind, important to appreciate that one of the issues (identified as "Issue 2") in ***The Hector*** was whether the bill, dated three days before the completion of loading, could be regarded as authorised by the shipowner. In his judgment, delivered on 16 March 1998, Rix J held that there was no authority – actual, usual or ostensible – binding on the owners in respect of the bill (see [1998] 2 Lloyd's Rep 287, 297-298). The absence of the owner's authority was a factor which the judge treated as relevant to the other issue which he addressed ("Issue 1") – that is to say, whether, as a matter of construction, the bill was an owner's bill or a charterer's bill (see [1998] 2 Lloyd' Rep 287, 296 and 297). It is, of course, self evident that, if Rix J had held that, as a matter of construction, the bill was an owner's bill, his finding on issue 2 would have provided a reason why the owner could disclaim responsibility under it; as the judge, himself, pointed out at page 297. But the point went further than that. Rix J took the view that both USEL and Uvisco knew that the shipowner had not authorised the bill; and that that knowledge formed part of the background circumstances against which the bill had to be construed. At page 296 he said this:

"*Whatever might be the admissibility or relevance of Uvisco's or USEL's subjective intentions, I consider that on these facts [knowledge that the shipowner had not authorised the bill] the surrounding circumstances strongly support the conclusion that on a purely objective test both Uvisco and USEL intended to bring into existence a charterer's bill and not an owner's bill. Where both parties who played a role in creating that bill had in fact no authority to bind the owners in the terms of the bill which they created, and either knew or ought to have known that they had no such authority, it is difficult to think why there should be any objective reason arising from the surrounding circumstances for concluding that the bill was an owner's bill.*"

152 Nevertheless, Mr Justice Rix addressed, as a distinct issue, the question whether, as a matter of construction, the bill of lading evidenced a contract with the ship owner, or with the time charterer. He reminded himself, at [1998] 2 Lloyd's Rep 287, 293, that: "*although each case must ultimately turn on the terms of the bill of lading in question and upon its own circumstances, it has long been well established in English law that a bill of lading signed for the master is very likely to be an owner's bill.*"

But he reached the conclusion that that general rule must yield, in the circumstances of that case, to the express stipulation on the face of the bill of lading, that the carrier was USEL. He said this, at page 294:

"*As a matter of construction, then, I have found the issue an intriguing one, largely I think because of the pressure created by the general rule that a bill of lading signed by the master is an owner's bill. There is also of course the powerful pointer of cl 17. However, I have not been able to satisfy myself that the stipulation that the carrier is USEL is to be shrugged off as ambiguous. What does it mean, and why has it been inserted, unless it is intended to have effect as the definition of the carrier? The term 'carrier' is a critical term. It is not like an expression which might merely indicate that USEL was the operator of the vessel or the owner of the line. 'Carrier' is the expression in which the party with the obligations to carry out the bill of lading contract is clothed. That is made clear by the bill of lading terms as a whole, and by cl 17 in particular. It is also made clear by the Hague Rules, to which the bill of lading was made subject by cl 2. Thus art I(a) [of the Hague Rules] defines 'Carrier' as including 'the owner or charterer who enters into a contract of carriage with the shipper'. The bill of lading therefore stipulates that the carrier under the bill of lading is USEL. Although the master may be the servant of the owners, and cl 17 say that the owners are the carriers, the only party which is identified expressly by name in the bill of lading as the carrier is USEL. For all that anyone reading the bill of lading knows USEL are owners, and there is no conflict between the stipulation that USEL are the carrier on the one hand and the signature for the master and cl 17 on the other. I accept that that does not apply to Uvisco, who were aware that USEL were not the owners, but only the charterers of the vessel: but that is to go beyond a matter of pure construction on the face of the bill.*

In my judgment, therefore, the matter can be looked at in two ways. Either the three elements of the bill – the USEL stipulation, the signature and cl 17 – can be regarded as being consistent with one another, on the basis that because it is stipulated that USEL are the carrier, it must therefore follow that they are owners too; or the typed stipulation of USEL as carrier on the face of the bill must be regarded as superseding the printed provisions of cl 17. After all, that clause does at least contemplate that, despite its terms, someone other than the owners may be adjudged to be carrier. In the latter case the signature for the master will take effect on the basis that the owners have authorized the agents who have signed for the master to contract in those terms. If the owners have authorized it, then the fact that the bill is signed by agents for the owner's servant, their master, cannot compel the bill to be construed as an owner's bill. The rule is only that in the ordinary way a bill signed by or for the master will be an owner's bill, not that it must be."

