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IN THE HIGH COURT OF JUSTICE — Claim No. 2010 Folio 365

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice

Thursday, 7th October 2010

Before:

MR JUSTICE BURTON

B E T W E E N :

PACE SHIPPING CO. LTD. of Malta — Appellant

- and -

CHURCHGATE NIGERIA LTD. of Nigeria — Respondent

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MR D. BAILEY, QC (instructed by Jackson Parton) appeared on behalf of the Appellant.

MR S. BUCKINGHAM (instructed by Bentley Stokes & Lowless) appeared on behalf of the Respondent.

J U D G M E N T

(As approved by the Judge)

MR JUSTICE BURTON:

1. This has been an application under s69 of the Arbitration Act 1996 which has been ably argued by Mr Bailey QC and for which I gave permission on 16 June, 2010. I emphasise, for reasons that will become apparent later in my judgment, that it has been an application under s69 - namely, on a point of law, and not an application under s68. It seems to me, as will become clear, that a good part of the complaint of Mr Bailey relates to a feeling which his clients have that they have been ambushed by the late taking of a point which was not on the face of the pleading. There may be some substance in that, as I shall discuss. However, that does not arise save as part of the background to my consideration as to whether he is right about his point of law.

2. The Award against which this is an appeal was in fact the Third Award, after the matter had come before higher courts, as I shall explain, on a number of occasions. That Third Award was made on 1 December 2009 by a majority of the very experienced Arbitrators sitting in relation to this series of awards. The majority of the Arbitrators concluded in favour of the Respondent on the issue which is now before me on appeal. Those were Mr Roger Rookes and Mr Ben Leach. The dissenting minority member was Mr Bruce Harris.

3. The circumstances arise out of a cargo claim which arose as long ago as 2004 when Arbitrators were appointed. The actual Claimant in the Arbitration, and now Appellant in this appeal, Pace Shipping Co. Ltd. of Malta ("Pace"), launched the Arbitration with a claim for a declaration of non-liability. The real claimant in the Arbitration was consequently the Defendant and Counterclaimant, namely Churchgate Nigeria Ltd ("Churchgate"). There has been a very helpful chronology prepared by Mr Buckingham, of counsel, who has appeared for Churchgate, from which the somewhat complicated history in relation to the Arbitration has been made clear. The First Award was made on 6 September 2007. The conclusion was at that stage in favour of Pace. Pace's case was that Churchgate had no title to sue. Pace's closing submissions were served on 8 June, 2007. They included the assertion that title to the cargo rested not with Churchgate, but with a company called New Burlington International Corporation ("NBIC"). There was included in the closing submissions the following paragraph (18):

> "However, of crucial importance, there is no evidence that [Churchgate] ever became the owners of the cargo, and that is really the end of the case, since the only case advanced by [Churchgate] is that they are entitled to advance a claim in their own name and right pursuant to s.2 of the [Carriage of Goods By Sea Act 1992] CoGSA 1992. In consequence we do not need to consider the possibility that [Churchgate] could have advanced a claim on behalf of [NBIC] under s2(4) of CoGSA if they were the lawful holders of the bills of lading with rights of suit under s.2(1) thereof, which is of course denied. Any such claim is time-barred".

They then refer to an authority, to which I shall refer later, a decision of Hobhouse J in the Commercial Court in *The World Era* [1992] 1 Lloyd's Law Rep 45.

4. Before taking the matter any further I should set out the material terms of s2 of CoGSA, around which the entirety of this appeal has revolved. I do not need to set it all out. S2(4) is the central provision in issue. S2(1) reads:

> "Subject to the following provisions of this section a person who becomes: (a) the lawful holder of bill of lading ...
> shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract".

S2(2) provides:

> "Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—
>
> > (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
> > (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements."

S2(4) reads:

> "Where in the case of any document to which this Act applies –
> (a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage, but
> (b) sub-section (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,
>
> the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised".

