CA on appeal from Central London County Court (HHJ Hallgarten QC) before Peter Gibson LJ; Chadwick LJ; Rix LJ. 31st July 2000.

LORD JUSTICE RIX:

1. This appeal arises out of the theft of a Lotus Esprit sports car from a fenced and locked compound at Southampton docks, where it was awaiting export on the *Rigoletto*, due to depart on 1 September 1994. The issue on the appeal is whether the first defendants, Southampton Cargo Handling Plc ("SCH"), and/or the fourth defendants, Associated British Ports Plc ("*ABP*"), were liable for the loss.

2. SCH were stevedores at Southampton docks, of which ABP were owners and operators. SCH were licensees of ABP under an "*Operators Licence*" dated 10 April 1990, whereby SCH were authorised to carry out stevedoring operations. SCH were also the appointed cargo handlers at Southampton of the owners of the *Rigoletto*, Wallenius Lines ("Wallenius").

3. The compound from which the car was stolen was owned and operated by ABP, but used by SCH, among other stevedores at the ports, for the storage of cars awaiting shipment. SCH were probably the biggest, but not the exclusive, users of the compound.

4. The car belonged to one or other of the three claimants, to whom I shall refer simply as *"Lotus"*. No distinction was drawn between them. The car was received for shipment on the *Rigoletto* by SCH, on 24 or 25 August 1994. A "*standard shipping note*", a printed form, was prepared by Lotus and addressed "*To the Receiving Authority"*. This note (the "*shipping note*") was signed by an employee of SCH who entered the date "*25/8/94"* beneath his signature in a box headed "*Dock/Terminal Receipt...Receiving Authority Remarks*". The note read in part -

   "*TO THE RECEIVING AUTHORITY - Please receive for shipment the goods described below subject to your published regulations and conditions (including those as to liability)."*

   SCH published its conditions in a document called "Conditions of Business March 1992" (the "SCH conditions").

5. The car was one of seven Lotus Esprits which arrived as a batch and were identified by their chassis numbers on the shipping note. A few days later, a further batch of five Lotus Esprits arrived, also for shipment on the *Rigoletto*. Ultimately, the two batches, minus the stolen car, were loaded on the *Rigoletto* on 1 September, a total of eleven cars. A bill of lading was issued on behalf of Wallenius in their standard form, dated 1 September 1994, identifying these eleven cars. The stolen car was not mentioned on that bill of lading, since it had never been shipped; but it was common ground that Lotus would have been entitled to a "*received for shipment*" bill of lading for the stolen car in otherwise identical form. The case proceeded as though such a bill of lading had been issued (the "*bill of lading*").

6. There were therefore potentially (at least) four contractual or quasi-contractual relationships: that between Lotus and SCH under the shipment note incorporated the SCH conditions; that between SCH and ABP was governed by the Operators Licence; that between SCH and Wallenius was governed by a document called "Schedule of Charges" dated 7 April 1993, which had been countersigned by Wallenius; and that between Lotus and Wallenius with respect to the stolen car was governed by the terms of the bill of lading.

7. The claim by Lotus had originally been brought against a number of defendants apart from SCH and ABP, viz Wallenius, Mann Motorships Limited ("Mann", the UK shipping agents of Wallenius), Seaking Shipping Limited ("Seaking", Lotus's forwarding agents), Shorrock Guards Limited ("Shorrock", who provided security services at the docks), and BET plc (Shorrock's parent company). Ultimately, however, the claim was only pursued against SCH and ABP.

8. Lotus's claim against SCH was put in bailment and under the terms of the SCH conditions; the claim against ABP was also put in bailment and otherwise on the basis of an alleged duty of care to take reasonable steps to guard against loss by theft. SCH and ABP also had claims against one another.

9. In the court below it was held that SCH were bailees of the car, and were bound by the terms of their conditions under which liability in negligence was accepted, if proved. It was found to be proved. SCH sought to raise a defence grounded in the Himalaya clause contained in the Wallenius bill of lading, but this defence was rejected on the basis that the clause did not apply to pre-loading events. ABP on the other hand were exonerated from liability, on the basis that they were not bailees of the car, nor were they under a duty of care to safeguard it from theft. If, on the other hand, ABP had been found liable along with SCH, then their respective share of responsibility would have been 60% as to ABP and 40% as to SCH.

10. In this court, three main issues have been argued, upon which permission to appeal was granted by the trial judge. In other respects permission to appeal was refused. First, SCH submit that they were not bailees, since their possession of the car was only as agents for Wallenius. Therefore they never had any personal responsibility for the car. Secondly, they submit that, even if they were bailees of the car, nevertheless the Himalaya clause does apply to give SCH a complete defence, and that if the SCH conditions apply as well, it is open to SCH to choose which contractual regime to rely upon. Thirdly, they submit that in any event ABP are liable as well, either as bailees or as being in breach of a duty of care to safeguard the car against theft, and that the division of responsibility, in the light of the apportionment below, falls as to 60% on ABP rather than on themselves.

The SCH conditions

11. Since there was no appeal on any issue of construction of the SCH conditions, it is unnecessary to set out the terms which gave rise to debate below. It is sufficient to say that they were construed as reversing the burden of proof

in bailment, so that SCH accepted liability if negligence was proved against them. In the circumstances the only term which I need set out in full is clause 18 which provided as follows:

"18. The user shall include in its Bill of Lading a provision that SCH, its employees, agents and sub-contractors shall have the benefit of any terms in such Bill of Lading excluding or limiting the liability of the user in respect of cargo."

"User" was defined under clause 1(e) to include (among others) shipper and shipowner. In the context of clause 18, user there must refer to shipowner. Clause 18 was relied on by SCH to indicate to all those affected by its conditions, viz to Lotus, that it was to be contemplated that SCH would enjoy the benefit of a Himalaya clause in any bill of lading issued.

12. Clause 1(f), in referring to ABP and their premises at Southampton docks, also makes mentions of their conditions ("ABP's Conditions"), and clause 6 provides that where applicable the user undertakes to comply with them. I will refer to them further below, for they were incorporated into SCH's Operators Licence.

The bill of lading

13. The following terms of the Wallenius bill of lading are relevant:

"2. Responsibility.

The Hague Rules contained in the international convention for the unification of certain rules relating to bills of lading, dated Brussels the 25th August, 1924 as enacted in the country of shipment shall apply to this Contract...

The Carrier or his Agents shall not be liable for loss of or damage to the goods during the period before loading or after discharge howsoever such loss or damage arises...

7. Loading, Discharging and Delivery

of the cargo shall be arranged by the Carrier's Agent unless otherwise agreed. Landing, storing and delivery shall be for the Merchant's account. Loading and discharging may commence without previous notice...The merchant or his Assign shall tender the goods when the vessel is ready to load and as fast as the vessel can receive...The Merchant or his Assign shall take delivery of the goods and continue to receive the goods as fast as the vessel can deliver...Otherwise the Carrier shall be at liberty to discharge the goods and any discharge to be deemed to be a true fulfilment of the contract...If the goods are not applied for within a reasonable time, the Carrier may sell the same privately or by auction.

16. Exemptions and immunities of all Servants and Agents of the Carrier

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent Contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature acceptable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such Servant or Agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Carrier is or shall be deemed to be acting as Agent or Trustee on behalf of and for the benefit of all persons who are or might be his Servants or Agents from time to time (including independent Contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by this Bill of Lading.

The Carrier shall be entitled to be paid by the Merchant on demand any sum recovered or recoverable by the Merchant or any other from such Servant or Agent of the Carrier for any such loss, damage or delay or otherwise."

The contract between SCH and Wallenius

14. The contract between SCH and Wallenius is contained in a document headed "*Schedule of Charges for Cargo Handling*" incorporated in which are some general terms, such as -

"5. <u>STORAGE</u>

5.1 Continuous receiving will be allowed during the weekday hours of 0700-1800 hours...

Motor cars may also be received up to a maximum of three days per week during weekday evening overtime hours up to 2100 (2000 hours Fridays) subject to advance consultation...

6. <u>CONDITIONS</u>

6.1 The handling charges cover labourage ship and shore and such equipment as is normally required...

6.2 The above handling charges cover working in normal hours 0800-1700 hours Mondays-Thursdays and 0800-1600 hours Fridays only...

