Neutral Citation Number: [2023] EWCA Civ 471

Case No: CA-2022-001001

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
KING'S BENCH DIVISION
COMMERCIAL COURT
Mrs Justice Moulder
[2022] EWHC 957 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2023

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE POPPLEWELL
and
LADY JUSTICE FALK

- -

Between:

UNICREDIT BANK A.G.	**Claimant (Appellant)**
- and -	
EURONAV N.V.	**Defendant (Respondent)**

- -
- -

John Russell KC and Gemma Morgan (instructed by **Holman Fenwick Willan LLP**) for the **Appellant**
Robert Thomas KC and Paul Toms (instructed by **Preston Turnbull LLP**) for the **Respondent**

Hearing dates: 28 and 29 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 4 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Popplewell :

Introduction

1. This case raises a novel issue as to the status of a bill of lading in the hands of voyage charterers after they have ceased to be the charterers as a result of a novation of the charterparty. BP Oil International Ltd ('BP') sold a cargo of oil to Gulf Petrochem FZC ('Gulf') on terms delivery ex ship Fujairah or Singapore. BP voyage chartered the vessel SIENNA ('the Vessel') from the defendant ('Owners'). Owners issued a bill of lading to BP on shipment. The claimant ('the Bank') had financed the purchase by Gulf on terms which conferred a security interest in the cargo. Before completion of the carriage, the Bank paid BP the purchase price, and the charterparty was novated to Gulf. The oil was discharged on Gulf's instructions in Oman. It had been envisaged at the time of the novation that BP would indorse the bill of lading directly to the Bank, but as result of COVID restrictions the indorsement had not taken place by the time of discharge. Owners discharged the cargo against Gulf's letter of indemnity. After discharge the bill of lading was indorsed by BP to the Bank. The Bank brought a claim against Owners for the value of the cargo alleging breach of the contract of carriage contained in or evidenced by the bill of lading in delivering the cargo without production of the bill. Following a trial, Moulder J dismissed the claim on the grounds that there was no contract of carriage contained in or evidenced by the bill of lading at the time of discharge, and therefore no breach; alternatively that if there had been any such breach, it did not cause the loss, because the Bank was aware of the intended delivery without presentation of the bill, and would have authorised or permitted Owners to do so.

2. The Bank appeals on both points. Owners seek to uphold the judgment on the grounds relied on by the Judge, and on three additional grounds advanced in a Respondent's Notice.

Chronology

3. On 30 January 2020 BP sold to Gulf minimum 110,000 m.t. maximum 150,000 m.t. very low sulphur fuel oil for delivery ex ship at one safe berth Fujairah in one full cargo lot, with an option for Gulf to nominate Singapore as an alternative discharge port. The contract provided for payment against a letter of credit no later than 5 calendar days after notice of readiness ('NOR') at the discharge port, against a commercial invoice and a warranty of title in agreed form, by which BP would warrant that it had, and was conferring, good title in return for payment. There was no requirement for presentation of bills of lading.

4. The sale contract also provided that should Gulf request a charterparty novation, BP would request such a novation from the owners, and assist where possible to obtain it; and BP agreed that in the absence of a novation, Gulf's declared discharge port, or declared discharge vessel in the case of ship to ship ('STS') discharge, would always be acceptable to BP.

5. On 6 February 2020, BP entered into the charterparty with Owners on the BPVOY5 form ('the Charterparty'). The discharge port was named as Fujairah or, in charterers' option, Singapore/Vietnam range. Lumpsum freight was payable immediately upon completion of discharge, at three different rates dependent on the discharge port.

6. Clause 30 was a standard term of the BPVOY5 form, which is one of the forms in common use by participants in the tanker trade. It provided that bills of lading were to be signed as charterers directed without prejudice to the Charterparty. Clause 30.7 provided:

> "If an original Bill of Lading is not available at any discharge port to which the Vessel may be ordered by Charterers under this Charter, or if Charterers require Owners to deliver cargo to a party or at a port other than as set out in the Bill of Lading, then Owners shall nevertheless discharge such cargo in compliance with Charterers' instructions, upon presentation by the consignee nominated by Charterers ("the Receiver") of reasonable identification to the Master and in consideration of Charterers indemnifying Owners in the manner prescribed in the form of letter of indemnity agreed and published from time to time by the International Group of P&I Clubs addressing the relevant circumstances. Such indemnity shall be deemed to have been given when Charterers issue instructions to Owners pursuant to this Clause. Charterer's liability under such indemnity shall a) in no case exceed twice the CIF value of the cargo at the discharge port on completion of discharge; b) cease three years after disconnection of hoses at the discharge port unless beforehand Charterers have received from Owners written notice of a claim under it."

7. This clause, and the payment terms under the sale contract, reflected the fact that it is common in this trade for bills of lading not to be available for presentation to the vessel at the time of delivery. Indeed the evidence of the Master of the Vessel at trial was that in his 20 years of tanker experience, presentation of bills of lading had occurred on only a handful of occasions; and that discharge would almost always be against a letter of indemnity ('LOI'). BP's chartering manager, Mr Van de gaer also confirmed in his evidence that it was standard in the large tanker trade to discharge against an LOI. One reason which has been suggested for this practice is that there are often chains of contracts which, especially for voyages of shorter duration, do not allow time for the bills to work their way through the contractual chain to the receiver by the time of discharge. This is not unique to the tanker trade. Moreover, there are other reasons why bills of lading are sometimes not available to the receiver at the time of discharge. The Law Commission Report No 196 of 19 March 1991 ('the Law Commission Report'), which followed very wide market consultation and gave rise to the Carriage of Goods by Sea Act 1992 ('COGSA'), recorded at paragraph 2.42 that a bill of lading may sometimes take as much as a year to reach the ultimate holder.

8. Mr Russell KC suggested that another reason for discharge against LOIs without presentation of bills was that commodity trade financing typically involves the buyer's bank taking a security interest over the bill, by way of pledge, and becoming the lawful holder of the bill, which it retains following discharge as security for payment by the buyer (or by sub-buyers directly to the bank). Retaining the bill whilst permitting the discharge against an LOI is an essential aspect of such trade financing, he submitted, because the way in which it is understood to provide security against non-payment by the buyer is that as holder, the financing bank is able to sue the carrier under the bill for having delivered the cargo without its production. This is the liability against which the carrier requires indemnification under the LOI.

9. I will return to the significance of the issues in this case to commodity trade financing. There can be no doubt, however, that the practice of carriers discharging against an LOI

from the charterer or receiver, in the absence of presentation of bills of lading, is widespread and of long standing, and is not confined to the tanker trade.

10. On 19 February 2020 a bill of lading was signed by the Master of the Vessel, acknowledging shipment on board by BP Europa SE-BP Nederland on behalf of BP of 101,693.093 m.t. at Europoort Rotterdam ('the Bill of Lading' or 'the Bill'). It provided that delivery should take place at "Fujairah for orders" and that delivery should be made to the order of BP. It contained a clause paramount by which it incorporated the Hague-Visby Rules, and many typical contractual provisions dealing, for example, with liberty to deviate, war risks, strikes, ice, quarantine, general average, collisions, and a Himalaya clause. It provided for English law and jurisdiction. It did not purport to incorporate any of the terms of the Charterparty. It had the usual rubric at the bottom: "In witness whereof the Master or Agent of the said vessel has signed bills of lading all of this tenor and date, one of which being accomplished the others will be void."

11. On 11 March 2020, Owners sought from BP's brokers, Poten, "any extra details regarding the discharge orders", to which Poten responded the following day that they were awaiting instructions, "however, in the meantime and just to ensure mutual understanding, can you confirm that LOI is an invocation in line with CP clause 30.7". Owners replied the same day, 12 March 2020, "We agree that LOI is an invocation in line with CP clause 30.7." This appears to be an agreement that the discharge instructions when given would be for discharge without presentation of a bill of lading, and BP would thereby be invoking its right under clause 30.7 to require delivery against its indemnity in the terms set out in that clause, which would be deemed to be given without the need for a separate letter of indemnity. Later on the same day BP gave instructions to Owners for the Vessel to "head for Fujairah and wait at anchorage for further discharge orders".

12. Also on 12 March 2020 the Bank issued a letter of credit ('the L/C') on behalf of Gulf in favour of BP for the majority of the cargo, being 80,000 m.t. +/- 10% ('the Cargo'). It did so pursuant to trade finance arrangements contained in a Facility Agreement, Pledge Agreement and Deed of Assignment, each dated 18 December 2019. As is common in such trade finance arrangements, they provided amongst other things that any bill of lading would be pledged as security for repayment of the financing; that such pledge would be enforceable upon events of default which included non-payment; and that the goods themselves would be pledged from the time when Gulf acquired a proprietary or possessory interest in them.

13. It was intended by the Bank and Gulf that the Cargo would be resold to sub-buyers, approved by the Bank, on terms which required the sub-buyers to pay the Bank directly, 90 days from date of invoice against presentation of invoice and a certificate of quantity issued by an independent surveyor.

14. In line with the sale contract, the L/C provided for payment five calendar days after NOR at the discharge port against a commercial invoice and warranty of title.

15. The Vessel arrived at anchorage at Fujairah and gave notice of readiness on 16 March 2020. From 25 March 2020 she was ordered to drift off Khor Fakkan, north of Fujairah and outside port limits, to await discharging instructions.

16. On 31 March 2020 BP requested Owners' consent for the Vessel to shift to Sohar, Oman and to perform STS discharge there, rather than into a facility at Fujairah. On the same

day, Owners gave their agreement subject to all STS costs, including anchorage charges, being for charterers' account. The Vessel remained drifting off Khor Fakkan.

