The Cherry
[2002] SGCA 49

Case Number : CA 39/2002, 40/2002, 41/2002

Decision Date : 12 November 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Steven Chong SC, Lim Tean and Shem Khoo (Rajah and Tann) for the appellants; Vivian Ang, Corina Song and Kenny Yap (Allen and Gledhill) for the respondents

Parties : —

Admiralty and Shipping – Bills of lading – Delivery of cargo without surrender of original bills of lading – What constitutes delivery – Whether delivery includes discharge

Agency – Construction of agent's authority – Whether third party acting as agent of cargo owner and authorised to give instructions on discharge quantity – Whether delivery to third party amounts to delivery to cargo owner

Agency – Implied authority of agent – Third party authorised to arrange discharge of cargo – Whether implied authority given to third party to decide on discharge quantity

Contract – Breach – Causation – Whether breach of contract was cause of loss or whether loss would have occurred even if there had been no breach

Contract – Breach – Obligation to discharge under bill of lading contract – Whether partial discharge in accordance with instructions of cargo owner

Tort – Conversion – Right to sue for conversion – Whether person suing having either actual possession of, or immediate right to possess, goods at time of alleged conversion

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1. There are three appellants in these consolidated appeals. They are, respectively, the owners of the vessels *Cherry*, *Epic* and *Addax*. The appeals arise out of the carriage of three parcels of fuel oil on board the vessels from Kuwait to the port of Fujairah in the United Arab Emirates and the discharge of a further parcel of oil into the *Cherry* at Fujairah. The respondents in all three appeals are Glencore International AG of Switzerland. Claiming as owners of the fuel oil, the respondents commenced admiralty actions against each of the ships to recover damages for fuel oil that was not delivered to them and/or was converted by the appellants.

2. Although the actions involved three different voyages, three different ships and four different parcels of cargo, the basic facts of the three actions were so similar as to necessitate a joint hearing. The consolidated actions were tried before Kan Ting Chiu J who found in favour of the respondents on all their claims. He entered interlocutory judgment against the appellants for damages and costs and directed the Registrar to assess the damages. Against his judgment, these appeals are now brought.

The background

3. The events giving rise to the actions took place in November and December 1997. At the time, the three vessels were managed by a Greek company called Dynacom Tankers Management Ltd. They were also on time charter to Metro Trading International Inc ('Metro'). Metro was then a significant supplier of bunkers in the Persian Gulf as well as of fuel oil to the Far East. In addition, Metro owned and operated a floating fuel oil storage and blending facility using vessels anchored in the waters off Fujairah. The primary storage and blending vehicle was an oil tanker called *Metrotank*.

4. Between April 1992 and February 1998, the respondents and Metro did business together on many occasions. From the end of 1994 onwards, the respondents regularly delivered substantial quantities of oil into Metro's floating storage facility at Fujairah. These cargoes were intended for subsequent resale, often in the form of blended products. The arrangement between Metro and the respondents from June 1996 onwards was that the respondents would purchase oil to be stored at Fujairah on the basis that such oil would subsequently be sold to Metro who would then sell it on to consumers in India and the Far East. Both Metro and the respondents purchased the oil required for this business operation. Additionally, the respondents financed Metro's purchases. Whenever Metro entered into a contract with a supplier, the respondents would enter into a contract with Metro to purchase the oil on back-to-back terms and the respondents would then provide the letter of credit necessary to enable the supplier to receive payment. It became the practice for the respondents to open a letter of credit in the name of Metro in favour of the supplier and for Metro to give irrevocable instructions to its bankers to hold the documents of title relating to the cargo to the order of the respondents.

5. Three of the four parcels of oil involved in the present case were purchased by Metro from Kuwait Petroleum Corporation ('KPC') on FOB Kuwait terms. These parcels were on-sold by Metro to the respondents. The respondents then voyage chartered the vessels *Cherry*, *Epic* and *Addax* from Metro to carry the oil to Fujairah and deliver the same to the floating storage facility. In respect of these parcels, the respondents' claims related to the fact that on the arrival of *Cherry* and *Addax* at Fujairah, only part of their cargoes were discharged into the storage facility. The rest was retained on board. In respect of *Addax* none of the cargo was discharged. The claims were made in respect of the cargo so retained.

6. The fourth parcel was bought by Metro from the National Iranian Oil Company and shipped on board the vessel *Hyperion* at Bandar Mahshahr, Iran, to be carried to Fujairah. Metro on-sold it to the respondents. When the *Hyperion* arrived at Fujairah, instead of discharging its cargo into the storage tanks there, it discharged the cargo into the *Cherry.* The *Cherry* then carried the cargo on to Singapore and delivered it to a third party.

7. In respect of the cargoes loaded on to the vessels at Kuwait, the respondents' original claims were for damages for breach of the bills of lading contracts and/or duty and/or breach of duty as bailees. The claims were founded in contract and, alternatively, in tort. In respect of the *Hyperion* cargo loaded onto the *Cherry*, the respondents' claim was for damages for breach of duty as bailees and/or conversion and/or wrongful detention and/or wrongful interference with the cargo by misappropriating it or removing it from Fujairah. The difference stemmed from the fact that the respondents had no contractual relationship with the owners of the *Cherry* in relation to their receipt of the *Hyperion* cargo so that this claim was founded only in tort. We will consider the appeals on the contractual claims and the tortious claim separately.

The bills of lading claims: the facts

8. As the facts and issues in the three appeals relating to the carriage of the cargoes to Fujairah by the appellants are, for practical purposes, similar, we will adopt the approach of the judge and use the *Cherry* action to consider the common matters.

9. On 24 November 1997, the respondents chartered the *Cherry* from Metro as disponent owners to carry a parcel of oil from Kuwait to Fujairah. Pursuant to the charterparty, on 3 December 1997, the *Cherry* loaded a cargo of 87,972 metric tons of bunker grade fuel oil 380 cst at the port of Mina Abdulla, Kuwait.

10. The bill of lading issued for the shipment on 3 December 1997 named KPC as the shipper, was signed on behalf of the master, and was made out to the order of Banque Trad Credit Lyonnais (France) SA ('BTC'). In accordance with the arrangements described in 4, BTC had, at the instance of the respondents, issued a letter of credit in favour of KPC and Metro had given instructions that all correspondence relating to the credit were to be addressed to the respondents and the bill was to be at their disposal.

11. BTC duly made payment under the letter of credit upon presentation of the bill and, on 2 February 1998, the respondents instructed BTC through their agents, Glencore UK Ltd ('Glencore UK'), to endorse the bill to the order of Credit Lyonnais and forward it to Credit Lyonnais with further instructions for the latter to endorse the bill in blank and forward it to Glencore UK. These instructions were complied with and Glencore UK duly received the bill.

12. In the court below, the appellants contended that the respondents could not sue as holders of the bill of lading because they were not in physical possession of the bill which was with Glencore UK. The judge found that Glencore UK was holding the bill simply as the agent of

the respondents for the transmission of documents and therefore the respondents were the holders of the bill for the purposes of the Bills of Lading Act (Cap 384). On appeal, the appellants did not contest this finding. Thus, before us the ability of the respondents to sue the appellants in contract as parties to the respective bills of lading is not challenged.

13. Before loading took place, Metro as time charterers had ordered the vessel to proceed to Kuwait to load the cargo of fuel oil and 'on completion of loading vessel to proceed for orders to STS Area offshore Fujairah … if Fujairah will be declared as final dischport [ie discharge port], cargo will be discharged according to the instructions of 'Metro Storage Coordinator …'. After the vessel loaded the cargo, the respondents as voyage charterers gave instructions to Metro regarding the discharge of the cargo.

