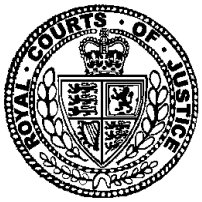

Neutral Citation Number: [2024] EWCA Civ 1312

Case No: CA-2024-000316

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT
Clare Ambrose (sitting as a Deputy Judge of the High Court)
[2023] EWHC 3264 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2024

Before:

LORD JUSTICE UNDERHILL,
Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE MALES
and
LORD JUSTICE SNOWDEN

- -

Between:

1) AMS AMEROPA MARKETING AND SALES AG **2) BALOISE BELGIUM S.A.**	**Respondents/ Claimants**
- and -	
OCEAN UNITY NAVIGATION INC	**Appellant/ Defendant**

'DORIC VALOUR'

- -
- -

David Semark (instructed by **Wikborg Rein LLP**) for the **Appellant**
Craig Williams (instructed by **Hughes & Dorman**) for the **Respondents**

Hearing date: 22 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 1 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

LORD JUSTICE MALES:

1. The issue on this appeal is whether a bill of lading holder making a claim against a shipowner for damage to cargo occurring during the voyage must give credit for a payment received from the seller of the damaged goods. The judge, Ms Clare Ambrose, sitting as a Deputy High Court Judge, held that no such credit need be given. The shipowner appeals.

The facts

2. The first claimant and the respondent to the appeal ('Ameropa') is a company based in Switzerland. It purchased a cargo of soybeans from Zen-Noh Grain Corporation on FOB terms and entered into a voyage charter dated 7th July 2020 with Pacific Basin Spuramax Ltd for carriage of the cargo from (in the event) Convent in Louisiana to Abu Qir Port in Egypt.

3. The second claimant is an insurer based in Belgium. It was common ground before the judge that, as the insurer of the cargo, it has no title to sue in its own name as a matter of English law and that its claim should be dismissed. I need not consider its position further.

4. By a sale contract dated 15th July 2020 Ameropa agreed to sell 50,000 metric tons of US no.2 or better yellow soybeans in bulk +/- 10% to an Egyptian company called International Oil Multiseed Extraction Co ('Oilex') on CIF terms. The sale contract provided that quality and condition would be final at loading as per an independent first class FOSFA approved surveyor's certificate.

5. On 3rd and 4th August 2020 the cargo, a total of 49,574.949 metric tons of yellow soybeans in bulk, was loaded on board the vessel 'DORIC VALOUR', owned by the appellant ('the shipowner'), from the Zen-Noh Grain Elevator at Convent.

6. On 4th August 2020 50 clean bills of lading on the Congenbill form were issued on behalf of the shipowner. The bills name Zen-Noh Grain Corporation as shipper and state 'to order' in the consignee box. Oilex was identified as the notify party.

7. On 25th August 2020 Ameropa issued an invoice to Oilex for USD 21,565,102.82, with the sale price stated as USD 435/mt. On 2nd (or possibly 4th) September 2020 Oilex paid Ameropa the invoiced amount and became the holder of the bills of lading and owner of the cargo.

8. Meanwhile, on or around 30th August 2020 the vessel arrived at Abu Qir Port. When the holds were unsealed by SGS, the cargo in holds 1, 2, 3, and 5 was found to be sound but damage was found on the surface of the cargo in hold 4. The crew started work to segregate the damaged cargo. On 2nd September 2020 a further quantity of heat-damaged cargo was found adjacent to the No. 4 port topside fuel oil tank. A total of about 3,631.79 mt of cargo discharged from hold 4 was sent by truck to a separate warehouse about 100 km away, at a place called El Sherouq. The judge found that this represented an admixture of sound and damaged cargo.

9. The judge recorded that although there was no direct evidence from Ameropa or Oilex to explain their actions, one of the survey reports indicated that Oilex had rejected the

cargo taken to El Sherouq. It was Ameropa who arranged and paid for the trucks and the warehousing of this cargo.

10. By 12th September 2020 all visually damaged cargo in hold 4 had been removed and discharge was completed by 14th September 2020. The vessel sailed on 15th September 2020.

