Neutral Citation Number: [2018] EWCA Civ 778

Case No: A3/2017/1226/QBCMF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE ANDREW BAKER
[2017] EWHC 654 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2018

Before:

LADY JUSTICE GLOSTER
(VICE PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION)
and
LORD JUSTICE FLAUX

- -

Between:

AP MOLLER-MAERSK A/S trading as MAERSK LINE	**Appellant**
- and -	
KYOKUYO LIMITED	**Respondent**

- -
- -

Sara Masters QC and Daniel Bovensiepen (instructed by **Bentleys, Stokes and Lowless**) for the **Appellant**
Robert Thomas QC and Benjamin Coffer (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing dates: 13 and 14 March 2018

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Judgment Approved

Lord Justice Flaux:

Introduction

1. The appellant appeals against the Order of Andrew Baker J sitting in the Commercial Court dated 30 May 2017 whereby he determined a series of preliminary issues in favour of the respondent cargo interests. The appeal concerns the scope of the Hague and Hague-Visby Rules and their application to the carriage of goods by sea in containers.

The factual background

2. The factual background was common ground at the trial and before this Court. The respondent claims as the receiver of three container loads of frozen tuna shipped at Cartagena in Spain for carriage by the appellant to Japan. The containers formed part of an original booking for the carriage of 12 Super Freezer containers at -60°C from Cartagena Container Terminal to Maersk Yokohama Terminal via Valencia and Singapore. The cargo was booked by an entity called Fuentes on behalf of the respondent.

3. The cargo in the three containers comprised frozen Bluefin tuna loins each weighing at least 20kg and up to 75kg and, in the case of container A, bags of frozen Bluefin tuna parts, each bag weighing 20kg plus or minus 10%. The containers were stuffed by the shippers and delivered to the appellant pre-stuffed. The frozen tuna loins were stuffed into the containers as individual items of cargo, without any wrapping, packaging or consolidation. The bags were stuffed into the containers as individual bags, without additional wrapping or packaging, and without consolidation. The three loads were made up as follows:

   (i) Container A contained 206 frozen loins and the bags (said by the claimant to number 460).

   (ii) Container B contained 520 frozen loins.

   (iii) Container C contained 500 frozen loins. That container was re-stuffed into the Replacement Container at Barcelona following a possible malfunction of the refrigeration equipment of Container C.

4. It was common ground that the three containers were received by the appellant pursuant to a contract or contracts of carriage incorporating the appellant's standard terms and conditions of carriage ("the Maersk Terms") and containing an implied term that the shippers were entitled to demand that a bill or bills of lading be issued by the appellant. The respondent's title to sue was in issue on the pleadings but the judge proceeded on the basis that the respondent had good title to sue pursuant to the contract(s). This was not a matter in issue on the appeal.

5. Maersk drew up and provided to the respondent a draft straight consigned bill of lading covering all 12 containers naming Caladeros de Mediterraneo S.L. ("Caladeros") as shipper and the respondent as consignee. In the draft, under the rubric "Particulars Furnished by Shipper" and the standard form words: "*Kind of Packages; Description of goods; Marks and Numbers; Container No./Seal No.*", was stated: *"11 containers said to contain 5782 PCS FROZEN BLUEFIN TUNA LOINS"*, listing those containers (which included Containers B and C) and the number of "*PCS*" and weight of tuna in each, and *"1 Container Said to Contain 666 PCS, 206 PCS FROZEN BLUEFIN TUNA LOINS, 460 BAGS FROZEN BLUEFIN TUNA OTHER PARTS"*, identifying Container A as that container, repeating its contents as "666 PCS" and stating a weight for those contents.

6. All twelve containers were shipped on *Maersk Tangier* on 24 November 2012. She sailed from Cartagena to Valencia, where nine of the twelve containers were transshipped on to *Maersk Emden* on 3 December 2012, but Containers A, B and C

were not. They were transshipped instead onto *Maersk Eindhoven*, which departed Valencia on 3 January 2013. Due to an alarm triggering on Container C, it was discharged from *Maersk Eindhoven* at Barcelona. Its contents were re-stuffed into the Replacement Container, which was then shipped on *Maersk Tangier* on 13 January 2013.

7. On 17 and 18 January 2013, the respondent made a request (to which the appellant agreed) that the destination of Container B and the Replacement Container be altered to Shimizu, requiring onward carriage by road from Yokohama to Shimizu.

8. No bill of lading was ever in fact issued in respect of any of the three containers. What happened is that, in order to avoid further delay in delivery, the appellant proposed in an email dated 28 January 2013 to issue sea waybills: "*If you need not issue in Japan, we will revise to Sea Waybills. Please confirm.*" The respondent agreed to this proposal on the telephone.

9. Accordingly, the appellant issued three sea waybills. Those for Containers A and B were dated 8 February 2013. The waybill for the Replacement Container was dated 12 February 2013. Each waybill stated that it was a "*NON-NEGOTIABLE WAYBILL*" and named Caladeros as shipper and the claimant as consignee. In the Waybill for the Replacement Container, the claimant was also named as notify party.

10. As regards the goods covered:

    (1) Like the draft bill of lading, each waybill contained a central section on its face headed "*PARTICULARS FURNISHED BY SHIPPER*", above standard-form introductory words, "*Kind of Packages; Description of goods; Marks and Numbers; Container No./Seal No.*"

    (2) The entry in that section was in each case "*1 Container Said to Contain [no.] PCS FROZEN BLUEFIN TUNA LOINS*", followed by particulars identifying respectively Container A, Container B and the Replacement Container. The number of "*PCS*" stated in each case was the number of individual frozen tuna loins, i.e. 206, 520 and 500 respectively.

    (3) The waybill for Container A made no mention of the bagged frozen tuna parts. It stated a total weight of 18,740 kg for the 206 frozen tuna loins. The draft bill of lading had stated that as the weight of 666 items, namely the 206 frozen tuna loins plus 460 bags of other parts.

    (4) Towards the bottom, on the left, each waybill had a box for "*Carrier's Receipt. Total number of containers or packages received by Carrier*", in which the entry was "*1 container*".

11. Container A was discharged to the respondent at Yokohama on 15 February 2013; Container B and the Replacement Container were discharged at Yokohama on or about 22 February 2013 and 1 March 2013 respectively and delivered to the respondent at Shimizu on 27 February 2013 and 5 March 2013 respectively. The respondent contends that the tuna as delivered to it was damaged through raised temperatures during carriage and/or rough handling during re-stuffing into the

Replacement Container. It says that the damage should be valued for the purposes of compensation at about ¥ 121 million (at the time about £858,000) in the aggregate.

12. It is common ground that any liability of the appellant is governed by the Maersk Terms and by either the Hague-Visby Rules or Articles I to VIII of the Hague Rules, Article IV rule 5 of each of which sets out monetary limits of liability. Those limits are £100 "per package or unit" in the Hague Rules and, in the Hague-Visby Rules, the greater of 666.67 units of account "per package or unit" or 2 units of account "per kilogramme of gross weight of the goods lost or damaged".

13. Of the preliminary issues ordered to be tried, only three remain relevant on this appeal:

    (1) Is liability limited pursuant to Article IV rule 5 of the Hague Rules or pursuant to Article IV rule 5 of the Hague-Visby Rules (whether applicable compulsorily or contractually)?

    (2) If liability is limited pursuant to Article IV rule 5 of the Hague Rules, are the relevant packages or units the containers or the individual pieces of tuna?

    (3) If liability is limited pursuant to Article IV rule 5 of the Hague-Visby Rules, are the containers deemed to be the relevant package or unit for the purposes of Article IV rule 5(c), or are the individual pieces of tuna "packages or units" enumerated in the relevant document as packed in each container for the purposes of Article IV rule 5(c)?

14. Issue 3 as originally ordered also raised the question of what is the relevant document in which the number of packages or units must be enumerated for the purposes of Article IV rule 5, specifically whether it was relevant to look at what was enumerated in the draft bill of lading or it was only relevant to look at what was enumerated in the sea waybills. The judge recorded at [7] of his judgment that Mr Robert Thomas QC for the respondent conceded that the answer was the sea waybills so that he said no more about it in the judgment, other than at [121] where he recorded again that, by agreement, it was only relevant to look at the waybills. However, before this Court there was some debate on this question, to which I will return below, given that Article IV rule 5(c) refers to what is "enumerated in the bill of lading" and there was in fact no bill of lading issued in the present case.

