Case No: A3/2015/2525

Neutral Citation Number: [2017] EWCA Civ 365
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEENS BENCH DIVISION
Mr. Justice Andrew Smith
2013FOLIO424

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2017

Before :

LORD JUSTICE LEWISON
LORD JUSTICE HENDERSON
and
SIR CHRISTOPHER CLARKE

- -

Between :

MSC Mediterranean Shipping Company S.A.	**Appellant**
- and -	
Glencore International AG	**Respondent**

- -
- -

Michael Howard QC and Yash Kulkarni (instructed by **Duval Vassiliades**) for the **Appellant**
John Passmore QC (instructed by **Gateley Plc**) for the **Respondent**

Hearing dates : 21st and 22nd February 2017

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Judgment

Sir Christopher Clarke:

1. Between January 2011 and June 2012 Glencore International AG ("Glencore") made 69 shipments of drums of cobalt briquettes which were carried by Mediterranean Shipping Company SA ("MSC") to Antwerp. This case concerns the 70th shipment, which was of a cargo of three such containers. Glencore, the respondent, was the holder of the bill of lading ("the B/L") and the owner of the cargo. MSC was the carrier. After the cargo was discharged at Antwerp two of the three containers were misappropriated. All 69 shipments were made under bills of lading the terms of which were materially similar to those in the B/L.

2. At Antwerp the following four corporations were involved:

   (i) C Steinweg NV ("Steinweg") were Glencore's agents at the port and the notify party in the B/L; they had acted for Glencore for some 25 years;

   (ii) Carjo Trans BVBA ("Carjo Trans") were hauliers engaged by Steinweg;

   (iii) Mediterranean Shipping Company Belgium NV ("MSC Belgium") acted as the local agent for MSC;

   (iv) MSC Home Terminal NV ("MSC Home") operated a terminal for MSC where the cargo was placed prior to collection. The terminal was an open yard with a secure perimeter.

3. The port operated an electronic release system ("ERS"). Under this system carriers provided, against bills of lading, computer generated electronic numbers ("import pin codes") which were given to the relevant receivers or their agents and the port terminal. This was instead of delivery orders or release notes which would be presented to the terminal to take possession of the goods. The holders of bills of lading had to present the pin codes to the terminal in order to take delivery of the goods. In practice the collecting driver would enter the pin codes manually in order to gain access to the terminal and enable him to collect the containers.

4. The system was introduced with effect from the start of 2011. It was not mandatory and was not adopted by all the carriers using the port. Under the ERS, so far as applicable to MSC, when a consignee or its local agent presented a bill of lading and paid any freight or other charges outstanding, the Import Operations Department of MSC Belgium sent to it at a designated email address a release note, which provided the pin codes. These were also sent by way of electronic data exchange to the port terminal. Each code was automatically generated by the system when the relevant employee in the Department clicked the computer mouse on a button on the screen;

and corresponded with a code stored under encryption in the Port Authority's database. No copy of the email with the release note attached containing the codes is stored on the outbox of the assistant in the Department. A hard copy of the release note could be obtained from the MSC Belgium database but only after authorisation by someone at a senior level in the computer department.

5. Steinweg acted as Glencore's agent in respect of each of the 69 shipments. It presented the original bills of lading to MSC or MSC Belgium and on each occasion, it used a pin code to take delivery of the goods from the MSC Terminal operated for MSC by MSC Home.

6. The judge described the usual course of events in these terms:

> *" 12 Shortly before a vessel arrived at Antwerp, MSC would send Steinweg an "Arrival Notice", which gave her estimated time of arrival ("ETA"), and it included a note that, "Please note containers will only be released against pincode". After the bill was presented and freight and charges were paid, MSC would send Steinweg an electronic document headed "Release Note", which gave a pin code (or codes) for release of the goods and stated the period, usually of about a month from discharge, during which the code was "valid". The Release Notes included the following provisions (the second of which was commonly, if not invariably, underlined) under the heading "Clauses and conditions governing subject receipt note":*
>
> - *"All terms and conditions contained in the MSC bill of lading concerned are applicable to subject release note. The addressee of subject release note expressly confirms to have knowledge to these terms and conditions and to accept them unconditionally.*
> - *"This release note is subject to the terms and conditions contained in the Resolution by Alfaport Antwerp dated 3rd of September 2010 concerning electronic release of containers in the port of Antwerp. The text of this Resolution is available on our website .... The addressee of this release note expressly confirms to have knowledge of these terms and conditions and to accept them unconditionally.*
> - *"Discharge of the cargo will constitute due delivery of the cargo. After discharge the cargo will remain on the quay at risk and at the expense of the cargo, without any responsibility of the shipping agent or the shipping company/carrier".*

7. The sequence of events in relation to the subject cargo was as follows.

The Bill of Lading

8. The B/L, issued on **21 May 2012**, acknowledged the receipt by MSC, as carrier, at the port of loading – Fremantle, Australia – of 3 containers each containing drums of cobalt metal briquettes, in apparent good order and condition. The port of discharge was Antwerp. The goods had been shipped on board the "MSC Eugenia" on **20 May 2012**. The Bill was a negotiable bill, marked "To order". It provided:

> *"If this is a negotiable (To Order/of) Bill of Lading, one original Bill of Lading, duly endorsed must be surrendered by the Merchant to the Carrier (together with outstanding freight) in exchange for the Goods or a Delivery Order".*

The B/L contained an express choice of English law and conferred exclusive jurisdiction on the English High Court.

9. On **24 May 2012** Glencore sent two copies of the B/L to Steinweg plus other documentation. On **20 June 2012** MSC sent Steinweg an arrival notice giving an ETA for the "MSC Katrina", to which the goods had been transhipped, of 24 June 2012. Steinweg lodged with MSC Belgium one of the copies of the B/L, signed and stamped by itself and Glencore, and paid the handling charges. On **22 June 2012** MSC Belgium emailed Steinweg a Release Note which contained three pin codes, one for each container, which were valid from "discharge" to 25 July 2012. On about **26 June 2012** the shipment arrived at the port. The containers were discharged and placed in the MSC Terminal. On **26 June 2012** Steinweg communicated the pin codes to its hauliers Carjo Trans.

10. On **27 June 2012** when Carjo Trans went to collect the containers, it found that two of them had already been collected. It reported this to Steinweg and the Port Authority confirmed this to Steinweg as well. Exactly what happened to the two containers is unknown but it was common ground that they were delivered to "unauthorised persons"; and the judge thought it most likely that the loss occurred after someone had learnt of the codes and had used them to steal the containers. This appears to have been the first time that MSC had had a problem of this kind when using the ERS. After the loss MSC and Steinweg adopted certain measures, described at [15] of the judgment, to avoid it happening again.

11. On **25 March 2013** Glencore issued a claim against MSC claiming damages for breach of contract, bailment and conversion. It also claimed against MSC Home. The claim against the latter was not pursued. On **10 July 2015,** following a hearing on **6 and 7 July 2015**, Andrew Smith J gave judgment in favour of Glencore. By the start of the trial title to sue had been agreed; as had damages, subject to liability, in the sum of US $ 1,109,364.78; and the live issues between the parties had been reduced to four.

