JUN 0 9 1997

Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

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T-2403-81

BETWEEN:

UNION CARBIDE CORPORATION
and
GLEE CHEMICAL LABORATORIES INC.
and
TRANSOCEAN TRADING CORPORATION
and
UNION CARBIDE THAILAND LTD.
and
MANILA PLASTIC PRODUCTS
and
JEMIKEN ENTERPRISES CORP.
and
SOLID STATE MULTI PRODUCTS CORP
and
HANTEX TRADING
and
LAFUMAR MARKETING CORP.
and
PRODUCERS PACKAGING CORP.
and
SRI THEP THAI LTD., PART
and
PLASKO TRADING INC.

Plaintiffs,

AND:

FEDNAV LIMITED

Defendant

REASONS FOR JUDGMENT

NADON J.:

By their action, the Plaintiffs claim the sum of $630,301.18 plus interest and costs against the Defendant Fednav Limited (hereinafter referred to as the "Defendant" or as "Federal Commerce").[1]

[1] The Plaintiffs commenced this action on April 27, 1981 against the vessel HUDSON BAY, Bona Maritime Corp. and Federal Commerce and Navigation Ltd.. In and around 1984, Federal Commerce and Navigation Ltd. and Federal Marine Terminals Ltd. were amalgamated to form Fednav Limited.

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The Plaintiffs allege that the Defendant is in breach of a contract of carriage pursuant to which the Defendant agreed to carry cargo to the Far East. In the alternative, the Plaintiffs allege that the Defendant is liable in tort.

The Defendant denies that it is liable either in contract or in tort. The Defendant submits that it is not a party to the contract of carriage entered into by the Plaintiffs. The Defendant's position is that the owner of the ship which carried the cargo in question is the party with whom the Plaintiffs contracted for the carriage of the goods. With respect to the claim in tort, the Defendant denies having committed any tort.

The relevant facts are not complicated and can be summarized as follows.

THE FACTS

The Plaintiffs, save the Plaintiff Union Carbide Corporation ("Union Carbide"), are the consignees of shipments of synthetic resin ("the cargo") carried from Montreal to Bangkok and Manila respectively, onboard the vessel "HUDSON BAY" pursuant to bills of lading dated January 5, 1979. The Plaintiff Union Carbide is the shipper of the cargo carried by the vessel.[2]

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[2] The Plaintiff Union Carbide Thailand Ltd. was 100% owned by Union Carbide.

The consignees purchased their respective cargoes from Union Carbide on cif Bangkok and cif Manila terms. The cargoes of the Plaintiffs Union Carbide Thailand Ltd. and Sri Thep Thai Ltd. were destined for Bangkok. The cargoes of the other Plaintiffs were destined for Manila. Union Carbide's commercial invoices to the consignees are all dated January 1979.

The cargo, synthetic resin, was manufactured in Canada by Union Carbide Canada ("UCC")[3]. The cargo was purchased by Union Carbide from UCC and became the property of Union Carbide upon delivery to the dock in Montreal.

On or about October 17, 1978, Union Carbide entered into a liner booking note contract with Federal Commerce. Pursuant to clause 1 of this contract, Union Carbide undertook to ship approximately 7,150 metric tons of synthetic resin in bags. In clause 1 of the booking note, Union Carbide's shipment is described as follows:

> Synthetic resin in bags on 1 ton pallets each 43.5" x 55" x 51" in following quantities: - Manila - 2090 m/t; Djakarta - 1266 m/t; Singapore - 2110 m/t; Bangkok - 1688 m/t. Total 7150 m/t.

Also by clause 1, Federal Commerce undertook to reserve space for Union Carbide's shipment on one or two vessels to be nominated.

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[3] UCC was a subsidiary of Union Carbide. UCC marketed resin in Canada and any surplus was sold to Union Carbide for sale abroad.

On October 30, 1978, Federal Commerce nominated the vessels DUGI OTOK and HUDSON BAY to carry Union Carbide's shipment of resin. The HUDSON BAY was nominated to carry the cargo destined for Manila and Bangkok and the DUGI OTOK was nominated to carry those cargoes destined for Djakarta and Singapore. The present litigation is only concerned with the cargo carried by the HUDSON BAY.

At all material times herein, the ship HUDSON BAY was owned by Bona Maritime Corporation ("Bona Maritime") of Liberia.[4] At all material times herein, the HUDSON BAY was under time-charter to Federal Commerce pursuant to the terms and conditions of a charter-party in the New York Produce Exchange Form dated at Greenwich, Connecticut on August 23, 1978. The charter-party contained the usual terms and conditions of the New York Produce Exchange Form and more particularly clauses 8 and 26 thereof which read as follows:

> 8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners), shall be under the orders and directions of the charterers as regards employment and agency; and charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the captain, who is to sign or if requested by charterers to authorize charterers and/or their agents to sign bills of lading for cargo as presented, in conformity with mate's or tally clerk's receipts, at owners' risk as to trim and stability of vessel.
>
> 26. Nothing herein stated is to be construed as a demise of the vessel to the time-charterers. The owners to remain responsible for the navigation of the vessel, acts of pilots and tugboats, insurance, crew, and all other matters, same as when trading for their own account.

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[4] Although Bona Maritime was named as a Defendant in the Statement of Claim, a notice of the proceedings was never served upon it. As a result, Bona Maritime is not a party to this action.

On October 23, 1978, pursuant to clause 62 of the charter-party, Federal Commerce exercised its option to undertake a further voyage after completion of the then current one.

Between November 1, 1978 and December 12, 1978, the cargo sold by UCC to Union Carbide was delivered by trucks to Federal Commerce at shed 49 of the Port of Montreal. In fact, the cargo was delivered to Federal Marine Terminals Ltd. ("Federal Marine"), the stevedores retained by Federal Commerce to load the cargo on the HUDSON BAY. On most of the delivery receipts, the notation "sifting" was entered by those persons who received the cargo.

The cargo remained at shed 49 until such time as Federal Marine commenced the loading thereof onboard the HUDSON BAY. The stevedores loaded Union Carbide's cargo from December 19 to December 23, 1978, from December 27 to December 30, 1978 and from January 3 to January 5, 1979. In all, the stevedores loaded 3,790 pallets each containing 40 bags of 25 net kg.. The cargo was loaded in holds numbers 1, 3 and 5 of the HUDSON BAY.

On January 5, 1979, Montreal/Bangkok bills of lading numbers 1, and 3 to 7, and Montreal/Manila bills of lading numbers 1 to 7, 9 to 11, and 13 to 16 were issued and dated at Montreal on January 5, 1979. On the front side of the bills of lading, in the upper right hand corner, the name Federal Commerce and Navigation Ltd. appears with its Montreal address. The bills used are, without doubt, the Defendant's printed form. The bills of lading were issued and signed by Federal Commerce on January 5, 1979 "by authority of master as agent only". I should point out that most of the bills of lading issued at Montreal bear a notation that a certain number of pallets are "sifting".

From Montreal, the HUDSON BAY proceeded to the Port of Quebec where it loaded, in holds numbers 2, 3, and 4 cargo destined for Port Kelang, Malaysia and Bangkok. Loading of the Quebec cargo was completed on January 11, 1979 and the vessel sailed on that day.

The consolidated stowage plan of all the cargo loaded on the HUDSON BAY at the Ports of Detroit, Oshawa, Trois-Rivières, Montreal and Quebec, was signed by the Chief Officer of the HUDSON BAY who stated that the cargo described on the consolidated stowage plan had been loaded, stowed and secured to his satisfaction.

The HUDSON BAY arrived at the Port of Bangkok on March 6, 1979. The cargo bound for that port was discharged between March 6 and March 11, 1979. Upon discharge of the cargo, a portion thereof was found to be in a damaged condition.

The vessel then sailed to Manila where it arrived on March 17, 1979. Discharge of the cargo bound for Manila was effected between March 17 and March 24, 1979. Again, a portion of the cargo was found to be damaged upon discharge.

The Plaintiffs seek to recover the loss which they claim to have suffered by reason of loss and damage caused to their cargo while onboard the HUDSON BAY. The Plaintiffs, save for Plasko Trading Inc. and Union Carbide, commenced proceedings against the HUDSON BAY and Federal Commerce in the United States District Court for the Southern District of New York on

December 14, 1979. On December 17, 1979, Plasko Trading Inc. commenced similar proceedings before the same court. In October 1980, Federal Commerce filed defences to both actions. On January 12, 1981, Federal Commerce filed a motion seeking the dismissal of the action filed on December 14, 1979, on the ground of *forum non conveniens* invoking, *inter alia,* clause 4 of the bills of lading which provides that any action arising out of the carriage of the goods under the subject bill of lading shall be brought before the Courts of Canada.

On April 7, 1980, the United States District Court for the southern district of New York made the following order:

> A motion for dismissal having been made by defendant on the grounds of forum non conveniens; and the cause having come on to be heard on February 27, 1981, and the Court having heard argument of counsel, and being fully advised, it is
>
> ORDERED that the action be dismissed on consent of the plaintiff provided that no defence be interposed to this action in the courts of Canada based on the time in which the action is instituted should the plaintiff bring such action within three months of the date of this Order.

As I indicated earlier, the Plaintiffs in the American actions were the consignees of the cargo shipped by Union Carbide to Bangkok and Manila. Union Carbide was not a named Plaintiff in either of the two actions.

On April 27, 1981, the named Plaintiffs in the New York actions commenced proceedings in the Federal Court of Canada against the HUDSON BAY, Federal Commerce and Bona Maritime. The shipowners were not a Defendant in the New York actions. As well, Union Carbide appears as a Plaintiff in the present proceedings although it was not a named Plaintiff in the New York actions. Although Bona Maritime was named as a Defendant in the Canadian action, the Plaintiffs did not serve their statement of claim upon it and, as a result, Bona Maritime is not a party to these proceedings.

On April 23, 1996, the Plaintiffs filed an amended Statement of Claim so as to amend the style of cause of their action. The Plaintiffs substituted as a named Defendant Fednav Limited, a company which resulted from the amalgamation of Federal Commerce and Navigation Ltd. and Federal Marine in lieu of Federal Commerce and Navigation Ltd..

As the Plaintiffs did not serve their Statement of Claim upon the HUDSON BAY and Bona Maritime, two of the named defendants, I ordered, on September 5, 1996, that the style of cause be amended so as to delete, as Defendants, the names of the vessel and Bona Maritime.

I now turn to the issues which must be determined.

THE ISSUES

The following issues must be determined.

1. The parties to the contract of carriage. As a sub-issue, is the Plaintiff Union Carbide a proper Plaintiff in this case?

2. Whether Federal Commerce is liable to the Plaintiffs either in contract or in tort.

3. In the event that there is liability on the part of Federal Commerce, either in contract or in tort, the amount of compensation to which the Plaintiffs are entitled.

THE PARTIES TO THE CONTRACT

Christopher Tse, Union Carbide's Business Development Manager, testified that his company's regular terms of sale to Asia in 1979 were cif terms. He testified further that his company followed the "Incoterms".[5] Under the Incoterms, it is the vendor's duty to, *inter alia*: contract on standard terms at his own expense for the carriage of the goods to the intended port of destination; load the goods at his own expense on the designated vessel at the port of shipment and notify the buyer that the goods have been loaded; at his own cost and in a reasonable form, obtain a policy of marine insurance against the risks of carriage; and, at his own expense, provide to the buyer, without delay, a clean negotiable bill of lading, an invoice for the goods shipped and the insurance policy covering such goods. (See generally David M. Sassoon, *CIF and FOB Contracts*, 4th ed., (London: Stevens & Sons, 1995). See also William Tetley, *Marine Cargo Claims*, 3d ed. (Montreal: Les Éditions Yvon Blais Inc., 1988) at 171-173).

[5] The "Incoterms" constitute the interpretation of cif terms as recorded by the International Chamber of Commerce.

In the present instance, Union Carbide fulfilled all of its obligations as a cif vendor and no issue arises out of the contracts of sale. The goods were shipped, they were carried to destination and they were received by the respective consignees. Because a portion of the goods arrived in a damaged condition, the consignees filed claims against Federal Commerce and against their cargo insurers. In due course, the consignees were indemnified by their insurers pursuant to the terms and conditions of the policies taken out by Union Carbide to cover the goods shipped. As required by the contracts of sale, the consignees paid the purchase price to Union Carbide.

The cif vendor bears all the risks of loss until the goods have been loaded onboard the ship at which point the risk shifts to the purchaser. At page 224, paragraph 274, David Sassoon, *supra*, states the principle as follows:

> 274. The passing of the property is a matter of great significance in c.i.f. contracts and will carry serious consequences for the parties, *e g* in the event of the insolvency of the buyer or the sellor, the loss or destruction of the goods where the loss is not covered by insurance, and the liability to capture and seizure on the outbreak of war. As a general rule in a contract for the sale of goods, the property and the risk pass at the same time, but this is not the usual case in a c.i.f. contract. Under a c.i.f. contract, the buyer is in effect the insurer, as of the time of shipment. The transfer to him of the bill of lading and the policy of insurance giving him the right of action in respect of loss or damage to the goods has the effect of placing the goods at his risk on and after shipment. ...

On the evidence before me, I am satisfied that the risk of loss to the cargo fell upon the consignees from the time the cargo was loaded on the HUDSON BAY in Montreal. As the evidence before me is that the goods were loaded on the HUDSON BAY in good order and condition, with the exception of some sifting as noted, the damage caused to the cargo occurred at a time when the risk of loss fell upon the consignees. That is certainly the view taken by the

consignees and their insurers. The consignees paid Union Carbide in full and the insurers compensated the consignees for their losses according to the terms of the respective policies. Consequently, there cannot be any doubt that the consignees were the persons who suffered a loss in the present circumstances.

Although the consignees were not initially parties to the contracts evidenced by the bills of lading, section 2 of the *Bills of Lading Act*, R.S.C. 1985, c. B-5 vests the consignees with all rights of action in respect of the cargo covered by the bills of lading issued at Montreal on January 5, 1979. Section 2 reads as follows:

> 2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.

Taking into consideration that the consignees were at risk when the loss and damage occurred and that they are, by reason of the *Bills of Lading Act*, the parties with the contractual rights of action in the present case, is Union Carbide a proper Plaintiff in the circumstances of this case? The answer to that question is, in my view, no.

Firstly, an issue arises as to whether Union Carbide was time-barred when it launched its lawsuit on April 27, 1981. This issue arises as follows. Union Carbide was not a named Plaintiff in the New York actions. When the New York Court dismissed the New York actions it made it clear that the dismissal was conditional on the Defendants not raising a defence of time-bar in Canada. This

condition was crucial to the Plaintiffs because their cargoes had been delivered in March 1979, 2 years prior to the dismissal of their actions in New York. Under Article III, paragraph 6 of the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 25 August 1924, enacted in Canada as a schedule to the *Carriage of Goods by Water Act*, R.S.C. 1985, c. C-27, (now repealed) referred to as the "Hague Rules", a claimant must file suit within one year of delivery of the cargo.

The present action was commenced in Canada on April 27, 1981, and Federal Commerce filed its Statement of Defence on September 1, 1981. In paragraph 7 of its Statement of Defence, Federal Commerce stated that it did not intend to raise the time-bar issue in the present action. However, on December 5, 1987, Federal Commerce applied to this Court for an Order allowing it to amend paragraph 7 of its Statement of Defence by adding the following words:

> ... Save and except with respect to the Plaintiff Union Carbide.

Federal Commerce argued that, as Union Carbide was not a Plaintiff in the New York actions, it was not prevented from raising the time-bar issue against Union Carbide. On November 18, 1988, Senior Prothonotary Jacques Lefebvre dismissed Federal Commerce's motion. That decision was appealed before the Trial Division of this Court and, on January 3, 1989, Teitelbaum J. reversed the Senior Prothonotary's decision. The Plaintiffs appealed Teitelbaum J.'s decision and, on March 16, 1992, their appeal to the Federal Court of Appeal was dismissed.