Otherwise Southampton Cargo Handling Plc's standard trading terms and conditions apply."

The Operators Licence between SCH and ABP.

15. The Operators Licence (headed "Stevedoring Services - Operators Licence") provides inter alia as follows:

"Southampton Cargo Handling plc is hereby authorised to carry out stevedoring operations...on the Dock Estate...subject to the terms and conditions set out below...

TERMS AND CONDITIONS

"Stevedoring" means The discharge and loading of cargo from and to vessels and the receiving and delivering of cargo including intermediate transit storage and associated handling...

"Customer" means A shipowner or cargo owner using ABP's Dock Estate...

4. All operations carried out by the Stevedore shall be conducted strictly in accordance with statutory regulations. including those governing health and safety of all personnel, regardless of by whom employed, and with any other regulations. bye-laws and conditions or requirements of ABP including its General Regulations and Conditions upon which services and accommodation are provided at Southampton Docks appertaining to activities and operations on the Dock Estate. The Stevedore must also comply with the requirements of H.M. Customs & Excise so far as such apply to the Stevedore's activities including terms of Approval for the Port...

7. The Stevedore shall provide stevedoring services during working hours appropriate to the requirements of the trade of the Port and its Customer."

16. SCH were charged an annual fee of £25,000.

17. The reference in clause 4 of the Licence to ABP's "*General Regulations and Conditions*" was a reference to ABP's *"Standard terms and Conditions of Trade"*. These were said to be applicable to all "*Customers"*, a term which embraced any one (like SCH) who availed themselves of any facility or service provided by ABP and anyone (like Lotus) whose goods came on to ABP's premises. These conditions ("*ABP's conditions*") provided inter alia as follows:

"2. APPLICATION OF TERMS AND CONDITIONS

These terms and conditions shall apply to all legal relationships between ABP and any customer whether in respect of contract, bailment or licence...

3. WARRANTY OF AUTHORITY BY CUSTOMER

The customer expressly warrants to ABP that he is either the owner or the authorised agent of the owner of the goods the subject matter of the transaction ...and further warrants that he accepts these conditions not only for himself but also as duly authorised agent for and on behalf of every other person, firm and corporation who is interested in the goods.

11. ABP'S DISCRETION OVER HANDLING METHODS

Subject to specific written instructions given to ABP by the customer and accepted by ABP in writing, ABP reserves to itself complete freedom in respect of the means and procedure to be employed in the receipt, collection, unitisation, stuffing, stripping, storage, packing, carrying, handling, tallying, loading, discharging or delivery of goods. If in ABP's opinion the interests of the customer so require, ABP may deviate from the customer's instructions (whether or not accepted by ABP) in any respect and any expenses reasonably incurred thereby shall be for the customer's account.

14. HOURS OF WORK

ABP shall not be bound to do any work outside the normal hours details of which can be provided on request, and which may be varied from time to time, unless otherwise agreed in writing by ABP, and shall be entitled to make additional charge for any work done outside such hours at the customer's request.

20. LIABILITY - PROOF OF NEGLIGENCE

ABP shall be liable for loss or misdelivery of or damage to goods or plant or any deficiency therein if, but only if, it be proved by the customer (otherwise than by evidence only of such loss, misdelivery, damage or deficiency of or to the goods or plant when in ABP's possession or power) to have been caused by the negligence of ABP or their directly employed servants."

In effect SCH's conditions mirrored ABP's conditions, so far as concerns liability for negligence, in that liability was accepted on proof of negligence.

18. It is to be observed that, although ABP's conditions were considered for the purpose of the claims between SCH and ABH, there appears to have been no allegation as between Lotus and ABH that these terms either did or did not apply to any relationship between those parties.

The judgment below

19. The judgment below is that of Judge Hallgarten QC sitting in the Central London County Court (Business List). He presided over a three day witness trial. A large number of factual and legal issues were canvassed before him. In a helpful judgment he made the following findings.

20. The car, like the other eleven, were intended for export to Canada. Preparations for shipment followed a standard course, whereby Seaking, as forwarders, made the necessary arrangements to have them taken, by road, from Lotus's factory in Norwich to the port and thence by ocean carriage to their destination. The shipping note was provided by Lotus to the road haulier: at the port it was signed for by a representative of SCH. It was common ground that the cars were physically received by SCH and driven from the transporter on which they had arrived into a vehicle compound, one of two at the docks, known as the Deep Sea Ro/Ro Terminal.

21. This compound was some 3½ acres in area with capacity for about 1500 cars. It had five separate entrances, and was surrounded by a seven foot high chain-linked mesh fence, with barbed wire on top and bottom. It was situated within a peninsula surrounded by water and bordered by a series of berths. It was owned and operated by ABP and used by stevedores such as SCH under licence from ABP for the storage of cars. SCH were its main but not exclusive users. ABP entrusted keys to the compound to SCH and the other stevedores during the day, but these were surrendered each evening to ABP. In the absence of special arrangements, the stevedores had no access to the compound overnight until recovering the keys each morning. Judge Hallgarten did not find specifically whether ABP maintained a set of keys for themselves during the daytime, but it is to be inferred that they did.

22. The cars in the compound were kept unlocked with their ignition keys in them. No complaint was made of that: it would have been impossible to control in any other practical way the process of teaming up car and key.

23. The basis for SCH dealing with the cars was that they had been appointed by Wallenius to look after cargo handling at Southampton. SCH accepted the Esprit cars tendered under the shipping note without qualification, acting as cargo handlers under the terms of their agreement with Wallenius. They looked exclusively to Wallenius for their remuneration. The judge said this:

"*For Lotus's part, there was no question of their being required to pay remuneration to SCH: so far as they were concerned, the entire remuneration payable after tender of the cars at Southampton was embraced in the freight rate agreed by Seaking on their behalf with Wallenius*."

24. ABP had a security officer who was responsible for the docks, Mr David Jones. They also employed Shorrock to provide security services, including mobile patrols, at the docks. Shorrock had responsibility for patrolling the dock area generally, including the compound. On 25 August Shorrock received an anonymous call to the effect that there were plans to steal a 4-wheel drive vehicle over the coming weekend. It is not clear whether ABP were informed, but SCH were not. At 0100 hours on 26 August Shorrock's mobile patrol discovered that the compound's fence had been cropped back, allowing vehicular access to and exit from the compound. However nothing was at that time found to be missing. The break in was patched up and a Land Rover was moved hard up against the area of cropped fence, locked and its keys removed. ABP were informed of these events later that morning, and SCH were also informed, but possibly not until 27 August.

25. It was on 30 August, at some stage prior to mid afternoon, that the car was found to be missing from the compound. The consignment of 7 Esprits had been parked in close proximity to the break in the fence, and Judge Hallgarten said that "the obvious inference is that the car had been removed through that break". I infer that the car had therefore been removed on the night of 25/26 August. ABP and Mann were informed on 31 August, and Mann wrote separately to SCH and ABP holding them both responsible for the loss. On the same day the second batch of five Esprits arrived at the docks for shipment: the judge inferred that it had been Lotus's and Wallenius's mutual intention that both batches were to be carried under the same bill of lading.

26. On 1 September the remaining eleven cars were shipped on board the *Rigoletto*, and a shipped bill of lading issued in respect of them on Wallenius's standard form.

27. The theft of the car was probably executed in the following manner. Heavy wire cutters would have effected entry into the compound within 1 / 2 minutes, at a time calculated to avoid the Shorrock patrols. Having severed and pulled back the mesh fencing, the thieves could simply drive the car out of the compound. Once out of the compound it was likely that it was loaded into a van, and driven straight on to the Stena Line ferry, there being no barriers or checks between the compound and the ferry terminal. There was a ferry departure at 11pm.

