among City arbitrators and one that makes it difficult to advise on settlement. If such a practice has developed, it is desirable that it should stop, but the issue is whether the award of costs in this case is an example of such an approach.

Where a claim is grossly exaggerated this can constitute a legitimate reason for depriving a successful claimant of some of his costs. Where a claimant takes substantial time pursuing discrete issues of fact on which he is unsuccessful, this can constitute a legitimate reason for not awarding him all his costs, the more so if the arbitrator considers that his conduct has been unreasonable. Although the owners' claim has been divided into five heads, it seems to me that some of those heads subdivided into a large number of discrete claims and issues. The arbitrator in his reasons described this case as one of "many claims and contentions". I suspect that the head of claim described as "inventory" subdivides in this way. The shell plating claim, where owners only recovered 10 per cent. of their claim, to which four days of the arbitration were devoted, is one in respect of which I feel that the arbitrator could well have been justified in disallowing some of owners' costs. It does not seem to me that when the arbitrator referred to the "varying successes" of owner's claims he had in mind simply the fact that the owners recovered significantly less than they had claimed. I think that he had in mind a large number of discrete items of claim, some of which succeeded and some of which failed.

For these reasons owners have not succeeded in persuading me that the arbitrator erred in principle in awarding the costs as he did. The second appeal must be dismissed. If, however, the remission of the first award to the arbitrator results in a different decision in relation to the entablature claim, it will be necessary for the arbitrator to reconsider his award of costs in the light of this.

	CLAIMS	AWARDS	% SUCCESS	% TIME
Owners				
Entablature	97,150.00	87,500.00	90.0	8.6
Crankshaft	50,456.82	3,906.00	7.7	4.3
Shell Plating	153,611.07	15,385.45	10.0	40.6
Furrow	119,947.00	55,000.00	45.9	6.0
Inventory	135,982.00	65,806.34	48.4	30.9
Spare Cylinder	4,094.08	4,094.08	100.00	AGREED
Charterers				
Life rafts	20,000.00	20,000.00	100.0	7.2

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Mar. 15, 16, 17, 21 and 22, 1994

EFFORT SHIPPING CO. LTD.
v.
LINDEN MANAGEMENT S.A. AND ANOTHER

(THE "GIANNIS NK")

Before Mr. Justice LONGMORE

Cargo — Dangerous cargo — Shipper's liability — Cargo of ground-nuts shipped at Dakar infested with Khapra beetle — Cargo jettisoned at sea — Whether infestation originated in ground-nut cargo shipped under charter — Whether Khapra beetle already on board vessel when ground-nut cargo shipped — Whether cargo dangerous by reason of presence of Khapra beetle — Whether shippers' liable — Bills of Lading Act 1855, s. 1.

On Nov. 18, 1990 the plaintiffs' vessel *Giannis NK* loaded a cargo of ground-nut extraction meal pellets at the port of Dakar into hold 4. Cargoes of bulk wheat pellets had been loaded into other holds at previous loading ports of Lome in Togo and Abidjan in Ivory Coast. The ground-nut pellets were fumigated after loading and an SGS certificate was issued. The vessel crossed the Atlantic to her first port of discharge San Juan in Puerto Rico, where part of the grain pellets cargo was discharged and then proceeded to Rio Haina in the Dominican Republic to discharge the balance of the cargo.

She arrived on Dec. 2 and was inspected by the agricultural authorities on Dec. 6. Live insects and shed skins were found in the cargo and the vessel was quarantined. The vessel was fumigated twice but after each fumigation live insects were still found in the vessel's holds and on Dec. 21, the vessel was ordered to leave the port with both the ground-nut cargo and the wheat cargo still on board. The authorities stated that they had found what they termed "trogoderma SP" viz a species of trogoderma and it was accepted that trogoderma granarium everts or Khapra beetle did exist in the vessel when she arrived at her destination.

Khapra beetle was an unusual insect. It originated in tropical areas and many countries where it was not endemic regarded it as so undesirable that they took serious steps to prevent its entry. Among such countries were the Dominican Republic and the United States. Their main objection to the Khapra beetle was its voraciousness when in its larval form. In appropriate conditions the beetles could multiply rapidly and the larvae would rapidly devour a cargo or store of feedstuffs if they were present within it.

The vessel sailed back to San Juan where she arrived on Jan. 11, outside the port. On Jan. 25 the United States Department of Agriculture came on board and sent specimens away for laboratory examination. These were identified as Khapra beetle and a notice was served on the owners on Jan. 31 requiring them either to return the cargo to its country of origin or to dump it at sea 25 miles from shore. Between Feb. 4 and 12 the vessel proceeded out to sea and jettisoned both the ground-nuts and the balance of the wheat still on board.

Owners notified charterers that they considered the infestation originated in the ground-nut cargo shipped under the charter. On Mar. 1 the receivers started proceedings against both the owners and the shippers of the cargo Sonacos of Dakar. These proceedings were pending in the Dominican Republic.

The owners claimed against the charterers and shippers. The charterers took no part in the action. The shippers denied that the cause of the owners' losses was Khapra beetle in the cargo shipped at Dakar. They argued that it was at least equally likely if not more likely that the Khapra beetle was already on board the vessel when the ground-nut cargo was shipped.

The owners claimed that the ground-nut cargo was a dangerous cargo by reason of the fact that it contained Khapra beetle. They argued that the beetle constituted a physical danger both to the ship which was put into quarantine and needed fumigation before it could perform further service for other charterers and to the other wheat cargo on board which had to be dumped at sea. The owners therefore claimed that they could recover from the shippers pursuant to art. IV, r. 6 of the Hague Rules which were incorporated into the contract of carriage evidenced by the bill of lading pursuant to which the ground-nuts were shipped or by virtue of the implied warranty that the shipper would not ship dangerous goods. The claim was for damages for delay, bunker expenses incurred during the delay, fumigation and other costs, and an indemnity in respect of any liability they may have to the receivers in the Dominican proceedings. There was also an issue as to whether the shippers had been divested of liability pursuant to s. 1 of the Bills of Lading Act, 1855.