The issue which is now before me is whether Union Carbide could institute proceedings on April 7, 1981. As I indicated above, Federal Commerce's position is that only those Plaintiffs in the Canadian action who were also Plaintiffs in the New York actions could institute proceedings in Canada. As Union Carbide was not one of those Plaintiffs, it was too late for it to commence proceedings in April 1981. The Plaintiffs' position is that although Union Carbide was not a named Plaintiff in the New York actions, it was protected by those proceedings in that it could have been added as a Plaintiff at any time had this become necessary. In paragraph 40 of her plan of argument, counsel for the Plaintiffs states her position as follows:

> It should be stressed again that the action, as it stood in New York, entirely protected the Plaintiffs. Not only could Union Carbide have been added as a named Plaintiff at any time if it had been necessary, but there would likely have been no need to do so, as Fednav, as the charterer, was, under American law, in the eyes of an American court, clearly a party to the bill of lading.

In support of that argument, counsel pointed out that the Plaintiffs were described in the New York actions, as the "shippers, consignees or owners of the shipment".

In support of their respective contentions, the parties filed the affidavits of experienced New York maritime lawyers. The Plaintiffs filed the affidavit of Martin Mulroy, an attorney and member of the firm of Hill, Rifkins, Carry, Louisburg, O'Brien and Mulroy. Federal Commerce filed the affidavit of Christopher H. Mansuy, an attorney and a member of the firm of Walker and Corsa. After carefully considering the opinions of both experts, I find the view expressed by Mr. Mansuy to be preferable. Briefly, my reasons are the following.

Rule 17(a) as found in the *U.S. Federal Rules of Civil Procedure* (St. Paul: West Publishing Co., 1995) at 82 and 83 provides:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

This rule requires that "the real party in interest" prosecute an action in its name. In paragraph 7 of their New York actions, the named Plaintiffs stated that they were bringing their actions on their "own behalf and, as agent and trustee, on behalf of and for the interest of all parties who may be or become interested in the said shipment, as their respective interests may ultimately appear, and Plaintiff is entitled to maintain this action".

Both Mr. Mulroy and Mr. Mansuy referred to the decision of the United States Court of Appeals rendered in *Farbwerke Hoeschst A.G.* v. *M/V "DON NICKY"*, 589 F.2d 795 (5th Cir. 1979). In that case, the shippers of a cargo of fertilizer brought an action in the United States against the carrier for damage caused to cargo by salt water during a voyage from Rotterdam to Panama. The cargo had been sold by the shippers to the consignees on cif terms. Summary judgments and final judgments were rendered in favour of the shippers by the District Court. The carrier appealed these judgments and sought an order vacating the judgments against them on the ground that the shippers were not the real

parties in interest and therefore could not obtain judgments against them. The carrier's appeal succeeded. The relevant portion of the Court of Appeals' judgment is at 797 and 798 and reads as follows:

> Defendants urge this court to vacate the judgments against them since plaintiffs, the shippers, are not the real parties in interest. Shipments were made C.I.F.; therefore, title to the cargo passed upon delivery to the carrier, and the consignee bore the risk of loss in transit. *York-Shipley, Inc. v. Atlantic Mutual Insurance Co.*, 474 F.2d 8 (5th Cir. 1973). Yet the consignee, Coagra, was not a party to the action. The Federal Rules of Civil Procedure require every action to be prosecuted in the name of the real party in interest. F.R.Civ.P. 17(a). Plaintiffs argue that this principle is liberally construed in admiralty law so as to permit them to sue "as agents and trustees on behalf of and for the benefit of the parties who may be or become interested in the said cargo, as their interests may ultimately appear." The district court, in a pretrial motion hearing which defendants failed to attend, accepted plaintiffs' argument that defendants' "defense ... about the real party doesn't go in admiralty." We disagree. The Federal Rules of Civil Procedure are fully applicable in admiralty cases. 7A Moore's Federal Practice ¶.01 (2d ed. 1978). Plaintiffs point to early case authority which permitted admiralty suits by shippers as representatives when the real party was abroad or otherwise unavailable. *Aunt Jemima Mills Co. v. Lloyd Royal Belge*, 34 F.2d 120 (2d Cir. 1929); *United States v. United States Steel Products Co.*, 27 F.2d 547 (S.D.N.Y. 1928). Those cases, however, permitted such representative suits only when the real party consignee had ratified the shipper's capacity to sue in its behalf. A shipper, after having parted with title to the goods, may not sue the carrier as trustee for the consignee. To the contrary, this court in *York Shipley, Inc. v. Atlantic Mutual Insurance Co.*, *supra*, 474 F.2d 8, dismissed for lack of standing an action initiated by a shipper against the insurer of goods shipped C.I.F. The court found that the shipper's only interest in the suit was "that of an unsecured creditor of its foreign customer," and that it therefore had no insurable interest. Since the judgments entered must be vacated on other grounds, we direct the district court on remand to meet the requirement of F.R.Civ.P. 17(a) by joinder or ratification of the real party in interest.

The Court of Appeals for the Fifth Circuit thus concluded that the shippers of cargoes sold under cif terms could not institute proceedings against a carrier "as trustee for the consignee". If that be the case, how can consignees, who are the real parties in interest, institute proceedings on behalf of the shipper who has no interest in the proceedings? In my view, the answer can only be that consignees, who have purchased their cargo under cif terms, cannot institute proceedings on behalf of their shipper.

Union Carbide was not a named Plaintiff in the New York actions because it had no interest in the proceedings. As I have already indicated, Union Carbide sold the cargo on cif terms to the consignees who paid the purchase price to Union Carbide, as required by the contracts of sale. Consequently, it is not surprising that the law firm retained by the consignees to institute proceedings in New York did not name Union Carbide as a Plaintiff. I am therefore of the view that Union Carbide was not a Plaintiff in the New York actions and that the prohibition not to raise the time-bar did not apply to Union Carbide.

Since Union Carbide filed its Statement of Claim in Canada on April 7, 1981, its action is time-barred having been commenced 2 years after the delivery of the cargo at Bangkok and Manila. Counsel for the Plaintiffs argued that Union Carbide's action is not time-barred because of Federal Commerce's statement in paragraph 7 of its original Statement of Defence that "it does not intend to raise the time-bar in the present action". Counsel for the Plaintiffs also argued that the Plaintiffs' consent to the dismissal of the actions in the United States and Federal Commerce's undertaking not to raise the time-bar issue in Canada, gives rise to a waiver or promissory estoppel by Federal Commerce on which the Plaintiffs relied to their detriment. Counsel also submits that Federal Commerce made a distinct waiver or promissory estoppel in its Statement of Defence on which the Plaintiffs have also relied.

With respect to the waiver arising from the order of dismissal by the New York Court, I agree entirely with what Mr. Mansuy says at page 12 of his affidavit, paragraphs 20 and 21:

> WAIVER
>
> 20. Under United States law, a waiver is a relinquishment of a known legal right and occurs when one party to a contract manifests an intent not to require the other party to comply with a contractual duty. Saverslak v. Davis-Cleaver Produce Co., 606 F. 2d 208 (7th Cir. 1979) cert denied, 444 U.S. 1078 (1980), annexed as exhibit L to this my affidavit. Union Carbide Corporation was not only not a named plaintiff, but rather an entity which the plaintiffs' attorneys argued was not necessary to the proceedings if the venue remained in New York.
>
> 21. To infer that Federal Commerce intended to forego rights it had against Union Carbide Corporation requires one to assume that:
>
> 1. Fednav knew that Union Carbide Corporation continued to have an interest in cargo which it had nevertheless "negotiated" to others;
>
> 2. Fednav knew that the named plaintiffs (all receivers located in the Far East) were merely acting as stand-ins for the Connecticut based, but absentee, Union Carbide Corporation.
>
> 3. Federal Commerce had reasons to anticipate that, more than 2 years after receiving bills of lading Union Carbide Corporation would decide to sue.

With respect to the Plaintiffs' argument that Federal Commerce waived its right to raise the time-bar issue against Union Carbide by reason of paragraph 7 of its original statement of defence, and that the Plaintiffs relied on this waiver to their detriment, counsel, at page 10 of her plan of argument, states:

> 48. Reliance does not need to be detrimental in order for a waiver to be effective. There need only be a showing that the course of action of the person benefiting from the waiver was altered. Union Carbide, in its reply, acknowledge the waiver, which, in itself, is sufficient alteration of its course of conduct to constitute reliance. When the amendment was sought, Union Carbide definitely acted on the waiver to its detriment, in that it expended a great deal of time, effort and costs in seeking to prevent the amendment, believing that a waiver had occurred.

> Had Fednav raised the time-bar issue when it first filed its Statement of Claim, Union Carbide would probably have been it time to seek a reversal of the Order entered by consent in the U.S. action. Plainly it could not do so 7 years after the fact. Union Carbide could also have sought to have the allegation of time-bar struck, which may have resulted in a decision on the substance of the argument much sooner, as the existence of prejudice would not have been the sole criteria looked at by the Court, as has been the case for the motion for permission to amend.

I cannot accept this argument. Firstly, there is no evidence before me that Union Carbide waived any of its rights since, on the evidence and upon a true construction of the contracts of sale, Union Carbide had no legal interest in the goods damaged during the voyage of the HUDSON BAY. Secondly, there is absolutely no evidence that Union Carbide ever authorized the institution of a lawsuit in its name in New York. No doubt, the actions were instituted at the request of the cargo insurers who indemnified the consignees for their loss. By reason of the terms and conditions of the policies of insurance, the consignees were bound to allow their insurers to institute lawsuits in their name and to provide their full cooperation with respect to the prosecution of these actions. However, the insurers did not pay anything to Union Carbide as it had been fully paid by its clients, the consignees, and Union Carbide had no obligation to the insurers. Thirdly, counsel states that because Federal Commerce amended its Statement of Defence 7 years after the fact to raise the time-bar issue, Union Carbide could not seek a reversal of the dismissal order rendered on April 7, 1981. There is no evidence before me on that issue. If Federal Commerce is in breach of the dismissal order, I have difficulty understanding why, even 7 years after, the aggrieved party could not apply for redress in the New York Court. Had this been attempted, the U.S. Court would have had to decide whether Union Carbide could, in fact, institute proceedings in New York against Federal Commerce in the circumstances of this case.

For these reasons, I have come to the conclusion that Union Carbide is not a proper Plaintiff in these proceedings and that, in any event, its action is time-barred. I do not believe that this conclusion causes the other Plaintiffs any prejudice since, by virtue of the *Bills of Lading Act, supra,* they are vested with all rights of action concerning the cargo covered by the subject bills of lading.

The Plaintiffs have fought hard to convince me that Union Carbide is a proper Plaintiff in this action and that its rights of action are not time-barred. The reason for this struggle is that counsel for the Plaintiffs is uncertain whether all of the Plaintiffs have proved their loss. Specifically, the Defendant has taken the position that Plaintiffs Lafumar Marketing Corp., Producers Packaging Corp., Jemiken Enterprises Corp., Glee Chemical Laboratories Inc., and Sri Thep Thai Ltd. have not proven that they have suffered a loss. I will return to this issue when I discuss quantum. Be that as it may, the struggle to include Union Carbide as a Plaintiff is predicated on the assumption that I might conclude that the aforesaid Plaintiffs have not proved their loss. Consequently, the Plaintiffs referred me to the decision of the House of Lords in *Dunlop* v. *Lambert* (1939), 7 E.R. 824 for the proposition that a shipper could recover from a carrier, with whom it had a contract, substantial damages as a trustee for the real owner, even though the shipper had suffered no loss. Thus, in the case at bar, counsel for the Plaintiffs argued that Union Carbide could recover damages as trustee for the aforesaid named Plaintiffs.

In reply, counsel for Federal Commerce referred me to the House of Lords' decision in *The Albazero*, [1976] 2 Lloyds Rep. 467. Counsel for Federal Commerce argued that the rule enunciated in *Dunlop* v. *Lambert* was only applicable where no bill of lading had been issued and where no other remedy was available to the person sustaining a loss which ought to be compensated. Counsel referred me more particularly to the reasons for judgment of Lord Diplock in *The Albazero* who stated at 475:

> The only way in which I find it possible to rationalize the rule in *Dunlop v Lambert* so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance upon goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to the another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.
>
> With the passing of the Bills of Lading Act, 1855, the rationale of *Dunlop v Lambert* could no longer apply in cases where the only contract of carriage into which the shipowner had entered was that contained in a bill of lading, and the property in the goods passed to the consignee or indorsee named in the bill of lading by reason of consignment or indorsement. Upon that happening the right of suit against the shipowner in respect of obligations arising under the contract of carriage passes to him from the consignor. Furthermore, a holder of the bill for valuable consideration in exercising his own right of suit has the benefit of an estoppel not available to the consignor that the bill of lading is conclusive evidence against the shipowner of the shipment of the goods described in it.
>
> The rationale of the rule is in my view also incapable of justifying its extension to contracts for carriage of goods which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of goods carried pursuant to the original contract.

As the claims filed by those Plaintiffs, whose proof of financial loss gives their counsel cause for concern, are covered by the *Bills of Lading Act*, the rule in *Dunlop* v. *Lambert* cannot, in my view, be invoked to their benefit. Further, I am of the view that the rule in *Dunlop* v. *Lambert* cannot be invoked to assist a Plaintiff who has a remedy but refuses or is unable to offer proper evidence to support his claim. The aforesaid Plaintiffs suffered a loss, they were compensated by their insurers and actions were instituted in their names. Why these Plaintiffs could not and did not provide satisfactory evidence, if that be case, to explain their loss is not for me to speculate.

IS FEDERAL COMMERCE THE CARRIER?

One of the defences raised by Federal Commerce is that it is not a party to the contracts of carriage evidenced by the bills of lading. More particularly, Federal Commerce submits that the bills of lading are contracts of carriage binding upon the owners of the HUDSON BAY. As I have already indicated, the shipowners are not a party to these proceedings. The position taken by the Plaintiffs is totally opposite to that taken by Federal Commerce. The Plaintiffs submit that the bills of lading are binding upon Federal Commerce.

Federal Commerce time chartered the HUDSON BAY from Bona Maritime upon the terms and conditions of a charter-party in the New York Produce Exchange form. The bills of lading were signed by Federal Commerce on behalf of the master of the HUDSON BAY. Clause 2 of the bill of lading provides that the contract evidenced by the bill of lading is one between the "merchant" and the owner of the vessel named in the bill of lading.

