Neutral Citation Number: [2018] EWHC 629 (Comm)

Case No: CL-2017-000546

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 23 March 2018

Before :

MR JUSTICE ANDREW BAKER

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Between :

SEVYLOR SHIPPING AND TRADING CORP	**Claimant**
- and -	
(1) ALTFADUL COMPANY FOR FOODS, FRUITS & LIVESTOCK **(2) SIAT SOCIETA ITALIANA ASSICURAZIONI E RIASSICURAZIONI S.P.A.**	**Defendants**

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Alistair Schaff QC & Andrew Carruth (instructed by **Horn & Co**) for the **Claimant**
Robert Thomas QC & Thomas Steward (instructed by **Holman Fenwick Willan LLP**) for the **Defendants**

Hearing dates: 15, 16 February 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. This case raises three questions of law concerning claims made by the lawful holder of bills of lading to whom and in whom rights of suit under the contract of carriage contained in or evidenced by the bills of lading have been transferred and vested as if he had been a party to that contract, under s.2(1) of the Carriage of Goods by Sea Act 1992 ('COGSA 1992'). The case came before me for argument as an appeal under s.69 of the Arbitration Act 1996 against a final award of arbitration dated 7 August 2017, with leave to appeal granted by Bryan J on 31 October 2017.

2. The arbitration concerned bills of lading dated 4 January 2014 by which the master of the claimant's refrigerated cargo ship *Baltic Strait* acknowledged shipment at Guayaquil, Ecuador, in apparent good order and condition of 249,250 boxes of fresh bananas for carriage to and discharge in Libya. The cargo deteriorated during the carriage and was discharged at Tripoli in that damaged condition between 28 January and 11 February 2014. The first defendant ('Altfadul') was named as consignee in the bills of lading and received the cargo in its damaged state at Tripoli.

3. The arbitrators, Messrs Martin-Clark, Young QC and Rayfield, found in their award that the claimant bill of lading carrier was liable under the terms of the bills of lading for the damage to the cargo. There is no challenge to that part of the award. The arbitrators valued the damage to the cargo, measuring it as the difference between the value of the cargo as in fact discharged and its value had it been sound on arrival, at US$4,567,351.13. There is no challenge to that part of the award either.

4. The arbitrators further found that Altfadul "*were at all material times (and certainly were after the resolution of the disputed rejection) the lawful holders of the Bills of Lading and accordingly had … relevant rights of suit under section 2(1) [of COGSA 1992]*". There was some debate about the precise effect of that finding, if it matters to know when Altfadul became lawful holder of the bills of lading. There was however no dispute but that Altfadul was correctly held by the arbitrators to have contractual title to sue the claimant on the bills of lading under s.2(1) of COGSA 1992, subject to the assignments to which I refer below.

5. It appears from the award that on 30 January 2014, Altfadul purported to reject the cargo, under the contract pursuant to which it had paid its seller for it, and claimed a refund of the price paid. The seller, Co.Ma.Co. S.p.A. ('CoMaCo'), was also the voyage charterer of the vessel under a voyage charter dated 14 December 2013 concluded between it and the claimant on the Gencon form with additional clauses. The bills of lading were on the Congenbill form issued for use with the Gencon form of charter. They referred to and incorporated the terms and conditions, liberties and exceptions of the voyage charter, including its arbitration clause. Hence the arbitrators' jurisdiction.

6. In due course – the award does not say when – CoMaCo agreed a credit of US$2,586,105.09 in favour of Altfadul, to be spread over three subsequent shipments. The arbitrators held that this was by way of settlement of a dispute over the validity of Altfadul's purported rejection so as to preclude or reverse that rejection. Hence the arbitrators' reference to a resolution of a disputed rejection. The arbitrators also found

that the amount of this settlement credit was almost exactly the same as an amount paid under the cargo insurance on the consignment "*which apparently could not be made directly to Altfadul in Libya*". That amount was just US$0.16 less, namely US$2,586,104.93.

7. The second defendant ('SIAT') is the well-known Italian insurer. It seems likely that SIAT was the cargo insurer, at the instance of CoMaCo, although the award does not say so. Its relevant capacity, however, is as the effective claimant in the arbitration which it joined following an assignment to it by CoMaCo on 6 November 2014 of various rights. The rights assigned included Altfadul's rights under the bills of lading as assigned by Altfadul to CoMaCo by an assignment dated 3 November 2014.

8. Though SIAT is therefore the party entitled to payment of the sum awarded by the arbitrators, that entitlement is as assignee of Altfadul's rights. This appeal therefore concerns the nature and extent of those rights. The sum awarded by the arbitrators is the full value of the cargo damage, US$4,567,351.13, plus interest, with jurisdiction reserved in relation to costs. The arbitrators rejected the claimant's contention that in assessing damages credit had to be given for the US$2,586,105.09 promised by CoMaCo to Altfadul. That is the part of the award challenged on appeal.

Questions Arising

9. The defendants' first answer to the claimant's contention before the arbitrators was that the sum promised by CoMaCo was or represented an insurance recovery so as to be *res inter alios acta*. The arbitrators dismissed that answer, concluding that, despite the extreme similarity in amounts, the credit promised by CoMaCo was by way of settlement of the sale contract dispute and was not an insurance payment. That conclusion cannot now be reopened.

10. The defendants' second answer to the claimant's contention on the measure of damages was that Altfadul could recover CoMaCo's loss, incurred by way of the credit promised to Altfadul, by virtue of s.2(4) of COGSA 1992. The arbitrators accepted that answer. Leave was granted to appeal against that conclusion upon the following two questions of law:

    i) Whether s.2(4) of COGSA 1992 operates where rights of suit under the bill of lading contract have not previously been vested in the party which has suffered loss, or whether it only operates where rights of suit were previously vested in that party but it has lost them by virtue of the operation of s.2(1) of the Act;

    ii) Where the charterers of a vessel suffer loss and damage but no longer pursue a claim against the carrier under the charter party, can the lawful holder of the bill of lading claim for the charterers' loss under the bill of lading contract by virtue of s.2(4) of COGSA 1992, or can the lawful holder of the bill of lading only claim under that provision for losses suffered by parties which have no rights of suit under any relevant contract of carriage?