The issues at trial

12. The first issue was whether MSC's provision of the pin codes to Steinweg constituted provision of a Delivery Order within the meaning of the B/L. MSC contended that, when Steinweg on behalf of Glencore tendered a copy of the B/L to MSC Belgium, MSC was then obliged to exchange it either for the goods or for a Delivery Order. MSC did not then contend that it delivered the containers in exchange for the B/L. Nor did it rely on the provision in the Release Note which said that discharge of the cargoes would constitute due delivery; nor did it argue that it delivered the containers by putting them into storage to await collection by Carjo Trans. What it did say was that it exchanged the B/L for a Delivery Order constituted by the electronic pin codes.

13. The judge rejected this argument. The parties, he held, must be taken to have been referring to a ship's delivery order as defined in section 1 (4) of the *Carriage of Goods by Sea Act 1992*. That sub-section provides:

> *"References in this Act to a ship´s delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which–*
>
> *(a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and*
>
> *(b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person."*

The essential feature of such a document was that it contained an undertaking given by the carrier (or possibly assumed by the carrier through attornment) to a person identified in it to deliver the goods to which it related to that person. The Release Note with the pin code was not a document containing such an undertaking.

14. The usual reason for agreeing that a delivery order, rather than goods, might be delivered, was, as the judge observed, to expedite the performance of contracts and, in particular, to allow bulk cargoes (which, for these purposes, would include a cargo of 3 containers under a single bill) to be split into parcels without resorting to the risky practice of issuing substitute bills. It was improbable, the judge thought, that a shipper would agree to a term whereby the holder of the bill of lading might surrender its rights under it against the carrier without receiving in return either the goods or the benefit of a substitute undertaking from the carrier [19]. He held that the expression was not understood in any wider sense by the parties; nor did the pattern of their previous dealings support a more generous interpretation of the expression.

15. The argument based on the pattern of previous dealings faced, the judge found, three obstacles. The first was that:

> *" 22 ...although in principle the factual background can sometimes inform the interpretation of a negotiable document of title, there is an obvious difficulty about a document having "different meanings for different people according to the knowledge of the background" (to use the words of Lord Hoffmann in Mannai Ltd v Eagle Star Assurance Co Ltd, [1997] 749, 779C/D). The proper approach to using the background knowledge to inform the interpretation of bills of lading was explained by Lord Hoffmann in Homburg Houtimport BV v Agrosin Private Ltd (The "Starsin"), [2003] UKHL 12 at paras 73ff: it is to be recognised that negotiable bills of lading, being documents of title, are "addressed" to and might need to be understood by various persons other that the original parties, and therefore the original parties are taken to have intended that they should be given the meaning conveyed by their wording in light of knowledge available to the range of persons to whom they are addressed. Thus,*
>
> > *"As it is common knowledge that a bill of lading is addressed to merchants and bankers as well as lawyers, the meaning which it would be given by such persons will usually also determine the meaning it would be given by any other reasonable person, including the court. The reasonable reader would not think that the bill of lading could have been intended to means one thing to the merchant or banker and something different to the lawyer or judge" (at para 76).*
>
> *The parties making the contract in the B/L would not have expected the range of addressees described by Lord Hoffmann to know of their own previous dealings, and are not to be taken*

to have intended that it should inform the interpretation of the B/L."

16. The second obstacle was that, as the judge found, Glencore did not know of the use of ERS in Antwerp until the loss and so did not know about that use when it entered into the B/L. Steinweg was not Glencore's agent for the purposes of entering into bills of lading, or making contracts for the carriage of goods, and its knowledge was not relevant to determine Glencore's contractual intention when it made the B/L contract.

17. The third obstacle was that MSC would have to show that, in the light of the previous pattern of dealings, the B/L not only (i) allowed MSC to use the ERS and so not deliver the goods or a delivery order immediately the bill of lading was surrendered but only deliver the goods when the codes were presented to the Port Authority; but also (ii) that when MSC provided the pin codes for previous shipments it was taken thereby to have fulfilled MSC's responsibilities with regard to the cargo and its delivery. The previous dealings provided no support for this position. Even if it was to be supposed that Glencore was content for the pin codes to be used, it did not follow that it would have agreed that delivery was considered to be made when Steinweg was sent the pin codes rather than when the goods were later received.

18. At [25] of his judgment the judge said this:

> *"MSC does not, of course, submit that, by providing the release note containing the pin codes, it undertook to Glencore or Steinweg that it would deliver the cargo to them: had it done so, it would clearly have been in breach of its undertaking. Mr Kulkarni's primary submission is that it thereby gave no undertaking at all with regard to delivery: his alternative submission is that, if MSC gave any undertaking, it was only that the goods would be delivered to whoever presented the right codes, and it did not undertake to deliver them to Steinweg or Glencore. Thus, it accepts that it did not give in exchange for the B/L a Delivery Order of the kind that I have described and that, in my judgment, was required by the B/L. I therefore conclude that MSC did not comply with its obligations under the B/L, unless it can rely on an implied term or show that it was varied by agreement."*

19. The second issue was whether the previous course of dealing between MSC and Glencore provided a basis for a term to be implied into the B/L that:

> *"upon surrender of the bill of lading by a lawful holder, a carrier or its agent may provide an import pin code… (so that thereafter the recipient of the import pin code can present the import pin code to take delivery of containerised cargo, provided always that the import pin code matches the corresponding [electronic data interchange] pin code)"*

20. The judge rejected this implied term on the basis that it sat awkwardly with (if it did not contradict) the express terms of the B/L that the goods or a Delivery Order were to be provided in exchange for it. The parties had relaxed the prima facie obligation of the carrier to deliver the goods only against surrender of the B/L by agreeing that Glencore might surrender the goods against a delivery order but the very fact that they had agreed such a limited relaxation made it difficult to suppose that they intended to go further.

21. There were further difficulties in the way of the implication. Carriers were not obliged to use the ERS and not all did; this showed that business requirements never dictated its use. Further the implication into a document of title from a course of dealings between the original parties faced the same objections as those expressed by Lord Hoffman in *The "Starsin"* about background known only to the original parties informing its interpretation. Further the implication, to be of any use, would have to be that MSC or its agent might use the ERS and provide a pin code and that by providing it MSC fulfilled its obligations in respect of delivery of the cargo and discharged it liabilities in contract and bailment. There was no proper reason to introduce such a term by implication.

22. The third issue was whether MSC's correspondence with Steinweg in January 2011 varied the terms of the B/L so that it could be exchanged for pin codes that were valid under the ERS. The judge rejected the proposition and no appeal is made in respect of that.

23. The fourth issue was whether Glencore was estopped from asserting that the delivery of the cargo upon presentation of a pin code was a breach of contract and/or duty by MSC. As to that the judge held that there was no basis for saying that Glencore represented, or so conducted itself as to let it be understood, that it was or would be content for the goods to be delivered to anyone who presented the correct pin code. The estoppel claimed was also answered by the judge's findings as to Glencore's limited knowledge about the use of ERS.