14. The instructions which Metro received from the respondents were not conveyed to the ship. Instead, on the same day, Metro asked the appellants to tell the master of the *Cherry* to discharge the cargo at Fujairah without production of the bill of lading and in accordance with Metro's instructions there. In making this request, Metro invoked the clause in the time charter ('the LO1 clause') which provided that they could make a request for delivery of the cargo despite non-production of the bill of lading against provision of a letter of indemnity for such delivery. This letter of indemnity was duly provided thereafter.

15. The *Cherry* arrived at Fujairah on 8 December and discharged only 32,000 metric tons of the oil. 55,972 metric tons remained on board and were carried to Singapore without the respondents' knowledge or consent. The appellants claimed that they acted under the instructions of Metro's officers at Fujairah when they discharged part of the oil and retained the rest on board.

16. The respondents sued the appellants for having breached their obligations under the bill of lading to deliver the entire *Cherry* cargo at Fujairah. Metro, having collapsed in February 1998, was left out of these proceedings.

The decision below

17. The substantive issues raised by the appellants below in respect of the *Cherry, Epic* and *Addax* cargoes were:

> (1) the appellants were not in breach of contract because they had delivered the cargo to Metro, the respondents' agents, at Fujairah.
>
> (2) the appellants had acted on the instructions of the respondents' agents, Metro, at Fujairah.
>
> (3) the respondents had clothed Metro with all the appearance of being the owner of the cargo and were bound by Metro's acts; and
>
> (4) in any event, the respondents had failed to prove that the appellants' acts had caused their loss.

The last issue, that of causation, is also relevant in relation to the *Hyperion* claim and will be dealt with after we have considered the arguments on substantive liability in respect of both the contractual and conversion claims.

18. The judge considered the first two issues together. He agreed with the appellants' submission that, as a matter of law, delivery of a cargo does not necessarily include its discharge from the carrying vessel. In this case, however, on the face of the respondents' instructions, discharge of all the oil into the storage facility was required. Anything short of that would not constitute delivery according to their instructions.

19. The judge then held that when the respondents issued the instructions that discharge should take place in accordance with instructions from the Metro local representatives, they did not constitute the Metro representatives their agents for issuing or changing discharge instructions. Instead, they were directing the *Cherry* to work with those representatives to carry out their discharge instructions. The instructions received by the master of the *Cherry* from Metro to comply with the 'local instructions' of the Metro storage coordinator referred to instructions in connection with the storage of the oil at the facility because the coordinator controlled the facility. Thus, when the

Metro representatives instructed the appellants to discharge only part of the cargo, they should have sought confirmation as to whether the obligation to discharge had been varied, instead of effecting a partial discharge and thereafter becoming parties to false reports and documents put up to represent that full discharge had actually taken place when it had not.

20. The appellants also contended that the instructions given by Metro to them were given by Metro as an agent acting on behalf of and within the scope of the authority conferred by their principal, the respondents, who had delegated to Metro the task of dealing with the appellants in taking delivery of their cargo. The fact that this task was performed by Metro contrary to the instructions of their principal or even in fraud of their principal would not take their acts outside the scope of their employment and, on the basis of the principles established by *Lloyd v Grace, Smith & Co* [1912] AC 716, the respondents would be liable for Metro's acts. The judge held those principles did not avail the appellants because:

> (1) the Metro representatives at Fujairah were characterised in the voyage instructions as storage coordinators whose scope of authority covered only coordinating storage of the oil; thus in purporting to decide the amount of oil to be discharged, they acted outside the scope of their authority; and
>
> (2) the appellants did not regard Metro as anyone's agent as their case was that they believed Metro to be the owner of the cargo.

21. On the third issue, the judge rejected the contention that the respondents had clothed Metro with the appearance of ownership of the cargo as even though they did not directly notify the appellants of their interest in the cargo, they had directed in the discharge instructions that they be identified as receivers of the cargo. Further, he found as a fact that the appellants knew of the respondents' sub-charter.

The appeals on the bills of lading claims

22. The issues arising in these appeals are basically the same issues that were canvassed below. In respect of the bills of lading claims, apart from causation, the appellants have framed the main issues as follows:

> (1) were the cargoes lately laden on board the three vessels delivered to the respondents under the bills of lading notwithstanding that they were not fully discharged into Metro's storage tanks; and
>
> (2) were the respondents bound by the acts of Metro in instructing the appellants to retain the cargo on board the three vessels?

It should be noted here that in both issues the underlying question is whether and to what extent Metro was acting as the agent of the respondents in relation to the cargo.

What constitutes delivery?

23. The position taken by the respondents below, and accepted by the judge, was that on arrival of the vessels at Fujairah all the cargo should have been discharged into the storage facility and that it was a breach of the delivery obligation under the bills of lading contracts for some of the cargo to have been retained on board the vessels. In this appeal, the appellants contended that there was no breach of the contracts of carriage in that the various parcels of cargo were delivered to the respondents at Fujairah and that this delivery was effected by placing the cargo at the immediate disposal, and under the control, of Metro, the respondents' representative at Fujairah.

24. The appellants' argument ran as follows. The judge expressly held as a matter of law that there can be delivery without full discharge. This holding meant that delivery can be effected even when cargo is retained on board. Accordingly, the fact that all the cargo was not fully delivered into Metro's storage tanks did not per se amount to a breach. The circumstances in which some of the cargo was retained on board the vessels had to be examined to determine whether such conduct constituted delivery. In this case, they submitted such examination would show that the respondents had no claim for non-delivery. Before us, the respondents have not challenged the proposition that delivery does

not necessarily include discharge. They say that that is not the issue and the issue is whether the appellants were entitled on the facts of the case to effect delivery without discharge as the carrier's normal obligations are to discharge and deliver.

25. In their consideration of the facts, the appellants placed great emphasis on what they saw as the respondents' intention as to how the cargo was supposed to be dealt with. They argued that the respondents intended that the cargoes be delivered to Metro without reference to the bills of lading and that the bills were not to serve the usual function of being the 'key to the warehouse'. In this respect, the appellants relied on the following:

> (1) it was the respondents' own case that they expected and intended the appellants to deliver the cargo into Metro's storage tanks without production of the bills because they knew that the vessels would arrive at Fujairah before the bills came into their possession;
>
> (2) the respondents had conceded that if all the cargoes had been so delivered, then despite the non-production of the bills, there would have been no claim against the appellants and, in fact, for those portions of the cargoes that were so discharged the respondents have not asserted any claim against the appellants even though no payment in respect of the same was ever received from Metro; and
>
> (3) the respondents never presented the bills to the appellants in order to take delivery of the cargoes at Fujairah.

26. With due respect to the appellants, we think their emphasis on the fact that the respondents did not contemplate that in this case delivery would be effected against production of the original bill of lading is a red herring. In the usual case of a claim for non-delivery, the complaint is that the cargo was discharged at the designated discharge port but handed over to someone who did not have the original bill of lading. In this case, the complaint is that cargo was not discharged and that this failure to discharge was a breach of the delivery obligation under the contract of carriage. It is not an answer to this complaint to say that the respondents could not have complained about a discharge of the cargo into the Fujairah storage tanks without production of the bill of lading since this is what they as voyage charterers instructed Metro as operators of the vessel to do.