153 The bill of lading which Rix J had to consider in *The Hector* did not include a clause in the same or in comparable terms to those of condition 35 in the present case. For convenience, I set out the terms of that condition:

"*35. If the ocean vessel is not owned by or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract of carriage with the owner or demise charterer as the case may be as principal made*

through the agency of the said company or line who act solely as agent and shall be under no personal liability whatsoever in respect thereof."

In the absence of any clause in the terms of condition 35 Rix J held that the typed stipulation describing USEL as carrier must be regarded as superseding the printed provisions of the identity of carrier clause (clause 17).

154 In ***The Flecha*** [1999] 1 Lloyd's Rep 612, Moore-Bick J had to consider bills of lading on the same printed form as that used in the present case. The bills were signed by agents "for Continental Pacific Shipping as carriers" or "for the carrier Continental Pacific Shipping". He reached the conclusion that the printed provisions prevailed. He said this, at page 618:

"I have already drawn attention to the identity clause, cl 33, which states in terms that the contract evidenced by the bill of lading is between the merchant and the owner of the vessel, and which further states that the line, company or agent who has executed the bill for and on behalf of the master is not a principal in the transaction. Clause 35 reinforces that. It provides that if the vessel is not owned by or chartered by demise to the company or line by whom the bill of lading is issued the bill of lading shall take effect only as a contract of carriage with the owners or demise charterers made through the said agency or line.

In these circumstances, it is plain that the terms of the bill of lading as a whole contemplate a contract of carriage between the owners of the vessel and the owners of the goods. Indeed Mr Baker [counsel for the shipowners] accepts that that is so and that it requires some positive indication that the charterers are undertaking a personal liability in contradiction to that which appears from these various parts of the bills of lading. He submits that there is a sufficient indication of that to be found in the description of the charterers as carriers in the various forms of signature to which I have referred. I am not satisfied that that is so. Indeed, it seems to me that if it were the intention of the shipping line to undertake personal liability for the carriage of the goods in contradiction to what is stated in the bill of lading terms something far clearer would be required in order to bring that about. It seems to me that the forms of signature in this case, while they raise questions as to the purpose of describing Continental Pacific as carriers, do not go far enough to make it clear that the parties intended that Continental Pacific Shipping were contracting in place of the owners contrary to all the terms of the bill of lading to which I have referred."

155 In the present case, Colman J preferred the approach of Rix J in *The Hector* to that of Moore-Bick J in ***The Flecha.*** He said this, at [2000] 1 Lloyd's Rep 85, page 95:

"No doubt, as Moore-Bick J observed in the passage which I have cited from his judgment in **The Flecha***, it may not in general be unusual to describe a liner company loosely as a carrier. However, in this case the words are used in a signature box on the contractual document which is replete with terms in which that word has a very obvious meaning . . .*

For these reasons I am not able to accept the argument, based on The Flecha, *that the use of that word is too vague and uncertain to displace the printed provisions, cll 33 and 35, and the attestation wording. By analogy with the reasoning of Rix J in* The Hector, *with which I entirely agree, I therefore conclude that as a matter of construction these were charterers' bills and not contracts binding the shipowners."*

156 In my view Colman J failed to appreciate that there is a significant difference between a bill of lading which includes only a clause in the terms of condition 33 (as in ***The Hector***) and a bill of lading which includes clauses in the terms both of condition 33 and of condition 35 (as in ***The Flecha*** and in the present case). Where a clause in the terms of condition 35 is included in the same bill of lading as an identity of carrier clause in the terms of condition 33 the proper approach, as it seems to me, is to construe the two clauses together on the basis that the one is not intended to be a mere repetition of the other. It is plain that the two clauses may overlap. But the approach to construction must be that parties have intended the clauses to be complementary, not repetitious. So I would construe condition 35 on the basis that it was intended to cover some situation which was not already covered by condition 33.

157 An obvious difference between the two clauses is that the final sentence of condition 33 is limited, by the words used, to cases where the bill of lading has been executed by a line, company or agent "for and on behalf of the master". In such a case it may be difficult to say that the bill of lading is "issued" by anyone other than the master on behalf of the shipowner. Be that as it may, it is clear enough that condition 35 is intended to apply to cases where the bill is issued by a person – a "company or line" – who is not the shipowner (or a demise charterer); and that that must include a case where the bill is not signed "for and on behalf of the master". Typically it will include a case where the bill is signed by a port agent as "agent"; or where it is signed by or on behalf of the liner company. In such a case, the purpose of condition 35 is plain enough. There are two limbs: (i) to ensure (so far as possible) that the bill takes effect as a contract of carriage with the owner or demise charterer (who, on the hypothesis which underlies the condition, is not the person issuing the bill); and (ii) to ensure that the person issuing the bill (not being the ship owner or demise charterer) does not become personally liable upon it.