The issue which must be determined is whether these bills of lading are binding upon Federal Commerce and/or Bona Maritime. This issue is not a novel issue. The principles of law applicable to this issue were long ago settled by the Supreme Court of Canada in *Paterson Steamships Limited* v. *Aluminum Company of Canada Limited*, [1951] S.C.R. 852. In *Paterson Steamships*, the issue, as here, was whether the shipowners or the time-charterers were parties to the contract of carriage. At 853 and 854, Rand J. put the matter as follows:

> The usual provisions of such a charter were stipulated. The owner was to be paid a specified sum monthly; the captain was to prosecute the voyages with despatch; although appointed by the owner, he was to be under the orders and direction of the charterers as regards employment and agency; and the latter were to load, stow and trim the cargo at their expense under the supervision of the captain who was to sign bills of lading for cargo as presented in conformity with notes or tally clerk's receipts. The owner was to pay for all provisions and the wages of captain and crew; and maintain the vessel in her class and efficiency. By clause 26 nothing in the charter was to be construed as a demise of the vessel and the owner was to remain responsible for the navigation of the vessel, insurance, crew and all other matters, the same as when trading for its own account.
>
> Under such a charter, and in the absence of an undertaking on the part of the charterer, the owner remains the carrier for the shipper, and in issuing bills of lading the captain acts as his agent. In this case, the bill of lading was signed for the captain by the agents appointed by the charterers certainly for themselves and probably for the vessel also and that fact raises the first of the only two points deserving consideration.
>
> It is, I think, too late in the day to call in question the relation of the time charterer of his or the ship's agent towards cargo. The charterer has purchased the benefit of the carrying space of the ship; he is the only person interested in furnishing cargo; and the captain is bound to sign the bills of lading as presented, assuming them not to be in conflict with the terms of the charter party. The practical necessities involved in that situation were long ago appreciated by the courts and the authority of the charterer to sign for the captain confirmed.
>
> For the purpose of committing cargo to carriage, the captain, the charterer and the ship's agent are all agents of the owner, acting in the name of the captain; and where the charterer has the authority, as here, to sign for the captain, that he may appoint and act by an agent would seem to me to be unquestionable. To hold him to a personal performance would, under modern conditions of traffic, be an intolerable restriction.

Clauses 8 and 26 of the time-charter in *Paterson Steamships* are identical to clauses 8 and 26 of the subject charter-party. That is not surprising since the New York Produce Exchange form is the most commonly used form of time-charter and has been in use for a long time.

In *Paterson Steamship* at 854, Rand J. makes it clear that under such a time-charter party, the shipowner is the carrier and, in issuing the bill of lading, the master of the ship is his agent. The only caveat is in circumstance where it can be shown that the time-charterer has specifically undertaken the carriage of the goods. In reaching that conclusion, Rand J. relied on a long line of English decisions dating back to 1893. As Rand J. states, and I agree entirely with him, it is now too late to call into question the nature of the relationship between the time-charterer, the shipowner and the cargo owner which arises where bills of lading are issued by the time-charterer on behalf of the master in the context of a New York Produce Exchange form. That, in my view, has been settled and should not be revisited.

This position was reconfirmed by the Supreme Court in *Aris Steamship Co. Inc.* v. *Associates Metals and Minerals Corporation*, [1980] 2 S.C.R. 322. Once again, the Supreme Court had to decide whether the time-charterer or the shipowner was the carrier. The trial judge allowed judgment in favour of the cargo owner against the time-charterer and dismissed the action against the shipowner. The trial judge was of the view that the master of the ship, in signing bills of lading pursuant to clause 8 of the charter-party, was acting as agent on behalf of the time-charterer and not on behalf of the ship's owners. The decision was appealed to the Federal Court of Appeal which, on the authority of *Paterson*

Steamships, set aside the decision of the trial judge. Jackett C.J., ([1978] 2 F.C. 710) at 717 and 718, dealt with the issue as follows:

> I turn to the substantive question involved in the appeal, which as I understand it is whether, on the facts of this case, the learned Trial Judge erred in holding that the appellant's contract of carriage was not a contract with the respondent as the owner and operator of the vessel whose servant, the Master of the vessel, in accordance with the complicated arrangements that governed the entering into of contracts with shippers for carriage of goods on the vessel, signed the bills of lading in respect of the carriage of the appellant's goods. I have not been able to identify any respect in which the facts in this case differ from the facts that were under consideration by the Supreme Court of Canada in *Paterson Steamships Ltd v Aluminum Co of Canada Ltd* in such a way as to avoid the same conclusion in this case as was reached by the Supreme Court of Canada in that case. In the absence of some relevant difference, I am of the view that the learned Trial Judge erred in not holding that the appellant's contract of carriage was with the respondent.

On appeal, the Supreme Court of Canada took the opportunity of confirming the principles laid down in *Paterson Steamships.* Before quoting with approval the above passage taken from the decision of Jackett C.J., Ritchie J., at 328, stated:

> The trial judge adopted the view that there was no contractual relationship between Aris [the shipowner] and the plaintiff relating to the delivery of the cargo and that the bills of lading were signed by the captain as agent for the charterer. Like Chief Justice Jackett, and for the reasons which he states, I cannot subscribe to this proposition and on the other hand incline to the view that both the captain and the charterer were acting as agents for the owner in fulfilling the terms of the contract evidenced by the bill of lading.

I believe it useful to give a brief summary of the relevant facts underlying the decisions rendered in *Aris Steamship.* For the present purposes, I would adopt the summary of the facts given by Ritchie J. of the Supreme Court of Canada at 325 and 326:

> The Plaintiff's action is one for damages allegedly resulting from delays in the shipment and delivery of a cargo of pig iron carried

aboard the vessel Evie W, a ship owned by Aris which had entered into a time charter with Worldwide, the last paragraph of which read as follows:

> 26 Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers The owners to remain responsible for the navigation of the vessel, Acts of Pilots and tugboats, insurance, crew, and all other matters, same as when trading for their own account.

It is thus clear that no part of the ownership of the vessel was transferred to Worldwide under this contract. As is usual in the case of such a time charter, the arrangement was that the ship was available to Worldwide which was responsible for obtaining cargo to fill the hull as circumstances and convenience dictated; the master and crew were provided by the owner Aris, and bills of lading covering cargo to be shipped were executed by the Master on the owner's behalf. Clause 8 of the charter defines the role of the Master as follows:

> 8 That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts Without prejudice to this Charter Party

In the present case arrangements were made through Worldwide and its associates in the business, for a cargo of pig iron owned by the plaintiff to be taken aboard at Koverhar, Finland, destined for Toledo, Ohio and Hamilton, Ontario, a voyage which would obviously involve the use of the St. Lawrence Seaway. In accordance with arrangements I have indicated, the bill of lading covering this cargo was signed by Captain Skovelis who was a director and shareholder of Aris. A separate cargo of plywood-veneer in which the plaintiff had no interest whatever was loaded on the same ship in Finland for transit to Great Lakes ports.

Various difficulties attributable to heavy weather and other marine hazards which need not be detailed, were encountered on the voyage from Finland although the trial judge made no finding as to perils of the sea. In any event, the weather which was encountered forced the vessel to put in to Greenoch for repairs on October 19, and once again gales of near hurricane force made it necessary for the ship to seek refuge at Plymouth and Falmouth in England, from which latter port she finally sailed on November 5. In the result, a voyage commenced at Koverhar in Finland on October 4, 1967, did not terminate until arrival at Montreal, Quebec, on the 22nd of November of that year, at which time it was found necessary to discharge some of the plywood-veneer cargo in order to lighten the vessel which was overloaded for Seaway transit. This unloading, and the intervention of a strike, resulted in Worldwide notifying the shippers of the veneer that it would not deliver that cargo as agreed but would offload it in Montreal. A dispute arose as to whether Worldwide or the shipper should defray the cost of offloading and this culminated in the plywood cargo owners arresting the ship. A further dispute then arose between Aris, Worldwide and the insurer as to which would post a bond to allow the vessel to proceed thus causing added delays resulting in arrangements having to be made for as much of the pig iron as possible to be shipped to its proper destination by other vessels. A substantial part of the pig iron cargo could not however be shipped in this fashion and it was necessary for the shipper to arrange for the transportation of this remaining cargo to its destination by rail. It is the cost of this latter arrangement which is the subject matter of the plaintiff's claim for damages in the present case

As Ritchie J. states, the arrangements to carry the Plaintiff's cargo from Koverhar, Finland, to ports on the Great Lakes were made through the time-charterer Worldwide Carriers. Specifically, and this appears quite clearly from the reasons for judgment of the trial judge, a voyage charter-party was entered into between Worldwide Carriers, as disponent owners, and the Plaintiffs, Associated Metals and Minerals Corporation, for the carriage of 10,000 long tons of pig iron.

A reading of the learned trial judge's decision ([1973] F.C.J. No. 803 (QL)) also makes it abundantly clear that the Plaintiffs conducted all of their negotiations and discussions with the time-charterer. The shipowners' only involvement was the master's signature on the bills of lading. That is why the trial judge concluded that the contract of carriage evidenced by the bills of lading was one between the Plaintiffs and the time-charterer. At 32 (QL) of his reasons, the trial judge states:

> There was no contractual relationship between the owners, Aris Steamship Co. Inc. and plaintiffs relating to the delivery of the cargo to the Great Lakes ports. While the Captain was required to sign Bills of Lading and did so with a notation indicating he believed the weight shown on them was inaccurate, he was signing these, not as an agent of the owners but of the charterers, Worldwide Carriers Limited (see Clause 8 of charter-party *supra*).

In *Aris Steamship*, as here, the shipper did not deal with the owners of the ship but rather with the time-charterer. Thus, the fact pattern in the case at bar is not relevantly different from that found in *Aris Steamship* or *Paterson Steamships*. The Courts have taken the view that in the context of a New York Produce Exchange form charterparty, the time-charterer acts as the agent of the shipowners in fulfilling the terms of the contract evidenced by the bill of lading.

Thus, in my view, unless there is a clear undertaking by the time-charterer that he will carry the shipper's goods, the shipowner is the carrier. In the present case, there is no undertaking by Federal Commerce that it will carry the goods to Bangkok and Manila.

In the present instance, the cif vendor, Union Carbide, made all arrangements necessary to fulfil its obligations under the contracts of sale. In addition, Union Carbide made sure that the cargo sold to its clients was insured.

In order to fulfil its obligations under the contracts of sale, Union Carbide entered into a booking note contract with Federal Commerce. Pursuant to that contract, Federal Commerce agreed to reserve space for Union Carbide's cargo on one or two vessels to be nominated. The issue which arises is whether Federal Commerce, by reason of the terms and conditions of the booking note contract and the issuance of bills of lading, undertook to carry Union Carbide's cargo.

In my view, the answer to that question is no. Firstly, nowhere in the booking note is there an undertaking by Federal Commerce that it will carry Union Carbide's cargo. Clause 1 of the booking note simply provides that Federal Commerce will reserve space for Union Carbide's cargo. The clause then goes on to provide that Federal Commerce has the right, but not the obligation, to substitute, tranship and forward Union Carbide's goods "according to the provisions of clause 6 overleaf". Clause 6 "overleaf", as all the other clauses which appear "overleaf", is a clause extracted from Federal Commerce's regular bill of lading and consequently must be read in that context.

Clause 6 "overleaf" is clause 7 of the bills of lading issued on January 5, 1979. It reads as follows:

> Whether expressly arranged beforehand or otherwise, the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the Carrier or others or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to tranship, land and store the goods either on shore or afloat and reship and forward the same at Carrier's expense, but at Merchant's risk.
>
> Whenever the goods are to be forwarded to a final destination other than the named vessel's port of discharge the carrier acts as forwarding agent only of the Merchant in order to effect on-carriage to such final destination, without any other responsibility whatsoever, even though the freight for the whole transport has been collected by him. The carriage by any intermediate, terminal, or barge carrier and all transhipment or forwarding shall be subject to all the terms whatsoever in the regular form of Bill of Lading, freight note, contract, or other shipping document used at the time by such on-carrier, whether issued for the goods or not, even though such terms may be less favourable to the Merchant than the terms of this Bill of Lading and may contain more stringent requirements as to notice of claim or commencement of suit and may exempt the on-carrier from liability for negligence.
>
> The Merchant expressly authorizes the carrier to arrange with any such intermediate, terminal or barge carrier that the lowest valuation of the goods or limitation of liability contained in the Bill of Lading or shipping documents of such carrier shall apply even though lower than the valuations or limitation herein; pending or during transhipment the goods may be stored ashore or afloat at their risk and expense and the Carrier shall not be liable for detention.
>
> The responsibility of the carrier shall be limited to the part of the transport performed on the vessel named herein or substituted therefore, and the carrier shall not be liable for loss, damage, or delay howsoever occurring arising during any other part of the transport even though the freight for the whole transport has been collected by him.

Clause 6 "overleaf" must necessarily be read in conjunction with clause 2 of the bills of lading which provides that:

> The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner alone shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of,

> and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.
>
> It is further understood and agreed that as the Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Company or Agents shall not be under any liability arising out of the contract of carriage nor as Carrier nor bailee of the goods.

The HUDSON BAY was nominated by Federal Commerce to carry Union Carbide's cargo destined for Manila and Bangkok. Pursuant to clause 8 of the time charter-party, Federal Commerce was under a duty to load, stow and trim all cargo loaded onboard the HUDSON BAY at its expense under the supervision of the captain. Therefore, as between Bona Maritime and Federal Commerce, Federal Commerce had the duty to retain stevedores to load Union Carbide's cargo onboard the HUDSON BAY at Montreal. Federal Commerce retained the services of Federal Marine to load Union Carbide's cargo on the HUDSON BAY in Montreal.

Following the completion of loading at Montreal, Federal Commerce issued bills of lading by authority of the master of the HUDSON BAY, as agents only. In so doing, Federal Commerce relied on clause 8 of the charter-party which authorized the master of the ship to sign or, if requested by charterers, to authorize charterers and/or their agents to sign, bills of lading for cargo as presented in conformity with mate's or tally clerk's receipt. Counsel for the Plaintiffs argued that there was no evidence that the master of the HUDSON BAY had authorized Federal Commerce to sign bills of lading on his behalf. In evidence was a letter dated December 5, 1978 from the master of the HUDSON BAY to Fedmar International, Federal Commerce's agent in Detroit, authorizing Fedmar to sign bills of lading on his behalf with respect to cargo "which may be received for shipment and/or shipped by this vessel under C/P-B/N covering this voyage ...".

Counsel for the Plaintiffs argued that this letter covered the Detroit cargo only. Be that as it may, on the authority of *The Berkshire*, [1974] 1 Lloyd's Rep. 185 (Q.B.), I am satisfied that Federal Commerce could validly sign the bills of lading on behalf of the master. In *The Berkshire*, Brandon J. (as he then was), after citing clause 8 of the New York Produce Exchange form,[6] expressed his understanding of that clause, at 188 and 189, as follows:

> The effect of such a clause in a charter-party is well settled. In the first place, the clause entitles the charterers to present to the master for signature by him on behalf of the shipowners bills of lading which contain or evidence contracts between the shippers of goods and the shipowners, provided always that such bills of lading do not contain extraordinary terms or terms manifestly inconsistent with the charter-party; and the master is obliged, on presentation to him of such bills of lading, to sign them on the shipowners' behalf.
>
> In the second place, the charterers may, instead of presenting such bills of lading to the master for signature by him on behalf of the shipowners, sign them themselves on the same behalf. In either case, whether the master signs on the directions of the charterers, or the charterers short-circuit the matter and sign themselves, the signature binds the shipowners as principals to the contract contained in or evidenced by the bills of lading.
>
> Authority for the propositions set out above is to be found in *Tillsman & Co v. S.S. Knutsford*, [1908] 2 K.B. 385; [1909] A.C. 406. See also, as regards terms manifestly inconsistent with the charter-party, *Kruger & Co Ltd v Moel Tryvan Ship Co Ltd*, [1907] A.C. 272, at pp. 278-9.
>
> ...
>
> On the footing that the charterers had authority, under cl. 8 of the charter-party, to sign the bills of lading on the shipowners' behalf, they were in my view entitled to appoint Ocean Wide as agents to do this for them and Ocean Wide were entitled to appoint Ayers as sub-agents to do it for them. The signing of a bill of lading is a ministerial act and I do not consider for this and other reasons that the principle *delegatus non potest delegare* applies to such an act.

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[6] The clause before Brandon J. read as follows:

> ... The Captain (although appointed by the owners), shall be under the orders and directions of the charterers as regards employment and agency; and the charterers are to load, stow, trim and discharge the cargo at their expense and risk under the supervision of the captain, who is to sign bills of lading for cargo as presented, in conformity with mate's or tally clerk's receipts.