17. On 1 April 2020 BP presented conforming documents under the L/C in respect of the Cargo, the invoice being for 80,000 m.t., and was paid thereunder on 2 April 2020. Gulf thereby became owners of the Cargo and the Bank's security interest attached to it.

18. On 2 April 2020 Gulf asked BP to indorse the Bill of Lading directly to the Bank, pursuant to a request which the Bank had made to Gulf. BP responded that it would do so, but that "original BLs are still passing through the commercial chain and have not yet arrived in BP offices for onward indorsement. This will be done as soon as practically possible, but it may take some time, especially at the moment with COVID-19 social/working restrictions."

19. On 6 April 2020 Owners, Gulf and BP entered into a novation agreement in respect of the Charterparty ('the Novation Agreement'). It was not a substitution of Gulf for BP ab initio, but rather operated prospectively, providing that Gulf would replace BP as charterer from that date. There was a specific clause dealing with freight and discharge port expenses: BP agreed to pay the previously agreed freight immediately after final discharge at the rate agreed for the voyage Rotterdam/Fujairah, with Gulf paying all incremental freight thereafter. The Novation Agreement also confirmed tripartite agreement to discharge STS at Sohar, at Gulf's cost. Otherwise Gulf assumed in place of BP the rights and liabilities provided for in the Charterparty vis a vis the Owners in respect of carriage of the cargo thereafter; and the Charterparty terms continued to govern the rights and liabilities between BP and the Owners in respect of prior performance of the carriage.

20. Between 26 April and 2 May 2020, Owners discharged the Cargo by STS transfer to two vessels, the 'Kutch Bay' and 'Prestigious', pursuant to Gulf's instructions. They did so without requiring presentation of any bill of lading. The evidence of Owners' witnesses at trial, Mr Van de Gaer and the Master, was that they did so in reliance on the indemnity from Gulf under clause 30.7 of the Charterparty. Owners were unaware of the Bank's interest in the Cargo. There was no dialogue between Owners and BP about the discharge, although BP was copied in to the emailed NORs and statements of fact at Sohar, from which it would have been aware of the STS discharge taking place there.

21. The original Bill of Lading was indorsed by BP in favour of the Bank on 7 August 2020 and received by the Bank on 13 August 2020. By that time it appeared that Gulf had been guilty of fraud in relation to this and other cargoes. Gulf did not repay the sums it had borrowed from the Bank.

22. I have explained what happened in respect of the Cargo, i.e. the financed cargo of 80,000 m.t. The Judgment does not reveal what happened in relation to the balance of the cargo shipped under the Bill, amounting to some 20,000 m.t., which was not the subject of the L/C and payment under it. In response to an inquiry from the court on the hearing of the appeal, neither side could provide any further information.

The claim and issues at trial

23. The Bank's claim was founded on Owners being in breach of the contract of carriage contained in or evidenced by the Bill of Lading in delivering the Cargo without presentation of the original Bill. There were also claims in bailment and conversion, but it was agreed

before the Judge, and before us, that they added nothing to the contractual claim and I say no more about them.

24. The Bank pleaded that title to sue arose under s. 2(1) of COGSA by virtue of the indorsement to it of the Bill. Section 2(1) provides that a lawful holder of a bill of lading "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". Section 2(2) deals with spent bills by providing that the s. 2(1) rights of a person who becomes the lawful holder after the bill has ceased to confer a right to possession of the goods are nevertheless conferred if, amongst other things, that person becomes holder by virtue of contractual arrangements entered into before the time when the right to possession ceased to attach to possession of the bill. Section 5(1)(a) provides that "the contract of carriage" in relation to a bill of lading means the contract contained in or evidenced by that bill.

25. Owners pleaded a number of defences both to liability and quantum. Those with which the appeal is concerned were primarily a breach defence and a causation defence as follows:

    (1) As to title to sue under s. 2 of COGSA, Owners pleaded that BP was the holder of the Bill of Lading at the time of indorsement; and that pursuant to well-established authority such a bill in the hands of a charterer is a mere receipt which does not contain or evidence any contractual terms. Accordingly, no rights of suit vested in the Bank upon indorsement under s. 2 COGSA because there never had been a contract of carriage contained in or evidenced by the Bill of Lading to which the Bank could become party. Further or alternatively the Bill of Lading was spent because the cargo had been delivered without production of the Bill prior to indorsement, with the knowledge and authorisation of the Bank.

    (2) Alternatively, if there was a breach, the Bank caused its own loss by authorising or approving or requesting or permitting Gulf to arrange discharge without production of the Bill of Lading; alternatively any breach did not cause the Bank any loss, because had Owners initially declined to discharge without production of the Bill, BP and the Bank would have authorised them to do so.

26. There was an agreed list of issues for trial. Three of the issues potentially affected the liability defence:

    Issue 1: Did the Bill of Lading contain and/or evidence the/a contract of carriage in respect of the Cargo on or after 6 April 2020 (being the date of the Novation Agreement) and prior to the misdelivery? ….

    Issue 2: Alternatively, were Owners' obligations as regards the carriage of the Cargo contained exclusively in the Charterparty and/or the Novation Agreement of 6 April 2020?

    Issue 5: Did the Bank become lawful holder of the Bill of Lading pursuant to s. 2 COGSA 1992 on 13 August 2020? In particular:

        5(1) Was the Bill of Lading spent as at the 13 August 2020 such that the Bank could acquire no rights thereunder?

5(2) If so, does the exception in s. 2(2)(a) of COGSA apply, so that the Bank became lawful holder even though the Bill of Lading was spent?

27. The causation defences were reflected in agreed issue 8:

Issue 8: If the Owners were in breach:

8(1) Has the breach caused the Bank any loss, or would the Bank have suffered the same loss in any event?

8(2) Did the Bank cause its own loss?

The Judgment

28. The Judge treated the breach defence as being determined by the answer to issues 1 and 2, which she treated as turning on the question whether the Bill was a mere receipt in the hands of BP at the date of discharge, or whether by then there had sprung up a contract of carriage between BP and Owners on the terms of the Bill. She did not consider whether the Bank's rights under s.2 were potentially capable of arising upon the indorsement in August 2020 irrespective of the contractual status of the Bill prior to that time, as issue 5 appeared to recognise. She cannot, however, be criticised for this, because the argument on behalf of the Bank before her treated the status of the Bill at the time of delivery as critical to the outcome. On appeal Mr Russell advanced the argument, albeit very much as a fallback and without developing it orally, that if the bill was a mere receipt in BP's hands at the date of discharge, nevertheless the effect of s. 2 of COGSA was retrospective and upon indorsement there was a contract between the Bank and Owners of which Owners had been in breach in delivering the Cargo without production of the Bill. That argument was not advanced to the Judge at trial, and indeed was not within the grounds of appeal. For reasons which I will explain below, I have concluded that this argument is both open to the Bank in this court, and correct, such that the status of the Bill at the date of discharge is not determinative of the breach issue. However I will address first the issue of the Bill's status on discharge, which was entirely understandably treated as determinative by the Judge and which forms the primary ground of appeal on the breach issue.

29. On that question the Judge's reasoning was essentially as follows. It was common ground that where a shipper is also the charterer, the bill of lading is generally not a contract of carriage but a mere receipt. It was clear on the authorities that where a bill of lading is issued to a charterer and then indorsed to a third party, it attains contractual status upon indorsement on the basis that "a new contract appears to spring up between the ship and the consignee on the terms of the bill of lading" (*Tate & Lyle Ltd. v Hain Steamship Co.* (1936) 55 Lloyd's Rep 159, 174). However the issue was whether it did so when it remained in the hands of the charterer after the charterer ceased to be a party to the charterparty. The Bank's submission was that the bill of lading always had "contractual status" in the hands of the charterer when issued but that it was not then a contractual document "in the full sense", and that the Bill "temporarily lost its full contractual status whilst in the hands of BP", which thereafter revived upon the novation. The Judge rejected this submission on the basis that the concept of a temporary loss of contractual status was not supported by the textbooks or authorities. In this connection she referred to Aikens & others *Bills of Lading* 3rd Edn 7.23 ("*Aikens*") and *Rodocanachi v Milburn* (1886) 18 QBD 67, citing the passages in which Lord Esher MR said that as between the shipowner and the charterer the bill of lading is to be taken only as an acknowledgement of receipt of the

goods; and statements of Lindley LJ to similar effect. She accepted Owners' submissions based on the intention of the parties: the textbooks made clear that the reason why the transfer is said to give rise to the creation of a contract with an indorsee is because the shipowner is taken to have issued the bill of lading to the charterer intending it to be passed on to a third party as the contract of carriage; by contrast in this case, at the time the Bill was issued, BP and Owners plainly did not intend their contractual relationships to be contained in the Bill; rather the Charterparty regulated those relationships. Whilst BP and Owners should be taken to have intended at the time the Bill was issued that it would regulate the legal relationship between Owners and a third party if BP transferred or indorsed it to a third party, there was no reason to conclude that they intended that their relationship would be governed by the terms of the Bill of Lading in the event that their contractual relationship was dissolved as it was by the novation. It would be perverse to infer the creation of contractual rights in a document which previously had no contractual status, from an agreement in which the existing contractual relations were terminated. There was no reason to conclude that the parties intended that their relationship would be governed by the terms of the Bill of Lading at the point where the contractual relationship between them in the Charterparty had just been terminated.

30. In relation to the causation defence, the Judge addressed the two issues identified in paragraph 8 of the agreed list of issues under a single heading, on the hypothesis that she was wrong about breach.