158 To state the obvious (once again) the purpose to which the first of those limbs is directed cannot be served unless the person who issues the bill has the actual or ostensible authority of the shipowner or demise charterer to do so on his behalf. Absent the authority of the shipowner the bill cannot take effect as a contract of carriage with him; whatever a clause in the terms of condition 35 may suggest. But the purpose to which the second limb is directed can be served whether or not the bill is executed with the authority of the shipowner. The clause provides, in clear terms, that, if the vessel is not owned by the liner company by whom the bill of lading is issued, the liner company shall be under no personal liability in respect of the bill. It may well be, as Colman J observed in his judgment in

the present case (see [2000] 1 Lloyd's Rep 85, 89) that the second limb provided the historical reason for employing the clause; because the inability of a time charterer to limit liability under the Merchant Shipping Act prevented liner companies from relying on the second sentence of condition 33 and made it necessary for such companies to avoid being held liable as carriers.

159 At first sight, a clause in the terms of condition 35 would serve the second limb of the purpose to which it is directed without the need for the inclusion of the words in parenthesis – "(as may be the case notwithstanding anything that appeared to the contrary)". It is unnecessary to have recourse to the words in parenthesis in order to hold that the clause applies whenever (a) the bill is issued by a liner company and (b) the vessel is not owned by, or demise chartered to, that company. In such a case, the clear intent of the clause is that the liner company is not liable on the bill as principal. The bill can take effect only as a contract of carriage with the owner or demise charterer; and then only if the bill was issued with the authority of the shipowner or demise charterer. And, if the bill was issued with the authority of the shipowner or demise charterer, the first limb of the purpose to which condition 35 is directed will be served without need to have recourse to the words in parenthesis. What, then, is the reason for including the words in parenthesis?

160 In my view the answer to that question lies in an examination of the inter-relation between the attestation, the definition of "Carrier" and the opening words of condition 33 on the one hand and the hypothesis upon which condition 35 is based on the other hand.

161 In a case to which condition 35 does not apply – that is to say, in a case where the bill is signed by the master (or for and on behalf of the master by the liner company or its agent) – the attestation, the definition of "Carrier" and the opening words of condition 33 can be expected to be consistent with one another. In such a case the contract is signed on behalf of the shipowner, the shipowner is defined as the carrier (see condition 1(c)) and the opening words of condition 33 – "The contract evidenced by this Bill of Lading is between the merchant and the owner of the vessel" – are apt to describe the identity of the carrier (as the condition purports to do). But what if the bill contains some other feature which gives rise to a latent inconsistency between those three elements? The bill under consideration in *The Hector* provides a convenient example. The bill contained a prominent statement that USEL was the carrier. There was no indication on the face of the bill that USEL was not the ship owner. As Rix J observed, at [1998] 2 Lloyd's Rep 287, 294:

"For all that anyone reading the bill of lading knows USEL are owners, and there is no conflict between the stipulation that USEL are the carrier on the one hand and the signature for the master and cl 17 on the other."

To put the point in another way, it would appear to anyone reading the bill (in ignorance of the true position) that USEL was the owner; and that, consistently with the inter-relation between the attestation, the identification of USEL as carrier and the clause (clause 17) in which the opening words of condition 33 were to be found, the bill was an owner's bill issued by USEL. The problem – "owner's bill or charterer's bill" – only emerges once it is known that, contrary to the position as it would appear to anyone reading the bill without that knowledge, USEL is time charterer and not owner. That is a situation in which, as it seems to me, the words which appear in parenthesis in condition 35 will be directly in point. That is, of course, the situation which has arisen in the present case.

162 In my view, the purpose and effect of the words in parenthesis is to emphasise that condition 35 is intended to apply to a case where, on the face of the bill, it does appear that the person by whom the bill has been issued is the ship owner; but where, with knowledge of the underlying facts, it can be seen that the person by whom the bill has been issued is not the ship owner.

163 This is such a case. So also was *The Flecha*. So also, in my view, was *The Hector* – but there, of course, there was nothing comparable to condition 35 in the bill of lading. Where condition 35 applies – that is to say, where (i) on the face of the bill it appears that the person by whom the bill has been issued is the shipowner, (ii) with knowledge of the underlying facts it can be seen that the person by whom the bill has been issued is not the ship owner and (iii) the person by whom the bill has been issued had the authority of the shipowner to issue the bill on his behalf – I can see no reason why the condition should not be given the effect which its terms require: "this Bill of Lading shall take effect only as a contract of carriage with the owner . . .". That is the contract to which the merchant agreed; it is the contract into which charterer entered by signing a bill of lading (through its agent) which contained condition 35; and it is a contract to which the shipowner was content to be bound when he gave the charterer authority to sign the bill of lading on his behalf.