24. I turn to the grounds of appeal.

Ground 1 Pin codes as (symbolic) delivery

25. Mr Michael Howard, QC, on behalf of MSC, submits that the judge was in error in failing to find that the provision of the pin codes to Steinweg itself amounted in law to delivery of possession of the goods. There are, he submits, two relevant general rules. The first is that a carrier who delivers otherwise than against a bill of lading does so at his peril. The other is a qualification of the first, namely that delivery can be effected by a symbolic act, whereby a sort of metonym of the cargo is given to the receiver.

26. In this respect he placed reliance on the classic case of *Glyn Mills v East and West India Dock Co* (1882) 7 App Cas 591. That case established that there was a duty on the part of the carrier to deliver goods to the presenter of a genuine original bill of lading, even if it is marked "second", provided that the carrier did not have notice of anyone else having title, as to which there was no duty of inquiry[1]. (A forged bill is, however, a nullity *Motis v Dampskibsselskabet*: [2000] 1 Lloyd's Rep 211 at [19]-[20]). Similarly, he submits, in the present case there should be no difficulty in regarding the delivery of a pin code as the relevant symbolic act and the possession of the pin code as that which entitles the possessor to delivery of the goods, the obligation of the carrier being to deliver to the person who first enters the pin code into the machine. At the beginning of the 21st century, when ports such as Antwerp are making use of ERS, it makes no sense, he submits, to make a distinction between the presentation of a paper bill of lading and the use of a code, which would be likely to be at least as secure if not more so.

27. The argument that delivery of the pin code amounted in law to delivery of the goods was not presented below. It was attractively presented before us but I do not find it compelling for the following reasons.

28. I do not find it altogether helpful in this context to talk of delivery by a symbolic act. When the carrier delivers the cargo to the first presenter of a genuine original bill of lading the presenter does not obtain delivery merely on receipt of the bill or by some symbolic act. He secures delivery of the actual cargo against presentation of the bill. The relevant question is: to whom is the carrier (actually) to deliver? The classic answer is: to the first presenter of the bill of lading.

29. MSC submits that delivery need not consist only of a physical transfer of the property. There can be a symbolic or constructive delivery of which the classic instance is the

[1] Several subsequent cases establish that, generally speaking, the obligation of the carrier is to deliver to the first presenter of an original bill of lading: *Sze Hai Tang Bank Ltd v Rambler Cycle Co.Ltd* [1959] AC 577.586; *The Somorvesky* [1994] 2 Lloyd's Rep 266,274.

delivery of a key to the warehouse where goods are stored. Thus para 8-08 of *Benjamin* states:

> *"Delivery may be effected by the handing to the buyer the key of a warehouse or other place where the goods are stored, provided that a licence to enter and take the goods can be implied..."*

A number of authorities dating from 1789 to 1921 are cited.

30. We were referred to one of them, namely *Dublin City Distillery v Doherty* [1914] AC 823, in which Lord Atkinson considered authorities on constructive delivery and referred to delivery of a key to a store as an example of such delivery. In that case the plaintiff had lent money to a distillery company on the security of manufactured whisky kept in a warehouse the doors of which had two keys, one kept by the company and the other by excise officers. The claim was that the whisky had been validly pledged, the pledge being said to be constituted by the combination of (i) a document called a warrant given by the distillery company to the plaintiff which described the particulars of the whisky and stated that it was "*deliverable*" to the plaintiff or his assigns; and (ii) the fact that on each advance the company entered the name of the plaintiff in pencil in its stock book against the whisky intended to be pledged and delivered to the plaintiff. Lord Atkinson held that the evidence did not establish that there was a constructive delivery of the whisky to the plaintiff. As he put it:

> *"the giving by the owner of goods of a delivery order to the warehouseman does not, unless some positive act be done under it, operate as a constructive delivery of the goods to which it relates" and*

> *"the delivery of a warrant was, in the ordinary case, ... no more than an acknowledgment that the goods are deliverable to the person named therein or to anyone he may appoint. The warehouseman holds the goods as the agent of the owner until he has attorned in some way and agreed to hold the goods for him; then and not until then, does the warehouseman become a bailee for the latter; and then, and not until then, is there a constructive delivery of the goods. The delivery and receipt of the warrant does not per se amount to a delivery and receipt of the goods."*

Lord Parker "*on the whole*" thought that the warrant was intended to mean that the company acknowledged that it held the goods as bailee for the plaintiff or his assigns. So it was a good pledge at common law. Lord Sumner took the same view as Lord Atkinson.

31. This case relates to a pledge, which can be achieved by the endorsement and delivery of a bill of lading. I do not regard it as of assistance to MSC in the present context, namely delivery under a contract of carriage. Whether or not delivery of a means of access to goods constitutes the delivery required by such a contract must depend on the context and terms of the contract. In the present case, where the parties contemplated either actual delivery against presentation of a bill of lading or in accordance with a delivery order, I do not think that delivery of the code can, itself, constitute delivery. Delivery usually means actual delivery, not delivery of a means of access, and nothing is spelt out in the contract to the contrary. Nor is it apparent that, because MSC Belgium sent the Release Note, MSC Home attorned to Glencore in respect of the goods or acknowledged that from that moment they held them on Glencore's behalf.

32. The example of symbolic delivery habitually given is of the provision of a key to the warehouse. The example contemplates that when the key opens the door the goods will be there. In the present case, entering the numbers provided access to only one of the three containers. MSC would say that all that that means is that containers already delivered (by the provision of the code) were stolen when they belonged to Glencore. That would depend on whether the theft preceded or followed the provision to Steinweg of the code. It seems to me unlikely that the parties intended that the rights of Glencore should depend on this circumstance[2].

33. Although the argument now presented was not presented below the judge addressed the question of what would amount to delivery in the following terms:

> *" 17 ……[MSC] does not contend that it met its obligation under the B/L by delivering to Glencore the goods in exchange for it. Nevertheless, I shall say something about what would constitute delivery of goods in order to set the scene for the parties' submissions on what is in issue. In the context of the sale of goods, Sale of Goods Act, 1979 s.61(1) provides a general definition of "delivery" as "voluntary transfer of possession from*

[2] Although the key to the warehouse is often referred to as a means of symbolic delivery, careful consideration would need to be given, in any specific case, as to what exactly the contract contemplated. It must be doubtful, for instance, whether delivery of the key is sufficient if the donor retained a spare – a question which would be relevant if the goods were stolen before the buyer had entered into actual possession.

one person to another". In Barclays v Customs & Excise, [1962] 1 Lloyd's Rep 81,89, Diplock J observed that a bill of lading contract is "not discharged by performance until the shipowner has actually surrendered possession (that is, has divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them". Thus, as it is put in Cooke on Voyage Charters (4th Ed, 2014) at para 10.4, delivery is "a bilateral act, involving the receipt of the goods by the consignee or his agent as well as the relinquishing of possession by the carrier, and so it cannot be effected merely by discharging the goods over the ship's side at the port of delivery. Equally delivery cannot, in the absence of special terms, be effected merely by putting the goods into the custody of a person who is not the agent of the consignee".