11. On 17th September 2020 an inspection took place at the El Sherouq warehouse. The inspection report indicated that segregation was not feasible and that a salvage solution would be sought. Bids were obtained, at prices ranging between USD 200/mt and USD 355/mt. On 24th September 2020 Ameropa notified Oilex that the damaged cargo had been sold at USD 355/mt and that the buyer (named as Itihad) would transmit the price to Oilex. Ameropa asked Oilex to notify it once payment had been received so that the cargo could be released to the buyer. Ameropa added:

> 'We hereby undertake to compensate you with the difference between the $355 and the final price of this quantity.'

12. Thus it was Ameropa who arranged the salvage sale of the damaged cargo, but it did so on behalf of Oilex, to whom the price was payable.

13. Later on 24th September 2020 Oilex confirmed that it had received the sum of USD 1,289,286.45 (i.e. 3,631.79 mt x USD 355), and that it was awaiting Ameropa's 'transfer of the difference between $355 and the final price that was paid by us' under its sale contract with Ameropa.

14. It appears that Ameropa did not immediately transfer this amount to Oilex. However, on 15th March 2021 it provided Oilex with a credit note for USD 284,015.08, being the difference between the 'final price' of USD 433.20/mt under the sale contract[1] and the price of USD 355/mt achieved on the sale to Itihad.

15. On 12th July 2021 Ameropa arrested the vessel in South Africa. The affidavit sworn to obtain the arrest of the vessel stated that the receivers, Oilex, had confirmed that their rights were assigned to Ameropa by reason of the credit note. In fact no written assignment had been executed at that stage, but on the following day Oilex did execute an assignment (albeit backdated to 7th September 2020) in the following terms:

> 'We, the undersigned INTERNATIONAL OIL MULTISEED EXTRACTION CO. herewith assign to AMS AMEROPA MARKETING AND SALES AG, all rights pertaining to us in connection with the above-referenced shipment.
>
> In particular we assign all rights to AMS AMEROPA MARKETING AND SALES AG to recover the loss suffered from the liable parties and in particular against the owner of the vessel m/v "DORIC VALOUR".'

[1] Slightly less than the invoice price of USD 435/mt. The reason for this minor adjustment was not explained, but it does not appear to have had anything to do with the damage to the cargo.

16. On 16th July 2021 the shipowner's P&I Club issued a Letter of Undertaking so that the vessel could be released. The LOU included an agreement that the claim against the shipowner would be subject to English law and jurisdiction.

17. The claim form in this action was issued on 2nd December 2021. I infer that the necessary extensions of time had been granted.

Liability

18. Ameropa's claim was brought as assignee of the rights of Oilex. Although there was also a pleaded claim that Ameropa was entitled to bring proceedings as a party to whom the shipowner owed duties in contract and tort, this claim was not pursued. Accordingly whether Ameropa was entitled to claim damages, and if so in what amount, depended on what Oilex would have been entitled to claim at the date of the assignment in July 2021.

19. The trial proceeded on the basis, admitted in the pleadings, that at all material times Oilex was the lawful holder of the bills of lading with rights of suit pursuant to section 2 of the Carriage of Goods by Sea Act 1992.[2]

20. The shipowner admitted at the trial that the damage to the cargo was caused by the heating during the voyage of fuel oil in the fuel oil tank adjacent to hold 4 and that this was a breach by the shipowner of the contract of carriage contained in or evidenced by the bills of lading. However, no such admission was made at the time, and in its Defence the shipowner originally pleaded that the damage to the cargo was caused by inherent vice. That defence was abandoned by an amendment made a few months before the trial.

The judgment

21. The main focus of the trial was the shipowner's case that the true extent of the damaged cargo was no more than about 300 mt and that the damages claimed were overstated. However, the judge found that the cargo interests had acted reasonably in concluding the sale to Itihad and in not attempting to segregate further the sound and damaged cargo which had been sent to the El Sherouq warehouse. Permission to appeal on this issue was refused.

22. The judge held that Ameropa was entitled to recover the sum of USD 293,755.10 as assignee of Oilex's rights under the bills of lading. That sum was based on the difference between (1) the sound value on arrival of the cargo sent to the El Sherouq warehouse and (2) the actual value of the cargo on discharge. The judge found that the best evidence of these values was respectively (1) the price under the CIF sale concluded on 15th July 2020 and (2) the price achieved on the sale to Itihad.