27. The rule that a carrier who delivers cargo without surrender of the original bill of lading does so at his peril has been too long established to need the citation of authority in support. The corollary of this proposition is that neither the owner of the cargo nor anyone else can insist on delivery of the cargo being made to him if he is unable to produce the bill of lading. In *The Houda* [1994] 2 LLR 541, it was argued that a provision in a time charter party providing that the charterers would indemnify the owners against the consequence of delivery of the cargo without presentation of the bill of lading gave the time charterer the right to order the shipowner to make such delivery. This argument was accepted at first instance but rejected by all three judges of the Court of Appeal. They held that there was no good reason, in the case of a time charterer, to depart from the general rule that the owners did not fulfil their contractual obligations if the cargo was delivered to a person who could not produce the bill of lading. Further, whilst it was open to a shipowner to decide that he was adequately protected by a letter of indemnity and to deliver in the absence of the bill, the rights of a time charterer to give orders in relation to the cargo did not entitle him to insist that cargo should be discharged without production of the bill. What applies to the time charterer who has a contract providing for him to indemnify the shipowner in such circumstances, applies even more forcefully to the owner of the cargo who has no such contractual arrangements. Accordingly, the respondents were never in a position to insist on the delivery of the cargo without the bill of lading whether such demand was made to Metro or to the appellants directly and the appellants could have refused to deliver the cargo at Fujairah or to deal with it there in any way until the bills were produced. The appellants did not take this course. Instead, they invoked the indemnity provisions and acted on the instructions of Metro in relation to the disposal of the cargo in the full knowledge that Metro could not produce the bills at that stage. The appellants thus knowingly committed acts that were in breach of contract and to escape liability for doing so they would have to establish that the respondents had given the instructions on which they acted or could be deemed to have done so and therefore that the respondents could not complain about the breach. They would have been able to establish this in answer to a contention by the respondents that discharge into the storage tanks at Fujairah without production of the bill of lading was a breach since the evidence was clear that that was what the respondents as voyage charterers had instructed Metro to do. Whether they have been able to establish this as an answer to the complaint of non-discharge is, as the respondents contend, a matter of fact to be decided on the evidence.

28. First, we have to consider whether, prima facie on the facts of this case, the appellants were required, as part of their delivery obligation, to discharge the cargo from the vessels. Looking at the documentary evidence, the bill of lading for the *Cherry* cargo stated:

> 'Shipped in apparent good order and condition by Kuwait Petroleum Corporation in the tank ship called … at the port of Mina Abdulla, Kuwait, a quantity of petroleum products said to be …, in bulk and to be delivered … in the like good order and condition at the port of Fujairah U.A.E. or so near thereto as the said ship may safely get (always afloat) unto the order of …'

The bill of lading thus provided for delivery at Fujairah. There was nothing in it to contradict the normal understanding that the carrier was required to physically discharge the cargo from the vessel at the discharge port and thereafter deliver it to the bill of lading holder. As stated above, in order to excuse non-performance of the discharge obligation by the carrier, there would have to be evidence that such was also the intention and/or instruction of the respondents as the other party to the contract of carriage. The judge stated that the instructions received by the carrier must be considered to determine whether delivery has been made. With respect, this statement is too broad. As far as the instructions received by the carrier are concerned, for him to avoid liability he would have to show that those instructions emanated from the bill of lading holder or were given with his authority. Otherwise acting on instructions received whether from a third party such as a shipping agent on shore or from a person with whom the carrier had a contract such as a time charterer would not release the carrier from liability.

29. In this case, the appellants' difficulty is that they had no direct contact with the respondents in relation to discharge. On discharge, the respondents dealt directly with Metro because they had voyage chartered the vessels from Metro and had rights vis--vis Metro to give instructions in relation to the cargo which they did not have vis--vis the vessels themselves as they were not then in possession of the bills of lading. However, the appellants would be able to rely on such instructions as a defence if the instructions supported their case. The respondents' instructions to Metro were not passed on to the vessels and the only discharge instructions the vessels received were from Metro itself.

30. In relation to *Cherry*, these instructions were given on two occasions. On 24 November 1997, Metro instructed the *Cherry* that 'if Fujairah will be declared as the final discharge port cargo will be discharged according to instructions of Metro storage coordinator'. On 6 December 1997, Metro further directed *Cherry* that 'You are kindly requested to follow local instructions from Metro storage coordinator'. In the cases of the *Addax* and the *Epic,* the voyage instructions from Metro to the vessels were even clearer in that they read in part 'Cargo will be discharged according to instructions of Metro storage coordinator'. Reading these instructions it appears to us that even Metro had told the vessels that what was required was a physical discharge of the cargo at Fujairah. This impression is fortified by Metro's telexes to the appellants invoking the respective LO1 clauses which telexes stated that owners were requested 'to discharge cargo as below without production of original B/L' followed by a description of the cargo involved and giving its quantity as the full quantity shipped on board.

31. The respondents' own instructions to Metro were specifically described as their 'discharge instructions' and in the case of the *Cherry* were given on 4 December. They read as follows:

> 'Please find below our discharge instructions, after completion of loading please forward full loaded details and instruct vessel to proceed to off Fujairah where she will discharge into MT Metrotank and or any other vessel and or shoretanks as instructed by Metro local representative.
>
> Receivers: Glencore International A.G.
>
> > Inspectors: We understand that you will ullage vessel on her arrival at Fujairah and that provided there is not a significant difference between arrival quantity and B/L quantity vessel will discharge without inspector being present and B/L quantity will be applied to inventory.

> Obviously should you note a significant difference between vessels arrival quantity and B/L then we request that you appoint Caleb Brett to attend for outturn quantity prior to vessel commencing discharge.
>
> ETA notices to be sent to following on a daily basis and then 12/6 hours.
>
> 1) The respondents, London Tlx 21223 attn. D. Hawkins
>
> Please also keep the above informed of vessel tendering NOR [ie Notice of Readiness] and throughout discharge' (emphasis ours)

The judge found that on the face of these instructions the carrier was to discharge all the oil into the facilities and anything short of that would not constitute delivery according to the respondents' instructions.

32. The appellants took a different view of the respondents' instructions. They submitted that it was clear from the same that:

> (1) the respondents were effectively instructing that delivery of the cargoes was to be made to Metro; and
>
> (2) the appellants were entitled to follow the instructions of the local representative of Metro as to the quantities to be discharged and the quantities to be retained on board.

33. The judge rejected the argument that the concluding words in the respondents' discharge instructions ie 'to discharge into *MT Metrotank* and or any other vessel and/or shoretank as instructed by Metro local representative' were evidence that Metro were the respondents' agents for the receipt of the cargo. He found that those words simply meant that the *Cherry* was to work with the Metro representative to carry out the discharging operation since Metro operated the storage facilities at Fujairah and the vessel could not discharge oil into the same without liasing with the Metro representative on an operational level.

34. Before us the appellants sought to argue that there were no words in the quoted instructions to restrict Metro's authority to merely 'coordinating storage'. Instead these instructions suggested that Metro had authority to issue instructions relating to discharge including discharge into other vessels (emphasis added by the appellants). The only qualification to the respondents' instructions was that the discharge must be '… as instructed by Metro local representative'. This language precluded any interpretation that Metro's authority was only restricted to coordinating storage.

35. We cannot agree with the interpretation given to the instructions by the appellants. It was because the storage facility consisted not only of the *Metrotank* but also of other vessels that the Metro representative had to give instructions on which ships' tanks the cargo had to be discharged into. This was a storage coordination function since where the cargo went would have depended on the available capacity of the various tanks comprising the storage facility.

36. We agree with the judge that the respondents' instructions required full discharge of the cargo from the ship into the storage facilities. It was clear from the repeated use of the word 'discharge' in relation to various aspects of what would happen on arrival at Fujairah that the respondents wanted all the cargo to leave the ship and be pumped into the storage facilities. These were the primary instructions. The direction that the vessel was to act in accordance with the instructions of the local Metro representative was only an operational instruction. Metro's storage facilities were made up of the *Metrotank* and other storage vessels and the reference to them could only have been intended as a description of the tanks into which the cargo was to be discharged. That the full quantity had to be discharged was also made clear from the instructions as to the ullaging of the vessel which was to confirm that there was no discrepancy between the bill of lading and the arrival quantities. This was because the bill of lading quantities were to be applied to the inventory of cargo in storage maintained by Metro for the respondents. The bill of lading quantity was essentially the full loaded quantity of the cargo and the respondents were therefore asking for and

expecting the full loaded quantity to be discharged. As far as the respondents were concerned, Metro had no authority to direct the ship to retain any part of the cargo on board.