The Hague and Hague-Visby Rules

15. Before considering the judgment in more detail it may be helpful to set out the relevant provisions of the Hague and Hague-Visby Rules. The Hague Rules were enacted in this jurisdiction by the Carriage of Goods by Sea Act 1924. The provisions of the Rules set out in the Schedule to the Act which are relevant for present purposes are:

> "Article I
>
> *Definitions*
>
> In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say-

> (b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
>
> Article IV
>
> *Rights and Immunities*
>
> 5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100l per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

16. The Hague-Visby Rules consist of the Hague Rules as amended by the Protocol signed at Brussels on 23 February 1968. They were enacted in this jurisdiction by the Carriage of Goods by Sea Act 1971 ("the 1971 Act") which came into force on 23 June 1977. Section 1 of the Act provides, inter alia, as follows:

> "**Application of Hague Rules as amended.**
>
> (2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.
>
> (3) Without prejudice to subsection (2) above, the said provisions shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different States within the meaning of Article X of the Rules.
>
> (4) Subject to subsection (6) below, nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title.
>
> (6) Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to—
>
> (a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, and
>
> (b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract

> for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading,
>
> but subject, where paragraph (b) applies, to any necessary modifications and in particular with the omission in Article III of the Rules of the second sentence of paragraph 4 and of paragraph 7."

17. The Hague-Visby Rules are then set out in the Schedule to the Act. Article I (b) is in the same terms as in the Hague Rules. Other relevant provisions are as follows:

> "Article III
>
> 3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—
>
> …
>
> (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.
>
> …
>
> 8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.
>
> Article IV
>
> (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.
>
> …
>
> (c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of

> transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.
>
> Article X
>
> The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:
>
> (a) the bill of lading is issued in a contracting State, or
>
> (b) the carriage is from a port in a contracting State, or
>
> (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,
>
> whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person."

The judgment below

18. In relation to Issue 1, the judge noted at [43] that shipment was from a port in Spain, which was a contracting state within Article X(b) of the Hague-Visby Rules and went onto say, at [44], that the issue was therefore whether the contract of carriage was *"covered by a bill of lading"* within the meaning of Article 1(b). The particular issue of principle was whether it was so covered where the contract as concluded provided for the issue of a bill of lading on demand, but by subsequent agreement a document other than a bill of lading was issued instead. He said that on the agreed facts of the case the contract of carriage concluded prior to shipment provided for the issue of a bill of lading on demand and, had a bill been issued, Article 1(b) would undoubtedly have been satisfied, even if the bill issued had been a straight consigned bill in line with the draft bill of lading, as *JI Macwilliam Co Inc v Mediterranean Shipping Co S.A. ("The Rafaela S")* [2005] UKHL 11; [2005] 2 AC 423 established that straight consigned bills are within Article 1(b). However, no bill of lading had been issued, only the sea waybills which were non-negotiable ship's receipts marked as such, not any species of bill of lading.

19. He then referred at [45] to section 1(4) of the 1971 Act as being a necessary condition for the Hague-Visby Rules to have the force of law and to the respondent's submission that this was sufficient and that, on the case law, it is not necessary for a bill in fact to be issued, as it is sufficient that the contract provided for it to be issued. He referred to the fact that the appellant sought to distinguish the case law on the basis that in none of the previous cases was there a subsequent agreement to issue something other than a bill of lading, expressly instead of a bill of lading. He recorded the appellant's submission that it would be illogical to hold that the contract was covered by a bill of lading, when it was not in fact covered by a bill of lading but by a different kind of transport document altogether.

20. At [46] he agreed with the appellant that none of the prior cases involved the present facts but he accepted the respondent's submissions on this point, saying:

> "However, I agree with the claimant that the basis of decision in the prior authorities has been that whether a contract of carriage is "*covered by a bill of lading*" for present purposes is defined by whether, when concluded, the contract provided for a bill of lading to be issued. In short, I accept Mr Thomas QC's submission that that is sufficient to satisfy Article I(b) and therefore sufficient (assuming other requirements to be satisfied) for the Hague-Visby Rules to have the force of law here under s.1(2) of COGSA 1971, as well as being necessary for the Rules to have the force of law here because of s.1(4)."

21. The judge went on to consider the previous authorities at [47] saying first that: "it should be noted that Article I(b) was not amended by the Visby Protocol, so it matters not whether a prior decision was on the Hague Rules rather than on the Hague-Visby Rules." He referred specifically to two English authorities. First the decision of Devlin J in *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, where a fire tender was damaged prior to loading before it crossed the ship's rail. In that case, the judge said no bill of lading was issued but Devlin J held that Article 1(b) of the Hague Rules was nonetheless satisfied. The judge noted that *Pyrene v Scindia* was applied by the Supreme Court of Canada in *Anticosti Shipping v St Amand* [1959] S.C.R. 372 and by the Supreme Court of Western Australia in *The Beltana* [1967] 1 Lloyd's Rep 531.

22. The second English authority to which he referred was the decision of the Court of Appeal in *Parsons Corporation v. C V Scheepvaartonderneming Happy Ranger ("The Happy Ranger")* [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep 357 (in fact a decision on the Hague-Visby Rules) rejecting the argument (which had found favour with the judge at first instance) that under *Pyrene v Scindia* it was necessary before Article 1(b) could be satisfied where no bill of lading was issued, that the bill to be issued contained the terms of the contract originally agreed between the shipper and the carrier. The judge noted that both Tuckey LJ at [24]-[25] (with whom Aldous LJ agreed) and Rix LJ at [40]-[41] decided that it was sufficient for Article 1(b) to be satisfied that the contract of carriage as originally concluded provided for a bill of lading to be issued. At [48] the judge went on that the thrust of the leading commentaries was to the same effect.

23. As the judge noted in [49], the appellant was not contending that the agreement for the waybills to be issued rather than bills of lading amounted to a variation of the contract of carriage or gave rise to any waiver, election or estoppel. Accordingly, he said at [50]:

> "However, where the contract of carriage has not been varied, so as to remove any right to bills of lading if required, and the right to have bills of lading, if required, has not been waived (or in effect lost by operation of an estoppel), I can see no reason whatever for a different result than that which obtained in *Pyrene v Scindia*, *The Happy Ranger*, *Anticosti* and *The Beltana*. What has happened on the facts of this case is that bills of lading were not required in the event to enable the

> carriage to be undertaken and completed, so the right to have bills of lading, if required, became in practical terms otiose. The contract of carriage was still, however, a contract "*covered by*" a bill of lading in the sense used and discussed in the cases."

24. He went on to deal with various refinements in the arguments before him, which I do not need to set out here but will pick up to the extent necessary when I summarise the parties' submissions before this Court. The judge noted at [56] that although, in answering issue 1, the starting point was that, as he had concluded, the Hague-Visby Rules had the force of law, it did not necessarily follow that liability was limited by Article IV rule 5 (i) because the appellant could still accept a higher limit of liability by contract and (ii) because the Hague-Visby Rules as compulsorily applicable only govern carriage by sea so that in relation to two of the containers, it would in principle be open to the appellant to rely on a lower limit of liability if one was available under the Maersk Terms in respect of damage arising after discharge at Yokohama. He went on to consider the Maersk Terms at [58] to [63], concluding that in relation to any damage to the contents of two of the containers, if damage occurred in that final stage of transit, liability would be limited under clause 7(2)(c) of the Maersk Terms.

25. In relation to what I have described as Issue 2, whether, if, contrary to his conclusion that the Hague-Visby rules applied, limitation was to be assessed under Article IV rule 5 of the Hague Rules, the individual pieces of tuna were each a "package or unit" or the relevant package or unit was the container, the judge noted the rival contentions at [70]. The respondent contended that the individual frozen loins were "units" because stuffed individually in that way into the containers, it being immaterial whether they could have been shipped "as is" if not containerised. The appellant contended that a "unit" is an item which could be shipped "as is" if not containerised and that these frozen loins could not be, although, as the judge noted, there was no evidence as to whether they could have been carried in break-bulk ships with deep-freeze holds.

26. In relation to the bags of frozen tuna parts, the judge noted at [71] that they were not addressed at all in the appellant's written or oral submissions, so it was not being suggested that they could not be "packages" under article IV rule 5 because they could not be shipped "as is" if not containerised.

27. He then went on to consider the various English and Commonwealth authorities, culminating in the decision of Sir Jeremy Cooke in *Vinnlustodin HF v Sea Tank Shipping AS ("The Aqasia")* [2016] EWHC 2514 (Comm); [2016] 2 Lloyd's Rep 510, together with the travaux préparatoires for the Hague Rules and the academic commentaries. He reached the conclusion at [87] that each frozen tuna loin was a separate "unit" and each bag or frozen tuna parts a separate "package" within the meaning of Article IV rule 5 of the Hague Rules. In reaching that conclusion, at [86(v)] the judge rejected the appellant's argument that there was some added rule focusing not upon the cargo as shipped in the containers, but upon how, if at all, it could have been shipped if not containerised.

28. On 22 February 2018, the Court of Appeal (two of the members of which were Gloster LJ and myself) dismissed the carriers' appeal in *Sea Tank Shipping AS v Vinnlustodin HF ("The Aqasia")* [2018] EWCA Civ 276, concluding that "unit" in

Article IV rule 5 of the Hague Rules meant a "shipping unit" or physical item of cargo. In doing so, we approved the analysis of Andrew Baker J in the present case to the same effect. We were aware that the present appeal was forthcoming, but I noted in [72] of my judgment that there was no appeal against the judge's analysis in so far as he agreed with Sir Jeremy Cooke as to the meaning of "unit" in Article IV rule 5. Issue 2 in the present case is in a much narrower compass, concerning whether in the case of goods stuffed in containers, to be a "package" or "unit" the relevant goods had to be capable of being shipped "as is" break-bulk if not containerised. We were not intending to determine that issue in *The Aqasia*, which concerned bulk cargo, not cargo carried in containers.