23. In reaching that conclusion, the judge held that Ameropa did not have to give credit (because Oilex would not have had to give credit) for the payment of USD 284,015.08

[2] Strictly, this may not have been correct, as Oilex only paid for the cargo, and thus acquired the bills of lading, after discharge had begun. When delivery of the cargo was first demanded, it would appear that Ameropa may still have been the holder of the bills of lading and that its rights of suit had not been transferred to Oilex. However, this point was not explored at the trial and I shall ignore it.

made by Ameropa to Oilex by way of the credit note dated 15th March 2021. In the judge's view, this payment was collateral or, in the old phrase, *res inter alios acta*.

The appeal

24. The sole ground of appeal for which permission was given is that Oilex would have had to give credit for the payment of USD 284,015.08 made by Ameropa, which had effectively made it whole (save for USD 9,740.02, being the difference between the sum awarded by the judge and the amount of the credit note) and that Ameropa, as the assignee of Oilex's claim, could be in no better position. Mr David Semark for the shipowner submitted that this payment had avoided (or very substantially reduced) Oilex's loss, and that it was not collateral, but arose out of the shipowner's breach of the contract of carriage.

Legal principles

25. The general principles as to avoided loss were explained by Lord Sumption in *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313:

> '11. The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (*res inter alios acta*), which the law treats as not making good the claimant's loss. It is difficult to identify a single principle underlying every case. In spite of what the Latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under an indemnity insurance: *Bradburn v Great Western Railway Co* (1874-5) LR 10 Ex 1. Or disability pensions under a contributory scheme: *Parry v Cleaver* [1970] AC 1. In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer: *Arab Bank Plc v John D Wood Commercial Ltd* [2000] 1 WLR 857 (CA), at paras 92-93 (Mance LJ). Or because the benefit is derived from steps taken by the Claimant in consequence of the breach, which mitigated his loss: *British Westinghouse Electric and Manufacturing Co*

> *Ltd v Underground Electric Railways Ltd* [1912] AC 673, 689, 691 (Viscount Haldane LC). These principles represent a coherent approach to avoided loss. In *Parry v Cleaver* [1970] AC 1, 13, Lord Reid derived them from considerations of 'justice, reasonableness and public policy'. Justice, reasonableness and public policy are, however, the basis on which the law has arrived at the relevant principles. They are not a licence for discarding those principles and deciding each case on what may be regarded as its broader commercial merits.'

26. Referring to this passage, in *ED & F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2022] EWCA Civ 1704, [2023] 1 CLC 94, I said that:

> '52. There is a danger in picking out isolated sentences from this passage, as both counsel sought to do to some extent in argument before us. What emerges clearly, however, is the principle that collateral benefits (*res inter alios acta*) must be treated as not making good the claimant's loss, and that there is no single principle underlying every case. The broad principle ("Broadly speaking …") is that collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss, and the critical factor is the character of the benefit, but these are criteria which will sometimes be easier to state than to apply to the facts of any particular case.'

27. I went on to say at [54] that 'the question whether action which diminishes loss "arises out of the transaction" as distinct from being independent or collateral is a question of causation', citing the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, [2020] Bus LR 1196 at [53] and Lord Justice Phillips in *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353. However, it is important to appreciate that what matters is the effective (or proximate) cause of the receipt of the benefit. A benefit does not necessarily 'arise out of the transaction' merely because it would not have been received but for the defendant's breach.

28. In the context of shipping law, there is a clear and well established principle that when cargo is damaged by a shipowner in the course of a voyage, a bill of lading holder with title to sue is (in the absence of special circumstances) entitled to recover damages based on the difference between the sound arrived value and the actual value of the damaged cargo, without giving credit for a payment received pursuant to a contract of sale to which the bill of lading holder is a party. That is not because shipping law stands somehow outside the general principles explained in *Swynson*, but because such a payment is regarded as collateral, arising independently of the circumstances giving rise to the loss; or in causation terms, the effective cause of the payment is the relationship of the parties to the sale contract and not the shipowner's breach.