164 I do not find anything in the speeches in the House of Lords in ***Universal Steam Navigation Company Limited v James McKelvie & Co*** [1923] AC 492 which is inconsistent with the conclusion which I have just set out. I do not, myself, regard this as a case in which it is necessary to choose between written, stamped or typed words on the one hand and printed text on the other hand. Nor do I think it necessary to invoke some principle of "paramountcy". In my view the question whether the description of CPS as "carrier" in the signature box must yield to the opening words of condition 33 (which identify the carrier as the shipowner) is answered by construing the bill of lading as a whole. When that is done it is clear, as it seems to me, that the parties have provided the answer to that question by incorporating condition 35 as a term of their contract.

165 For those reasons I would allow the appeal on the first issue; and would hold that the shipowner is liable in contract under the bills of lading issued in the present case.

The Himalaya clause

166 I approach this issue on the basis that I am wrong in my view that the shipowner is a contracting party under the bills of lading. On that hypothesis, CPS must be regarded as the "carrier" for the purposes of condition 5 (the "*Himalaya*" clause); and the shipowner is an "independent contractor . . . employed by the carrier". On that point I agree with the judge, for the reasons which he gave at [2000] 1 Lloyd's Rep 85, 99.

167 I gratefully adopt the four-part analysis of the relevant provisions in condition 5 which has been set out by Rix LJ in his judgment. It is unnecessary for me to set it out again. The question, as he has pointed out, is whether the words in the second limb of those provisions: "*. . . every exemption limitation condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available to and shall extend to and protect every such . . . agent of the carrier . . . ,*"

confer on agents of the carrier the protection afforded by the first limb: "*. . . no . . . agent of the carrier . . . including every independent contractor from time to time employed by the carrier shall in any circumstance whatsoever be under any liability whatsoever to the shipper . . .*"

168 I agree that that question must be answered in the negative. The starting point, in my view, is to appreciate that the first limb of the relevant provisions has effect only as an agreement between the shipper and the carrier. I reject the submission that persons other than the carrier can take advantage of the protection afforded by the first limb, independently of the second limb. That submission is based on the words of the third limb: "*and all such persons shall* to this extent *be deemed to be parties to the contract in and evidenced by this Bill of Lading.*" [emphasis added]

The words which I have emphasised indicate, plainly in my view, that the third limb is ancillary to the provision, in the second limb, that (for the purposes of the second limb) the carrier: "*. . . is or shall be deemed to be acting on behalf of and for the benefit of all persons who are or might be his servants or agents . . .*"

The third limb does not have the effect (save as a provision ancillary to the second limb) of making persons other than the shipper and the carrier parties to the contract.

169 The purpose of the first limb of the relevant provisions is to protect the carrier against indirect liability in respect of claims for which (because of immunities contained in the earlier provisions in condition 5 or elsewhere) there could be no direct liability. Its object is to prevent an attempt by the shipper to circumvent the immunities contained in the earlier provisions of the condition (or defences available to the carrier under the Hague Rules) by bringing a claim against the carrier's agent in circumstances in which the carrier might himself be liable to indemnify the agent. As the judge put it at [2000] 1 Lloyd's Rep 85, pages 99-100: "*That first part has the contractual function of prohibiting actions against the servants or agents of the carrier, a prohibition which can be enforced by the carrier by injunction: see* **Nippon Yusen Kaisha v International Import and Export Co Ltd (The Elba Maru)** *[1978] 1 Lloyd's Rep 206.*"

170 It follows that the first limb of the relevant provisions cannot be regarded as an "exemption, limitation, condition or liberty herein contained" within the opening words of the second limb. The first limb does not confer an exemption, limitation, condition or liberty. What it does is to give the carrier a right, enforceable against the shipper, to prevent claims being pursued by the shipper against the carrier's agents.

171 For my part, I would accept that that "right" falls within the immediately following words of the second limb: "*every right exemption from liability, defence and immunity of whatsoever nature applicable to the carrier . . .*"

But that does not lead to the conclusion that the third party agent has an immunity from suit which the carrier itself does not have. Rather, it leads to the conclusion that the third party agent can prevent the shipper from attempting to enforce against it indirectly a liability which (by reason of the immunities which the agent does have – that is to say, the same immunities as the carrier) could not be enforced against it directly. To put the point another way, the effect of the words in the second limb "every right . . . of whatever nature applicable to the carrier" is to put the agent employed by the carrier in the same position *vis a vis* sub-agents employed by him as the carrier is in relation to its agents.

172 For those reasons, in so far as the point is of any materiality having regard to the conclusion which I have reached on the first issue, I would dismiss the appeal on the third issue.

Conclusion

173 It follows that, in relation to the claims in tort, I would allow the appeal on the second issue – save in relation to the Makros Hout claims; dismiss the appeal on the third issue; and dismiss the cross-appeal on the judge's refusal to entertain claims under the Latent Damage Act 1986. But I would allow the cross-appeal in relation to the claims in contract.

