1978 September 8

[HADJIANASTASSIOU, J.]

ARCHANGELOS DOMAIN LIMITED,

Plaintiffs,

v.

ADRIATICA SOCIETA PER AZIONE DI NAVIGATIONE THROUGH THEIR CYPRUS AGENTS MESSRS. A. L. MANTOVANI & SONS LTD.,

Defendants.

(*Admiralty Action No.* 41/71).

Admiralty—Shipping—Contract of carriage of goods by sea—Bill of lading—Whether it is the contract or only evidence of the contract.

Admiralty—Shipping—Contract of carriage and delivery of goods by sea—Against delivery of bill of lading or upon obtaining value thereof—Delivery of the goods against a bank guarantee and without production of bill of lading—Bill of lading an effective document of title for the goods—Ship-owner in delivering the goods did so at his peril—Such delivery prima facie *a conversion and a breach of contract.*

Admiralty—Shipping—Bill of lading—Release of goods without production of—Exemption clause—Carrier liable for payment of real and intrinsic value of the goods in the event of "damage or loss"—Goods not damaged or lost but misdelivered—Action of shipping agents can properly be treated as action of principals—Shippers never told of stipulations in the said clause and have never agreed to abide by them—They had a right to suppose that their goods were received on the terms of the contract—Ship-owners cannot take advantage of the exemption clause.

Interest—Right to by way of damages—Question left open.

By a contract of affreightment concluded between the parties to this action, the defendants undertook in consideration of a

prepaid freight of 100 mils per carton to load and transport on their ship "BRENNERO" 4,945 cartons of oranges, belonging to plaintiffs, from Famagusta to Marseilles It was further agreed that the said cargo of oranges would be delivered to the order of the plaintiffs with notice to Messrs Societe Marseillaise de Groupage of Marseilles against the delivery of the relevant bill of lading and/or the obtaining of the value thereof as per invoice attached to the bill of lading

The cargo was duly loaded on the ship and when the ship sailed away the agents of the defendants issued to the shippers a signed clean bill of lading This bill of lading was an "order" bill of lading and it was stamped "FREIGHT PREPAID"

The defendants did carry the said goods to their proper destination and delivered them to the said Messrs Societe Marseillaise de Groupage, against a bank guarantee for the value thereof but without applying to the plaintiffs for proper instructions or without an order from them, and particularly without collecting the value of the goods and without demanding or taking possession of the relevant bill of lading

The plaintiffs alleged that as a result of the defendants' breach they were unable to recover the value of their goods and by means of this action they claimed £4,945 as damages for breach of contract or alternatively for detainment and damages at the rate of 8 1/2 per cent per annum on the amount claimed, as interest paid or to be lost as from the date of the handing over of the cargo and/or delivering of the goods to the date of judgment

The defendants in order to escape the consequences of the breach of contract contended that the ship-owner was protected by clause 2 of the Bill of Lading which so far as relevant reads as follows:

> "Article 23 In the event of damage or loss and generally in every case for which the Company are answerable they shall only be liable for the payment of the real and intrinsic value of the goods loaded, as proved by proper invoices of origin and ascertained by a statement of a

* Quoted in full at pp. 469–70 *post*

sworn surveyor, excluding any compensation in respect of damages for lost profits for increase of commercial value".

Held, (I) on the question whether the bill of lading is the contract or only evidence of the contract:

That the bill of lading is not in itself the contract between the ship-owner and the shippers of goods, though it is an excellent evidence of its terms (pp. 456-67 *post*; *Leduc* v. *Ward* [1888] Q.B.D. 475 *distinguished*).

Held, (II) on the question whether the ship-owner in delivering the goods in question without obtaining the bill of lading is liable to the shippers:

(1) That irrespective of the bank guarantee for the value of the goods, it was the duty of the ship-owner to see that the goods are delivered to the person to whom he has contracted to deliver them.

(2) That delivery to a person not entitled to the goods without production of the bill of lading is *prima facie* a conversion of the goods and a breach of the contract; that the goods remained in the constructive possession of the ship-owner and once no bill of lading had at that date been produced, the ship-owner was under no obligation to surrender his constructive possession and control with the goods, except on production of the bill of lading; and that the master was not entitled to deliver them on a guarantee or under an indemnity where the person claiming delivery cannot produce it.

(3) That the bill of lading remained at all material times effective document of title for the goods, and the ship-owner in delivering the said goods without production of the bill of lading did so at his peril; that the contract was to deliver on production of the bill of lading to the person entitled thereunder and that, accordingly, the ship-owners are liable for the breach of contract once they delivered the goods to a person who was not entitled to receive them.

Held, (III) on the question whether the defendants are protected by clause 23 *of the bill of lading:*

(1) That the shipping company cannot be absolved from responsibility for the act which the plaintiff company complains, *i.e.*, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them; that if the exemption clause upon its true construction absolves the shipping com-

pany for an act such as that, that would be entirely unreasonable because these goods were not damaged or lost, but there was a misdelivery of the goods; and that once the action of the shipping agents in Marseilles can properly be treated as the action of the shipping company itself the shipping company could not take advantage of the exemption clause. (*Sze Hai Tong Bank Ltd.* v *Rambler Cycle Co. Ltd.* [1959] A.C. 576 at pp. 588–589 adopted and followed).

(2) That, moreover, since the shippers have never been told of the stipulations in the said clause 23 of the bill of lading and have never agreed to abide by them, once they were not aware and were not informed in the course of the shipment, the shippers had a right, having regard to all the circumstances, to suppose that their goods were received on the terms of the contract (See *Crooks* v *Allan* [1879] 5 Q B D 38)

Judgment for the plaintiffs in the sum of £4,945

(*Editor's note* The Court also dealt with the question of whether there exists a right to interest by way of damages in Cyprus but left it open as there was no factual foundation in order to decide it)

Cases referred to

Leduc v *Ward* [1888] 20 Q.B.D. 475 at pp. 478–480,

Rumpot v *Ditcheli* [1800] 2 Camp 556,

Phillips v *Edwards* [1858] 28 L J Ex. 52,

Crooks v *Allan* [1879] 5 Q B D 38 at p 40;

Sewell v *Burdick* [1884] 10 App Cas. 74 at p. 105,

S S Ardennes (Cargo Owners) v *S S Ardennes (Owners)* [1951] 1 K B 55 at p 59,

Sanders Brothers v. *Maclean & Co.* [1883] 11 Q B D 327 at p 341,

Barclays Bank Ltd v *Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81 at pp. 88–89,

Sze Hai Tong Bank Ltd v. *Rambler Cycle Co Ltd.*, [1959] A C. 576,

Skibsaktieselskapet Thor. Thoresens Linje v *Tyrer & Co.* 35 Ll. L Rep 163 at p. 170;

Miliangos v. *George Frank (Textiles) Ltd.* (*No.* 2) [1976] 3 All E.R. 599 at pp. 602–603.

Admiralty Action.

Admiralty action for £4,945.– damages for breach of a contract of affreightment.

L. Demetriades, for the plaintiffs:

E. Psyllaki (Mrs.), for the defendants.

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment. In this action in rem, the amended petition was filed (by order of the Court dated 11th December 1975) and the plaintiffs claimed against the defendants

(a) an amount of £4,945 damages for the breach of a contract of affreightment entered into between the parties;

(b) damages at the rate of 8 1/2 per cent per annum on the amount claimed as interest paid and/or lost as from the date of the handing over of the cargo in question and/or delivering of the goods to the date of judgment;

(c) an order for appraisement and sale of the ship "BRENNERO" and/or any other ship beneficially owned at the time of the filing of this action by the plaintiffs; and

(d) legal interest and costs.