11. In relation to Question (ii), the reference to charterers no longer pursuing a claim was Bryan J's refinement to the question proposed by the claimant's application for leave which had referred to charterers not bringing a claim. In the course of argument, it became apparent that the charterers' bringing or not bringing, pursuing or not

pursuing, their own claim was a red herring, at all events absent any suggestion that the charterers' loss had been compensated by the bill of lading carrier as the result of their making a claim. It also became apparent that the argument concerned exclusively head charterers, i.e. those chartering directly from the bill of lading carrier. Finally, the second half of Question (ii) seems to me unnecessary. The real question, therefore, and the further refined version of Question (ii) that I shall consider, is simply this:

ii) Whether the lawful holder of the bill of lading can claim by virtue of s.2(4) of COGSA 1992 loss suffered by the charterer of the vessel in respect of the bill of lading voyage whose charterparty was with the bill of lading carrier.

12. The third question of law arises by virtue of an argument by the defendants that the award is correct in law and so should be upheld even if it is wrong about s.2(4) of COGSA 1992. The defendants contend that at common law Altfadul was entitled to damages measured as the full value of the damage to the cargo irrespective of any recovery or entitlement to recover pursuant to its contractual arrangements for the sale and purchase of the cargo. That third answer to the claimant's contention on the measure of damages is not dealt with in the award. Mr Schaff QC for the claimant accepted, rightly, that if it raised only a point of law capable of being answered in the defendants' favour on the findings of fact in the award as it stands, then it was open to Mr Thomas QC for the defendants to seek to resist the appeal by reference to it as he did. Thus, the third question of law to be addressed is:

iii) Whether on the facts found in the award, Altfadul (and therefore SIAT) was entitled to damages equal to the full value of the cargo damage irrespective of any recovery or entitlement to recover from its seller, CoMaCo.

13. Mr Thomas QC contended, if he needed to, that if it were not possible to answer Question (iii) in the defendants' favour, as it stands and as a matter of law, then the award should be remitted to the arbitrators because, he said, the common law arguments were put to the arbitrators separately from and in addition to the insurance proceeds argument (paragraph 9 above) but were not addressed by them in the award. He also contended, as a final alternative, that if necessary the award should be remitted for reconsideration of the arbitrators' conclusion on the insurance proceeds argument on the basis, he said, that the arbitrators had not dealt with the defendants' case that the credit promised to Altfadul by CoMaCo had in fact been the price paid by CoMaCo to Altfadul for the assignment of Altfadul's rights under the bills of lading that were then assigned further to SIAT.

14. The extent to which the respondent to an appeal under s.69 of the 1996 Act may rely at the final hearing of the appeal, leave having been granted, upon points not dealt with by the arbitrators or points dealt with incorrectly by the arbitrators (so the respondent submits) has been considered a number of times: see *The Vigour, Icon Navigation Corp v Sinochem International Petroleum (Bahamas) Co Ltd* [2002] EWHC 2812 (Comm), [2003] 2 CLC 325; *The Mary Nour, CTI Group Inc v Transclear SA* [2007] EWHC 2340 (Comm), [2008] 1 Lloyd's Rep 250; *The Mahakam, Parbulk II A/S v Heritage Maritime Ltd SA* [2011] EWHC 2917 (Comm), [2012] 1 Lloyd's Rep 87; *The Dimitris L, Navios International Inc v Sangamon Transportation Group* [2012] EWHC 166 (Comm), [2012] 1 Lloyd's Rep 493; *Ramburs Inc v Agrifert SA* [2015] EWHC 3548 (Comm), [2016] Bus LR 135.

15. It is not necessary for the purposes of this judgment to revisit those decisions at any length. Suffice it to say they amply demonstrate that the further arguments summarised in paragraph 13 above are not open to Mr Thomas QC on this hearing. By contrast, as accepted by Mr Schaff QC, if the answer to Question (iii), as I have formulated it, is a simple 'Yes', as a matter of law, then indeed this appeal can and should be dismissed, and the award upheld, even if the arbitrators were wrong in law concerning s.2(4) of COGSA 1992 and even though they did not address Question (iii) in their award. That is so whether or not a defence of the award by reference to Question (iii) was put up in a Respondent's Notice as a ground for resisting leave to appeal (though as it happens, it was).

16. For convenience – and not intending by it to beg any issue – I shall refer to the award of US$4,567,351.13 as an award of 'full damages' reflecting the notion that it was the monetary value of the 'full loss' suffered by the cargo, however, whenever and by whomever economic loss was felt as a result. Since they founded themselves upon s.2(4) of COGSA 1992, the basis upon which the arbitrators awarded full damages was that:

    i) Altfadul's own recoverable loss was US$1,981,246.04, since in a claim in respect only of its own loss it would have to give credit for the US$2,586,105.09 promised to it by CoMaCo.

    ii) However, under s.2(4) Altfadul could also claim loss suffered by CoMaCo and the US$2,586,105.09 it promised Altfadul represented such a loss.

17. By reference to Questions (i) and (ii), the claimant attacks the second half of that logic. By reference to Question (iii), the defendants attack the first half. Thus, logically Question (iii) is the prior question. If the defendants are right on it, then the award and the argument on Questions (i) and (ii) proceed upon a false premise. I prefer therefore to take Question (iii) first.

Question (iii)

18. Mr Thomas QC advanced as a proposition of English law that a bill of lading holder suing on the bill of lading in contract may recover full damages despite an earlier recovery from an intermediate seller. To be clear, the reference to earlier recovery is to a recovery prior to the date on which damages are awarded. As a matter of law, therefore, he contended, Altfadul was entitled to recover full damages without reference to the US$2,586,105.09 promised by CoMaCo as Altfadul's seller by way of settlement of a sale contract dispute between them in relation to the damage to the cargo. He cited *R&W Paul Ltd v National Steamship Co Ltd* (1937) 59 Ll L Rep 28 as direct authority for his proposition of law and said that support for it is also to be found in *The Aramis* [1989] 1 Lloyd's Rep 213, *The Athenian Harmony* [1998] 2 Lloyd's Rep 410, *The Sanix Ace* [1987] 1 Lloyd's Rep 465, *Scrutton on Charterparties* 23rd Ed., Article 212, *Voyage Charters* 4th Ed., para. 18.91, and the Law Commission Report, "*Rights of Suit in Respect of Carriage of Goods by Sea*" (Law Com No. 196 of March 1991) that led to COGSA 1992.

