CA on appeal from Central London County Court (HHJ Hallgarten QC) before Evans LJ; Hobhouse LJ; Hutchison LJ. 15th May 1997.

**LORD JUSTICE HOBHOUSE:**

***Introduction*:**

In this action the Plaintiff shipowners, Cho Yang Shipping Co Ltd of Seoul, Korea, seek to recover freight from the Defendants, Coral (UK) Ltd of London W1, under three bills of lading issued in Hamburg for the carriage of containers containing sugar from Hamburg and Bremerhaven to Dubai and Mina Qaboos. Each bill of lading was issued in Hamburg by EOS Europa-Overseas Schiffahrtsargentur GmbH (EOS), the Plaintiffs' German agents, and related to the carriage of 20 containers.

The action was tried in the Central London County Court by Judge Hallgarten QC. Documentary and oral evidence was adduced. In February of last year he gave judgment for the Plaintiffs against Coral. Coral have appealed to this Court.

The three shipments were -

25 June 1993 per The *DRS Rostock*
30 June 1993 per The *Cho Yang Success*
16 July 1993 per The *St Petersburg Senator*

Only the second of these vessels was owned by the Plaintiffs but they were all sailing as part of the liner service operated by the Plaintiffs and the bills of lading were issued by EOS on their behalf. It is accepted that, apart from one point which can be left on one side until later in this judgment, all three shipments raise the same question and that it suffices to refer to the second shipment on the *Success*.

***The bill of lading* :**

The *Success* bill of lading was (like the others) on the Plaintiffs' form for issue by EOS. It was dated Hamburg 30 Juni [ie June] 1993. It named Coral as the shippers and consigned the goods to their order. The port of loading was Bremerhaven and the discharge port was Mina Qaboos. In the box headed "*Particulars Furnished By Shipper*" there appeared, besides the marks and description of the goods, the words "*'Freight Prepaid'*" and "*Clean On Board"*. Before it was issued there was added - it must have been by EOS - the stamped words "*Freight Prepaid As Arranged*" as well as "*Shipper's Load, Stow And Count"* and "*Shipped On Board 30 Juni 1993*". (This statement was not correct as to the knowledge of EOS the containers were not in fact shipped on board until 8th July; but nothing turns on this in the present case.) The form used stated that freight was payable at Hamburg. The box provided for "*Freight Rates Charges"* was left blank save for two stipulations that certain charges at the discharge port should be paid by the consignee. The back of the bill of lading contained typical liner clauses. The definitions of *"merchant*" and "*charges"* included respectively the shipper and freight. Charges were deemed to be fully earned on receipt of the goods to be paid non-returnable in any event. There was a wide lien clause. There was no further clause dealing with freight as such; there was a clause which referred to the Plaintiffs' tariff but no reliance has been placed on this and it was not in evidence. The wording of the bill of lading was all in the English language. It was expressly made subject to Korean law and jurisdiction.

***The legal context* :**

In the absence of some other consideration, the shipper is contractually liable to the carrier for the freight. (Scrutton, 20th Edn, Art.172) This is because the carriage is for reward and the personal liability to pay the reward is a contractual liability (whether the carriage was as a common carrier or pursuant to a *'special'* contract). The personal liability is that of the person with whom the performing carrier has contracted to carry the goods. This person is normally the shipper. ( ***Domett v Beckford*** 5 B & Ad 521) But the shipper may be shipping as the agent of the consignee in which case the contract will be with the consignee. ( *eg* ***Fragano v Long*** 4 B & C 219, ***Dickenson v Lano*** 2 F & F 188) A contract to pay the freight will not always be implied from the fact of shipment and the issue of a bill of lading. ( ***Smidt v Tiden*** LR 9 QB 446) It is possible for there to be more complex contractual schemes; the performing carrier may be in contractual relations with others as well, as, for example, where there is a voyage or time charter; this can affect the position.

In English law the bill of lading is not the contract between the original parties but is simply evidence of it. ( *eg* ***The Ardennes*** [1951] 1 KB 55) Indeed, though contractual in form, it may in the hands of a person already in contractual relations with the carrier ( *eg* a charterer) be no more than a receipt. ( ***Rodocanachi v Milburn*** 18 QBD 67) Therefore, as between shipper and carrier, it may be necessary to inquire what the actual contract between them was; merely to look at the bill of lading may not in all cases suffice. It remains necessary to look at and take into account the other evidence bearing upon the relationship between the shipper and the carrier and the terms of the contract between them. (Scrutton Art 33) The terms upon which the goods have been shipped may not be in all respects the same as those actually set out in the bill of lading. It does not necessarily follow in any given case that the named shipper is to be under a personal liability for the payment of the freight.