Was delivery to Metro delivery to the respondents?

37. The appellants, however, argued that the cargoes were delivered to the respondents when they were placed at the immediate disposal, and under the control, of Metro at Fujairah because Metro was and/or must have been the respondents' agent to take delivery of the cargo. The appellants as the parties who were asserting that placing the cargo at the disposal of Metro meant delivery to the respondents had to prove that Metro had actual authority from the respondents, either express or implied to take delivery of the respondents' cargo at Fujairah without discharge and to deal with it as if the same belonged to Metro.

38. As far as express authority goes, we are of the view that on the evidence the appellants have not been able to establish this. First, a storage agreement existed between Metro and the respondents which provided that all oil bought by the respondents from Metro would be stored at Fujairah and then be dealt with in accordance with the respondents' further instructions. Secondly, the written instructions given to Metro by the respondents when the vessels were on route to Fujairah were, as discussed in 36, that all cargo was to be taken off the ship and put into the storage facility. Thirdly, the appellants did not adduce any evidence whether oral or written to show that the respondents had changed their instructions to Metro in relation to the discharge of the cargo.

39. The appellants' evidence was that oral instructions had been given by Metro at Fujairah for the partial discharge of the *Cherry* and the *Epic*. They did not call any evidence on how such instructions had been given in relation to the *Addax*. There was no evidence at all that these oral instructions from Metro actually emanated from the respondents.

40. Further, the relationship between Metro and the respondents in relation to the various parcels of cargo purchased by the respondents from Metro and thereafter stored at Fujairah was explored in legal proceedings between these parties in the High Court in England to which the appellants were also parties. This case (Case No: 1998 Folio 273, and commonly referred to as the UK Phase II proceedings) was heard before Mr Justice Moore-Bick together with other cases against Metro by other companies which had entered into agreements with Metro for the storage of oil products belonging to them at Metro's storage facility in Fujairah. Among the complex questions dealt with in his judgment delivered on 1 August 2001, was the question whether Metro was entitled to dispose of the oil as soon as it reached Fujairah. In answer to this question, Moore-Bick J said at 173:

> 'I am unable to accept either that Mr Kilakos (Metro) asked Mr Heuze (Glencore) to give him the freedom to dispose of oil as soon as it reached Fujairah and to account for it in arrears, or that, if he had done so, Mr Heuze would have agreed to such a request. Whatever Glencore's perception of the arrangements in place under JV1, I am quite sure that Mr Heuze would not have agreed to release oil to Metro without qualification from the very moment of its arrival at Fujairah since such an agreement would quite clearly have deprived Glencore of the benefit of any security.'

41. In answer to arguments that Metro had the authority to use the oil once it arrived at Fujairah, the judge said at 245:

> 'For the reasons I have already given I am unable to accept that it was agreed between them that Metro should be entitled to dispose of oil before any ITT contract had been issued in respect of it. I do not consider that there was any ambiguity about the agreement in this respect or that Mr Kilakos believed that the new arrangements involved a fundamental change in the parties' relationship of that kind.'

42. As parties to the UK Phase II proceedings, the appellants would be bound by the decision therein. We also note that in fact the appellants had pleaded in their defences herein certain findings of Moore-Bick J in those proceedings and had alleged that the respondents were also bound by the same and that it would be *res judicata* to raise the issues decided in the UK Phase II proceedings in Singapore.

43. Accordingly, the judgment of the English court has confirmed that Metro had no actual authority and were not entitled to use the oil as though it were their own from the moment of its arrival at Fujairah and this finding must also bind the appellants in these proceedings.

44. The fact that Metro had no actual authority from the respondents to instruct the appellants to retain and divert cargo to the Far East is, as the respondents submitted, further supported by the elaborate trail of false documentation which purported to show that the cargo had been fully discharged at Fujairah. Two categories of false documents adduced in evidence are relevant here:

> (a) false discharge telexes from Metro and Rima (the brokers) showing that the cargoes had been discharged in full when they had not; and
>
> (b) ships' documents and telexes also showing that the cargoes had been discharged in full when they had not.

45. The appellants' witnesses when asked in cross-examination why it was necessary to falsify the documents took the position that the false documents were necessary to protect the ship-owners from claims and also to deceive the end receivers of the cargoes. At the same time, however, they attempted to say that the documents were commercially true. The production of such documents which would indicate that the vessels had totally discharged at Fujairah all cargo carried from Kuwait appears to us to justify the inference that the appellants knew that Metro did not have authority to order the vessels not to discharge nor to deal with the cargoes as though they belonged to Metro.

46. In their Case, the appellants attempted to explain why the false documents had been produced. They asserted that these documents were consistent with their position that the cargo had been delivered to Metro. At Fujairah, Metro had ordered only part discharge of the cargo in the case of *Epic* and *Cherry* and no discharge in the case of *Addax*. After other cargoes were loaded onto the three vessels at Fujairah, Metro issued new bills of lading for the voyages from Fujairah to the Far East. All these new bills described the port of loading as Fujairah. It was therefore necessary for the appellants to prepare documentation to signify that the previous voyage had ended and the new one had commenced. It was necessary for these documents to evidence that all the cargoes had been delivered to Metro at Fujairah, in the event that Metro should claim for short delivery of oil at Fujairah. The documents which reflected full delivery were the Dry Tank Certificates, OBQ report and the Tank Inspection Certificate. These arguments are not convincing. To protect themselves against claims from Metro all that the appellants would have had to do would have been to obtain written instructions on how much cargo was to be discharged and how much was to be retained and, on completion of partial discharge, a receipt from the Metro representative confirming the amount of cargo received in the storage facility and the amount of cargo retained on board. The documents evidencing that the ships' tanks were empty could only have been intended to deceive other parties who might make a claim if it turned out that the ships' tanks had not been emptied prior to loading of the cargo for carriage from Fujairah to the Far East.

47. One basis of the agency relationship between Metro and the respondents as posited by the appellants was that since delivery is a physical act there had to be someone to take delivery of the cargo at Fujairah on behalf of the respondents. The only person who came forward to take delivery at Fujairah was Metro and the respondents had not suggested that someone other than Metro was their representative. In fact, the respondents had issued discharge instructions to Metro even though they could have issued such instructions directly to the appellants. Whilst the respondents refused to describe Metro as their agent, Metro was the only party on the ground able to give instructions as regards the delivery/discharge of the cargo.

48. The appellants' assertion that there had to be a representative from the respondents at Fujairah to take delivery was a peculiar argument for them to make since at all material times they knew that they would not be making delivery to a representative of the bill of lading holder. This is because the time charterer Metro had already invoked the LO1 clause and request discharge and delivery without production of the bill. The appellants therefore knew that they would be acting on the instructions of Metro as time charterer and would not have expected a representative of the cargo owners to be present at discharge. Neither would they have been expecting anyone but Metro to be giving them instructions in relation to discharge since they had secured an indemnity from Metro against any consequences that might arise from following those instructions and implementing discharge and delivery at Fujairah without presentation of the bills.

49. Accordingly, the reason why Metro was the only party that came forward in relation to the cargo at Fujairah would have been self-evident to the appellants and such an action could not have constituted them the respondents' agents, let alone the respondents' agents for taking delivery of the cargo. It is also significant that the appellants' witnesses said that they were acting on the instructions of Metro as time

charterers. The master of the *Cherry*, for example, when asked whom he was obliged to deliver the cargo to under the terms of the bill, replied that he would have to deliver in accordance with his time charterers' instructions and that was to the time charterers. Further, the appellants were aware that the storage facility was run by Metro and it was only Metro's representative who could give directions on the mechanics of discharge and storage.