In *The Rewia*, [1991] 2 Lloyd's Rep. 325 (C.A.), Leggatt L.J. stated that even if the charterers did not obtain the master's authorization to issue bills of lading on his behalf, ratification would take place when the master, with knowledge of the bills of lading, undertook to carry the goods.

Clause 6 of the booking note provides that Federal Commerce's regular form bill of lading shall be used and that all the terms, conditions and exceptions thereof shall form part of the booking note contract. One of the clauses on the Federal Commerce bill of lading is a clause entitled "parties to the contract". The first part of clause 2[7] of the bill of lading, often referred to as the "demise"[8] clause, reads as follows:

> **2. Parties to the contract**
>
> The contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner alone shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.
>
> It is further understood and agreed that as the Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Company or Agents shall not be under any liability arising out of the contract of carriage nor as Carrier nor bailee of the goods.

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[7] Clause 2 of the subject bills is not a "pure" demise clause. Tetley, at 248, offers the following example of a demise clause:

> "If the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary), the bill of lading shall take effect as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof"

[8] For a discussion of the demise clause, see W. Tetley, *Marine Cargo Claims*, *supra* at 248-259.

Briefly put, the clause is to the effect that the contract evidenced by the bill of lading is one between the owner of the cargo and the owner of the vessel on which the goods are to be carried. The clause further provides that the owner of the ship shall be the only party liable for loss or damage to cargo or for any breach or non-performance of the obligations arising out of the contract of carriage. The clause finally provides that the company or agent who has issued the bill of lading on behalf of the master of the vessel is not a principal and that such company or agent "shall not be under any liability arising out of the contract of carriage nor as carrier nor bailee of the goods".

In *The Berkshire*, *supra*, at 188, Brandon J., responding to an argument made by the shipowners that the demise clause was an extraordinary clause, stated:

> It was argued for the shipowners that the demise clause was in itself an extraordinary clause; that the charterer could not lawfully have presented a bill of lading containing it to the master for signature on behalf of the shipowners; and that they could not, therefore, bind the shipowners by signing such a bill of lading themselves.
>
> I must confess that I do not understand this argument. All the demise clause does is to spell out in unequivocal terms that the bill of lading is intended to be a shipowners' bill of lading The charter-party entitles the charterers to present to the master for signature by him on the shipowners' behalf, or to sign themselves on the same behalf, bills of lading of that kind. How then can it be said that the demise clause is, within the meaning of the principle set out above, an extraordinary clause? In my view, so far from being an extraordinary clause, it is an entirely usual and ordinary one.

I agree entirely with Mr. Justice Brandon. In *Paterson Steamships* and in *Aris Steamship*, the Supreme Court of Canada concluded that bills of lading signed on behalf of the master of a ship were binding upon the owners of that ship and not upon the time-charterers. With or without a demise clause, a bill of lading issued in the circumstances of this case constitutes a contract binding upon the

owners of the ship and not upon the time-charterers, unless, as stated by Rand J. in *Paterson Steamships*, there is an undertaking on the part of the charterer that he will carry the cargo.

The demise clause, in the present case, by reason of clause 6 of the booking note contract, formed part of the booking note contract and, as a result, Union Carbide was made aware that the bills of lading would be contracts binding upon the owners of the carrying vessel. I cannot see, in the circumstances of this case, how the Plaintiffs can escape this conclusion.

As I indicated earlier, clauses 2 and 7 of the bills of lading must be read together as part of one contract. In other words, one cannot read clause 7 (clause 6 "overleaf" of the booking note contract) without considering clause 2. The "carrier" referred to in clause 7 is not, in my view, Federal Commerce but the person with whom the contract of carriage has been entered. Clause 2 of the bills of lading, which forms part of the booking note contract, is clear and it provides that the contracts evidenced by the bills of lading are between the merchant and the owner of the carrying vessel. It is true that Federal Commerce described itself as the carrier in the booking note contract. However upon a true construction of the contract of carriage as a whole, it is clear that the "carrier" is the owner of the ship upon which the goods were carried.

Counsel for the Plaintiffs argued that both the shipowners and Federal Commerce were the carriers of the cargo shipped by Union Carbide. In support of this argument, counsel referred to the *Carriage of Goods by Water Act*, S.C. 1993, c. C-21, (Schedule I, article I(a)) which defines "carrier" as follows:

> "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

Counsel for the Plaintiffs argued that the owners of the ship are a "carrier" within the meaning of the rules by reason of the issuance of the bills of lading by Federal Commerce on their behalf, and further, that Federal Commerce is also a carrier by reason of the terms and conditions of the booking note contract and the issuance by Federal Commerce of the bills of lading. In other words, counsel's position is that both the owners and the charterers can be the "carrier". Counsel's argument finds inspiration in the words of Professor Tetley as expressed in *Marine Cargo Claims*, *supra* note 8. The argument made by counsel found favour with my colleague Reed J. in *Canastrand Industries Ltd.* v. *The Ship Lara S.*, [1993] 2 F.C. 553. At 586, Reed J. cites with approval the opinion expressed by Professor Tetley at pages 235, 236 and 242 of *Marine Cargo Claims*:

> Professor Tetley in his text *Marine Cargo Claims*, 3rd ed., 1988 at pages 233-245, discusses who is a carrier under the Hague or Hague/Visby Rules [*Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 25 August 1924* (Brussels, 23 February 1968)]. He states at pages 235-236:
>
> > Traditionally the carrier was the person who contracted with the shipper to carry the goods One must now ask, if the carrier must also have contracted with the shipper under the Hague or Hague/Visby Rules? The answer is that the person who issues the bill of lading contracts both on his own behalf and on behalf of the other persons who have responsibilities under the Hague Rules In other words, the contracting carrier contracts in a dual capacity - as principal and as agent Thus the charterer who issues the bill of lading also contracts for any other charterer and for the shipowner who have responsibilities under the rules
> >
> > * * *
> >
> > The bill of lading is usually signed by the master or on his behalf, and such a bill of lading normally binds the owner of the vessel for whom the master acts The only exception appears to be the case where the master is employed directly by a demise charterer.
> >
> > When a time or voyage charterer signs as agent for the master, the owner is still bound, because the master is the employee or, in effect, préposé or agent of the owner This seems to be true even when the name of the charterer appears in the heading of the bill of lading, as was held by the Supreme Court of Canada in *Paterson SS Ltd v Aluminum Co* This was also the position taken by Brandon J. in *The Berkshire* and the Supreme Court of Canada in *The Evie W*
> >
> > In both the *Paterson SS Ltd* and *The Berkshire* cases, and probably in *the Evie W*, the owner knew of the charterer's practice of issuing master's bills of lading on the charterer's bill of lading forms And, in effect, this is the usual practice in most world shipping, so that cases of the owner not being apprised are rare [footnotes omitted, underlining added]

At page 242:

> Usually, suit is valid against both the owner and the charterer In *The Quarrington Court*, it was held that a bill of lading issued by a charterer on its own form, and signed by the charterer's agent for the master in accordance with the master's written authority, bound both the vessel owner and the charterer Other decisions have held the charterer responsible in contract and the shipowner in tort
>
> Carriage of goods is effectively a joint venture of owners and charterers (except in the case of a bareboat charter) and, consequently, they should be held jointly and severally responsible as carriers. [footnotes omitted, underlining added]
>
> The logic of holding both the shipowner and the charterer liable as carriers seems entirely reasonable under a charter such as that which exists in this case. The master will have knowledge of the vessel and any peculiarities which must be taken into account when stowing goods thereon. He supervises that stowage. He has responsibility for the conduct of the voyage and presumably also has knowledge of the type of weather conditions it would be usual to encounter. In such a case it seems entirely appropriate to find the master and therefore, his employer, the shipowner jointly liable with the charterer for damage arising out of inadequate stowage.

Madam Justice Reed seems to have accepted Professor Tetley's theory that where goods are loaded on a time-chartered ship the owners of that ship and the time-charterers are engaged in a joint venture insofar as the carriage of the goods is concerned. I cannot accept the soundness of this view. Firstly, such a conclusion defies the decisions of the Supreme Court in *Paterson Steamships* and *Aris Steamship.* Secondly, there cannot be a joint venture between owners and charterers unless there has been a meeting of the minds between the parties to the joint venture. Can it be said that, in entering into a time charter-party in the New York Produce Exchange form, as is the case here, the owners and the charterers have agreed to jointly carry the goods loaded on the ship? In my view, it cannot be so said. Thirdly, in order to agree with Professor Tetley, one must forget that the Federal Court of Appeal has clearly held that the question as to who the carrier is one which depends upon the documents and the circumstances of the case. (See *Lantic Sugar Ltd.* v. *Blue Tower Trading Corp.* (1994), 163 N.R. 191).

In *Scrutton on Charterparties and Bills of Lading*, 20th ed. (London: Sweet & Maxwell, 1996), the learned authors make the following comments regarding the words "includes" and "the charterer" found at article 1(a) of the Hague Rules amended by the Brussels Protocol 1968, (the "Hague-Visby Rules") attached as a schedule to the U.K. *Carriage of Goods by Sea Act, 1971*. The learned authors, at 422, state that:

> **Article I**
>
> **In these Rules the following words are employed, with the meanings set out below: -**
>
> **(a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.**
>
> "Includes" The use of this word suggests that the definition is not exhaustive and, if so, the "carrier" might include a freight agent or forwarding agent or carriage contractor in cases where by issuing a bill of lading he enters into a contract of carriage with the shipper It does not include a stevedore At all events, it does not extend beyond the person who is contracting as carrier under the relevant contract of carriage This will usually be a bill of lading, in which case the carrier is the person (whether owner of the vessel or charterer) who makes himself liable under that document. Where the bills are incorporated into a charterparty, the carrier will be the shipowner, or disponent owner, as the case may be
>
> "*The charterer*" This, no doubt, contemplates a case in which a charterer is liable on the contract of carriage and the shipowner is not This may arise (1) in the case of a charter by demise, and (2) where the charterer issues and signs his own bill of lading

The position taken by the learned authors appears to be that in circumstances where the charterer will be liable on the contract of carriage, the shipowner will not. I agree with this point of view. A charterer will issue and sign a bill of lading either on his own behalf or on behalf of the master. Where he signs on behalf of the master, and is so authorized, the shipowner will be bound by the issuance of the bills of lading but not the charterer. Where the charterer issues and signs bills of lading on his own behalf, he shall be bound by those bills. Consequently, in most cases, the word "or" in article 1(a) of the Hague Rules will mean exactly that. The carrier shall either be the owner or the charterer, but not both. I need not discuss a situation where a charterer issues and signs a bill of lading on behalf of the master and on his own behalf. That is certainly not the situation in the present case.

Clause 26 of the charter-party is of relevance to the present issue. It provides that the owners of the HUDSON BAY are "to remain responsible for the navigation of their vessel, acts of pilots and tugboats, insurance, crew and all other matters, same as when trading for their own account". In *Lantic Sugar Ltd.* v. *Blue Tower Trading Corp.*, *supra*, McGuigan J.A. of the Federal Court of Appeal gave approval to the Trial Judge's view that the words "all other matters" of clause 26 of the New York Produce Exchange form charterparty were effective to include cargo claims in the matters for which the shipowners, rather than the charterers, were to remain responsible.

In *The Rewia*, *supra*, the English Court of Appeal had to decide whether bills of lading issued on behalf of the master of the ship were charterers' bills or owners' bills. After reviewing the relevant caselaw, Leggatt L.J. concluded that bills of lading signed on behalf of a master could not be charterers' bills unless the contracts were made with the charterers alone. At 333, Leggatt L.J. stated:

> In essence the plaintiffs' argument depends on the use of liner forms of bills of lading, coupled with their ignorance of the fact that the vessel was chartered. But on the present state of the evidence there is nothing to detract from the bills of lading which on their true construction were signed for the master by agents to whom he was empowered to give authority and must be taken to have done so, since he was required to sign them as presented. The master was in fact the servant of the shipowners. It is nothing to the point to say that further investigation might yield different results, because the determination of the question whether the bills of lading were owners' bills depends on the true construction of the bills. As Mr. Gaisman forcefully points out, the original plaintiffs in this action were consignees of the goods who could only have had title as assignees of the bills of lading, and not by way of an assignment of an oral booking contract. What are sued on are the contacts contained in or evidenced by the bills of lading. Those contracts were made for either the first or the third defendants and the Court would therefore derive no assistance from a factual inquiry into the circumstances in which the booking contract was made.
>
> It is common ground that the charter in the present case is a time charter, not amounting to a demise. It appears to me that the law was correctly stated by Mr. Justice Channell in the passage from *Wehner v Dene SS Co.* which I have cited earlier. That formulation has never been doubted. The facts of the

> present case are indistinguishable from those in *Wilston v. Andrew Weir* (sup.), and that decision has never been doubted. The text in Scrutton on Charterparties to which note 79 is appended is now misleading, and in context only the first of the cases there referred to is helpfully cited. If Mr. Justice Walton had had the benefit in 1905 of the cases subsequently decided, he would have been unlikely to regard them as "to some extent ... "conflicting")". They are all of a pattern. In my judgment they support the conclusion that a bill of lading signed for the master cannot be a charterers' bill unless the contract was made with the charterers alone, and the person signing has authority to sign, and does sign, on behalf of the charterers and not the owners. Accordingly, the bills of lading in this case were owners' bills.

In the present case, I cannot conclude that the contract of carriage was made with the charterers. The bills of lading issued on January 5, 1979, are, without doubt, owners' bills of lading.

One of Union Carbide's obligations under the contracts of sale was to contract on standard terms for the carriage of the goods to the ports of destination. Union Carbide was also obligated to provide to the buyers clean negotiable bills of lading. Union Carbide performed these obligations and provided to the consignees the bills of lading issued on January 5, 1979. These bills clearly provided, in my view, that the contracts evidenced by them were contracts with the owners of the ship on which the goods were loaded. These are the bills which Union Carbide provided to its clients in fulfilment of its contractual obligations.

Finally, I wish to refer to the distinction made by Hobhouse J. in *The Torenia*, [1983] 2 Lloyd's Rep. 210 (Q.B.) at 216 between contracts for carriage and contracts of carriage. Generally speaking, time-charterparties constitute contracts for the carriage of goods and not contracts of carriage. It is

my view that the present booking note contract also falls within the category of contracts for carriage. Hobhouse J. explains the distinction as follows:

> The relationship between the present parties is contractual. It follows (as was accepted by both Counsel) that the question of legal burden of proof has ultimately to be decided by construing the contract between them. Cases such as *The Glendarroch* (sup.) were decided as a matter of construction of the contract before the Court, albeit approaching the question of construction by having clearly in mind the legal and historical background to such contract. In ascertaining the effect of the contract one must take into account the nature of the contract. The contract here is a contract in a bill of lading; it is a contract of carriage -- that is to say, a species of a contract of bailment. It is not, as Mr. Pollock for the defendants at one stage argued, a mere contract *for* the carriage of goods. Charter-parties are typically contracts for the carriage of goods. They are executory. They are intended to give rise to bailments (not necessarily between the parties to the charter-party). They may include terms of an intended bailment, but they are not normally the contract of bailment itself. They cover other matters besides the bailor/bailee relationship. The case of *Joseph Constantine Steamship Lines v Imperial Smelting Corporation*, (1941) 70 Ll.L.Rep. 1; [1942] A.C. 154, illustrates this. The alleged breach there was a failure to load; that is to say, a failure to perform an executory obligation to create a bailment.