The facts may be briefly stated as follows:

The plaintiffs, Archangelos Domain Ltd., are a company registered in Cyprus under the Companies Law, Cap. 113, and they are carrying on business in Cyprus and abroad especially in the field of exporting oranges to various countries. The defendants ADRIATICA SOCIETA PER AZIONE DI NAVIGATIONE are the ship-owning company—of the ship "BRENNERO" and have their principal place of business in Venice. The defendants are carrying on business in many parts of the world, including Marseilles and Cyprus, and in the latter place they are operating through their agents, Messrs. A. L. Mantovani & Sons Ltd.

The plaintiffs during the latter part of May, 1971, entered into a contract of affreightment with the defendants' agents,

whereby the latter undertook, in consideration of a prepaid freight of 100 mils per carton and 50% surcharge, to load and transport on the ship "BRENNERO" 4,945 cartons of Valencia oranges of 15 kilos each, from Famagusta to Marseilles. The cargo of oranges belonging to the plaintiffs, was agreed between the parties to be delivered to the order of the plaintiffs with notice to Messrs. Societe Marseillaise de Groupage of Marseilles against the delivery of the relevant bill of lading and/or the obtainment of the value thereof as per invoice attached to the said bill of lading.

On May 21, 1971, the said cargo of oranges was duly loaded on the said ship and the plaintiffs had paid to the defendants (through the defendants' agents) the total amount of freight of £568.083 pence. Later on when the ship sailed away the agents of the defendants issued to the shippers a signed clean bill of lading dated 21st May, 1971. This bill of lading (*Exhibit* 1(*a*)) was stamped "FREIGHT PREPAID; SHIP LOST OR NOT LOST; MARSEILLE IN TRANSIT". It appears further that this was an order bill of lading and there were other conditions on the back stamped in ink "PLEASE DELIVER TO THE ORDER OF UNION BANK OF SWITZERLAND—NICOSIA THE 28/5/71—BANQUE POPULAIRE DE CHYPRE LTD. NICOSIA BRANCH".

Although the conditions for the carriage of the goods appear in small letters on the back of the said bill of lading in Italian language, on the contrary, regarding the responsibility of the ship, at the front of the bill of lading this warning is stamped in small letters. "Ship not responsible for breakage and/or leakage. Value, weight, quality, contents, marks and number unknown. Ship not responsible for any loss or damage of goods through the voyage being protracted by any cause whatsoever. Ship not responsible for condition of perishable goods when delivered."

It is not in dispute that the defendants carried the goods in question to their proper destination, Marseilles, and had notified the said firm Societe Marseillaise de Groupage, but it was the plaintiffs' allegation that in breach of their contract of affreightment and/or their duty under the law, the said cargo of oranges was delivered and handed over without applying to them for proper instructions or without an order from them; and parti-

cularly without obtaining the value of the said goods. There was a further allegation by the plaintiffs that the defendants had failed to demand or take possession of the relevant bill of lading, the original of which was sent to Marseilles through their Cyprus bankers, Messrs. Bank Populaire de Cypre, together with the relevant invoice for the payment of the value of the said goods.

Finally, the plaintiffs claimed that as a result of the defendants' breach they were unable to recover the value of their goods, and had suffered loss and damages.

On the contrary on 4th June, 1976, the defendants repudiated the averments of the plaintiffs that they were negligent and/or that they were in breach of their contract of affreightment. They further alleged that the defendants did carry and deliver the said cargo to the consignees, Messrs. Societe Marseillaise de Groupage and/or to the plaintiffs' agents, and/or to the order of the plaintiffs who had expressly authorised the said firm to take delivery of the said cargo. There was a further allegation that as an additional measure, in order to protect the interest of the plaintiffs, and in order to cover the value of the goods until the production of the bill of lading in question, they had asked the said firm to give a bank guarantee for the value of the said goods. But the defendants went even further and alleged that when the plaintiffs were informed by the said consignees and/or agents that a bank guarantee was pending, and inquired into the fate of the bill of lading, they replied by cable on the 30th June, 1971, that the said bill of lading was in the hands of a certain Mr. Schmid who had paid for it at a Swiss Bank in St. Gall of Switzerland. This gentleman was the ultimate buyer of the goods—a fact unknown to the defendants at the time—to whom the said cargo was duly delivered by Messrs. Agrumexport. With that information in mind, the defendants alleged that they did not call upon the said consignees and/or agents to honour their obligations under the said bank guarantee once it was confirmed to them that the value of the cargo was paid to the plaintiffs by Mr. Schmid.

In the alternative, the defendants claimed that if the plaintiffs did not collect any amount towards the value of the said cargo, that was entirely due to their fault or negligence to accept to minimize their loss once they had a duty to do so under the law.

There is no doubt that Mr. P. Manglis, for reasons not given, visited Marseilles, apparently some time in May 1971, and after his return to Cyprus he had written a letter to Mr. Rakedjian on 25th May, 1971.

The French and the English translation prepared by the writer of that letter is in these terms:

"I thank you again for the reception you and Mrs. Rakedjian have given me in Marseille.

With reference to our cartons of oranges from Marseille to London, we are still considering the matter but it now seems to us that the packages will remain in Marseille. The Bills of Lading of "BRENNERO" and "NUSHABA" are destined for Marseille 'in transit' in case you will need to send them to England. You will receive our instructions about the two vessels, by telex, within this week.

In the meantime I expect to receive the copies of your vouchers for the vessels, which have already cleared at Marseille."

I should have added that apparently Mr. Rakedjian is a director of the firm Societe Marseillaise de Groupage. There was a further correspondence, this time by telex, and Mr. Manglis on 31st May 1971, said to Somagro, Marseilles, this, (translated into English) "PLACE ORDER ARGUMEXPORT NUSHABA 4147 CARTONS AND BRENNERO 4945 CARTONS."

There was a further telex again dispatched to Soma Group Marseilles and in English it reads: "THE BILLS OF LADING 'BRENNERO' AND 'NUSHABA' ARE WITH MR. SCHMID WHO HAS PAID THEM TO THE UNION OF SWISS BANKS AT ST. GALL CONTACT MR. COHEN WHO WILL ARRANGE THIS WITH SCHMID."

Apparently there was no satisfactory arrangement reached between the shippers and the carriers for the goods in question, and the plaintiffs addressed a letter to Messrs. A. L. Mantovani and Sons Ltd., the agents of the defendants and had this to say:

"Thank you for your letter dated the 26th of July 1971

concerning the above shipment together with the copy of a letter dated the 6th of July addressed to you by Adriatica in Marseilles.

We have taken due note of your comments as well as those of your principals, but unfortunately your reply does not provide anything new.

The facts are that we have shipped through you 4945 cartons oranges on motor vessel Brennero. You have delivered these goods to the consignees without having collected the original bill of lading, but instead you have delivered the goods on a banker's guarantee, by the BANCO ESPANOL EN PARIS—Succursale de Marseille. We consider it is your duty to regularise this matter by collecting from the Company you have delivered the goods the original bill of lading and if this is not produced immediately to enforce the banker's guarantee and the amount to be collected is £4945 as per enclosed invoice.