SIR ANDREW MORRITT V-C

174 The circumstances in which this appeal arises have been fully described by Rix LJ. I gratefully adopt his account of them. It is apparent that there are four broad issues (1) whether the Shipowners are liable to the Cargo owners in contract; (2) whether the Shipowners are, subject to the provisions of clause 5 of the Charterparty ("the *Himalaya* Clause"), liable to the Cargo owners in tort, and if so for what; (3) whether if the Shipowners are liable to the Cargo owners in tort the *Himalaya* clause excludes such liability; (4) whether Colman J was right to refuse the Cargo owners permission to amend so as to rely on Latent Damage Act 1986.

1. Contract

175 The answer to the first issue depends on whether the Shipowners were parties to the relevant Bills of Lading; given that authority is no longer in issue that depends on the proper construction of the respective bills of lading. In respect of the voyage with which this appeal is concerned the bills of lading fell into five categories, namely those described by the judge as the Makros Hout, Fetim, Homburg Hout and Hunter bills of lading and a further set to which I shall refer as the Fetim 2 bills of lading.

176 Each of the five sets used a common form of liner bill bearing the name and logo of Continental Pacific Shipping Ltd, the time charterer. The face of the form contains boxes to be completed with particulars of the shipper, consignee, notify address, goods to be shipped, freight and other similar matters. At the foot is an attestation clause which states "*IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.*"

That is followed by a box for the appropriate signature.

177 On the reverse of the form are set out the Standard Terms and Conditions. They include (the grammatical errors being in the originals) the following:

"*1. DEFINITIONS In this Bill of Lading both on the front and on the back the following expressions shall have the meanings hereby assigned to them respectively, that is to say*
'Shipper' includes the consignee, the receiver, and the owner of the goods, also the endorser and the holder of the Bill of Lading, also the endorsee and the holder of the Bill of Lading
'Receiver' includes the consignee and the owner of the goods, also the endorsee and the holder of the Bill of Lading
'Carrier' means the party on whose behalf this Bill of Lading has been signed." . . .

33. IDENTITY OF CARRIER The contract evidence by this Bill of Lading is between the merchant and the owner of the vessel named herein or substitute and it is therefore agreed that said ship owner only shall be liable for any damage or loss billed to any breach or non performance of any obligation arising our of the contract of carriage whether or not relating to the vessel's seaworthiness. If despite the foregoing, it is adjudged that any other is the carrier and/or bailee of the goods ship here under, or limitation of, and exoneration from liabilities provided for by law or by this Bill of Lading shall be available to such other. It is further understood and agreed that as a line, company or agent who has executed this Bill of Lading for and on behalf of the master is not a principal in the transaction and the said line. Company or agent shall not be under any liabilities arising out of the contract of carriage, nor as carrier nor bailee of the goods. . . .

35. If the ocean vessel is not owned by or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case not withstanding anything that appeared to the contrary. This Bill of Lading shall take effect only as a contract of carriage with the owner or demise chartered as the case may be as principal made through the agency of the said company or line who act solely as agent and shall be under no personal liability whatsoever in respect thereof."

178 The difference between the five categories of bill of lading I have referred to lies in the way the signature box was completed. In the case of the Fetim 2 bills, to the relevant signature was added a stamp recording "As Agents Only". But in the case of the other four sets there was added to the signature, in one form or another, the word "carrier". Thus in the Makros Hout bills the signature was "As Agent for Continental Pacific Shipping (the Carrier)", in the Homburg Hout bills "as agents for the carrier Continental Pacific Shipping" and in the Fetim and Hunter bills "as Agents for Continental Pacific Shipping as Carrier". It is not in dispute that but for the addition of the word "carrier" in these three contexts each bill would be or evidence a contract of carriage between the shipper and the shipowner, conventionally known as an owner's bill.

179 Colman J considered the addition made all the difference. He concluded that "as a matter of construction these were charterers' bills and not contracts binding the shipowners". For the Cargo owners it is submitted that the judge was wrong. Both the judge in the court below and counsel for both parties in this considered at length and in detail three recently decided cases at first instance dealing with similar problems. They are, in the order in which they were decided, ***The Ines*** [1995] 2 Lloyd's Rep 144 (Clarke J), ***The Flecha*** [1999] 1 Lloyd's Rep 612 (Moore-Bick J) and *The *Hector* [1998] 2 Lloyd's Rep 287 (Rix J). I do not propose to refer to them at this stage nor in such detail at any stage because, whilst instructive, they are not binding on us whether on a question of construction or otherwise.