18 Mere discharge of cargo therefore does not constitute delivery as a general rule. ..... In some circumstances, delivery might be effected by putting goods into a port authority's custody, but it is accepted that this did not happen here. First, the goods were not deposited into the custody simply of the Port Authority: they were put into the MSC Terminal. The evidence does not make clear quite what role the Port Authority had in managing goods that were stored there, but the MSC Terminal was operated by MSC Home and operated for MSC. Secondly, although by emailing the pin codes MSC Belgium provided Steinweg with the means to take possession of the goods as long as they were valid, as I have explained, under the ERS in so far as its procedures reflected the model covenants, MSC Belgium had at all times the power, albeit not the contractual right as against Glencore or Steinweg, to invalidate them. To that extent, MSC did not, in Diplock J's words, divest itself of all powers to control any physical dealing in the goods."

34. Mr Howard submits that this analysis was faulty. There were two model covenants approved by the Antwerp Port Authority by its Resolution of 3 September 2010, being a covenant between the shipping company or ship‘s agent and (i) the terminal operator and (ii) the forwarder. The former entitled the shipping company or ship’s agent to announce that the “*release has expired or has been withdrawn*”. The latter provided for the “*release*” (i.e. the making available for delivery) being withdrawn if the container was not withdrawn within the free period specified in the release note or if during that period additional costs were incurred or in other special cases. These

covenants were, as the judge found [10], never agreed by MSC with the Port Authority or with Steinweg. All that he found was that the ERS was operated by the parties "*broadly as the covenants contemplated*" [10]. In those circumstances it is unclear, Mr Howard submits, why the judge thought that the pin codes might be revocable at all. The fact that MSC Home operated the Terminal for MSC would not give MSC any control over MSC Home's activities; nor was there anything to suggest that once pin codes were generated MSC could revoke the codes or countermand the handing over of the goods by MSC Home. Even if such revocation was physically possible, of which there was no evidence, it could not legitimately have been done. If it was physically possible for the codes to be recalled by MSC, such revocation would not affect the delivery that had taken place by their provision; and the legal effect of that recall would be that, delivery having taken place, MSC would be guilty of conversion.

35. I do not find consideration of the revocability of the codes by or at the behest of MSC to be particularly fruitful because, as I have said, the most important question is as to what form of delivery the contract contemplated. Nor do I think *Barclays Bank v Customs & Excise* (see [33] above) to be of assistance to MSC. The case did not concern symbolic delivery but whether the bill of lading could effectively be pledged to a party other than the consignee after the goods had been discharged but before they had been delivered to the consignee. They had not been delivered because they were in the possession of a custodian who held the goods to the order of the shipowners and who had made no acknowledgment that he was holding them on behalf of the consignee.

36. Lastly, the judge was satisfied that MSC Belgium had the power, albeit not the contractual right, as against Glencore or Steinweg to invalidate the codes [18] and thus prevent delivery of the containers. The basis of this was his inference at [10] that MSC "*operated the ERS broadly as the covenants contemplated"*. Those covenants provided for withdrawal of "*the release*" by the shipping company or its agent: see [34] above. This power was expressed by the judge as being "*under the ERS in so far as its procedures reflected the model covenants"*. The use of the expression "*in so far as*" is, perhaps, not wholly clear but I take the judge to be saying that the ERS procedure did in fact reflect the model covenants in this respect so that the reality was that MSC Belgium would be able to prevent delivery: see what he said in [10]. Further the Release Note incorporated the terms of the Alfaport Antwerp Resolution which approved the two model covenants. So someone claiming the benefit of the Release Notes would have to recognise the power of recall by MSC of the release contemplated by those covenants, even though such recall might involve a breach of obligations as to delivery. Article 1 of the operator's covenant provided that the conditions of the covenant applied "*without prejudice to the applicable legal and contractual provisions*".

37. The judge also accepted that MSC Home would act at MSC Belgium's behest (and, thus, that of MSC its principal) because the Terminal was "*operated for MSC*". That seems to me an inference that he was entitled to draw, particularly having regard to

the fact (i) that the goods, once discharged, were being stored for MSC, a situation which continued after the provision of the codes and (ii) the provisions of the operator's covenant which, on the judge's finding, the procedures of the ERS reflected and which entitled the shipping company to forbid release of the goods.

38. Accordingly, the judge held, MSC did not, in Diplock J's words divest itself of "*all powers to control any physical dealing with the goods*" [18].

39. The finding set out in the previous paragraph begs the question as to what is relevant in this context. Is it whether in practice MSC had power to prevent release against the codes or whether it could, vis a vis Glencore, legitimately do so? Mr Howard submits that it must be the latter since otherwise symbolic delivery could almost never take place. The seller of goods who tendered the key to the warehouse can always change the locks.

40. It seems to me that Diplock J was concerned with practice rather than legitimacy. In determining whether delivery has actually occurred it is the position in practice that is relevant. He was concerned, as his language indicates, with whether the shipowner had "actually surrendered possession", That practical ability to prevent discharge was the criterion (as opposed to legitimate entitlement to do so) was also the approach adopted by this court in *The Jag Ravi* [2012] 1 Lloyd's Rep 637, where at [45] Tomlinson LJ referred to the possibility that the ship-owner might attempt to revoke the authority given by a delivery order, and might succeed in doing so, as a relevant consideration in determining whether delivery had taken place. I would accept that, in the ordinary case, where a shipowner discharges goods into a storage facility the goods remain undelivered so long as any order given by the shipowner to the facility remains revocable. Thus in *The Jag Ravi* the court rejected the proposition that the discharge of the cargo and the issue of a delivery order in the form of a request to the yard to deliver, constituted delivery within the meaning of the letter of indemnity.

41. Neither of those cases were cases of symbolic delivery. In the first the court was concerned to discern when (actual) delivery had been made under a bill of lading contract. In the second the question was whether delivery had taken place within the meaning of a letter of indemnity. I would accept that where the parties have agreed that symbolic delivery suffices, then such delivery takes place when the symbol is delivered, notwithstanding that the deliverer of the symbol may in practice be able to deprive the recipient of the actual goods after the symbol has been handed over, or does so, the remedy in the latter case being in conversion.

42. In the present case the B/L does not, in my judgment, provide that provision of the pin codes amounts to delivery. At best the code was some form of delivery order.

Ground 2 The Release Note and pin codes as a Delivery Order

43. MSC submits, in the alternative, that the Release Note containing the pin codes was itself a Delivery Order for the purposes of the bill of lading.