28. ABP had ownership and control of the docks in general, including the compound. They were generally responsible for the port's infrastucture, and so were also responsible for maintenance of the compound. In 1995, that is to say in the year following these events, they installed concrete posts at intervals around the perimeter of the compound so as to avoid the possibility of further removals of vehicles via breaches in the mesh fencing. They concerned themselves with security at the port in general, both in their own interest and also because of the requirements imposed on them by HM Customs & Excise. A letter from HM Customs & Excise to ABP dated 25 February 1992, reconfirming Southampton docks as an "*approved"* port, attached a Schedule D headed "SECURITY", which was countersigned by ABP's port manager on 26 January 1993 and provided that -

"The transit sheds, compounds and baggage examination halls shall be maintained in a secure condition. The port perimeter and compounds shall be securely fenced to a height of at least 2 metres. The entrance doors or gates shall be fitted with proper fastenings for both Crown and Principals locks. When not open for Customs and Excise business the transit sheds, compounds and baggage examination halls shall be secured by Principals locks save as permitted by an officer of Customs and Excise.

The approval holder shall give prior notification of any proposed changes to the perimeter fencing including any new entrances, exits or access to neighbouring quays and/or alteration to the internal layout of, or additions to, the approved area.

I/We acknowledge on behalf of the Principal receipt of the original of this schedule and undertake to ensure that the conditions set out therein are complied with."

29. In the light of these findings, Judge Hallgarten reasoned as follows. First, that SCH were independent contractors acting as Wallenius's agents for receipt and pre-shipment storage of the cars. They were not, however, acting *"merely as agents*" as an employee does. Nor was their handling of the cars merely fleeting, as it often is in classic stevedoring duties. They were therefore bailees of the cars, and they received them on the terms of their conditions, and it was to their conditions that the shipping note referred in speaking of "*published regulations and conditions*", and not to any prospective bill of lading. Prima facie therefore SCH's liability to Lotus was governed by their conditions, under which the burden of proof in bailment was reversed, so that they were only liable for negligence that had been proved against them.

30. Such negligence had been proven. The fence was flimsy and easily breached. There should have been some more solid impediment preventing vehicles from being driven away - either a continuous horizontal barrier or, as were later installed, concrete posts. An alternative would have been for SCH to have employed a night watchman within the compound, or extra patrols carried out by Shorrock, another expedient which was put into place after

the theft. The ferry provided a convenient escape route, and that risk was heightened by the fact that the hourly Shorrock patrols were suspended when a ferry was in port. The general approach to security at the docks was somewhat lax. In particular SCH had never carried out any kind of security survey in respect to risk affecting vehicles handled by them, even though they ought to have been alert to the risk of theft from the compound when it was left unattended at night.

31. These same factors would have led to an apportionment of 60% of the responsibility to ABP, if there had been any liability on their part, which there was not. This was because they were neither bailees, nor did they otherwise owe a duty of care to safeguard the cars in the compound against theft. They were not bailees because ABP never took voluntary possession or custody of the cars, but allocated the compound on a non-exclusive basis so as to enable SCH better to perform their stevedoring services pursuant to their licence from ABP; and because the overnight surrender of the compound's keys to ABP did not constitute delivery of possession or custody of the vehicles within it. They did not owe Lotus a duty of care because, in the absence of a relationship of bailment, it was not possible to impute a positive duty to ABP to safeguard the cars against theft: they neither expressly nor impliedly assumed responsibility to the owners of goods left within their compound.

32. As for the position in contract between ABP and SCH, there was nothing in the express terms whereby ABP undertook responsibility for the safeguarding of goods within their compound. Since ABP were not bailees, they were not sub-bailees either, and in the circumstances it was not possible to imply a term importing such responsibility. Therefore SCH's claim for an indemnity from ABP failed. There has been no appeal from that conclusion, even though SCH have maintained on this appeal that ABP are to be treated as bailees or sub-bailees of Lotus.

33. There remains the defence raised by SCH based on the Himalaya clause in the bill of lading. As to that, Judge Hallgarten reasoned that that issue depended on the question whether Wallenius would have been protected against liability under its bill of lading if they had personally undertaken the storage of the car in place of SCH, and concluded that they would not. He said -

"I have to say that I have not found this to be at all an easy question and, if authority exists on the point, it has not been brought to my attention. Nonetheless, applying what I consider to be first principles, I believe that the answer to the question should be "no". As I see it, in the context of a Bill of Lading which contemplated no involvement on the part of the carrier with pre-loading operations, Clause 2 should be approached as a provision inserted out of an abundance of caution, so as to avoid any suggestion of the carrier being liable before the goods reach his province. But if - as in the present case - for whatever reason, directly or indirectly, the carrier, through independent contractors or otherwise, accepts super-added duties such as storage not within the scope of the Bill Lading, I do not believe that there is any reason to extend the ambit of the exclusion clause to avoid his liability as a bailee. In those circumstances, I do not believe that SCH are protected by any provision of the Bill of Lading."

34. If, however, he had held that the Himalaya clause were to be applicable to protect Wallenius and therefore SCH as well, he would also have held, treating Lotus as dealing otherwise than as a consumer, that the exclusion which protected SCH should be regarded as part and parcel of a contract for the carriage of goods by ship and therefore outside the scope of the relevant sections of the Unfair Contract Terms Act 1977 (see section 1(2) and para 2(c) of Schedule 1; "UCTA"). If, on the other hand, he were to be wrong about that, so that UCTA did apply, then he would have said that a total exclusion of liability would indeed be unreasonable.

35. Since he held that the Himalaya clause did not apply, Judge Hallgarten did not have to decide what would have been the position if both the SCH conditions and the Himalaya clause had both, at any rate prima facie, applied. He merely observed, by reference to a dictum of Lord Goff of Chieveley in ***The Pioneer Container*** [1994] 2 AC 324 at 344C/G, that there was no conceptual reason why a bailee cannot rely both upon his own terms and upon a Himalaya clause contained in the carrier's contract, if that clause were intended to cover him and the operation in question.

36. I turn now to consider the three issues argued on this appeal.

Were SCH bailees?

37. On behalf of SCH, Ms Sara Cockerill submitted that they were not bailees. She founded her submission on a definition of bailment, derived from ***POLLOCK and WRIGHT's*** *Possession in the Common Law* (1888) set out in ***CHITTY on CONTRACTS***, 28th ed, 1999, at para 33-003, to the effect that a bailee is any person who "*otherwise than as a servant*" receives possession of a thing from another or holds possession for another either to keep and return the thing to that other or to apply it according to his directions. (I note, however, ***CHITTY's*** comments on that definition at paras 33-003/6).

38. In that context she advanced two reasons for her submission that SCH were not bailees. The first, was that SCH acted in all they did as mere agents of Wallenius, so that possession of the car was merely that of an agent for Wallenius. She submitted that in this respect SCH were like a servant, who holds possession only for his employer. The second reason advanced was that SCH lacked control over the car, that control belonging to Wallenius. She said that control was of the essence of bailment, and that the fact that SCH could not deal with the car without first consulting Wallenius, their principals, for their instructions showed that a critical element of bailment was missing.

39. In my judgment this submission was not well founded. It may be granted that SCH were agents for Wallenius, but they were not Wallenius's servants, nor is the agency of an independent contractor incompatible with bailment. Moreover, the fact that a person may owe duties in more than one direction does not mean that he cannot be a bailee.

40. The exception in the case of a servant is discussed in ***POLLOCK and WRIGHT*** at 57/60, but no modern case law has been drawn to our attention. (However, there is an extensive treatment of the exception in ***PALMER on BAILMENT***, 2nd ed, 1991, at chapter 7.) It would appear that the exception turns on a (rebuttable) inference, to be derived from the relationship, that there is no intention on the part of the employer to transfer possession to the servant, only an intention to allow the servant to utilise his employer's possession. Another example of the same principle cited by ***POLLOCK and WRIGHT*** is that of the host or hotelier who allows his guest to use his plate or furniture, but does not transfer possession of it. There is no reason, however, to extend this exception or principle to the sphere of agents, a fortiori in the commercial sphere. Bailees are probably very often agents.