As will be readily appreciated, the inclusion of the words 'freight prepaid' in the bill of lading does not of itself show that the shipper is not to be under any liability for the freight if it has not in fact been paid. ( *eg* ***The Nanfri*** [1979] AC 757) Such words are not, in English law, words of contract ( *eg* ***Compania Vascongada v Churchill [***1906] 1 KB 237) and their insertion in the bill of lading does not without more serve to negative a pre-existing, undischarged, contractual liability to pay the freight. Indeed, a request to the carrier that he issue a freight prepaid bill of lading before the freight has in fact been paid would normally imply a personal undertaking by the person making the request that it would be paid. ( *cf* the implied indemnity where a charterer requests the master to sign bills of lading: ***The Caroline P*** [1984] 2 Lloyds 466.) Thus, in the present case, the mere inclusion of those words in the bill of lading does not preclude a

liability of Coral for the freight but it is part of the evidence to be taken into account when considering whether or not Coral were under a contractual liability to the Plaintiffs for the freight.

The parties have argued this case solely upon the basis of English law. No foreign law has been pleaded nor has any evidence of it been adduced. There is a certain artificiality about this. The shipment was at a German port and the bill of lading was issued in Germany. In German law a bill of lading has a different contractual status. A German Court has already considered a similar claim by the Shipowners against another shipper, a German company.

***The facts of this case*** **:**
The primary facts are not now in dispute: the findings of the Judge are accepted. In this case the shipment of the containers of Coral's sugar on the *Success* arose from a chain of contractual relations. Coral contracted with Nortrop Speditions- und Schiffahrtsgesellschaft mbH of Hamburg. Nortrop contracted with Interport Speditions- und Befrachtungskontor Stoob GmbH also of Hamburg. Interport contracted with EOS the Hamburg agents of the Plaintiffs acting on their behalf. The relevant contracts related to other shipments besides those concerned in this case. The communications relevant to the making of the various contracts extended back to the preceding September, 1992. It is not necessary to trace the steps by which the contracts came about. They seem to have originated from a long term contract between Interport and Nortrop. The Judge held that in all the relevant transactions the parties were dealing with each other as principals and not as agents (apart from EOS).

The contracts were not mere booking contracts; they were contracts *for* the carriage of certain numbers of containers during stated periods from German ports to Gulf ports at stated freights. It is not now in dispute that as a result of each of these contracts the one party became liable to pay to the other, for each shipment made, the freight which those two parties had agreed upon between them. Thus Coral became liable to pay to Nortrop US$1010 per container, Nortrop to pay to Interport US$1000 and Interport to pay to EOS (as the agents of the Plaintiffs) US$980 less 2½% commission. At all material times Coral had no knowledge of the existence of Interport and had no dealings with them; similarly they had no knowledge of any freight rate other than the $1010 to which they had agreed. Nortrop had no authority to impose any liability upon Coral to pay freight to the performing carrier (whoever it might be). The agreement between Coral and Nortrop was that Coral would pay Nortrop the freight they had agreed, not any one else. Nortrop gave no authority to Interport to contract on behalf of Coral; Nortrop did not disclose to Interport the identity of the goods owners.

It was also part of each contract that an owner's freight prepaid liner bill of lading would be issued. At the relevant times in Hamburg there was an Association of forwarding agents, shipping companies and shipping agencies, the Frachten-Ausschuß, of which EOS, the Plaintiffs and, at the material time, Interport were members. Members of the Association were entitled to be issued with freight prepaid bills of lading and be given credit for the payment of the freight due on the shipment. The purpose was to enable the relevant member to collect payment from its customer before having to pay the carrier; this is how it was put by the witness called by the Plaintiffs from EOS, Mr Müller, in his statement.