29. In relation to what I have described as Issue 3, the judge considered that "packages or units" in Article IV rule 5(c) of the Hague-Visby Rules must have the same meaning as in Article IV rule 5(a), which in turn had the same meaning as in Article IV rule 5 of the Hague Rules and that rule 5(c) was a deeming provision where goods were carried in containers. At [89] he said:

> "Its effect for containerised cargo is to make the container the only 'package or unit' for the purpose of rule 5(a), whether or not that would otherwise be the correct conclusion (upon looking into the container under *The River Gurara*), unless there is a sufficient specification of how the cargo inside comprises 'packages or units'."

30. At [90] he continued that, in order to express the gist of the words in rule 5(c), they should be re-ordered to read: *"the number of packages or units ... as packed in [the container]*" be *"enumerated in the bill of lading*". The controversy concerned the words *"as packed"*. As the judge said:

> "Is the sense of rule 5(c) that the bill of lading must enumerate the contents of the container, the items enumerated being in fact 'packages or units' given how the container was packed; or is the sense that there must be in the bill of lading an enumeration of the contents that specifies how the items enumerated were packed into the container?"

31. He noted that the majority of the Federal Court of Australia in *El Greco v Mediterranean Shipping* [2004] 2 Lloyd's Rep 537 (hereafter *"El Greco"*) thought the latter was the correct answer.

32. At [94(iii)] the judge referred to the observation made by Diplock LJ (chairman of the drafting committee for the amendments to the Hague Rules) in the travaux préparatoires for the Hague-Visby Rules that the intention behind rule 5(c) was to ensure that where the application of the 'package or unit' limit was not by reference to the container, that would be apparent from the face of the bill of lading. He rejected the argument of Ms Masters QC that this provided an answer which in effect favoured the approach of the majority in *El Greco*. The judge said:

> "Firstly, there is nothing to suggest that Diplock LJ had in mind the problem of inaccurate enumerations, or statements enumerating a number of items that were not in fact the

> 'packages or units' that had been stuffed into the container. Secondly, and perhaps more fundamentally, that purpose is served if an enumeration is sufficient if it (a) in fact enumerates the 'packages or units', considering how the cargo has been packed in the container, and (b) is consistent with the proposition that the items enumerated are 'packages or units' for the cargo "*as packed*". Such an enumeration, *ex hypothesi*, does not mislead the carrier (nor a third party, e.g. banker, transacting on the strength of the document). For example, were it not for any awareness he might have of the *El Greco* decision, a reasonable carrier asked to issue a bill of lading stating the cargo to be "*one container said to contain 100 car engine parts*" would surely act on the basis that, on the face of things, there were 100 separate items inside the container, if the consequence would have any impact on him, e.g. as to the freight he would wish to charge (the consequence being that, unless the weight-based limit of liability applied instead, his limit of liability would be 666.67 units of account per engine part, rather than 666.67 units of account for the entire contents)."

33. The judge then analysed the facts of and judgments in *El Greco*. That case concerned 2,000 packages (each a bundle of posters and prints, with about 130,000 posters and prints in all) stuffed in the container. The statement on the bill of lading which cargo interests alleged satisfied the requirements of Article IV rule 5(c) of the Hague-Visby Rules, so that the container was not the "package or unit" was "said to contain 200,945 pieces posters and prints". Thus as the judge said, the bill of lading enumerated, wildly inaccurately, the total number of individual posters and prints and failed to mention the fact that they were in 2,000 packages. In the Federal Court, Beaumont J (dissenting) thought there were 2,000 "packages or units", the majority thought there was one, the container. However, as the judge pointed out at [96], despite the length of the judgments, it is plain there was no Article IV rule 5(c) enumeration: the "packages or units" of the cargo as stuffed (2,000 bundles) were nowhere mentioned in the bill of lading, so that the actual decision of the majority, that the default rule under Article IV rule 5(c) that the container is the unit was not displaced, was correct.

34. The judge also considered that the enumeration of 200,945 pieces, posters and prints was "unequivocally inconsistent" with being an enumeration of "packages or units" as packed in the container. The judge had done his own calculation that it would take 279 man hours to stuff them individually, so he said that it was inconceivable, without being told more, that they had been stuffed individually without any consolidation into "packages".

35. In the light of those views the judge expressed his view at [98] that if the enumeration had correctly stated: "said to contain 2,000 bundles of posters and prints" then, contrary to the majority decision in *El Greco*, there was no additional requirement to state on the face of the bill of lading that the enumerated bundles had not been further consolidated within the container:

> "It was therefore not necessary to the decision for the majority to say, as in effect they did, that even a true enumeration of the number of 'packages or units' of the cargo as stuffed in that case, e.g. "*said to contain 2,000 bundles of posters and prints*", might not suffice if the language used was not consistent only with the proposition that the enumerated bundles had not been (further) consolidated. The suggestion that such a further requirement is present in Article IV rule 5(c) appears in the majority judgment at [284]. It is said to follow from the discussion that precedes it, but I do not think it does at all. In particular, I agree with the immediately prior conclusion, at [282], that "*The words "as packed ..." are not a proviso; rather, they are a part of the rule's description of what is to be enumerated in the bill ...: the packages or units as packed.*" To my mind, it does not follow that more is required than what I have just called a true enumeration, i.e. a statement identifying, and putting a number on, the items that do in fact comprise the cargo "*as packed*". That is, as I have indicated, all that Article IV rule 5(c), as I read it, has ever called for. Nothing in the history, the authorities or the *travaux préparatoires* explored at huge length in the judgments in *El Greco*, seems to me to point to any need to introduce the further, and rather technical, linguistic requirement proposed by the majority."

36. At [100] the judge referred to the anomaly mentioned by *Aikens on Bills of Lading* arising from the approach of the majority in *El Greco*:

> "…the majority's additional requirement gives a restrictive meaning to the enumeration provision in Article IV rule 5(c), leading to fine differences of wording producing markedly different results including results that appear anomalous. They illustrate by saying that "*one container with 100 car engine parts packed inside*" is a sufficient enumeration but "*one container said to contain 100 car engine parts*" is not. I regard that as anomalous indeed, and not an outcome I would endorse unless the language of rule 5(c) compels it. In my judgment, there is no such compulsion."

37. The judge then concluded on this issue at [101] that the individual frozen tuna loins were the "packages or units" as packed in the containers and that since they were identified and enumerated in the waybills as the cargo, by the operation of Article IV rule 5(c), they were the "units" for the purposes of Article IV rule 5(a). As the judge said:

> "The language of enumeration is consistent with the truth (namely that the enumerated frozen loins were, "*as packed*", individual articles of cargo, i.e. 'units'). That suffices."

Grounds of appeal

38. The grounds of appeal in relation to the three issues set out at [13] above can be summarised as follows:

(1) The judge was wrong to conclude that liability was limited by Article IV rule 5 of the Hague-Visby Rules and to hold that they had the force of law pursuant to the 1971 Act. He was wrong to hold that the contract was "covered by a bill of lading" within Article I(b) of the Hague-Visby Rules and that the requirements of section 1(4) of the 1971 Act were satisfied, in circumstances where sea waybills had been issued rather than bills of lading by agreement between the parties. He should have held that the contract was "covered" by the sea waybills so that the Hague Rules applied contractually.

(2) On the basis that liability was limited pursuant to Article IV rule 5 of the Hague Rules, the judge was wrong to hold each frozen tuna loin was a "unit" within that provision. He should have held each frozen tuna loin would only fall within the true meaning of "unit" if it could be shipped "as is" break bulk without the need for packaging. Accordingly, he should have held that the containers were the relevant "package or unit".

(3) The judge was wrong to hold that for the purposes of Article IV rule 5(c) of the Hague-Visby Rules there was a sufficient enumeration of the packages or units "as packed" if the waybills correctly stated the number of units packed, despite not stating how they were packed inside the container, whether in packages or loose. He should have held that the enumeration needed to make clear that the enumerated tuna loins were "as packed" individual unpackaged items of cargo, which it did not. He should therefore have held that there was no sufficient enumeration pursuant to Article IV rule 5(c) so that the containers were deemed to be the relevant packages or units.

Respondent's Notice

39. By its Respondent's Notice the respondent sought to uphold the Order of the judge for additional reasons. In relation to Issue 1, it is contended that he should have held that if the Hague-Visby Rules were not compulsorily applicable, they were nevertheless contractually applicable in respect of two of the containers by virtue of clause 6.2(b) of the Maersk Terms.