In *Grace Plastics Ltd.* v. *The Bernd Wesch II*, [1971] F.C. 273 (C.A.), Jackett C.J. had to decide whether a "shipping note" constituted a contract for carriage or of carriage. In that case, the Plaintiff company had retained the services of a freight forwarder who, for a lump sum payment, undertook to arrange the transportation of the Plaintiff's equipment from Europe to Cornwall, Ontario. In order to perform its contractual obligations, the forwarder contracted with the time-charterer of the vessel BERND WESCH II by way of a document called a "shipping note". Jackett C.J. explained this agreement as follows at page 276:

> The forwarder thereupon entered into an arrangement, by means of a document called a "shipping note", with the defendant Hy Car who had a time charter in respect of the vessel *Bernd Wesch II* from her owner, the defendant Jonny Wesch, for the carriage of the plant or equipment and the chemicals in question from the European Ports to Montreal. It is common ground that the arrangement between the forwarder and Hy Car was that two

> items of plant or equipment known as "reactors", each of which weighed 70 tons, were to be carried "on deck" and that the rest of the shipment was to be carried "under deck".

After the goods were loaded on the vessel, a bill of lading was issued. The bill indicated that the freightforwarder was the shipper and further indicated that the goods were consigned to the order of the forwarder.

The Plaintiff asserted claims, both in contract and in tort, against the owners of the vessel and the time-charterer. At 278 and 279, Jackett C.J. dealt with the contractual issue as follows:

> The *Bernd Wesch II* was owned and operated by Jonny Wesch. It was under a time charter, not a demise charter, to Hy Car. According to the terms of the contract for carriage, which provided for use of "Hy Car Line Bills of Lading", it was an agreement for carriage of goods under a formal contract (the Bill of Lading to be issued) which would be executed on behalf of the "Master" of the vessel selected to carry the goods. This was a contract that was, when it was executed, a contract on behalf of an unknown principal, namely, the owner and operator of the vessel that was subsequently to be chosen; and it was not a contract by the charterer as principal. See *Paterson Steamships Ltd. v. Aluminum Co. of Canada* [1951] S.C.R. 852. I am therefore of the view that the claim on the contract of carriage, if there is one, is against Jonny Wesch; and that there can be no such claim against Hy Car, who contracted on behalf of an unknown principal who has now been identified by proof of the charterparty in this action.

I also wish to refer to the decision of Smith J. of the Exchequer Court of Canada in *Apex (Trinidad) Oilfields, Ltd.* v. *Lunham & Moore Shipping, Ltd.* (1962), 2 Lloyds Rep. 203. Again, this was a case where a time-charterer, pursuant to clause 8 of the New York Produce Exchange Form charterparty, issued bills of lading on behalf of the master of the ship. The Plaintiff asserted a cause of action in contract against the time-charterer. The Plaintiff's case was that it had entered into a contract of affreightment with the time-charterer in respect of its goods. The Defendant did not deny having entered into a contract of

affreightment with the Plaintiff but defended the case on the ground that it had never undertaken to carry the Plaintiff's goods. At 206, Smith J. dealt as follows with the defence:

> This ground of defence is that there was no contractual relationship between plaintiff and defendant in respect to the carriage of the cargo from Walton, Nova Scotia, to Port of Spain, and that since there is no allegation of tort against the defendant there is a complete absence of *lien de droit* between the parties.
>
> It is clear that the defendant was neither the owner nor the charterer with demise of the vessel. (See Charter Demise Clause.) The freight contract (Exhibit P-1) between Canadian Industrial Minerals, Ltd., and the defendant is merely an undertaking by which, on the one hand, the defendant obligated itself to provide space in the vessel for the cargo, voyage and at the rates specified, and the shipper, on the other, obligated itself to provide the cargo and pay the freight stipulated. It is not the contract of carriage. The agreement is made, as above noted,
>
> > ... subject to all terms, conditions, exception and liberties expressed in carrier's Bill of Lading in current use at the time of shipment.
>
> It is the bill of lading which constitutes the contract of carriage and it provides expressly that all agreements or freight engagements for the shipment of the goods are superseded by the bill of lading.

I therefore come to the conclusion that Federal Commerce is not a party to the contracts evidenced by the bills of lading and that, consequently, Federal Commerce is not a "carrier" within the meaning of the Hague Rules. In my view, the "carrier" was Bona Maritime.

I cannot see how Bona Maritime could have argued that it was not bound by the contracts evidenced by the bills of lading in the circumstances of this case. I recognize that the owners did not participate in these proceedings and hence did not lead any evidence, but I fail to see how their participation would have changed my conclusion on this issue since the owners chartered their ship to Federal Commerce on the terms of the New York Produce Exchange form pursuant to

which Federal Commerce was authorized to issue bills of lading on behalf of the master.

In view of this conclusion, Federal Commerce is not liable in contract to the Plaintiffs. I now turn to the Plaintiffs' submission that Federal Commerce is liable in tort.

IS FEDERAL COMMERCE LIABLE IN TORT?

The Plaintiffs submit that Federal Commerce is liable in tort for the damages caused to their cargo. Specifically, the Plaintiffs submit that Federal Commerce was negligent in allowing the pallets to be stowed more than 3 tiers high and in allowing the HUDSON BAY to sail with an improper stow.

To reach any conclusion on this issue, it is necessary to examine the evidence pertaining to the Plaintiffs' allegations, bearing in mind that as Bona Maritime was not a party to these proceedings there is absolutely no evidence regarding the voyage of the HUDSON BAY from Montreal to the Far East.

As I indicated earlier, pursuant to clause 8 of the charter-party, the charterers had the obligation to load, stow, trim and discharge the cargo at their expense under the supervision of the captain. By reason thereof, Federal Commerce retained Federal Marine to load the Plaintiffs' cargo onboard the HUDSON BAY at Montreal.

The first port of call of the HUDSON BAY on the subject voyage was Detroit. Before any cargo was loaded on the HUDSON BAY at that port, Federal Commerce prepared a stowage plan. Pursuant to this plan, Federal Commerce decided in which holds cargo would be loaded onboard the HUDSON BAY for carriage to the Far East. The stevedores, based on this information, would carry out the loading operation. For example, Captain Phiroz Moos, who was Federal Marine's cargo superintendent in 1978-79, testified that Federal Commerce had advised him with respect to the holds which were available to him for the loading operation. With that information, Captain Moos was able to decide how he would load the Plaintiffs' cargo. Specifically, Captain Moos decided how many pallets of resin would go into holds numbers 1, 3 and 5. During his testimony, Captain Moos stated that after seeing the stowage plan, he "filled it in", i.e. he inserted the figures which appear in the stowage plan. Captain Moos testified that, after the ship docked at Montreal, he went onboard to meet the master and the chief mate. He then brought the chief mate into the shed to show him the cargo and he informed him of his intentions regarding the loading operation. Captain Moos testified that the mate agreed with his plan.

It goes without saying that the positioning of the cargo onboard the vessel is determined on the basis of the port rotation and the tonnage of the cargo. With respect to their argument that the true cause of their loss is the fact that Federal Commerce allowed the loading of the pallets at an excessive height, the Plaintiffs rely on the evidence of experts Captain Don Angel and Captain Stewart Baker. I begin with Captain Angel's evidence.

At the end of October 1978 UCC requested Captain Angel to attend at shed 49 of the Port of Montreal to examine the cargo intended for carriage on the HUDSON BAY. Specifically, Captain Angel was asked by Mr. Norman Cunningham of UCC to provide an opinion with respect to the packing of the cargo. On November 3, 1978 Captain Angel wrote to Mr. Cunningham advising that:

> We herewith confirm having visited Shed 49 at the Montreal Harbour and having examined a shipment of Polyethylene Resin stored in the Shed and intended for export.
>
> The resin is contained inside multi-ply paper bags of 5-ply construction, the inner ply being laminated to a plastic film. Each bag contains 25 kilograms net weight. A total of 40 bags are stacked on each pallet in 8 tiers to make a 1,000-kilogram pallet load. Each pallet is then wrapped in several lawyers of polyethylene film of 1mm thickness to prevent slippage of bags. The entire pallet load is covered by twin-ply corrugated fibreboard folded around the sides and over the top, this fibreboard covering is then secured by several turns of 1mm polyethylene film. Each pallet was of new construction and built of fresh, stout timber.
>
> It is our opinion that this method of packaging is satisfactory and adequate for the export shipment of the product contained within the bags and it is customary to the trade.

I should point out that Captain Angel, between the years 1974 and 1988, had occasion to survey a considerable number of Union Carbide's cargoes, the majority of which consisted of shipments of anywhere between 1,000 to 2,000 tons, mostly non-containerized cargoes. In the present case, in addition to being asked by UCC to provide an opinion with respect to the packing of the cargo sold to Union Carbide, Captain Angel was asked by Union Carbide to survey, on their behalf, two large shipments at the end of 1978. These "large" shipments were destined for the DUGI OTOK and the HUDSON BAY.

On November 18, 1978 Captain Angel attended a meeting at shed 49. Present at the meeting were Norman Cunningham, who at the time was the supervisor of distribution services for UCC, Ray Greene, a surveyor acting on behalf of Federal Commerce and Brian Adams, the manager of Federal Marine, surveyors in the Port of Montreal.

The purpose of the meeting was to discuss the packing of Union Carbide's cargo in respect of which Federal Commerce had expressed concern. According to Captain Angel, Federal Commerce's concerns were not about the bags but about the cardboard sleeve. Federal Commerce was concerned about the protection and the stability offered by the cardboard sleeve. Captain Angel testified that he could never understand exactly what the concerns of Federal Commerce were, but that he had the impression that Federal Commerce believed that the fork lift trucks might damage the bags of resin because of a lack of protection. Captain Angel explained that the purpose of the cardboard sleeve was to keep the pallet together as a unit and to prevent the chafing of bags while in stow. Captain Angel explained that the cardboard sleeve was not intended to be a structural support for overstowing cargo.

A discussion then took place with regard to the notation "sifting" made on the majority of the delivery receipts. Captain Angel explained to Federal Commerce that this was not a problem since it only meant a loss of approximately 0.5 kilograms per pallet. Captain Angel testified that no one at Federal Commerce suggested that the packing be changed.

Before the cargo was loaded onboard the vessel, Captain Angel had occasion to inspect it while in the warehouse located at section 49. In a report of survey dated January 12, 1979, Captain Angel describes what he saw as follows:

> [...] We noted a substantial number of pallets had slight traces of resin sifting from the bottom. In most of these cases, the amounts were insignificant and not from any visible holes in the pallets. We also noted that where the pallets were located in blocks in the warehouse, those pallets facing outward into the alleyways leading to the warehouse doors and on the corners of the blocks were, in many cases, scuffed and holed and leaking. Substantial quantities of resin were sighted on the floor of the warehouse in the alleyways.

Subsequently, Captain Angel attended at section 49 of the Port of Montreal to survey the loading of Union Carbide's cargo. Specifically, Captain Angel was in attendance from December 19 to December 23, 1978, from December 27 to December 30, 1978, and from January 3 to January 5, 1979.

In his report, Captain Angel describes the loading operation of Union Carbide's cargo into holds numbers 1, 3, and 5. He observed that prior to the loading of Union Carbide's cargo, a cargo of steel plates had been loaded into the three holds and that a cargo of paper had been loaded into holds numbers 2 and 4. Captain Angel explained that the pallets were taken from the warehouse to the quay by forklift trucks, were then lifted into the holds by shore cranes, and were finally stowed in the holds by forklift trucks.

Commencing with hold number 1, Captain Angel stated that pallets bound for Manila were stowed in the hold to a depth of three tiers. Following the completion of the third tier, steel plates were placed over the top of the pallets and a further three tiers of pallets bound for Bangkok were placed on top. A further

two tiers were stowed on top of the previous tiers in the square of the hatch. In hold number 3 an initial stack of three tiers of pallets bound for Manila was again placed over Oshawa steel plates, then a further four tiers of pallets were placed over the initial three tiers and a further two tiers were stowed over the seven tiers in the square of the hold.

A similar pattern was followed by the stevedores in hold number 5. Three tiers of Manila bound pallets were stacked over Oshawa steel plates and then a further two tiers of pallets were placed over the previous three tiers in the square of the hold. With respect to the three holds, Captain Angel commented that substantial void spaces remained. At page 5 of his report, Captain Angel states:

> The loading of the vessel was completed at 1100 hours on the 5th January 1979. Being as holds Nos 1, 3 and 5 all contained void spaces into which pallets would tumble if left unsecured, we requested the Master of the vessel to advise us what arrangements were to be made for the securing of this cargo and the shoring up of the pallets adjacent to the void spaces. He did advise us that Federal Commerce & Navigation Co. Ltd. had stated that they were unable to obtain carpenters to carry out this work in the port of Montreal and that they had assured the Master that all necessary shoring and securing work would be carried out in the vessel's next port of call which was Quebec City.

Captain Angel also observed that a number of pallets had been loaded on the vessel in a damaged condition. He observed that approximately 184 pallets bound for Manila "contained tears in the side, resulting in one or more bags spilling its contents and we noted approximately 60 pallets of bags to be stowed either loose or on pallets with the wrappers either loose or missing". With respect to the pallets consigned to Bangkok, Captain Angel noted that approximately 105 pallets were damaged at the time of loading "and to have one or more bags leaking and spilling its contents and we noted approximately 40 pallets of bags to have the bags stowed in the holds either loose or on pallets with the wrappers either loose or missing".

Captain Angel then concluded his report as follows:

> The damages which we have noted in this report reflect only those pallets seen to be holed or torn. In the majority of these cases, the holes have been caused by contact between the pallets and forklift trucks or by contact with other objects whilst being carried by forklift trucks. We also believe that there may be a possibility of some splitting of bags, particularly in the lower tiers, caused by pressure of stow.

In his survey report, Captain Angel does not make any comment or provide any opinion with respect to the advisability of loading the pallets beyond three tiers. However, in a letter of opinion sent to the attorneys for the Plaintiffs on March 23, 1996, seventeen years subsequent, he stated the following:

> I have reviewed my letter dated November 3, 1978 to Union Carbide Canada Ltd. and the Toplis & Harding Survey Report File No. 17M78-950A dated January 12, 1979 carried out by myself, and can confirm my opinion as follows·
>
> The type of materials used to pack the bags of resin and the manner in which they were secured onto the pallet produced, in my opinion, a secure and stable unit as was customary in this trade, and able, if properly handled and carried, to withstand the normal rigors of the intended transit.
>
> The manner and plan of stowing of the cargo in the vessel was, in my opinion, inadequate to ensure the safe carriage of this cargo. The damage reported to have been noted upon arrival of the cargo at destination is consistent with, and in my opinion, was probably caused by the stow collapsing and the breakage of pallets occurring in places.
>
> Any damage done to the pallets on board the vessel would be increased at discharge when the pallets were lifted from the hold and again when handled on the quayside, transported to storage and during storage, until the damaged pallets could be stripped, damaged bags re-bagged, and the cargo re-palletized.

During his evidence at trial, Captain Angel stated that he had informed Brian Adams, the Manager of Federal Marine, that three tiers was the maximum height to which the pallets should be stowed. Captain Angel indicated that four tiers were possible if proper dunnage flooring was done between the second and third tiers.

At the hearing, Captain Angel stated unequivocally that the height to which the stevedores had stowed the pallets was an improper height for the commodity. The consequences of this stow, according to Captain Angel, were that pallets would be crushed, bags would split at the level of the lower tiers and sagging would occur. Captain Angel testified that he had never, during his career, seen palletized cargoes stowed to a height of eight to nine tiers.