We were provided with a copy of the relevant document (*'Letter of Responsibility'*) signed by Interport in favour of the other members of the Association including EOS which, in translation, included the following:

*"1. I herewith commit myself with regards to the liner agents ..... with whom I am effecting export shipments, or will effect in future, to settle the payable freight within a period of 15 working days (except Saturday) after the date mentioned in the Bill of Lading for all shipments for which I receive Bills of Lading from the liner agents which are payable at the port of loading, especially those, accepted under the conditions "FREIGHT PAID" respectively "FREIGHT PREPAID" without prior freight payment irrespective of whether these Bills of Lading are issued in my name or in the name of third parties and/or if I am acting on my behalf or as representative of a third party. Furthermore this is unaffected by the responsibility for the freight payment of third parties.*

*The Bill of Lading clause "FREIGHT PREPAID" or a remark with the same meaning does not symbolize a "receipt" of the freight payment for me. Therefore I remain responsible for the burden of proof for freight payment.*

*2. This declaration does not justify the responsibility for the liner agents to deliver Bills of Lading without cash payment of freight. It is rather within the liner agents' discretion if they are ready to make a concession to me.*

*This concession can be cancelled at any time, especially on default of my payments. It is also within the liner agents' discretion to generally decide cash against documents or a prompt cash payment in future, especially if they are instructed by the shipping line or by the conference. ....."*

The remaining paragraphs of the document gave EOS remedies against Interport should it fail to pay within the period of credit.

It was this procedure that was followed for the relevant shipment. Coral had sold the sugar on C&F terms; Coral gave Nortrop instructions what particulars Coral required the bill of lading to contain. These were incorporated in what the witnesses called a "*matrix*" being a blank document with the requested wording appropriately positioned so that when EOS prepared the actual bill of lading for issue on behalf of the Plaintiffs this *'matrix'* could simply be inserted. The '*matrix'* was sent by Nortrop direct to EOS, presumably with the knowledge and concurrence of Interport. The wording requested by Coral included the words "*'Freight Prepaid'*". Unlike the Judge, I consider that the clear inference is that it was pursuant to the Frachten-Ausschuß agreement and the practice above referred to that EOS additionally stamped the bill of lading "*FREIGHT PREPAID AS ARRANGED*". This can only have been a reference to their arrangement with Interport. When EOS released the bill of lading, they sent an invoice to Interport for the freight (at $980 per container, less 2½% commission). Interport invoiced Nortrop and were paid by Nortrop (at $1000). Nortrop invoiced Coral and were paid by Coral (at $1010).

At the time the containers were shipped and the bill of lading issued, EOS were apparently still treating Interport as creditworthy. Interport were still fully effective members of the Frachten-Ausschuß. What went wrong was that Interport were in fact in financial difficulties (having accepted more commitments than they could fulfil) and when the time came for Interport to pay EOS they failed to do so and, being insolvent, have not done so since. It was under these circumstances that EOS on behalf of the Plaintiffs on 28 August (some two months after the date of the bill of lading) wrote a letter to Coral demanding that they pay the freight, sending them a back-dated invoice (at $980).

***The Judge's Judgment*** **:**
The trial was primarily taken up with resolving the disputes regarding whether any of the intermediaries were the agents of the Plaintiffs or the Defendants and who were the parties to the relevant bills of lading. He held that all the intermediaries were acting as principals. He also held that the shipper of the goods and therefore the party to the bills of lading contracts was Coral.

Having thus answered the question who were the parties to the contracts evidenced by the bills of lading, he went on to ask himself whether "*the terms of such contracts preclude recovery of the bill of lading freight*?" Presumably he was referring to recovery from Coral of the freight EOS had agreed with Interport. He answered this question by considering in turn the clauses "*freight prepaid*" and "*Freight prepaid as arranged*". As regards the former he said: *"In my view the basic commercial function of a* ***"freight prepaid"*** *clause is to assure the notify party or other consignee that as between him and the shipowner no liability for freight can be asserted. In my view, the expression* ***"freight prepaid"*** *serves in no way to affect the basic liability of the shipper if freight has not in fact been prepaid: cf* ***the Constanza M*** *[1981] Lloyds 505 per Lloyd J at 514."* (p.12)

(Neither party before us founded any argument upon ***The Constanza M*** .) The Judge excluded any entitlement of Coral to rely upon an estoppel; he had earlier refused an application by the Defendants for leave to amend to raise such a plea.