180 The starting point for the consideration of the proper construction of these bills of lading is the decision of the House of Lords in ***Universal Steam Navigation v James McKelvie*** [1923] AC 492 on which counsel for the Shipowners placed considerable reliance. The case concerned a bill of lading expressed to be made between the owners of a steamer and "James McKelvie & Co Charterers" which had been duly signed "For and behalf of James McKelvie & Co (as Agents)". The owners sought to recover demurrage from James McKelvie as the charterer. The claim failed because, notwithstanding that the bill of lading was expressed to be made with James McKelvie & Co as charterers, they had signed as agents. Accordingly they were not liable as principals. The relevant principle was expressed by Lord Sumner, at page 500, thus: "*As a matter of construction, when a signature so qualified is attached to a general printed form with blanks filled in ad hoc, preponderant importance attaches to the qualification in comparison with printed clauses or even with manuscript insertions in the form. It still,*

however, remains true, that the qualifying words 'as agents' are a part of the contract and must be construed with the rest of it."

181 If that principle stood alone then the argument for the Ship owners that the signature box in which the word "carrier" is specifically added should prevail over the apparently clear import of standard conditions 33 and 35 would have much force. But there is another general principle, to which the judge was not referred, clearly established by the decisions of this court in **English *Industrial Estates Corpn v George Wimpey & Co Ltd*** [1973] 1 Lloyd's Rep 118 and ***Pagnan spa v Tradax Ocean Transportation SA*** [1987] 3 All ER 565, [1987] 2 Lloyd's Rep 342. That principle, correctly summarised in *Chitty on Contracts* 28th Ed, Para 12-068 and not disputed by either party, is that: "*It is open to the parties to stipulate in their printed conditions of contract that written provisions appended to the printed form are not to override, modify or affect in any way the application or interpretation of that which is contained in the printed conditions, and effect must then be given to such a stipulation even though this is contrary to the ordinary rule*."

182 It is submitted by the Cargo owners that clause 35, by reference to the words "not withstanding anything that appeared to the contrary", is a provision within this principle. The Shipowners accept that those words do bring the principle into operation but, they submit, only as to the identity of the owner not the carrier.

183 I prefer the submissions for the Cargo owners. The bill of lading must be construed as a whole. The signature box is part of the bill of lading. The normal rule whereby greater importance is attributed to specific provisions, including the signature box, put into a standard form is qualified by and to the extent that clause 35 of the standard conditions is applicable.

184 Given the nature of clause 35 it is appropriate to start with its terms. It is in my view apparent that the opening parenthesis is misplaced and the full stop should be a closing parenthesis. If those obvious mistakes are corrected then it reads "*If the ocean vessel is not owned by or chartered by demise to the company or line by whom this bill of lading is issued as the case may be (notwithstanding anything that appears[ed] to the contrary) this bill of lading shall take effect only as a contract of carriage with the owner or demise charterer as the case may be*."

So read I am unable to accept the submission for the shipowners that the clause deals with ownership alone for it goes on to deal with the identity of the parties to the contract of carriage notwithstanding anything to the contrary.

185 Clause 35 applies because the bill of lading was issued by the time charterer, not the owner or demise charterer of the vessel. Accordingly the bill of lading takes effect "only" as a contract of carriage with the owner deemed to have been made as principal through the agency of the time charterer. The only contrary indication in the bill of lading is the addition in the signature box of the words "as carrier". But clause 35 is to take effect notwithstanding those words. It follows that the definition contained in clause 1(c) refers to the principal by whom the bill of lading was issued, that is the shipowner. Another consequence is to validate the attestation clause. If the description of carrier were to prevail it could only do so, as counsel for the shipowners frankly accepted, if the attestation clause were regarded as false. But once clause 35 prevails the signature on behalf of the time charterer is as agent for the owner and may fairly be treated as done on behalf of the Master. And once the words in the signature box are overridden then, in addition to clause 35, Clause 33 operates. That clause too plainly provides for the carrier to be the owner of the vessel.

186 I reach this conclusion on what appears to me to be the plain meaning and effect of the words used in the context in which they appear in the various bills of lading. I differ with reluctance from the contrary view expressed by Rix LJ. Nevertheless I am reinforced in my opinion by the knowledge that my conclusion is the same as that of Chadwick LJ in this case and of Moore-Bick J in *The Flecha* [1999] 1 Lloyd's Rep 612 in respect of a bill of lading in virtually identical terms to the bills of lading in this case. In the case of the contrary decision of Rix J in *The Hector* [1998] 2 Lloyd's Rep 287 I would observe that the bill of lading in that case did not contain any provision comparable to clause 35.