41. Nevertheless, Ms Cockerill sought support for her analogy of the servant in what Diplock J said in ***Midland Silicones Ltd v. Scruttons Ltd*** [1959] 2 QB 171 at 189 about stevedores who receive goods as agents for shipowners for the purpose of loading them. In the House of Lords *sub nom* ***Scruttons Ltd v. Midland Silicones Ltd*** [1962] AC 446 at 470 Viscount Simonds, in referring to this passage, said this: *"For I agree with Diplock J. in thinking that the appellants were not bailees **"whether sub, bald or simple"**."*

42. The appellant stevedores in that case had dropped a drum from an upper floor of a PLA shed, after discharge of cargo from the vessel into that shed, in the course of loading it into a lorry. Judge Hallgarten contrasted the fleeting nature of that handling, which he described as "*the performance of classic stevedoring duties",* with what occurred in this case. I agree. Here, SCH received the cars some six days before the scheduled loading of the *Rigoletto*, and in the meantime had to store them in the compound. In my judgment, Viscount Simonds' dictum effectively treats a stevedore in the classic situation as an example of a relationship where possession of the chattel is not transferred, but the thing is merely handled or used for some temporary purpose. It seems to me that it matters not whether such a stevedore is regarded as a servant, or agent or independent contractor. In the present case, however, SCH were the "*receiving authority*" who received the goods for shipment and were obliged to take care of them, subject to their conditions, which inter alia plainly contemplated that goods might be in the possession of SCH and subject to a particular and general lien (clause 17). That is a still further distinction from the position in ***Midland Silicones v. Scruttons,*** where there were no terms operating as between Scruttons and the goods owners. In such circumstances, whatever SCH's other responsibilities to Wallenius as their cargo handlers, SCH were plainly bailees of Lotus's cars.

43. In any event, and whether SCH were bailees or not, the fact is that by reason of the shipping note SCH received the goods for shipment at the request of Lotus but on their terms, and SCH were bound by those terms. It might have been submitted, consistently with Ms Cockerill's submission on the subject of bailment, that under those terms SCH stipulated as agents only on behalf of Wallenius and without personal responsibility: but there was no such submission, and indeed it would have been an impossible one. Judge Hallgarten said:

"Prima facie, therefore, it seems to me that SCH's liability to Lotus is governed by SCH's Conditions of Business, although there is a separate question whether Lotus are also entitled to the benefit of the exemptions contained in the putative Bill of Lading, stemming from the application of Clause 16 thereof."

44. In ***Singer Co (UK) Ltd v. Tees and Hartlepool Port Authority*** [1988] 2 Lloyd's Rep 164, to which the judge also referred, Singer's forwarding agent contracted as principal with the port authority on the terms of a shipping note in materially identical terms to the note in the present case. Singer was able to sue the port authority in sub-bailment. The case is therefore a precedent both for the proposition that a receiving authority under such a shipping note, such as SCH, or in that case the port authority, is a bailee, and for the proposition that the shipping note may contain or evidence a contract. In that case the shipping note was treated as a contract between the receiving authority and the claimant's forwarding agents, who had prepared and signed the note. In the present case both the pleadings and the judgment are somewhat opaque as to whether the shipping note was treated as evidencing a contract directly between Lotus and SCH, or merely as evidencing a bailment or sub-bailment on terms. For my part, I cannot see why it does not evidence a direct contract. It states that Lotus is the exporter, that Lotus prepared the note, and it was signed for Lotus. It contains a statement that "*The company preparing this note*" makes a declaration that the goods are properly described, and asks the receiving authority to receive the goods described for shipment subject to the latter's terms. In the course of argument in this court, it was acknowledged by both Ms Cockerill for SCH and by Mr Stephen Houseman on behalf of Lotus that the shipping note could be regarded as containing the terms of a direct contract between the two parties. In my judgment it does.

45. The next issue is whether the Himalaya clause is wide enough to protect SCH under a separate contract evidenced by the bill of lading. Let it be assumed, however, that it does. On that hypothesis, the question becomes whether SCH has to accept liability under the terms of the shipping note, or is entitled to avoid liability under the terms of the Himalaya clause. If both sets of terms apply, which takes precedence? Or can SCH simply choose?

46. Ms Cockerill submitted that SCH could choose. She relied on what Lord Goff said in ***The Pioneer Container*** [1994] 2 AC 324 at 344E/G as follows:

"[*Their Lordships] are satisfied that, on the legal principles previously stated, a sub-bailee may indeed be able to take advantage, as against the owner of the goods, of the terms on which the goods have been sub-bailed to him. This may, of course, occur in circumstances where no "H**imalaya**" clause is applicable; but the mere fact that such a clause is applicable cannot, in their Lordships' opinion, be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner of the goods. If it should transpire that there are in consequence two alternative regimes which the sub-bailee may invoke, it does not necessarily follow , if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods: see Mr. A.P.*

*Bell's "**Sub-Bailment on Terms,**" ch. 6, pp. 178-180, of Palmer **and McKendrick, Interest in Goods** (1993). Their Lordships are therefore satisfied that the mere fact that a "**Himalaya**" clause is applicable does not of itself defeat the shipowners' argument on this point."*

47. I have already remarked that the judge, while referring to this passage in Lord Goff's speech, was not called upon to adjudicate between the two regimes, since he held that the Himalaya clause did not avail SCH.

48. However, I am assuming for the moment that the Himalaya clause provides SCH with a complete defence. The two regimes are therefore inconsistent, unlike the position in ***The Pioneer Container,*** where there was nothing in the Himalaya clause to conflict with the exclusive jurisdiction clause, contained within the terms of the sub-bailment, which was the centre of the dispute in that case.

49. In my judgment, however, Lord Goff's dictum does not assist Ms Cockerill. Perhaps the simplest way to put it is that SCH had already chosen between the regimes when they signed the shipping note and elected to receive the cars on the terms of their own conditions. Whether or not that created a contract between them, or only a relationship of bailment or sub-bailment on terms, there was such direct contact between the two parties then, through the shipping note, as to eliminate the possibility that SCH did intend to rely, or could rely, as against Lotus, on the potential inconsistent contract which might otherwise have come into being through the Himilaya clause in Wallenius's bill of lading. It may be observed that Lord Goff was not so much concerned to say that a sub-bailee could choose to rely on a Himalaya clause contained in some one else's contract, as to insist that, despite the (theoretical) availability of an applicable Himalaya clause, a sub-bailee could prefer to receive the goods on his own terms. I refer to the concluding sentence of the passage from Lord Goff's speech cited above. To put the matter another way, where the sub-bailee speaks for himself, *eg* by issuing his own bill of lading, saying "These are the terms on which I am willing to accept a sub-bailment", then he will be taken to have made his choice between that and at any rate any inconsistency within another regime brought about indirectly through a contract primarily made between other parties.

50. That conclusion is consistent with the judgment of the Court of Final Appeal of Hong Kong in ***Bewise Motors Co Ltd v. Hoi Kong Container Services Ltd*** [1998] 4 HKC 377. That case was concerned with similar facts in that it involved the theft of cars from the Hong Kong docks before shipment. The shipper had contracted with company A for the carriage of the cars to China, and A had contracted with company B for stevedore services at the docks. The latter contract contained B's own standard terms. The contract of carriage contained a Himalaya clause which on one view entitled B to a larger exemption from liability than B's own terms would give it. (In the event a majority of the Court concluded that B's terms in any event exempted B from all liability.) B was a sub-bailee. The shipper sought to rely as against B on B's terms of exemption, whereas B preferred, if it had to choose, to rely on A's terms via the Himalaya clause. The Court held that B's terms and only B's terms applied. Ching PJ said (at 390C/E):

"There is, instead, a more basic point raised by Mr Ma which we would address. Both the `Himalaya' clause and the so-called doctrine of sub-bailment are mechanisms designed to extend the benefit of the terms between the original parties to the sub-contractor or sub-bailee. Neither, however, are mechanisms which can supervene over the actual terms of a sub-contract or a sub-bailment. So, in logic, where a sub-contractor or a sub-bailee expressly declines to enter into a transaction except upon his own terms alone there can be no room for the incorporation of the terms of the contractor or bailee, still less ratification of those terms after the event. No reported decision produced to us dealt with such a question."

51. Ching PJ did not refer specifically to Lord Goff's dictum cited above, although ***The Pioneer Container*** was mentioned in his judgment. There is, nevertheless, good sense in what he said. For present purposes it is enough to say that in such circumstances the sub-bailee's own terms should apply in preference to the terms brought into play via the Himalaya clause at any rate to the extent of any inconsistency between them.