This matter has been delayed considerably and our patience is being exhausted your urgent action by Telex on this matter is imperative. We take this opportunity to give you due notice that unless this matter is regularised very shortly and in any case before the 1st of September 1971 we will initiate legal proceedings against you as agents of Adriatica to safeguard our interests."

On 15th September 1971 the agents of Adriatica in reply said in that telex:

"REFERENCE PREVIOUS EXCHANGES HAVING COMMUNICATED WITH OUR MARSEILLES PRINCIPALS WE NOW HAVE THE FOLLOWING TELEX FROM A FREE TRANSLATION OF WHICH IS APPENDED HEREBELOW:-

M/S 'BRENNERO' FAMAGUSTA/MARSEILLES 21.5.71 AT FAMAGUSTA 28.5.71 B/L 1 = PALADIN GEM = 4945 CARTONS ORANGES

REFERENCE YOUR YESTERDAYS AND TODAYS TELEX MESSAGES PLEASE POINT OUT TO THE

SHIPPERS THAT AS ALREADY WRITTEN YOU WE COULD OBTAIN PAYMENT FROM SOCIETE MARSEILLAISE DE GROUPAGE OR THROUGH THEM FROM BANCO ESPANOL BUT THIS WE COULD DO ONLY IN EXCHANGE FOR THE DOCUMENT OF TITLE OF THE GOODS VIZ. ORIGINAL BILL OF LADING ACCOMPANIED BY THE OTHER USUAL DOCUMENTS (INVOICE, ETC.) STOP FURTHERMORE THE EXISTING MONETARY REGULATIONS FOR IMPORTED MERCHANDISE CALL FOR VARIOUS FORMALITIES WHICH ONLY A BANK MAY ACCOMPLISH STOP IT IS ALSO NECESSARY TO BEAR IN MIND THAT THE SHIP-OWNERS AND/OR THEIR REPRESENTATIVES CANNOT UNDERTAKE RESPONSIBILITY FOR WHAT HAS TAKEN PLACE IN SWITZERLAND AS THE GOODS, BY VIRTUE OF THE CONTRACT OF CARRIAGE, WERE DESTINED TO MARSEILLES STOP IF BILL OF LADING WERE TO BE IN THE HANDS OF THE FRENCH BANK THE LATTER WOULD HAVE CONTACTED US WHEN THE RECEIVERS REFUSED PAYMENT RATHER THAN RETURN THE BILLS OF LADING TO CYPRUS AND IN THIS CASE WE WOULD HAVE BEEN ABLE TO FINALISE THE OUTSTANDING MATTER MORE EXPEDITIOUSLY STOP ANY CASE WE ARE NOW IN THE STAGE OF FINALISING OUR NEGOTIATIONS FOR WHICH WE SHALL BE ABLE TO CONFIRM TOMORROW MEANTIME IT IS NECESSARY SEND BILLS OF LADING TO BANK NATIONALE DE PARIS IN MARSEILLES UNQUOTE ABOVE FOR YOUR KIND INFORMATION AND GUIDANCE ="

On 17th September, 1971, the agents of Adriatica dispatched another telex to the plaintiffs, which is in these terms:-

"REFERENCE PREVIOUS EXCHANGES WE NOW WISH TO TRANSCRIBE HEREBELOW A FREE TRANSLATION FOR A TELEX MESSAGE WE HAVE RECEIVED FROM OUR CORRESPONDENTS IN MARSEILLES:-

MS 'BRENNERO' FAMAGUSTA/MARSEILLES 21.5.71

AT FAMAGUSTA 28.5.71 B/L 1 : PALADIN GEM 4945 CARTONS ORANGES

FURTHER OUR TELEX 3145 OF 14/91 WE CONFIRM THAT THE BANCO ESPANOL ARRANGED PAY TO BANQUE NATIONALE DE PARIS AT MARSEILLES THE AMOUNT OF FRENCH FRANCS 49.450 FOR WHICH AMOUNT THEY HAVE INVOKED THE TERMS OF THE LETTER OF GUARANTEE AND THIS AGAINST PRESENTATION FROM THE PART OF B.N.P. OF THE ORIGINAL BILL OF LADING SUPPORTED BY THE USUAL DOCUMENTS (INVOICE, ETC.) STOP SUBSEQUENTLY BANCO ESPANOL WILL DELIVER US SAID BILL OF LADING AGAINST RELEASE OF LETTER OF GUARANTEE STOP WE ALSO CONFIRM THAT SUCH A PROCEDURE CONSTITUTES ONLY POSSIBILITY FOR US TO OBTAIN POSSESSION OF THE BILL OF LADING FOR THIS REASON WE REQUEST YOU TO INDUCE THE SHIPPERS TO ACCEPT THE ABOVE PROCEDURE THEY INSTRUCTING BANQUE POPULAIRE DE CHYPRE SEND IMMEDIATELY DOCUMENTS WITH INSTRUCTIONS TO THEIR CORRESPONDENTS, I.E. BANQUE NATIONALE DE PARIS AT MARSEILLES SAME TIME SETTLING DIRECTLY BETWEEN THEMSELVES ANY COMMERCIAL DISPERTES WITH THEIR FRENCH OR SWISS CLIENTS THEREBY LEAVING US/OWNERS/YOURSELVES OUT OF ANY LEGAL ACTIONS STOP PLEASE CONFIRM ABOVE ARRANGEMENTS ENABLING US INFORM BANCO ESPANOL UNQUOTE.

KINDLY PUT US IN A POSITION TO REPLY THANKS."

It appears that nothing has materialized and no settlement was reached between the parties and inevitably the plaintiffs issued an action against the defendants claiming damages.

I think I must add that these proceedings had been protracted for a long time indeed, but I do not think it is necessary to go once again over the history of these proceedings which cover many pages of lengthy addresses. However, it is necessary only to add that there was a change of counsel, and a

judgment was issued against the defendants when the latter failed to appear in Court, but finally even that judgment was by consent cancelled.

With this in mind and once the earlier writ of summons and the petition were amended by an order of the Court in October 1976, Mr. Manglis gave evidence in Court in support of the case of the plaintiffs. As he was familiar with the facts and circumstances of this case, he said that it was the duty of the carriers before the delivery of the oranges, to collect the original bill of lading, or at least make sure that they had a bank guarantee representing the value of the said goods. When the goods were carried to Marseilles on transit, the bill of lading was sent through the bank to their client in Switzerland, who would obtain the said bill and then go to Marseilles and take delivery of the goods. But the witness added that the carriers delivered the goods without waiting to collect the bill of lading in spite of the fact that no instructions were given to the carriers by them. As a result of that action, the plaintiffs did not collect their money although they were told that it had been paid, but in actual fact the value of the bill of lading was not paid and it was returned to them and paid by the bank of Cyprus.

Questioned further by counsel, Mr. Manglis described the action of the carriers as an unauthorised and irresponsible act which caused to the plaintiffs loss and damages amounting to £4,945 as well as interest.

In cross-examination, Mr. Manglis was questioned about the alleged contract of affreightment entered between the plaintiffs and the defendants, and he explained that the said contract was entered and concluded between his company and A. L. Mantovani & Sons, as agents for Adriatica Lines, the defendants. Questioned further as to whether the agents told the person who booked space on the ship "BRENNERO" that the contract of carriage would be covered by a standard Adriatica bill of lading, his reply was that Adriatica simply accepted to carry the goods to Marseilles. Furthermore he said that there was nothing in the telexes, to the best of his knowledge, stating that the standard conditions of an Italian bill of lading would apply.