44. The expression "Delivery Order" is not defined in the B/L; and the term is capable of different meanings. It may mean an order given by an owner of goods to someone who is in possession, or who is expected to come into possession, of the goods to deliver them to the person named in the order. That person may be a warehouseman or other bailee. (MSC contends that the Release Note was at least that. The provision of the codes to Steinweg was a means of instructing the Terminal to deliver to whoever entered the correct codes.) It may be a statement by a person in possession of goods that he will deliver them to a specified person. It may constitute an undertaking to deliver to the person specified in the order. It may be both an instruction and an undertaking. In each case the order may or may not cover assignees.

45. The expression "ship's delivery order" depends, at common law on the context in which it occurs: see *Carver on Bills of Lading* (3rd edition) 8 -030. In essence *"the document should give the person in whose favour it is issued some rights (probably of a contractual nature) against the ship*": ibid 8-031. For the purposes of CoGSA 1992 it has the definition set out in [13] above.

46. I agree with the judge that, under an English law contract, such as the present, a delivery order should be regarded as having the same meaning as a ship's delivery order, as now defined under CoGSA *1992*, subject to the minor qualification in [61] below. The Delivery Order is to be provided by the owners of the ship as an alternative to actual delivery in exchange for the B/L and in substitution for it. It seems to me implicit in those circumstances that the parties intended that the Delivery Order should have the key attribute of a bill of lading, namely an undertaking by the carrier to deliver the goods to the person identified in it, which would, here, have to be Glencore or Steinweg, Glencore's agent. As the judge found, it is improbable that a shipper would agree to a term whereby he might surrender the bill without receipt of either the goods or the benefit of a substitute undertaking in his favour from the carrier. Further, a construction of a "Delivery Order" to be given by the carrier under an English law contract, which tallies with the definition of a ship's delivery order in UK statute law, is appropriate.

47. In *Krohn & Co v Thegra N.V*. [1975] 1 Lloyd's Rep 146, 153 Kerr J, as he then was, observed (i) that in a c.i.f. contract it was a fundamental feature that the buyer should as far as possible obtain control over the goods by means of the document against

which he parts with his money; (ii) that this object was fully achieved in the classic and ordinary case in which the required documents included bills of lading by means whereof the buyer acquires ownership and contractual rights against the carrier; and (iii) that where a c.i.f contract entitled the seller to tender delivery orders instead of bills of lading, so as to enable him to split cargoes covered by a single bill of lading for the purposes of delivery, the contract should be so construed that these objects, although they could not be attained in full, were nevertheless attained so far as possible. An option to tender delivery orders instead of bills of lading in a c.i.f contract should, he held, prima facie be interpreted as intended to confer upon the buyer, inter alia, some right against the person in possession of the goods. This could be done by an instruction to deliver to the buyer given to the person in possession and the attornment of the latter to the buyer; or by a direct undertaking by the person in possession to deliver the goods to the buyer or his order. That approach was, he held, consistent with earlier authorities including *Colin & Shields v W.Weddel & Co* [1952] 2 AER 317; *Cremer v General Carriers SA* [1974] 1 WLR 341. These concerned what were described as ship's delivery orders.

48. The B/L is not, of course, a c.i.f. contract, only a document likely to be required under such a contract. But, as it seems to me, the considerations to which Kerr J referred, are equally applicable in the present case, governed, as it is, by English law, and that the contract should be construed so as to require an undertaking on the part of MSC to deliver to Glencore/Steinweg. I do not accept that MSC could provide any form of document, or number, that they liked provided it could be regarded as some form of delivery order.

49. Mr Howard submitted that the judge's interpretation of "Delivery Order" involved writing in the word "*ship's*" which was not there, and that it should be rejected on that account. I do not agree. The judge had to interpret a somewhat loose term which can have different meanings (including "ship's delivery order", which could, in some contexts, be no more than an instruction by the ship); and "*where a contract uses the term [delivery order] the question in which sense the term is used is one of construction in each case*" - *Benjamin Sale of Goods* (1974) paras 1389-1390 as applied by Kerr J, in *Krohn*. That exercise requires consideration of what, in the context of this contract, the words are to be taken to mean. The absence of the word *"ship's*" is in no way determinative.

50. In short, I do not regard it as possible to treat the obligation to produce a Delivery Order as satisfied by a Release Note which does no more than instruct the Terminal to deliver against the entry of pin codes which it provides to Steinweg.

Ground 3 Release Note and pin codes as ship's delivery order

51. Mr Howard submits that the Release Note with the pin codes contained in it was, on proper analysis, a ship's delivery order within section 1 (4) of *CoGSA 1992*. The Release Note, sent by MSC Belgium to Steinweg identifies the cargo and identifies to whom the cargo is to be delivered. In MSC's skeleton produced shortly before the hearing entitled "Delivery Orders" the Release Note was said to represent an undertaking by MSC (not MSC Home) to deliver to Steinweg (see paragraph 12), but MSC's case as expounded at the hearing and in its earlier skeletons is that the undertaking, if there was one, was to deliver to whoever first entered the correct code.

52. The Release Note, which notified Steinweg of the codes, has the following clauses:

> *"3 All terms and conditions contained in the MSC bill of lading concerned are applicable to subject release note. The addressee of the subject release note expressly confirms to have knowledge of these terms and conditions and to accept them unconditionally.*
>
> *...*
>
> *5 Discharge of the cargo will constitute due delivery of the cargo. After discharge the cargo will remain on the quay at risk and at the expense of the cargo, without any responsibility of the shipping agent or the shipping company/carrier"*

53. MSC does not rely on clause 5 and says that the terms of the bill of lading would override it in any event. This is not surprising in the light of *Sze Hai Tong Bank,* where the Privy Council held that a similar clause did not protect the carrier who had delivered goods otherwise than to the holder of a bill of lading. MSC contends that there was an obligation to deliver under the B/L which continued under the Release Note but in such a manner that the mode of delivery was different, namely that the obligation was to deliver against the pin codes i.e. to Glencore/Steinweg if it was the first presenter of the codes or to the first presenter if it was not. Alternatively. MSC submits, the Release Note confirmed the delivery obligation under the B/L but in that modified form.

54. I have some difficulty in accepting that an obligation to deliver continued *under the B/L* after discharge. The B/L provided that it was to be exchanged for the goods or a Delivery Order. Accordingly, it is first necessary to look at what is said to be the Delivery Order to see whether it contains an undertaking to deliver, although, if it does not and by virtue of the B/L it should have done, there would be a breach of MSC's obligations under the B/L to produce a document which did contain such an undertaking. That was what the judge found to be the case. If, after discharge, there was a continuing obligation on the part of MSC to deliver to Glencore/Steinweg it

may not, of course, matter whether the obligation arose under the B/L or the Release Note or both.

55. The critical question is as to the nature of the obligation (if any) which is required to be accepted in order for a document to constitute a Delivery Order. In my view, as I have said, a Delivery Order within the meaning of the B/L does require an undertaking on the part of MSC to deliver and the undertaking required is, as the judge found, one in favour of Glencore or Steinweg. As the judge pointed out – see [18] above - MSC did not suggest below that it gave an undertaking to deliver to either of those.

