CA on appeal from High Court (Mr Nigel Teare Q.C. before Waller LJ; Tuckey LJ; Mr Justice Black. 13th February 2003

Lord Justice Tuckey:

Introduction.

1. Steel coils carried by the defendants under a voyage charter party with the second claimant and bills of lading issued to or held by the first and third claimants' were allegedly damaged by defective loading, stowage or discharge. At a trial of preliminary issues Mr Nigel Teare Q.C. sitting as a Deputy High Court Judge decided that the defendants had no liability under the charter party. There was no liability under the bills either so long as the alleged damage was not caused by acts or omissions of the defendants, their servants or agents.

2. The claimants' appeal raises questions of construction and a point of principle about the meaning and effect of Article III r.2 of the Hague Visby Rules on the bills. This rule says:

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

   Following an observation by Devlin J. in ***Pyrene v Scindia Navigation Co.*** (1954) 2 QB 402 it has been settled English law that this rule does not oblige the carrier to load, stow and discharge. However, if he has agreed to do so, he must perform these obligations properly and carefully. The claimants say this is wrong: the rule does impose an obligation on the carrier and any provision in the bills to the contrary is made null and void by Article III r.8.

3. By their respondents' notice the defendants challenge the judge's qualification of their liability under the bills.

The Charter Party

4. The cargo was to be carried in the defendants' vessel Jordan II from Bombay to Barcelona and Motril. The cargo was described as:

   5,500 metric tonnes, 5 per cent more or less in charterers' option. Galvanised steel coils (maximum piece weight 12 tonnes) … cargo under this charter party to be separated by vessels holds. In case same is not possible, any artificial separation, if necessary, to be arranged by owners at their time, risk and expense….

5. The charter is dated 4th December 1997 and is on a Stemmor 1983 form which was designed for the carriage of ore cargoes. The relevant clauses are:

   3. Freight to be paid at and after the rates of $3.3 per metric ton. F.I.O.S.T(- lashed/secured,/dunnaged …….. (The acronym stands for Free In and Out Stowed and Trimmed. The letters and following words were added to the printed form "freight" clause).

   7. Charterers to have full use of all vessel's gear to assist in loading and discharging cargo. Vessel's gear should only be considered as supplementary to the shore gear. Shore winch/crewmen to be used at all times. (This clause replaced the "winch" clause which was deleted)

   17. Shippers/charterers/receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel. Trimming is understood to mean levelling off the top of the pile and any additional trimming required by the master is to be for Owners account.

   44. This contract is governed by English law….

Bills of Lading

6. The cargo was shipped under two bills of lading issued in Bombay on 2nd January 1998 to the first claimant as shipper. The third claimant was named as consignee. The bills were on the Congenbill form and provided that freight was payable "*as per charter party dated 4. 12. 97*" and incorporated "*all terms and conditions liberties and exceptions*" of that contract. The Hague Visby Rules applied.

The Claim

7. The cargo was discharged at Motril in February 1998. The claimants alleged that it was damaged by rough handling during loading and/or discharging, and/or inadequate stowage due to failure to provide dunnage, failure to secure the coils and/or stacking them so that the bottom layers were excessively compressed.

8. Both parties agreed to the trial of preliminary issues. Issue 1 was:

   Whether on a true construction of (a) the charter party dated 4th December 1997 and (b) the contracts of carriage contained in or evidenced by the bills of lading numbered 1 and 2 dated 2nd January 1998 the defendants are under any liability for any damage to the cargo caused as a result of loading, stowage, laying of dunnage, securing or discharging.