Then the witness was questioned, *inter alia*, as follows:-

"*Q.* To summarize, Mr. Manglis, I suggest that Messrs.

Mantovani & Sons had expressly stated to you at the time that the carriage would be governed by a standard Adriatica bill of lading.

A. Even if that was the case, how could we know what the standard Adriatica bill of lading says if it is in Italian. Adriatica did offer to pay for the goods by telex against a bill of lading, so they must have accepted that. I produce the two telexes dated 15th September, 1971, and 17th September, 1971, marked *exhibits* 2 and 3.

Q. I understand that in these telexes they mention that whilst they deny liability they would try to enforce payment of the guarantee.

A. They promised to enforce payment.

Q. I put it to you that these telexes were referring only to the bank guarantee obtained by the defendants and there was no admission of any liability on their part.

A. I believe that they only mention that this will avoid litigation between us. Nothing else.

Q. You said whilst being examined in giving evidence in chief that the value of the cargo was £4,945; however, this is not stated in the bill of lading which I have perused.

A. Correct. The value of the goods never is stated here, it is on an accompanying invoice.

Q. However, the invoice is never in the hands of the ship-owners or the master who only keeps a master's copy of the bill of lading.

A. Yes, I agree, but however, Adriatica secured a bank guarantee for the exact amount, so they must have known the value. They were shown the invoice.

Q. You said that the goods were carried to Marseilles under this contract of carriage and were to be delivered to your order, to the order of the shippers, that is, did you give orders to the ship-owners to whom they should deliver the cargo?

A. By implication to anybody who had the original bill of lading in his hand which is the usual procedure done every day in the export of produce from Cyprus.

Q. It is not the term of the contract but it is the every day practice.

A. Yes.

Q. So, it would be a reasonable thing for the ship-owners to deliver the cargo to somebody pointed out by you without waiting to obtain the bill of lading (being a perishable cargo).

A. Only if he feels secure enough in doing so and a bank guarantee is sufficient security.

Q. I put it to you that Messrs. Societe Marseilles De Groupage to whom the cargo was delivered by the ship-owners were your agents.

A. No, they were the agents of Mr. Schmid of Agrum Export. Mr. Schmid was the original buyer of the freight in Switzerland and Societe Marseilles De Groupage were acting as a transitier.

Q. However, I have here a copy of a letter signed by you dated 25th May, 1971, addressed to Messrs. Societe Marseilles De Groupage by which you ask them to wait for your telex instructions what to do with the cargo of the Brennero and Nushaba.

A. I have read it and I produce it marked *exhibit* 4. When we started selling oranges to Mr. Schmid, the orange market in France had good prices; but by the time the last two boats were due to arrive, the market had dropped, and Mr. Schmid was worried about losing money, although he had agreed to pay this price and so he inquired whether we could send the merchandise on to England instead, where the prices were higher, and with that in mind we prepared the bill of lading for the last two boats to be for Marseilles in transit, though possibly we may want to divert them to the U.K. not to lose money.

Q. Later on, subsequently to this letter, you did authorise Societe Marseilles De Groupage by telex dated 31st May, 1971, to place 4,945 cartons ex Brennero at the order of Agrum Export. Please produce it.

A. Yes. I produce it marked *exhibit* 5, but I want to add that this is addressed to Societe Marseilles De Groupage who presumably to get the fruit had already delivered the bill of lading, it was not addressed to the ship–owners. Presuming that the ship–owners gave the cargo to the rightful owner of the bill of lading, then I advised Societe Marseilles De Groupage that the merchandise could be disposed of in France.

Q. Mr. Manglis, you must permit me to disagree with you on this point, because you will agree with me that if Societe Marseilles De Groupage were already in possession of the bill of lading they did not have to take any instruction from you, but only from the original owner of the goods who had paid for the bill of lading. If they were in possession of the bill of lading then they would get instructions from the holder, not from you.

A. The holder was interested to find out if he could get a better price in London."

Regarding the allegation of the defendants that the bank guarantee was valid for three months and that before taking steps to enforce a claim on that bank guarantee, they had a duty to inquire into the bill of lading, this witness agreed that they had done so.

He further agreed that he had sent the telex, (*exhibit* 6); he also telephoned Mr. Schmid in Switzerland, who was in his opinion the principal of Societe Marseilles De Groupage, and who advised him that he had paid the documents and was sending them on to Marseilles. After that communication from Mr. Schmid he sent the telex (*exhibit* 6) to Societe Marseilles De Groupage, who were Schmid's agents. It later turned out that Mr. Schmid had not paid the documents and they were returned to him through their bank a few days later. Then he was questioned in these terms:

"*Q.* I put it to you that relying on your own statement, the ship-owners have acted reasonably in releasing Societe Marseilles De Groupage from their obligation under the bank guarantee.

A. At the time when we had a claim against the clients, the bank guarantee was still valid and the money had been deposited in a French bank."

Finally the witness was questioned as to whether Mr. Schmid offered to pay half the price for purposes of settlement and that his offer was not accepted, and in reply the witness said that he would never accept half the price if he could get the price from Mr. Schmid's guarantors or the guarantee of his agents.

In giving evidence on the question of obtaining loans from a bank in order to be able to cope with their exports, Mr. Georghios Rohobos, an employee of the company, told the Court that every time they export their products they obtain loans from a bank and pay interest of 8 1/2% on a percentage of 80% on each trans-shipment. In the present case the amount was £4,945. He further said that they still owe money to the bank with regard to that shipment of oranges, but he was not in a position to say what was the exact amount they had borrowed. He added that they continue to owe to the bank the original amount which they had borrowed, but he could not say exactly what was the position then and did not remember the amount.

The defendants called evidence in rebuttal and on November 13, 1976, Mr. Savvas Marcou in charge of the loading operations at the office of Messrs A. L. Mantovani & Sons in Famagusta, told the Court that in 1971 he was responsible for the loading of the ship "BRENNERO".

Regarding the reservation of space on the said ship he agreed that the defendants asked them to reserve space and they applied to their principals to reserve the necessary space. When they received information he telephoned the defendants and told them that they reserved the space and asked them to sign the necessary booking note confirming reservation both of the space and also of the terms which include the number of packages, the weight, the freight and the terms of shipment in accor-

dance with the carriers' bill of lading. That booking note is prepared by them and in the plaintiffs' case they sent that booking note to their Nicosia office to be signed by the shippers and then it was returned to them in Famagusta. One copy of this booking note is kept by the shippers and when the ship arrived at port they advised the shippers to bring the cargo at a certain time alongside the vessel for shipment. If the booking note, he added, is not signed by the shippers then they would reject the shipment.

In explaining what is the purpose of a booking note he said that the booking note declares the name of the ship, the quantity and the weight of the cargo, the date of shipment, the port of loading, destination, and also it contains a clause that the shippers are accepting the terms and conditions of the carriers' bill of lading. He explained, however, that although that booking note was placed in the ship's file because of the invasion of the Turkish troops it was found impossible to produce it in Court.

In cross-examination the witness said that a seasonal agreement is made during a certain period of the year and that it was not unusual for seasonal agreements to be entered into between the producers and their company. He was not aware that such a seasonal agreement was entered into between their company and the plaintiffs. He further explained that even if there was such an agreement, the only thing one would have done, was to mention only the space and nothing more because, he added, in each case a booking note was required. But a booking note, he conceded, could cover two or three shipments at the same time. He also agreed that shipments relating to seasonal agreements about oranges particularly, were made with regard to the plaintiffs, with Mr. Umberto, a director of A. L. Mantovani & Sons Ltd.