56. I entertain some doubt as to whether the Release Note is to be treated as providing any undertaking to deliver at all. On its face it notified Steinweg of the code which the hauliers would need to enter if delivery was to be given to them. It also contained a provision (albeit one not relied on) that discharge would constitute delivery of the cargo and a provision that all the terms of the B/L were applicable. The applicable term is that the carrier shall provide a Delivery Order. Hence one looks at the Release Note to see what it provides which is either no undertaking at all or, on MSC's case, an undertaking to deliver to the first presenter of the correct codes. In either case it is not the Delivery Order called for by the B/L. namely to deliver to Glencore/Steinweg. A promise to deliver to whoever first enters the right code, whether or not that is Glencore/Steinweg, is not the same.

57. A possible alternative analysis is that, since the B/L requires a Delivery Order to contain an undertaking to deliver to Glencore /Steinweg, and since the terms and conditions of the B/L are, by the terms of the Release Note, applicable to it, the Release Note contains, impliedly or as a matter of construction, an undertaking to deliver to Glencore provided, at any rate, that the right pin code was entered. If so, MSC was in breach. So, either way, MSC is liable. I would prefer the judge's analysis since I find it difficult to *imply* an obligation to deliver to Glencore/Steinweg in a Release Note which has a clause that discharge will constitute due delivery (even though that clause might not prevail over an express obligation) and an obligation to provide a Delivery Order embodying an obligation to deliver to Glencore/Steinweg when the latter obligation is absent from its wording.

58. Mr Howard contended that, given that, ordinarily, the carrier was entitled and bound to deliver to the first presenter of the bill (who might turn out not to have been the person in fact entitled to the goods) it was illogical to hold that the Release Note with pin codes could not count as a Delivery Order so that the carrier was entitled and bound to deliver to the first presenter of the codes, particularly when the system had been in operation without objection since the beginning of 2011. The fact that the codes might be used by a thief was neither here nor there. Use of the correct numbers by a thief did not involve forgery and the fact that there might be more than one

person who could claim delivery, provided he was first in time, was no different to the position that applied when there was more than one original bill.

59. Whilst I see the force of those submissions the position in relation to bills of lading is well established but the position in relation to pin codes is not. No "custom of merchants" applies. Both Glencore and the range of addressees to whom the B/L could pass, might, or might not, have been prepared to accept that the goods should be deliverable to the first person to key in the pin code. They might have preferred to have the goods deliverable to the producer of the bill of lading or the beneficiary of any delivery order given in exchange, preferring to have the level of security provided by a paper document (which might be difficult to forge) rather than the risk of unauthorised electronic access to a code, e.g. by hacking. As it was Glencore was, on the judge's findings, unaware when it made the contract that any ERS was in use. I am not satisfied that what Glencore must be taken to have agreed by subscribing to the B/L was that delivery could and should be made to the first presenter of the code, whoever that was, and that, if it was, they would have no rights under the contract.

60. It may be that a system whereby delivery against a pin code is valid, even if presented by a thief, is sensible because of the benefits of using modern technology in place of paper. But, if that is to be done, it requires, in my view, either appropriate contractual provision or statutory imposition.

61. Glencore contends that the Release Note cannot be a Delivery Order because it was not a document: unlike the B/L for which it was to be a substitute. If, as I think, a Delivery Order required an undertaking by MSC to Glencore/Steinweg I doubt that it would matter that the undertaking was only given in an email which could be printed out since (a) the obligation would only be performed by actual delivery to Glencore/Steinweg; and (b) there would be no problem about proving that the undertaking was in fact given. Further Mr Passmore accepted, as I understood him, in answer to a question from Lewison LJ, that if Steinweg printed out the Release Note sent to it, that would count as an original. If someone else made a copy delivery to them would not be good delivery anyway. Further, if "*any document*" in section 1 (4) of CoGSA 1992 does not extend to an email, which I doubt, I would still regard an email which contained the requisite obligation to deliver to Glencore/Steinweg as a Delivery Order.

62. If a Delivery Order could be an obligation to deliver to the first presenter of the code I do not think it would be necessary for the code to be set out in an original document since it would be the number which entitled the possessor to delivery. No question would arise as to whether the number was an original or a copy. A number is a number.

63. Reference was made by Glencore to the fact that the Secretary of State has not exercised his power under section 1 (5) of CoGSA 1992 which provides:

> *"The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to–*
>
> *(a) the issue of a document to which this Act applies;*
>
> *(b) the indorsement, delivery or other transfer of such a document; or*
>
> *(c) the doing of anything else in relation to such a document"*

I do not regard the failure of the SOS to make any such order as casting any light on the true interpretation of the obligations under the B/L.

Ground 4 Estoppel

64. MSC submits that in any event Glencore is estopped from contending that delivery of the cargo upon presentation of a pin code was a breach of contract and/or duty on the part of MSC. Glencore, it submits, gave the appearance that it was content for the ERS to be used for the 69 previous shipments and cannot now complain that it was used for the three containers under the B/L. The judge rejected that argument in the following terms [33]:

> *"I can see no basis on which it could be said that Glencore represented, or so conducted itself as to let it be understood, that it was or would be content for the goods to be delivered to anyone who presented the correct pin code: still less did it make a sufficiently clear representation along these lines, or sufficiently indicate that it would be so content, as to give rise to an estoppel. The estoppel arguments are also answered by my findings about the limited knowledge that Glencore had about the use of the ERS.*

65. MSC submits that what happened in relation to the previous 69 shipments (namely delivery against pin codes) established that the pin codes procedure was an acceptable substitute for the Delivery Order procedure, as that phrase was interpreted by the judge. Steinweg had authority to handle delivery procedures. The judge found [11]

that its task was to arrange that goods consigned to Glencore were duly delivered at Antwerp and that it was entitled and authorised by Glencore to adopt any proper procedures to do so. It had authority to permit departures from the contract so far as delivery was concerned. The judge appeared to have accepted [34] that in view of the previous pattern of dealings the B/L allowed MSC to use the ERS and so not to deliver the goods immediately the B/L was surrendered. But he has in effect held that Glencore are estopped from complaining about the use of the Release Note procedure instead of the Delivery Order procedure but are not estopped from complaining that the procedure has been followed.

66. If, MSC submits, there had been a contractual variation to the effect that the supply of pin codes in a Release Note was a fulfilment of the obligation to give a Delivery Order in substitution for a bill of lading, or that the pin code system was to be employed by way of replacement for the Delivery Order system, it could not sensibly have been argued that MSC was in breach of contract in failing to deliver the cargo to Glencore even though it had followed the contractually agreed mechanism for delivery by delivering to the first person who entered in the code. A waiver or equitable estoppel should have the same effect.