50. The appellants also attempted to rely on implied actual authority. They cited the case of *Pole v Leask* [1860] 28 Beav 562 for the proposition that when an authority given to an agent is in general terms it would be construed liberally and according to the usual course of dealing. Further an agent always has the actual implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority.

51. The principles relating to implied actual authority are not of much assistance to the appellants, however, in view of the holding above that the extent of Metro's actual authority as evidenced by the respondents' instructions to them was to arrange for the cargoes to be discharged at Fujairah and stored there. The authority was specific not general. The only implied actual authority that would follow from it would be such implied authority as was necessary to do whatever was ordinarily required for the task of discharge and storage. Metro did not need to have authority to decide on discharge quantities in order to execute effectively its express authority to arrange discharge for the purpose of storage. Coordinating storage only involves telling the carrier which storage vessel to discharge into and cannot extend to instructing the carrier to retain the cargo and take it to a different port altogether.

52. In an attempt to derive authority from a course of dealing, the appellants pointed to previous voyages when oil carried from Kuwait to Fujairah had been retained on board at Fujairah and then carried on to the Far East. They named five previous shipments involving the vessels *Shoko, Alex, Tasman Spirit, Cherry* and *Orient* and said that in these cases the retention of part of the cargo on board had had no consequence to the carrier. The significance of the respondents' failure in those cases to sue the vessels for keeping cargo on board was that their inaction demonstrated a course of dealing by the respondents and Metro in relation to retention of cargo on board. The appellants thus had no reason not to follow Metro's instructions on retention.

53. The evidence was, however, that in the cases of *Shoko, Alex* and *Tasman Spirit*, the respondents had specifically authorised Metro not to discharge the cargo so that Metro on those specific occasions had express actual authority to give the instructions they had given to the ship-owners. Those three cases therefore are not evidence for the existence of a general authority given to Metro to retain cargoes on board. Further, in seeking to rely on previous shipments, the appellants were not in fact relying on the principles of implied actual authority. What they were actually seeking to do was invoke the principles of apparent authority. In the present case, apparent authority does not avail them because first, they did not plead it and, secondly, they did not adduce evidence to show that at the material time, they had consciously inferred from the previous voyages that Metro had the authority to order the retention of cargo and that in good faith they had relied upon the appearance of such authority.

54. In the appellants' Case it is stated that at all material times the appellants believed that Metro was the owner of the cargo because:

> (a) the instructions to load cargo at Kuwait were given by Metro;
>
> (b) these instructions were for loading on account of Metro;
>
> (c) the instructions relating to discharge of the cargo required them to discharge strictly in accordance with Metro's directions; and
>
> (d) it was Metro who issued the letter of indemnity which stated that the cargo had been consigned to Metro.

Without necessarily agreeing that in a situation where Metro were the time charterers of the vessel and where the commercial realities were that ownership of the cargo could change hands several times in the course of the voyage, the appellants had good reason to believe that Metro owned the cargo, we would observe that such a belief completely undercuts the credibility of any assertion that relies on a belief that Metro was an agent with apparent authority from the cargo owners to deal with the cargo as it deemed fit.

Were the respondents bound by the acts of Metro in instructing the vessels to retain cargo on board?

55. In this respect the appellants' contention was that where Metro had implied actual authority to issue discharge instructions including instructions to retain cargo on board, it must follow that the appellants cannot be liable to the respondents for following Metro's instructions. This is so even if Metro had acted fraudulently by misappropriating the cargo and in this connection, the appellants rely on the *Lloyd v Grace, Smith & Co* decision. As we agree with the judge's holding that there was no actual or implied actual authority given to Metro to do what it did, it must follow that, as the judge held, the appellants cannot avail themselves of the protection offered by *Lloyd v Grace, Smith & Co*. The principal is not liable merely because by appointing the agent he gives him the opportunity to behave fraudulently: *Farquharson Bros. & Co. v King & Co* [1902] AC 325; *Morris v C.W. Martin & Sons Ltd* [1966] 1 QB 716. In the present case, the respondents cannot be liable merely because they did not appoint their own representatives at Fujairah to prevent Metro from giving false discharge instructions.

The *Hyperion* appeal

56. The respondents' claim for the loss of the cargo carried from Iran to Fujairah on board the *Hyperion* and then discharged into the *Cherry* sounded only in conversion as there was no contract between the owners of the *Cherry* and the respondents in respect of this cargo. It is relevant to note the manner in which the respondents have pleaded this cause of action. At paragraphs 11 to 13 of their statement of claim in the *Cherry* action, they state:

> '11. On or about 7 December 1997, the Defendants unlawfully and without the consent of the Plaintiffs, misappropriated and removed from the vessel "HYPERION", approximately 32,635.720 mt of 180 CST Cargo and loaded the same on board the Vessel.
>
> 12. The Defendants carried approximately 32,635.720 mt of the 180 CST Cargo on board the Vessel from Fujairah, U.A.E. to Port Dickson, Malaysia pursuant to a bill of lading dated 8 December 1997.
>
> 13. In the premises, the Defendants have converted approximately 32,635.720 mt of the 180 CST Cargo to their own use.'

Therefore the act of conversion complained of is alleged to have taken place on or about 7 December 1997.

57. The appellants contended that the judge was wrong to find them liable in conversion to the respondents because the respondents were not entitled to immediate possession of the *Hyperion* cargo on 7 December 1997 as they were not holders nor indorsees of the bill of lading issued by the owners of the *Hyperion* for that cargo.

58. The appellants relied on the well established legal principle that a person has the right to sue for conversion if and only if he had, at the time of the conversion, either actual possession of, or the immediate right to possess, the goods converted. Being the owner of the goods allegedly converted is not always sufficient to entitle that person to immediate possession. See *Clerk & Lindsell on Torts* (17th Ed) 13-51, 13-52 and 13-77. In the court below, the judge accepted this principle but went on to hold that the rule was not inflexible and that the right to sue in conversion may be transferred to the plaintiff from a preceding holder of that right. In coming to this conclusion, the judge relied on *Bristol & West of England Bank v Midland Railway Co* [1891] 2 QB 653.

59. In the *Bristol Bank* case, cargo shipped under a bill of lading was subsequently transferred into the custody of Midland Railway. The shipping documents were first held by Toronto Bank, then City Bank and last by Bristol Bank. Before Bristol Bank received the documents, Midland Railway had already delivered the good to a man named Clark who was acting dishonestly and thus were unable to make delivery to Bristol Bank when the latter subsequently presented the bill. Bristol Bank then sued Midland Railway for conversion and the action succeeded despite the fact that the mis-delivery of the goods took place when City Bank was the holder of the bill of lading. The judge commented that the defence raised by Midland Railway was that Bristol Bank's action could not be maintained because the goods were released to the consignee before Bristol Bank acquired any title to them but that that defence was rejected on the basis that City Bank had had property rights to the goods as pledgees and those rights had been transferred to Bristol Bank which then acquired the right to sue, although it

became the pledgee after the goods were released to the consignee. The judge was further of the view that the case dealt with Bristol Bank's title to the goods and not to its immediate rights of possession but that that was not an immediate and material difference as the issue was that of the right to sue and the reasoning would be the same whether it was a right to sue by having title in the goods or having the immediate right of possession. With respect, we are unable to agree. Conversion as a cause of action can only be invoked by the person having the immediate right to possess.

60. Other authorities have not adopted the judge's view of the *Bristol Bank* case. Instead, *Bristol Bank* has been construed as a case where the plaintiffs succeeded because the act of conversion sued on was the inability of Midland Railway to produce the goods when Bristol Bank presented the bill and demanded delivery. At that stage Bristol Bank was the pledgee of the goods and had the right to possess them. Bristol Bank was relying on its own right of possession and not on the antecedent right invested in City Bank at the time the goods were delivered to Mr Clark.