29. In *R & W Paul v National Steamship Co* (1937) 59 Ll LR 28 a quantity of maize in a hold adjacent to the engine room bulkhead was damaged by heating during the voyage. The bill of lading holder, to whom property in the cargo had passed by reason of the endorsement of the bill, brought a claim in contract pursuant to the Bills of Lading Act 1855 and in tort. However, the bill of lading holder had been fully compensated for the

damage by its seller as a result of an arbitration held under the contract of sale. In an *extempore* judgment, Mr Justice Goddard held that the bill of lading holder was nevertheless entitled to recover the difference between the sound arrived value of the cargo and its actual value on arrival:

> 'In this case I understand what happened was this. After the contract was made, by which Messrs. Paul bought from Messrs. Broster, Messrs. Paul's representative went to the bank, paid the price and the freight, and obtained the bills of lading which had already been indorsed, and they obtained possession thereby of the cargo; when it was taken out of the ship it was theirs; it was taken out on their account as purchasers of the cargo. When this damage was found, surveys were held and so forth, samples were taken, and an arbitration was held between Messrs. Paul and Messrs. Broster under the terms of the contract which I have just read, and it resulted in Messrs. Broster having to pay a sum of money to Messrs. Paul, and it is agreed here, and admitted by Mr Mocatta[3], that if they recover damages in this case, they are trustees of those damages for Messrs. Broster, who have already paid them. In the view I take of this case, I do not think that that matter affects the plaintiffs' right to sue at all; if they have a right to sue the ship, what they have to do with the damages by reason of some other transaction they may have entered into does not seem to me to affect the case at all.'

30. Mr Justice Goddard went on to say:

> '… I cannot understand how it is said that the property in these goods which were delivered, which Messrs. Paul paid for and obtained by reason of being the holders of the bill of lading – the absolute and complete property – did not pass to Messrs. Paul by the endorsement of the bill of lading, as I think it did, then the absolute property is transferred by virtue of the Bills of Lading Act and all the remedies in respect of that property, remedies against the shipowner in respect of that property, give them a right to sue for damages.
>
> In this respect, I do not think that Mr Mocatta has seriously contended that the fact that Messrs. Paul had been compensated by Messrs. Broster, who were merely intermediate purchasers, really affected the question at all; it would only affect the ultimate destination of the damages because I have no doubt that Messrs. Paul will have to account to Messrs. Broster. Under those circumstances, it seems to me it is enough to say that in my judgment Messrs. Paul had a title to sue for damages in this case by virtue of the Bills of Lading Act. Also, it seems to me that they must have a right to sue by virtue of the implied contract following on the decision in *Brandt's* case, they being the people

[3] It seems likely that this was a slip by Mr Justice Goddard and that he intended to refer to Mr Miller, counsel for the bill of lading holder. Mr Mocatta was counsel for the shipowner.

> who, it is conceded, paid the shipowner, and took delivery from the shipowner.'

31. Mr Semark submitted that this case should be distinguished on two grounds. The first was that in *R & W Paul* the sale contract was on Rye Terms whereby the seller guaranteed the condition of the cargo on arrival at the discharge port. Accordingly the seller was not only liable to compensate the buyer (i.e. the bill of lading holder) but had actually been held liable to do so in an arbitration under the sale contract. Mr Semark submitted that, in contrast, Ameropa was under no liability to make the payment of USD 284,015.08 to Oilex: the sale contract here was on CIF terms so that risk passed on shipment, and Ameropa as the seller had the benefit of a final certificate as to the quality and condition of the goods issued at the load port; Oilex therefore had no claim under the sale contract to be compensated for the damage.

32. I accept that in these respects the facts of the two cases are different, but I do not accept that this affects the reasoning of Mr Justice Goddard, which in my judgment is equally applicable in the present case. As he put it, the payment under the contract of sale was made 'by reason of some other transaction' into which the bill of lading holder had entered (i.e. the sale contract), which did not affect its right to recover full damages from the shipowner. So here, the payment by Ameropa was made by reason of the sale contract.

33. Moreover, although the evidence about it was limited, it is apparent that Oilex was in fact demanding compensation from Ameropa under the sale contract, which Ameropa agreed to (and eventually did) pay. In this regard, it is necessary to bear in mind that although we now know that such a claim, brought in FOSFA arbitration, would (or at any rate should) have failed on the facts as found by the judge, this would not have been apparent at the time. At the time it was possible that the shipowner would say, as in fact it did in its Defence in this action, that the damage to the cargo was caused by pre-shipment inherent vice. If that proved to be correct, there was a potential liability on Ameropa under the sale contract, for example if part of the cargo had been shipped with an excessive moisture content, causing it to heat. To succeed in such a claim, Oilex would have needed to get round the final quality certificate, but it is not unknown for challenges to be made to such certificates, and sometimes to succeed: for example, see *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, [2002] 1 Lloyd's Rep 295 and *The Kriti Palm* [2006] EWCA Civ 1601, [2007] 1 All ER (Comm) 667.