19. Mr Schaff QC did not address Question (iii) on its merits in his skeleton argument. That is a little surprising: when the claimant sought leave to appeal, the defendants filed a Respondent's Notice resisting leave supported by a skeleton argument squarely

taking the point and the claimant addressed it in a reply skeleton argument settled by Mr Carruth; as I have said, Mr Schaff QC rightly accepted that if a s.69 appeal for which leave has been granted is defended by an argument of law that arises and is capable of determination on the facts found in the award, that argument is open to the respondent at the final hearing of the appeal; and there was nothing that might have suggested, after leave was granted, that the defendants would not pursue Question (iii).

20. The formulation by Mr Carruth of the claimant's response to the point was tailored to the fact that, as raised under the Respondent's Notice, it was expressed to be a challenge to the arbitrators' conclusion that the CoMaCo credit was not *res inter alios acta* because it was a sale contract settlement rather than an insurance payment. There is a manifest error in the arbitrators' expression of that conclusion, which was that "*All in all we do not think the payment [by CoMaCo] should properly be regarded as res inter alios acta as proposed by the Owners [i.e. the claimant]*". It was of course the defendants, not the claimant, who were saying *res inter alios acta*.

21. Subject to correcting for that obvious error, with respect I agree with the approach adopted by the Respondent's Notice, namely that the proposition advanced by reference to *R&W Paul* challenges that conclusion, because by raising Question (iii) the defendants challenge the idea that a finding of *res inter alios acta* required CoMaCo's promised credit to have been an insurance payment. But that does not mean, as Mr Carruth contended in his skeleton, that the defendants cannot take the point, they having not sought leave to appeal. There was nothing for the defendants to appeal – they had been awarded the full damages they claimed. It would have been open to Bryan J, if satisfied on the papers that the defendants were correct on Question (iii), to refuse the claimant leave to appeal because of it. His not refusing leave did not amount to a determination of Question (iii) against the defendants on its merits, however, and would not have done so even if he had adverted to the point in his reasons for giving leave, which he did not.

22. Going back to Mr Carruth's skeleton argument, then, the claimant's response on the substance of Question (iii) was to submit that:

    i) *R&W Paul* is doubtful authority at best because it was based upon a contractual title to sue under the Bills of Lading Act 1855 rather than COGSA 1992.

    ii) There have been developments in the law of *res inter alios acta* since 1937. *Swynson Ltd v Lowick Rose LLP (in liquidation)* [2017] UKSC 32, [2017] 2 WLR 1161 was cited, but that gnomic observation was not otherwise explained or elaborated.

23. Thus, it was not said that *R&W Paul* was not authority for the proposition contended for by the defendants, only that (i) it was not authority for that proposition under COGSA 1992 and (ii) (but very enigmatically) it might somehow not now survive as good law after *Swynson Ltd*. As to (i), there is no difference between COGSA 1992 and the old Bills of Lading Act that might be material to the decision in *R&W Paul*. As to (ii), there is nothing in *Swynson Ltd* to cast doubt on that decision.

24. In argument, Mr Schaff QC answered Question (iii) differently, contending that as explained by *The Sanix Ace*, which he said I should take as the leading modern authority and analysis, the doctrine of full recovery in respect of damaged cargo was limited to cases where the claimant owned or was entitled to immediate possession of the cargo when it was damaged. That answer, if correct, did not make it impossible in principle for Altfadul to have had an entitlement to full damages. However, Mr Schaff argued, it meant that the award could only be upheld by reference to Question (iii), i.e. Question (iii) could only be answered with an unqualified 'Yes', as a matter of law, if the award found that Altfadul was the cargo owner or entitled to possession when the cargo suffered damage. He submitted that there was no such finding.

25. In my judgment, Mr Thomas QC's proposition, founded upon *R&W Paul*, is sound for bill of lading holders who receive cargo in damaged condition from the ship and who then own, or later come to own, the damaged cargo pursuant to sale arrangements to which the carrier is not party. How much more widely the proposition applies I do not need to decide. What I have just stated is sufficient for the present case because on the facts found by the arbitrators, SIAT was pursuing as assignee the rights of Altfadul as a bill of lading holder who received the damaged bananas from the ship and either owned them when they were discharged or (possibly) from when the sale contract dispute was settled (if later). The latter possibility arises if (which cannot be judged from the findings in the award) the rejection of the cargo by Altfadul on 30 January 2014 was effective to re-vest title in CoMaCo, in which case that will have been reversed only by the settlement of the sale contract dispute.

26. As Mr Thomas QC neatly put it, and in my view correctly put it, the logic is simple: in breach of the bill of lading contract, the bananas were discharged in badly damaged condition; if they had been discharged in sound condition, as they should have been, Altfadul would have had bananas worth more than the damaged bananas it actually got, to the tune of US$4,567,351.13; Altfadul therefore suffered that full loss; English law says that is so irrespective of the price Altfadul paid CoMaCo for the bananas (whether gross, or net of the credit agreed against future shipments because of the damage).

27. In *R&W Paul*, the plaintiff sued the bill of lading carrier alleging that it had contractual title to sue on the bills either under the Bills of Lading Act 1855 as indorsees to whom property in the cargo had passed upon or by reason of the indorsement, or under an implied contract on the terms of the bills by reason of taking delivery against presentation of the bills at Avonmouth. The cargo was yellow maize, 7,176 m.t. in bulk plus 364 m.t. in bags, shipped in Buenos Aires. A material proportion of the cargo was discharged in a heat-damaged condition. When the cargo was discharged from the vessel, it was the plaintiff's cargo and it was discharged for their account as purchasers of it. The plaintiff recovered compensation from its seller through arbitration in respect of the cargo damage. The defendant conceded that if the plaintiff was entitled to full damages from the shipowner on the bill of lading claim it would hold on trust for the seller to that extent. But that did not found or affect the decision on the point of Goddard J (as he was then), which was this, (1937) 59 Ll L Rep at 30 rhc and 33 lhc:

> *I do not think that that matter affects the plaintiff's right to sue at all; if they have a right to sue the ship, what they have to do with the damages by reason of some*

other transaction they may have entered into does not seem to me to affect the case at all.

and

I do not think that Mr. Mocatta [for the shipowner] has seriously contended that the fact that Messrs. Paul had been compensated by Messrs. Broster, who were merely intermediate purchasers, really affected the question at all; it would only affect the ultimate destination of the damages, because I have no doubt that Messrs. Paul will have to account to Messrs. Broster. Under those circumstances, it seems to me it is enough to say that Messrs. Paul had a title to sue for damages in this case by virtue of the Bills of Lading Act. Also, it seems to me that they must have a right to sue by virtue of the implied contract following on the decision in Brandt's case, they being the people who, it is conceded, paid the shipowner, and took delivery from the shipowner.