The Judgment

9. I should start by saying that the judgment is a model of clarity and deals fully with the many submissions which were made to the judge. I shall attempt only a brief summary of his conclusions. It was agreed that at common law the obligation to load, stow and discharge the cargo was on the shipowner and that if this responsibility was to be transferred to the charterer, clear words were required. The judge concluded that if clause 3 had stood alone it arguably would not have transferred responsibility to the second claimant but with clause 17 it did. Clause 17 encompassed all cargo operations which would be required by a cargo of ore but no trimming was required for a cargo of steel coils. The parties had identified what was required for such a cargo in clause 3 (lashed/secured/dunnaged) and the real question was whether these activities could be read into the standard form clause 17 in place of or as a definition of the obligation to trim. The judge said:

It is common ground that the express definition of trimming in the second sentence of clause 17 makes no sense in the context of a cargo of steel coils. I agree that the second sentence cannot have been intended by the parties to have had any effect because there would be no "levelling off the top of the pile" of steel coils. It was an apt definition in the context of an ore cargo but not in the context of a cargo of steel coils. However the cargo of steel coils, like a cargo of ore requires to be put on board and discharged. I consider that clause 17 transfers the responsibility for the proper performance of these activities to the charterers. Further, clause 3 shows that the parties gave attention to the cargo activities which this cargo would require instead of trimming once it was in the hold, namely, lashing, securing and dunnaging. My first impression on reading clauses 3 and 17 together was that the reference to trimming in the first sentence of clause 17 should be read as the reference to the activities of lashing, securing and dunnaging in the cargo which the parties had stated this cargo required instead of trimming in clause 3. So read clause 17 is effective also to transfer responsibility for the proper performance of those activities of the charterers.

10. The judge next had to consider whether clauses 3 and 17 were inconsistent with or inapplicable to the bills of lading. How, for example, could clause 17 transfer responsibility for cargo work at the point of loading to the receivers when the receivers were not there to do it and at the time of loading might be wholly unaware of the terms of the bill of lading? For this reason the judge accepted that performance of the cargo work at the port of loading had been transferred to the shippers and for cargo work at the port of discharge to the receivers. The consequence of this was:

Where a claim under the bill of lading is brought by the receivers in respect of damage done during cargo work at the port of loading the shipowner is not able to say that responsibility for that damage had been transferred to the receiver but he can say that he, the shipowner, had not undertaken to carry out the cargo work at the port of loading or at the port of discharge and that any damage done during loading or stowage was caused by an act or omission of the shipper for which, pursuant to Article IV r. 2 (i), he was not responsible. Conversely where a claim is brought by the shipper in respect of damage done during discharge, the shipowner will have a defence if he can prove that the damage was by a cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier for which pursuant to Article IV r.2 (q), he was not responsible.

This is why he concluded that the first and third claimants could not claim under the bill of lading for damage to the cargo caused by poor loading, stowage or discharge so long as the alleged damage was not caused by the acts or omissions of the defendants, their servants or agents.

11. The judge reached this conclusion on the assumption that the settled English law about the meaning and effect of Article III r. 2 to which I have referred was correct. On this assumption his construction of clauses 3 and 17 meant that the defendants had not accepted any responsibility for cargo work. But, as I have said, the claimants contended that Article III r. 2 did impose such responsibility on the defendants and to the extent that clauses 3 and 17 said otherwise they were null and void under Article III r. 8 which says:

Any clause, covenant or agreement in a contract carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods arising negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than is provided in these rules shall be null and void and of no effect.

The claimants supported this submission by reference to the Travaux Preparatoires to the Hague Rules (which for present purposes are the same as the Hague Visby Rules) and decisions in other jurisdictions.

12. The judge rejected these submissions for three reasons. First he said he was bound to do so because in ***G.H. Renton & Co. v Palmyra Trading Corporation*** (1957) AC 146 the majority had approved Devlin J's. view of Article III r.2. Next he said that the Travaux Preparatoires did not indisputably support the claimants' submissions although they very nearly did so. Finally he was prepared to assume that other jurisdictions had interpreted Article III r.2 differently but said:

…. where a commercial judge as distinguished as Devlin J. expressed his preference for one of two competing interpretations of Article III r.2 as long ago as 1954 and where that preferred interpretation has been regarded as settled law by English Courts ever since…. I do not consider that it is right, at any rate for a court of first instance, to disturb that well established understanding of Article III r. 2. In commercial law there is generally accepted to be a special need for certainty, consistency or continuity….