61. In *Margarine Union G.M.B.H. v Cambay Prince Steamship Co* [1969] 1 QB 219, Roskill J dealt at length with *Bristol Bank*. In the course of his judgment he stated:

> '… Mr Lloyd developed an interesting argument founded on the decision of the Court of Appeal in *Bristol and West of England Bank v Midland Railway Co* ... Mr Lloyd argued that the cause of action upon which they succeeded was the original cause of action upon which they succeeded was the original cause of action in respect of the conversion of the goods when they were wrongly handed to Clark. Thus, he argued, they were able to recover in respect of an antecedent tort committed by the defendants before the plaintiffs acquired title.
>
> Mr Mustill, on the other hand, argued that the successful cause of action of the Bristol Bank was not the original conversion but the conversion following the inability (and, therefore, the refusal) of the defendants to deliver the goods to the Bristol Bank when the Bristol Bank claimed them under the bills of lading after the Bristol Bank had got title thereunder …
>
> …
>
> If one had to determine the matter merely from reading the report itself, I would conclude that the cause of action upon which the Bristol Bank succeeded was a cause of action resulting from the inability of the defendants to deliver the goods to the Bristol Bank after the Bristol Bank had become the pledgees of the goods …
>
> I had dealt with the submissions on either side in relation to the *Bristol Bank* case at considerable length because much of the argument before me was devoted to an analysis of the decision in that case. Clearly it is a case of importance for the decision of the present case, for, if the plaintiffs' submission upon it be right, it is a case where a plaintiff who acquired title by accepting shipping documents nonetheless succeeded in recovering in respect of an antecedent tort committed at the time when that plaintiff is not the owner. But, in my judgment, that is not what that case decided.' (at pp 246-250)

This analysis of *Bristol Bank* was accepted by the English Court of Appeal in *The "Future Express"* [1993] 2 LLR 542 at 548-9.

62. On the proper interpretation of the case therefore, it is clear that *Bristol Bank* did not obliterate the requirement that a plaintiff suing in conversion had to have had the immediate right to possession at the time of the alleged conversion in order to maintain such an action. Moreover, the case did not allow the right of possession to be transferred retrospectively to the date when the act of conversion occurred. In the present case therefore, in order to succeed in conversion the respondents had to show that on 7 December 1997 they had the immediate

right to possession of the *Hyperion* cargo.

63. The evidence showed that, as of that date, the respondents did not hold the bill of lading issued by the owners of the *Hyperion.* This bill was made out to the order of the shipper, National Iranian Oil Company ('NIOC'), and was given to the shipper upon completion of loading in Iran. The respondents did not dispute this. Their position was that they were the owners of the cargo at all material times (and thereby entitled to possess it) because the contract of sale with NIOC provided that title to the cargo would pass at the loading port to the buyer, Metro, as the product passed the flanges of the ship and their own back-to-back contract with Metro had identical provisions. Thus, on loading, title to the oil passed to them.

64. Having title to the goods, however, does not mean having the immediate right to possession. When goods are shipped on board a vessel and a bill of lading is issued in respect of the carriage, it is the carrier's presumed intention and legal obligation to deliver to the holder of the bill of lading. In addition, s 19(2) of the Sale of Goods Act (Cap 393) states that 'where goods are shipped, and by the bill of lading, the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal'. Hence, the presumption would be that the immediate right to possession would lie with the seller, NIOC, until it endorsed the bill of lading over to the buyer or its bank and completed the endorsement by delivery of the bill. As per the usual arrangement, that bank was BTC. Such endorsement and delivery could have not occurred until 19 December 1997 at the earliest as that was the date on which payment was made. Although there was no evidence as to when the bill was actually sent to BTC, a telex message sent on 15 December makes it clear that as of that date the document had still to be submitted. Thus, on 7 December, NIOC still had the bill of lading and on presentation of the bill to *Hyperion* would have been entitled to delivery up of the cargo. On that day, the respondents were not the persons entitled to possess the cargo.

65. The respondents relied on the case of *The Filiatra Legacy* [1991] 2 LLR 337 as support for the proposition that as owners of the *Hyperion* cargo they were entitled to sue for conversion. That case, however, is distinguishable from the present one. It was a shortage claim and the plaintiff buyer of cargo founded its suit on the torts of negligence and conversion in the alternative. At p 399 Mustill L.J. considered that since the buyers were suing in tort, 'they have to establish that they were the owners of the oil at the time of discharge: *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] 1 AC 785.' *Aliakmon* was a negligence case. In it Lord Brandon stated (at p 809) that in order to enable a person to claim in negligence for loss of or damage to property, he must have had either the legal ownership or a possessory title to the property concerned at the time of the loss or damage and it is not enough for him to have had only contractual rights in relation to the property at that time. This meant that to sue in negligence, *either* legal ownership *or* possessory rights would suffice. In *The Filiatra Legacy* neither the issue of immediate right to possession nor any other possessory right was raised. The requirements for maintaining an action for conversion were not considered. Accordingly, *The Filiatra Legacy* is of no assistance to the respondents.

66. In the event, we are satisfied that the respondents were not entitled to make a claim for conversion of the *Hyperion* cargo on 7 December 1997 and that, accordingly, the appeal of the owners of the *Cherry* in respect of this parcel of cargo must be allowed.

Causation

67. On the issue of causation, the judge held that the onus was on the respondents to prove that the oil was lost and that the appellants had caused the loss. The respondents did not have to establish, as contended by the appellants, that they would not have suffered loss through other causes. The appellants had the burden of proving their assertion that the oil would have been lost in any event notwithstanding their own wrongdoing. The judge found that the respondents had discharged their burden and that the appellants had been unable to establish that the oil would have been lost anyway even if it had been discharged in full at Fujairah in accordance with the respondents' instructions.

68. As Kan J held in *The Feng Hang* [2002] 2 SLR 205, a claimant can recover damages for a breach of contract or in tort where that breach (or wrong) was the 'effective' or 'dominant' cause of the loss. The courts adopt a common sense approach in interpreting the facts of each case to determine whether the breach was the cause of the loss or merely gave the opportunity for the loss to be sustained. Though different terms have been used, ('dominant and effective cause' in contractual cases like *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 as opposed to what is termed the 'but for' test often used in tort cases to determine causation) the law of causation in tort and contract is the same.

69. In the very recent case of *Kuwait Airways Corporation v Iraqi Airways Co* [2002] 2 WLR 1353, decided only in May 2002, a month

after the first instance decision herein, the House of Lords dealt with causation in a claim for conversion. Whilst the claims that we are now considering arise from contractual breaches, those breaches resulted in misappropriation of the respondents' property. The appellants in submitting that their wrongdoing did not cause the respondents' loss put their arguments, to a large extent, in terms of the principles enunciated in that case in the judgment of Lord Nicholls of Birkenhead at 69-83 of his judgment. To summarise, his Lordship noted that the inquiry into whether the wrongful conduct causally contributed to the loss, widely undertaken as a simple 'but for' test is predominantly a factual inquiry. The 'but for' test, however, is not always a reliable guide and can be over-exclusionary particularly in situations where more than one wrongdoer is involved. To determine the applicability of the test in a particular tortious situation, one has to have regard to the purpose sought to be achieved by that tort. In the case of conversion, its principle purpose is to protect the ownership of goods by imposing a strict liability on persons who misappropriate the goods of others. Consistent with this principle, every person through whose hands goods pass in a series of conversions is himself guilty of conversion and liable to the owner for the loss caused by his misappropriation of the goods because each such person wrongfully excludes the owner from possession of his goods. Further, it is irrelevant that in the absence of the defendant's conversion someone else would have wrongfully converted the goods. The likelihood that had the defendant not wronged the plaintiff, somebody else would have done so is no reason for diminishing the defendant's liability for the loss he brought upon the plaintiff. Thus, in cases of successive conversion, there is little place for the 'but for' test and if that test is to be applied at all, it calls for consideration of whether the plaintiff would have suffered the loss in question had he retained his goods and not been unlawfully deprived of them by the defendant. Loss that the owner would have suffered even if he had retained the goods is not 'caused' by the defendant.