52. Moreover, if I am right to view the relationship between Lotus and SCH as one of direct contract and not merely a bailment or sub-bailment on terms, then the argument in favour of the precedence to be accorded to SCH's terms becomes in my judgment still stronger. On that basis, it would at the very least be proper to try to read the two contractual regimes together. Where there is inconsistency, it would be in accordance with principle to think that an acceptance of liability was intended to take effect over an exclusion of liability.

53. In this connection, and whether the legal relationship is viewed as a bailment or sub-bailment on terms or as a matter of direct contract, I bear in mind clause 18 of SCH's conditions which may be said to warn Lotus that the carrier will issue a bill of lading containing a Himalaya clause to protect SCH. Even so, at any rate where there is inconsistency, it seems to me that SCH's own conditions ought to be construed as intended to prevail. After all, such conditions have been specifically drafted by SCH as appropriate to their individual circumstances, as distinct from the alternative regime via the Himalaya clause, which applies indiscriminately to any agent or independent contractor employed by the carrier.

54. For all or any of these reasons, I think that even if the Himalaya clause could otherwise apply to SCH and to the theft of the car so as to exclude all liability on their part, the assumption of liability for proven negligence to be found in SCH's own conditions would take precedence: and that is so whether SCH and Lotus were in direct contractual relations or whether their relationship was merely that of a bailment or sub-bailment on terms.

55. I mention here briefly a submission from Ms Cockerill that the primacy of the SCH conditions, even in circumstances where the Himalaya clause might otherwise protect SCH, was not within Lotus's respondents' notice and therefore

was not open as a solution. I disagree. The judge below held that the SCH conditions applied. If SCH wished to displace that holding on appeal, then the burden of that fell on them.

56. In the circumstances, SCH's appeal against liability to Lotus must fail and it is unnecessary to decide the difficult questions which arise concerning the extent of the potential application of the Himalaya clause. Nevertheless, since those questions were debated, I shall address them briefly.

The Himalaya clause

57. Lord Reid's fourfold test for the successful invocation of a direct contract between shipper and stevedore via a Himalaya clause contained in a contract of carriage between shipper and carrier is set out in ***Midland Silicones v. Scruttons*** at 474. Forty years on, there now tends to be little difficulty in giving successful effect to that test: see ***The Eurymedon*** [1975] AC 154, ***The New York Star*** [1981] 1 WLR 138, ***The Mahkutai*** [1996] AC 650 at 664/5. In the present case the only aspect of that test which was disputed was the need for the Himalaya clause contract to have been activated by SCH's performance of some act referable to the contract of carriage. That need relates to the fourth stage of Lord Reid's test, the problem of consideration. As Lord Wilberforce put it in ***The Eurymedon*** at 167H/168A: -

"The exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed: the performance attracts the exemption or immunity in favour of whoever the performer turns out to be. There is possibly more than one way of analysing this business transaction into the necessary components; that which their Lordships would accept is to say that the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the appellant, made through the carrier as agent. This became a full contract when the appellant performed services by discharging the goods."

58. Thus Mr Houseman said that SCH had never reached the point of performing any act or service referable to the contract of carriage at the time of the theft of the car, because at that time performance of the contract of carriage had not begun. All that was happening was that the cars were being stored awaiting shipment. As of the night of 25/26 August, shipment on the *Rigoletto* was still some 6 or so days away.

59. On analysis, this issue depended, as did other points raised by Mr Houseman, on the scope and construction of clause 16's protection.

60. Thus Mr Houseman submitted (1) that a Himalaya clause has no application prior to and outside the scope of the adventure for which the carrier itself has responsibility; (2) that Wallenius had no responsibility under its contract of carriage in respect of pre-shipment storage and therefore SCH could derive no protection from the clause in that respect; (3) that in any event the clause could give no wider immunity than Wallenius would have enjoyed under the bill of lading in respect of pre-shipment storage, which was none; (4) that SCH was not acting in the course of or in connection with its employment, as required by the clause, in storing the car in the compound; and (5) that in any event the clause failed to satisfy the requirement of reasonableness for the purposes of UCTA and was therefore unenforceable.

61. Other than submission (5), on which the court indicated that it did not wish to hear argument, the essence of Mr Houseman's argument was that SCH's performance of pre-shipment storage at the docks was not referable to any obligation of performance under the contract of carriage, and that even if it had been, it would have carried with it no exemption.

62. Ms Cockerill disputed each of these submissions. Her main points were that there was no reason in principle why the scope of the clause could not extend more widely in the case of stevedores than in the case of the carrier itself, and that as a matter of construction the first part of clause 16 afforded the servant, agent or independent contractor a wider area of exemption than applied to the carrier (see "*but without prejudice to the generality of the foregoing provisions*" which introduces the second part of the clause); that in any event the scope of Wallenius's obligations under its contract of carriage extended to pre-shipment storage, just as the scope of a carrier's obligations often extended beyond the end of ocean carriage into the period of post-discharge storage (see eg ***The New York Star***); and that, contrary to Judge Hallgarten's reasoning in the court below, clause 2 of the bill of lading, in excluding liability for loss or damage to the goods "*during the period before loading or after discharge*" was limiting not the scope of the adventure, but the carrier's responsibility under that adventure.

63. The prior case which comes closest to discussing this range of issues is ***Raymond Burke Motors Ltd v. The Mersey Docks & Harbour Co*** [1986] 1 Lloyd's Rep 155. The plaintiff shipper's motor-cycles were in the defendant's container park awaiting shipment when they were damaged by the defendant's negligence in discharging another vessel. The motor-cycles were never shipped, but the bill of lading, if it had been issued would, as in the present case, have contained a Himalaya clause, to the protection of which the defendant lay claim. The defence failed because the defendant had never done any act or performed any service referable to the contract of carriage. The act which caused the damage was done in discharging a different vessel from that which was to have carried the motor-cycles. And the act of storing the motor-cycles was carried out by the defendant not as agent of the carrier but as agent of the forwarding agent. It so happened that in that case the forwarding agent and the carrier was the same person, Manchester Liners, but Leggatt J found that the damage to the motor-cycles occurred at a point when Manchester Liners were still acting in their first capacity, as forwarding agent, and not in their second capacity, as carrier. He was able on the facts of that case to identify the precise moment which divided the performance of the one set of obligations from the other set, viz the despatch of a straddle carrier for the purpose of picking up the shipper's consignment (at 161). He twice described the distinction between the

two hats worn by Manchester Liners as "*essential" (*at 158) or "*crucial" (*at 161). He also found that in any event the defendant's negligence was wholly collateral to the performance of any duty under the contract of carriage since it occurred in the context of unloading another vessel (at 162).

64. Two things strike me about a consideration of ***Burke Motors v. Mersey Docks.*** The first is that, as Judge Hallgarten himself found, the case is indeed distinguishable on the facts. The three important differences are that in the present case (a) it is clear that SCH are acting in only one capacity, as agents of Wallenius, and it has not been found or suggested that Wallenius, like Manchester Liners, were acting in two capacities; (b) the precise point at which performance of the contract of carriage begins was there, unlike here, identified; and (c) the negligence here was not collateral to the task of pre-shipment storage. Secondly, the issues which have been debated, and which I have sought briefly to expose above, depend to an important extent on the facts.

65. Now in the present case, Judge Hallgarten's solution, which I have cited above, was to hold that clause 2 of the bill of lading showed that the contract of carriage did not embrace "*the period before loading*" (clause 2). If, therefore, Wallenius had undertaken, either directly or through its agents like SCH, additional duties of pre-shipment storage, then such obligations lay entirely outside the contract of carriage evidenced by the bill of lading, and were obligations in respect of which Wallenius had provided itself with no exceptions.

66. That solution was adopted without identifying where Wallenius's contract of carriage began, other than, I suppose, to say that it began with loading. Where, however, does loading begin, and what does it involve? Strictly speaking, I would imagine (but I am not purporting to make any finding) that it began at the earliest with moving the cars from their place of storage in the compound out to the berth where the *Rigoletto* either was or was expected. Mr Houseman I think would have said that loading meant physical loading, from quay to ship, on 1 September, while the *Rigoletto* was in berth: for he did submit, referring to some evidence given at trial which has not been incorporated as a finding into the judgment below, that "*the period before loading*" for the purposes of clause 2 should be taken to mean (and be limited to) "*the period between the commencement of pre-loading operations (ie cargo checks and stowage arrangements on 30 August) and actual physical loading*".