(The reference to *Brandt's case* is a reference to *Brandt v Liverpool, Brazil & River Plate Steam Navigation Co Ltd* [1924] 1 KB 575.)

28. There was consideration in *R&W Paul* of when and how the plaintiff acquired property in the cargo, because that was part of establishing title to sue in contract as bill of lading indorsee under the 1855 Act. That is not an enquiry required by COGSA 1992 as part of proving title to sue. But there was no consideration of whether that meant the plaintiff owned the cargo when it suffered damage. The basis of the decision in *R&W Paul* as to full damages is not that the plaintiff owned the cargo when it suffered damage. It is, rather, that the plaintiff came to own, and took from the ship, damaged cargo, because of the defendant shipowner's breach of the bill of lading contract, and that was sufficient in law for full damages. Exactly as Mr Thomas QC put it, the plaintiff bill of lading holder suing on the bill of lading in contract was entitled to full damages despite an earlier recovery from an intermediate seller.

29. That understanding of *R&W Paul* coincides with the analysis of Hobhouse J (as he was then) in *The Sanix Ace*. He thought the carrier's argument that there should be nominal damages in the case before him a "*surprising contention*" (at 468 lhc), and explained at 470 rhc that:

Yet another aspect of the law with which the novel and erroneous proposition of the carriers before me comes into conflict is the established law about remoteness of damages and mitigation in relation to maritime contracts. As will be apparent from the article in Scrutton to which I have already referred [19th Ed., Art.194; now 23rd Ed., Art.212] and the cases there cited [one of which was and is <u>R&W Paul</u>], the provisions of contracts of sale and purchase to which the goods owner is a party are, in the absence of special circumstances, res inter alios acta which are not to be taken into account in assessing the damages to be paid to the goods owner. (Of course, at an earlier stage, when the plaintiff is seeking to establish his title to sue, he does need to establish his ownership of the goods and this may involve an examination of the contracts of sale and purchase to which he was a party.) ... The carriers of goods are not concerned, in the absence of special circumstances, with rights of indemnity or rights to recover or recoup the price, or rights to damages as between goods owners and mercantile parties with whom they may be in contractual relations. Such considerations are too remote.

30. In my view, the decision in *R&W Paul* was not confined by *The Sanix Ace* to a case where the claimant was the owner of the cargo (or entitled to possession) when it suffered damage. *The Sanix Ace* was such a case. That mattered on the facts because in that case a voyage charterer claimed full damages under the voyage charter although (a) it was not the receiver or end purchaser of the cargo and (b) it had been paid in full by the receivers and end purchasers to whom it had sold the cargo. Those receivers had to pay in full despite the damage because the sale contracts passed the risk of cargo damage to them as from shipment, but passed property to them only after the cargo had been damaged. Hobhouse J upheld an award of full damages in arbitration because even though the claimant charterer did not feel loss by receiving damaged rather than sound goods, it had owned the cargo when it suffered damage and that sufficed.

31. As I say, that does not confine the decision in *R&W Paul*; rather it extends it, or at least it confirms that the underlying logic is not confined to the case in which the contractual claimant is the receiver and end purchaser who gets damaged goods rather than sound goods due to the carrier's breach. Hobhouse J considered and relied on cases about claims in tort for negligence, such as *The Charlotte* [1908] P 206 (a collision case) and *The Aliakmon* [1986] AC 785 (cargo damage). In relation to torts, English law has developed by reference to interests in goods when they suffer damage. Accordingly, tort cases were relevant to the case before Hobhouse J, though it was a breach of contract case, because the claimant could only say it had suffered loss by reference to a logic derived from its interest in the damaged goods when they suffered damage.

32. In my judgment, there is nothing in *The Sanix Ace* generally, or in Hobhouse J's discussion of *R&W Paul* in particular, to support the conclusion that the bill of lading holder who, as receiver and end purchaser, takes delivery of cargo damaged by reason of a breach of the bill of lading contract by the carrier, must give credit in a claim for full damages against the carrier under the bill of lading for a recovery made from his seller. To the contrary, I think Hobhouse J took *R&W Paul* at face value and, as I have said, it was founded upon the plaintiff's having been the receiver and end purchaser who therefore got damaged goods from the ship and not upon ownership of the goods when they suffered damage. In my judgment, far from *The Sanix Ace* supporting Mr Schaff QC's argument before me, that argument in substance recycled the 'surprising contention' or 'novel and erroneous proposition' advanced by the carriers and rejected by Hobhouse J in that case.

33. In a manner characteristic of the common law, there is a pleasing coherence or symmetry between *R&W Paul* and *The Sanix Ace*, though half a century apart, as regards damages entitlements under contracts for the carriage of goods by sea. Assuming title to sue in contract, the carrier is liable to full damages if sued by the receiver who, by reason of the carrier's breach, receives damaged rather than sound goods (*R&W Paul*) or if sued by a claimant who did not receive the damaged goods but who owned the goods when they were damaged by the carrier's breach (*The Sanix Ace*), in each case irrespective of how financial loss reflecting or resulting from the cargo damage is or comes to be distributed across the sale of goods chain (*ibid*). The former sues as the owner of the damaged goods since but for the breach he would have been the owner of undamaged goods; the latter sues as the owner whose sound goods were damaged. In either case, it is the property in the goods that carries the

right to recover full damages (to echo Hobhouse J at 468 rhc) – the receiver's property in damaged goods that he should have received undamaged, the *Sanix Ace* claimant's property in the undamaged goods when they were damaged.