13. The judge's conclusions about the defendants' liability under the bills of lading made it unnecessary for him to consider whether, if there was liability, the second claimant was obliged to indemnify the defendants against it under the terms of the charter party. This was the second preliminary issue. The judge however said that if he had to decide this issue he would have decided it in the defendants' favour. There is no appeal against this part of the judgment and so it is unnecessary to refer to it further.

Construction of the Charter Party (Issue 1(a))

14. I have already referred to the position at common law and the need for clear words if the contract is to transfer the obligation to load, stow and discharge from owners to charterers. There are three facets of the cargo operation which have to be considered. Who is to pay for it; who is to carry it out; and who is liable for it not being done properly and carefully? The judge decided and I agree that there is no presumption that each of these responsibilities should fall on the same party. In other words, if the charterer has agreed to pay for the cargo operation, there is no presumption that he has also agreed to carry it out or be liable if it is done badly.

15. We have been referred to a number of cases in which the courts have had to consider whether the words in a particular contract do or do not transfer the obligation to carry out cargo work. These cases are helpfully

summarised and commented upon in Voyage Charters 2nd edn. (2001) at paras. 14.53 – 14.55. I think, however, that the only sure principle which can be derived from these cases is that each case depends upon the contract in question and the context in which it is made. I agree with the editors of Scrutton on Charter Parties 20th edn. (1996) at p. 175 that no general rule can be derived from these cases.

16. So with this introduction I turn to the words used in the charter party in this case and its context, the most important aspect of which is that the parties chose to use a standard form of contract for an ore cargo. Such a cargo would only have to be trimmed, whereas a cargo of steel coils did not need to be. Steel coils needed to be lashed/secured/dunnaged as necessary to ensure proper stowage.

17. Mr Young Q.C. for the defendants argued that clause 3 on its own transferred the obligation to carry out the cargo operations to the second claimants. *"Free",* he submitted, meant free of risk and expense, so each of the operations identified by the following letters of the acronym and the following words in the clause had to be carried out by charterers at their own risk. The judge did not accept this submission and nor do I. In some contracts so-called FIOST clauses do transfer responsibility to charterers, but it does not follow that use of the acronym on its own will always do so. The natural meaning of the word "*Free"* is at no cost (in this case to owners). It is not suggested that it has any wider customary meaning and appearing as it does in the freight clause I can see no reason why it should be given any wider meaning in this contract, particularly as clause 17 says *"Free of expense".* As Mr Rainey Q.C. for the claimants put it FIOST as a genus may have a wide meaning but the species used in this case is simply a "*who is to pay*" provision.

18. Mr Rainey submitted that clause 17 was so discordant with the rest of the contract that it should be ignored altogether. I do not agree. The discordance arises from the reference to "*trim"* and its definition. There is nothing discordant or unclear about the words "…*charterers to put the cargo on board… and discharge cargo free of expense to the vessel".* These words not only deal with cost but also the obligation to carry out the operation itself. Charterers must put the cargo on board and discharge it

19. If this had been a cargo of ore there is no doubt, as Mr Rainey conceded, that clause 17 would have transferred the obligation to carry out all the cargo work to charterers. The question is whether by use of the word *"trim*" the parties to this contract must be taken to have meant the work which had to be done to stow a cargo of steel coils described in clause 3.

20. Mr Rainey submits that the answer to this question is no, or at least it is unclear which is sufficient for his purpose. It is impermissible, he says, to import words from what is obviously a cost/price regime into one dealing with responsibility. There is no presumption that the parties did so. They spelt out what they intended in clause 3 but made no amendment to clause 17. This cannot therefore be assumed to be a mistake. The judge was not required to strain the language of the contract to give the word "*trim"* a meaning since the courts often accepted that words in such contracts, particularly standard form contracts, were meaningless.