70. The appellants accepted that to avoid liability for the respondents' loss the burden lay on them to prove that even if the cargoes had been delivered in full into Metro's storage tanks, the respondents would still have suffered the loss of the cargoes. To discharge that burden they asserted that the respondents would still have suffered the loss because either:

> (a) Metro had sold the cargo to receivers in the Far East. Pursuant to those sales, Metro had to ship out the cargo even if it had been discharged in full into the storage tanks and as such the cargo would not have remained in those tanks; or
>
> (b) It was the respondents' sale of the cargoes to Metro through what the parties termed 'ITT contracts' and Metro's failure to pay for the same that caused the respondents' loss.

Onward sale by Metro

71. Turning to the first basis, the appellants relied on three pieces of evidence to prove the cargoes had been sold by Metro. First, new bills of lading had been issued for the cargo that was on-carried to the Far East naming Metro as shipper and parties in the Far East as the parties to whom, or to whose order, delivery was to be made. Secondly, there were also survey reports for these cargoes naming the Far Eastern parties as consignees. The appellants considered that the fact that such documents were issued at Fujairah before the vessels left that port lent weight to their contention that these cargoes had been sold to buyers in the Far East prior to the vessels' respective arrivals at Fujairah or, at the latest, prior to the vessels' departures from Fujairah for the Far East. Thirdly, the appellants referred to the evidence of the respondents' witness, David Hawkins, in cross-examination. When asked whether he agreed that the three cargoes that were shipped out of Fujairah to the Far East on board the *Cherry, Epic* and *Addax* had been sold by Metro to receivers who took delivery of them, Mr Hawkins replied:

> 'I have no idea what Metro did with it. I assume that Metro are not stupid to give it away, so I am sure that they sold the oil, yes. They sold the oil without the knowledge of Glencore.'

The appellants submitted that in the light of this evidence, it was clear that if the cargoes had been discharged from *Cherry, Epic* and *Addax* they would have not remained in Fujairah. Metro would simply have reloaded the same cargoes onto the same vessels or other vessels for shipment to the Far East since these cargoes had already been sold.

72. The judge considered this issue and held that there was no basis, on the evidence, for assuming that if all the oil had been discharged it would have been sold and shipped out by Metro. He considered that while that might have happened, the fate of the oil in storage was

entirely a matter of conjecture. We agree with the judge. In order to succeed in their argument, the appellants have to be able to show exactly what would have happened to the oil had it been discharged in full. They adduced no evidence establishing the fact that if this had been done, the very same cargo would have been removed by Metro for its own use. In any case, it would have been very difficult for Metro to have done this because the storage facility contained oil belonging to several parties and once any of the oil from these three ships had entered the storage tanks it would have become commingled with the oil already there and lost its separate identity. In view of the fungible nature of oil, the contention of the appellants that Metro could and would simply have reloaded the 'same' cargoes onto the same vessels or other vessels for shipment to the Far East cannot be accepted. The appellants would not have been able to show that the oil loaded back on was the 'same' cargo that had been discharged.

73. Secondly, we agree with the submission of the respondents that there was no evidence that Metro had contracted to sell the specific cargoes that were on board the *Cherry,* the *Epic* and the *Addax*. The evidence showed that what Metro had contracted to sell was a parcel of 180 cst fuel oil and several parcels of 380 cst fuel oil. The quantities they had contracted to sell and ship out of Fujairah were larger than the quantities that were shipped on board the three vessels. Also, the specifications of the cargoes sold to the Far East were different from the specifications of the cargoes loaded at Kuwait though the generic grades were the same. As Metro's sales were sales of bulk oil cargoes, they had sold unascertained goods and not specific goods. There was no evidence that Metro had to use the respondents' cargo on the *Cherry*, the *Epic* and the *Addax* to fulfil its contracts because as asserted by the appellants, 'it had sold the same'. None of the contracts of sale identified the goods sold as being the cargo on board any of the respective vessels at the material time.

74. The evidence of Mr Hawkins that he assumed that Metro was not stupid enough to give away oil and that he was sure that they had sold the oil, cannot support the appellants' contention that if all the oil had been discharged it would have been sold. This is because Mr Hawkins was referring to the oil that was retained on board the vessels and carried off to the Far East. He was not referring to oil that had been discharged. His evidence therefore did not relate to what Metro would have done to the oil that had it been discharged in full but related only to what Metro did in respect of the oil that it had already converted.

75. Further, the appellants' allegation that if all the oil had been discharged it would inevitably have been lost was considerably weakened because there was no evidence at all to show that the portions of the *Cherry* and *Epic* cargo that were discharged did not remain in storage. As at 7 February 1998, when the collapse of Metro was discovered, there were still substantial quantities of fuel oil remaining in the storage facility, about 750,000 metric tons in all. It is evident that if the respondents' cargoes had been fully discharged from the vessels into the storage facilities, this may have increased the quantity of fuel oil held in storage in February 1998 and available to compensate the various persons who stored oil with Metro including the respondents.

76. As the respondents submitted, even if the specific cargoes had been sold by Metro, that sale could not have resulted in the loss if the appellants had not actively assisted in the retention of the cargoes on board their vessels and carried them to destination for delivery to Metro's buyers. It was the active and direct involvement of the appellants in retaining cargoes on board the vessels, in agreeing to act on the instructions of Metro to issue false documents to create the appearance that the previous cargoes had been fully discharged, and in actually carrying the cargoes and delivering them to the Far East, that enabled Metro to fulfil their sale obligations.

ITT contracts

77. In the course of their business dealings, the respondents often but not always on sold the oil stored in the Fujairah facility to Metro itself. Such sales were effected by sales contracts termed 'In-tank Transfer Contracts' ('ITT contracts'). In respect of the *Cherry* and *Epic* shipments, the respondents sold the cargo to Metro by ITT contracts concluded in January 1998. At the time of each sale, the respondents were unaware that part of each shipment had not been discharged into the facility and the ITT contracts made were therefore for the entirety of each shipment. In the case of the *Cherry*, the relevant ITT contract was evidenced by a telex dated 28 January 1998 to Metro from the respondents. This telex referred to the recent transaction concluded between the respondents as the seller and Metro as the buyer and included the following terms:

> 'Product:
>
> Fuel oil ex Kuwait per mt *Cherry* stored on vessel m/t *Metrotank* off Fujairah.

Quantity/Price:

87,972.000 metric tons exactly of fuel oil ex Kuwait at USD96.96 per metric ton with tank transfer dates as follows

21,993.000 metric tons on the 20/1/98

21,993.000 metric tons on the 21/1/98

21,993.000 metric tons on the 22/1/98

21,993.000 metric tons on the 23/1/98

Delivery:

Stock transfer of cargo held to order of Glencore International AG stored on m/t *Metrotank* off Fujairah.

Payment:

In full without discount offset or counterclaim 55 days after stock transfer date of …

Risk and title:

Risk shall pass from seller to buyer on the date of the stock transfer. Title shall pass on exchange of title document.

Special condition:

Stock transfer will take place upon receipt of an irrevocable documentary credit … However for payment purposes stock transfer date will be 20th, 21st, 22nd and 23rd January 98. …'

In the case of the *Epic*, the telex was dated 12 January and the oil sold was divided into four equal parcels to be transferred on four successive days starting 8 January 1998. There was a similar contract for the *Hyperion* cargo but there is no need to consider that further in view of our decision above. No such contract was made in respect of the *Addax* cargo.