34. It is sufficient to answer Question (iii) in favour of the defendants that the claimant has no answer to the application in this case of the decision in *R&W Paul*, which has stood for over 80 years. It would not be appropriate for me to depart from that decision now even if I thought it may have been wrong. As it is: firstly, I entertain no such doubt; secondly, I agree with Mr Thomas QC that its correctness has been endorsed or assumed by *Scrutton* (see currently Article 212 at n.102 in the 23rd Ed.), the Court of Appeal, *obiter*, in *The Aramis* ([1989] 1 Lloyds Rep 213, at 226 *per* Bingham LJ (as he was then), with whom Stuart-Smith and Pill LJJ agreed), Colman J in *The Athenian Harmony* [1998] 2 Lloyd's Rep 410 at 416 rhc, and the Law Commission Report at para. 2.27; thirdly, *R&W Paul* as thus endorsed in *The Aramis* is treated as good law for Mr Thomas QC's proposition by *Palmer on Bailment*, 3rd Ed., para. 2-024, f.n.142. (Mr Thomas QC is also right that *R&W Paul* is taken to be good law by *Voyage Charters* at para. 18.91; but since Mr Young QC is a co-author of *Voyage Charters* and one of the arbitrators in the present case, it would not be right to place weight on that.)

35. For all those reasons, in my judgment the answer to Question (iii) is 'Yes', as a matter of law, and this appeal will be dismissed.

36. Mr Schaff QC submitted that if the appeal were to fail in this way that would be harsh on the claimant. This was a forensic comment on the way this case developed, rather than a submission that the law is unjust if correctly stated by Mr Thomas QC. It was thus irrelevant to the legal analysis. Whether it is even fair comment can only be assessed by looking at material extrinsic to the award, which is impermissible on the final hearing of a s.69 appeal. Since the submission was made, and I was in fact made aware of the background despite its irrelevance, I will say that I disagree with the comment in any event. The suggestion that full damages were not available because of the credit promised by CoMaCo was made for the first time on the eve of the final hearing of the arbitration. The arbitrators rejected it by reference to s.2(4) of COGSA 1992, which it seems they were the first to raise, having not had the benefit, as I mention below, of the full argument Mr Schaff QC devoted to Question (ii) on appeal. Though with the benefit of that much fuller argument I conclude below that the arbitrators erred in law as to s.2(4), there is nothing harsh about upholding their award upon a different, but sound, answer in law to the claimant's last-minute point. All the more so when, as it happens, the different, but sound, legal answer was proposed to the arbitrators by the defendants, over and above their adoption of the arbitrators' suggestion that s.2(4) sufficed.

COGSA 1992

37. To introduce Questions (i) and (ii), I first set out in full COGSA 1992, s.2:

2. Rights under shipping documents.

(1) Subject to the following provisions of this section, a person who becomes-

(a) the lawful holder of a bill of lading;

(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill-

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order-

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any documents to which this Act applies-

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives-

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any documents to which this Act applies, from the previous operation of that subsection in relation to that document;

> but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

38. The statutory concept of 'holder' under COGSA 1992 is confined to 'bills of lading' as defined, that is to say transferable bills (see s.1 and s.5(1)/(2) of the Act). At one point, Mr Thomas QC submitted, given the finding in the award that the bills of lading named Altfadul as consignee, that they were straight consigned bills. But under COGSA 1992, straight consigned bills are not 'bills of lading', they are 'sea waybills'. Taking the bills in this case to have been sea waybills would make a nonsense of the arbitrators' later finding that Altfadul was at all material times the lawful holder under the Act. More precisely, as I noted at the outset, their finding was that Altfadul was the lawful holder "*at all material times (and certainly … after the resolution of the disputed rejection)*".

39. Putting those findings together, the purport of the award is that: Altfadul was named as consignee in transferable bills; as such, Altfadul was the holder of the bills of lading when in possession of them (COGSA 1992, s.5(2)(a)); and Altfadul had possession of the bills at all material times; if, contrary to that view, Altfadul's purported or attempted rejection of the cargo cast doubt over its being in possession of the bills, then on any view that doubt was removed when the disputed rejection was resolved.

40. In relation to the proper construction of s.2(4) of COGSA 1992, as raised by Questions (i) and (ii), both sides referred me to extracts from *Bennion on Statutory Interpretation*, 7th Ed., as to the principles to be applied. It was common ground that in interpreting the statute, the aim is to establish objectively the intention of the legislature, the primary tool for that task being the text of the legislation as enacted. *Prima facie*, the meaning of that text is to be taken to be that which corresponds to the plain or literal meaning conveyed by the words used given their ordinary meaning as words and the grammar of the provision being construed. That said, any given provision, word or phrase is not to be construed in isolation but in the context of the surrounding provisions, words or phrases, and in the light of any discernible legislative purpose, at all events where it is clear that the legislation has been enacted to remedy a particular mischief.

41. The legislature is presumed to be informed as to, and to have legislated in the light of, any rules of the common law in the field in which it has chosen to legislate. Further, it is an established principle of statutory interpretation that if a legislative term has been the subject of judicial ruling in the same or similar context to that in which it is used again by the legislature, it may be presumed the legislature intended it again to bear the judicially determined meaning (see *Lowsley v Forbes* [1999] 1 AC 329 at 340F-G, *per* Lord Lloyd of Berwick).

42. That last principle (the 'consistency presumption') is of importance in relation to Question (ii). The Bills of Lading Act 1855 was the legislative predecessor to COGSA 1992, repealed and replaced by the new Act. As I outline below, the primary purpose of COGSA 1992 was to remedy the perceived inadequacy of the 1855 Act as a solution to the strictness of privity of contract under the common law in the field of

carriage of goods by sea. The 1855 Act required property in the goods to pass to the bill of lading consignee or indorsee "*upon or by reason of*" the consignment or indorsement if by the Statute the consignee or indorsee was to acquire contractual rights under the bill. The essential legislative aim of COGSA 1992 was to remove the link between the passing of property and the contractual title to sue on the bill.

43. For the immediate point, however, what matters is that s.1 of the 1855 Act expressed the effect of that Act in these terms, namely that where it operated, the consignee or indorsee respectively "*shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.*" The effect of COGSA 1992, where it operates, is that the holder or other person falling with s.2(1)(a)-(c) "*shall … have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract*".