In cross-examination, Captain Angel stated that he had begun to look at this file in February of 1996, two months before the trial. Before February 1996, Captain Angel had not looked at the file since writing his report in 1979. In preparing for the trial, Captain Angel did not have access to his original file or to his notes because his employer's files had been destroyed when the company moved its business premises. Captain Angel stated that during the course of his survey he was in contact with Norman Cunningham of UCC. He stated that he remembered calling Mr. Cunningham to advise him with regard to the height of the stow. Mr. Cunningham apparently instructed Captain Angel not to do or say anything. Captain Angel then stated that Mr. Cunningham's rationale in giving him these instructions was that the decision regarding the height of the stow was the carrier's decision and that consequently Captain Angel should not get involved. Captain Angel explained that the shipment of resin which went onboard the HUDSON BAY was the largest Union Carbide shipment with which he had been involved. Captain Angel testified that at the time of the November 8, 1978 meeting, he did not expect that the pallets would be stowed more than three tiers high. He stated that he would have expected Federal Commerce and Federal Marine to distribute the pallets over the five holds.

When asked by Mr. Colford, counsel for the Defendant, why he did not object to the manner in which the pallets were being stowed in the holds of the ship, Captain Angel answered that he had not received such a mandate from his client. Captain Angel stated that he did not attend either Bangkok or Manila to examine the condition of the goods at the time of discharge.

I now turn to the evidence of Captain Baker.

Captain Baker was not present during the loading of Union Carbide's cargo on the HUDSON BAY. He was retained by the Plaintiffs to provide an opinion based on a number of documents which were provided to him. The conclusion to his report dated March 16, 1996, is the following:

> The excessive height to which the stow was taken, the lack of securing of void spaces, the possibility that the bags were wet, the collapse of the shelving built to support the cargo, the lack of sufficient dunnage placed at the correct orientation, the stowage of loose bags used to fill some void spaces could individually or collectively have contributed to the collapse of this cargo and the subsequent damage.
>
> We believe that the most salient cause is the excessive height to which this cargo was stowed. The considerable sinkage of the cargo over a very short period indicates some early troubles prior to the vessel sailing.

Captain Baker testified at the trial that the pallets could be stowed up to a maximum of six tiers if the stow was done properly. He preferred four tiers as a reasonable height for this stow. In his opinion, anything over six tiers high constituted a "big risk of extensive damage".

Another witness for the Plaintiff who testified with regard to the height of the stow was Mr. Norman Cunningham. He explained that in UCC's warehouse the maximum height to which pallets were stacked was three tiers. He explained that UCC's standard instructions to stevedores were that they were not to exceed three tiers. He added that in some cases UCC was prepared to allow four tiers with appropriate dunnage. Mr. Cunningham stated that he did not know if UCC's standard instructions had been given to the loading stevedores in the case at bar.

Mr. Cunningham was examined on discovery by the Defendant in March of 1983. During his examination, Mr. Cunningham undertook to provide answers to a number of questions which he was unable to answer during his examination. The answer to undertaking number 15 is a Union Carbide memorandum dated August 11, 1983 from D.E. Gould to R.D. Toth. The undertaking deals with the packing of the cargo and the recommended height of stacking. It reads as follows:

> The 5-ply, 270-pound basis weight kraft multiwall bag in general use for export of plastic resins circa 1978 had demonstrated a multiple margin of safety in stacking strength tests conducted under normal storage and transportation conditions. In compression tests, a single bag of polyethylene resin supported nearly 25,000 pounds prior to failure. This is equivalent to storage at 55.5 pallets high - a safety factor of 18.5 times the recommended 3 pallets high storage.
>
> Paper is readily wetted by moisture or water, causing it to lose most of its strength. Testing reveals that various papers retain only 1 to about 8% of their original dry strength when completely saturated with water. Wet strength paper, the outer ply of these export bags, retains 15% or more of its dry strength, when thoroughly wetted with water. The circa 1978 export bag would have retained approximately 8.33% of its strength in wet conditions. This would provide for a stacking height capability of 4.6 pallets high - still a small safety factor, 1.5, above the recommended 3 pallets high storage.
>
> The weakness of paper packages when wet is well know through common, everyday, experiences (ex: paper hand towels, napkins, etc.) and is documented in many books on paper (ex: Handbook of Pulp and Paper Technology; Britt (1970) Van Nostrand Reinhold Company, 450 West 33rd Street, New York, NY 10001 and Pulp and Paper; Casey (1950, 1962) Interscience Publishers Ltd., 88/90 Chancery Lane, London, W.C.2)

> Union Carbide clearly provided the precaution on each of these export packages to KEEP DRY as shown in the attached copy of print appearing on these bags and dated July 23, 1976. It is indeed expected that those handling these paper bags of plastic will head the warning, and that total performance, only possible when paper packages are dry, will be experienced in shipping, storage, and ultimate use by our customers.
>
> Excessively high stacks of multiwall bag packages are likely to lean in one direction or another due to human error in loading or motion in transportation. A stack of 10 pallet loads tilted as little as 5 degrees from vertical places all the weight on one edge of the bags and pallets. This reduces available support strength to 10 or 12 percent of the original. Expected compression failure height is thus reduced from 55.5 down to 5.5 pallets high. A margin of safety exists for the recommended 3 pallets high stacking, but much higher stacks would be expected to result in bag failure.
>
> The combined affects [*sic*] of excessive moisture, water, and stacking height diminish the strength and increase the demands on paper packages, sometimes to the destruction of packages and loss or damage to the contained product. Perhaps this quantifying of these adverse influences on package performance and evidence of adequate warning will assist the legal presentation regarding the Bankok [*sic*] incident. If we can provide additional assistance, just give us a call.

Thus, although the compression tests showed that a bag of resin could support almost 25,000 pounds prior to failure, or the equivalent of 55.5 pallets, Union Carbide recommended, for the reasons stated in the memorandum, that the stow not exceed three tiers.

For the Defendant, the only expert who testified on this issue was Peter Marcotte. Mr. Marcotte is an independent consultant who specializes in export industrial packaging. He has been involved in the industrial packaging business since 1974.

Firstly, Mr. Marcotte expressed the view that the pallets could not be stacked more than three tiers high "without a high probability of tilting". He then went on to explain why, in his view, the packing of the cargo was insufficient for the intended purpose. At paragraphs 15, 16 and 17 of his affidavit dated March 21, 1996, he states:

> 15. As it must have been anticipated that these pallets were going to be stacked in different places, that is, port terminals, on a ship, possibly transit warehouses, no consideraton [*sic*] appears to have been given to creating an artificial top out of wood or a triple wall corrugated cap top to create a level surface; as whatever strength the palletized unit has exists around its perimeter, a top would add more stability and strength and reduce the tilting tendency the bags as laid on the pallet would create;
>
> 16. If I were asked to prepare and pack these bags for carriage to the Far East on a bulk carrier where there was no tier limitation, this is what I would propose:
>
> > a. I would accept the nature of the product and the bags as described in the documentation as a given;
> >
> > b. I would use 2 or 3 mil. film stretch wrap both as an inner layer and an outer layer; extra thickness gives more stability to the unit;
> >
> > c. I would use triple wall sleeve with equivalent top and bottom caps of a minimum 650 lbs test that will provide more stacking strength as well as a smooth flooring for the cargo;
>
> These methods were known and these materials were available in 1978. Using these methods and materials would have significantly increased the cost of packing this cargo, but as a packer, I wouldn't be responsible for negotiating the kind of deal that was negotiated in the Liner Booking Note in this case.
>
> I would not expect stevedores to have to do anything beyond what they would be expected to do when loading these pallets into a bulk carrier. I certainly would not expect stevedores to have to do anything to compensate for any inherent weaknesses in the packaging, especially if they were not evident either upon receipt or at the time of loading;
>
> 17. For the foregoing reasons, it is my professional opinion that this cargo was packed for the intended voyage on a bulk carrier without any tier limitation in a totally inadequate manner;

Further to his affidavit of March 21, 1996, Mr. Marcotte filed a rebuttal affidavit dated April 2, 1996, in response to the expert reports of Captains Angel and Baker. Mr. Marcotte stated in his affidavit that he would agree with Captain Angel that the packing of the cargo was adequate if the pallets were not stowed more than three tiers high. He also stated that he was in agreement with Captain Baker that the stowage of loose bags to fill void spaces was not good practice, adding that the placing of bags directly on wooden pallets without the use of slip pads was also bad practice.

None of the aforementioned witnesses were present when the cargo was discharged at Bangkok and Manila. However, they had the benefit of photographs taken by the attending surveyors at the ports of discharge.

At Bangkok, the discharge of the cargo was surveyed by Bayne, Adjustors and Surveyors, Ltd. on behalf of the consignees. With respect to the cargo destined for Union Carbide Thailand Limited, the surveyors attributed the cause of damage to poor stowage, the fact that the pallets and contents were trussed by the tension of the hoisting sling during the discharge operation and to the negligence of the crane operator during unloading. The surveyor who did the survey in respect of the cargo destined for Sri Thep Thai Ltd., attributed the damage to spillage of contents due to rough handling during transit.

With respect to the Manila cargo, surveys were conducted in respect of each consignment. I have examined each of the surveys and believe that the comments made by the surveyors concerning the cargo consigned to Manila Plastic Products accurately reflect the comments generally made by the surveyors who

attended onboard the vessel. At page 7 of the schedule annexed to his survey report dated September 12, 1979, surveyor D.E. Marasigan relates what the cargo surveyor saw upon attending onboard the vessel:

> We wish to mention that we have attended on board the vessel at the request of Union Carbide Philippines, Inc. during which time we noted that the subject shipment was co-mingled with other lots of Synthetic Resins stowed 4 to 5-tiers high all over Hold Nos. 1, 3, and 5. Majority of the pallets' fibreboard covers were found torn and water-stained, contents (Bags Synthetic Resins) also water-stained, torn and bursted, especially those stowed at Port and Starboard Wings. Provisional platforms of approximately 10' high from ceiling boards and approximately 4' wide constructed through the whole length of Port and Starboard Wings of Hold No. 1 were seen collapsed at each Forward End. Pallets rendered loose and Bags torn/bursted. Loose Synthetic Resins of assorted shapes and grades were found strewn all over each Hold.

Mr. Marasigan, who in fact did the majority of the Manila surveys, was examined by the parties, prior to trial, in the Philippines. In answer to a question posed by counsel for the Defendant, Mr. Marasigan stated that he did not believe that "the stacking in the vessel" was the cause of the damages. At page 50 of the April 1, 1996 transcript of his evidence, the following questions and answers appear:

> MR. COLFORD
>
> Q - Of course, in each one of your reports in your conclusion, you have the same conclusion which we've seen in paragraph B page 6 of Exhibit "P-78". Now, when I asked you earlier and you talked about unrecovered spillage due to tearing and bursting of bags brought about by the weakening of craft paper bag containers consequential to wetting, aggravated by improper handling, etc., etc." May I suggest you that could the weakening be brought about by the stacking in the vessel?
>
> A - No.
>
> Q - Was it only due to the wetting insofar as you could see?
>
> A - Wetting and collapsing of the pallets because the vessel encountered bad weather.

To place this shipment in context, I should perhaps state that between 1975 and 1979, Union Carbide shipped out of Montreal six to ten shipments a year of more than one thousand metric tons. These shipments all went on liner vessels, mostly tween-deck ships. Vincent Wilson, who at the relevant time was the Ocean Transportation Services Manager for Union Carbide, testified that his company's loss ratio on these shipments was 75 to 80% satisfactory. That evidence was confirmed by witnesses from certain of the consignees who stated that they expected to see their cargo arrive with approximately 10% of the cargo damaged. Mr. Wilson is the person who signed the booking note contract on behalf of Union Carbide. He stated that no instructions were given to Federal Commerce that certain types of vessels were not to be used.

On the evidence before me, I am of the opinion that Federal Commerce is not liable in tort. My starting point for this conclusion is the fact that Union Carbide, UCC and Captain Angel were all aware of a restriction with respect to the height to which the pallets could be stowed. This stems from the testimony of Mr. Cunningham and Captain Angel and from the memorandum produced by the Plaintiffs in fulfilment of undertaking number 15 of Mr. Cunningham's examination on discovery. In these circumstances, it is somewhat surprising that Union Carbide did not pass on this information to Federal Commerce when the booking note contract was entered into in October 1978. The fact that the pallets could and should not have been stowed higher than three tiers was certainly relevant insofar as Federal Commerce was concerned. Indeed, it was important in regard to the type of ship that would be nominated to carry the cargo and it was also relevant in determining the positioning of the cargo in the holds of the designated ship. With a three tier limit, the amount of freight payable to carry the

cargo might have been higher. However, in the event, Union Carbide did not inform Federal Commerce of any restriction or limitation in regard to the stowage of the pallets when it made the booking note contract.

Consequently, when Federal Commerce prepared its stowage plan for the HUDSON BAY it was not aware nor could it have been aware, in my view, of the height restriction. As I indicated earlier, the stowage plan would have been prepared prior to the commencement of loading cargo on the HUDSON BAY in Detroit.

The only evidence that the height restriction was communicated to Federal Commerce is that of Captain Angel. I did not find Captain Angel's testimony on this point to be very clear. In chief, I understood him to say that he advised Federal Commerce during the November 18, 1978 meeting. He stated that he told Federal Commerce that three tiers was the maximum height and that four tiers were possible if proper dunnage flooring was done between the second and third tiers.

However, in cross-examination, I understood Captain Angel to say that at the time of the November 1978 meeting, he had not raised the height limit because he had not anticipated that the stow would exceed three tiers. He added that he expected Federal Commerce to distribute the pallets over five holds, i.e. approximately 700 tons per hold. He then stated that he would have advised Ray Greene, a surveyor employed by Federal Commerce, and Brian Adams, Federal Marine's general manager, of the height restriction.

In my view, Captain Angel did not inform Federal Commerce in November 1978 of a height restriction. If Captain Angel said anything, he said something to the stevedores when he realized that they were stowing the pallets to a height which exceeded Union Carbide's recommended height of three tiers. Captain Angel does not mention any problem with the height of the stow in his survey report of January 12, 1979. In fact, when one reads his conclusion, he mentions only the possibility that some bags might split because of the pressure of stow. Nothing is said in the report about the stow exceeding the Union Carbide recommended height. Further, Captain Angel did not object nor did he protest the fact that the stevedores were stowing the pallets up to nine tiers in the square of the holds. Captain Angel stated that he did not object because that was not part of his mandate. He duly informed Mr. Cunningham of his observations but Mr. Cunningham apparently instructed him not to do anything because stowing the cargo was "the carrier's decision". During cross-examination, Captain Angel conceded that he had not looked at his file, nor had he been consulted in regard thereto, before the early part of 1996. Thus, Captain Angel paid no attention to this matter for a period of 17 years. In these circumstances, I have great difficulty accepting that he now remembers having told Federal Commerce and Federal Marine that there was a height restriction, bearing in mind that his notes and file were destroyed years ago and that he does not mention, anywhere in his report, his concern about the height of the stow.

It is also relevant to point out that the then cargo superintendent of Federal Marine, Phiroz Moos, testified that he was given the stowage plan prepared by Federal Commerce for the HUDSON BAY which told him in which holds the cargo would be going and to what port the cargo was destined. With this

information, Captain Moos decided the specifics of the stow, i.e. how many tons of the cargo would be going in holds 1, 3 and 5. All the details of the stow, i.e. the blocking, securing, etc., would be effected by the stevedores as they proceeded with the stow in the holds of the HUDSON BAY. This appears clearly from Captain Angel's survey, specifically where he describes the securing of the cargo in holds numbers 1, 3 and 5. For example, at page 5 of his report, Captain Angel states that because he noticed void spaces in holds 1, 3 and 5, he approached the master to find out what steps would be taken to ensure that the cargo was fully secured. Captain Angel goes on to state that the captain advised him that due to the unavailability of carpenters to complete the securing of the cargo in Montreal, the work would be carried out at the Port of Quebec. There is no evidence before me as to whether this work was indeed carried out in Quebec.