———*Held*, by Q.B. (Com. Ct.) (LONGMORE, J.), that (1) in the light of all the evidence from Africa, the Dominican Republic and Puerto Rico, the Khapra Beetle was found in hold 4 and only in hold 4, i.e. the hold into which the ground-nut cargo had been loaded (*see* p. 175, col. 2; p. 176, col. 1);

(2) it was most unlikely that the Khapra beetle came on board with the previous rice cargo from Vietnam which was not a recognized source of Khapra beetle; and it was not likely that the Khapra beetle larvæ and adults found in hold 4 at the end of the voyage were Khapra beetle (or the issue of Khapra beetle) introduced to the vessel before April 1989 when the owners acquired the vessel (*see* p. 177, col. 1);

(3) on the balance of probabilities Khapra beetle came on board the vessel with the ground-nut cargo because the infestation was found in hold 4 which

contained the ground-nut cargo and not in any other hold (*see* p. 177, col. 2);

(4) the effective cause of the vessel's inability to discharge was the justified apprehension on the part of the Dominican authorities that the cargo contained Khapra beetle rather than living insects (*see* p. 178, col. 2);

(5) if the Hague Rules did not deal with non-physically dangerous goods one could not determine the rights of the parties in relation to such cargo by reference to the rules; the words "goods of a dangerous nature" in art. IV of the Hague Rules meant goods that were physically dangerous; and the normal meaning of the word "dangerous" in relation to goods appeared to imply that the goods were such as to be liable to cause physical damage to some object other than themselves (*see* p. 180, col. 1);

(6) there was not any physical damage to the vessel although there was damage to the other cargo since it had eventually to be dumped at sea and was totally lost; it was known to the shippers that any cargo infested with Khapra beetle would be very likely to be rejected at destination; the rejection and the subsequent dumping of other cargo on board the same vessel was a natural and not unlikely consequence of shipping Khapra infested cargo, which was thus dangerous in the sense of being liable to give rise to the loss of other cargo shipped in the same vessel; ground-nuts shipped by the defendant shippers were "goods of a dangerous nature" within art. IV, r. 6 of the Hague Rules (*see* p. 180, cols. 1 and 2);

(7) the Hague Rules imposed a strict liability on the shipper for damages and expense arising out of or resulting from the shipment of goods of a dangerous nature; the shipper could not argue that he did not know and had no means of knowledge that the goods were dangerous; the obligation of the shipper was wider at common law because he could be liable for the shipment of non-dangerous goods, such liability arising even if he did not know or have the means of knowledge of the defect in the cargo which was likely to cause danger or delay (*see* p. 180, col. 2; p. 181, col. 1);

—— *Mitchell v. Steel*, [1916] 2 K.B. 610, applied.

(8) if that was wrong the owners had not satisfied the Court that the shippers either knew or ought to have known that the ground-nuts were infested with Khapra beetle at the time of shipment (*see* p. 181, col. 1);

(9) under the Bills of Lading Act, 1855 a shipper's liabilities remained and were not transferred; the shipowners loss arose from the act of shipping infested ground-nuts and the shipper's liability for loss of that kind could not be transferred away from the shipper by virtue of the shipper endorsing the bill of lading to a third party; the shippers were liable to the plaintiff shipowners (*see* p. 181, col. 2; p. 182, col. 1);

——*The Athanasia Comninos*, [1991] Lloyd's Rep. 277, considered.

The following cases were referred to in the judgment:

Athanasia Comninos, The [1991] 1 Lloyd's Rep. 277;

Bamfield v. Goole & Sheffield Transport Co. Ltd., [1910] 2 K.B. 94;

Brass v. Maitland, (1856) 6 El. & Bl. 470;

Chandris v. Isbrandtsen & Moller Co. Inc., (1950) 83 Ll.L Rep. 385; [1951] 1 K.B. 240;

Fox v. Nott, (1861) 6 Hurl & Nor. 630;

Mediterranean Freight Services Ltd. v. BP Oil International Ltd. (The *Fiona*), [1993] 1 Lloyd's Rep. 257;

Ministry of Food & Lampert & Holt Line Ltd., [1952] 2 Lloyd's Rep. 371;

Mitchell v. Steel, [1916] 2 K.B. 610;

Rederi Aktiebolaget Transatlantic v. Board of Trade; (1924) 20 Ll.L.Rep. 241; (1924) 30 Com. Cas. 117;

Smurthwaite v. Wilkins, (1862) 11 C.B. N.S. 842.

This was an action by the plaintiffs Effort Shipping Co. Ltd. claiming damages against the defendant charterers Linden Management S.A. and the shippers Sonacos of Dakar in respect a cargo of ground-nuts which had been shipped by the shippers and which was found to be infested by Khapra beetle thus causing the cargo to be rejected at destination and to be dumped at sea together with the other cargo on board the vessel.

Mr. Alistair Schaff (instructed by Messrs. Bentleys Stokes & Lowless) for the plaintiffs; Mr. Duncan Matthews (instructed by Messrs. Richards Butler) for the defendant shippers.

The further facts are stated in the judgment of Mr. Justice Longmore.

Judgment was reserved.

Tuesday Mar. 29, 1994

JUDGMENT

Mr. Justice LONGMORE: The owners of the vessel *Giannis NK* have sued the shippers of a cargo of ground-nuts in an action which raises a number of points of law about a shipper's liability for so-called dangerous cargo and also the question whether, if the shipper did indeed have such a liability, he can argue that he has been divested of that liability pursuant to s. 1 of the Bills of Lading Act, 1855. It is perhaps ironic that this latter point should, as far as Counsel are aware, fall to be directly decided for the

first time 139 years after the passage of the Act and nearly two years after it has been repealed. The Carriage of Goods by Sea Act, 1992, however, only applies to bills of lading issued after July 16, 1992. The bill of lading in the present case was signed by or on behalf of the master of the vessel on Nov. 18, 1990.

Trogoderma granarium everts, or Khapra beetle, as it is more commonly called, is an unusual insect. It originates in tropical areas and many countries where it is not endemic regard it as so undesirable that serious steps are taken to prevent its entry. Among such countries are the Dominican Republic and the United States of America. Their main objection to the Khapra beetle is its voraciousness when in its larval form. In appropriate conditions the beetles can multiply rapidly and the larvæ will rapidly devour a cargo or store of feedstuffs if they are present within it.

In the late 1950s and early 1960s the United States launched an expensive and successful programme to exclude Khapra beetle and since then both that country and many Caribbean countries, including the Dominican Republic, exercise their statutory importation powers to exclude vessels and cargoes infested with this insect.

On Nov. 18, 1990 the vessel *Giannis NK* loaded a cargo of ground-nut extraction meal pellets at the port of Dakar into hold number 4 of the vessel. Cargoes of bulk wheat pellets had been loaded into other holds at the previous loading ports of Lome in Togo and Abidjan in Ivory Coast. The ground-nut pellets were fumigated after loading and an SGS certificate was issued. The vessel crossed the Atlantic to her first port of discharge, San Juan in Puerto Rico, where part of the cargo of grain pellets was discharged and then proceeded to Rio Haina in the Dominican Republic to discharge the balance of the cargo, including the ground-nut pellets.

She arrived on Dec. 2 and on Dec. 6 was inspected by the agricultural authorities. Live insects and shed skins were found in the cargo. As a result the vessel was quarantined. There followed two separate fumigations but after each fumigation live insects were still found in the vessel's holds and on Dec. 21 the vessel was ordered to leave the port with both the ground-nut cargo and the wheat cargo still on board. The authorities stated that they had found what they termed "trogoderma SP", viz a species of trogoderma. There are many species of trogoderma but it was eventually accepted by the defendants that whatever other species of trogoderma may have been on board, trogoderma granarium everts did exist in the vessel when she arrived at her destination.