44. In the hands of a voyage charterer whose charter is with the bill of lading carrier, a bill of lading is a receipt only and his contract with the carrier is still the charter (the 'mere receipt rule'), unless the charter provides otherwise or particular facts lead to a different conclusion, e.g. if the charterer transacts upon the basis of the bill of lading independently of the charter as in *Calcutta S.S. Co Ltd v Andrew Weir & Co* [1910] 1 KB 759, as explained in *The Dunelmia* [1970] 1 QB 289. The mere receipt rule was unaffected by the operation of the Bills of Lading Act 1855 if the charterer was the indorsee of the bill to whom property passed by reason of the indorsement, that being the point decided by the Court of Appeal in *The Dunelmia*. Though, to use the statutory language, the 1855 Act in such a case operated to transfer to and vest in the charterer all rights of suit under the bill of lading contract as if it had been made with him, the mere receipt rule still applied.

45. In my judgment, the same is true for s.2(1) of COGSA 1992, the successor provision to the 1855 Act enacted in materially identical statutory language. The consistency presumption applies. There is nothing in the other provisions of COGSA 1992 suggesting an intention to depart from the judicially determined meaning of the language in question. The Law Commission Report is explicit in the view that nothing in COGSA 1992 was intended to require *The Dunelmia* to be decided differently under it (Report, para.2.53). I reject Mr Thomas QC's submission, advanced if he needed it, that the mere receipt rule does not now apply where the charterer is the lawful holder in whom rights of suit are vested under s.2(1) of COGSA 1992. The statutory vesting of those rights of suit in him does not entitle a charterer to whom the mere receipt rule applies to sue the carrier under the bill of lading for losses suffered by him. His entitlement to recover those losses from the carrier is governed by the charter alone.

46. The parties agreed that, so long of course as any use made of it conforms to the well-known principles of statutory construction I have mentioned, the Law Commission Report was admissible in considering the proper construction of COGSA 1992. In particular, it was common ground that, Parliament having adopted the recommendations of the Report and enacted the law proposed by the Law Commission, the Report may be treated as good evidence of the legislative purpose of the Act by way of identifying the mischief or mischiefs intended to be remedied by it.

47. In that regard, the Law Commission Report is clear. The requirement of the 1855 Act that property pass to the consignee named in the bill of lading, upon or by reason of the consignment of the goods, or to the indorsee of the bill, upon or by reason of the indorsement, was regarded as a serious defect of English law defeating the legitimate expectations of those involved in the sale of goods carried by sea. A buyer might carry the risk of loss of or damage to the goods that occurred during the voyage yet be unable to sue in contract on the bill. Financiers taking bills of lading as security were treated as pledgees who did not acquire the general property in the goods to satisfy the 1855 Act. The legislative policy recommended by the Law Commission and adopted by Parliament was "*simply to allow the lawful holder of a bill of lading to sue the carrier in contract for loss [of] or damage to the goods covered by the bill, irrespective of whether the property in the goods passes upon or by reason of the consignment or indorsement*" (para.2.21), so "*there [will] no longer be a link between the transfer of contractual rights and the passing of property*" (para.2.22).

48. A primary aim was to increase the cases in which the party bearing the loss of or damage to the goods would also be the party with the contractual title to sue under the statute. But the reform adopted was not to fix title to sue in contract by reference to the incidence of loss; and the Law Commission recognised that "*Transferring rights of suit to the holder of a bill of lading, regardless of the passage of property in the goods to which the bill relates, may give rights of action to those who have actually suffered no loss*" (para.2.24). They regarded it as "*unsatisfactory that a sea carrier should be able to question the entitlement to sue of the consignee or indorsee by raising a technical point that the loss may ultimately fall on someone else*" (para.2.25). This concern is the origin of s.2(4) – since the general rule of English law is that the claimant who has suffered no loss himself cannot recover substantial damages, "*clause 2(4) of the Bill provides that where a person with an interest or right in respect of goods to which the document relates is not the holder of the bill of lading, the holder shall be entitled to exercise the statutory rights of suit to the same extent that they could have been exercised if they had been vested in the person for whose benefit they are exercised*" (para.2.27).

49. The position of the charterer whose charter is with the bill of lading carrier was given particular attention by the Law Commission at paras.2.51-2.55 of the Report. In short, the Report recognised that particular issues arise where a bill of lading passes through the hands of such a charterer (e.g. the point decided in *The Dunelmia*) and made clear that it was not intended by the new Act to change how those issues would be determined.

50. Finally, before I turn to Questions (i) and (ii) in turn, I should introduce the abbreviations I shall use. Each Question concerns s.2(4) of COGSA 1992, so each requires on any view that:

    i) There were goods to which a shipping document the subject of the Act related (see s.2(4)(a)). That was plainly the case here.

    ii) The acts or omissions constituting a breach of the contract of carriage contained in or evidenced by that shipping document (the careful phrasing is deliberate, see paragraph 61 below) caused loss or damage to be sustained by a party ('L') with an "*interest or right in or in relation to [the] goods*" (see s.2(4)(a) again). No point was raised in relation to that requirement here, either

generally or as to whether L's interest or right in or in relation to the goods must exist when it suffers loss. The argument proceeded on the basis that the credit promised by CoMaCo to Altfadul was loss suffered by CoMaCo, and was caused by the claimant's failure carefully to keep and carry the bananas (etc), and that CoMaCo was a party with a relevant interest or right in or in relation to the goods.

iii) Rights of suit in respect of that breach were vested by s.2(1) in another party ('H') (see s.2(4)(b)). Here, that was Altfadul (from whom SIAT as assignee then had the benefit of those rights).

51. The arbitrators held that (i) what I have just said was sufficient for s.2(4) to operate, so that H was "*entitled to exercise [the] rights [vested in it by s.2(1)] for the benefit of [L] to the same extent as they could have been exercised if they had been vested in [L]*" and (ii) if s.2(1) had vested rights in CoMaCo, it could have recovered its relevant loss by exercise of those rights. The first of those conclusions is challenged by Question (i); the second by Question (ii).

Question (i)

52. The argument for the claimant under Question (i) was that what I have set out in paragraph 50 above was insufficient for s.2(4) to operate. There was said to be this further requirement, namely that the rights of suit vested in H must have been previously vested in L but lost by it through the operation of s.2(1).