21. I do not accept these submissions. If one looks at clause 3 it is clear that the parties have put their minds to what is required to stow the steel coils. Like trimming, lashing/securing/dunnaging was necessary to make the cargo fit for carriage. No trimming was required but after the letter T there is a dash and what is required for this cargo is spelt out. Clause 17 was intended to transfer the obligation to perform all cargo work to the charterer. There is nothing in the remainder of the contract to suggest that this was not the intention of the parties here. They must therefore have intended that the obligation to carry out trimming was intended to refer to what would actually be required which they set out in clause 3. Against this background they cannot have intended that whilst charterers would have to pay for stowing the cargo as well as loading and discharging it, they did not actually have to do the stowing.

22. There is nothing impermissible about this approach to construction. Clauses 3 and 17 can and should be read together. The parties should obviously have deleted the second sentence of clause 17. Their failure to do so is not fatal to what I think is the proper construction of the contract. This standard definition of "trim" is contrary to the special definition which the parties adopted for the purposes of this contract in clause 3.

23. These conclusion are supported, I think, by that part of the description of the cargo referring to separation and the reference in clause 7 to the charterers having the right to use the vessel's gear.

24. Clause 17 does not refer specifically to the third facet of the cargo operation – liability if the work is not done properly and carefully. However, Mr Rainey accepts, rightly I think, that if all the cargo work had to be performed by charterers they would be liable if it was not properly or carefully carried out.

25. For these reasons I think the judge reached the right conclusion on issue 1(a).

26. There must however be a footnote to this conclusion which is also relevant to issue 1(b). In the course of the hearing before the judge the claimants said that they would be relying on what has been called "the intervention proviso" if their construction arguments failed. This proviso is derived from the decision of the House of Lords in ***Canadian Transport v Courtline Ltd.*** (1940) AC 934. In that case the House decided that responsibility for stowage had been transferred to charterers but at p,944 Lord Wright said:

    "… to the extent that the master exercises supervision and limits the charterers' control of the stowage, the charterers' liability will be limited in a corresponding degree."

    and at p. 952 Lord Porter added: "*If it were proved that the master had …. intervened in the stowage, again the responsibility would be his and not the charterers."*

27. There was some discussion before us as to the legal basis for relieving charterers from liability in such circumstances. Mr Young accepted that it might be a liability in tort for the negligent act of the master or for a failure to act where he had assumed a duty to act but failed to do so. I think this analysis is probably correct but it is not essential for determination of this appeal. The circumstances in which the intervention proviso can be relied on were not argued and the position may be unclear (see Voyage Charters at para. 16.42) so I shall say no more about this.

Construction of the Bills of Lading (Issue 1(b)

28. The bills incorporated the terms of the charter party. Assuming the construction of clauses 3 and 17 under Issue 1(a) the contract of carriage on the bills provided that

Shippers/charterers/ receivers to put the cargo on board, lash, secure and dunnage, and discharge the cargo free of expense to the vessel.

29. The first question is whether Article III rules 2 and 8 make this term null and void – the point of principle to which I have already referred.

30. We decided to hear Mr Rainey first as to whether we were bound by ***Renton v Palmyra***. At the end of his submissions about this we said that we were bound and so no useful purpose would be served by hearing argument on the merits of the point based upon the Travaux Preparatoires and authorities from other jurisdictions. The judge has admirably summarised these arguments in paras. 60 – 71 of his judgment. In this judgment therefore I shall only say why I think we are bound by ***Renton v Palmyra***.

31. That case concerned a strike clause in bills of lading which permitted the shipowner to discharge at another safe port. Strikes prevented the cargo of timber from being discharged at English ports so it was discharged at Hamburg. The cargo receivers argued that the strike clause was repugnant to the main object of the contract of carriage and contrary to Article III r. 2 which required shipowners to "*properly … carry… and discharge the goods …*" so it was null and void. In answer to the Hague Rules point the shipowners argued that the obligation properly to carry in Article III r. 2 was concerned only with the manner in which the goods were carried. It had no geographical significance. They also relied on ***Pyrene v Scindia*** saying that they had not agreed to discharge at strike bound English ports and Article III r. 2 did not prevent them from contracting in this way.