31. At [60] the Judge recorded what the Bank contended, in paras 45 and 46 of its Closing Note, would have happened if Owners had refused to discharge the Cargo without production of the Bill. The Bank there argued that the likely sequence of events would have been that the Owners would have contacted BP as the holder of the Bill; that it was reasonable to assume that BP would have advised that the Bill had been sent for indorsement and transfer to the Bank and that indorsement and transfer was likely to take some time due to COVID restrictions; and that the Bank would have been contacted by Owners and asked what it wanted to do. The Judge then recorded the Bank's case, based on the evidence of two witnesses from its Business team, Mr Borchert and Mr Cotasson, and Ms Bodnya, the Bank's officer who had been in day to day contact with Gulf during the course of the voyage, that the Bank would have told Owners not to discharge the cargo. At [61] she reiterated that it was the Bank's case that the Bank would have been involved and would have sought to give instructions to Owners, albeit that the Bank's case was that it would have told Owners not to discharge the Cargo.

32. At [63] the Judge accurately recorded the submission of counsel for the Bank in oral closing submissions that Ms Bodnya's evidence was that she would not have agreed to discharge into the 'Kutch Bay' and 'Prestigious' and that this was "the necessary element for the owners to establish any case of defence based on causation".

33. That factual case was in issue, and the witnesses had been cross-examined on the basis of Owners' contention that the Bank would have authorised discharge to take place without the Bill. At [62] the Judge recorded the submission in closing for Owners as being that "if hypothetically Ms Bodnya had been told by Gulf that the Financed Cargo was to be discharged at Sohar to two STS Vessels she would not have objected and thus the breach (i.e. delivery without production of the Bill of Lading) did not cause the loss".

34. The Judge then addressed this factual dispute in some detail. She concluded that Ms Bodnya had been made aware by Gulf of most of the relevant developments, and that she

did implicitly, if not expressly, approve discharge without the Bill. At [93] the Judge said that in the light of the evidence of Ms Bodnya which led to such finding, it was clear why the Bank did "not seek to press the argument that there was (or would have been) no approval by the Bank to discharge without production of the Bill but rather seeks to argue that there was no "*general approval*" from the Bank and no specific approval for delivery without production of the bill at Sohar by STS into Kutch Bay and Prestigious."

35. The Judge then addressed Ms Bodnya's evidence further, including matters which went to her credibility. At [119] she rejected Ms Bodnya's evidence that she would not have agreed to the particular STS discharge into the 'Kutch Bay' and 'Prestigious', addressing and rejecting each of the reasons Ms Bodnya had given as to why she would not have agreed to it.

36. Her conclusions on the causation question were then contained in [120]-[122] in the following terms:

> "120. Looking at the wider question of whether the Bank would have insisted on production of the Bill of Lading and whether it would have permitted discharge without production of the Bill, including by STS at Sohar, the evidence is that:
>
> i) the Bank had no specific concerns about Gulf falling into default at this time;
>
> ii) in relation to the Sub-buyers, Gulf had taken out trade credit insurance covering 90% of the receivables under the contracts with the Sub-buyers and the Bank had the benefit of an assignment of this policy and thus believed at the time that it was insured as to 90% against credit risk; and the Bank had received (or had no reason to believe that it would not receive) a 10% cash margin which covered the remaining credit risk.
>
> iii) Ms Bodnya had been told the names of the Sub-buyers and had confirmed that they were acceptable and by 4 May 2020, had received the invoices.
>
> 121. Against this economic background, having regard to my assessment of the credibility of Ms Bodnya and in the circumstances discussed above including the impact of Covid, I find on the evidence that:
>
> i) the Claimant did permit and in any event, would have permitted discharge without production of the Bill of Lading;
>
> ii) the Claimant would have permitted discharge at Sohar by STS;
>
> iii) if the Claimant had been aware, or told that discharge was to be made by STS at Sohar, the Claimant would not have halted discharge and have carried out investigations into Gulf and/or the Sub-buyers; and
>
> iv) the loss would have occurred in any event.
>
> 122. I find that any breach by the Owners in discharging the Financed Cargo without production of the Bill of Lading did not cause the loss or in the alternative that the Bank would have suffered the same loss in any event. If therefore I were wrong on Issues 1 and 2, the claim falls to be dismissed on this basis."

37. On the appeal the Bank contended that the Judge had not addressed or decided issue 8(2), namely whether the Bank caused its own loss, and Owners agreed. It is not entirely clear to me that this is so. Issue 8(2) formed part of the heading to the section. It is true that at [119] the Judge prefaced her conclusions by saying "The issue for the Court is whether the failure by the Owners to require production of the Bill of Lading caused the loss or whether the Bank would have suffered the same loss in any event"; and her conclusions at [122] addressed these two alternatives, which seem to reflect Issue 8(1). However the terms of [121(i)], referring to what the Bank permitted as well as what it would have permitted, appear to be addressed to issue 8(2). However I am content to proceed on the basis agreed by the parties, namely that the Judge did not decide issue 8(2) notwithstanding the reference to it in the heading to the section.

The Grounds of Appeal and Respondent's Notice

38. In the Notice of Appeal, the Bank advances two grounds of appeal. Ground 1 is that the Judge erred in holding that the Bill did not contain or evidence a contract of carriage after the novation. She should have held that upon novation it contained or evidenced a contract of carriage with BP and "accordingly" rights of suit were transferred to the Bank upon indorsement in August 2020. Ground 1 was expanded in the Bank's skeleton argument on appeal, and briefly in oral argument, to include an alternative argument that s. 2 of COGSA conferred rights of suit upon indorsement in August under what then became a contract of carriage irrespective of its status at the time of discharge. In Owners' skeleton they addressed the merits of this alternative argument without raising an objection to it being raised. At the hearing of the appeal, however, Mr Thomas KC submitted that the argument was not open to the Bank, not having been argued below, and not being within the terms of Ground 1 in the Notice of Appeal.

39. Ground 2 is that the Judge erred on both the causation issues. The breach caused the loss because if it had not taken place the Cargo would have remained on the Vessel and the Bank would have been able to enforce its security interest. The Bank's acquiescence in discharge without production of the Bill as an aspect of the financing scheme was legally and factually irrelevant where the Bank was not the holder of the Bill at the time of discharge and so could not waive any breach, and the acquiescence was unknown to Owners and played no part in Owners' decision to discharge without production of the Bill.

40. The Respondent's Notice points pursued by Owners were as follows:

    (1) As to the breach issue, the Judge should have held that BP requested or authorised or consented to the discharge without production of the Bill:

        (a) by invoking the indemnity regime in clause 30.7 of the Charterparty on 12 March 2020; and/or

        (b) by entering into the Novation Agreement such that it gave instructions to deliver without production of the Bill by virtue of Gulf subsequently giving such instructions; and/or

        (c) by not objecting to discharge at Sohar.

    (2) As to the causation issue, the Judge should have held that the Bank caused its own loss by authorising discharge without production of the Bill (i.e. issue 8(2)).

(3) Alternatively the case should be remitted for findings on the question of whether the Cargo was delivered to the six sub-buyers from Gulf to whom the Bank had given its approval.

Ground 1: the point argued below

41. I address first the question whether the Bill contained or evidenced a contract of carriage between Owners and BP at the time of discharge. Mr Russell renewed the argument advanced and rejected below that when issued, the Bill had contractual status which was temporarily suspended. His analysis was that it had no contractual force when issued to BP as charterer; but that its contractual status assumed contractual force once the Charterparty came to an end.

42. I have some difficulty with the concept of a document having contractual status without contractual force. But however that may be, the answer to the current issue does not lie in labelling, but rather, in my view, in an understanding of the underlying rationale for the "mere receipt" rule and for the existence of a contract on the terms of the bill when transferred to an indorsee by a shipper/charterer.

The bill of lading as a contract

43. As every law student knows, a bill of lading fulfils one or more of three functions, which developed historically in this order (see *Aikens* Chapter 1). First, it operates as a receipt, having evidential value that the goods have been loaded on the vessel as described in the bill, in the quantity identified and in apparent good order and condition. Secondly it is a document of title whose possession confers a constructive right to possession of the cargo. Thirdly it is, in some circumstances, a document containing the terms of a contract of carriage between the carrier and the lawful holder of the bill. We are concerned with the third of these, which was described by Lord Selbourne LC in *Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591, 596 as its "primary office and purpose".

44. It is also trite that when issued to a non-charterer shipper, in most cases the bill strictly speaking evidences, rather than contains, the contract of carriage, the contract usually being concluded prior to issue between the shipper and the carrier (see e.g. *Sewell v Burdick* (1884) 10 App Cas 74, 105, *Leduc v Ward* (1888) 20 QBD 475, 479-480). Hence s. 5 of COGSA defines the contract of carriage in relation to a bill of lading as being the contract "contained in or evidenced by" the bill of lading. However the distinction is rarely important in practice, and is of no significance to the issue in the present appeal. I shall use the expression bill of lading contract for convenience.

The carrier's obligation to deliver only against production of an original bill of lading

45. There is longstanding authority that the carrier who issues a bill of lading is under an obligation not to deliver without production of an original bill, and that it does so at its own peril in exposing itself to suit from the lawful holder: *Glyn Mills Currie* at 610; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, 586; *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda)* [1994] 2 Lloyd's Rep 541, 552, 553, 556-7; *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S* [1999] 1 Lloyd's Rep 837, 840; [2000] 1 Lloyd's Rep 211 at [19]. As these authorities make clear, this is a contractual obligation, not an incident of the bill as a document of title: the contract is to deliver to the

person entitled under the bill of lading on production of the bill. The Bank's cause of action in this case is, therefore, a contractual one and depends upon a right to sue under a contract contained in or evidenced by the Bill. There are a few very limited exceptions to this principle, whose scope is not finally settled (see *SA Sucre Export v Northern River Shipping Ltd (The Sormovskiy 3068)* [1994] 2 Lloyd's Rep 266 and *Motis*), but they are of no relevance to the current issue. The carrier is in breach if it delivers without production even where delivery is to the person who is in fact entitled to the goods: see *The Houda* at pp. 552, 553, 556 and *The Sormovskiy 3068* at p. 274. Where, as is not uncommon, the carrier is under an obligation towards a charterer by the terms of the charterparty to deliver without production of the bill, it has put itself in a position where it has contractual obligations to different parties which conflict. That is but one aspect of the conflicting obligations which commonly arise for a carrier whose contract with the charter is on the terms of the charterparty and that with the bill of lading holder is on the terms of the bill. The carrier's remedy is to obtain protection by an indemnity.