67. Ms Cockerill, on the other hand, (quite apart from her submission that the protection given to an independent contractor through the Himalaya clause could be more extensive than was available to the carrier under its contract of carriage), relied heavily on the fact that SCH's receipt of the cars on 25 August was a receipt for shipment on the *Rigoletto* as agent for the carrier Wallenius. Therefore, she said, all possession by SCH was referable to the contract of carriage. No distinction was to be drawn between post-discharge storage (***The New York Star***) and pre-loading storage.

68. There is something to be said on both sides of this issue. In theory, a contract of carriage may certainly indicate that the period and scope of its operation extends before as well as after the period of sea carriage. In practice, bills of lading frequently deal with the period after discharge, if only because of the rule that a carrier can only deliver with safety against production of a bill of lading, with the result that a carrier has to contemplate that he may well be in the position of a bailee for some time after discharge from the ship. That was the situation in ***The New York Star.*** There, however, the bill of lading terms expressly contemplated that the carrier would continue as a bailee after the carriage itself had ended (at 146/7). The application of this reasoning to the period before loading is not documented in any decided case put before us, but of course a through bill of lading may well expressly cover a period before shipment as part of the overall contract.

69. The difference between the period before loading and after discharge may be said to be this: that once a carrier has taken possession of the goods, he will always want to cover himself even after discharge until he has delivered the goods against the bill of lading; whereas as to the period before loading, why should the carrier have any interest at all in it, and, if he does have any, for how long is he to seek protection? The answer could be this: that the carrier is interested as long as he has possession of the goods, and once he has received the goods for shipment he has possession, and owes obligations as a bailee, even if not strictly as a carrier, which he must either fulfil, or mitigate by means of appropriate exceptions in his contract, or else pay the consequences of breaching. It might also be said that once it is common ground, as it is, that upon receipt of the car Wallenius was obliged to provide, if requested, a received for shipment bill of lading in respect of it, it must follow that the period between receipt and loading is part of the scope of the contract of carriage, even if it is not part of the carriage itself.

70. In the present case, the finding is that SCH received the car for shipment as the agent of Wallenius. SCH were responsible for all aspects of cargo handling, "*including intermediate transit storage and associated handling"* (the definition of "*stevedoring"* contained in ABP's conditions which were incorporated into the SCH/Wallenius contract). SCH were paid nothing by Lotus or any agent of Lotus, and received their remuneration entirely from Wallenius. To put it another way, Lotus paid for storage and cargo handling at Southampton docks entirely through the freight payable to Wallenius. In these circumstances one might expect to find that the position during storage and associated handling at the docks prior to loading might be expressly referred to in Wallenius's contract of carriage, and provision made for it. But the fact is, that other than the statement in clause 2 that there shall be no liability for loss of or damage to the goods during the period before loading, there is nothing. In the circumstances, clause 7, dealing with *"Loading, Discharging and Delivery",* seems inappropriately drafted. It begins by saying that loading, discharging and delivery "*shall be arranged by the Carrier's Agent unless otherwise agreed",* but nothing is said about pre-loading arrangements. The clause goes on to say that "*Landing, storing and delivery shall be for the Merchant's account"*. That is the only express reference to storage, but only in the context of discharge and delivery, in which context it is made clear that the cost falls outside the freight charge. When at

the end of clause 7 reference is made to the right of the carrier to sell the goods if they are *"not applied for within a reasonable time",* there is something on which to base a submission that the contract recognises the possibility that some form of bailment may survive the end of the carriage, but that does not of course extend to the period before loading. Therefore, unless perhaps the expression in the first sentence *"unless otherwise agreed"* is intended to allude to the possibility that pre-loading cargo handling might be made the subject of special agreement, the contract reflected in these bill of lading terms simply does not seem to do justice to a business arrangement of the kind found to have occurred in this case.

71. In these circumstances, I would for my part have liked to have known more, if that were possible, about the way in which the arrangements worked, particularly as I imagine they were probably of some standing and regularity. As it is, I find it hard to say that *"the period before loading"* fails to extend to any period before loading so as to deprive Wallenius of its exception of liability in that regard. But, in agreement with Judge Hallgarten, I am inclined to think that the contract of carriage evidenced by the bill of lading simply does not contemplate performance of services by the carrier or its agents prior to loading. It would seem to follow that any pre-loading services would be a matter for special arrangement (viz, *"otherwise agreed"*). Such special arrangements may of course follow their own course, and in the present case would seem to have been entered into on the terms of the shipping note.

72. In the result, partly because I feel uncomfortable about an incomplete understanding of the facts of the parties' relationships and of the loading sequence, I am not unhappy that it is unnecessary to reach a firm conclusion on the submissions raised under the heading of the Himalaya clause. I would, however, be inclined to say that the scope of the contract evidenced by the bill of lading does not embrace pre-loading storage, and to agree that SCH therefore obtain no protection in that regard. That may be either because the form of bill of lading has not been adapted to take account of the special arrangements made regarding the pre-loading period, or because it was always intended that such arrangements would stand on their own feet in accordance with the terms variously applicable under the shipping note, the SCH/Wallenius contract, and the Operators Licence. It would follow, if that were right, that whether the Himalaya clause operated or not, the conclusion in this case would be the same: that as between Lotus and SCH, it is the terms of the shipping note which apply.

73. In the circumstances there was no need to decide the points that were raised under UCTA. These issues were not argued, and I therefore say nothing at all about them.

Are ABP liable?

74. Lotus as well as SCH obtained permission from Judge Hallgarten to appeal on this issue, but in the event Lotus did not do so (as perhaps they reckoned they had no need to do), and the running was left entirely to SCH.

75. Ms Cockerill submitted that ABP were either bailees or sub-bailees from SCH of the car, stressing among other points the ownership and operation of the common-use compound by ABP, the control exercised over it by means of the fencing and the keys, especially at night, and the responsibility undertaken by ABP in respect of security.

76. On behalf of ABP, Mr Richard Nussey submitted that ABP were neither bailees nor sub-bailees, but mere occupiers of the compound and licensors of SCH. As occupiers, they may have owed an occupier's duty to prevent damage from any lack of care in maintaining their premises or plant; but in general occupiers did not owe a duty to take care to prevent chattels which had been placed on their land being stolen. Nor did a licensee such as ABP easily become a bailor. Since the presence of the cars in their compound was referable to their licence to SCH, it could not be said that possession of the cars swung between SCH and themselves depending on the surrender of the keys. It was not like cases of landlord and tenant where the key was the symbol of the intention to grant possession. In the present case there was no intention to transfer possession of the car to ABP.

77. In my judgment, however, ABP were bailees of the car, at any rate in the sense of sub-bailees from SCH. Judge Hallgarten said that "*ABP never took voluntary possession or custody of the cars*". However, I have no difficulty in principle in thinking of a port operator as a bailee of goods deposited for safe keeping in their secure compounds. For myself, I would draw attention to the following factors. (1) ABP were not merely the owners and occupiers of the docks, but operators of them, for commercial reward. Docks are precisely the sort of premises where shippers and receivers in the course of their business have to resort in the expectation that their goods will receive a level of security appropriate to the apparent nature of such goods. (2) It is to meet such expectations that port operators provide secure compounds for the storage of goods such as cars. (3) The compound in question was not a merely open site upon which cargo owners or their stevedores could leave goods if they wished, and at their risk, but a secure compound, fenced and locked, and regularly patrolled by security guards: precisely as the users of such compounds might expect. (4) ABP charged a fee inter alia for the provision of such a storage service. Thus SCH paid ABP an annual fee of £25,000 for their Operators Licence, and, in addition, the Court was told by Mr Nussey, although it was not in the judgment below, that storage fees were charged if cars remained in the compound for more than a certain period. (5) The combination of the fencing and the locks and keys at the entrance gates shows that the movement of the cars placed within the compound was controlled. Access to the cars was controlled. The keys were, it is to be inferred, kept by ABP, even if they were also available, as a matter of convenience, to licensed stevedores during operating hours during the day. But at night those keys had to be surrendered back to ABP. I asked Mr Nussey why that was so. He answered, not altogether surprisingly, that it was done for the sake of security and so as to control use of the keys. (6) SCH could not take cars out of the compound at night at will. Of course, they did not have the keys to do so. But the control exercised by ABP over the compound went further than that, for the position was that special arrangements had to be made with ABP if, exceptionally, a vessel was to be loaded outside normal daytime hours. Those hours were set out in