As I have said earlier, it has been all along the allegation of the plaintiffs that the contract of carriage was based and concluded between the shippers and the carriers before the bill of lading was issued and delivered to them. There is no doubt that the plaintiffs had applied to the agents of Adriatica inquiring with a view to booking space on one of their ships, and according to a telex of the agents of Adriatica, I read: "Further to your telex dated 8.5.71 our requirements on 'BRENNERO'

due Famagusta 21.5.71 they are 5000–6000 packages. Please confirm the soonest possible." (*Exh.* 1).

On May 11, 1971, the agents dispatched another telex to the shippers for the attention of Mr. Koulermos, and I read:

"REFERENCE YOUR YESTERDAY'S TELEX BRENNERO FAMAGUSTA 21/5 WE CONFIRM YOU RESERVATION SPACE FOR 5/6000 CARTONS CITRUS TO MARSEILLES FREIGHT RATE 2/- PER CARTONS FREEOUT PLUS 15 PER CENT CONGESTION SURCHARGE PREPAID STOP SAILING TIME OF THE SHIP 5 P.M. ON THE SAME DAY".

The first question which arises is, what is the effect of that contract of carriage. Counsel submitted that the contract of carriage was contained in the bill of lading which *prima facie* contained evidence of the contract of carriage. Counsel relies in support of her argument on *Scrutton on Charterparties*, 18th edn. at pp. 52–53; and on *Leduc Co.* v. *Ward*, [1888] 20 Q.B.D. 475.

It is true that usually, as in the case in hand, the bill of lading is signed by the carriers' agent and is delivered to the shippers after the ship sails away.

In the *Leduc's* case (*supra*), Lord Esher, M. R. delivering the first judgment of the Court of Appeal had this to say at pp. 478–480:

> "In this case the plaintiffs, the owners of goods shipped on board the defendants' ship, sue for non-delivery of the goods at Dunkirk in accordance with the terms of the bill of lading. The defence is that delivery of the goods was prevented by perils of the sea. To that the plaintiffs reply that the goods were not lost by reason of any perils excepted by the bill of lading, because they were lost at a time when the defendants were committing a breach of their contract by deviating from the voyage provided for by the bill of lading. 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 order 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. Where there is no charterparty, as between the grantee of the bill of lading and the shipowner, the bill of lading is no doubt a receipt for the goods, and as such, like any other receipt, it is not conclusive, for it may be controverted by evidence shewing that the goods were not received; the question whether it will be more than a receipt as between the shipper and shipowner depends on whether the captain has received the goods, for he has no authority to make a contract of carriage to bind the shipowner, except in respect of goods received by him. If the goods have not been received, the bill of lading cannot contain the terms of a contract of carriage with respect to them as against the shipowner. But, if the goods have been received by the captain, it is the evidence in writing of what the contract of carriage between the parties is; it may be true that the contract of carriage is made before it is given, because it would generally be made before the goods are sent down to the ship: but when the goods are put on board the captain has authority to reduce that contract into writing: and then the general doctrine of law is applicable, by which, where the contract has been reduced into a writing which is intended to constitute the contract, parol evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract, except where there is some usage so well established and generally known that it must be taken to be incorporated with the contract."

In spite of this decision and of some other decisions, with

which I need not deal now, I think a doubt has some times been raised whether the bill of lading is a conclusive statement of the contract between the shipper and the shipowner; or is only one piece of evidence helping with others to show what that contract is, and so subject to be contradicted or varied, or added to, by verbal or other evidence, to show the agreement, for if the bill of lading is the statement of the contract, it cannot, in the absence of fraud or mistake, be altered or added to by any evidence of preliminary or contemporaneous negotiations or agreements on the subject matters of the contract. The point, however, does not seem to have often given rise to practical difficulty; but there is some conflict of authority upon it.

The bill of lading purports to be a statement of the contract: and it would be anomalous and inconvenient that a formal document accepted by the parties, and apparently expressing the relation between them, should be only evidence liable to be rebutted, of that relation. On the other hand the bill of lading is not usually signed only after the goods have been shipped; and it some times happens that it contains terms not agreed upon at the time of shipping or that it varies or omits some of the terms as then understood. (See *British Shipping Laws* Vol. 2, *Carver Carriage by Sea* 12 ed. Vol. 1 at pp. 48–49. See also *Scrutton on Charterparties* Op. Cit., at pp. 52–53. See also *Runquist* v. *Ditchell* [1800] 2 Camp. 556; and *Phillips* v. *Edwards* [1858] 28 L.J. Ex. 52).

These cases favour the contention that the bill of lading is not conclusive evidence of the contract; and in a later judgment by Lush J., in *Crooks* v. *Allan* [1879] 5 Q.B.D. 38, that eminent Judge expressed the following opinion at p. 40:

> "A bill of lading is not the contract, but only the evidence of the contract; and it does not follow that a person who accepts the bill of lading which the shipowner hands him necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms."

Though there were other cases decided in favour of a bill of lading being the contract, nevertheless dicta in the House of Lords, since those cases, have not supported the view that the bill of lading contains the contract. In particular, Lord Bramwell said in the House of Lords in *Sewell* v. *Burdick* [1884] 10 App. Cas. 74 at p. 105:

> "I take this opportunity of saying that I think there is some inaccuracy of expression in the statute, it recites that, 'by the custom of merchants a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee.' Now the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not indorsed. I do not say that the vendor might not retain a lien, nor that the non-indorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to shew that the property passes by the contract. So if the contract was one of security—what would be a pledge if the property was handed over—a contract of hypothecation, the property would be bound by the contract, at least as to all who had notice of it, though the bill of lading was not handed over.
>
> There is, I think, another inaccuracy in the statute, which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take for instance goods shipped under a charterparty, and a bill of lading differing from the charterparty; as between shipowner and shipper at least the charterparty is binding: *Gledstanes* v. *Allen*, 12 C.B. 202.
>
> These distinctions are of a verbal character, and not perhaps of much consequence; but I am strongly of opinion that precision of expression is very desirable, and had it existed in such cases as the present there would have been the contradictory opinions which have been given."

Furthermore in *S. S. Ardennes (Cargo Owners)* v. *S. S. Ardennes (Owners)* [1951] 1 K.B.D. 55 Lord Goddard C.J., having stated the facts said at p. 59:

> "It is, I think, well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms: *Sewell* v. *Burdick* per Lord Bramwell[1] and *Crooks* v. *Allan*[2]. The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is no party to the preparation of the bill of lading; nor does he sign it. It is unnecessary to cite authority further than the two cases already mentioned for the proposition that the bill of lading is not itself the contract; therefore in my opinion evidence as to the true contract is admissible.
>
> *Leduc & Co.* v. *Ward*[3], on which Sir Robert Aske so strongly relied, was a case between shipowner and endrorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855, so that no evidence was admissible in that case to contradict or vary its terms. Between those parties the statute makes it the contract. In any case, the representation that the ship would sail direct to London would amount to a warranty, for it was in consequence of that representation that the goods were shipped, both parties being fully aware of its high importance in the circumstances; or, as it might be put, it was a promise that the shipowner would not avail himself of a liberty which otherwise would have been open to him.