The evidence leads me to conclude that those in charge of the loading of the Plaintiffs' cargo on the HUDSON BAY in Montreal did not know, nor could they know, that stowing the pallets as they did could lead to damages. It certainly was not obvious to Captain Angel who had considerable experience in dealing with the subject cargo. At pages 113 and 114 of the transcript of Captain Angel's cross-examination of April 24, 1996, the following questions and answers appear:

> Q. You knew there was going to be a big problem at the conclusion of this loading, didn't you? As a professional mariner, you knew this was going to collapse?
>
> A. No, I wouldn't say that I knew. I had an opinion that there would be a problem with eleven (11) tier [*sic*], and I can ...
>
> Q. When you say a "problem", are you saying a possibility or a reasonable probability there would be a problem?
>
> A. In my opinion there was a possibility. I don't know the conditions that the ship is going to encounter. I can presume the conditions, so I can't say with certainty that something is going to happen, but if you stow these pallets this high, in my opinion, something will happen.

The fact that it was far from obvious that the stow should not exceed three tiers is also the view of expert Peter Marcotte. In his affidavit of March 21, 1996, at paragraph 16, he states:

> I would not expect stevedores to have to do anything beyond what they would be expected to do when loading these pallets into a bulk carrier. I certainly would not expect stevedores to have to do anything to compensate for any inherent weaknesses in the packaging, especially if they were not evident either upon receipt or at the time of loading.

I am therefore of the view that at no time whatsoever was Federal Commerce advised of a restriction regarding the height of the stow. I am also of the view that, absent a clear notice or warning, Federal Commerce could not know that the proposed stowage was unsafe for the cargo as it was not obvious.

I am also of the view that Captain Angel did not inform Federal Marine of the height restriction. I have not been convinced that Captain Angel advised Federal Marine that Union Carbide's packing would not serve its purpose if the stow exceeded three tiers.

In those circumstances, I cannot see how one can fault those in charge of the loading operations for their decision to stow the cargo as they did. As Captain Moos explains, bearing in mind that he had been instructed to load the cargo in holds 1, 3 and 5, the work could not be done otherwise. On the information available to it at the relevant time, Federal Commerce cannot be faulted for having prepared a stowage plan whereby the Plaintiffs' cargo would be loaded in holds 1, 3 and 5 of the HUDSON BAY.

Even if Captain Angel had advised the stevedores of a height restriction, that would not, in any event, render Federal Commerce liable for the loss. Federal Marine's services were retained by Federal Commerce to receive the cargo at the dock, to load it on the vessel and to secure it properly. If the stevedores were negligent, that negligence does not fall upon the shoulders of Federal Commerce. Vis à vis Federal Commerce, Federal Marine was an independent contractor. The stevedores could have been sued by the Plaintiffs but they were not. Also, the carrier would have been responsible for acts of negligence on the part of the stevedores.

For the purposes of the foregoing analysis, I have assumed that the height of the stow was the cause of the loss, but on the evidence before me I am not convinced that it was. Captain Baker attributes the damages to a combination of factors:

1. height of stow;
2. lack of securing of void spaces;
3. wetness of the cargo;
4. collapse of the shelving built to support the cargo;
5. lack of sufficient dunnage;
6. the use of loose bags to fill void spaces.

Captain Baker then goes on to state that, in his opinion, the height of the stow was "the most salient cause". In that opinion, Captain Baker is joined by Captain Angel.

Mr. Marcotte, who testified for the Defendant, agreed with Captains Baker and Angel that the pallets ought not to have been stowed higher than three tiers because the packing of the cargo was not designed to withstand the pressure of a height which exceeded three tiers, given that the nature of transportation was by sea in a bulkcarrier. However, according to Mr. Marcotte, it would have been possible for Union Carbide to pack its cargo in a way that would have allowed stowage up to eight or nine tiers. Thus, according to Mr. Marcotte, Union Carbide is to be blamed for the damages caused to the cargo.

On this evidence, although the damage may have been caused by the height of the stow, the true cause of the loss may be the [illegible]s, unbeknownst to Federal Commerce, inadequately packaged by Union Carbide for carriage.

It is important to remember that the surveyors at the ports of discharge were not of the view that the height of the stow, in itself, was the cause of the loss. They seem to place emphasis on the fact that the cargo was wet. Captain Baker mentions this as a contributing factor. In fact, out of the six factors mentioned by Captain Baker in his report, four of these factors clearly relate to work carried out by the stevedores. As to "wetness of the cargo" as a contributing factor, this could have happened during the loading of the cargo at Montreal or during the ocean crossing. In either case, "wetness of the cargo" cannot be attributed to Federal Commerce.

Wetness of the cargo is also mentioned in the Union Carbide memorandum of August 11, 1983. The writer of the memorandum clearly states that it is essential that the paper bags be kept dry. We know from the evidence that the cargo was not dry at the time of discharge.

The evidence also reveals that the stevedores stowed the pallets to a height of eight tiers in the square of hold number 1, and to a height of nine tiers in the square of hold number 3. In hold number 5, the height of the pallets did not exceed five tiers throughout.

There is no evidence, for example, that the damage caused to the cargo stowed in holds numbers 1 and 3 was greater than that caused to the cargo stowed in hold number 5. In fact, if one were to accept at face value the Manila survey reports, it would appear that the damage was greater to the cargo stowed in the port and starboard wings of holds 1 and 3 where the height of the stow was less than in the square.

In conclusion, on the evidence before me I am unable to state with any degree of certainty whether the losses suffered in this instance were the result of insufficient packaging or improper stowage, including the decision to stack to a height of eight or nine tiers. There was damage in areas of holds numbers 1, 3 and 5 where the stow did not exceed six tiers. With respect to that damage is the cause of the loss the excessive height or is it the fact that the stevedores did not secure the stow properly? Federal Commerce would not be liable if the cause of the loss was negligent work on the part of the stevedores.

For these reasons, I have come to the conclusion that there is no liability in tort on the part of the Defendant. Union Carbide was, in this case, required either to have designed a more sturdy package for the pallets or to notify Federal Commerce that the packaging provided was only adequate up to a height of three tiers. As I have already found that Federal Commerce was not notified of the height restriction, nor was it obvious from the pallets themselves, I cannot conclude that Federal Commerce is liable in tort.

QUANTUM

Although the Plaintiffs' action will be dismissed, I will nonetheless make some findings with regard to the compensation to which the Plaintiffs would have been entitled had they succeeded on their action. In dealing with the issue of quantum, it is necessary to address an evidentiary issue which arose during the trial. That issue is whether documents prepared for the purpose of establishing a claim under insurance policies are admissible in order to prove the quantum of the claims. In my view, they are not admissible.

The Plaintiffs in this action must establish to my satisfaction both that they have suffered a loss and the amount of that loss. In so doing, they cannot rely on any agreements or bargains struck with their insurers. (See *Redpath Industries Ltd.* v. *Federal Pacific (Liberia) Ltd.* (1993), 63 F.T.R. 131 at 142 (Rothstein J.)). What the cargo insurers paid to the respective Plaintiffs is not relevant to the issues which I have to determine and more particularly is not relevant to the amount of compensation which I have to calculate. The Plaintiffs must prove their

standing to sue, the Defendant's liability, either in contract or in tort, and finally the amount of the damages which the responsible Defendant must pay. In so doing, the Plaintiffs must demonstrate that the damage caused to their goods has led to a financial loss on their part. In assessing that evidence, I cannot see the relevance of the insurance documents. The insurers were bound to compensate to the extent that the claim met the terms and conditions of the applicable policy.

I therefore conclude that the insurance documents are not admissible and cannot help the Plaintiffs in proving their loss.

An issue arises with respect to the sufficiency of evidence brought by the Plaintiffs in establishing their loss. Specifically, the Defendant alleges that, as several of the Plaintiffs failed to provide any representative to attest to the losses actually suffered, their respective losses have not been adequately established. In response, Me Tabib states:

> 93. The Defendant is suggesting that unless the Plaintiffs produce one of their representatives to testify that they have in fact suffered a loss from the loss and damages caused to their cargo, they can recover nothing. This suggestion is ludicrous. The measure of damages in cargo damage claims is the difference between the arrived sound market value of the cargo and its arrived damaged market value. Any other financial loss suffered by the plaintiff is not recoverable, and even where no financial loss was suffered (say for example if the cargo had been given to it by a person and had cost him nothing) the basis of recovery remains exactly the same. Whether or not the Plaintiffs testify that they have suffered a loss, and whatever loss these Plaintiffs might testify to is therefore entirely irrelevant save to the extent that their testimony has any relevance to establishing the market value of the cargo, in which case, the testimony is not properly a testimony as to the loss suffered but a testimony as to the market value.

With respect to those who hold the contrary view, I believe that one must make a distinction between damage done to one's property and the loss actually suffered.

The fundamental principle which governs recovery is described in D. Harris, *Remedies in Contract and Tort* (London: Weidenfeld and Nicolson Ltd., 1988) at 39-40 as:

> [C]ompensation should be assessed so as to give P the equivalent in money of the value he would have enjoyed if the promise had been performed by D according to its terms. Hence, the central concept of 'loss' following a breach of contract is P's failure to obtain a future expected benefit. The purpose is not to *restore* P to the former position he was in, before the contract was made, but to give him the monetary equivalent of the future *improvement* in his position which D had undertaken to produce, in return for some price paid or promised by P. Loss of a promised (and therefore expected) benefit, such as the loss of anticipated profits, is the core of the contractual concept: it is typically an attempt to achieve the *post*-performance situation, which is to be contrasted with the attempt in the law of tort typically to restore the *pre*-accident situation.

Harris goes on to state at 41:

> But a crucial feature of the concept of loss in this context is that it refers to the *net* loss actually suffered by P, that is, the loss of the net benefit which he expected to receive from full performance by D. If, as the result of D's breach, P is relieved of the obligation to complete performance of his side of the contract, the cost which he has avoided must be deducted from the gross benefit which he would have received from D's performance, so as to leave only the net loss to be compensated by the award of damages.

Thus, adducing real evidence, in this case documentary evidence of the arrived sound market value and the arrived damaged market value, will establish the amount of the damage caused to the goods, but not necessarily the loss suffered by the Plaintiffs. For example, if the cargo is damaged but re-packaged by the Plaintiffs and then re-sold for the same price as undamaged goods on the market, the Plaintiffs will in fact have suffered no loss as a result of the damage, save for the expenses of re-packaging. This is not to say that this course of action was or should have been followed in this case, only that it requires the testimony of the Plaintiffs to establish what in fact occurred and what losses in reality were suffered.

The Arrived Sound Market Value (A.S.M.V.) minus the Arrived Damaged Market Value (A.D.M.V.) rule does not relieve the consignee of the burden of mitigation which was described by Lord Haldane in *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co.*, [1912] A.C. 673 (H.L.) at 689:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

This principle is re-affirmed by the Federal Court of Appeal in *The Ship Cisco* v. *Redpath Industries Ltd.*, [1994] 2 F.C. 279. Thus, the Plaintiffs must come to court and testify as to what portion of the damages suffered actually caused them a loss.

In her submission, Me Tabib gives as an example the fact that the Plaintiffs would be entitled to the difference in the value of the goods as arrived compared with the value if sound irrespective even if they had received the goods gratuitously. This is true. In such a case the Plaintiffs would have arranged for the best of bargains and that is what they would have been able to claim. However, the Plaintiffs must come to court and say that they exist in law, that the damages suffered have caused a loss to those particular Plaintiffs and that the Defendant is responsible for that loss. The Plaintiffs have not satisfied this onus if they merely establish that damages were suffered. The physical damage is not equivalent to the quantum which the plaintiffs are entitled to recover from a defendant.

In *The Ship Cisco* a portion of a cargo of sugar was damaged by seawater. The consignee of the sugar, Redpath Industries, and its insurers agreed that the cargo would be accepted but that the insurer would settle the insurance claim for 50% of the sound market value of the sugar, less the expense of off-loading it. Redpath was able to blend the wet sugar into large portions of dry sugar and in the end was able to use the entire portion of the damaged cargo in this manner. The trial judge awarded the A.S.M.V. less the A.D.M.V. but then deducted the amount of settlement given to Redpath by the insurance company on the grounds that the Defendant could not be called upon to pay for a loss which was not in fact incurred. This decision was appealed by the Defendant to the Federal Court of Appeal.

Desjardins J.A. wrote at 288:

> The appellants claim the Trial Judge erred in law in using, as a basis for his award, the settlement entered into between the respondent and its under-writers since it bore no relationship to the breach for which the appellants were responsible...they claim that the Trial Judge should have evaluated the damages on the basis of the economic loss actually suffered by the respondent.

In the result, the Court of Appeal agreed with the position of the appellants that the loss actually suffered was the true measure of the quantum of damages. At 292-293 Desjardins states:

> It was evident at the outset, that the respondent had no intention of selling the damaged goods. It decided it would keep it and refine it.
>
> * * *
>
> What the formula A.S.M.V. less A.D.M.V. teaches us is a means of assessing the loss to the claimant at arrival. When the goods are lost at sea or arrive in a state beyond repair, the A.D.M.V. is nil. If third parties sales have occurred in the meantime, they are an irrelevant consideration to the loss. When the goods arrive damaged but are still of some use, the A.D.M.V. represents the best market value which can be found. If the owner does not give himself the trouble of finding such best

> market, he is held accountable for the difference. But where the damaged goods have been repaired without any other option being considered, the A.D.M.V. (which is a market value) does not exist since no market was looked for. To apply the formula in this case would be to give to it an air of unreality. The principle of *resitutio in integrum* should, however, be given its full effect.
>
> I do not find it necessary to decide whether the respondent had "a duty" to mitigate its loss the way it did or to discourse on the scope of this duty. The respondent decided to use the damaged raw sugar in the ordinary course of its business. And after being processed, the sugar became part of its regular product. The respondent cannot therefore be indemnified for more than its loss.

This general principle was echoed by Décary J.A. at 298 where he states:

> That measure of damage [A.S.M.V. less A.D.M.V.] is no more absolute than in other areas of the law; a plaintiff can only recover loss which he could not have reasonably avoided.

The court then went on to examine what steps had in fact been taken by the Plaintiffs and to what expenses they had been put.

At this juncture I must make it clear that I do not consider the issue raised by the Defendant to be in line with *Wood* v. *Grand Valley Railway Co.* (1915), 51 S.C.R. 283 wherein it was stated that a judge must do his or her best to estimate the quantum where damages are difficult to quantify in monetary terms. I also do not consider that this case is closely in line with the evidentiary situation faced by the Court of Appeal in *The Ship Cisco* where the proof from the Plaintiff's witness was sparse. In the case before me, there is no representative at all for some of the Plaintiffs and therefore no evidence at all on this point.

In *The Ship Cisco*, at 299-300 Décary J.A. states:

> The goods were delivered in a damaged condition. Notwithstanding their damaged condition, the respondent was able to use them in its refinery. The fact that they were used by the respondent indicates that they had, at least to it, a value in the refining process, inferior of course to their sound value. To establish that value the owner is expected to assess the inconvenience he will have gone through at the end of the day, cost wise, trouble wise and risk wise, in order to be in a position to use the damaged goods as if they had been delivered in a sound condition. This inconvenience will be referred to as extra costs of production. Needless to say, only those extra costs that have been reasonably incurred will qualify.
>
> It all boils down to a question of evidence.
>
> A word, first, on the burden of proof.
>
> It is not disputed, in breach of contract cases, that the difficulty in ascertaining the amount of the loss cannot relieve the wrongdoer of the necessity of paying damages and is no reason for not giving substantial damages. Courts must under such circumstances do the best they can even if that best is a matter of guess work. One must be careful, however, not to apply that principle where the difficulty arises not from the nature of the loss or the circumstances of the case, but from a plaintiff's own failure to adduce available evidence.