67. I do not think that the judge was in error in concluding that there was no estoppel on which MSC could rely. If there had been a variation of the contract to the effect that delivery to the first presenter of the code was a fulfilment of the delivery obligation under the contract, Glencore would have no claim. There was, however, no such agreement and, importantly, no question arose in the case of the first 69 shipments, where delivery was in fact made to Glencore or its agents, as to what the position would be if delivery was made to someone who had stolen the codes. The judge was right when he said that the breach relied on by Glencore was not simply that delivery was made against the codes but that delivery was not made to Glencore or its agents at all. No representation let alone a clear one was made by Glencore or on its behalf that delivery otherwise than to it would be acceptable provided that it was made to the first presenter of the codes. The fact that cargoes had been delivered to Glencore after presentation of pin codes on many occasions did not say anything about what the position would be if they were not.

68. In addition, I would not accept that Steinweg had any authority to make such a representation. It had no express authority. Nor is one to be implied. Authority to make arrangements to ensure delivery to Glencore pursuant to the B/L or Delivery Order did not impliedly extend to accepting that delivery pursuant to the B/L would validly be made by delivery to the first presenter of the codes whether that was Glencore or a thief, especially when Glencore was not even aware of the ERS system.

69. For all these reasons I do not accept that provision of the pin codes constituted the provision of a delivery order within the meaning of the contract.

Ground 5

70. By an application notice dated 13 February 2017 MSC applied to adduce new evidence and to amend its notice of appeal so as to include a request for an order that, if the appeal was unsuccessful on grounds 1 to 4, the case should be remitted to the Court below on the issues of causation and/or contributory negligence. The issue of contributory negligence was not pursued before us.

71. The application was supported by a witness statement from Mr Jonny Duval of MSC's solicitors which set out information derived from MSC's Antwerp lawyer and its Area Manager for Europe, P & I Insurance, Legal and Claims Department. This revealed that shortly after the theft of the two containers the Antwerp police launched a criminal investigation under the supervision of an Investigating Magistrate. Access to the records of such an investigation cannot be obtained unless special authorisation is granted by the Magistrate. An application to view the file was made on 27 May 2014 but was unsuccessful. A second application was made on 9 December 2016 and on 19 December 2016 the Magistrate gave permission to inspect the file between 29 and 30 December 2016. Inspection of some of the documents contained in the 30 or so boxes took place then.

72. On 5 January 2017 Mr Duval was copied in on an email message from Glencore's solicitors – Gateley Plc - referring to an article in Bloomberg which suggested computer hacking at the offices of MSC Belgium. The article reported that technicians had found a bunch of surveillance devices on an MSC network and that MSC had hired a private investigator who had called PWC's digital forensics team which learned that computer hackers were intercepting network traffic to steal pin codes. Gateley on behalf of Glencore sought disclosure from MSC of documents in their control in respect of the matters referred to in the article. Mr Duval emailed later saying that he was instructed by MSC that there was not and never had been a PWC report.

73. The material obtained from the criminal file included two statements which, Mr Duval suggested, revealed that the hacking had not been at MSC but at Steinweg. The first statement from Ms Sarah Ooms to the police dated 20 June 2012, two days before MSC Belgium sent the codes to Steinweg, stated that on 14 June 2012 her computer was hacked and that a second attempt was made on 19 June 2012 on both her computer and that of Charles Reynolds-Payne, Steinweg's commercial manager.

74. What the hacking consisted of was that an email of 14 June 2012 appeared to come from CSAV, another shipping line which makes use of the MSC Home Terminal, and

was sent to what was a general email address for Steinweg so that everyone in the office received it. Attached to the email was a PDF file to which a CSAV bill of lading was attached. In the bill, Ms Ooms was mentioned in the box specifying Steinweg as the Notify Party as the person for whose attention any notification should be given. On opening the document she received an indication that she should execute an Acrobat Reader update from a specified website. She did not do so. Nor did she believe that any of her colleagues did so either. She contacted a man at CSAV in the Netherlands who said that he had not sent the email.

75. On 19 June 2012, one day before the date of the arrival notice she and Mr Reynolds-Payne received an email from a named individual at Containerships Rotterdam NV with the same PDF and its accompanying bill of lading attached. It was signed by a named individual. When she contacted Containerships she was told that he was unknown to them.

76. On 20 June 2012 she received a phone call from the MSC terminal to the effect that they had also received the same email that she had received from Containership, who had contacted her because she was mentioned in the bill. Ms Ooms said that she did not know whether MSC installed the software update.

77. Ms Ooms also said that she had heard that EKB Container Logistic Group NV received a similar email sent in her name (which she did not in fact send).

78. The second statement was from Mr Graziano Asnot, the Steinweg systems manager, and was dated 15 July 2014. He stated that an NAS appliance was found in the office next to the office of Steinweg's financial director. This is apparently an appliance which permits unlawful remote electronic eavesdropping and snooping. A check was made of log data which revealed that an active appliance had tried to make outside contact. This had been blocked by the fire wall so that, Mr Asnot suspected, no data had got out through the company network. There was no information as to when the appliance was placed and MSC submits that there was, therefore, no reason to think that it had not been in place for a long period and indeed as far back as June 2012, the time of the theft. On that evidence there is, in fact, no way of telling.

79. At trial Ms Corin Gautschi of Glencore and Mr Reynolds-Payne of Steinweg gave evidence that there had been one previous theft of cobalt from Antwerp in November 2011 which involved the use of pin codes which had been misappropriated where Steinweg had been acting. Both she and Mr Reynolds-Payne gave evidence at the trial without mentioning the incidents of June 2012. Mr Reynolds-Payne said in his statement that "*Steinweg has only being[sic] involved in one other similar case, but I am now aware in general terms that the so-called cyber-crime had been an issue in*

the port of Antwerp". He also said that he understood from the police that it was thought that in some way the thieves were able to hack one or other of the parties involved in order to gain the containers but that, so far as he was aware, the police inquiries into the incident had not yet reached a conclusion. He did not mention the incidents in June 2012 to MSC or MSC Belgium.

80. On 16 January 2017 Mr Duval for MSC sought disclosure from Glencore of all reports regarding the hacking of Steinweg's systems and all documents referred to in the documents released to MSC's Antwerp lawyer by the police, which were attached to his email. He said that he would be considering with Counsel the extent to which any further disclosure was required. In response Mr Andrew Messent of Glencore's solicitors pointed out, in an email of 17 January 2017, that the report in respect of the earlier incident involving CSAV and MSC Terminal had been disclosed and he sent a copy of the disclosed document the next day. On 7 February 2017 Gateley Plc said that they were informed by Steinweg's Belgian lawyers that Steinweg did not prepare or commission any report in relation to the breaches of computer security in this case.

81. In a witness statement of 17 February 2017 Mr Messent reported that Glencore, in the persons of Ms Gautschi and Ms Catherine Zanetti, who was responsible for insurance matters, had confirmed that Glencore had no knowledge of any hacking of Steinweg's computer system potentially connected to the loss of the containers and in particular of any spying device found in Steinweg's office or the hacking of the computers of Ms Ooms and Mr Reynolds-Payne. There had been no correspondence between Glencore and Steinweg about any such hacking of which they were aware nor had Glencore or any agent of Glencore made a report into the hacking of Steinweg's computer system. A report in respect of the theft of the two containers had been made by Steinweg's liability insurers but this had not been disclosed by Steinweg. He exhibited to his statement a series of documents obtained from Steinweg's lawyers. These showed that in relation to the statement given by Ms Ooms on 20 June 2012 it was reported to the police 2 days later that according to "*the first findings*" nobody was infected at Steinweg. Her computer was handed over to the police who took a copy of the hard disc and did not, to the best of Steinweg's lawyers' knowledge, revert with any communication that the disc contained any indication of viruses or hacking. Further, inquiries of the police of the MSC Terminal produced confirmation from the IT department that employees were not allowed to perform updates save onto laptops.