187 For all these reasons I consider that Colman J reached the wrong conclusion on the construction of the bills of lading in this case. In my view the contract of carriage was with the shipowners so that they are liable in contract as claimed. I understand that the quantum of such a liability is not in dispute. In the light of this conclusion the alternative of joint and/or several liability of owner and charterer to which Rix LJ refers in paras 70-76 and what I have described as issues (2) and (3) do not arise. But in case this matter goes further it may be of some assistance if I indicate my conclusions if such issues had to be decided.

2. Tort

188 The judge considered at some length the question whether the Shipowners were liable to the Cargo owners in tort. Before considering the issues of fact he highlighted the need to resolve two threshhold issues, namely (1) whether, assuming that the shipowners' negligence consisted in the poor quality of the stow prior to the commencement of the voyage and that the defective stowage caused progressive damage to the cargo after the start of the voyage, the Cargo owners had any cause of action in tort at common law in respect of any of the damage so caused; and (2) if in principle such a cause of action would be available, whether the shipowners were in breach of their duty of care in relation to the stowage of the cargo.

189 On the first issue he decided [p 102] that: "*What determines whether a cargo owner, who has no contract with the shipowner can sue in negligence for cargo damage caused by negligent acts of the shipowner before title passed to*

the cargo owner is solely and simply whether by the time when the cargo was lost or damaged the title in the cargo had passed to the claimant."

With regard to the second threshhold issue he had no doubt [p 103] that the shipowners were in breach of their duty of care. The Shipowners dispute the first but not the second conclusion. They contend that the judge's conclusion is inconsistent with the decisions of Roskill J in ***The Wear Breeze*** [1969] 1 QB 219, [1967] 3 All ER 775 and of the House of Lords in ***The Aliakmon*** [1986] AC 785, [1986] 2 All ER 145 as well as being wrong in principle.

190 The judge then considered in some detail what damage to the cargo had occurred, when and why. His findings may be summarised as follows

(a) the cargo loaded at all three ports was wet damaged by rain before shipment,
(b) the shipowners' servants were in breach of their duty of care in the stowage of the cargo,
(c) once the cargo had been badly stowed and the voyage had commenced there was nothing that could have been done to prevent progressive damage to the cargo throughout the voyage,
(d) the pre-shipment wet damage by rain did not exceed 15% of the total physical damage found at discharge,
(e) the remaining 85% of the physical damage was caused by condensation during the voyage due to bad stowage,
(f) the condensation damage started at the early part of the voyage, 40% occurred after 8 January 1996 and the damage occurred at a lineal rate both before and after that date,
(g) the financial depreciation in the value of the cargo proceeded at the same rate as the physical damage.

The judge considered that on the basis of those findings the claimants other than under the Hunter bills of lading were entitled to damages for negligence in sums which the parties could, and subsequently did, calculate.

191 The Shipowners dispute the conclusion that any of the claimants, except Makros Hout, sustained recoverable damage. They submit that on the judge's findings all the damage arose before title to the goods passed to any of the other claimants. If this submission is well founded then even if the judge were right on the first of the threshhold issues no claimant, other than Makros Hout, could recover.

192 In my view even if the shipowners owed the cargo owners the duty of care found by the judge he was wrong to have concluded that any damage was caused by the negligence of the shipowners after the respective claimants, other than Makros Hout, obtained title to the goods.

193 In ***Cartledge v Jopling*** [1963] AC 758, [1963] 1 All ER 341 the House of Lords considered when for the purposes of the Limitation Act a cause of action for personal injuries arising out of pneumoconiosis contracted by a workman due to the negligence of his employer accrued. Lord Reid, at page 771 of the former report, recognised that *"It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action."*

Lord Pearce was of the same opinion. He said, at page 780 *"In cases of personal injury the law is clear and has been settled for many years. Although two separate actions may be brought, one for personal injury and one for damage to property, both being caused by the same negligence . . . , only one action may be brought in respect of all the damage from personal injury."*

194 The same point arose in ***Pirelli General Cable Works Ltd v Oscar Faber & Partners*** [1983] 2 AC 1, [1983] 1 All ER 65 in relation to the negligent design of a building. It was accepted by both parties and by the Judicial Committee of the House of Lords that the same principle applied.

195 Counsel reserved the question whether ***Cartledge v Jopling*** and ***Pirelli General Cable Works Ltd v Oscar Faber & Partners*** had been correctly decided. He accepted that they were binding on us but suggested that they did not deal with ascertainable incremental damage. He accepted that the relevant breach of duty occurred before any of the claimants, other than Makros Hout, obtained title to the cargo. He did not suggest that there was a continuing breach of duty but he did claim that the continuing accrual of damage gave rise to a continuing cause of action. He sought to rely on cases concerned with the wrongful withdrawal of support such as ***Darley Main Colliery v Mitchell*** (1886) 11 App. Cas. 127.