The vessel had been arrested by the receivers, Proteinas Nacionales, on Dec. 19 and could not, in fact, sail until security for their claims had been provided. The vessel was eventually released and sailed back to San Juan where she arrived on Jan. 11 outside the port. While she was there her holds were inspected by Mr. Peter Twiss on behalf of owners and their P & I club. He reported the presence of skins of a trogoderma species in number 4 'tween deck but he had not seen any evidence of living insects in that cargo space. He could not enter the lower hold nor could he take away any of the skins for laboratory examination. He strongly suspected, however, that the skins were those of the larvæ of Khapra beetle.

On Jan. 25 the United States Department of Agriculture inspectors came on board and found one larva and one adult which they sent away for laboratory examination. These were later identified as trogoderma granarium everts, Khapra beetle, and a USDA notice was served on the vessel on Jan. 31 requiring owners to remove the cargo and either return it to its country of origin or dump it at sea 25 miles from shore. Between Feb. 4 and 12 owners accordingly proceeded out to sea and jettisoned both the ground-nuts and the balance of the wheat still on board.

The vessel then returned to San Juan where she was again inspected by USDA authorities on Feb. 12 and 13. On this occasion they found in the now empty hold 17 larvæ and one adult beetle. This was confirmed to be Khapra beetle and a methyl bromide fumigation was required. This was completed successfully on Feb. 23 and she presented for her next voyage in North Carolina on Feb. 24, 1991.

Owners had already notified the charterers of the vessel that they considered the infestation originated in the ground-nut cargo shipped under the charter. On Mar. 1 the receivers started proceedings against both owners and shippers of the cargo, Sonacos of Dakar. These proceedings are pending in the Dominican Republic. Meanwhile owners have instituted this action against both the charterers of the vessel and the shippers of the cargo. Although charterers have been served with notice of the action they have taken no part and no judgment has been entered against them. The action has, however, been defended on its merits by Sonacos who have denied that the cause of owners' losses was Khapra beetle in the cargo shipped at Dakar. Sonacos say that it is at least equally likely, if not more likely, that the Khapra beetle

was already on board the vessel when the ground-nut cargo was shipped. That is the principal question of fact which I have to decide.

Owners claim that the cargo of ground-nuts was a dangerous cargo by reason of the fact that it contained Khapra beetle. They say further that the beetle constituted a physical danger both to the ship, which was put in quarantine and needed fumigation before it could perform further service for other charterers, and to the other wheat cargo on board which had to be dumped at sea. They say, therefore, that they can recover from the shippers by reason of art. 4, r. 6 of the Hague Rules to incorporate into the contract of carriage evidenced by the bill of lading pursuant to which the ground-nuts were shipped, or by virtue of the implied warranty contained as a matter of English law in every contract of carriage that the shipper will not ship dangerous goods. The claim is for:

(1) damages for delay to the vessel;

(2) bunker expenses incurred during that delay;

(3) other expenses incurred during that delay, such as fumigation costs;

(4) an indemnity in respect of any liability they may have to the receivers in the Dominican proceedings.

Source of infestation — The arguments

Mr. Schaff, for the plaintiffs, accepted that owners had the burden of proving that the ground-nut cargo was the source of the Khapra beetle on board the vessel of discharge and that owners' losses were caused by that infestation. In support of his contentions he asserted: (1) that the beetle was found only in hold number 4 and that this pointed to the cargo in that hold as the source. (2) that the only other suggested source was either a cargo loaded and discharged before owners acquired the vessel in early 1989, or the cargo of Vietnamese rice which immediately preceded the cargo carried on the voyage with which this case is concerned. It was common ground that no other cargo carried by these owners could have been the source of this infestation. (3) that Khapra beetle did not exist in Vietnam so that a Vietnamese source could be excluded. (4) that although a source in an old cargo could not be entirely discounted, the mechanism whereby it could emerge as a source of infestation on the voyage between Senegal and the Caribbean was highly unlikely to have occurred.

Mr. Matthews, for the shippers, reminded me that no onus of proof was on the shippers so that if I was left in doubt about the source of infestation, owners' claim must fail. He further argued that I could not be satisfied as to the probabilities of owners' case because: (1) the evidence did not support the conclusion that Khapra beetle was only found in number 4 hold; (2) even if it was only found in number 4 hold that did not mean that the cargo loaded in that hold had to be the source of infestation; (3) it was at least as likely that the ship was the source of infestation as that the source was contained in the ground-nut pellets; (4) the ship's source could be either the immediately preceding cargo of Vietnamese rice or a pre-1989 cargo. It did not matter which it was and, indeed, it was impossible to say which was more likely; (5) the Dominican authorities refused the vessel permission to discharge, not because of the presence of Khapra beetle nor because of any infestation in the ground-nut cargo, but because of the presence of live insects in the cargo in general with the result that owners could not prove that their loss was due to the shipment of Khapra beetle and must fail on the issue of causation.

How many holds?

I deal first with the question whether Khapra beetle existed only in hold number 4 or whether it was present in other holds also.

(A) *The African evidence*

Neither SGS nor Sonacos found any infestation in the sample which they took at loading and examined. This constitutes some evidence that any infestation may not have been in the cargo but does not assist on the question whether the infestation which manifested itself on discharge was in any particular hold.

(B) *The Dominican evidence*

There were two examinations by or on behalf of the Ministry of Agriculture in Santo Domingo. The first on Dec. 6, 1990 showed the presence of various insects in the cargo without drawing any distinction between the wheat bran and the ground-nuts. It also detected one skin of a trogoderma species. It was not examined to determine whether it was that species or trogoderma which is Khapra beetle. The second examination on Dec. 7 did not reveal any sign of trogoderma at all but merely various insects in the cargo in general. No report was made about the holds in which any of the findings were made.

The vessel was then put in quarantine and fumigated. At the end of that process the holds were inspected but live insects (unspecified) were found and a second fumigation was ordered. This was concluded on Dec. 17 and

there was a further inspection by and on behalf of the Ministry of Agriculture on Dec. 18 which found various insects in the cargo — two coleoptera pupæ "plus one larva of the dermestidae family, possibly trogoderma SP". Once again, no examination seems to have been done to determine whether the species of trogoderma was Khapra beetle.

As from Dec. 13 after the first fumigation, the buyers from Sonacos and the sellers to the receivers had instructed SGS to attend the vessel on their behalf. SGS sent a Mr. Lluberes who kept a running diary of his visits to the vessel. On the date of his first visit he reported the presence of flies in three holds and on Dec. 18, after the second fumigation, he reported the presence of "many insect skins" in holds 2, 3 and 4. On Dec. 19 the Dominican authorities decided to refuse the vessel permission to discharge and on Dec. 21 the vessel was ordered to leave the port.