40. In relation to Issue 3, the respondent contended that if the judge's conclusion on what was a sufficient enumeration was wrong, he should have held that there was a sufficient enumeration for the purposes of Article IV rule 5(c) if the bill of lading stated the number of items shipped, whether or not they constituted the relevant packages or units. Alternatively if, contrary to the judge's decision and the respondent's primary case, the approach of the majority in *El Greco* should be followed, the judge should have held that that approach led to the conclusion that the individual pieces of tuna are the relevant units, because it is apparent from a fair reading of the waybills that the individual pieces of tuna were packed directly into the container and not packaged together in any way.

Summary of the parties' submissions

41. Given that my analysis of the issues raised by this appeal set out below identifies the principal submissions advanced by the parties, it is not necessary to set them all out in detail. However, in summary, the parties' submissions on each of the issues were as follows.

42. On Issue 1, Ms Masters QC submitted on behalf of the appellant:

(1) Contrary to the judge's conclusion, Article I(b) of the Hague-Visby Rules and section 1(4) of the 1971 Act are not co-terminous, but both have to be satisfied. The words in Article I(b) "covered by a bill of lading" must mean actually covered. Unless a bill of lading was in existence, the contract could not be covered by it. This conclusion was supported by the French text of the Article.

(2) Sea waybills which were issued here are different creatures from bills of lading (including straight bills of lading) and were not documents of title within the meaning of the Hague-Visby Rules. Where, as here, sea waybills had been issued instead of bills of lading by agreement between the parties, it could not be said the contract of carriage was "covered by a bill of lading" within Article I(b) of the Hague-Visby Rules or that the contract "by implication provides for the issue of a bill of lading or other similar document of title" within section 1(4) of the 1971 Act.

(3) The judge's conclusion that a right to demand a bill of lading was sufficient to satisfy the requirements of both provisions was inconsistent with the decision of the Court of Appeal ([2003] EWCA Civ 556; [2004] QB 702) and the House of Lords in *The Rafaela S.*

(4) There was no warrant for giving an extended meaning to "covered by a bill of lading". *Pyrene v Scindia* and *The Happy Ranger* were clearly adopting a pragmatic solution to the particular issue of damage prior to shipment, where it was clear that, but for that damage, a bill of lading would have been issued.

(5) The approach of the judge had arbitrary consequences, for example if the contract provided that the shipper was not entitled to a bill of lading but one was subsequently issued, on the judge's reasoning, the contract would not be "covered by a bill of lading" unless there was an express variation of the contract to require the issue of such a bill.

(6) She submitted that on a proper analysis, none of the cases supported the judge's approach.

(7) Given that no bill of lading was ever issued, the respondent could not bring itself within the Hague-Visby Rules pursuant to Article X or rely upon the terms of Article IV rule 5(c).

(8) On the proper construction of the Maersk Terms the Hague-Visby Rules were not applicable as a matter of contract.

43. In relation to this Issue, Mr Robert Thomas QC submitted in summary on behalf of the respondent:

(1) The judge was correct in his analysis for the reasons he gave. Both *The Happy Ranger* and *The Rafaela S* proceeded on the basis that there was no distinction between how Article I(b) was to be interpreted in the two sets of Rules and *Pyrene v Scindia* remained good law in relation to the Hague-Visby Rules.

(2) It was clear from the terms of section 1(4) of the 1971 Act that it was contemplated that the Hague-Visby Rules could still apply compulsorily where the contract provided for a bill of lading even if one was never issued. If the issue of a bill of lading was a prerequisite of the application of the Hague-Visby Rules, section 1(4) would have been superfluous.

(3) It followed that Article X and Article IV rule 5(c) of the Hague-Visby Rules should be interpreted to ensure the Rules did apply in the present case and on the basis, so far as the latter provision was concerned, that enumeration in the waybills would satisfy the provision.

(4) If the Hague-Visby Rules did not apply compulsorily, they would apply in relation to two of the containers contractually by reason of clause 6.2(b) of the Maersk Terms.

44. I propose next to summarise the parties' submissions in relation to Issue 3 which follows on more naturally from the judge's conclusion on Issue 1. Ms Masters QC submitted, in summary, as follows:

(1) The judge had been wrong not to follow the approach of the majority in *El Greco* and conclude that the words "as packed" in Article IV rule 5(c) meant that the enumeration not only had to state the number of packages or units but how they had been packed in the container, whether as separate items or consolidated into packages. The language used in enumeration must specify or be consistent with the possibility that the cargo was packed so as to be packages or units. Simply giving the number of frozen tuna loins did not tell one how they were packed for shipment. Ms Masters QC relied, as she had before the judge, on what Diplock LJ had said at the International Maritime Conference forming part of the travaux préparatoires for the Hague-Visby Rules as to the purpose of what became Article IV rule 5(c).

(2) The judge's contrary approach had involved rewording the provision in Article IV rule 5(c) at [90] of the judgment which was impermissible in the case of an international convention. This approach also led to ambiguity as it told the carrier nothing about how the goods were made up for transport within the container.

(3) The respondent's alternative approach in their Respondent's Notice that it was sufficient to specify the number of items shipped was clearly wrong because it gave no meaning to "packages or units". The judge had correctly recognised at [101] of the judgment that if the *El Greco* majority approach was correct, there was no sufficient enumeration in the present case.

45. On Issue 3, Mr Thomas QC submitted as follows:

(1) The judge's analysis that (taking the waybill for Container B as an example) "1 Container said to contain 520 PCS [pieces] Frozen Bluefin Tuna Loins" was a

sufficient enumeration of 520 units for the purposes of Article IV rule 5(c) was clearly correct. The appellant's contrary argument that "as packed" required some further "enumeration" as to how the loins were packed within the container was wrong and was an approach which would lead to very substantial differences in result depending on what language was used. Allsop J had himself recognised some of these difficulties in [287] of the majority judgment in *El Greco*.

(2) Mr Thomas QC illustrated this point by reference to the example given in *Aikens on Bills of Lading* 2nd edition at [10-331], that a bill of lading stating that the container was said to contain: "100 pieces of engine parts packed inside" would be sufficient to constitute 100 units under Article IV rule 5(c), but a statement that the container was said to contain: "10,000 pieces of engine parts" would not, so that in that example the container would be one unit. It was unsatisfactory for these nuances of language to be relevant. He submitted that the appellant's approach did not accord with what Diplock LJ had said in the travaux préparatoires in explaining the purpose of the provision, that it could be seen straight away from the face of the bill of lading how many packages or units there were.

(3) The words "as packed" in Article IV rule 5(c) simply did not have the significance which Allsop J attached to them in *El Greco*. They were no more than descriptive. Mr Thomas QC also relied upon the fact that these words were not replicated in the French text of the Hague-Visby Rules which stated: "tout colis ou unité énumeré au connaissement comme étant inclus dans cet engin" i.e. "each package or unit enumerated in the bill of lading as being included in this article of transport". Accordingly, the Court should not adopt the approach of the majority in *El Greco*.

(4) He also relied upon the alternative ways in which the respondent's case was put in the Respondent's Notice, specifically that it was sufficient enumeration if the bill stated, as the waybills did here, the number of items shipped, even if they did not constitute the relevant packages or units. This was essentially the approach favoured by Beaumont J in the dissenting judgment in *El Greco* at [93] to [100]. Mr Thomas QC submitted that it reflected the intention of the Rules and did justice to the language of Article IV rule 5(c).

46. In relation to Issue 2 identified at [13] above, whether, if the Hague Rules apply, the relevant "package or unit" was the container or the individual pieces of frozen tuna loin, Ms Masters QC submitted in summary:

(1) She accepted that, on the basis of the decision of the Court of Appeal in *The Aqasia*, "unit" means a physical item of cargo and not a unit of measurement. However, the appellant's case did not depend upon that distinction but was that each frozen loin was only capable of being a "unit" within Article IV rule 5 of the Hague Rules if it was capable of being shipped with no additional packaging.

(2) The Hague Rules were not intended to deal with items which were containerised as containerisation was unknown in the 1920s. This was clear from the wording of the Rules and the travaux préparatoires. She relied upon [177]-[178] and [278] of Allsop J's judgment in *El Greco* and [52] of my judgment in *The Aqasia* as demonstrating that "unit" had been introduced into what became Article IV rule 5

at a late stage to cater for items of cargo which are carried without packaging, such as cars or boilers.

(3) She submitted that the decision of the Court of Appeal in *River Gurara v Nigerian National Shipping Line Ltd* [1998] QB 610 did not establish that the container could never be a "package" for the purposes of Article IV rule 5 of the Hague Rules.

(4) She also emphasised that under Article IV rule 5, the "package or unit" limitation was only a default rule. The shipper could always avoid this by declaring what the goods were worth in the bill of lading.

47. In relation to Issue 2, Mr Thomas QC submitted:

(1) The decision of the Court of Appeal in *The Aqasia* established that "unit" in Article IV rule 5 of the Hague Rules means a "shipping unit" or item of cargo synonymous with "piece" (referring to [23], [26], [50] and [87] of my judgment in that case). Although that case had not concerned containerised cargo, the appellant's case that, where cargo was shipped in containers, it had to be capable of being shipped break bulk without further packaging was inconsistent with the reasoning of the Court of Appeal. Nothing in the language of Article IV rule 5 or in the travaux préparatoires supported this additional requirement.