34. The second ground of distinction proposed by Mr Semark was that the claim in *R & W Paul* was brought in what he described as a 'representative' capacity in view of the bill of lading holder's liability to account to its seller (Broster) for any damages received from the shipowner. I do not accept that this is a valid ground of distinction either. The whole point of Mr Justice Goddard's observations about the liability *inter se* of the parties to the sale contract was that this had nothing to do with, and did not affect the liability of, the shipowner. The position would have been the same in the present case if there had been no assignment and the claim against the shipowner had been brought by Oilex. The fact that Oilex may have had a liability to account to Ameropa for any damages received from the shipowner would not have affected the shipowner's liability.

35. In practice, such a liability to account is likely to be of only theoretical interest in most cases. In most cases, apparently including the present case, the cargo insurers will compensate the cargo interests for damage occurring during the voyage and any claim brought against the shipowner will be a subrogated claim brought in the name of the party with title to sue. The law should not unnecessarily frustrate such practical arrangements.

36. The next case, *The Sanix Ace* [1987] 1 Lloyd's Rep 465, was a claim under a voyage charterparty. The charterer was the FOB buyer of a cargo of DIR pellets in bulk, to whom property and risk passed on shipment. Cargo in two of the vessel's three holds was damaged during the voyage as a result of the entry of seawater. The cargo was sold on to 11 separate receivers. Under these sale contracts, risk passed on shipment, but the property could not pass until specific cargo was appropriated to the individual receiver. Because of the damage, that never happened, so that the property in the cargo remained at all times with the charterer. Nevertheless, the charterer succeeded in obtaining full payment of the price payable under its contracts of sale with the receivers because it was in a position to present conforming documents under letters of credit which the receivers' banks had opened. The shipowner's argument that this had extinguished the charterer's loss was firmly rejected by Mr Justice Hobhouse:

> 'The arbitration brought by the claimants continued and resulted in an award in their favour. Before the arbitrators it was argued by the carriers that the claimants could only recover nominal damages. It was admitted that the claimants had the property in the damaged goods at the material times but it was argued that they had suffered no recoverable loss because they had been able to collect the price for the goods from the end users. This surprising contention was rejected by the arbitrators but was persisted in by the carriers on appeal to this court and has been re-argued before me.
>
> The argument is patently unsustainable and I did not feel it necessary to call upon the claimants' Counsel. It has long been settled law that the owner of goods is entitled to sue and recover damages in respect of loss or damage to those goods. The only qualification is that, if he is suing in tort, his claim may be defeated if his title was a bare proprietary one and did not include any right to possession of the goods. In English law it is the claimants' property in the goods which gives the right to recover substantial damages. In tort the title to sue and recovery of substantial damages are concurrent. There is no such thing in the relevant context as a right to sue in tort for merely nominal damages. In contract, although nominal damages can be awarded, the right to recover substantial damages can be proved by proving possession or ownership of the relevant goods. The carriers' argument before me that the claimants had suffered no damage because they had subsequently been paid by the end users in misconceived. As soon as the goods are damaged the owner of the goods suffers loss. Formerly he was the owner of goods of full value and subsequently he is the owner of goods

> with only a reduced value. He has suffered a loss. Whether or not he may be able to recoup his loss from others is a separate question.'

37. After referring to *The Charlotte* [1908] P 206 and *R & W Paul*, Mr Justice Hobhouse continued:

> 'Similar decisions are collected at art. 194 of *Scrutton on Charterparties*.[4] The fact that the claimant or plaintiff has contracts of sale or purchase which enable him to collect the price from his buyer or obtain reimbursement of the price or other compensation from a seller do not disentitle him from recovering full damages. Full damages assessed by reference to the sound arrived value of the goods are not affected by the fact that the owner of the goods has sold them on at a higher or lower price.
>
> …
>
> Yet another aspect of the law with which the novel and erroneous proposition of the carriers before me comes into conflict is the established law about remoteness of damage and mitigation in relation to maritime contracts. As will be apparent from the article in *Scrutton* to which I have already referred and the cases there cited, the provisions of contracts of sale and purchase to which the goods owner is a party are, in the absence of special circumstances, *res inter alios acta* which are not taken into account in assessing the damages to be paid to the goods owner. (Of course, at an earlier stage, when the plaintiff is seeking to establish his title to sue he does need to establish his ownership of the goods and this may involve an examination of the contracts of sale and purchase to which he was a party.) In the present case, if the claimants had chosen to release the end users from their contracts of purchase and had chosen to deal direct with the cargo insurers, the carriers could not have complained. Similarly, whether the end users were solvent or insolvent would be equally irrelevant. The carriers of goods are not concerned, in the absence of special circumstances, with rights of indemnity or rights to recover or recoup the price, or rights to damages as between goods owners and mercantile parties with whom they may be in contractual relations. Such considerations are too remote.'