Mr. Matthews submitted that at this stage there was no real evidence of the presence of Khapra beetle at all and, indeed, the refusal of permission to discharge had nothing to do with Khapra beetle. If, however, the skins found by Mr. Lluberes were shed larvæ skins of Khapra beetle, the evidence was that they were in holds 2, 3 and 4, not just number 4.

As against this, however, there is evidence of a species of trogoderma being in the cargo at discharge, although where it was found is not clear. Moreover, Mr. Lluberes expressly said in a statement which was read to the Court (bundle 2, p. 167) that he did not know what the insect skins were. It is quite possible that the skins seen by Mr. Lluberes in number 4 hold were different from those seen by him in numbers 2 and 3 holds.

Puerto Rico evidence

The vessel then returned to Puerto Rico where she was examined first by Mr. Twiss and later by USDA officials. Mr. Twiss in his evidence described how he went into number 4 'tween deck on Jan. 14, 1991 via an access opening but could not obtain access to the lower hold. He found in the 'tween deck thousands of matted skins lying around the floor with a core of ground-nut pellets in the middle of the cargo space. None of the skins was actually on the cargo, he picked up a lump of ground-nut material from the square of the hatch and examined that. He could find no sign of infestation in the comparatively small quantity of cargo in the 'tween deck. He asked for a ladder and was provided with a short ladder which he was able to rest against the coaming of the hatch opening. He climbed up and investigated the steel work which was in good clean condition. He was fairly sure from his experience that the skins were those of the larvæ of Khapra beetle but could not be sure until an official examination was done. He would not himself take any specimens off the ship.

Mr. Twiss also inspected holds 2 and 3 more cursorily. There were no trogoderma skins in those holds but he did see numerous live insects. Again, he was impressed by the clean state of the vessel.

On Jan. 25 inspectors from the United States Department of Agriculture inspected the cargo. They inspected holds 3 and 4 and found one dead larva and one dead adult. Interception form 309 described them as being found "with meal pellets (holds)". They sent these specimens to Washington for examination and the answer came back that the pest was trogoderma granarium everts. Mr. Matthews argued that the use of the word "holds" indicated that they were found in both the holds said to have been inspected. As against that the assistant officer in charge of the USDA Plant Protection and Quarantine Station in San Juan, who was not himself present at the inspection, recorded on Jan. 28 that "a dead adult and larvae that looks like k.b." were found in hold number 4. Moreover, the USDA operations manual makes it clear that if specific materials in which insects are found are from different origins, then a separate interception form should be prepared for each origin. In fact USDA officials only prepared one form 309 in which the origin was stated to be Senegal. If the larva and the adult had been found in separate holds it would have been necessary for a second form to be completed, which was not done.

After the cargo had been dumped at sea USDA officials made a further inspection or interception of holds 2, 3 and 4 on Feb. 13 and 14. The ship inspection report stated that an insect believed to be Khapra beetle had been found on the vessel and further stated that it had been found in hold number 4. Fumigation was required and the interception report recording that the inspectors had been present stated that seventeen live larvæ and one live adult trogoderma granarium everts had been found to be present. The report further stated that three holds had been examined and one hold had been infested.

In the light of all this evidence it seems to me overwhelming that the Khapra beetle was found in hold number 4 and only in hold number 4. Mr. Matthews tendered two statements, both dated March of this year, from Mr.

Velez who was one of the inspectors present at the last inspection of the vessel, saying that he and a fellow inspector, Mr. Ruiz, inspected two holds together and then split up and went to different holds but communicated by walkie-talkie radios. He said he remembered finding three live larvæ and also that Mr. Ruiz, in another hold, told him on the walkie-talkie radio that he had found a live adult beetle. He cannot remember which hold he or Mr. Ruiz was in and nor can he say why the contemporary documents only recorded one hold being infested. I prefer the contemporary documentation to the recent thoughts of Mr. Velez who was not available for cross-examination and may, in any event, be regarding the 'tween deck and the lower hold as different holds. I conclude on the evidence now available that the Khapra beetle was found in number 4 hold of the vessel.

The mere facts that the Khapra beetle was only found in hold number 4 does not necessarily mean that the beetle came on with the ground-nut cargo loaded on this particular voyage. Nevertheless if, as I find, the infestation was only found in one hold, it is a pointer to a particular cargo being the origin of the infestation rather than the ship. I therefore turn to examine the mechanism by which Khapra beetle would have got on board the ship and this necessitates an examination of the expert evidence.

Expert evidence

Owners relied on the evidence of Mr. Twiss, who gave factual evidence of what he saw on board the vessel when he inspected her in San Juan. He also gave opinion evidence on the question how Khapra beetle could have arrived on the ship. He was sure that the skins which he had seen in number 4 'tween deck were Khapra beetle skins and that they must have come on board the vessel at the same time as the ground-nuts were loaded in Senegal where the beetle is endemic. He said it was "a hundred pounds to a penny" that the cargo was infested with live insects, by which he meant live Khapra beetle. The fact that he did not see any live insects was nothing to the point, since he could only inspect the 80 or 90 tons of cargo in the 'tween deck. He thought that the skins he saw were the cast-off skins of larvæ which were in the ground-nut cargo in loading and that they were probably blown out of the pelletized cargo during the actual process of loading and came to rest on the 'tween deck floor. In effect they were winnowed out of the main body of the cargo. He agreed he had never seen anything like this phenomenon before but when it was put to him that there might have been live larvæ already on board the vessel at the time of loading, together with cast-off skins which could have collected on the underside of the 'tween deck and become dislodged in the course of the voyage, he dismissed that as fanciful and said that in any event some skins would have remained in place and that his search of the 'tween deck ceiling area did not reveal any sign of Khapra beetle at all. He said he was particularly struck by the cleanliness of the 'tween deck space.

Sonacos relied on the opinion evidence of Mr. Kirman. He did not have the advantage of seeing any of the cargo spaces of the vessel but said that he did not think the possibility that the Khapra beetle came on with the cargo was any more likely than the possibility that the ship was already infested. Whether the vessel was infested by reason of the previous rice cargo from Vietnam or by reason of a cargo carried by the vessel before she was acquired by the owners in 1989 he could not say, since either origin was possible. The reason for the at first sight strange possibility that the infestation may pre-date owners' acquisition of the vessel is (a) that it was common ground between the experts that the beetle could not have come on with any cargo actually carried by owners between their acquisition of the vessel and the carriage of the rice cargo from Vietnam; and (b) that one of the characteristics of Khapra beetle is that they frequently, in the right conditions, achieve a state of suspended animation referred to by entomologists as "diapause". Apparently they can exist in this state alive but inert for many years. After surviving for a long time in this way, if conditions change they will revert to an ordinary living state and continue their lives as larvæ, then pupæ, then breeding adults. In neither the pupal nor their adult states do these beetles cause damage. It is only when they are in larval state that they can and do cause havoc.