196 As I have indicated I do not accept any of these objections. As the authorities show the unlawful withdrawal of support occurs when the damage is sustained by the owner of the surface land, that is on subsidence not excavation. ***Darley Main Colliery v Mitchell*** [ibid] p 133. On the judge's findings the damage was sustained when the voyage commenced. By that time the consequences of condensation were inherent in the cargo; no further breach of duty or element of causation arising from the original breach was needed for their development. Thus when the voyage commenced the tort of which complaint is made was both committed and complete.

197 In these circumstances I see no purpose in dealing further with the questions whether the judge was right to find a duty of care owed by the shipowners to the cargo owners or whether the judge should or did find that the damage was sustained on an "across the board" or "parcel by parcel" basis as helpfully analysed by Rix LJ.

3. The Himalaya Clause

198 In the light of the conclusions I have reached on the first two issues this issue does not arise. In agreement with Rix and Chadwick LJJ. I consider that the judge reached the right conclusion. I can express my reasons quite shortly.

199. The relevant provisions are contained in clause 5 of the Standard Conditions. Together with additions of part numbers, which I have added for ease of reference, they are:

> *"[1] It is hereby expressly agreed that no servant or agent of the carrier including any person who performs work on behalf of the vessel on which the goods are carried or any of the other vessels of the carrier, their cargo, their passenger or their baggage, including towage of and assurance and repairs to the vessel and including every independent contractor from time to time employed by the carrier shall in any circumstances whatsoever be under any liability whatsoever to the shipper, for any loss or damage or delay of whatsoever kind arising or resulting directly from any neglect or default on his part or acting in the course of or in the connection with his employment [2] and, without prejudice to the generality of the provisions in this Bill of Lading every exemption limitation, condition and liberty herein contained and every right exemption from liability, defence and immunity of whatsoever nature applicable to the carrier is entitled hereunder shall also be available to and shall extend to protect every such servant or agent of the carrier [3] [who] is or shall be deemed to be acting on behalf of and for the benefit of all persons who are or might be his servants or agents (including any persons who performs works on behalf of the vessel on which the goods are carried or of any of the other vessels of the carrier, their cargo, their passenger, or their baggage, including towage of and assistance and repairs to the vessels and including every independent contractor from time to time employed by the carrier [4] and all such persons shall to this extent be deemed to the parties to the contract in or evidenced by the Bill of Lading . They shall indemnify the carrier against any claim by the third parties against whom the carrier cannot rely on these conditions, in as far as the carrier's liability would be accepted if said parties over bound by these conditions."*

200. The issue arises only if the shipowners are liable to the cargo owners in tort but not in contract. On this footing Pt 2 of the clause cannot avail the shipowners because there is no relevant "exemption, limitation, condition, liberty, right, exemption from liability, defence or immunity" available to the time charterer as the carrier.

201. The judge considered that even if the shipowner was an "independent contractor employed by" the charterer Pt 1 could not protect him either as it was a covenant not to sue third parties enforceable by the carrier alone. I agree. It would be odd if the more limited protection afforded by Pt 2 in reference to the position of the carrier, qualified as it must be by art III(8) of the Hague Rules, was preceded by the much wider protection apparently given by Pt 1 to servants, agents or independent contractors generally and in their own right. If the construction and effect put forward by the shipowners were right then the argument if not the result in the ***The Eurymedon*** [1975] AC 154, [1974] 1 All ER 1015; ***The New York Star*** [1980] 3 All ER 257, [1981] 1 WLR 138 and ***The Mahkutai*** [1996] AC 650, [1996] 3 All ER 502 would have been different. In my view the judge was right to conclude that the clause had the more limited application and effect of a covenant not to sue enforceable by the carrier alone.

4. The Latent Damage Act 1986

202. As the judge recorded, the basis for a claim pursuant to the provisions of the Latent Damage Act 1986 was put forward by counsel for the cargo owners in the course of his opening but was not formulated with any detail until after the evidence was complete. At that stage he submitted that it was not necessary to plead the claim but if it was he applied for leave to amend. The judge concluded that the claim must be pleaded and refused leave to amend for that purpose. It is now accepted that the claim must be pleaded but it is contended that the judge was wrong to have refused leave so to do.

203. Thus the appeal is against the exercise of the judge's discretion at a late stage of the trial. Moreover if such an amendment were allowed it would, as the draft showed, have raised fresh issues of fact concerning the knowledge of the shippers. The judge made no findings of fact in respect of that issue so that even if this court considered that it was entitled to interfere with the exercise by the judge of his discretion either this claim would fail or a new trial would have to be ordered. Given the way the point emerged during the course of the trial I see no just basis on which a new trial should be ordered even if contrary to my view the shippers were not liable in contract anyway. I agree with Rix and Chadwick LJJ that the judge came to the right conclusion on this issue.

Judgment accordingly.

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