46. This is so even if the bill is issued to a charterer in whose hands it is a mere receipt. The carrier, by issuing a negotiable bill, takes the risk that if he delivers without its production, the bill has or will become a contract of carriage by negotiation, a matter of which he will generally be ignorant. This was explained by Millet LJ in *The Houda* at p. 557 in these terms:

> "It is true that, if the bill of lading is made out in the name of the charterers or their order, then unless and until it has been negotiated the charter-party represents the only contract for the carriage of the cargo. But the risk to the master lies in the fact that, unless the bill of lading is produced to him, he cannot know whether it has been negotiated or not. Once he has complied with the charterers' instructions to sign and deliver a negotiable bill of lading, he renders the shipowners potentially liable to any person to whom the bill of lading has been negotiated, and cannot safely deliver the goods to anyone, including the charterers themselves, unless the bill of lading is produced to him. This is equally true whether the charter-party is a voyage charter-party or a time charter-party."

The "mere receipt rule"

47. There is also longstanding authority that in the hands of a charterer the bill of lading is usually merely a receipt and does not contain or evidence a contract of carriage with the carrier. This is commonly referred to as 'the mere receipt rule' (see e.g. *Sevylor Shipping and Trading Corp v Altfadul Company for Foods Fruits & Livestock (The Baltic Strait)* [2018] 2 Lloyd's Rep 33 at [44]).

48. It is instructive to consider the underlying basis for this so called 'rule'. In *Rodocanachi v Milburn*, shipowners, who had issued a bill of lading to charterers, unsuccessfully sought to rely on a term in the bill which was more favourable to them than the charterparty terms, in response to a claim by charterers for cargo lost as a result of the master's negligence. It was held that as between shipowners and charterers only the charterparty could be regarded as constituting the contract, and the bill of lading must be looked at as a mere receipt for the goods.

49. At pp. 74-75 Lord Esher MR referred to the fact that the charterparty provided in effect that bills were to be issued "without prejudice to the charterparty" and continued:

> "It seems to me that, in either of the views I have been expressing, the case is really covered by the authorities, which expressly hold that as between the charterers and the shipowners the bill of lading does not alter the contract between them contained in the charterparty. But, assuming that under this clause of the charterparty the master was to sign bills of lading in the form customary at the port of lading, and that the form of this bill of lading was such customary form, so that only a bill of lading in this form could be signed in accordance with the charterparty, then the result would be that the bill of lading to be signed under the charterparty would be one the stipulations of which were in part not the same as those of the charterparty. What in that case is the rule as to the construction of the two documents ? In my opinion even so, unless there be an express provision in the documents to the contrary, the proper construction of the two documents taken together is, that as between the shipowner and the charterer the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgement of the receipt of the goods. With regard to the effect of these documents as between charterers and shipowners, I adopt fully what was said by Lord Bramwell in *Sewell v. Burdick*. (10 App. Cas. 105). This doctrine gives effect to both instruments, because, although as between the shipowners and the charterers the bill of lading is only a receipt for the goods, it will be the contract upon which the holder of the bill of lading to whom it is indorsed must rely as between himself and the shipowner……
>
> Thirdly assuming that this was the only form of bill of lading that could be signed consistently with the charterparty, then there being nothing in either document to shew that the terms of the bill of lading were to be in substitution for the charterparty contract, that is still the contract between the shipowners and the charterers, and the bill of lading is to be treated as only a receipt for the goods."

50. Lindley LJ said at p. 78:

> "It was argued that, reading the cesser of liability clause and the 10th clause of the charterparty together, an intention was shewn that a new and different contract from the charterparty should be created as between the plaintiffs and defendants by the bill of lading. I cannot say that I see on the documents any trace of such intention. The authorities shew that prima facie, and in the absence of express provision to the contrary, the bill of lading as between the charterers and the shipowners is to be looked upon as a mere receipt for the goods. There is nothing here to shew any intention to the contrary; so far from there having been in fact any animus contrahendi when the bill of lading was signed, the jury have found upon the evidence that there was none, and that the bill of lading was taken as a mere receipt."

51. In *Temperley v Smyth* [1905] 2 KB 791 Sir Richard Henn Collins MR said at p. 802:

> "The broad distinction between the position of a charterer, who ships and takes a bill of lading, and an ordinary holder of a bill of lading is, I think, that in the former case there is the underlying contract of the charterparty which remains until it is cancelled, and taking a bill of lading does not cancel it in whole or in part unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so."

52. It is clear from these passages that the principle that the bill is merely a receipt in the hands of the charterer does not rest on some abstract rule or custom of merchants, but on the contractual intention of the parties as a matter of the construction of the charterparty and

the bill of lading. The rationale for the mere receipt principle is that when the parties to the charterparty are also the bill of lading holder and the issuing carrier, the two contractual documents must be construed together. Absent clear wording to the contrary, the proper construction is that the charterparty prevails in the event of any inconsistency. The bill does not vary the terms of the charterparty. Where the bill is issued pursuant to the charterparty and is without prejudice to the charterparty, the intention is clearly that the charterparty terms prevail and the bill is thus treated as being a mere receipt.

53. The principle is properly described as being that the bill of lading in the hands of the charter is *usually* a mere receipt. It is a principle which prima facie applies, but is subject to any expressed contrary intention. This is illustrated by *Gullischen v Stewart Brothers* (1884) 13 QBD 317, decided two years before *Rodocanachi v Milburn*, in which Lord Esher, then Sir William Brett MR, was also a member of the Court. In that case shipper/charterers were held liable for demurrage under the terms of the bill of lading notwithstanding that the charterparty provided that their liability for demurrage should cease on shipment. The contract was treated as being on the terms of the bill of lading and the cesser clause in the charterparty was treated as inoperative.

54. Further illustration of the principle being one of contractual intention, is to be found in the authorities covering the position where the bill is issued to a non-charterer shipper and then indorsed to the charterer. In *Calcutta S.S. Co. v. Andrew Weir & Co*. [1910] 1 K.B. 759 Hamilton J found the bill of lading to be the governing contract in such circumstances. The leading textbook writers for the following 60 years treated that decision, and an obiter passage in the judgment of Scrutton LJ in *Hogarth S.S. Co. v. Blyth, Greene, Jourdain & Co. Ltd*. [1917] 2 KB 534 agreeing with Hamilton J's reasoning, as authority for the general proposition that where a bill of lading is issued to a shipper, other than the charterer, differing in terms from the charter, and the charterer subsequently becomes indorsee of the bill of lading, it is the bill not the charter which governs the contractual relationship with the carrier.

55. In *President of India v Metcalfe (The Dunelmia)* [1970] 1 QB 289, this Court decided the opposite, namely that in such circumstances the contract was on the charterparty terms, not those of the bill of lading. Lord Denning MR said at p. 305B-C:

> "It seems to me that whenever an issue arises between the charterer and the shipowner, prima facie their relations are governed by the charterparty. The charterparty is not merely a contract for the hire of the use of a ship. It is a contract by which the shipowners agree to carry goods and to deliver them. If the shipowners fail to carry the goods safely, that is a breach of the contract contained in the charterparty; and the charterers can claim for the breach accordingly, unless that contract has been modified or varied by some subsequent agreement between the parties. The signature by the master of a bill of lading is not a modification or variation of it. The master has no authority to modify or vary it. His authority is only to sign bills of lading 'without prejudice to the terms of the charterparty'."

56. Edmund Davies LJ said at p. 308B-D:

> "The charterparty being a contract, on fundamental principles its terms cannot be altered without the express or implied assent of both charterer and owner. The bill of lading also is, in general, a contract (this time between shipper and owner) and it is common to find in it a provision, as in the present case, that "All conditions and exceptions as per

> charterparty . . ." But where the charterer himself ships the goods, the bill of lading has, not surprisingly, been held to operate as a mere receipt for, and document of title to, the goods, and not to operate either as a new contract between charterer and owner: *Rodocanachi v. Milburn* (1886) 17 Q.B.D. 316; 18 Q.B.D. 67; or as in any way modifying the charterparty contract: *Temperley S.S. Co. v. Smyth & Co*. [1905] 2 K.B. 791. But it is submitted for the appellants that the position is quite different where, though the goods are not shipped by the charterer or his agent, the shipper later indorses over to the charterer the bill of lading issued to him. In such circumstances, so it is submitted, the bill of lading becomes the governing document should any claim arise between charterer and owner for damage to the goods."

57. After considering *Calcutta SS v Weir* and *Hogarth SS v Blyth*, Edmund Davies LJ continued at p. 310C-D:

> "The charterparty in the present case expressly provided that "The master or his agent shall sign bills of lading at any rate of freight required by the charterers or their agents, without prejudice to this charterparty, but at not less than the chartered rate" and I can find nothing which thereafter affected the rights of the parties under that charterparty. In particular, it appears to me that the indorsement over of the bill of lading to the charterer was an incident which, while forming part of the narrative, had no impact upon the charterparty."