1. [1884] 10 App. Cas. 74 at p. 105.
2. 5 Q.B.D. 38.
3. 20 Q.B.D. 475.

As I have formed this view, it is unnecessary for me to consider the other matters argued by Sir William McNair, for instance, whether the liberty clause is not inconsistent with the opening clause of the bill of lading. I do not think that there is anything in the point as to waiver taken in the defence. For whatever reason, the ship arrived late, later, that is, than she would have arrived had she not gone first to Antwerp. She had the plaintiffs' goods on board, and they were of a perishable nature. I cannot see that they can be said to have waived their claim for damages because they took delivery and paid the freight rather than let the goods remain to be dealt with in some way by the shipowners, a course which might and probably would have largely increased the damages, as the fruit might then well have perished, or at least deteriorated."

As I have said, in the present case this was an "order" bill of lading, and I do not know whether before the goods were delivered, they were put into a transit warehouse and held there to the order of Archangelos Domaine. In any event, once the ship owning company undertook to carry them to their contractual destination, and there to surrender possession of them to the person who under the terms of the contract is entitled to obtain possession of them from the ship owners, such a contract was not discharged by performance until the ship owner had actually surrendered possession—that is, has divested itself of all powers to control any physical dealing in the goods, to the person entitled under the terms of the contract to obtain possession of them. That this is so finds support on *Sanders Brothers* v. *Maclean & Co.*, [1883] 11 Q.B.D. 327. L.J. Bowen had this to say at p. 341:

"The Law as to the indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under

similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

In a more recent case in *Barclays Bank Ltd.*, v. *Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81, Lord Diplock dealing with the provisions of an "order" bill of lading, and having considered the contention of the Customs and Excise said at pp. 88–89:

"This is indeed a startling proposition of law which, if correct, would go far to destroy the value of a bill of lading as an instrument of overseas credit. It would mean that no bank could safely advance money on the security of a bill of lading without first making inquiries at the port of delivery, which may be at the other side of the world, as to whether the goods had been landed with the shipowner's lien, if any, discharged or released. It would also mean that no purchaser of goods could rely upon delivery and indorsement to him of the bill of lading as conferring upon him any title to the goods without making similar inquiries, for it would follow that once the goods had been landed and any lien of the shipowner released or discharged, the owner of the goods could divest himself of the property in them without reference to the bill of lading. It would also follow that the shipowner, once the goods had been landed in the absence of any lien, could not safely deliver the goods to the holder of the bill of lading upon presentation because the property in and right to possession of the goods, might have been transferred by the owner to some other person. To hold that this was the law would be to turn back the clock to 1794 before the acceptance by the Court of the special verdict of the Jury as to custom of merchants in the case of *Lickbarrow* v. *Mason*, [1794] 5

Term 683, and which laid the foundation for the financing of overseas trade and the growth of commodity markets in the 19th century.

The contract for the carriage of goods by sea, which is evidenced by a bill of lading, is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners. Such a contract is not discharged by performance until the shipowner has actually surrendered possession (that is, has divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them.

So long as the contract is not discharged, the bill of lading, in my view, remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred. It is clear law that where a bill of lading or order is issued in respect of the contract of carriage by sea, the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading (see *The Stettin* [1889] 14 P.D. 142). Until the bill of lading is produced to him, unless at any rate, its absence has been satisfactorily accounted for, he is entitled to retain possession of the goods and if he does part with possession he does so at his own risk if the person to whom he surrenders possession is not in fact entitled to the goods.

In the present case, the contract of carriage evidenced by the bills of lading, had not been discharged on June 2, 1961, when Bruitrix purported to pledge the goods to the Bank by deposit of the bills of lading as security for advancement of money to them. The goods were in the constructive possession of the shipowners being held in the physical possession of the British Transport Commission on behalf of and to the order of the shipowners who had power to control any physical dealing with them. No bill of lading had at that date been produced to the ship-

owners. The shipowners were under no obligation to surrender their constructive possession and control to deal with the goods, except on production of the bill of lading and had no intention of doing so. In those circumstances it seems to me beyond argument that the bills of lading were at all material times effective documents of title for the goods by deposit of which to the Bank a valid pledge of the goods for security on advances could be made."

Finally, he concluded as follows:–

"It is not necessary in this case to consider what is a much more difficult question of law, left open by Mr. Justice Willes in *Meyerstein* v. *Barber*, [1870] L.R. 4 H.L. 317, as to what the position would be if the shipowners had given a complete delivery to Bruitrix of the goods without production of the bill of lading, at the date when they were entitled under its terms to deliver, and Bruitrix had subsequently purported to pledge the goods by deposit of the bill of lading. That question does not arise because in this case not only had complete delivery of possession not been given to Bruitrix, but no delivery of possession at all at the relevant time on June 2, had been given. In my opinion the pledge made on June 2, by deposit of the bill of lading was a valid pledge and as a consequence I think that I can give judgment for the plaintiffs in this case."

In *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.*, [1959] A.C. 576, the respondent manufacturer shipped from England to Singapore bicycle parts to the value of about £3,000 under a bill of lading requiring the goods to be delivered "unto order or his or their assigns", and which, by clause 2, provided that "(c) ..... the responsibility of the carrier ..... shall be deemed ..... to cease absolutely after the goods are discharged" from the ship.

After the goods had been discharged in Singapore the carrier's authorised agent, in accordance with what was alleged to be the common practice there, released them to the consignee against a written indemnity by the latter's bank in favour of the carrier, but without production of the bill of lading. The consignee never paid for the goods, and on a claim by the respondent against the carrier for damages for breach of contract or for conversion, the latter brought in the consignee and

the indemnifying bank as third parties, claiming to be entitled to be indemnified by them. The bank—the present appellant—admitted liability to indemnify the carrier if the latter were held liable.

Lord Denning, having stated the facts, delivered the judgment of their Lordships and had this to say at pp. 585–588:–

"The shipping company's agents were quite frank about what they did. Their representative said in evidence: 'In issuing delivery orders and in everything we do we act as agents for the Glen Line. It is an accepted fact that, in absence of bills of lading, goods are released on an indemnity. I agree we are supposed to deliver on the bill of lading being produced to us. I agree that, when we do not have the bill of lading produced, we cover ourselves by getting an indemnity. When it is suggested to me that we get these indemnities because we know we are doing what we should not do, I say that if no risk, we would not need indemnity. I agree we get indemnity because we are being something we know we should not do, but it is common on the bank's guarantee.'

It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was 'unto order or his or their assigns,' that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by clause 2 of the bill of lading.....

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough

to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: 'Of course not.' There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it: and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.

But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has as one of its main objects, the proper delivery of the goods by the shipping company, 'unto order of his or their assigns,' against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see *Glynn* v. *Margetson & Co*[1]; *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*[2].

To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery. For that is what has happened here. The shipping company's agents in Singapore acknowledged: 'We are doing something we know we should not do.' Yet they did it. And they did it as agents in such circum-

1. [1893] A.C. 351, 357.
2. [1956] 1 Q.B. 462, 501.

> stances that their acts were the acts of the shipping company itself. They were so placed that their state of mind can properly be regarded as the state of mind of the shipping company itself. And they deliberately disregarded one of the prime obligations of the contract. No Court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause: see *The Cap Palos*[1]."