(2) The appellant's case involved the revival and application of the "functional economics" test to limitation, at one time adopted by United States courts in applying section 4(5) of USCOGSA in the case of containerisation, which had been heavily criticised by District Judge Beeks in the United States District Court in Seattle in *The Aegis Spirit* 414 F.Supp 894 at 902; [1977] 1 Lloyd's Rep 93 at 100-101, and subsequently abandoned by United States courts. The functional economics test had also been rejected in this jurisdiction by the Court of Appeal in *The River Gurara* [1998] QB 610 and in Australia by the Federal Court in *El Greco*.

(3) The appellant's case would involve the court having to make some counterfactual assessment as to whether goods stuffed in a container could hypothetically have been shipped in some other manner on some other vessel break bulk, presumably by reference to expert evidence. This was artificial and unnecessary.

Analysis and Conclusions

Issue 1 Is liability limited by reference to Article IV rule 5 of the Hague Rules or Article IV rule 5(c) of the Hague-Visby Rules?

48. In my judgment, where, as in the present case, the contract of carriage at its inception provides for the issue of a bill of lading on demand, the contract of carriage is "covered by a bill of lading" within the meaning of Article I(b) of the Hague-Visby Rules. Furthermore, since, as is common ground, the contract provided by implication for the issue of such a bill of lading on demand, the requirements of section 1(4) of the 1971 Act are clearly satisfied.

49. It is no answer that no bill of lading was ever in fact issued. Devlin J in *Pyrene v Scindia* [1954] 2 QB 402, where, because the fire tender was damaged during loading and never carried on the ship, it was deleted from the bill of lading, rejected any suggestion that the Hague Rules would only be incorporated in the contract of carriage if a bill of lading was issued. At 419-420 he said:

> "The next contention on behalf of the plaintiffs is that the rules are incorporated in the contract of carriage only if a bill of lading is issued. The basis for this is in the definition of article 1 (b) of "contract of carriage"; I have already quoted it, and it "applies only to contracts of carriage covered by a bill of lading." The use of the word "covered" recognizes the fact that the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain. Those terms must be in force from the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. Moreover, it would be absurd to suppose that the parties intend the terms of the contract to be changed when the bill of lading is issued: for the issue of the bill of lading does not necessarily mark any stage in the development of the contract; often it is not issued till after the ship has sailed, and if there is pressure of office work on the ship's agent it may be delayed several days. In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply. There is no English decision on this point; but I accept and follow without hesitation the reasoning of Lord President Clyde in *Harland & Wolff Ltd v Burns & Laird Lines Ltd* 1931 S.C. 722."

50. Furthermore, despite the submissions to the contrary of Ms Masters QC, the decisions of the Court of Appeal in *The Happy Ranger* and of the Court of Appeal and the House of Lords in *The Rafaela S* proceed on the basis that the principle enunciated by Devlin J is equally applicable to Article I(b) of the Hague-Visby Rules. Thus, *The Happy Ranger* [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep 357 concerned a contract for the carriage by sea of three reactors from Italy to Saudi Arabia, one of which was damaged during loading. The contract of carriage incorporated a specimen bill of lading but at the time the damage occurred no bill had been issued. The bills of lading eventually issued for the two undamaged reactors and the repaired reactor which had been damaged were on different terms to those of the specimen bill. The judge at first instance accepted on the basis of *Pyrene v Scindia* that the fact that no bill of lading had been issued was not conclusive, but distinguished that principle on the basis that the parties had only ever intended the contract of carriage to be governed by the terms of the specimen form of bill. Since that was always the contract

of carriage and its terms were fully set out, the judge considered that the cargo interests were not entitled to demand at or after shipment a bill of lading setting forth the terms of the contract.

51. That decision was reversed by the Court of Appeal. The principal judgment was given by Tuckey LJ (with whom Aldous LJ agreed). At [24]-[25], Tuckey LJ held:

> "24…It does not seem to me that the Rules are concerned with whether the bill of lading contains terms which have been previously agreed or not. It is the fact that it is issued or that its issue is contemplated which matters. As it was put in one of the cases "the bill of lading is the bedrock on which the mandatory code is founded" [a reference to what Bingham LJ said in *The Captain Gregos* [1990] 1 Lloyd's Rep 310 at 317-8]. If a bill of lading is or is to be issued the contract is "covered" by it or "provides for its issue" within the definitions of article I(b) and section 1(4) of the 1971 Act.
>
> 25. It follows that I think the [Hague-Visby] Rules applied compulsorily to the contract of carriage and that the judge's conclusion on this issue was wrong."

52. Although Rix LJ dissented on another point not relevant to the present question at [41] he agreed with this analysis:

> "…the contract of carriage itself contemplates the issue of a bill of lading and provides in advance for its form and the provisions to be contained in it. Therefore, for the reasons set out by my Lord in regard to the…issue…it is hard to see why the question regarding the effect of the incorporation of clause 3 [of the specimen bill] should provide an answer otherwise than in favour of the compulsory application of the Hague-Visby Rules (the "Rules")."

53. In *The Rafaela S*, four containers of printing machinery were carried from South Africa to Felixstowe where they were transhipped onto another vessel and carried on to Boston. During the on-carriage to Boston, the goods were damaged. The defendant issued a straight bill of lading, naming the claimant as consignee and stated to be non-negotiable, for the carriage from South Africa to Felixstowe but no bill of lading was issued in respect of the on-carriage. If one had been, it would have been a straight bill of lading as well. The principal issue before the Court of Appeal and the House of Lords was as to the status of straight bills of lading. Both appellate courts held (contrary to the conclusion of the arbitrators and the judge at first instance) that a straight bill of lading was a "bill of lading" within the meaning of Article I(b) of the Hague-Visby Rules and section 1(4) of the 1971 Act. In the Court of Appeal, it was accepted that the Rules still applied to the on-carriage, notwithstanding that no bill of lading was ever issued for that leg, applying *The Happy Ranger*. As Rix LJ put it at [27]:

> "I conclude that although MSC was contracted to arrange on-carriage to Boston, it was not contracted to carry the machinery

> to Boston until it entered into a new arrangement at some stage, the details of which are not reported, to on-carry the goods from Felixstowe. That was a separate contract of carriage, which entitled the shipper to demand a bill of lading and therefore, subject to the straight bill of lading issue, meant that the contract was "covered by a bill of lading" for the purposes of article I of the Hague or Hague-Visby Rules: see *Parsons Corporation v. C V Scheepvaartonderneming "The Happy Ranger"* [2002] 2 Lloyd's Rep 357."

54. In the House of Lords, this point was effectively common ground so it was dealt with briefly by Lord Bingham of Cornhill at [2] of his speech:

> "The good[s] were trans-shipped and loaded on a different vessel at Felixstowe. It is agreed that the shipper (and seller) of the goods, Coniston International Machinery Limited of Liverpool, could have required the issue of a document to record or evidence the contract for the onward carriage of the goods from Felixstowe to Boston; that any document so issued would, for all purposes relevant to this appeal, have been in the same form as that issued for the first leg of the carriage; and that nothing turns on the lack of a document. It is convenient to speak as if a document had been issued in the form the document would have taken had it been issued. It is no longer necessary to review two questions (whether there was one contract of carriage or two, and whether Felixstowe was a port of shipment in the UK) which exercised the arbitrators and the lower courts."

55. It follows that the submission by Ms Masters QC, that the judge's conclusion that the Hague-Visby Rules apply compulsorily where, as here the contract of carriage provides that the cargo interests have a right to the issue of a bill of lading on demand and shipment is from a contracting state, was in some way contrary to the decision of the Court of Appeal and the House of Lords in *The Rafaela S*, is misconceived. Both appellate Courts clearly proceeded on the basis that it was sufficient that the cargo interests could have called for the issue of a bill of lading, even if none was in fact issued. Furthermore, both *The Happy Ranger* and *The Rafaela S* proceed on the basis that the principle enunciated in *Pyrene v Scindia* in relation to Article I(b) of the Hague Rules is equally applicable to Article I(b) of the Hague-Visby Rules.

56. As Mr Thomas QC pointed out, none of the text books suggests that, in this regard, any distinction or difference of interpretation is to be drawn between Article I(b) of the Hague Rules and Article I(b) of the Hague-Visby Rules. He referred the Court in particular to [9-106] of the 4th edition of *Carver on Bills of Lading* by Sir Guenter Treitel QC and Professor Francis Reynolds QC dealing with the words "covered by a bill of lading" in both sets of Rules in the same terms. Likewise, the 23rd edition of *Scrutton on Charterparties* at [14-031] cites both *Pyrene v Scindia* and *The Happy Ranger* in support of the principle that where the contract of carriage provides that the shipper is entitled to a bill of lading on demand, the Hague-Visby Rules will apply even though no bill of lading is ever demanded or issued.