Mr. Kirman then went on to suggest that the larvæ could collect and shed their skins on the underside of the hatch covers where it would be difficult to detect them. Since Mr. Twiss had not, in fact, inspected the underside of the hatch cover of number 4 'tween deck, he could not say whether there was any sign of larval infestation there. If, in the course of the voyage, the hatch covers were rolled over or rolled back from the hatch opening with any degree of violence the skins could become detached from their position and float down to cover the floor of number 4 'tween deck and thus be present there, to be found by Mr. Twiss when he inspected the vessel at San Juan on Jan. 14, 1991.

Mr. Kirman, when expounding his view in cross-examination, described this as "a theory which I cannot discount" and said it was at least as likely as the theory that the beetle came on board with the ground-nut cargo. Both Mr. Twiss and Mr. Kirman were eminently qualified as practised ship and cargo surveyors. I also had the assistance of an expert entomologist, Mr. Adams, on entomological matters such as the diapause of Khapra beetle about which very little is in fact known with certainty.

The conclusions I have reached on this evidence are as follows: (1) it is most unlikely that the Khapra beetle came on board with the rice cargo from Vietnam. Vietnam is not a recognized source of Khapra beetle, there is only one recorded instance of a Vietnamese cargo being associated with Khapra beetle in any way and that was on a voyage to Russia. It was not an infestation. The publication "Quarantine Pests for Europe" produced in 1992 in association with the European and Mediterranean Plant Protection Organisation does not list Vietnam among the countries where trogoderma granarium is established. Information letter number 70 of the Plant Protection Committee for the South East Africa and Pacific region recorded in 1969 that trogoderma granarium had not been found in Vietnam south of the 17th Parallel. The rice cargo was loaded in Saigon, south of the 17th Parallel.

On Mar. 2 Professor C. Y. Chen of the Africa and Pacific Protection Commission stated in terms that Khapra beetle had not yet been reported to occur in Vietnam. Mr. Kirman relied on the 1965 distribution map for his contrary view but the weight of the published evidence is such that I can feel sure that the Khapra beetle on board the vessel did not come from Vietnam. There was also evidence that the rice cargo was fumigated, in all probability efficiently, by means of methyl bromide in Saigon and that Khapra was not observed when the rice cargo was discharged.

(2) It is not likely that the Khapra beetle larvæ and adults found in number 4 hold at the end of the voyage were Khapra beetle (or the issue of Khapra beetle) introduced to the vessel before April, 1989 when owners acquired the vessel. In this connection it is important that number 4 hold was originally a refrigerated compartment. In May 1990 the vessel was dry-docked in Piraeus, the insulation surrounding the hold was taken out and the hold, including the 'tween deck, was converted into a traditional cargo space. Neither the square of the hatch nor the hatch covers were themselves insulated so the conversion work did not affect the underside of the hatch covers but the rest of the space was substantially rebuilt. If Khapra beetle had been resident in the parts of the space where conversion work was done, that work would either have detected the beetle or eliminated it. It is for this reason that the underside of the hatch covers was the only place where diapausing larvæ could exist undetected to emerge from their diapausal state and start to shed their skins and become breeding adults during any subsequent voyage.

In these circumstances, Mr. Kirman's theory as I understood it required the following to have happened:

(a) Khapra beetle attached themselves to the underside of the hatch covers at some date prior to April 1989.

(b) They were still present there in May, 1990 when the vessel went into dry dock in Piraeus. Presumably they were in diapause since, if fully alive and active, they would need something to feed on which was not available from cargo carried between April, 1989 and May, 1990.

(c) They remained undetected throughout the conversion work done in dry dock in Piraeus in May, 1990.

(d) After the conversion work was completed during the course of the voyage, the hatch covers were banged open and shut with sufficient force to dislodge some but not all of the larvae on the underside of the hatch covers.

(e) The larvæ which got detached and fell into the lower hold were not detected or eliminated in Saigon when the rice cargo was loaded and fumigated because, presumably, they burrowed into the ship's sides. They then awaited the loading of the ground-nut cargo and infested that.

(f) Meanwhile, the larvæ still attached to the hatch covers remained there, shedding their skins which then became detached as a result of another, more or less violent, closing of the hatches with the curiosity that none of the skins actually fell into the small amount of cargo in the middle of number 4 'tween deck but only round about where Mr. Twiss saw them.

It seems to me that this sequence of events, while possible, is too far-fetched and unrealistic to be in the least probable and I find myself forced to reject this as a probable mechanism for Khapra beetle being in the vessel.

(3) On the balance of probabilities I find that Khapra beetle came on board the vessel with the ground-nut cargo because: (a) the infestation was found in number 4 hold which contained the ground-nut cargo and not in any

ther hold; (b) their presence can readily be ccounted for by some such mechanism as Mr. Twiss described; (c) no other more probable nechanism has been suggested. I may add that n general terms I found Mr. Twiss's expert evilence more persuasive than that of Mr. Kirnan.

Causation

As I have already said Mr. Matthews conended that the reason why the Dominican uthorities rejected the vessel and the cargo ltimately had to be dumped at sea was not the resence of Khapra beetle at all but the presnce of live insects in the cargo in general. It is ot altogether easy to discern the matters which nfluenced the decision on the part of the Domiican authorities to refuse permission to discharge the cargo and order the vessel away rom the port and it is certainly true to say that heir decisions were made before it was fficially confirmed, while the vessel was off San Juan, that Khapra beetle had been found. Mr. Matthews argued that if the authorities had been concerned about Khapra beetle in the ground-nut cargo they would have allowed the wheat cargo to be discharged. I cannot accept his argument. The expert evidence established that both the United States of America and various Caribbean countries, including the Dominican Republic, were very concerned to prevent the landing of any cargo containing trogoderma granarium everts. Indeed, as I have already said, the United States successfully devoted very considerable time, energy and resources to its complete extinction in that country in the late 1950s and the early 1960s.

The first analysis conducted in Santa Domingo on Dec. 6, 1990 detected the presence of a skin of trogoderma species of the dermestidae family. On Dec. 17 the local press reported that the first inspection had discovered a mutation of trogoderma granarium, one of the most devastating of cereal pests. That may have been an inaccurate report in as much as the presence of trogoderma granarium had not been conclusively established, whether as a mutation or otherwise, but the report was nevertheless in circulation. The final analysis, after two fumigations in Santa Domingo, reported on Dec. 18 the presence of a larva of the dermestidae family, possibly a trogoderma species. There was a further report in the press on Dec. 20 to the effect that discharge had been held up because trogoderma granarium had been found. In these circumstances the authorities were clearly concerned that there was a very real possibility that the cargo was infested with trogoderma granarium. They may also have been concerned about the presence of the live insects and even have thought wrongly that the wheat cargo, rather than or as well as the ground-nut cargo, was the source of infestation. Nevertheless I am satisfied that the presence of trogoderma granarium everts was a substantial cause of the rejection of the vessel.