In the case at bar, with respect to Plaintiffs Glee Chemical Laboratories Inc., Jemiken Enterprises Corp., Producers Packaging Corp. and Sri Thep Thai Ltd., no representatives testified at the trial. As to Lafumar Marketing Corp. a witness, Dolores Santos, testified but she was not a proper witness. Ms. Santos had no personal knowledge. All she could do was to identify signatures and company documents. In March 1979, Ms. Santos was a personnel officer. She was in charge of the secretarial staff. She had been told, at the relevant time, by her superiors that a claim had been made under the insurance policy. She could not give any relevant evidence regarding the company's loss. Therefore, her testimony cannot be given any weight.

The only witnesses who testified with respect to the losses suffered by these Plaintiffs were the surveyors retained by the insurers to ascertain the losses payable under the relevant policies. The reports issued by these surveyors, and hence their testimonies, constitute, to a large extent, hear-say evidence. With regard to many aspects of the claim, the surveyors simply relate in their reports, and in their testimony, facts which were obviously not within their personal knowledge. For example, with respect to the claim made by Producers Packaging Corporation, the only witness on damages was Jesus Victa who, in 1979, was employed by Manila Adjusters and Surveyors Company. According to the survey report issued by Mr. Victa in 1979 with respect to the cargo destined for Producers Packaging, 7.39564 metric tons of resin were damaged, i.e. mixed with other grades and/or shapes and contaminated with foreign matter. The report further indicates that the consignee asked for an allowance of 35% with respect to the damaged resin which it kept. At page 7 of his report Mr. Victa states:

> We believe that 35% allowance asked by consignee on the remaining contents of 951-second hand bags weighing 7,395.64 kilos Net contaminated Synthetic Resins is fair and reasonable and may be used as basis of settlement by parties concerned. Same to cover expenses that will be incurred in reconditioning/cleaning.

However, as stated clearly by the Court of Appeal in *The Ship Cisco* the insurance settlement is not evidence of the loss actually suffered by the insured. Page 24 of the transcript of the testimony of Mr. Victa reads:

> Q. Why did you accept the 35%?
>
> A. Well, considering the extent of damage and the consignee would have to clean or remove the dirt and the quality was different because it was mixed with other shapes of resins.

> Q. Did you verify if you could sell it yourself to somebody else with a better price?
>
> A. Usually, we're not allowed to conduct a salvage sale however, what I did was to canvass outside the sound market value of the good order ones and the price of the damaged ones. So, the good order cargo as stated here at the time, April, 1979 was ₱10.00 per kilo and the damaged cargo per kilo as conducted by Smith Bell was ₱5.12.

During cross-examination, the transcript at page 46 states:

> Q. Now, on page 6 of your report, looking down at the bottom, we look at the off-grade synthetic resins that have been co-mixed, what I'm trying to understand is, how was the loss allowance of 35% arrived at?
>
> A. As I have stated a while ago that I canvassed outside how much was the fair market value of the damaged cargo and the good order cargo. That's why when the consignee asked for a loss aloowance [sic] of 35% based on my canvass outside at that time, that was fair.

Without the testimony of the Plaintiff, what the above testimony indicates is only that the surveyor felt that 35% compensation was fair. It reveals only the opinion of a third party and does not indicate the actual loss suffered by the Plaintiff. Furthermore, if the Plaintiff does not testify as to what steps it took, any testimony as to the Plaintiff's position is merely hearsay and irrelevant evidence, except with respect to the fact that it was actually said. The testimony of Mr. Victa is also insufficient proof of what actions the Plaintiff subsequently took. Why could not the consignee in question use the damaged goods? If the consignee was given a 35% allowance, what did it do with the goods?

The transcript reveals, as a further example, that Mr. Victa gave the consignee instructions not to touch the damaged cargo, but there is no proof from the consignee as to whether these instructions were in fact followed. The transcript at 55-56 states:

> Q. How would you control or take note of the damage that the consignee's workers may do to a good order pallet? Do you know whether or not he is damaging it while taking it of [sic] the truck?
>
> A. There was already an arrangement with the consignee's receiving checker to jot down all the external conditions of the pallets in the delivery receipts.

This testimony only reveals what the instructions to the consignee were, but evidence of what was actually done is necessary in order for the Plaintiffs to be successful.

Many other examples could be given but that will not be necessary. On the whole, the above-mentioned Plaintiffs have not adduced sufficient evidence so as to allow me to quantify their loss.

In conclusion, a plaintiff, absent an admission from the defendant, must come to Court to explain the loss suffered as a result of damage to its property. Thus, even if I had found in favour of the Plaintiffs, either in contract or in tort, the Plaintiffs Glee Chemical Laboratories Inc., Jemiken Enterprises Corp., Producers Packaging Corp., Lafumar Marketing Corp. and Sri Thep Thai Ltd. would not have succeeded as they had not proved their loss.

I now turn to those Plaintiffs who have adduced sufficient evidence. In regard to these claims, I am of the view that they ought to be compensated on the following basis: the cif invoice price + 10% sales tax + 30% duty + 10% profit. Thus these plaintiffs would have been entitled to 157% of the cif price. Although the evidence adduced was not of the best quality, I am nonetheless satisfied that this amount is the loss which these Plaintiffs have established. I cannot, however, go beyond that in compensating the Plaintiffs.

The representatives of the Plaintiffs who testified were in a difficult position since they did not have access to their employers' files which had all been destroyed by the time the examinations took place in the spring of 1996. The witnesses could therefore only testify based on their recollection, experience and the documents provided to them by counsel. In most cases, they could not state whether their companies had in fact paid the 10% sales tax and the 30% duty. However, they all testified that the goods could not possibly have been withdrawn from the harbour had these taxes not been paid.

Me Tabib argued that in addition to the cif price, the duties and the taxes, anyone purchasing resin in Manila or Bangkok in 1979 would have had to pay, at a minimum, 10% more to obtain the resin. However, Me Tabib did not stop there. She argued that the Plaintiffs were entitled to compensation based on a market value of 200% of the cif price of the resin.

Notwithstanding Me Tabib's most able and persuasive arguments, I am not prepared to allow the Plaintiffs more than 10% over and above the cif price + 40%. Firstly, the Plaintiffs' representatives who testified all stated that their sales records for the 1979 year were not available and therefore they could not state what the selling or buying price of resin in Manila or Bangkok was in 1979. Further, no evidence was presented through other sources as to the general market price for resin in Bangkok or Manila for the year 1979. There is also no evidence before me from Union Carbide with regard to its selling price to customers in Bangkok or Manila for the period of March 1979 to December 1979.

Surveyor Marasigan testified that he had consulted "consignees" to determine the market price of resin. The other surveyors who testified with respect to the Manila cargo all relied on the information obtained by Mr. Marasigan. Mr. Marasigan's evidence is not satisfactory. All Mr. Marasigan could say was that he had been informed by "consignees" with respect to the prevailing "market". That is clearly hear-say evidence and I am not prepared to give it any weight.

It would not have been difficult for the Plaintiffs to produce their sales records for 1979. Had that evidence been adduced, I assume that I would have had no difficulty in finding what the sound market value was at the relevant time. I was not given any satisfactory explanation as to why those documents were not kept. The burden of proof rests on the Plaintiffs, the consignees, to prove the sound market value. Their sales records ought to have been produced.

The other evidence relied on by Me Tabib was that of expert witness Anthony David Craske. In giving his opinion, Mr. Craske relied on trade publications, journals and trade statistics. He obviously also relied on his personal experience and his own network of information.

He testified that the period of 1978 and 1979 was a “famous period” for the chemical trade. In his opinion, in 1979 prices in the Far East for resin were on the rise. In cross-examination, he indicated that he could not state whether the price increases had occurred in the first quarter of 1979 or later.

On the evidence before me, I am not prepared to allow the Plaintiffs more than 10% above the cif price + 40%. It may well be that the market value was far superior to what I am allowing the Plaintiffs but, on the evidence, I am not prepared to go further as to do so would be speculative. As I said earlier, proving the market which prevailed in March-April 1979 was not a difficult task but, unfortunately, the Plaintiffs have not adduced satisfactory evidence. The fact that 17 years have intervened between the date of the loss and the commencement of the trial does not mean that I must accept evidence which is not satisfactory.

I now turn to the claims of those Plaintiffs who have proven a financial loss. I must point out that clause 5 of the bills of lading provides that the “carrier” is not liable for any loss or damage which occurs after discharge. A clause similar to clause 5 was upheld by the Supreme Court of Canada in *ITO - International Terminal Operators* v. *Miida Electronics*, [1986] 1 S.C.R. 752. Thus, any loss or damage which occurs after discharge is not the carrier's responsibility. To the extent that the Plaintiffs' action is in tort, the Plaintiffs must demonstrate that the damages which occurred after discharge result directly from the Defendant's negligence.

The evidence adduced by Union Carbide Thailand with respect to the damage caused to its cargo rests primarily on the evidence of surveyors employed by Bayne, Adjustors and Surveyors, Ltd. These surveyors, Harnchai Vichaithamkhun and Sittichai Kuptimitr testified on behalf of Union Carbide Thailand. The surveyors' evidence was to the effect that when the cargo was withdrawn from the harbour 4,480 bags of resin were torn with spillage amounting to a loss of 107,101 kilograms. On the evidence, I am satisfied that this loss existed when the cargo was discharged from the ship. Consequently, had I found in favour of the Plaintiffs on liability, I would have allowed Union Carbide Thailand to recover its loss resulting from the shortage of 107,101 kilograms. As I indicated earlier, the Plaintiffs are entitled to compensation on the basis of 157% of the cif price.

I now turn to the Manila consignees. Before examining the individual claims, a few words regarding the unloading of cargo and its handling in the Port of Manila are in order. When goods are offloaded from a ship in Manila, a survey with respect to the condition of the goods is performed by the arrastre contractor, the port authority, and surveyors representing the ship. As a result of this survey, the arrastre contractor issues a bad order certificate, the purpose of which is to show the condition of the goods as they came off the ship. In the survey reports, these certificates are referred to as the E. Razon Inc. certificates.

The goods are then segregated into groups. The first group, containing pallets referred to as bad order pallets, was placed in shed N located at pier no. 15. The other group, containing pallets referred to as good order pallets, was placed in warehouse no. 7 on pier no. 3. The handling of the pallets from ship's

side to shed N and warehouse No. 7 was performed by the arrastre contractor. Neither the ship's representatives nor the consignees' representatives were allowed to participate or observe the movement of the cargo.

Prior to the withdrawal of the cargo from the harbour, the various cargo surveyors requested the arrastre contractor to conduct an inspection of the cargo so as to determine whether additional damages had been done to the cargo. The purpose of the request was to attempt to determine whether additional cargo was damaged during the movement from ship's side to shed N and warehouse no. 7. The arrastre contractor refused to conduct the inspection requested by the surveyors on the ground that the cargo had been discharged in a damaged condition from the ship. The position apparently taken by the arrastre contractor was that they would not issue any bad order certificates unless it could be shown that they had caused the damage.

As a result, no inspection of the pallets could be performed at the harbour by the surveyors appointed on behalf of the consignees. Such an inspection could only take place, and in fact did take place, once the cargo was delivered to the consignees' premises.

The Defendant takes the position that, unless the Plaintiffs can show that no damage was caused after discharge, it is only liable for the damages noted during the joint discharge survey performed by the arrastre contractor and a representative of the ship. The Plaintiffs, on the other hand, base their claim on the damages ascertained by them following the delivery of the goods to their warehouses.

The Defendant takes the position, rightly in my view, that the damages noted at the time of discharge, as evidenced by the E. Razon Inc. certificates, constitutes *prima facie* evidence of damages caused to the cargo while in the care and custody of the vessel. The Defendant further submits that as a result of the aforementioned certificates, the Plaintiffs bear the burden of proving that the additional damage results directly from the condition in which the cargo was discharged from the ship.

Me Tabib submits that the evidence of the cargo surveyors is to the effect that no damage was caused to the cargo during the transport from the harbour to the consignees' warehouses. Thus, she took the position that the damage ascertained at the warehouses was in existence when the cargo was loaded into the trucks at the harbour. That position, on the evidence, is in my view well taken. The issue then is whether the aggravation of damages, ascertained by comparing the damage noted at the time of discharge and the damage noted by the consignees in their warehouses, was caused by the arrastre contractor or is the direct result of the condition of the goods as they came out of the ship. At paragraphs 82 and 83 of her written arguments, Me Tabib sets forth the issues as follows:

> 82. Loss which could have occurred at the ports are of three kinds. 1) loss or contamination of product through the spilling of resin from already damaged bags; 2) Additional damage to bags from pallets falling from forklift trucks or being damaged by rough handling; and 3) loss by pilferage from bags or resin from bags or non delivery of whole pallets or of bags.
>
> 83. There is very little direct evidence of any such losses, and certainly no evidence of how much loss was caused in this way, although there are indications that these kind of losses may have occurred. For all those losses, it must be considered whether the damage is a direct and foreseeable result of Fednav's negligence in tort or breach of duty under the bill of lading, and thus, the liability of Fednav. It must also be considered whether the damage was caused by the negligence of others in such a way that it constitutes a *novus actus interveniens* which would relieve Fednav of liability, and finally, whether Fednav can benefit from the bill of lading exclusions of liability for post-discharge damage.

With respect to what happened between the discharge of the cargo from the ship and its time of withdrawal from the harbour, there is no evidence. The cargo surveyors first saw the pallets after they had been placed by the arrastre contractor at shed N and warehouse no.7.

I agree with Me Tabib, in view of the condition of the cargo as it came off the ship, that further damages were inevitable. It is easy to imagine the difficulty that would have been encountered by the arrastre contractor in manipulating damaged pallets and damaged bags. As Mr. Colford states in his written arguments at page 33:

> The overall problem with the assessment is th [illegible] ent on getting greater following the discharge of the [illegible] hether due to unstable condition of the pallets, m [illegible] court will have to determine what losses are attributable to the carrier's fault as opposed as to what may have been caused by other intervening factors.

Mr. Colford goes on to state:

> It is the Defendant's submission that the failure of the receivers to exercise due care in the handling of a cargo that became unstable constituted a failure to mitigate losses. There was no evidence of any remedial action taken by the receivers following the discharge - the cargo was all handled as if it was in good order. As it is difficult to separate what was lost through rough handling and theft while in the custody of the port from what was lost as a direct consequence of the voyage, we submit that the starting point for assessment of damages is the after discharge joint survey report reproduced in the Manila surveys and the after discharge report in the Sittichai report.

Further, Mr. Colford pointed out to me that the evidence of surveyor Jesus Victa showed that pilferage and careless handling were rampant in the Port of Manila in 1979.

In the circumstances, after carefully reviewing the evidence, I would have been prepared to allow those Plaintiffs who have satisfied me that they have indeed suffered a loss, to recover the damages noted on the E. Razon certificate plus 50% of the difference between that damage and the damage noted at the consignees' warehouses.

For these reasons, the Plaintiffs' action shall be dismissed with costs.

"MARC NADON"
JUDGE

Ottawa, Ontario
May 20, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE: T-2403-81

STYLE OF CAUSE: UNION CARBIDE CORPORATION ET AL. v. FEDNAV LIMITED

PLACE OF HEARING: Ottawa, Toronto, Ontario

DATE OF HEARING: April 22nd, 23rd, 24th, 25th, 26th & 30th, 1996
May 29th & 30th, 1996,
September 3rd & 4th, 1996
October 7th & 8th, 1996

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE NADON
DATED MAY 20TH, 1997

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