57. Whilst as the judge acknowledged, none of the English and Commonwealth decisions which follow and apply the principle of *Pyrene v Scindia* is concerned with the factual situation which arose here, namely the issue of sea waybills rather than bills of lading, equally there is nothing in those authorities which supports the appellant's suggestion that a different result should be reached under the Hague-Visby Rules merely because some other form of documentation was in fact issued. In my judgment, in circumstances where the appellant expressly eschews any case of variation or waiver or estoppel, the fact that sea waybills were issued can make no difference to the correct analysis. Because the contract of carriage entitled the respondent to ask for the issue of a bill of lading on demand, the contract of carriage was from its inception one which was "covered by a bill of lading" within the meaning of Article I(b) of the Hague-Visby Rules and a contract which "by implication provides for the issue of the bill of lading" within the meaning of section 1(4) of the 1971 Act.

58. Ms Masters QC submitted that *Pyrene v Scindia* and *The Happy Ranger* were intended to provide only a limited qualification to the fundamental principle that there is a bill of lading in existence, as the "bedrock" on which the Hague-Visby Rules are founded, to deal with the particular situation where the goods are damaged during the loading process, so never actually shipped. However, in my judgment, there is nothing in the authorities which limits the principle that, where the contract of carriage contemplates that a bill of lading will be issued on demand, the contract is "covered by a bill of lading" and "by implication provides for the issue of a bill of lading" from inception, to the particular situation of damage during loading. The principle is of much wider application, as *The Rafaela S* demonstrates.

59. Ms Masters QC also submitted that the critical distinction between all the earlier authorities (English and Commonwealth) and the present case is that in none of the other cases had sea waybills been issued by agreement between the parties. However, in my judgment the fact that for expediency, to avoid further delay, the parties agreed that sea waybills would be issued cannot alter the position. Since there was no variation or waiver or estoppel the contract remained one which was covered by a bill of lading and which by implication provided for the issue of a bill of lading, even after the sea waybills were issued. The email from the appellant of 28 January 2013 referred to at [8] above appears to proceed on the basis that issue of bills of lading in Japan was not required, presumably because there was no on-sale which required a negotiable document of title. If that position had changed and the respondent had chosen to effect an on-sale for which bill(s) of lading might have been required, the respondent could in fact still have demanded a bill or bills of lading, even after the sea waybills were issued.

60. I was unimpressed by Ms Masters QC's remaining submissions as to why this Court should reach a different result from that reached in *Pyrene v Scindia*, *The Happy Ranger* and *The Rafaela S.* She submitted first that the French text of the Convention, which in the case of the Hague Rules is the only authoritative version: see per Devlin J in *Pyrene v Scindia* at p 421, and which is of equal authenticity to the English version in the case of the Hague-Visby Rules, used the words "constaté par un connaissement" which means "noted" or "recorded" by a bill of lading. She submitted that this provided strong support for her submission that the bill of lading must be in existence.

61. In my judgment, that submission has to be approached with considerable caution. The appellant has adduced no evidence of French law or of any other system of law which uses the French text of either Convention to support the proposition that the French text is interpreted as requiring that a bill of lading be actually issued. Without any such evidence, I would not be prepared to conclude that the French text compelled such a conclusion. In any event, this submission cannot detract from the fact that the principle of *Pyrene v Scindia* has been applied to the Hague-Visby Rules by the Court of Appeal in *The Happy Ranger* and *The Rafaela S* and by the House of Lords in the latter case, in decisions which are either binding on this Court or, even if the relevant passages in the judgments were obiter, we should follow unless we consider them to be wrong, which I do not.

62. In support of her contention that the issue of the sea waybills meant that the contract of carriage was not "covered by a bill of lading", Ms Masters QC gave the example of the converse situation, where, at the time the contract of carriage was made, the parties agreed that the shipper had no right to demand a bill of lading, but then subsequently agreed that a bill of lading would be issued. She made the point that, at inception, neither Article 1(b) nor section 1(4) of the 1971 Act would be satisfied, but she submitted that surely once the bill of lading had been issued, the contract of carriage was throughout covered by a bill of lading. She criticised the judge's analysis of this argument at [53] of the judgment that, where the bill of lading was subsequently issued without obligation, section 1(4) of the 1971 Act would indeed preclude the Rules from having the force of law and that it would only be where there was a variation of the contract, so as to impose an obligation on the carrier to issue a bill of lading on demand, that section 1(4) of the 1971 Act would be satisfied.

63. In my judgment, the criticism of this analysis is unwarranted. The factual scenario posited seems to me if not entirely fanciful, extremely unlikely to occur. It is difficult to imagine in what circumstances the parties would expressly agree that the shipper was not entitled to a bill of lading, but the carrier would gratuitously then issue one subsequently. The subsequent issue of a bill of lading would surely only happen where the contract of carriage originally made was expressly varied, so as to provide that the shipper was entitled to the issue of a bill of lading after all, in which case, as the judge said, there would be no problem with the application of section 1(4) of the 1971 Act. There is nothing illogical in this analysis and, even if there were, the criticism made by Ms Masters QC does not overcome a fundamental problem with her argument on Issue 1. This is that, on the authorities, until the moment when the sea waybills were issued, the cargo interests were entitled to a bill of lading on demand, so that the requirements of Article I(b) and section 1(4) were satisfied and yet, on the appellant's case, that was all changed by the issue of the sea waybills, even though it is accepted that there was no variation of the contract or waiver or estoppel. As a matter of contractual analysis, the argument is simply unsustainable.

64. For all these reasons I consider that the judge was correct to conclude that the Hague-Visby Rules had the force of law in the present case under section 1(2) of the 1971 Act. As the judge said at [56] of his judgment, it does not follow that liability is limited by Article IV rule 5 of the Hague-Visby Rules, because the appellant may have assumed greater liability or because damage occurred after the sea transit, so that the appellant can limit by reference to the Maersk Terms. Those are not matters within the scope of the appeal so that it is not necessary to deal with them.

65. The issue which did arise during the course of argument was what might be described as the "gateway" into the Hague-Visby Rules. This raises two points. First, Article X(b) of the Rules (the relevant provision here because carriage was from Spain, a contracting state) by its terms refers only to: "every bill of lading relating to the carriage of goods between ports in two different States if: (b) the carriage is from a port in a contracting State". Ms Masters QC submitted that this provision could not be applied where no bill of lading was ever in fact issued.

66. The second point was that Article IV rule 5(c) of the Hague-Visby Rules provides that: "the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units". Ms Masters QC submitted that this provision of the Rules could not apply where there was no bill of lading in which the number of packages or units were enumerated, but only sea waybills to which Article IV rule 5 did not apply.

67. It is fair to say that neither of these matters was argued on behalf of the appellant at the trial. As the judge recorded at [121] of his judgment in relation to the issue whether, for the purposes of Article IV rule 5(c), it was relevant to look at what was enumerated in the draft bill of lading or only relevant to look at what was enumerated in the waybills, the judge said: "By agreement it is only relevant to look at the waybills". From that passage, it is clear that, before the judge, Ms Masters QC was not arguing that, for the purposes of Article IV rule 5(c), the answer should be neither, because there were no bills of lading. The Article X(b) point was simply not argued at all.

68. In the circumstances, I have considerable doubts whether it should be open to the appellant to run these points at all. However, in any event, I consider that they are misconceived. The starting point in my view is section 1(4) of the 1971 Act. Although this is expressed in negative terms: "nothing in this section shall be taken as applying anything in the Rules", the clear intention is that where the contract of carriage "expressly or by implication provides for the issue of a bill of lading or any similar document of title", as the contract does in the present case, the Hague-Visby Rules will apply to that contract and will have the force of law pursuant to section 1(2). I agree with Mr Thomas QC that section 1(4) would be superfluous if, as Ms Masters QC contends, the issue of a bill of lading were a prerequisite to the application of the Hague-Visby Rules.

69. Therefore one has to approach the provisions of the Hague-Visby Rules themselves on the basis that, because the requirements of section 1(4) of the 1971 Act (and for that matter of Article I(b)) are satisfied, it is intended that the Hague-Visby Rules should have the force of law in a case such as the present. If Article X(b) and Article IV rule 5(c) were interpreted literally as Ms Masters QC contends, that would clearly frustrate that intention and achieve a result flatly contrary to the decision of the Court of Appeal in *The Happy Ranger* that, where the requirements of Article I(b) and section 1(4) of the 1971 Act are satisfied, the Hague-Visby Rules apply compulsorily to the contract of carriage even though a bill of lading has not been issued, provided that one was contemplated (see per Tuckey LJ at [24]-[25]).

70. In my judgment, the solution to any apparent conundrum is that these Articles should be given a purposive construction, so as to give effect to the clear intention that the Hague-Visby Rules apply compulsorily to the contract of carriage. Specifically, the

references in Article X to "bill of lading" should be read as "contract of carriage which is covered by a bill of lading or similar document of title", giving effect to the case law on the meaning of "covered by a bill of lading" in Article I(b). Some support for this purposive approach to Article X is to be found in the article *The Hague-Visby Rules* by Mr Anthony Diamond QC in (1978) 2 LMCLQ 225 at 261 and in the textbooks *Scrutton on Charterparties* 23rd edition [14-010] to [14-012] and *Aikens on Bills of Lading* 2nd edition (2015) [10.23].