58. All three members of the Court treated *Calcutta SS v Weir* as distinguishable on its facts, not as wrongly decided. It was treated as an example of a claim properly brought on a bill of lading contract notwithstanding that it had come into the hands of the charterers, because that was properly regarded as reflecting the intention of the parties in that particular case. It remains, therefore, an illustration of how the mere receipt principle is no more than a prima facie principle based on the intention of the parties which yields to an expressed contrary intention.

59. Before considering how this principle should be applied to a shipper/charterer in whose hands the bill is initially a mere receipt but who retains it when the charterparty has come to an end, I should address the basis for the bill of lading becoming a contract when the shipper/charterer indorses it to a third party.

The contract arising upon indorsement by the charterer

60. Where the bill is indorsed by a charterer in whose hands it is a mere receipt, the indorsee becomes party to a contract of carriage on the terms of the bill. This is what the Bills of Lading Act 1855 provided for if property passed upon and by reason of the indorsement, and what COGSA provides for in wider circumstances. This too, is well established by longstanding authority, but its juridical basis is less clear.

61. In *Tate & Lyle v Hain Steamship*, Lord Atkin said at p. 174:

> "The consignee has not assigned to him the obligations under the charterparty: nor in fact any obligation of the charterer under the bill of lading, for ex hypothesi there are none. A new contract appears to spring up between the ship and the consignee on the terms of the bill of lading."

62. In *Leduc v Ward*, Lord Esher MR said at p. 479:

> "The plaintiffs were clearly indorsees of the bill of lading to whom the property passed by reason of the indorsement ; and, therefore, by the Bills of Lading Act, the rights upon the contract contained in the bill of lading passed to them. The question, therefore, arises what the effect of that contract was. It has been suggested that the bill of lading is merely in the nature of a receipt for the goods, and that it contains no contract for anything but the delivery of the goods at the place named therein. It is true that, where there is a charterparty, as between the shipowner and the charterer the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage between them are contained in the charterparty; and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit; but, where the bill of lading is indorsed over, as between the shipowner and the indorsee the bill of lading must be considered to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods."

63. In *Scrutton on Charterparties and Bills of Lading* (24th ed) the authors consider the principles which may underlie the proposition that a new contract springs up when the bill of lading is indorsed (at paragraphs 6-014 and 6-015):

> "This view is so long established that it is scarcely open to question. It is, however, not easy to explain. The lawful holder has by statute transferred to him all rights of suit under the contract of carriage, i.e. "the contract contained in or evidenced by" the bill of lading and may in certain circumstances become subject to liabilities under that contract. But in the case of the indorsement from the charterer-shipper of a bill of lading differing from the charter, there is, per Lord Esher in *Rodocanachi v Milburn*, no "contract contained in the bill of lading", but only a "mere receipt". How, then, can the indorsement pass what does not exist? Does a contract spring into existence on the transfer to the lawful holder, which had no existence before? And, if so, what statutory authority is there for such a "creation", as opposed to the "transference" ordained by statute? It may be said, as in *Leduc v Ward*, that between shipowner and indorsee the bill of lading must be considered to contain the contract, "because the shipowner has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods". But this view, which appears to rest on some sort of estoppel against the shipowner, fails in the numerous cases where the variation from the charter is in favour of the shipowner and against the shipper and is also difficult to reconcile with the admitted law that a shipowner may repudiate against an indorsee for value a bill of lading, which his agent had no authority to give.
>
> Possibly the difficulty may be resolved by a consideration of the wording of the Carriage of Goods by Sea Act 1992 itself. Section 2(1) transfers to the lawful holder of the bill of lading all rights of suit "under the contract of carriage as if he had been a party to that contract". The definition of "contract of carriage" in s.5(1)(a) presupposes that the bill of lading does contain or evidence a contract: but if it is a mere receipt and the governing document is the charterparty it does not do so. As, however, the words of the statute must be given a sensible meaning, it is submitted that the true meaning is that the lawful holder has vested in him all rights of suit 'as if there had been a contract in the terms contained in the bill of lading and he had been a party to that contract'."

64. I agree that this is how section 2 must be interpreted and that the new contract "springs up" as a result of the operation of COGSA, and before it the Bills of Lading Act 1855, not as the result of the application of any common law principles of contract or estoppel.

Nevertheless the rationale underlying it is to my mind that it represents the presumed intention of both the carrier and the indorsee. If one asks why the carrier is prepared to issue a bill of lading so that it contains contractual terms vis a vis a non-charterer shipper, or any non-charterer indorsee, the answer is because the carrier will generally want its relationship with the person interested in the goods and the maritime adventure to be a contractual one. By putting the document into circulation, the carrier can impose the contractual terms commonly found in bills, subject to the constraints of the Hague and Hague-Visby Rules where they mandatorily apply, which form an internationally negotiated and accepted set of rules balancing the interests of carriers and cargo interests (as to which see *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605, 621 and *Deep Sea Maritime Ltd v Monjasa A/S (The Alhani)* [2018] EWHC 1495 (Comm) [2018] 2 Lloyd's Rep 563 at [20]). Many aspects of the Hague or Hague-Visby Rules provide carriers with protections which would not exist absent a contract, such as the defences in Article IV rule 2 and time and package limitation. Bills of lading often contain a clause paramount incorporating the Hague or Hague-Visby Rules and it is often the carrier who is contending for the existence of a contract on the terms of the bill where its existence is disputed.

65. Equally those interested in the cargo and its carriage will generally be best served if their relationship with the carrier is a contractual one. That brings the benefit of the mandatory obligations imposed on carriers by the Hague and Hague-Visby Rules where they apply, and avoids the vacuum which might otherwise exist if the only potential claim lay in tort or bailment.

66. The Law Commission Report explained some aspects of these mutual interests at paragraph 2.14:

> "No consultant dissented from the Working Paper's view that if claims are to be made against a sea carrier, it is desirable that they are contractual rather than tortious. First, if the claim is in tort, the claimant has the onus of proving negligence and also that he had either the legal ownership of, or possessory title to, the goods in question at the time when the loss or damage occurred. In the case of a purchaser of part of a bulk, it is unlikely that he will have such rights because loss or damage to the cargo will usually occur while the goods are still unascertained. Even in other cases, it may be difficult to pinpoint the exact time either of the negligence or when ownership passed to the claimant. Furthermore it is unsatisfactory that a buyer can sue in tort and evade the provisions of the contract of carriage which incorporates an internationally accepted set of rules. Difficulties will also confront carrier who seeks to plead contractual limitation or exemption clauses against a claim in tort. In *The Aliakmon* ([1985] QB 350, 399) Robert Goff LJ would in principle have applied the bill of lading terms to the claim in tort, but his reasoning was not accepted by the House of Lords ([1986] AC 785, 819-820)."

67. Nor can the vacuum be satisfactorily filled by the doctrine of bailment on terms. The doctrine permits a bailee to rely upon the terms on which he voluntarily assumes the duty as a bailee to qualify what would otherwise be his responsibility towards the owner of the goods or person entitled to possession: see *East West Corporation v DKBS AF 1912 A/S* [2003] QB 1509 at [30] and [69]. But the doctrine does not provide the bailee with a cause of action against others as if the terms were contractual. If the charterparty ceases to govern, the carrier would still wish to have rights to recover losses for which the holder of the bill would commonly be responsible in contract if the bill contained a contract, such as

for freight, general average and demurrage. It is also common for bills to incorporate the terms of a charterparty, thereby conferring on the carrier the same contractual rights as are held against the charterer if the bill contains or evidences a contract.

68. I agree with the authors of *Aikens* at 7.32 that "[t]here is a strong presumption that goods to be carried by sea are to be carried pursuant to a contract and there is also universal knowledge and recognition, in commercial and shipping circles, that bills of lading are issued in connection with such contracts and that they contain contractual terms."; and at 7.34 that "[i]t will generally be contemplated by commercial parties that if the contract of carriage is known to be part of, or pursuant to, a commercial sale concerning the goods, a bill of lading will be required (as a document of title) and that this will contain contractual terms. The legal basis for such implied incorporation [of the bill of lading terms into the contract of carriage] is thus the presumed intention of the parties…". I endeavoured to make a similar point in *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* [2019] 1 Lloyd's Rep 101 at [42].

The bill of lading in the hands of a charterer when it ceases to be charterer

69. Just as where the bill is issued to a charterer both the mere receipt principle, and the springing up of a contract when indorsed by the charterer to a third party, depend upon the presumed intention of the parties, so the position governing a bill in the hands of a charter who ceases to be charterer should also, in my view, be determined by the presumed intention of the parties, subject always to any contrary agreement or circumstances which demonstrate a contrary intention.

70. Just as a carrier and indorsee would generally want their relationship to be contractual following indorsement, so too it is in the interests of both the carrier and the charterer that their relationship should be contractual for so long as the latter has an interest in the goods and the voyage. While the charterparty subsists, the charterparty usually performs that function to the exclusion of the bill of lading. But if the charterparty ceases to govern, both parties would presumptively expect the completion of the voyage to be carried out on the terms of a contract, not in a legal vacuum. The bill of lading provides that function.

71. A voyage charterparty may come to an end during the course of the voyage for a number of reasons. There may be an accepted repudiatory or renunciatory breach. There may be an express right of termination under the charterparty. In a trip time charter there may be a right to withdraw for non-payment of hire. The carrier will not usually know at the date of termination whether the charterer to whom it had issued the bill remains the holder. If it does, the carrier and the ex-charterer will generally want their relationship to be contractual for the remainder of the voyage for the same reasons as apply in the case of an owner and indorsee from the charterer.