38. This is a clear decision, by an acknowledged master of shipping law (see *The Superior Pescadores* [2016] EWCA Civ 101, [2016] Bus LR 1033 at [41]), that the provisions of contracts of sale and purchase to which the goods owner is a party are, in the absence of special circumstances, *res inter alios acta* which are not taken into account in

[4] See now Article 213 of the 25th Edition (2024).

assessing the damages to be paid to the goods owner. It is valuable to have such a principle, which promotes certainty in commercial life and is straightforward to apply.

39. Finally, in *The Baltic Strait* [2018] EWHC 629 (Comm), [2018] 2 Lloyd's Rep 33 a cargo of bananas was damaged during the voyage. The bill of lading holder purported to reject the cargo under the contract of sale and claimed a refund of the price which it had paid its seller. The seller agreed a credit of USD 2,586,105.09 which was found to be by way of settlement of a dispute over the bill of lading holder's purported rejection under the sale contract. The bill of lading holder claimed damages from the shipowner and the issue was whether it had to give credit against its claim for the credit agreed under the sale contract. Mr Justice Andrew Baker held that it did not. The credit under the sale contract was *res inter alios acta*:

> '18. Mr Thomas QC [counsel for the bill of lading holder] advanced as a proposition of English law that a bill of lading holder suing on the bill of lading in contract may recover full damages despite an earlier recovery from an intermediate seller. To be clear, the reference to earlier recovery is to a recovery prior to the date on which damages are awarded. As a matter of law, therefore, he contended, Altfadul was entitled to recover full damages without reference to the US$2,586,105.09 promised by CoMaCo as Altfadul's seller by way of settlement of a sale contract dispute between them in relation to the damage to the cargo. He cited *R&W Paul Ltd v National Steamship Co Ltd* (1937) 59 Ll L Rep 28 as direct authority for his proposition of law and said that support for it is also to be found in *The Aramis* [1989] 1 Lloyd's Rep 213, *The Athenian Harmony* [1998] 2 Lloyd's Rep 410, *The Sanix Ace* [1987] 1 Lloyd's Rep 465, *Scrutton on Charterparties* 23rd Ed., Article 212, *Voyage Charters* 4th Ed., para. 18.91, and the Law Commission Report, "*Rights of Suit in Respect of Carriage of Goods by Sea*" (Law Com No. 196 of March 1991) that led to COGSA 1992.
>
> …
>
> 24. In argument, Mr Schaff QC [counsel for the shipowner] answered Question (iii) differently, contending that as explained by *The Sanix Ace*, which he said I should take as the leading modern authority and analysis, the doctrine of full recovery in respect of damaged cargo was limited to cases where the claimant owned or was entitled to immediate possession of the cargo when it was damaged. That answer, if correct, did not make it impossible in principle for Altfadul to have had an entitlement to full damages. However, Mr Schaff argued, it meant that the award could only be upheld by reference to Question (iii), i.e. Question (iii) could only be answered with an unqualified 'Yes', as a matter of law, if the award found that Altfadul was the cargo owner or entitled to possession when the cargo suffered damage. He submitted that there was no such finding.

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

40. After citing from *R & W Paul*, Mr Justice Andrew Baker continued:

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

41. Mr Justice Andrew Baker then cited *The Sanix Ace*, saying:

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

> feel loss by receiving damaged rather than sound goods, it had owned the cargo when it suffered damage and that sufficed.'