71. Likewise, in my judgment, where, as here, the requirements of Article I(b) and section 1(4) of the 1971 Act are satisfied, the reference to enumeration in the bill of lading in Article IV rule 5(c) must be read as encompassing any other document which contains the enumeration which would have been in the bill of lading if such a bill had been issued, here the sea waybills.

72. This purposive approach to the provisions is also supported by the decision of the House of Lords in *Adamastos Shipping v Anglo-Saxon Petroleum* [1959] AC 133. That case concerned a tanker charterparty which incorporated a typed Paramount Clause which provided: "This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the United States 1936 ["USCOGSA" which enacted the Hague Rules, with certain amendments, in the United States] which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities under said Act."

73. The House of Lords held that the words "this bill of lading" should be read in their context as if they were "this charterparty" in order to give effect to the intention to incorporate USCOGSA into the charterparty and that the words in section 5 of the Act (corresponding to Article V of the Hague Rules), that the provisions of the Act should not be applicable to charterparties, must be rejected as meaningless (see in particular per Viscount Simonds at pp 153-4).

74. The House also held, by a majority, that notwithstanding the limitations as to the applicability of USCOGSA, the material provisions of the Act should be interpreted as affecting the rights and liabilities of the parties in connection with non-cargo carrying voyages and voyages other than to and from United States ports. The majority also held that "loss and damage" in section 4 of the Act relating to the carriers' immunities from liability (corresponding to Article IV rule 1 and rule 2 of the Hague Rules) should be interpreted in context as encompassing not only physical loss of and damage to cargo, but the financial loss suffered by the charterers in only being able to complete fewer voyages than they would have done but for the owners' breach of charterparty (see in particular per Viscount Simonds at pp 155-7).

75. It is fair to note that the majority of the Court of Appeal in *The Happy Ranger* rejected the appellants' submission, by way of extension of the *Adamastos* principle, that it was not necessary to consider whether the contract of carriage in that case fell within Article I(b) of the Hague-Visby Rules, because clause 3 of the specimen bill of lading, the Paramount Clause, applied the Hague or Hague-Visby Rules applicable in the country of shipment, so that the Hague-Visby Rules governed carriage in trades where they applied, which they did in that case because it was a shipment from Italy.

76. However, in his rejection of that argument at [19] Tuckey LJ did recognise in terms that the scope of Article X must be subject to Article I(b). He said:

> "The Rules do not define or even refer to trades but I am prepared to accept that they include voyages or carriage of cargoes within the scope of article X. This article applies "to every bill of lading relating to the carriage of goods" so to this extent it is compulsory but whilst the issue of a bill of lading is a necessary condition of the application of the Rules, it is not in itself sufficient. The scope of article X must be subject to article I(b) so if this contract is not one which is covered by a bill of lading or similar document of title the Rules, including article X, do not apply. If they do not apply they are obviously not compulsory. I do not think it is permissible to manipulate the wording of clause 3 to delete the words "apply compulsorily"".

77. It seems to me implicit in this passage that if article I(b) does apply, as in the present case, so that the contract of carriage is covered by a bill of lading and (as Tuckey LJ goes on to hold at [24]-[25]), the requirements of section 1(4) of the 1971 Act are satisfied, so that the Hague-Visby Rules apply compulsorily, Article X must be interpreted so as to give effect to Article I(b) and section 1(4) of the 1971 Act.

78. In all the circumstances, I consider that the appeal should be dismissed in relation to Issue 1, on the basis that the Hague-Visby Rules apply compulsorily and have the force of law in the present case. The provisions of Article X and Article IV rule 5(c) must be interpreted in a manner which gives effect to that compulsory application and does not frustrate it. I would add that, if I had concluded that Article IV rule 5(c) could not apply to the enumeration in the sea waybills, I would have been prepared to conclude that it could apply to the draft bill of lading, without any manipulation of language. Of course that conclusion is not one for which the appellant ever appears to have contended, no doubt because it might entail having to accept that limitation under Article IV rule 5(c) in respect of the bags of frozen tuna parts should be on the basis of each bag being a "package", as opposed to being able to limit by reference to the container, because the sea waybill for the Replacement Container omitted any reference to the bags. It is no answer to that point to say that the respondent is pursuing a claim against the appellant for omission of the bags from the sea waybill, as that claim might or might not succeed.

79. Given my conclusion that the Hague-Visby Rules apply compulsorily in the present case, it is not necessary to consider the point raised by the respondent in (1) of the Respondent's Notice that if they did not apply compulsorily, they were contractually applicable in respect of two of the containers by virtue of clause 6.2(b) of the Maersk Terms.

Issue 3 Are the individual frozen tuna loins or the containers the relevant packages or units for the purposes of limitation under Article IV rule 5(c) of the Hague-Visby Rules?

80. Given my conclusion that the Hague-Visby Rules are compulsorily applicable in the present case, it seems appropriate to turn next to Issue 3, which is whether for the

purposes of limitation under Article IV rule 5(c), the individual tuna loins were each a "unit" or the containers were the "packages or units".

81. In considering this question, the correct starting point is the language of the provision itself. It seems to me that two aspects of the wording point clearly to the correctness of the analysis adopted by the judge. First, the words: "the number of packages or units enumerated" mean no more than the specifying of the number of packages or units in words or numbers. "Enumeration" does not as a matter of language entail some further description in the bill of lading as to how the packages or units are actually packed in the container.

82. Second, the words "as packed" are simply descriptive, in the sense that they are stating no more than that the enumerated number of items have been packed in the container. That is really all that the judge meant at [90] of his judgment. He was making the point that "as packed" was doing no more than describing that the enumerated number of packages or units had been packed in the container. That analysis does not in fact depend on any impermissible re-ordering of the words. As the judge indicated at [98] of his judgment, this is essentially what Allsop J himself was saying at [282] of *El Greco*, when he said:

> "The words "as packed in such article of transport" are not a proviso; rather, they are a part of the rule's description of what is to be enumerated in the bill or sea carriage document: the packages or units as packed."

83. However, at [284], Allsop J went on to conclude that "enumeration…as packed" did require some additional statement as to how the packages or units were packed in the container:

> "Thus, one needs to be able to identify on the bill (or sea carriage document for the Amended Rules) the enumeration of packages or *units as packed.* The bill must make that clear. There needs to be an identification of packages or units (for transport) *as packed.* Thus, to use and modify the words of Mr. Justice Colman in *The River Gurara*: the bill must use words which make clear the number of packages or units separately packed for transportation (as packed). If it is not clear from the face of the bill what numbers of packages or units are packed as such by some words (perhaps by the natural meaning of the language describing the item) such that one cannot tell how many packages or units were packed as such in the container or other article of transport, there will only be one package or unit – the container or other article of transport. An enumeration on the face of the bill of a number of pieces of cargo that could be packed in a variety of ways and thereby not showing the packages or units as packed – that is, how or in what number they are packed, will not be an enumeration called for by art. IV, r. 5(c)."

84. In my judgment, contrary to that analysis, the words "enumeration…as packed" simply do not justify the additional requirement for which the appellant contends, that

the bill of lading (or here the waybill) has to go on to specify how the packages and units have been packed in the container. The conclusion that "enumeration" means no more than specification in words or figures of the number of packages or units and that the words "as packed" are no more than descriptive, is strongly supported by the French text of Article IV rule 5(c) which simply refers to enumeration of the number of packages or units "being included" in the container. It is impossible to read the additional requirement for which the appellant contends out of those words any more than it is out of "as packed". If Article IV rule 5(c) was requiring that the bill of lading state how the packages or units were actually packed in the container, I would have expected it to say so in clear terms in both the English and French texts.

85. As I have indicated, both parties relied on what Diplock LJ said in the travaux préparatoires. The Court of Appeal in *The Aqasia* (at [34] to [38] of my judgment) dealt with the circumstances in which the Court can look at travaux préparatoires, namely primarily to confirm the meaning of words in either set of Rules which the Court has concluded is the clear meaning of the words.

86. Of particular relevance to the present issue, Diplock LJ said this about the compromise on the wording of what became Article IV rule 5(c) which was reached by the drafting committee:

> "The whole point of the container clause [Article IV rule 5(c)] …to enable anyone who looks at a bill of lading, relating to transport by container, pallet, or other similar method of grouping goods, to see whether the container is the package for the limitation clause, or whether the packages in it are. Under this paragraph all you will have to do is to look at the bill of lading and see, <u>does it contain any figures of the numbers of packages other than the containers themselves</u>. So with any bill of lading which goes into anyone's hands it is possible at once to see whether it is the container which is the unit for the purposes of calculating the maximum liability – we are only dealing with maximum here – or whether it is any of the packages within it.
>
> …
>
> So this is a perfectly simple way of seeing from the bill of lading what the maximum liability of the shipper is for the goods. And it has this advantage – and this is essential in anything we are trying to do for commerce – that it leaves it to the shipper and the carrier to make their own bargain as to whether they want the higher maximum on the internal package basis and the higher freight, or the lower freight on the basis of the container and its contents being the package. Anyone looking at the bill of lading can tell which option has been exercised in respect of which goods in the container." (my underlining)

87. Contrary to Ms Masters QC's submissions, I do not consider that Diplock LJ was contemplating that before the packages or units of cargo could be the relevant

packages or units for limitation purposes, the "enumeration" in the bill of lading had to include a description of how the items were actually packed in the container. Indeed, the underlined words are flatly contrary to any such suggestion. What he was contemplating was that, if the bill of lading stated the numbers of packages and units and not just the number of containers, then it would be obvious from the face of the bill that the shipper was trying to limit liability on the higher per package or unit of cargo basis and the carrier could adjust its freight rates to take account of that. Accordingly, this part of the travaux préparatoires seems to me to support the construction of Article IV rule 5(c) which I consider is the correct one.