72. Mr Russell drew attention to the unfortunate and anomalous consequences of the contrary position. Most strikingly, a conclusion that after cessation of the charterparty for any reason there is no contract at all between the charterer/shipper and carrier governing their relationship means that if the shipowner loses or damages the cargo, the charterer/shipper, who may well still be the owner of the cargo, has no contractual rights or remedies against him; and the Hague/Hague-Visby Rule regime which usually applies to the carriage of goods by sea under a bill of lading does not apply. One of the primary functions of the bill of lading, to give contractual rights to the holder in respect of the carriage of the goods, would be negated.

73. Conversely, it would mean that the carrier would have no contractual rights against the shipper, or anyone else (absent novation), in relation to the kinds of losses suffered during the continuation of the voyage in respect of which the commercial expectation would be that they were not for the carrier's account.

74. Further, on the Judge's analysis, once the shipper ceases to be charterer it cannot transfer contractual rights against the carrier to a buyer or any other party after discharge, whereas a non-charterer shipper could do so whether before or after discharge, and a charterer shipper could do so before, but not after discharge. This would be anomalous and have no commercial justification. Indeed it would deter sales of cargo in trades where the bill of lading might not be available at the time of discharge because the charterer would not be able to ensure that he could pass on the important contractual rights in the bill of lading contract which a purchaser would expect to receive.

75. Moreover it would operate anomalously vis a vis an indorsement to a pledgee. One of the purposes of COGSA was to reverse the effect of *Sewell v Burdick* (1884) 10 App Cas 74 under the 1855 Act, so as to enable a party with a security interest to be able to enforce that interest as holder of the bill: see the Law Commission Report at 2.2(a). The pledgee will not typically know whether a charterer/shipper has indorsed the bill to the pledgee's client buyer before or after termination of the charter, which may be a matter of happenstance. Yet if the Judge be right, the rights of the pledgee would anomalously turn on that happenstance.

76. Mr Thomas submitted that if the charterer remained the holder of the bill after cessation of the charterparty relationship, there was no need for a continuing contractual relationship: the vacuum was satisfactorily filled by the carrier's liability being a bailment on the terms of the charterparty. However, for the reasons explained earlier, and in the Law Commission Report, a non-contractual claim by the cargo owner, whether in tort or bailment, does not satisfactorily protect the position of either carrier or cargo interests in the remainder of the voyage; nor does it afford the carrier the rights of action it would reasonably expect for general average, freight and demurrage.

77. Moreover, although any bailment might originally have been on the terms of the charterparty for so long as the bill remained a mere receipt, I have some difficulty in those remaining the terms on which the carrier is bailee of the cargo thereafter vis a vis the ex-charterer as the person with the proprietary and possessory interest in the cargo represented by the bill. The terms of the charterparty will have ceased to exist as governing terms either entirely or, as in the present case, for the future where there is express agreement between carrier and charterer that the carrier's contractual obligations will no longer be governed by the charterparty. The position of the carrier vis a vis a third party with a proprietary or possessory interest in goods who might sue in bailment, other than the charterer, is that the bill of lading would represent the terms of the bailment on terms, not the charterparty. The bill of lading as a document of title is in effect an attornment in advance to all holders: a recognition in advance that the goods are being held for each holder and giving the holder the right to call for delivery: see the Law Commission Report at 5.4. Although it is not necessary to decide the point, I would have thought that there is no reason to treat the ex-charterer differently from anyone else once it has ceased to be in a contractual relationship; and that the better analysis is that the bailment is on the terms of the bill, just as it is vis a vis a shipper or indorsee who is not a charterer, because it is the bill which contains or evidences the contractual terms between the parties.

78. I would therefore characterise the mere receipt principle as being that in issuing a bill of lading, the carrier usually contracts with the holder on those terms save only for so long as the holder is a charterer, and save to the extent thereafter (if at all) that the contractual relationship with the carrier for performance of the carriage remains governed by the charterparty (as it was for pre Novation Agreement conduct in the present case). The bill of lading will not otherwise be a mere receipt but will contain or evidence a contract of carriage. This reflects the presumed intention of the parties. It is no more than a general presumption, and is subject to a contrary agreement or circumstances showing a contrary intention.

Applying the principles to the facts of this case

79. The mere receipt principle therefore prima facie applies in this case to render the Bill of Lading a contract of carriage between BP and Owners when the Charterparty ceased to perform that function upon the novation. The final question on this issue is whether the Novation Agreement is itself a contrary agreement or evinces a mutual contrary intention.

80. I can envisage circumstances in which a charterparty is brought to an end by agreement between carrier and charterer in which it is clear that the carrier and the charterer intend to cease all contractual relations thereafter. If, for example, the charterer demonstrated to the carrier that it was no longer holder of the bill of lading and the reason why a novation was sought was that it had no further interest in the goods or the remainder of the voyage, a novation might well evidence such an intention. That is not, however, the position in this case. BP had in fact passed title to Gulf and been paid in respect of the Cargo (i.e. the financed cargo of 80,000 m.t.) but there is no evidence or information before the court that it had divested itself of title in relation to the rest of the cargo on board the Vessel. BP at that stage remained holder of the Bill. As Mr Thomas accepted, at the time of the Novation Agreement, Owners knew nothing about whether BP retained title or an interest in the cargo on board, and nothing about whether BP remained the holder of the Bill. In those circumstances it is impossible to attribute to Owners, from the mere existence of the Novation Agreement, an intention that all contractual relations with BP should cease. In order to displace the mere receipt principle it is necessary to find circumstances evidencing a mutual contrary intention.

81. Moreover the Novation Agreement involves the continued application of clause 30.7, which contemplated Gulf being entitled to order discharge without production of the Bill in return for a deemed LOI pursuant to that clause. The continued agreement to an indemnity in those circumstances necessarily contemplated that BP would be able to bring a valid claim for breach by reason of discharge without production of the Bill if it remained holder. As is clear from the authorities, such a claim is a contractual one arising as an incident of the bill of lading contract.

82. For these reasons I differ from the conclusion reached by the Judge on the breach point argued before her. In my view the Bill was not a mere receipt in BP's hands at the time of discharge; it had become a document containing or evidencing a contract with BP from the date of the Novation Agreement, and remained so at the date of discharge.

Ground 1: the point not argued below

83. That is sufficient to determine Ground 1 in favour of the Bank, but in my view there is a short answer to Owners' breach defence irrespective of whether the Bill was a mere receipt

in the hands of BP at the time of discharge. Section 2(1) of COGSA provides that "the lawful holder of a bill of lading….shall, (by virtue of becoming the holder of the bill…) have transferred to him and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract". The language of s. 2(1) makes clear that it operates retrospectively. The indorsee is put in the same position as if he had been a party to a contract on the terms of the bill from the date of its issue: *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196, 218.

84. The position is no different for an indorsee from a charterer from that which applies to an indorsee from a non-chartering shipper. As explained in *Scrutton* at 6-015 quoted above, in such a case where the bill has not previously been a contract the indorsee is treated as if there had been a contract and as if it had been a party to that contract. This is the whole point of section 2. By the indorsement, a contract not only "springs up", but is treated by COGSA as having always existed: the indorsee becomes party to a contract on the terms of the bill as if it existed as a contract from the date of its issue, so as to be able to take advantage of a bill of lading contract governing the whole of the carriage.

85. This is no less true where indorsement takes place after discharge than it is where indorsement takes place before provided the indorsee takes pursuant to pre-existing contractual arrangements, as the Bank did in this case. Section 2(2) expressly confers the rights of suit provided for in s. 2(1) in such circumstances, provided the conditions there identified are fulfilled. As reflected in paragraph 2.10 of the Law Commission Report, where there are circumstances which mean that the bill is not available at discharge, the statutory purpose is to give the holder thereafter the rights of suit against the carrier which it would have had if it had been party to a contract of carriage from the outset, thereby giving effect to reasonable commercial expectations. That applies as much to an indorsee from a charterer, where a contract on the terms of the bill "springs up", as it does to an indorsee from a non-charterer shipper or subsequent indorsee.

86. Mr Thomas objected that this would be a very odd result because it would unfairly impose on Owners in this case an obligation not to discharge without presentation of the Bill in circumstances where Owner's only contractual obligation to anyone at the time of discharge was to discharge without production pursuant to clause 30.7 of the Charterparty. This ignores the effect of section 2 being not only to bring into existence a contract, where the indorsement is from the charterer, but also to treat the contract retrospectively as if it had existed from the moment of issue. It is inherent in such a scheme that conduct which is not a breach of contract at the time it occurs may subsequently be treated as such.

87. There is nothing odd or unfair about this result. There is often a conflict between charterparty responsibilities and bill of lading responsibilities. The carrier, by issuing the negotiable bill, takes the risk of exposing itself to the liabilities contained in the bill if and when it becomes treated as contractual, notwithstanding that it has assumed different responsibilities under the charterparty. So if, for example, an indorsee from a charterer brought a claim for damage to cargo occurring prior to the indorsement, it would be no answer for the carrier to argue that the alleged breach had occurred at a time prior to indorsement when the bill was a mere receipt and that at that time the carrier's only contractual responsibilities were in a charterparty which contained a relevant exemption from liability, so that when the conduct occurred it was not a breach of any existing contractual obligation. The contractual duty to deliver only against presentation of an original bill is no different in this respect from any other contractual obligation in the bill of lading contract. The carrier, by issuing a negotiable bill, takes the risk that if it delivers

without production of the bill, the bill will be or have become a contract of carriage by negotiation by the time of delivery, a matter of which it will usually be unaware, as explained by Millett LJ in *The Houda* at p. 557 in the passage quoted above. The carrier takes the same risk in relation to negotiation of the bill following discharge. That is why it is usual for carriers to require a letter of indemnity against such liability.