As regards the other clause he rejected the submission that there was any significance in what he described as the *"vague and cryptic*" words *as arranged* . He apparently saw significance in the fact that EOS had also stamped other bills of lading in the same way. But this demonstrated nothing: the other bills of lading may also have been issued under the scheme of the Frachten-Ausschuß agreement (of which it seems that the Judge was not given a copy). Similarly, he did not accept that they were probably referable to Interport's adherence to the Frachten-Ausschuß agreement. He did not feel compelled to the conclusion that thereby the Plaintiffs were looking exclusively to Interport if for some reason they remained unpaid.
*"In my view one would need much stronger facts than can be deduced in the present case before being able to conclude that according to the agreement which underlay the bills of lading the Plaintiffs were giving exclusive credit to Interport and abrogating any rights against the true shippers."*

He therefore held Coral liable to the Plaintiffs for the bill of lading freight; but he said that the Plaintiffs must give Coral credit for the commission of 2½% to which Interport would have been entitled had they paid the freight.

***Conclusion*****:**
In my judgment the Judge came to the wrong conclusion and asked himself the wrong question. He did not ask himself whether it was to be inferred that Coral had agreed to pay freight to the Plaintiffs. He did not take adequate account of the fact that the bill of lading is only evidence of the contract between the shipper and the carrier which has been made before the goods were shipped nor of what terms and what agreement were to be inferred from what had happened prior to shipment. He asked himself the question whether there was anything in the bill of lading to *preclude* liability. He should have asked whether having regard to the facts of this particular shipment it is to be inferred that Coral were undertaking to the Plaintiffs that they would pay freight to them.

In a situation such as that which occurred in this case the question can only be answered by looking at all the relevant evidence not just the fact that Coral owned the sugar at the time it was shipped and were named as the shippers in the bill of lading. As I have explained earlier in this judgment it is correct that the inference that the shipper is agreeing to pay the freight is the usual inference but it is not a necessary inference and a different inference may in a particular case be appropriate. Here the Plaintiffs and EOS had their own agreement with Interport as principals and extended credit to them. Whatever agreement Coral had made about freight with Nortrop was unknown to the Plaintiffs and EOS. EOS never agreed or attempted to agree any freight with Coral or Nortrop. All EOS knew was that Coral required a freight prepaid bill of lading. EOS had an agreement with Interport which provided for the issue of freight prepaid bills of lading against Interport's undertaking to pay the freight within the agreed period of credit and they contemplated that during that period the shipper would, directly or indirectly, have paid Interport (as indeed occurred). The inference that Coral did not agree to pay freight to the Plaintiffs is in my judgment inescapable.

There are a number of difficulties about the case of the Plaintiffs as accepted by the Judge. The bill of lading does not say what the freight was. The freight sued for was a freight agreed to solely between EOS and Interport. When did Coral agree to pay that freight? If it is alleged that an agent made that agreement on Coral's behalf, did that agent have their authority to do so? These questions cannot be satisfactorily answered. In the present case the freight agreed to by Coral was higher than that agreed to by the other parties up the line but that need not have been the case. Where each of the parties is dealing as a principal, each is taking the risk of profit or loss on the freight transaction. It is possible that Coral might have been able at the time they made their contract with Nortrop to obtain more favourable terms than Interport obtained from EOS. As with a hierarchy of charterparties, the freight rate risk was separated from the carriage risk. The Plaintiffs argued before us that Coral were liable for the freight and that if Interport defaulted it was for Coral to sue Nortrop for failing to procure that Interport had paid the freight and to indemnify them against the

consequences of Interport's default. This argument might have been persuasive if the intermediaries had been acting as agents but, as the Judge held, they were not.

In my judgment the correct inference in the present case is that there was no agreement by Coral to pay freight to the Plaintiffs. The Judge should have dismissed the Plaintiffs claim. The appeal should be allowed.

***The DRS Rostock shipment* :**
This conclusion makes academic the other point argued by the Appellants on this appeal. It related only to the shipment on the *DRS Rostock* . Coral argued that they were not the shippers because the containers had originally been delivered for shipment in May on the *Choyang Giant* at Hamburg but Interport had failed to make the necessary contract with EOS and the containers were not shipped. Interport however themselves issued a bill of lading on their own form dated Hamburg 28th May naming Coral as the shippers and stating, untruthfully, that the containers had been "shipped on board" the *Choyang Giant* . When the containers were actually shipped the following month on board the *DRS Rostock* , a bill of lading was issued by EOS on behalf of the Plaintiffs. Although this bill of lading named Coral as the shippers, it contained a cross-reference to the Interport bill of lading and it was accordingly argued on behalf of the Defendants that this meant that Coral were not properly to be regarded as the shippers under the EOS bill of lading.