Since the experts agreed that the presence of other insects did not matter and there is no positive evidence that the authorities thought that the presence of other insects was enough to refuse permission to discharge the vessel in itself, I find the effective cause of the vessel's inability to discharge was the justified apprehension on the part of the Dominican authorities that the cargo contained Khapra beetle rather than living insects.

The law

Mr. Matthews had a considerable number of legal defences to the claim in the event that the facts were as I have determined them to be. He argued:

(1) That the contract was governed by the Hague Rules which made specific provision for dangerous cargoes. There was no room for any warranty to be implied beyond that stated in the contract by virtue of the incorporation of the Hague Rules.

(2) That the provisions of the Hague Rules were, unlike English common law principles relating to dangerous cargo, confined to physically dangerous cargo.

(3) That the ground-nuts shipped by Sonacos were not physically dangerous, they merely contained a defect which did not damage either the ship or other cargo. The fact that the ship could not be further traded until the cargo was removed did not make the cargo physically dangerous.

(4) That if, contrary to his submissions, there was scope for the operation of any implied warranty of common law in relation to dangerous cargo which was wider than the Hague Rules, e.g. because the shipping of the cargo had caused delay and expense, any such liability only arose if the shipper knew or ought to have known that the cargo was a dangerous cargo.

(5) That in any event, Sonacos as shippers had been divested of any liability when they endorsed the bill of lading to their purchaser, Agrocean Trading Ltd., because s. 1 of the Bills of Lading Act had operated to transfer

liabilities as well as rights after the transfer of property in the goods upon or by reason of the endorsement of the bill of lading.

None of these questions seems to have been determined by any decision which is binding on me. I shall consider each of them in turn.

(1) *The alleged exclusive ambit of the Hague Rules*

The common law of England and Wales has for some time recognized two similar but distinct principles in relation to the shipment of goods which cause loss to a shipowner. There is first the principle that a shipper undertakes not to ship goods which are liable to cause damage to the vessel or other cargo shipped thereon without giving notice to the shipowner of the character of the goods. This proposition was laid down in, for example, *Brass v. Maitland*, (1856) 6 El. & Bl. 470, where the shipper was held potentially liable for shipping casks of bleaching powder which, unknown to the ship owner, contained lime chloride which damaged the casks and leaked out causing damage to other cargo on board.

There is also a second principle that the shipper undertakes not to ship goods which are liable to cause delay to the vessel. Examples of such goods are contraband cargo or cargo for which the cargo-owner requires a licence for import which he does not, in the event, obtain. An example of this second principle is *Mitchell v. Steel*, [1916] 2 K.B. 610, in which charterers had loaded a cargo of rice for Alexandria but then asked the shipowners to discharge the cargo at Piraeus instead. The shipowners agreed to this course but the cargo could not be discharged at Piraeus without the express permission of the British Government who controlled the port in the First World War. Permission was not granted and the vessel had to discharge at Alexandria after all. The charterers were held liable for the resulting delay by Mr. Justice Atkin, who described the case as being analogous to a case of dangerous goods.

The second principle has been treated by authors and editors of books on carriage by sea as part of the law concerning dangerous goods and it seems that both principles may indeed have a common origin in a proposition set out in the fifth edition of Abott on Shipping (1825) at p. 270:

> The general duties of the merchant . . . are comprised in a very narrow compass. The hirer of anything must use it in a lawful manner and according to the principle for which it is let. The merchant must lade no prohibited or uncustomed goods by which the ship may be subjected to detention or forfeiture.

See, also, the current 14th edition, published 1901, p. 643.

This passage was cited by both the majority judgment in *Brass v. Maitland*, (1856) 6 El. & Bl. 470 at p. 484 and the minority judgment given by Mr. Justice Crompton, at p. 492, which Mr. Justice Atkin preferred to follow in *Mitchell v. Steel*. After successful Counsel for the shipowners in that case himself became the Commercial Judge, he also referred obiter to the above statement of Lord Tenterden as constituting the true basis of the doctrine which "is apt to be a little obscured if one thinks only of dangerous goods", see *Rederii Aktiebologet Transatlantic v. Board of Trade*, (1924) 20 Ll.L.Rep. 241 at p. 243, col. 1; (1924) 30 Com. Cas. 117 at p. 128.

This brief account of the development of English law helps to put Mr. Matthews' first two submissions into context and shows that there is a danger of confusing what are two distinct but allied principles. He contends that the Hague Rules make provisions in relation to goods of a dangerous nature and that those provisions are the exclusive contractual provisions on that subject. He then argues that on the true construction of the rules goods of a dangerous nature can only refer to physically dangerous goods so that the shipowner has no remedy in relation to goods which cause delay but are not themselves physically dangerous. The truth is that if the Hague Rules relate only to physically dangerous goods, non-physically dangerous goods are not dealt with at all and there is no reason why the parties' rights in that regard should not be determined by the law which governs the contract.

As Mr. Justice Devlin, said in an only slightly different context in relation to s. 4(6) of the United States Carriage of Goods by Sea Act 1936:

> The Act is not intended as a code. It is not meant altogether to supplant the contract of carriage but only to control on certain topics the freedom of contract which the parties would otherwise have. [*Chandris v. Isbrandtsen & Moller Co. Inc.*, (1950) 83 Ll.L. Rep. 385 at p. 394, col. 1; [1951] 1 K.B. 240 at p. 247.

If, therefore, the Hague Rules are to be construed as relating to physically dangerous cargo they are not intended to control the parties' freedom of contract on the topic of non-physically dangerous cargo. If the parties have made no express provisions, the provisions

implied by the law governing the contract of carriage will govern the rights of the parties.

Mr. Matthews relied on *Mediterranean Freight Services Ltd. v. B.P. Oil International Ltd. (The Fiona)*, [1993] 1 Lloyd's Rep. 257, especially p. 268, in support of his proposition that the Hague Rules provided the parties with their only remedies. But I do not read that case as saying that where the Hague Rules do not deal with a particular topic at all it must be presumed that the parties have no remedy in relation to such topics. The true position is that if the Hague Rules do not deal with non-physically dangerous cargo one cannot determine the rights of the parties in relation to such cargo by reference to such rules.

(2) *The construction of the Hague Rules*

I consider that Mr. Matthews is probably correct in his submission that the words "goods of a dangerous nature" in art. IV of the Hague Rules mean goods that are physically dangerous. He has the support of the editors of both Scrutton on Charterparties, 19th ed. p. 457 and Carver, Carriage of Goods by Sea, 13th ed. par. 566. Moreover the normal meaning of the word "dangerous" in relation to goods does seem to me to imply that the goods are such as to be liable to cause physical damage to some object other than themselves.