MSC's submissions

82. MSC contends that Glencore had failed to make disclosure on a matter that was central to the trial and that that failure was compounded by the provision of evidence which was deliberately misleading. Mr Reynolds-Payne's statement made a glancing reference to Steinweg having been involved in another similar case without making

any reference to all to the contemporaneous hacking or likely hacking of its own computers. Ms Ooms did not give evidence. MSC could not be expected to have realised that this material was available; it was misled into the belief that the theft of the containers came out of the blue when it was, in truth something that Glencore should have anticipated. It is probable that with more time to carry out a proper investigation MSC would uncover more internal documentation. Steinweg, Glencore's agents, should have alerted MSC Belgium to what had occurred as a matter of urgency. Had they done so the overwhelming likelihood is that simple additional security measures would have been taken to prevent the ill effects of the hacking as was in fact done after the incident. The non-disclosure has thus deprived MSC of a potential defence that the loss was solely caused by Steinweg in failing to warn MSC of the hacking. Causation was not the subject of any express pleading because there was no material on the basis of which it could have been. But causation is always an issue.

Glencore's submissions

83. Glencore relies on the fact that, as it contends, MSC's defence never raised any issue about how the pin codes became known by the thieves. Paragraph 11 simply said that no admissions were made as to how the pin codes became known to the people who took the goods, the precautions taken by Steinweg to keep the pin codes safe and secure, or the identity of the people who took the goods. MSC purported to reserve a right to plead further "*in this regard*" after disclosure. It was not pleaded that any loss was not caused by MSC or that any question of contributory negligence arose. Disclosure was thus limited to what was raised on the pleadings. At trial, no issue remained as to how the codes came to be known. No such issue appears in the List of Issues. In consequence there was no evidence directed towards how the codes came to be known; and the judge made no findings on that topic.

84. In MSC's further skeleton argument in relation to grounds 1 and 4 of 14 March 2016 it was said that "***Control of the relevant codes was lost by or within Glencore***". It was that which led to Glencore's application for disclosure referred to in [72] above. After MSC lost its application to the Investigating Magistrate in May 2014 no further application was made until December 2016 although the trial took place in July 2015. Contrary to what Mr Duval suggested in his witness statement the new evidence does not show that there had been no hacking at MSC Belgium's site. In the light of Ms Ooms' complaint to the police it was not at all clear that the Steinweg system was accessed or hacked at any time, let alone prior to the pin codes being accessed in the present case. The evidence at trial was that the codes were generated only when the Release Note was sent by MSC which happened on 22 June: so they could not have been accessed on either 14 or 19 June. There was nothing misleading in the statements of Mr Reynolds-Payne or Mr Gautschi. Nor has any relevant evidence been suppressed. MSC has simply assumed from the fact that Steinweg received one rogue email on 14 June 2012 and two on 19 June 2012 and that MSC Home received a similar one on 20 June 2012 that Steinweg's computer system was hacked in a way

which allowed the PIN codes to be taken, and then complains that Mr Reynolds-Payne in failing to make that assumption gave deliberately misleading evidence.

Conclusion

85. I would refuse permission to amend the notice of appeal and to remit the case for further investigation on the question of causation for a number of reasons.

86. First, I regard it as too late to raise this issue now. It was tolerably clear from an early stage that one of the ways in which the thieves might have gained access to the codes was by hacking someone's computer. I accept that, in the absence of any evidence that there was or might be a leak known to Steinweg, MSC could not plead that that was so. But, if MSC was satisfied from their inquiries that the leak could not have come from any of MSC, MSC Belgium, or MSC Home it would have been open to it to invite the court to infer that it came from Steinweg. However, any potential issue as to whether the leak came from Steinweg, and whether Steinweg knew that there was a risk of that, faded from view. It was never pleaded in terms that control of the codes was lost by or within Glencore or Steinweg (or that Glencore was put to proof that that was not so), although MSC felt able to assert in March 2016, before the Investigating Magistrate ordered disclosure of the police file in December, that control was lost within Glencore. The agreed list of issues did not raise any issue as to how the codes came to be made known or any issue as to causation.

87. Second, whilst I recognise that disclosure does not have to await a specific request, no attempt appears to have been made, in the disclosure process before the trial, to ask whether there was any documentation which indicated that there might be a leak from either Glencore or Steinweg. Further, no renewed application was made to the Magistrate before the trial. Whilst it is impossible to know what the result of such an application would have been there is some reason to suppose it would have succeeded. Inspection was initially refused because "*in the current state of affairs all suspects could not yet be apprehended and interrogated*" such that "*the necessities of the investigation*" meant that the application could not be granted. That state of affairs cannot have applied in December 2016 and may well not have done so in the first half of 2015, by which time over 2 ½ years had elapsed since the loss. At trial Mr Reynolds-Payne was not asked any questions about whether he knew whether anything that had happened at Steinweg might have caused the leak. Nor was the issue taken up or disclosure sought after MSC in March 2016 said that the leak of the pin codes came from Glencore.

88. Third, I am not convinced that the evidence sought to be adduced would have an important influence on the result of the case. It seems to me far from clear that the

thieves got access to the codes from access to a Steinweg computer (as opposed to an MSC Belgium or MSC Home computer or some other means) or that it was apparent to Steinweg that the risk that access to the codes might be so obtained was sufficiently great that a failure to alert MSC Belgium/MSC Home could be said to break the chain of causation. As to the latter Glencore submits that, in circumstances where a Delivery Order would have obliged MSC to deliver to Glencore/Steinweg, delivery against a pin code without any further verification was at MSC's risk; and, when that very risk materialised, it cannot be heard to say that there was any such break. I am disposed to accept that the chain of causation could be regarded as broken by sufficiently egregious action or inaction on Glencore/Steinweg's part but it seems to me doubtful that what is described in Ms Ooms' evidence in relation to June 2012 falls into that category. I also note that MSC Home received on or before 20 June 2012 the same email as Steinweg received on 19 June 2012 and, since that was discussed with Ms Ooms in a telephone call between MSC Home and her, MSC Home must, I infer, have been aware that Steinweg had received the same hacking email.

89. Lastly, I am not persuaded that Mr Reynolds-Payne or Mr Gautschi have been underhand.

90. For these reasons I would not grant permission to adduce the evidence of Jonny Duval or to amend and would dismiss the appeal.

Lord Justice Henderson

91. I agree.

Lord Justice Lewison

92. I also agree.