32. The House decided unanimously in favour of the shipowners but did so for different reasons on the Hague Rules point. Viscount Kilmuir and Lord Tucker did so on the geographical point. However Lord Morton at p. 169/170 said:

I construe the words "shall properly and carefully carry and discharge the goods carried" as meaning that the carrier must perform the duties of carriage and discharge imposed upon him by the contract in a proper and careful manner. In Pyrene v Scindia Devlin J. said: "There is, however, a third interpretation to Article III r.2. The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think correctly, in Carver's Carriage of Goods by Sea, 9th edn. (1952), page 186, is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide".

My Lords, I agree with this passage, save that, to my mind, not only is the construction approved by Devlin J. more consistent with the object of the rules, but it is also the more natural construction of the language used.

Lord Cohen agreed with Lord Morton. Lord Somervell at page 174 said:

The general ambit of the Hague Rules is to be found in Article III r.2 which has already been cited. It is, in my opinion, directed and only directed to the manner in which the obligations undertaken are to be carried out. Subject to the later provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes properly and with care. This question was considered by Devlin J. in ***Pyrene Co. Ltd. V Scindia Navigation Co. Ltd****. in relation to the words* ***"shall properly and carefully load"****. I agree with his statement, which has already been cited.*

Prima facie, therefore, the rules leave the parties free to contract in the terms in question here.

33. It is clear from these passages that a majority of their Lordships expressly approved what Devlin J. said in ***Pyrene v Scindia*** and I think there is no doubt that this was one of the reasons why they dismissed the appeal. We also looked at the Court of Appeal decision (1956) 1 QB 462 where two members of this court did likewise (see Singleton LJ at ps. 497/8 and Hodgson LJ at p. 510). This court similarly approved ***Pyrene v Scindia*** in ***The Coral*** (1993) 1 Lloyds Rep.1.

34. Mr Rainey argued that *Renton v Palmyra* was a split ratio about which one should be cautious. It did not concern loading and by using the words "prima facie" Lord Somervell was only expressing a tentative view. I disagree. The ratio is split but the majority are clear on the point in question. If this view of Article III r.2 applies to the

obligation to carry, which is the essence of the contract, it must also apply to the incidental obligations including loading, handling and stowing referred to in this article.

35. I turn finally to the part of this appeal which has caused me the greatest difficulty. This relates to the judge's qualification of his answer to Issue 1(b). I have already referred to his reason for doing so (para. 10).

36. Neither party has appealed the judge's split of responsibility between the shippers and the receivers. Indeed the judge records that Mr Young conceded the point. His skeleton argument and respondents' notice assumed that the judge's qualification was based upon the intervention proviso and asked for clarification in this context of what the judge meant by "omissions". It is clear however from the passage which I have cited that the judge's qualification is based upon Article IV r.2 (i) and (q).

37. Mr Rainey submits that the consequence of the judge's decision is that the defendants have a liability to the receivers' for improper loading and stowing and to the shippers' for improper discharge unless they have an Article IV r.2 (i) or (q) defence. Put another way, he says that faced with such claims the defendants cannot say that they have transferred their responsibility to one or other of the shippers', charterers or receivers' and so have no liability. On the receivers' claim the defendants are to be taken as having the primary responsibility for properly and carefully loading the vessel which they will only escape if they can show that the damage was caused by the act or omission of the shipper. On the shippers' claim the position is the same: they will only have a defence if they can show that the damage was caused by the act or omission of the owner of the goods (the receiver) or some other cause for which they were not to blame.

38. Mr Young disputes this analysis. Under the bills of lading the defendants have not undertaken any responsibility for any cargo work and this should be a complete answer to any claim by the shippers or the receivers or any other holder of these bills subject except if they have intervened. He suggested that one could reach the same result by Article IV rules (i) or (q) but that is plainly not so.

39. I have not found this an easy point, not least because it was not argued before the judge or identified in the skeleton arguments for this appeal and only emerged in the course of oral argument. Mr Young needs permission to cross appeal, but if he is right he should obviously have it. I think he is. Clauses 3 and 17 were intended to relieve the defendants of all responsibility for cargo operations. These clauses were incorporated into the contract of carriage contained in the bills of lading. If Mr Rainey is right the clauses have obviously not had their intended effect. I can see no reason for denying them this effect. I do not think it follows from the judge's split of responsibility for carrying out loading and discharging that the defendants should be responsible for the failure of the shippers, the receivers (or the charterers) to carry out any part of these operations properly or carefully. This means that I do not think that the defendants need to rely on the Article IV defences to escape liability in this case.