Having reviewed the authorities at length, it clearly emerges that Leduc's case (*supra*) on which counsel for the defendants so strongly relied, is distinguishable from the present case. That was a case between shipowner and endorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855, so that no evidence was admissible in that case to contradict or vary its terms. Between those parties the statute makes it the contract.

On the other hand, in this case, I would reiterate that evidence was admissible to contradict or vary the terms, because the contract has come into existence before the bill of lading was signed by the agents of Adriatica and handed to the shippers after the goods had been put on board, and after the ship had sailed away. With this in mind, I have formed the view that the bill of lading was not in itself the contract between the shipowner and the shippers of goods, though it has been said to be excellent evidence of its terms. I would, therefore, dismiss this contention of counsel.

The second question is whether the shipowner in delivering the goods in question without obtaining the bill of lading is liable to the shippers. In trying to explain their stand with regard to the delivery of the cargo in question, without obtaining the bill of lading, the agents of Adriatica in Marseilles said in their letter dated July 6, 1971:-

> "Please find attached copy of our letter of today to the Societe Marseillaise de Groupages—MARSEILLE and to the BANCO ESPANOL EN PARIS—Marseille Branch, the contents of which are self explanatory.
>
> Also attached photocopy of telexes to which the letter refers.
>
> Please advise shippers of goods, Messrs. ARCHANGE-

1. [1921] P. 458 at p. 471.

LOS DOMAIN LTD., in Nicosia indicating to them that, since the goods were perishable we had no reason to refuse delivery in exchange for a Bank letter of Guarantee, especially as this was established by the Societe Marseillaise de Groupages who was mentioned in notify on the documents."

But with respect, in the case in hand, irrespective of the bank guarantee for the value of the goods, it was the duty of the shipowner to see that the goods are delivered to the person to whom he has contracted to deliver them, *i.e.* to the person named as a consignee in the bill of lading, or to the assignee of the person who is empowered by the bill of lading to make an order or assignment of it. Certainly, Societe Marseillaise De Groupage was neither a consignee in the bill of lading, once it was an "Order" bill of lading, nor the assignee of the person who was empowered by the bill of lading to make an order or assignment of it. In the absence of such authority, it was the responsibility of the shipowner to deliver the said cargo to the right person: to the person who was entitled to them as owner or as holder of the bill of lading. Delivery even to the consignee named in the bill of lading does not suffice to discharge the shipowner where the consignee does not hold the bill of lading. "It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract in the bill of lading is to deliver to the person named in ... or entitled under it." (Per Wright J. in *Skibsaktieselskapet Thor* v. *Tyrer*, [1929] 35 Ll. L. Rep. 163, 170).

It is therefore, clear in my view that delivery to a person not entitled to the goods without production of the bill of lading is *prima facie* a conversion of the goods and a breach of the contract. The goods remained in the constructive possession of the shipowner and once no bill of lading had at that date been produced, the shipowner was under no obligation to surrender his constructive possession and control with the goods, except on production of the bill of lading. I repeat, the master was not entitled to deliver them on a guarantee or under an indemnity where the person claiming delivery cannot produce it. In those circumstances, it seems to me beyond argument that the bill of lading remained at all material times effective document of title for the goods, and the shipowner, in delivering the said goods without production of the bill of lading did so at his peril. The contract was to deliver, on production of the

bill of lading, to the person entitled under the bill of lading. In the present case, it was to the order of the plaintiff, if they had not assigned the bill of lading. In my view, therefore, they are liable for the breach of contract once they delivered the goods to a person who was not entitled to receive them.

In this case, counsel quite fairly conceded in his opening address that the cargo in question should not be delivered to anyone else unless the original bill of lading was produced, but he went on to argue, that on the facts of this case, the delivery of the goods was justified—being of a perishable nature—and that the shipowner was not liable in damages. Although I may find myself in sympathy with the argument of counsel, it is a clear exposition of the law that a shipowner who delivers without production of the bill of lading, does so at his peril, and this was known all along to the agents of Adriatica.

For the reasons I have given at length, I find that the defendants are liable to pay damages, and I would dismiss this contention of counsel also.

In order to excape the consequences of the misdelivery, the defendants say that the shipowner is protected by clause 23 of the bill of lading which, in English, says that:-

> "ARTICLE 23—In the event of damage or loss and generally in every case for which the Company are answerable they shall only be liable for the payment of the real and intrinsic value of the goods loaded, as proved by proper invoices of origin and ascertained by a statement of a sworn surveyor, excluding any compensation in respect of damages for lost profits for increase of commercial value.
>
> Should the value declared on the bill of lading be lower than that ascertained from the invoice or by the survey, the Company shall be liable for payment only on the basis of the lower value declared.
>
> Indemnity for goods whose value has not been declared and for which the appropriate extra freight has not been charged, may in no case exceed the amount of Lit. 200,000 per package.
>
> Goods for which the tariff does not provide also for value tax will have the same nevertheless imposed when

the Shipper declares the value of the goods in the shipping order, if each package exceeds the minimum value of Lit. 200,000.

For the carriage of small packages, the responsibility of the Company is limited to a maximum of Lit. 750 (seven hundred and fifty) for packages up to 25 Kg., to Lit. 1,500 (one thousand five hundred) for those over 25 Kg. and up to 60 Kg. to Lit. 2,500 (two thousand five hundred) for those over 60 Kg."

With respect, the exception, on the face of it, could hardly be more comprehensive, and I think that shipping company cannot be absolved from responsibility for the act which the plaintiff company complains, *i.e.*, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolves the shipping company for an act such as that, that would be entirely unreasonable because these goods were not damaged or lost, but I repeat, there was a misdelivery of the goods. I think that once the action of the shipping agents in Marseille can properly be treated as the action of the shipping company itself, the case of *Sze Hai Tong Bank Ltd.*, (*supra*), is on all fours with the facts of the present case, and I can do no better than adopt and follow what was said in that case by Lord Denning at pp. 588-589:-

"The self-same distinction runs through all the cases where a fundamental breach has disentitled a party from relying on an exemption clause. In each of them there will be found a breach which evinces a deliberate disregard of bounden obligations. Thus, in *Bontex Knitting Works Ltd.* v. *St. John's Garage*[1], the lorry driver left the lorry unattended for an hour, in breach of an express agreement for immediate delivery. In *Alexander* v. *Railway Executive*[2] the cloak-room official allowed an unauthorised person to have access to the goods, in breach of the regulations in that behalf. In *Karsales* (*Harrow*) *Ltd.* v. *Wallis*[3] the agent of the finance company delivered a car which would

1. [1943] 60 T.L.R. 44, 253.
2. [1951] 2 K.B. 882; [1951] 2 All E.R. 442.
3. [1956] 2 All E.R. 866.

not go at all, in breach of its obligation to deliver one that would go. In each of those cases it could reasonably be inferred that the servant or agent deliberately disregarded one of the prime obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf: and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent: see *Smackaman* v. *General Steam Navigation Co*[1]; *Ashby* v. *Tolhurst*[2], by Sir Wilfrid Greene M. R., and Swan, *Hunter and Wigham Richardson Ltd.* v. *France Fenwick Tyne and Wear Co. Ltd.*[3]"

But there is another reason why I cannot accept this contention of counsel, and that is that I am not prepared to rely on the evidence of Mr. Marcou that in the booking note a clause was inserted that the shippers were accepting the terms and conditions of the Carrier's bill of lading. Mr. Economou was dealing with this case since 1971, and he never asked specifically for the production of a booking note—once the file was left in Famagusta, and according to the evidence, a copy was handed over to the plaintiff company. Furthermore, it appears that with regard to the seasonal agreements, Mr. Umberto was the only person who was handling such agreements, but he was never called to give evidence whether such an agreement was in existence.