(3) *Were the goods physically dangerous?*

Mr. Schaff argued with some force that the ground-nuts in the present case were physically dangerous because the result of their being infested with Khapra beetle was that (a) the vessel was put into quarantine in the Dominican Republic as from Dec. 8, (b) after the confirmation of the presence of Khapra beetle at San Juan in Puerto Rico all the cargo had to be dumped at sea, (c) the vessel could not be used for her next fixture, or indeed any fixture, without being fully fumigated. He argued that (a) and (c) constituted physical damage to the ship and (b) constituted physical damage to the other cargo. Since I have held that the owners are not without remedy even if the cargo was not physically dangerous, I will merely state my conclusion that there was not any physical damage to the vessel. There was, however, damage to the other cargo since it had eventually to be dumped at sea and was totally lost. It was known to the shippers that any cargo infested with Khapra beetle would be very likely to be rejected at destination. The rejection and subsequent dumping of other cargo on board the same vessel seem to me to be a natural and not unlikely consequence of shipping Khapra-infested cargo, which is thus dangerous in the sense of being liable to give rise to loss of other cargo shipped in the same vessel.

I therefore conclude that the ground-nuts shipped by the defendants were "goods of a dangerous nature" within art. IV, r. 6 of the Hague Rules.

(4) *Knowledge and/or negligence of shipper*

The Hague Rules impose a strict liability on the shipper for damages and expenses arising out of or resulting from the shipment of goods of a dangerous nature. The shipper cannot argue that he did not know and had no means of knowing that the goods were dangerous. As far as physically dangerous cargo is concerned at common law the shipper's liability is likewise strict. In *Brass v. Maitland*, 6 El. & Bl. 470 itself, this was decided by the majority judgment of the Court of King's Bench. Mr. Justice Crompton dissented on this aspect and said the absence of negligence should be a defence. In *Bamfield v. Goole & Sheffield Transport Co. Ltd.*, [1910] 2 K.B. 94, the majority of the Court of Appeal preferred the majority judgment in *Brass v. Maitland* and that concludes the matter for a Judge at first instance.

Mr. Matthews argued, however, that in so far as the shipowners were relying on principles implied by English law in relation to non-physically dangerous goods causing delay to the vessel as exemplified by *Mitchell v. Steel*, [1916] 2 K.B. 610, which they would have to do if the ground-nuts were not physically dangerous and the Hague Rules only covered physically dangerous cargo, absence of any negligence on the part of the shipper was a relevant consideration. He relied on the fact that Mr. Justice Atkin (1) expressly preferred the judgment of Mr. Justice Crompton and the statement of law contained in the 5th edition of Carver and (2) based his conclusion on the charterer's knowledge in that case that the rice could not be discharged in Piraeus without the permission of the British Government. As against this, it is not clear that *Bamfield v. Goole* was cited to Mr. Justice Atkin. Moreover he defined the relevant principle cautiously. He said, at p. 614:

> Whatever may be the full extent of the shipper's obligations it appears to me that it amounts at least to this. That he undertakes that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the owner facts which are within his knowledge indicating that there is such risk, if the owner does not and could not reasonably know those facts. I think that is placing the obligation of the shipper within very moderate limits *and it may be considerably wider* [Emphasis supplied]

I consider that the obligation of the shipper is indeed wider at common law and that he is liable even if he does not know or have the means of knowledge of the defect in the cargo which is likely to cause "danger or delay". As far as physically dangerous goods are concerned the matter is concluded by authority. As far as goods likely to cause delay are concerned the law is (and ought to be) the same. It would be most unsatisfactory if different principles governed each type of case. There would inevitably be argument of the kind canvassed in (3) above on the question of whether the goods were in truth physically dangerous.

Moreover, there is no logic in either law or, I would suggest, common sense for requiring a shipowner to prove negligence on the part of a shipper when he has suffered delay and expense from the shipment of a non-physically dangerous cargo but to absolve him from that requirement when delay or expense has arisen from the shipment of a physically dangerous cargo which may not, in the event, have caused any physical loss or damage at all.

The next question is whether, if I am wrong, Sonacos either knew or ought to have known that the ground-nuts were infested with Khapra beetle. The onus of proof would be on the shipowners if it were necessary to consider the point. The owners did not satisfy me that Sonacos either knew or ought to have known that the cargo was infested at the time of shipment. Mr. Schaff said that there was no effective pre-loading fumigation. There was, however, a fumigation on board ship. Details of that fumigation were disputed but I do not think that the shippers can in any way be said to have been negligent merely because the fumigation did not work.

(5) *Bills of Lading Act, 1855*

The preamble of the statute recites the pre-1855 state of the law under which property in goods covered by a bill of lading would pass to an endorsee upon endorsement of the bill but the rights under the contract contained in the bill of lading continued in the original shipper. The preamble then states that it is expedient that contractual rights should pass with the property. The Act then provides in s. 1:

> Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property and the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Section 2 of the Act provided, inter alia, that nothing in the Act should affect any right to claim freight against the original shipper. The result of that section is that the shipper's liability for freight continued in spite of the wording of s. 1.

Mr. Matthews relied on s. 2 to argue that s. 1 must have been intended to divest the shipper of his liabilities once the bill of lading had been endorsed and the property and the goods had been transferred upon or by reason of that endorsement, Unless that was so s. 2 was unnecessary. The difficulty with this argument is that s. 1 does not say in terms that an endorsee shall have transferred and vested in him all liabilities of the shipper, it merely says that the endorsee:

> . . . shall be subject to the same liabilities in respect of such goods as if the contract had been made with himself.

There is thus a difference of language between the rights which are transferred and vested and the liabilities to which the endorsee is merely said to be subject. This must be a deliberate difference and it seems to follow that whatever the position may be in relation to an endorsee's liabilities, the shipper's liabilities remain and are not transferred away from him, the shipper.

Mr. Matthews contended that *Smurthwaite v. Wilkins*, (1862) 11 C.B.N.S. 842 was an authority to the contrary effect. That was a case which concerned an intermediate endorsee of a bill of lading. It was held that such intermediate endorsee, unlike the shipper, did not retain a liability for freight after he had endorsed the bill and thereby transferred the property and goods shipped to another person. The Court of Common Pleas was not concerned with the position of the original shipper. There are certain passages in the judgment which could be said to imply that liabilities of the shipper did pass under the Act to a subsequent endorsee, see Chief Justice Erle at p. 849 and Mr. Justice Williams at p. 850. But these passages are only concerned to express shortly the effect of the Act. I cannot regard the case as an authority to the effect that an original shipper is divested of his liabilities when the Act does not expressly say so.