SCH's contract with Wallenius. The ABP conditions also contained an "*Hours of Work*" clause, clause 14, which is cited above. Thus it was not true, as Mr Nussey submitted, that SCH had "*exclusive right to determine when and why the car should leave the compound; and ABP had no power to exercise any rights over the car"*. On the contrary, clause 11 of ABP's conditions emphasised ABP's "complete freedom" over handling methods, including "*receipt, collection, ... storage, ... loading ... of goods";* and clause 20 recognised that goods may be in ABP's "*possession or power"*. (7) ABP were responsible for security at the docks in general and the compound in particular. It may be true, as Mr Nussey submitted, that the compound was locked, and the security guards required, at the insistence of HM Customs and Excise - I have cited the Schedule D Security requirement imposed by Customs and Excise on ABP above. Nevertheless, someone had to be responsible for security, and it was entirely to be expected that ABP would be, even if not exclusively. (8) It was consistent with such expectations that reports concerning the break-in on the night of 25/26 August and the loss of the car on 30 August went first to ABP, rather than to SCH. (9) Lotus had notice, because of the reference to ABP and to ABP's conditions in SCH's conditions, that their cars would be stored on ABP's premises. (10) The cars were parked in the compound with their individual keys within them.

78. In those circumstances, it seems to me that ABP had possession of the car at all times, and the fact that during the daytime SCH were also key-holders did not mean that ABP lacked possession. Mr Nussey submitted that a customer of a public house who leaves his car in its car park was a licensee of the public house, not a bailor of his car to it. That, he went on to submit, could be contrasted with the position that obtains in more hazardous parts of the world, where a hotel might provide a secure compound for their guests' cars: he accepted that in that case the hotel would be a bailee of the cars, even if, during the daytime (or even at night) the guest had a key or swipe card which allowed him to gain access to or egress from the compound. In my judgment, ABP's compound is analogous to that example.

79. Mr Nussey relied on the fact that the relationship between SCH and ABP was described as a licence. However, he accepted that a bailment could coexist with a licence, even though the law recognises as a familiar distinction the difference between a bailment which transfers possession and imposes the responsibility of safe-keeping, and a mere licence which does neither. ***PALMER***, *Bailment*, at 382, in opening a lengthy section on the distinction, particularly in the context of the parking of cars, says:

"The law has repeatedly drawn a distinction between bailments and licenses; the former requiring a transfer of possession and a voluntary acceptance of the common law duty of safekeeping, the latter amounting to no more than a grant of permission to the user of a chattel to leave it on the licensor's land on the understanding that neither possession shall be transferred nor responsibility for guarding the chattel accepted. The distinction is easy to state but difficult to draw, or, rather, it is difficult to place specific cases on one side or the other."

80. There follows an attempt to state certain factors as indicative of a bailment, while emphasising that *"everything depends upon the immediate facts"* (at 385). Among such factors are the transfer of the ignition key (see at 386ff), procedures regarding the removal of the chattel (at 391ff), fees and charges (at 393ff), the physical geography of the car-park (at 394ff) and so on. In summary (at 412/3), "the side of the line on which a given case may fall is largely intuitive - "*a matter of impression*"."

81. No case has been cited to the court by either party on this issue, and none was cited in the judgment below. Ultimately, the two critical aspects of the matter are whether possession has been transferred and whether there is a voluntary acceptance of a duty of safe-keeping: see ***CHITTY*** at para 33-006. To some extent, as the range of cases (from many different common law jurisdictions) discussed in ***PALMER*** indicates, these two factors inter-relate with one another. In the present case, I see no reason why it should not be said that possession has been transferred to ABP and that the circumstances were such that there was a voluntary assumption of the duty of safe-keeping. Consistently with that analysis ABP protected itself with conditions which were for present purposes the same as SCH's conditions - indeed it is probable that the latter were modelled on the former. Those conditions were designed to be applicable both to SCH as a licensee and to owners of cargo such as Lotus. Indeed, although no reliance has been placed on it in this case, clause 3 of ABP's conditions involves a warranty by SCH that they are the authorised agent of the owner of the goods and that they accept ABP's conditions on behalf of the owner. As it is, in the light of ***The Pioneer Container***, there is no difficulty in regarding Lotus as having a direct right of action against ABP under the concept of a sub-bailment on terms: see *The Place of Bailment in the Modern Law of Obligations* by Andrew Bell, chapter 10 in *Interests in Goods*, 2nd ed, 1998, edited by Palmer and McKendrick.

82. In these circumstances I conclude that ABP were bailees or sub-bailees of Lotus, and were liable as well to Lotus for lack of care in safe-guarding the car. If I was wrong on the factor of a transfer of possession to ABP, I would nevertheless be prepared to say, for the same reasons as I have set out above, that ABP owed a duty of care to safe-guard Lotus's car against theft. It is true, as Judge Hallgarten pointed out, quoting ***PALMER***, Bailment, at 413, that in general - *"an occupier is not liable for loss of his visitor's property by theft, unless he has become a bailee."*

Nevertheless, ***PALMER*** later goes on, at 426/9, to refer to exceptions. Quite apart from these, however, it seems to me that the situation under discussion is not reflected in the citation from ***PALMER***, for it is hardly qua "*visitor"* that Lotus and their cars come within ABP's compound, nor is it qua "occupier" that such a duty is imposed on ABP. Rather, in the circumstances of this case, and in the absence of any notice excluding such responsibility, ABP have in effect voluntarily accepted a duty of care to safeguard cars in their fenced, locked and patrolled compound.

83. It follows that it is common ground that liability between SCH and ABP is to be apportioned as to 40% to SCH and 60% to ABP. Since Lotus did not appeal against ABP's absolvement from liability below, the formal position is, I think, that SCH are 100% liable to Lotus, but are entitled to a 60% contribution from ABH.

Conclusion

84. In sum, SCH's appeal against Lotus fails, but their appeal against ABP succeeds. It follows that Lotus's separate appeal against the order of costs below becomes moot.

Chadwick LJ :

85. The first of the appeals before us in time (0828), is an appeal by the claimants in the action, Lotus Cars Limited, Group Lotus Limited and Lotus Cars USA Incorporated (together "*Lotus*"). In that appeal *("the Lotus appeal*") Lotus appeal, with the leave of the judge, His Honour Judge Hallgarten QC, against so much of his order of 27 July 1999 as (i) dismissed their claim that the fourth defendant, Associated British Ports ("*ABP*"), owed to them a duty of care at common law to prevent the theft of their motor vehicle on 25/26 August 1994, (ii) ordered them to pay ABP's costs of defending the action and (iii) ordered that the costs to be paid to them by the first defendant, Southampton Cargo Handling Limited ("*SCH*"). The order sought on that appeal is that SCH, and not Lotus, pay the costs of ABP and indemnify Lotus against any costs paid by Lotus to ABP under the judge's order. Lotus do not seek any order against ABP, either in respect of the value of the motor vehicle or in respect of costs.

86. The second of these appeals (0874), although second in time, is to be regarded as the principal appeal. In that appeal ("the SCH appeal") SCH appeals, again with the leave of the judge, against so much of the judge's order as ordered that SCH should pay to Lotus the whole of the amount claimed in the action (£33,400.26). The order sought on that appeal is that the judgment against SCH be set aside; alternatively (i) that SCH and ABP contribute to the judgment sum in the proportions 40% and 60% respectively and (ii) that SCH and ABP contribute to Lotus' costs of the action in the same proportions.