On the contrary, Mr. Manglis, in giving evidence said that he had never been told that the contract of carriage would be dovered by a standard Adriatica bill of lading. I think, considering the evidence as a whole, I am prepared to accept the statement made by Mr. Manglis. As I said earlier, once the bill of lading was in a foreign language, one would have expected, along with the words already stamped on the face of the bill of lading "Ship not responsible for breakage etc. etc." to include on it in English that the shippers accept the conditions of the bill of lading. I would, therefore, find as a fact

1. [1908] 13 Com. Cas. 196.
2. [1937] 2 All E.R. 837.
3. [1953] 2 All E.R. 679.

that the shipper has never been told of such stipulations, and has never agreed to abide by them, once he was not aware and was not informed in the course of shipment. Having regard to all circumstances, the shipper had a right to suppose that his goods were received on the terms of the contract: see *Crooks* v. *Allan* (*supra*).

For the reasons I have given, and once I took the view that the bill of lading was not the contract between the shipowner and the shipper of goods, I would dismiss this contention of counsel also.

The third question is whether the plaintiff company are entitled to receive interest. Counsel on behalf of the defendant company argued that the amount of 8 1/2% charged on the loans by the bank as interest, is too remote and cannot be recovered by the plaintiff company even if they are paying it, once it was not in the contemplation of the parties.

With regard to the question of interest, no authority was quoted by counsel in which interest was awarded by way of damages, when the plaintiffs borrowed money from a bank, in the absence of an agreement. In England in *Miliangos* v. *George Frank* (*Textiles*) *Ltd.* (No. 2) [1976] 3 All E.R. 599, Bristow, J., dealing with the question whether the plaintiff was entitled to the rate of interest that he had actually paid to borrow in order to have the use of the money which the defendants had failed to pay, said at pp. 602–603:–

> "But in considering what is the appropriate award of interest in the circumstances of this case, where a Swiss plaintiff recovers in a complaint on a contract the proper law of which is clearly Swiss law, a judgment in the English Court in Swiss francs, what is the law that the English Court should apply? Dicey and Morris[1] state that the liability to pay interest, and the rate of interest payable in respect of a debt e.g. in respect of a loan, is determined by the proper law of the contract under which the debt is incurred, *e.g.* by the proper law of the contract under which the loan was made. The editors have not come to the conclusion that this rule should also apply to interest awarded by the Court by way of damages, that is to achieve

1. Conflict of Laws (9th Edn., 1973), p. 866, r. 166.

restitutio in integrum where a contract has been broken which did not of itself provide for interest to be payable in case of a breach. Previously it had been thought by the editors that the award of such damages, being a matter of procedure, would be governed by the lex fori. The application of either law brings inconvenience, because what you could reasonably expect to borrow the money for in Switzerland, or what order the Swiss Courts would make, must equally be a matter for expert evidence. However familiar English Judges may be with the incidents of borrowing from banks in England, most of them, I suspect, have no knowledge, judicial or otherwise, about the cost of borrowing Swiss francs in Zurich. So in this action, whichever system of law has to be applied, there will have to be a reference so that evidence can be led in order to arrive at the right answer. In future, no doubt, where a plaintiff seeks his judgment in foreign currency, both parties will be prepared at the trial with the necessary evidence to deal with the question of interest. In view of the unusual course which this case has followed throughout it is not surprising that it has only recently become clear that what interest the Court can award cannot be ascertained without evidence being given.

Such little authority as there is in this field suggests that the view expressed in the earlier editions of Dicey is the more correct, that is that you look to the proper law of the contract to decide the substantive question: is there a right to interest by way of damages? But how much you ought to award, if there is such a right, is a matter of procedure, not of substantive law, and falls to be decided in accordance with the lex fori (see *J. D'Almeida Araujo Lda* v. *Sir Fredrick Becker & Co. Ltd.*[1], a decision of Pilcher, J., and the Funabashi,[2] a decision of Dunn J.). These decisions seem to me to be entirely consistent with sound principle, and I therefore follow them and hold that while you look to the proper law of the contract to see whether there is a right to recover interest by way of damages, you look to the lex fori to decide how much. Here it is agreed that the law of Switzerland gives a right to interest

1. [1953] 2 All E.R. 288.
2. [1972] 2 All E.R. 181.

by way of damages. The lex fori, in the form of s.3(1) of the 1934 Act, empowers me to award interest at my discretion, apart, as I hold, from compound interest. In my judgment the plaintiff should be treated mutatis mutandis in the same way as he would have been had he been awarded judgment in sterling and he had then borrowed sterling in England pending judgment so as not to be out of his money. In my judgment, he is entitled to interest during the agreed period at a rate at which someone could reasonably have borrowed Swiss francs in Switzerland at simple interest and not at compound interest. Since this Court is not in a position to take judicial notice of what this rate should be, that question has to be the subject of further enquiry.

Interest awarded at a rate to be determined at which Swiss francs could have been borrowed in Switzerland at simple interest during the agreed period."

There is no doubt that Justice Bristow found that the proper law of the contract of Switzerland gives a right of interest by way of damages; and that the lex fori, in the form of s.3(1) of the 1934 Act empowers the Court in England to award interest at its discretion (apart of course from compound interest). With this in mind, the question is: is there a right of interest by way of damages in Cyprus? I think in Cyprus the position is regulated by s.33(1) of the Courts of Justice Law, 1960, (No. 14 of 1960), which deals with interest on debts etc. and on judgments, but nowhere does it say that the Court is entitled to award interest by way of damages.

In England, s.3(1), so far as material, provides: "In any proceedings tried in any Court ..... for the recovery of ..... damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the period between the date when the cause of action arose and the date of judgment".

On the contrary, our section 33(1) of the Courts of Justice Law, 1960 says that "In any proceedings tried in any Court for the recovery of any debt upon which interest is payable, whether by virtue of any agreement or otherwise, as provided by law, the Court shall award interest at the rate agreed upon

or otherwise as by law provided, for the period commencing on the date when such interest became payable until final payment."

Turning now to the evidence before me, it is clear that the evidence of Mr. Rohobos is a most unreliable one. It is true that he said that when they shipped the oranges in question they borrowed money from the bank and paid interest at 8 1/2% on a percentage of 80% out of the sum of £4,945; and that they still owed money to the bank with regard to that shipment. But, with respect, going through his whole evidence, he was unable to specify whether that amount was paid off or indeed what was the exact amount, and he was content to say that he could not say exactly what was the position, and he did not remember what was the amount due, although he is the accountant of the plaintiff company. As I said, the evidence on this issue is most unreliable, and in the absence of any receipts or indeed of any other evidence coming from the bank, I have no alternative but to disregard such evidence.

Finally, regarding the question as to whether there exists a right to interest by way of damages in Cyprus, in the particular circumstances of this case, and once there is no factual foundation in order to decide the issue raised, I think it is necessary to leave this question open, and decide it in a proper case.

For the reasons I have endeavoured to give at length, I find that the plaintiff company is entitled to obtain judgment in their favour with costs.

Judgment accordingly for the sum of £4,945 in favour of the plaintiffs with 4% interest. Costs to be assessed by the Registrar.

Judgment and order for costs as above.