40. Accordingly to make the position clear I would allow the cross appeal on Issue 1 (b) to the limited extent of deleting the judge's qualification. Again however this is subject to the intervention proviso.

Lord Justice Waller:

41. I agree. I will add a word in relation to the last point. As my lord has said it was not satisfactorily argued, but it may be a point of some significance.

42. The bills of lading represent the contract originally made between the shipper and the ship. It is at that stage that it is necessary to analyse what the terms of that contract were. That analysis points to the shipper having agreed with the shipowner, that so far as loading was concerned the shipper would carry it out and be responsible and the shipowner would not. The shipper also agreed that as regards discharge the receiver would carry it out and be responsible and the shipowner would not.

43. If the shipper never transferred the bill of lading there is no difficulty with the shipper having to accept the bargain that he has made. It is true the shipper will be the receiver, but Mr Rainey I think accepted, and in my view rightly, that in that situation there is no question of the "receiver" [who would of course also be the shipper] having any right against the shipowner in respect of the discharge operation, or the loading operation unless the shipowner "intervenes" in the loading or the unloading.

44. The transfer of the bill of lading to the consignee of the goods, and indeed, if there were a chain, to the ultimate consignee of the goods, transfers and vests in the consignee "*all rights of suit under the contract of carriage as if he had been a party to that contract of carriage*" [section 2(1) of the Carriage of Goods by Sea Act 1992]. The receiver or consignee can however be in no better position than the shipper who made the contract in pursuing any suit under that contract. The receiver must thus accept under that contract that the receiver has the obligation to discharge, and not the shipowner, and indeed that the shipper had the obligation to load, and not the shipowner.

45. So far as the shipper is concerned, his bargain with the shipowner was that the receiver would discharge and he cannot as a matter of contract have any remedy against the shipowner in respect of the discharge operation unless the shipowner intervened.

46. Mr Rainey would I think argue that the receiver has some independent right as against the shipowner in so far as any damage may have been suffered in the course of loading. Clearly, if the shipowner had intervened that may give some independent right, but Mr Rainey would seek to argue for some independent right beyond intervention. His argument was that the shipowner, by making a contract with the shipper, cannot divest himself of his common

law obligation to the receiver, and he argued that that obligation would include the obligation to be responsible for the loading.

47. I cannot see that there is anything to prevent the shipowner making a contract with the shipper on terms that the shipper will be responsible for loading, and the receiver will be responsible for discharge and the shipowner responsible for neither, unless it be Article III rule 2 of the Hague Visby Rules. But unless Devlin J was wrong in his view of Article III rule 2 in the *Pyrene,* Article III rule 2 does not compel the shipowner to be responsible for the loading and unloading; it simply compels the shipowner to load and unload properly if he undertakes those functions, and Devlin J contemplates the shipowner being able by contract to agree not to undertake the functions. It is not open to us to hold that Devlin J was wrong for the reasons given by Tuckey LJ.

48. In the result, neither the receiver nor the shipper has any independent cause of action against the shipowner in relation to loading or discharge unless the shipowner has intervened. As to what would constitute "*intervention*" and indeed as to whether the shipowner may not in some circumstances have a duty to intervene so as to impose liability on the shipowner, is, as my lord has said, not for determination on this appeal.

Mrs. Justice Black: I agree with both Lord Justice Tuckey and Lord Justice Waller.

Order: Appeal dismissed with costs; £20,000 to be paid on account, application for permission to appeal to House of Lords refused. (Order does not form part of the approved judgment)

Simon Rainey Q.C. and Nicholas Craig (instructed by Jackson Parton) for the Appellants
Timothy Young Q.C. and Sudanshu Swaroop (instructed by More Fisher Brown) for the Respondents