78. A perusal of the telex confirmation reflecting the *Cherry* ITT contract would appear to indicate that delivery of the cargo so sold to Metro was not to take place until Metro supplied the respondents with an irrevocable letter of credit for the price of the cargo. In the UK Phase II proceedings, however, Moore-Bick J having heard the evidence on how Metro and the respondents dealt with each other, found that the respondents had represented to Metro that they, like Metro, regarded the ITT date as the date upon which oil sold by in-tank transfer was delivered to Metro. He held at 167 of his judgment:

> '… Glencore's representation that oil sold by in-tank transfer would be treated as delivered to MTI on the ITT date provided the unspoken basis on which all such contracts were made. An objective observer standing in the shoes of Mr Heuze and knowing what he knew about the commercial background to that request would have realised that. To hold that the parties nonetheless intended to contract on terms that delivery would not occur until a letter of credit had been opened would be to ignore commercial reality.'

79. On the basis of the foregoing facts, the appellants submitted that in respect of the *Cherry* and *Epic* cargoes, it was the respondents' sale of the cargoes to Metro through the ITT contracts and Metro's subsequent failure to pay for the same which effectively caused the respondents' loss. They submitted that even if the entirety of the cargoes lately laden on board those vessels had been discharged into Metro's storage facility at Fujairah, as the respondents asserted should have been done, Metro would have had full control of such cargoes and the ability to deal with them as Metro deemed fit as of the dates of the respective ITT contracts. As such, Metro would have, at the very latest, been able to deal with the *Cherry* and *Epic* cargoes in January 1998 and the respondents would not have been able to reclaim the cargo by the time they brought the claims against appellants in late February 1998.

80. In support of their argument, the appellants relied on the English Court of Appeal decision of *Hiort & anor v The London and North Western Railway Company* [1879] 4 Ex D 188. Messrs Hiort and Brochmer, the plaintiffs in that case, were grain merchants. The defendants were a railway company and warehousemen who stored the plaintiffs' grain. The plaintiffs appointed G as their agent to sell the grain and the defendants requested the plaintiffs to issue standing orders to permit them to deliver grain on the instructions of G. The plaintiffs refused to issue such standing orders. Nevertheless G obtained delivery of 60 quarters of oats from the defendants on the promise that he would later forward them a delivery order from the plaintiffs. The plaintiffs subsequently contracted to sell 60 quarters of oats to one T and gave him a delivery order addressed to the defendants. T then endorsed the delivery order to G who forwarded it to the defendants as the delivery order that he had promised to send them. T was unable to pay for the oats and G never accounted to the plaintiffs for the oats which he had taken. The Court of Appeal found that there had been conversion by the defendants but awarded the plaintiffs only nominal damages.

81. The appellants argued that the facts of the present case were analogous to those of *Hiort's* case. It was the fact that the goods were delivered that exposed the plaintiffs there to a credit risk. The fact that the delivery was early caused no loss to the plaintiffs. Similarly, in the present case, at best, the respondents could accuse the appellants of allowing Metro to deal with the cargo earlier than they were entitled to do under the ITT contracts. It was the ITT contracts that exposed the respondents to Metro's credit risk. The early delivery or release to Metro did not cause the respondents' loss. The best corroborative evidence of this was the fact that even in respect of the cargo that was discharged into Metro's storage tanks, the respondents received no payment ie they suffered from the same credit risk.

82. The appellants relied in particular on the following passage from the judgment of Thesiger LJ:

> 'If [the defendants] had not delivered these goods at the respective dates at which they were delivered, they would have been bound by virtue of the delivery order *issued subsequently* by the plaintiffs to have delivered them exactly in the same way, and to the persons to whom they were delivered. The damage has not been sustained by the delivery by the defendants, but in consequence of the plaintiffs selling their goods and authorising the delivery of them to persons, who are liable to the plaintiffs for the price, and treated by them as liable down to the present time, but who have not paid for them.' (At p 198, emphasis supplied by the appellants)

83. The second member of the court, Bramwell LJ, also considered that the appropriate award was one for nominal damages. There had been a conversion by the wrongful delivery to G but no substantial damages resulted because of what had taken place subsequently. The order that the oats be delivered to T or his nominee G was equivalent to a return of the goods in that the plaintiffs were in the same position they would have been if, subsequent to first taking delivery, G had returned the oats to the plaintiffs since the plaintiffs would then have redelivered them to G pursuant to their subsequent sale to T. The third member of the court, Baggallay LJ, held that the fact did not entitle the plaintiffs to any damages at all, not even nominal damages. It can be seen from this short summary that although all three judges in *Hiort* found in favour of the defendants, there was no common ground in their reasoning. In the course of his decision in *Kuwait Airways,* Lord Nicholls considered *Hiort.* He observed that the reason why Hiort failed was that his loss would have been suffered even if the conversion had not taken place. This was because Hiort would equally have received no payment for his goods if, instead of misdelivering the goods, the railway company had delivered them in accordance with his instructions.

84. Our task here is to determine whether the appellants' breaches of contract were an effective cause of the respondents' loss or, to put it the other way, whether the respondents would still have lost the oil had it all been discharged into the storage tanks. In either case, the answer depends on a consideration of the relevant facts. In our view, the most relevant fact is that the oil complained about was not put into the tanks. It was taken away. On the face of it, the action of the appellants caused the oil to be lost to the respondents. The appellants had

the burden of showing that it would have been lost in any case. As we have discussed in 72 to 76, they were not able to produce evidence to discharge this burden. There was no evidence either before the judge or before us that had all the oil from the *Cherry* and *Epic* been put into the tanks in Fujairah in December 1997, it or most of it would not still have been there in February 1998 when Metro collapsed.

85. In our view, the parallel which the appellants sought to draw between this case and *Hiort's* case does not bear up under scrutiny. In *Hiort's* case, the goods were prematurely delivered into the control of the fraudster, G, who then made away with them. The plaintiffs' orders were, in effect, to release the same goods from storage to G, with payment to be obtained from T. In this case, however, the oil should have been delivered into a storage tank to be kept for the respondents and it was not. No instructions were ever given to the appellants to take it away or that would allow Metro to deal with it in advance of the ITT contracts. That is where the analogy breaks down. No doubt, Metro could lawfully have dealt with all of the *Epic* oil from 13 January 1998 onwards and with all of the *Cherry* oil from 23 January 1998 onwards pursuant to the ITT contracts. That fact does not prove that Metro would have so dealt with all of the oil so as to remove it entirely from the storage facility by the end of the first week of February 1998. As long as the oil or part of it was still in the facility when Metro collapsed, the respondents could have reclaimed it since, contractually, they retained title until payment although they had agreed to allow Metro to deal with it from time of the delivery. Even if they had transferred title the remaining oil could have been the subject of execution proceedings. The difference between *Hiort's* case and the present one is that in *Hiort's* case, it was proved that the plaintiffs would in any case have delivered the goods to someone who would not have been able to pay for them. In this case, the appellants have not proved that had they dealt with the oil as they should have, all of it would in any case have been lost in that Metro would have disposed of it as G did the oats. The appellants' actions were an effective cause of the loss. The fact that there would not have been a loss had Metro been able to pay for the oil is besides the point.

86. We conclude that even in respect of the oil covered by the ITT contracts, the appellants have not been able to establish that their wrongful actions did not cause the loss sustained by the respondents.

Conclusion

87. In the event, apart from the appeal of the owners of the *Cherry* in respect of the *Hyperion* cargo, the appellants' appeals have failed and are dismissed with costs. The appeal of the owners of the *Cherry* in respect of the *Hyperion* cargo is allowed and they are awarded the costs of this portion of the appeal and of this portion of the action below.

Sgd:

YONG PUNG HOW	CHAO HICK TIN	JUDITH PRAKASH
CHIEF JUSTICE	JUDGE OF APPEAL	JUDGE