Mr. Matthews also relied on *Ministry of Food v. Lampert & Holt Line Ltd.*, [1952] 2 Lloyd's Rep. p. 371 at p. 382, where Mr. Justice Sellers

said that it did not seem to him to have been decided whether s. 1 of the Bills of Lading Act:

> . . . operates to transfer all the liabilities to the shipper, whether incurred before or at the time of shipment or before endorsement of the bill of lading or only to transfer liability subsequent to shipment or endorsement of the bill of lading.

The way in which this question is posed certainly seems to assume that some liabilities are transferred but this was very much an obiter passage in the judgment which was, in any event, concerned with whether the consignee had a liability, not whether liability remained with the shipper.

In spite of these two authorities referred to by Mr. Matthews the balance of authority seems to favour the proposition that the shipper is not divested of his liabilities; see (1) *Fox v. Mott*, (1861) 6 Hurl. & Nor. 630, at p. 636, per Chief Baron Pollock; (2) the joint reports Numbers 196 and 130) of the Law Commission and Scottish Law Commission on Rights of Suit in respect of Carriage of Goods by Sea 1991, par. 323, and the policy considerations there advanced; and (3) Benjamin Sale of Goods, 4th ed. 1992, par. 18–040. Benjamin refers to *The Athanasia Comninos* decided in 1979 but only reported in [1992] Lloyd's Rep. 277 where Mr. Justice Mustill says of s. 1 of the Bills of Lading Act at p. 281:

> It may well be that in the main a transfer of the document, viz the bill of lading, satisfying the requirements of the Act operates to transfer away many of the shipper's contractual obligations, but the Act cannot in my judgment have been intended to divest the shipper of responsibility for the consequence of loss arising from the act of shipment itself.

While this passage certainly supports the view some liabilities can be transferred away from the shipper, it does not go far enough for Mr. Matthews' purposes since there can be no doubt that in the present case the shipowner's loss did arise from the act of shipping infested ground-nuts and the shipper's liability for loss of that kind cannot, according to Mr. Justice Mustill, be transferred away from the shipper. I should add, in case it be necessary, that Mr. Matthews did satisfy me that Sonacos had endorsed the bill of lading to their immediate purchasers to whom property in the ground-nuts passed upon or by reason of such endorsement.

Accordingly, I have to reject all five of Mr. Matthews' legal arguments and I conclude that the defendants are liable to the plaintiffs. Quantum has been agreed in the sum of $477,848.38 and subject to anything Counsel may say I propose to enter judgment for that sum. I will also adjourn generally, with liberty to restore if necessary, the plaintiffs' claim for an indemnity in respect of any liability they may have in respect of the proceedings instituted in Dominica.

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Feb. 24, 28, Mar. 1, 2 and 3, 1994

K/S STAMAR
v.
SEABOW SHIPPING LTD.

(THE "ANDREAS P")

Before Mr. Justice PHILLIPS

Sale of ship — Norwegian Saleform — Alleged breaches — Buyers contended that at time of delivery vessel failed to satisfy requirements of contract — Whether items of work carried out to comply with recommendations made by classification society before vessel delivered — Whether such costs recoverable from sellers.

On Mar. 19, 1991 the sellers agreed to sell to the buyers a bulk carrier called *Andreas P.* The contract was on the terms of the Norwegian Saleform 1987 and provided inter alia:

> 6. Drydocking
>
> In connection with the delivery the Sellers shall place the vessel in drydock at the port of delivery for inspection by the Classification Society . . . During the . . . inspections by the Classification Society the Buyers' representative shall have the right to be present in the drydock but without interfering with the Classification Surveyor's decisions.
>
> 11. Condition on Delivery. See Clause 17
>
> The vessel . . . shall be at Seller's risk and expense until she is delivered to the Buyers, but subject to the conditions of this Contract she shall be delivered and taken over as she was on 19 March 1991 fair wear and tear excepted. However vessel shall be delivered with present class free of recommendations. The Sellers shall notify the Classification Society of any matters coming to their knowledge prior to delivery which upon being reported to the Classification Society would lead to the . . . imposition of a recommendation relating to her class.
>
> 17. The vessel to be delivered in substantially the same condition as she was on 19 March 1991 fair wear and tear excepted with her present class maintained free of recommendations . . .

On June 25, 1991 the vessel was delivered to the buyers in drydock at the Hyundai Mipo Dockyard in Ulsan Korea. The buyers decided to take advantage of the delivery drydocking to effect work of their own.

The vessel was classified by Germanischer Lloyd (GL) and in accordance with the rules the vessel had to complete a special survey by the end of September 1991. Most of the examinations required to complete the special survey had been completed before the vessel reached Ulsan. In accordance with their rights under the sale contract the buyers put two representatives aboard the vessel for familiarization on the voyage to Ulsan. Closing of the purchase contract took place on June 26.

After the vessel had been delivered to the buyers at Ulsan, renewal of steelwork, almost all of it in the topside tanks was carried out to a total cost of U.S.$300,000. Lengths of anchor cable were replaced at a cost of $79,500. The buyers contended that these items of work were carried out to comply with recommendations made by GL before the vessel was delivered. They claimed as damages the cost of the work carried out and loss consequential on it.

The sellers denied liability arguing that no recommendation was made in relation to either item prior to delivery; that if recommendations were made they resulted from unauthorized and wrongful activities by the buyers prior to delivery and no claim could be founded on them; that the buyers expressly or impliedly agreed to pay for the work that was done; and that the buyers waived any right to make the claims they now advanced.

After delivery renewal of air and sounding pipes was effected at a total cost of some U.S.$37,500. The buyers contended that the sellers were aware that these pipes were defective, that the defects were such as would lead GL to withdraw the vessel's class or impose a recommendation relating to her class and that the sellers were in breach of cl. 11 of the contract in failing to notify GL of the defects. The sellers argued that they had notice of only five defective pipes and that the cost of repairing these pipes was dealt with by a special agreement made shortly before the vessel was delivered at Ulsan.

———*Held*, by Q.B. (Com. Ct.) PHILLIPS, J.), that (1) a requirement made by a GL surveyor, acting in that capacity, that a specified course of action must be taken as a condition of a vessel remaining in class would constitute a "recommendation within cll. 11 and 17 of the contract of sale; where a classification surveyor required an inspection to be carried out and repairs to be effected as found necessary it was no longer possible to describe the vessel as having class maintained free of recommendation; and although the damage found by the surveyor in holds 1 and 5 never led to any formal recommendation it was accepted that the damage was such as to affect the vessel's clean certificate of class (*see* p.190, col. 2; p. 191, col. 1);

(2) the fact that the surveyor had made a requirement that steel renewals be carried out had been communicated to the sellers before the vessel was delivered to the buyers on June 26; the vessel was thus delivered with her class subject to a recommendation that repairs be effected to wasted steelwork as found necessary (*see* p. 191, col. 1);

(3) on the evidence the express agreement that the buyers would pay for all work ordered by them implicitly extended to cover any work ordered pursuant to recommendations made by the surveyor as