88. I also agree with Mr Thomas QC that the appellant's construction has the potential to create uncertainty and lead to fine distinctions dependent on the precise language used, as Allsop J himself recognised at [287]. Andrew Baker J correctly regarded this as anomalous at [100] of his judgment. When the Court asked Ms Masters QC during the course of argument what additional wording on the waybills she contended would have been sufficient to satisfy the appellant's construction of "as packed", she said something like: "separately packed" or "as separate units" or "unpacked". The idea that, before the cargo interests could limit by reference to the number of frozen loins, they would have to include such anodyne or general wording which really, as a matter of common sense, did not tell the appellant more than it knew already from the information it had as set out in the draft bill of lading and waybills, simply demonstrates how unrealistic and uncommercial the appellant's approach is.

89. It is also right to point out that the approach of the majority in *El Greco* has received some criticism from academic commentators both here and in Australia. In a case note on the case in the *Lloyd's Maritime and Commercial Law Quarterly* (2005) LMCLQ 1, Professor Francis Reynolds QC identifies the uncertainties to which the approach of the majority gives rise:

> "The difficulty here is that the requirement for the enumeration of units "as packed" (which of course applies to packages also: "packages…as packed") seems as indecisive as the notion of "unit" standing alone, since the word "packed" can in normal speech apply to quite small unpackaged items (for example, a toothbrush may be packed in a suitcase); and to go further comes close to requiring the unit to be packaged (an interpretation specifically denied). The court of course knew that the goods were in packages, but not all goods need be (for example, some sorts of timber shipment). It is difficult to see that the words "as packed" were actually intended to bear the (imprecise) significance attributed to them. On the basis of the judgment, it seems difficult to say more than that what is needed is some indication in the bill of lading that the item concerned is intended to rank as a unit for limitation purposes: in the absence of this the default provision will apply and the container will be the package. It is in fact the default clause which saves the technique employed. It seems therefore that there may still be a need for a working definition of "unit" which excludes items too small or of too low value, and yet not

> apt to be part of a bulk cargo, from ranking for the limitation sum."

90. The same criticism appears at [9-269] of *Carver on Bills of Lading* 4th edition (unsurprisingly since Professor Reynolds is one of the authors). I have already referred to the passage at [10.331] of *Aikens on Bills of Lading* 2nd edition which highlights the fine differences in meaning depending on the wording used, to which the majority approach would give rise, although it is fair to say the authors prefer the majority approach to that of Beaumont J.

91. There is more trenchant criticism of the majority approach by Pierre-Jean Bordahandy of the University of Queensland in [2004] 6 JIML 477. He refers to the French text of Article IV rule 5(c), to which I have already referred, and expresses the view that, in failing to refer to the French text, the Federal Court erred in its interpretation of the Hague-Visby Rules.

92. In my judgment, these criticisms of the majority judgment in *El Greco* are justified and like the judge, I consider that the English courts should not follow the approach of the majority in that case. It seems to me that that approach places an impermissible gloss on Article IV rule 5(c) which is simply not justified by the wording of the provision. Accordingly, I consider that the judge was correct in the conclusion he reached that there was sufficient enumeration of the frozen tuna loins in the waybills that each loin was a separate "unit" for the purposes of limitation under Article IV rule 5(c). It follows that the appeal must be dismissed in relation to Issue 3.

93. In the circumstances, it is not necessary to consider the alternative ways in which the respondent put its case on this Issue in its Respondent's Notice, about which I say no more.

Issue 2 If the Hague Rules apply, are the individual pieces of tuna or the containers the relevant "package or unit" under Article IV rule 5?

94. This Issue would only arise if, contrary to my conclusion on Issue 1, the Hague Rules rather than the Hague-Visby Rules applied. Therefore, in one sense, the Issue is academic, but since it was fully argued I will deal with it.

95. In my judgment, there is nothing in the wording of Article IV rule 5 of the Hague Rules which justifies the gloss which the appellant seeks to place upon it, that where the cargo is stuffed in containers, the cargo interests must be able to show that the cargo could have been shipped "as is" break bulk without additional packaging. Although the Court of Appeal in *The Aqasia* was not dealing with containerised cargo, I consider that the analysis in that case of what constitutes a "unit" under Article IV rule 5 is inconsistent with this gloss being applicable.

96. Although the genesis of "unit" in the travaux préparatoires for the Hague Rules may have been to cover large items carried without packaging such as cars and boilers (see [52] of my judgment), it is clear that "unit" has a somewhat wider meaning. As I said at [26]:

> "I consider that, in the context of the Rules, a "unit" can be regarded as synonymous with a "piece", they are both

> descriptive of a physical item of cargo which is not a "package", because, for example, it is incapable of being packaged or is not in fact packaged."

That definition is clearly wide enough to encompass the frozen tuna loins stuffed in the containers without further packaging. There is simply no warrant for concluding that each cannot be a "unit" within that definition unless hypothetically they could also have been carried break bulk without being packaged in some way.

97. I also consider that the gloss which the appellant seeks to put upon the meaning of "unit" in the context of containerisation is objectionable because it seeks to revive the now discredited "functional economics" test. The correlation between the appellant's argument and the "functional economics" test can be seen from the formulation of that test by Oakes CJ in the Court of Appeals for the Second Circuit in *Royal Typewriter Co v MV Kulmerland* (1973) 483 F.2d 645; [1973] 2 Lloyd's Rep 428 at 431-2:

> "The statutory purpose here leads us to suggest what for want of a better term we will call the functional economics test. In this regard, the first question in any container case is whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper. Here it is plain that they could not . . . When, as here, the shipper's own individual units are not functional or usable for overseas shipment the burden shifts to the shipper to show why the container should not be treated as the 'package.' . . . Absent shipment in a functional packing unit, the burden is on the shipper to show by other evidence that his units are themselves 'packages.' Only then does custom and usage in the trade, the parties' own characterisation or treatment of the items being shipped in supporting documentation or otherwise, and any other factor bearing on the parties' intent become relevant."

98. As already noted, the "functional economics" test was heavily criticised by District Judge Beeks in the United States District Court in Seattle in *The Aegis Spirit* 414 F.Supp 894 at 902; [1977] 1 Lloyd's Rep 93 at 100-101, quoted by Phillips LJ in *The River Gurara* [1998] QB 610B-G. As Phillips LJ noted at 621-3, the "functional economics" test was abandoned by United States courts, including the Court of Appeals of the Second Circuit which had propounded the test and was not applied in other jurisdictions.

99. As Mr Thomas QC points out, in *The River Gurara* at 624B-C, Phillips LJ expressly endorsed the reasoning of Judge Beeks in *The Aegis Spirit*. He concluded at 625 that what determined the limit of liability under Article IV rule 5 of the Hague Rules was the number of packages proved to have been loaded in the containers rather than the number of containers. Mummery LJ agreed with Phillips LJ. Hirst LJ dissented, but on the basis that he would have adopted the same approach as Colman J at first instance, who had followed the law as set out in the American authorities after the abandonment of the "functional economics" test. For good measure, I note that the "functional economics" test was also disavowed by the Federal Court of Australia in

El Greco. At [230] to [239] of his judgment, Allsop J analyses the development and abandonment of the test in the United States. In my judgment, there is no basis for the revival of the test in the present case.

100. During the course of argument concerning the appellant's case on Issue 2, the question arose as to whether these frozen tuna loins could have been loaded, without further packaging or consolidation, in the refrigerated hold of a break bulk vessel. Having seen the photographs of the loins in the containers at discharge, that would seem to be a possibility, but it could not really be determined without some expert evidence. To the extent that the appellant's case would require such expert evidence about how the cargo could, hypothetically, have been carried in a completely different way, namely not in a container, in a completely different type of vessel, it seems to me that this highlights that this is an artificial and uncommercial approach. The Court should not adopt such an approach unless constrained to do so by the wording of Article IV rule 5 of the Hague Rules or by authority. Since, in my judgment, the Court is constrained by neither, I decline to adopt that approach. I consider that the judge was correct to reject the appellant's argument on this Issue and that the appeal in relation to it should be dismissed.

Overall conclusion

101. For all the above reasons, I consider that the appeal should be dismissed.

Lady Justice Gloster

102. I agree.