42. Finally, Mr Justice Andrew Baker stated his conclusion as follows:

> '33. … Assuming title to sue in contract, the carrier is liable to full damages if sued by the receiver who, by reason of the carrier's breach, receives damaged rather than sound goods (*R&W Paul*) or if sued by a claimant who did not receive the damaged goods but who owned the goods when they were damaged by the carrier's breach (*The Sanix Ace*), in each case irrespective of how financial loss reflecting or resulting from the cargo damage is or comes to be distributed across the sale of goods chain (*ibid*). The former sues as the owner of the damaged goods since but for the breach he would have been the owner of undamaged goods; the latter sues as the owner whose sound goods were damaged. In either case, it is the property in the goods that carries the right to recover full damages (to echo Hobhouse J at 468 rhc) – the receiver's property in damaged goods that he should have received undamaged, the *Sanix Ace* claimant's property in the undamaged goods when they were damaged.'

43. Mr Semark submitted that it was critical to the reasoning in *R & W Paul* that the bill of lading holder had title to the goods at the time when they were damaged, and that Mr Justice Andrew Baker was wrong in *The Baltic Strait* to say that it was sufficient that the bill of lading holder later came to own the damaged cargo (i.e. that the words which I have emphasised in [25] of his judgment were wrong). Mr Semark sought to distinguish the present case on the basis that Oilex only became the owner of the damaged cargo on payment, which did not occur until 2nd or 4th September 2020, after the damage had already occurred. I do not accept that submission. I agree with Mr Justice Andrew Baker's explanation, set out above, of why *The Sanix Ace* did not confine the decision in *R & W Paul* to a case where the claimant was the owner of cargo at the time when it suffered damage, and with his concluding summary of the position at [33].

Was the payment collateral?

44. Save in this one respect, Mr Semark did not challenge the decisions in the three cases which I have cited. Instead he submitted that the principles in those cases do not apply when the cargo claimant does not claim damages on the conventional basis of the difference between the sound arrived value and the actual value of the damaged goods on arrival. He submitted that the claim in the present case was based upon the difference between the full price paid for the cargo under the CIF contract dated 15th July 2020 and the actual salvage sale to Itihad, and that the sale to Itihad could not be viewed in isolation. Instead it should be seen as part of a composite arrangement whereby it was agreed between Ameropa and Oilex that the cargo would be sold, that Oilex would agree to release the cargo to the buyer, and that Ameropa would compensate Oilex for the difference between the price which it had paid and the price which it received. That composite arrangement had to be viewed as a whole as arising out of the shipowner's breach, with the benefits to Oilex consisting of both the proceeds of the salvage sale

and also the payment received from Ameropa, both of which had to be taken into account when assessing the value of the benefits obtained from steps taken in mitigation of the damage.

45. In my judgment this submission breaks down at the first stage. This was not a claim based on the actual salvage sale to Itihad. Rather, it was pleaded on the conventional basis of the difference between the sound arrived value and the actual value of the damaged goods on arrival, and this was the basis on which the judge awarded damages. As she made clear, the price of the CIF contract and the price of the salvage sale were simply evidence of these values.

46. Indeed, when seeking permission to appeal, the shipowner contended that the judge had been wrong to use the CIF price in this way, but I refused permission, saying that in this relatively low value case it was a reasonable and proportionate approach to treat the CIF price as the best available evidence of the sound arrived value of the cargo.

47. But in any event I would reject Mr Semark's submission. Although the evidence was limited, it is plain that Oilex was demanding compensation from Ameropa for the damage to the cargo and that this demand was made pursuant to their relationship under the contract of sale. If that were not so, there was no reason for Ameropa to be involved in the disposal of the damaged cargo or to agree to make the payment. Mr Semark suggested that the payment was made in order to get rid of the problem caused by the damage to the cargo. But in the absence of some claim by Oilex, the cargo damage was Oilex's problem and not Ameropa's.

48. The judge was therefore right to describe the payment to Ameropa as a 'commercial settlement'. She was right also to pose the question whether the payment arose out of the shipowner's breach; and to answer that question, applying the cases to which I have referred, by saying that the payment was directly linked to rights (by which I think she meant rights which were asserted) under the existing sale contract and was therefore not to be treated as a benefit obtained in the course of mitigation for which credit must be given to the shipowner, but was collateral or *res inter alios acta*.

49. It follows that Oilex had a valid claim against the shipowner against which it did not need to give credit for the payment received from Ameropa by way of the credit note dated 15th March 2021, and that it validly assigned that claim to Ameropa.

Disposal

50. I would dismiss the appeal.

LORD JUSTICE SNOWDEN:

51. I agree.

LORD JUSTICE UNDERHILL:

52. I also agree.