53. That further requirement is not stated in terms by s.2(4) and to my mind there is nothing in the statutory language in fact used that suggests it. Though it was presented as an argument that an additional requirement was conveyed by particular words, as I shall explain below, in reality this was a submission that s.2(4) has a specific and narrow subject matter, namely loss suffered by those who have lost rights of suit by operation of s.2(1). If s.2(4) is indeed so narrow, then (as Mr Schaff QC fairly recognised) it has solved only half the problem it was meant to address, namely the case where loss is suffered 'above' H in the chain of dealings with the bill of lading, not the other half, namely where loss is suffered 'below' H in that chain.

54. If it concerned only cases where loss was suffered by parties who had had but because of s.2(1) had lost their own rights of suit, it seems to me extraordinary that s.2(4) was not drafted in such terms, or by reference to s.2(5) which deals expressly with the loss of rights resulting from the operation of s.2(1). It would also be an oddity that the holder of a bill of lading could sue for loss suffered by an original party to the bill, since that party's rights are extinguished by a s.2(1) transfer (see s.2(5)(a)), but the holder of a sea waybill could not, since a s.2(1) transfer does not extinguish the rights of an original party to a sea waybill (see the closing words of s.2(5)).

55. Mr Schaff QC nonetheless contended that s.2(4) was indeed narrowed to cases in which L had had rights of suit but had lost them by virtue of s.2(1) because of the syntax. The sub-section applies where L has suffered his loss, "***but*** *[s.2(1)] operates …* ***so that*** *rights of suit … are vested in [H]*" (Mr Schaff's emphasis). That, he submitted, conveys that s.2(4) is concerned only with the case where s.2(1) is the problem in the sense that it divested L of what would otherwise have been his own ability to sue for his loss. In my judgment, that puts upon the "*but … so that*"

construct a weight it does not bear and finds in it a specificity it does not convey and that is not necessary to make sense of it.

56. Whenever the incidence of loss is dislocated from the incidence of title to sue under s.2(1), s.2(1) is the problem for L (as regards claiming for that loss in contract under the bill). It has not provided for him to have title to sue just as much where that is so *simpliciter*, i.e. where s.2(1) just did not give him title to sue, as in the particular instance where that is so because he once had title but s.2(1) took it away. Indeed, I agree with *Carver on Bills of Lading*, 4th Ed. at para.5-089, that the most obvious case requiring "*the assumption (or fiction) that [L] is a party to the contract of carriage (when actually he is not)*", that is to say the assumption or fiction created by s.2(4) if it operates, is "*the case where [L] is not and never has been a party to the contract. This would be the position where (assuming the other requirements of s.2(4) to have been satisfied) [L] was a buyer of goods covered by a bill of lading, of which [H] (the seller) had become the lawful holder, and that bill had not yet been transferred to [L].*"

57. Mr Schaff suggested that *Scrutton on Charterparties*, 23rd Ed. at para.3-019, is to contrary effect, at all events implicitly. The editors there write that:

> *Attaching rights of suit under the contract of carriage to the status of lawful holder of the bill of lading raises the possibility of dislocation of the incidence of loss and the right to sue, resulting as a matter of principle in losses being irrecoverable by the only party entitled to bring suit. Accordingly, s.2(4) of the 1992 Act provides that where a party with any interest in the goods suffers loss or damage by reason of a breach of the contract of carriage, but, by virtue of s.2(1), another party is entitled to sue in respect of that breach, the party in whom s.2(1) has vested the rights of suit is entitled to exercise those rights for the benefit of the party that has suffered the loss and damage to the same extent as they could have been exercised if they had been vested in the loss sustainer.*

Mr Schaff's argument was at best circular because in that passage the learned editors of *Scrutton* simply use a "*but, by virtue of*" construct reflecting the "*but … so that*" construct of s.2(4) itself. In fact, if anything, I think the passage supports the rejection of Mr Schaff's argument. As paraphrased there, the touchstone for s.2(4) to operate is simply that someone other than the loss sustainer is the person with title to sue under s.2(1), and the target of the provision, without limitation or further specificity, is the case where there is a dislocation between the incidence of loss and the incidence of the right to sue.

58. Finally, Mr Schaff suggested that it was illogical, for the case where L is a buyer of goods covered by a bill of lading of which L never becomes the lawful holder if: (a) s.2(4) applies where rights of suit on the bill are vested in H by s.2(1), so that H can recover L's loss on his behalf under s.2(4); yet (b) where s.2(1) has never operated, so that the lawful holder of the bill is the original contracting party (e.g. the shipper, 'S'), s.2(4) does not apply so that S cannot recover L's loss on his behalf under s.2(4). To my mind that is a different issue and does not support, let alone compel, Mr Schaff's suggested interpretation of s.2(4). In *Dunlop v Lambert* (1839) 6 Cl & F 600, as limited and explained in *The Albazero* [1977] AC 774, the common law had tackled the question of S suing for L's loss. COGSA 1992 proceeds on the basis that the common law "*recognised in principle that a consignor of goods could recover*

damages against the carrier where he had entered the contract for the benefit of the ultimate consignee, although not where the consignee had rights under the Bills of Lading Act" (Law Commission Report, para.2.26). There may still be room for debate as to the precise ambit of the rule in *Dunlop v Lambert* as confined by *The Albazero*, but I do not need to resolve any such debate. In my view, the legislature's decision not to intervene in that debate and to leave S's entitlement to sue for L's loss to the common law, does not tell in favour of Mr Schaff's suggested reading of s.2(4), and that is what matters for the present case.

59. For those reasons, in my judgment the arbitrators were right to reject the claimant's submission that s.2(4) of COGSA 1992 required CoMaCo to have had, but by virtue of s.2(1) to have lost, rights of suit under the bill of lading. If the appeal had not failed because of Question (iii), nonetheless I would not have allowed it by reference to Question (i).

Question (ii)

60. The question whether s.2(4) did not entitle Altfadul (or thus SIAT as assignee) to recover CoMaCo's loss because CoMaCo was the voyage charterer whose charter was with the claimant, the bill of lading carrier, was raised before the arbitrators. By granting leave to appeal, Bryan J in my view rightly did not accept a contrary argument raised at that stage (the contention being that s.69(3)(b) of the 1996 Act precluded leave to appeal on Question (ii)). That said, it seems to me from the award that the argument was rather different from, and certainly not as fully developed as, the argument presented by Mr Schaff QC on Question (ii) before me.