This argument was in my judgment rightly rejected by the Judge. The Interport bill of lading was effectively a sham.. It did not in truth evidence a contract of carriage nor any bailment of the goods to Interport. Although the facts surrounding the failure to ship the goods on the *Choyang Giant* tend further to support what I have said about the correct inferences to be drawn, they do not show that Coral were not the shippers of the containers when they were loaded on the *DRS Rostock* . This ground of appeal therefore fails. But as I have already said this point does not affect the outcome as the appeal succeeds upon the main ground.

**LORD JUSTICE EVANS:**
A bill of lading is issued after the goods have been shipped. It therefore serves as the shipowner's receipt for the goods and it is or can become a document of title for them. As regards the contract of carriage, the bill of lading in the traditional phrase "*contains and evidences*" the terms of that contract, except in those cases where the goods have been put on board by the shipper and received by the shipowner pursuant to some pre-existing contract such as a charterparty between them.

The contract of carriage thus contained in or evidenced by the bill of lading is like any other; its terms must be deduced from all of the circumstances in which shipment takes place, including of course the terms of the bill of lading which is expected to be and subsequently is issued.

Here, whoever in fact shipped the goods did so on behalf of the defendants, Coral, and they were rightly named as shippers and as contracting parties to the bill of lading contract. Normally and without more, the shippers would be liable to pay freight for the carriage. But that is not the invariable rule. Whether they are so liable depends, as always, on the terms of the contract made on this occasion.

The judge's significant finding was that each of the parties, save EOS, contracted as principals : Coral with Norport, Norport with Interport, and Interport with EOS as agents for the plaintiffs (shipowners). Each of those contracts was on different terms as to freight. The arrangements were made against the background of the existence of the local Association of forwarding agents and others. The "*Letter of Responsibility*" which has been quoted by Hobhouse L.J. called for the issue of "*Freight Prepaid*" bills of lading against, not pre-payment in the sense of before shipment, but payment within 15 days and therefore before and independently of delivery at the discharge port. The undertaking to pay freight was given by Interport, and it was to them that the plaintiffs' initial invoice quite properly was sent.

In these circumstances, the clear implication was that the plaintiffs would look to Interport for payment of the freight and not to the shippers, Coral. Moreover, the bill of lading clause "*Freight Prepaid as arranged*" expressly confirms this. The judge was wrong, in my view, to regard the clause as being of no significance so far as the shipper's liability was concerned.

The goods were received on board by the plaintiffs pursuant to their contract made through EOS with Interport. It has not been argued that that fact cannot as a matter of law affect the terms of their contract with the shippers (cf. ***The Aramis*** [1989] 1 Ll.R.213), and in my judgment it does not do so.

I entirely agree with the judgment of Hobhouse L.J. I too would allow the appeal.

**LORD JUSTICE HUTCHISON:**
I agree that the appeal should be allowed for the reasons given in the judgments of Hobhouse LJ and Evans LJ.

**ORDER:** Appeal allowed; judgment to be entered in favour of the defendants and the judgment that was entered in favour of the defendants be set aside; plaintiffs to pay one half of the defendants' costs below, those costs to include the costs incurred by the defendants in the subsequent taxation proceedings; application to vary the order made in respect of the defendants' unsuccessful application to stay the taxation proceedings refused; the costs recovered by the defendants in respect of the proceedings below to carry interest from the date when judgment was given below; defendants to have their costs of the appeal; the sum of US$ 56,686.57 paid to the plaintiff on 1st March 1996 be repaid, together with interest from that date at the rate of 9 per cent; the sum of £40,500 paid as regards costs on 20th December 1996 be repaid, together with interest at 7 per cent since that date; application for leave to appeal refused.

MR S CROOKENDEN QC (instructed by Messrs Clyde & Co, London EC3M 1JP) appeared on behalf of the Appellant/Plaintiff.
MISS P MELWANI (Instructed by Messrs Stockler Charity, London EC4A 1NE) appeared on behalf of the Respondent/Defendant.