88. Mr Thomas argued that this point was not open to the Bank in this court because it had not been argued below and was not even within the wording of Ground 1 of the Notice of Appeal. However I do not think that either of those points renders it unavailable in this court. As Mr Thomas fairly accepted, it is a pure point of law on which no additional evidence or factual findings would have been sought had it been advanced at trial. It was raised in the Bank's skeleton argument which accompanied the application for permission to appeal, and its revised skeleton following the grant of permission. In Owners' responsive skeleton argument the merits of the point were addressed, without at that stage any objection to it being advanced or relied on. Mr Thomas was therefore able to conduct the appeal and argue the point with sufficient notice, and did so. It would be mere formalism to require an amendment to the Notice of Appeal.

The Respondent's Notice point on Ground 1

89. Mr Thomas argued that if there would otherwise have been a breach in delivering the cargo without production of the Bill, there was no such breach in this case because BP authorised or consented to Owners doing so. The authorisation/consent was said to consist of one or more of the following: (i) the communications of 12 March 2020 by which BP invoked the deemed LOI regime in clause 30.7 of the charterparty; and/or (ii) the Novation Agreement itself; and/or (iii) BP's silence in the face of it being informed of the discharge at Sohar.

90. I cannot accept any of these arguments. As to the first, the highest that it could be put is that the communications of 12 March 2020 envisaged the possibility of discharge at Fujairah without production of the Bill. But the references to the LOI were merely an acknowledgement that when discharge instructions were given they would engage the deemed LOI. No discharge instructions were in fact given by BP: the instructions were not to discharge at Fujairah but to proceed to Fujairah for orders. Still less were they instructions to discharge at Sohar, with or without production of the Bill. Moreover they were clearly given by BP in its capacity as charterer, not holder of the Bill; the Bill was at that stage a mere receipt in the hands of BP. The communications simply do not amount to authorisation or instructions to Owners by BP qua holder of the Bill to discharge at Sohar without production of the Bill.

91. As to the second, the argument was that by virtue of BP's agreement in the Novation Agreement to Gulf acquiring the charterparty rights, including the right under clause 30.7 to require discharge without production of the Bill against a deemed LOI, BP was thereby consenting to Owners doing so if so instructed by Gulf. This too faces the insuperable difficulty that BP was clearly not acting qua holder of the Bill, but solely qua charterer, in entering into the Novation Agreement, which was concerned solely with the charterparty rights and obligations. The Novation Agreement simply cannot bear the construction that BP was clothing Gulf with authority to require discharge without presentation of the Bill *on BP's behalf under its Bill contract rights*. The fact that as a result of that agreement there was about to spring up between BP and Owners a contract on the terms of the Bill, which did not previously exist, does not affect the fact that nothing that was done by BP in

agreeing the terms of the Novation Agreement was done as an imminent contractual counterparty on the terms of the Bill.

92. As to the third argument, it is true that BP were one of the copy recipients of the NORs and Statements of Facts at Sohar. It is unclear what if any purpose this was intended to serve. However, what is clear is that no authorisation or consent was sought from BP, and mere silence in the face of such communications cannot amount to authorisation or consent.

93. There was another overarching point raised by Mr Russell in answer to all three arguments, which was contained in his skeleton argument but not developed orally. It relied upon *Aikens* at 9.66 for the proposition that waiver of a right under a bill of lading contract is not binding upon any subsequent holder of the bill.

94. In *Leduc v Ward*, a cargo was shipped under a bill of lading at Fiume for delivery at Dunkirk. The vessel deviated to Glasgow, where the cargo was lost as a result of perils of the sea off the mouth of the Clyde. Liability for loss by perils of the sea was excepted by the bill of lading terms, but deviation would preclude reliance on the exception. The deviation had, however, been orally assented to by the shipper. The claim was brought by an indorsee of the bill. It was held that the owners could not rely on the shipper's consent to the deviation against the indorsee. Lord Esher MR and Lopes LJ rested their decision on the parol evidence rule rendering inadmissible evidence to contradict the written terms of the contract contained in or evidenced by the bill. Fry LJ, however, based his decision on the wider proposition that it was inconsistent with the purpose of the 1855 Act rendering the contract contained in the bill of lading assignable that "anything which took place between the shipper and shipowner, not embodied in the bill of lading, should affect the contract" (p.484-5).

95. In *Tate & Lyle v Hain Steamship*, a ship was chartered to load at three ports and bills issued to the shipper/charterer. The vessel deviated before the charterer loaded cargo at the third port. That loading was a waiver by the charterer of the deviation. The vessel then suffered a casualty and incurred general average expenditure. When the salved cargo arrived at the discharge port, the bills of lading were presented by the holder, who was the indorsee from the shipper/charterer, in ignorance of the deviation. One question was whether the holder of the bills was liable for the freight and a general average contribution under the terms of the bills. It was argued that the holder of the bills was bound by their terms and was bound by the charterer's waiver of the deviation by virtue of loading the cargo at the third port. The House of Lords held that the indorsee was not bound or affected by the waiver. Lord Atkin, with whom Lords Thankerton, MacMillan and Maugham agreed, said at pp. 174-5:

> "…… in my opinion the fact of deviation gives the bill of lading holder the rights I have already mentioned. On discovery he is entitled to refuse to be bound by the contract. Waiver by the charterer seems on principle to have no bearing on the rights and liabilities which devolve upon the bill of lading holder under the Bills of Lading Act. The consignee has not assigned to him the obligations under the charterparty: nor in fact any obligation of the charterer under the bill of lading, for ex hypothesi there are none. A new contract appears to spring up between the ship and the consignee on the terms of the bill of lading. One of the terms is the performance of an agreed voyage, a deviation from which is a fundamental breach. It seems to me impossible to see how a waiver of such a breach by the party to the charterparty contract can affect the rights of different parties in respect of the breach by the same event of the bill of lading contract. I think, therefore, that a deviation would admittedly preclude a claim for contribution

> arising against parties to a subsisting contract of carriage, though no doubt the claim does not arise as a term of the contract; and as the bill of lading holder is entitled to say that he is not bound by the agreed term as to freight, the ship could not in the present circumstances claim against the plaintiffs either contribution or freight if they had to rely on the bill of lading alone."

96. Lord Wright reached the same conclusion at p. 178 on the basis of the parol evidence principle established in *Leduc v Ward*.

97. *Aikens* treats this as authority for a general proposition that a subsequent indorsee is not bound by a waiver of the bill of lading contract by the shipper, but goes on to justify it, at least in part, by reference to the circumstances of that case, which, like the present case, involved the shipper being the charterer so that the contract did not spring up until indorsement:

> "The commercial justification for such a result is that otherwise the indorsee may be adversely and unfairly affected by matters of which he has no knowledge. This is not a mere application of the *Leduc v Ward* principle. It is the fact that a new contract has sprung up when the bills were transferred to another that gives rise to the conclusion that (i) as between the shipowner and the bill of lading holder the shipowner has committed a repudiatory breach and (ii) that was not waived by the bill of lading holder. The position would, it appears, be the same under COGSA as it was under the Bills of Lading Act 1855."

98. *Tate & Lyle v Hain Steamship* is clear authority for the proposition that a waiver by a shipper/charterer cannot bind the indorsee in whose hands the bill of lading contract "springs up". The point taken by Mr Russell therefore seems to me a good one so far as concerns the first two ways in which Mr Thomas put the Respondent's Notice point.

99. Whether *Tate & Lyle v Hain Steamship* stands for any wider principle that any waiver by a bill of lading holder does not bind a subsequent indorsee, as might be suggested by Fry LJ's reasoning in *Leduc v Ward*, is more open to question. The desirability of such a principle rests on indorsees being able to acquire an assignment of rights under COGSA without being adversely and unfairly affected by terms outside those in the written bill of which they are ignorant. It is not necessary to express any concluded view on that question for the purposes of deciding this case, and I prefer not to do so in light of the fact that the point was not fully explored in argument. It has some relevance, however, to Mr Russell's submission that the effect the Judge's decision on causation is calamitous for the commodity finance trade, in which context I will return to it.

Conclusion on Ground 1

100. I would therefore hold that the appeal on Ground 1 succeeds both on the grounds advanced at trial, and on the new ground advanced on appeal. In those circumstances the outcome of the appeal turns upon Ground 2.

Ground 2: causation

101. Mr Russell submitted that the Judge had fallen into error in six respects:

(1) She had failed to address and identify what the breach was (or rather would have been, given that she had concluded that there was no breach and was addressing the causation question on the hypothesis that she was wrong on the breach question). She should have identified and had clearly in mind that the breach was discharge of the cargo.

(2) She had failed to identify the test for causation, namely whether the breach was an effective cause of the loss. She should have held that the breach caused the loss because the loss was effectively caused by the Cargo not remaining on the Vessel. Had the Cargo remained on the Vessel, the Bank's security interest would have been retained. This was as far as the counterfactual inquiry needed to go.

(3) She failed to distinguish between the two different analyses required by issues 8(1) and 8(2). Issue 8(1) required a counterfactual analysis of what would have happened if there had been no breach. Issue 8(2) required the Owners to show that conduct of the Bank was the sole effective cause of the loss.

(4) In relation to the first issue, she took a counterfactual which was utterly improbable and unrealistic. Owners would never have refused to deliver; they would have delivered against the deemed LOI, which is what almost always happens, as Owners' own evidence showed, and what they did in this case.

(5) Alternatively she should have held that if Owners had initially refused to discharge without the Bill, they would have done so a few days later in reliance on the LOI once it was discovered that the Bill was stuck in the system as a result of COVID and would not emerge until much later, in the event August.

(6) Alternatively there was no proper analysis of what the consequences would have been to justify a conclusion that the Bank would not have a claim.