61. The argument has always invoked the mere receipt rule. But as presented to the arbitrators, the argument appears to have been that where L is a charterer in whose hands the bill of lading would be a mere receipt, it cannot be said that L sustains loss "*in consequence of a breach of the contract of carriage [contained in or evidenced by the bill of lading]*", a requirement for s.2(4) to apply set by s.2(4)(a). Thus, s.2(4) would not apply as s.2(4)(a) would not be satisfied. Mr Schaff QC, who did not appear in the arbitration, did reiterate that argument before me. Hence my care in phrasing paragraph 50.ii) above, to ensure I did not beg a disputed question when stating what I took to be uncontentious. That careful phrasing, however, does not mean I think there is merit in this way of putting the argument. Rather, I found it a contrivance to distinguish, as the argument did, between the claimant's conduct constituting its breach of the bill of lading contract and the statutory reference to that breach. The claimant having failed carefully to keep and carry (etc), and that (a) being a breach of its contractual bill of lading obligations and (b) having caused CoMaCo's loss, that loss was sustained by CoMaCo in consequence of that breach, within s.2(4)(a) of COGSA 1992.

62. By far the greater focus of Mr Schaff's argument, however, and the way of putting the argument by which I am persuaded, concerned *The Dunelmia*.

63. Assuming as Mr Schaff submitted and I have concluded that the decision in *The Dunelmia* would be the same today under COGSA 1992 as it was under the 1855 Act, then as I explained in paragraphs 44-45 above, it is not authority for a proposition that s.2(1) of COGSA 1992 does not operate, if upon its terms it otherwise operates, where the holder is a charterer to whom the mere receipt rule applies. The language of s.2(1),

like that of the Bills of Lading Act 1855, does not allow of any such exception, so the rights of suit under the bill in contract are "*transferred to and vested in*" the charterer, because that is what the statute says, whatever the effect of that might be. *The Dunelmia*, then, is authority as to the effect of the statute transferring to and vesting in a charterer the rights of suit under the bill of lading, not as to the conditions under which the statutory transfer and vesting occurs. It is authority for the proposition that where a charterer to whom the mere receipt rule applies is the holder, the statutory transfer to and vesting in him of rights of suit under s.2(1) does not entitle him to recover losses he may have suffered from the carrier through the exercise of those rights.

64. The arbitrators asked themselves whether "*If we were to hypothesise that the Charterers had vested in themselves the rights of suit under the bill of lading, would they have been entitled to recover the loss suffered?*" In the face of the limited argument presented to them, they answered "*Yes*". In my judgment, with the benefit of the argument developed on appeal, the correct answer was "*No, unless they were charterers to whom the mere receipt rule did not apply: see The Dunelmia*".

65. In that regard, the arbitrators did ask the correct question. The question posed by s.2(4) is to what extent could the rights of suit in fact vested by s.2(1) in H have been exercised by L to recover its relevant loss or damage if they had been vested by s.2(1) in L. No specific 'counter-factual' circumstances need to be posited under which L became the holder of the bill of lading in a case where it never did, or never ceased to be the holder (or became the holder again) in a case where it was at some stage the holder but ceased to be so. Thus I do not accept Mr Thomas QC's argument that because the mere receipt rule and *The Dunelmia* allow of the possibility of charterers to whom the rule does not apply, it will not be possible to say on my interpretation of s.2(4) whether L, if the charterer, could or could not have exercised rights of suit, if vested in it under s.2(1), so as to recover its losses in a bill of lading claim.

66. Rather, s.2(4) requires that the facts be taken as otherwise they were and just adds one assumption, namely that on those facts the rights of suit under the bills of lading were vested in L rather than in H under s.2(1). Where L was the charterer, there is no need for, nor anything in s.2(4) calling for, the terms of L's charter, the terms of the bills of lading, or L's actual dealings with the bills of lading (or lack thereof, as the case may be), to be taken to have been anything other than they were. The statute simply asks that it be assumed, contrary to reality, that on those facts s.2(1) vested the rights of suit on the bills in L. The terms of the charter, the terms of the bills of lading, and the charterer's dealings with the bills (or lack thereof) will be facts by reference to which the law will say whether L was or was not a charterer to whom the mere receipt rule applied.

67. In the present case, there is no finding in the award of any facts upon which it could be argued that the mere receipt rule did not apply to CoMaCo. The answer to whether, on the findings of fact in the award, s.2(4) of COGSA 1992 entitled SIAT (as assignee of Altfadul) to recover on behalf of CoMaCo its loss by way of the credit it promised Altfadul, was 'No'.

68. Mr Thomas QC submitted that this answer contradicted or undermined the stated purpose of s.2(4) of COGSA 1992, which from the Law Commission Report, para.2.25, he said was to prevent carriers being able to question the entitlement of the

holder to recover "*by raising a technical point that the loss may ultimately fall on someone else*". I disagree. For a carrier to resist a claim in contract by H for loss suffered by L on the basis that the carrier's liability in respect of that loss is governed by its separate contract with L, is not a technical point on the incidence of loss. To allow H to recover L's loss in the face of such resistance would be to override freedom of contract in respect of charterparties in a way that I do not think is warranted by the language of s.2(4), given that it is not overridden by the language of s.2(1) (see *The Dunelmia* again); and it would be surprising to find that such freedom of contract had been overridden when the clear line taken by the Law Commission Report was for rights and liabilities under charterparties to be left unaffected by the Act.

Conclusion

69. For the reasons I have set out above, this appeal is dismissed because the arbitrators' award of full damages in favour of SIAT, as assignee of Altfadul, was correct in law whether or not they were right in their view as to the effect of s.2(4) of COGSA 1992.

70. As regards that view, (i) the arbitrators were correct that the operation of s.2(4) did not depend on whether CoMaCo at some stage had, but by virtue of s.2(1) lost, rights of suit under the bills of lading, but (ii) they were wrong to conclude that the operation of s.2(4) meant Altfadul (and therefore SIAT) could recover CoMaCo's loss on its behalf, CoMaCo having been the voyage charterer of the vessel in whose hands the bills of lading would have been mere receipts so that if s.2(1) had vested rights of suit in CoMaCo it could not have recovered its relevant loss by an exercise of those rights.