87. I agree with Lord Justice Rix, for the reasons which he has given, that what may be described as the first limb of the SCH appeal - that the judgment against SCH be set aside - must fail. To my mind it is clear that SCH received the vehicle from Lotus as bailee upon SCH's own Conditions of Business; that the relationship between Lotus and SCH was governed by those conditions; and that SCH accepted liability for negligence (if proved) under those conditions. The judge found negligence on the part of SCH proved; and there is no appeal against that finding. I agree that SCH cannot rely on the "Himalaya" clause in the bill of lading subsequently issued by Wallenius Lines. There is nothing I wish to add to the analysis in the judgment of Lord Justice Rix on that point. It follows that it is unnecessary to address the questions which would arise if the ***"Himalaya"*** clause governed the relationship between Lotus and SCH. I, too, incline to the view that the scope of the contract evidenced by the bill of lading does not extend to the period of pre-loading storage relevant in the present case. But I have reached no firm conclusion on that point.

88. The second limb of the SCH appeal - that liability to Lotus should be shared between SCH and ABP in the proportions 40% and 60% - turns on the question: did ABP owe Lotus a duty of care at common law to prevent the theft of the vehicle from the compound which ABP controlled? It is pertinent to have in mind that the direct contractual claim by SCH against ABP - based on the operator's licence granted under ABP's Standard Terms and Conditions of Trade - was dismissed by the judge. There is no appeal against his decision on that point. SCH's claim for indemnity or contribution against ABP on the appeal is put, as I understand it, solely on the basis that SCH and ABP are each liable to Lotus in respect of the same damage. It is the claim made, on that basis, under the Civil Liability (Contribution) Act 1978 which is the foundation for the second limb of the SCH appeal.

89. If ABP did owe Lotus a duty of care at common law to prevent the theft of the vehicle from the compound which ABP controlled, then it is not in dispute on this appeal (i) that ABP was in breach of that duty, or (ii) that the appropriate proportions in which liability should be shared as between SCH and ABP are the proportions 40% and 60%. So if that question is answered in the affirmative, SCH must succeed on the second limb of the SCH appeal.

90. The judge rejected Lotus' claim that ABP became bailees of the vehicle, either independently of SCH or, when the keys to the compound were relinquished overnight, as sub-bailees from SCH. He said this, at page 10 of his written judgment:

    In my view the circumstances were not such as to render ABP either bailees or sub-bailees. ABP never took voluntary possession or custody of the cars, but allocated the compound on a non-exclusive basis to SCH so as to enable SCH better to perform the stevedoring services which SCH undertook in accordance with the Operators Licence referred to above. I do not consider that the overnight surrender of the keys to the compound constituted a delivery of possession or custody of the vehicles within it.

91. For my part, I would not think it right to reverse the judge's conclusion on what is, in essence, a question of fact. As Mr Palmer has pointed out, in his work *Bailment* (2 Edition 1991) at page 385 - in a passage to which Lord Justice Rix has referred - when determining whether there has been a transfer of possession "*everything depends on the immediate facts*". I do not, myself, feel confident that I have gained a sufficient understanding of the facts, from the material put before us on this appeal, to enable me to interfere with a conclusion of fact reached by the judge after hearing the witnesses. The factors to which Lord Justice Rix has referred seem to me as consistent with an intention, as between SCH and ABP, that ABP should assume contractual responsibility to take reasonable care, as licensor, to ensure the security of the licensed premises - including, in particular, the secure compound - as they are with an intention that ABP should take possession of the vehicles in the compound. Had the contractual claim by SCH against ABP been pursued on this appeal -which it was not - I have little doubt that I would have been prepared to imply a term to the effect that ABP would take reasonable care to secure the compound. By that route I would have reached the same result as that which has commended itself to the other members of the Court on the second limb of the SCH appeal.

92. As matters stand, however, I would have dismissed the second, as well as the first, limb of the SCH appeal.

93. In the circumstances that the other members of the Court take a different view, the costs issues in the Lotus appeal fall away. They have not been argued, and it would be inappropriate, as well as unnecessary, to express any view as to whether the judge was correct to make the order as to costs which he did make.

Peter Gibson L.J.:

94. Six issues are raised by the appeal brought by the First Defendant("SCH"), the Respondent's Notice of the Claimants ("Lotus") and the appeal by Lotus:
(1) Was SCH a bailee of the car at the time it was stolen?
(2) Does the fact that SCH received the car on its own standard trading terms disentitle it from relying on the Himalaya clause in the Bill of Lading?
(3) If the answer to (2) is in the negative, had the Himalaya clause been activated at the time when the car was stolen?
(4) If the answer to (3) is in the affirmative, did the Unfair Contract Terms Act 1977 render the Himalaya clause unenforceable?
(5) Was the Fourth Defendant ("ABP") a bailee or sub-bailee of the car at the time it was stolen or did it otherwise owe a duty of care to Lotus?
(6) Did the Judge err in requiring Lotus to pay the costs of ABP which had been incurred by it in defending the action?

95. (1) On the first issue there is nothing which I would wish to add to what has been said by Rix L.J. in his judgment on that issue. I agree with him that the Judge was right to hold that SCH was a bailee.

96. (2) On the second issue, SCH must be taken to have chosen to rely on its own standard terms rather than the terms of the Bill of Lading with which they are fundamentally inconsistent. Again I agree with the reasons given by Rix L.J. on this issue.

97. (3) The third issue does not arise and I prefer to say nothing on it.

98. (4) The fourth issue also does not arise, and in view of the conclusion which was reached on the second issue we did not hear argument on it.

99. (5) On the fifth issue the Judge found ABP not to be a bailee because he was of the opinion that ABP never took voluntary possession of the car but allocated the compound on a non-exclusive basis to SCH to enable SCH better to perform the stevedoring services which it undertook in accordance with the Operators Licence. The Judge was also of the view that ABP owed no duty of care to safeguard the cars left within the compound against theft. In the result the Judge held SCH to be 100% responsible for Lotus' loss, even though, if ABP as well as SCH were liable to Lotus, he would have concluded that ABP would be liable in respect of 60% and SCH only 40% of Lotus' claim.

100. It is with hesitation that I disagree with the judge's finding on possession. But the conclusion whether or not there has been a voluntary assumption of possession is one to be reached from a consideration of all the circumstances of the case. The fact that SCH by its Operators Licence had no rights over any location in the Dock Estate emphasises the control retained by ABP over the compound. Like Rix L.J. I do not see why the owner of a port providing in return for fees a secure compound in which goods are deposited for temporary storage before shipment, which is guarded by security guards from a security firm engaged by the port owner, and which at night is locked and the keys left in the sole control of the port owner should not be treated in law as a bailee who has voluntarily assumed possession of those goods. The standard terms of SCH refer specifically to ABP and its conditions and to the docks being under ABP's control. ABP's conditions are expressed to apply to *"all legal relationships between ABP and any customer whether in respect of contract, bailment or licence", "customer"* is widely defined to mean *"any person .... who .... visits the premises of ABP and/or who delivers or brings goods .... into or whose goods .... come howsoever to be on those premises and/or who .... avail themselves of any facility or service provided by ABP,"* and SCH as a customer warranted that it accepted ABP's conditions on behalf of every person interested in the goods. The conditions gave ABP wide powers in respect of handling and storage of goods and limited its liability in negligence. The 10 factors to which Rix L.J. draws attention in para. 77 of his judgment strongly suggest that ABP did voluntarily assume possession of the goods within the secure compound and accepted the duty of safe-keeping.

101. I conclude, in agreement with Rix L.J and with the reasons which he has given on this issue, that ABP was a bailee or sub-bailee and as such liable to Lotus for failing in its duty of safekeeping. If wrong on that, I would hold that ABP owed a duty of care to the owners of the goods within its compound to safeguard them against theft.

102. (6) We have not heard argument on the sixth issue and, in the light of the conclusion of this court on the fifth issue, it would appear no longer to arise.

Order: Appeal by the first defendant against the claimants dismissed. The court will order that the fourth defendant make a 60% contribution in favour of the first defendant. Order as minuted by counsel. (Order does not form part of approved judgment.)

Ms Sara COCKERILL (instructed by Messrs Hayes for the Appellant/First Defendant)
Mr Stephen HOUSEMAN (instructed by Messrs Holmes Hardingham Walser Johnston Winter for the Respondent/Claimant)
Mr Richard NUSSEY (instructed by Messrs Paris Smith & Randell for Respondent/Fourth Defendant)