102. As to the first, the criticism is unjustified. The Judge clearly had in mind that the relevant breach was (or would have been) discharging the cargo without presentation of the Bill. She identified it as such in [1] of the Judgment when recording the Bank's claim, and in her emphasis of the Bank's case which she highlighted at [54] and [55], contrasting that with Owners' submission that the Cargo would have been discharged at [62].

103. As to the second, the argument advanced is unsound. There is no reason to think that the Judge did not have in mind the relevant principle of causation, that the breach must be an effective cause of the loss. In applying it, she was correct to proceed on the basis that it was not sufficient to conclude, without more, that in the absence of breach the Cargo would initially have remained on board the Vessel. It was necessary to ask what would have happened next. The loss claimed by the Bank was that discharge without production of the Bill prevented the Bank from being able to enforce its security interest against the Cargo in Owners' hands so as to recoup the lending which Gulf did not repay. This can, in my view, properly give rise to a claim where, as is usual, the financing bank expects discharge without presentation of the bill against an LOI as part of the financing arrangements (cf *Fimbank Plc v Discover Investment Corp (The Nika)* [2020] EWHC 254 (Comm) [2021] 1 Lloyd's Rep 109 at [34]). Nevertheless to establish causation, it was for the Bank to show, on the balance of probabilities, that in the event of performance by Owners, it would have enforced its security against the Cargo so as to recoup its lending. Otherwise the breach was not an effective cause of any loss: the failure to recoup the lending to Gulf would have occurred in any event, irrespective of the breach by Owners in delivering without

production of the Bill. The causation defence required an assessment of what would have happened to the Bank's security interest had Owners initially refused to discharge without production of the Bill. That was indeed the inquiry which both parties invited the Judge to undertake, and which she undertook.

104. The Judge took pains to record at some length the way in which the causation issues had been presented in the pleadings, written submissions, oral submissions and evidence. The position was as follows.

(1) In the pleadings, Owners had advanced two causation arguments. At paragraph 77.2 of the Amended Defence they advanced a positive case that any loss or damage was caused by the Bank authorising and/or approving and/or requesting and/or permitting Gulf to arrange delivery/discharge without production of the Bill. The Bank denied that it had done so at Reply paragraph 60. This is what may be termed the positive causation defence which came to be reflected in Issue 8(2). At paragraph 81 of the Amended Defence Owners identified that as a matter of law the Bank was only entitled to damages to put it in the position it would have been in had the Bill contract been performed, and sought particularisation of the Bank's case as to what such performance would have been and how it gave rise to the loss. This is what may be termed the negative causation defence. In response the Bank pleaded at paragraph 64 of the Reply that had Owners performed the Bill contract they would not have discharged/delivered the cargo without production of the Bill "and/or would not have discharged/delivered the cargo without the authorisation of the Bank and/or to any party other than the Bank or to the Bank's order".

(2) The negative causation defence was reflected in issue 8(1). At trial the Bank ran an evidential case that it would not have authorised the discharge at all had it known of the intended STS at Sohar, relying heavily on the evidence of Ms Bodnya. This was challenged in cross-examination.

(3) In its written Closing Note at paragraph 11(2) the Bank responded to the negative causation defence by saying that if Owners had not delivered the Cargo, it would have remained on board the Vessel. At paragraphs 41 and following the Note addressed the evidence as to what the Bank would have done if asked to authorise discharge. Paragraphs 45-46 summarised the Bank's case as to what would have happened if there had been no breach: first, upon being instructed by Gulf on or around 25 or 26 April to discharge without production of the Bill, Owners would have refused to do so; Owners would then, acting prudently, have contacted BP as the holder of the Bill to obtain discharge instructions; had BP been contacted by Owners, BP would have told them that the Bill had been sent for indorsement and transfer to the Bank, and might well have said that it was likely to take some time; Owners would then have contacted the Bank and asked what it intended to do; the Bank would then have told Owners not to discharge the Cargo without their consent, and investigations thereafter would have revealed the alleged fraud by Gulf. Mr Russell submitted that this was addressed in the context of quantum, not causation, but I can see no relevance in the supposed distinction: damages are measured by reference to the position in which the innocent party would have been had the breach not occurred, which is the same premise as falls to be applied for the negative causation defence. Moreover in the course of his oral closing speech, Mr Russell identified Owners' negative causation argument, correctly, as being that "if there had been no breach the same loss of the Bank's security interest would have occurred in any event, because the Bank would have agreed to the cargo

being discharged into the Kutch Bay and Prestigious in the same way as in fact happened, without production of the Bill of Lading". He continued "The starting point is that if owners do not breach their contract that is contained in the Bill of Lading, the cargo stays on the vessel until the bill of lading is produced. In my submission it is for the owners to persuade you in those circumstances that, notwithstanding that fundamental proposition, nonetheless the cargo would have ended up being discharged into the Kutch Bay and Prestigious." Having submitted that Owners' case to that effect was fanciful and that Ms Bodnya was an honest witness, Mr Russell continued:

> "….we invite you to accept her evidence as truthful and representing the true position, that she would not have agreed discharge into the Kutch Bay and Prestigious, which is the necessary element for the owners to establish any case of defence based on causation." (my emphasis).

105. It was therefore the Bank's own case that had Owners initially refused to discharge without production of the Bill, BP would have been consulted as to what to do; BP would have referred Owners to the Bank to make the decision; and Owners would have acted in accordance with the Bank's instructions. The Judge did identify these as the steps in her reasoning, summarising the effect of the pleadings and the Bank's submissions at [61], and Owners' submission at [62] that had Ms Bodnya been asked she would not have objected to discharge at Sohar without the Bill. The factual issue which fell to be decided on the evidence, therefore, was simply what instructions the Bank would have given.

106. There was no error in the Judge following this approach. Quite apart from it being the Bank's pleaded case, and that advanced orally, it would have been an obvious conclusion to draw from the evidence as a whole that BP would have been identified and consulted as the holder, and would have referred Owners to the Bank as the prospective indorsee and party at interest for the Bank to make the decision.

107. In that context the Judge's findings in para 121(i) that the Bank "would, in any event, have permitted discharge without production of the Bill of Lading" and in (iv) that the loss would have occurred "in any event", were not findings that the Bank would have adopted some passive role in standing by or acquiescing by silence in the discharge. Nor are they findings as to what the Bank would have allowed or instructed Gulf to do by way of discharge instructions under the Charterparty. The context was that it was the Bank's own case that instructions would have been sought from the Bank by Owners because it was the prospective holder of the Bill, and these were her findings as to what those instructions would have been in that capacity. They are supported by her careful analysis of the evidence in the preceding paragraphs.

108. As Mr Russell was inclined to accept, the obligation to deliver against a bill of lading is a contractual one which can be varied by express consent to the contrary. On the Judge's findings, had Owners initially complied with the obligation not to discharge without production of the Bill, what would have happened in practice is that they would have sought and obtained express consent to do so from both the holder and intended indorsee, who brings the present claim. In those circumstances delivery without production of the Bill would no longer have been a breach of the Bill contract. The initial breach would therefore have caused no loss.

109. I do not understand Mr Russell's fourth point, namely that the counterfactual of the Cargo remaining on board was an unrealistic one. That was the Bank's own counterfactual,

and the only one which would enable it to advance a case of causative loss as a result of the breach. It was for the Bank to identify what would have happened had there been no breach and that involved asserting that the Cargo would have remained on board.

110. Mr Russell's fifth point assumes that the Owners would have discharged the Cargo after a few days without waiting for instructions from the Bank. However that formed no part of the case advanced by the Bank as a matter of either argument or evidence at trial. The sole issue was what instructions would have been given by the Bank.

111. Similarly Mr Russell's sixth argument is misplaced for the reasons I have explained. The steps in the Judge's reasoning were clear and cannot be faulted.

112. As to Mr Russell's third point, it became common ground on the appeal that despite including it in her heading, the Judge had not in fact decided issue 8(2) or what I have termed the positive causation defence. However that is of no significance if, as I have concluded, the Judge was right in accepting the negative causation defence.

113. For similar reasons, the remaining Respondent's Notice points do not arise for decision.

114. Mr Russell submitted that the Judge's conclusion on causation would have calamitous consequences for those involved in providing commodity trade financing, because it would be open to Owners in almost every case in which discharge took place against an LOI without production of the bill of lading to assert a similar causation defence.

115. If that is so, it is simply the result of the application of conventional principles to which the practical consequences for market practice must yield. There are other forms of security available to those in the business of providing trade finance, and until 1992 taking a pledge of the bill of lading did not confer the security now said to be critical. I would question, however, whether the decision in this case has such far reaching consequences. It is the result of a particular finding of fact as to what instructions would have been given to these shipowners in the light of the fact that, as the Judge recorded in [120], the Bank thought they were wholly or largely secured in other ways. It is by no means clear that similar findings of fact could be made in most other cases.

116. Moreover if there is a general principle that waiver by a prior holder will not avail a subsequent holder, the argument is likely to be available relatively rarely. It will only be available where the counterfactual involves obtaining the consent not merely of the current holder, but of any future potential holder which might bring a claim for breach of the bill of lading contract. Since typically owners will not know who the latter might comprise, still less whether they were buyers or financiers or those with other interests, it may be unrealistic for such owners to establish that they would have sought and received instructions to discharge from the holder from whom they face a claim. The unusual features of the present case are that the Bill was enroute to its ultimate holder and was held up for administrative not commercial reasons. Owners were therefore in the unusual position in which they could easily have sought all the instructions they needed to be able to discharge without production of the Bill without exposing themselves to a claim for breach of contract; and on the case advanced by the Bank itself, would have done so.

Conclusion

117. For these reasons I would dismiss the appeal.

Falk LJ :

118. I agree that the appeal should be dismissed for the reasons given by Lord Justice Popplewell.

Asplin LJ:

119. I also agree.