5. Churchgate appealed the First Award in which, as I have indicated, Pace's application for a declaration of non-liability had succeeded on the express and only basis that Churchgate had failed to show that it had title to the cargo. The application for permission to appeal was made under s69 on the basis that the tribunal should have concluded that Churchgate had title to sue by virtue of s2 of CoGSA, as a result of becoming holder of the bills of lading, even though not owner of the goods. Churchgate's appeal came before Beatson J, with permission granted by Flaux J, on 12 June 2008.

6. Not surprisingly in the circumstances there was consideration by Beatson J, not only of s2, but in particular of s2(4). In the course of his judgment he said as follows, after setting out ss 2(1) and 2(2) in paragraphs 21 and 22, saying that CoGSA, as was well-known, sought to remove the linkage between title to sue and a proprietary or possessory interest in goods, and reciting, at paragraph 24, s2(4) of the Act:

> "25. The upshot is that the lawful holder of a bill of lading is given title to sue. This is so even where the holder does not suffer loss, provided that, where the bill of lading is spent before he becomes the holder, he became the holder by virtue of a transaction perfected in pursuance of any contractual or other arrangement".

He allowed the appeal in respect of Churchgate's title to sue, and remitted the issue to the arbitrators for reconsideration of whether Churchgate had acquired title to sue pursuant to s2 of the Act.

7. The Arbitrators reconvened without, as I understand it, any further submissions being served. On 24 October 2008 they concluded, by a majority - the same majority as eventually reached the Third Award conclusion - that Churchgate did have title to sue, and that Pace's claim for a non-

declaration of liability failed. The reasons for the Second Award included (at paragraph 4) the following passage,

> "It is clear from the judgment [of Beatson J] that in coming to and recording our decision in our first Award we fell into error by eliding, and thus confusing, proprietary title to sue with contractual title to sue under section 2(2)(a). … That someone who is not the owner of the goods can bring himself within section 2(2)(a) is demonstrated by section 2(4) of CoGSA which specifically contemplates the situation where a non-owner of the goods acquires contractual title to sue by reason of section 2(2)(a) and, thereby, is entitled to exercise the rights transferred to him for the benefit of someone else who has suffered the financial impact of a loss of, or damage to, the goods complained of. For this reason, the view we expressed in the Reasons that NBIC were at least as likely as not to have had title to the goods, is less significant".

They did not at that stage, consequently, conclude finally whether it was NBIC or the Defendant who had title to the goods, but they plainly had expressly in mind the impact of s2(4), if it should turn out that NBIC were the owner of the goods, such that it might be that Churchgate, albeit holders of the Bill of Lading, had themselves suffered no loss in respect of the cargo damage.

8. An important letter then followed, dated 27 January 2009, which was sent to the Arbitration panel before they reached any conclusion on what became their Third Award. It was sent by the solicitors for Churchgate, dated 27 January 2009. In material part it reads:

> "The tribunal has found that that [Churchgate has] title to sue by virtue of s2(2)(a) of CoGSA. Going forward, we note your holding in paragraph 4 of your Reasons that by virtue of s2(4) of CoGSA a non-owner of the goods who has acquired title to sue under s2(2)(a) is "entitled to exercise the rights transferred to him for the benefit of someone else" ... Thus, should the Tribunal find in [Churchgate's] favour on liability, [Churchgate is] entitled to recover substantial damages in respect of the cargo damage, even if some or all of the financial impact of that damage may ultimately fall on NBIC. [Churchgate] would of course be obliged to account to NBIC in respect of all such damages, but that is not a matter that need trouble the Tribunal, and does not affect [Churchgate's] entitlement to recover substantial damages for the damage to the cargo under CoGSA".

There was an immediate response by the solicitors for Pace, dated 30 January 2009. They said in terms,

> "No issue has been raised in this arbitration reference that [Churchgate is] claiming on behalf of NBIC. Any such claim would raise a new cause of action which is now time-barred. Accordingly, the Tribunal does not have jurisdiction to deal with the matter, but even if it had jurisdiction, the claim no longer exists".

This effectively repeated the submission that they had made in their closing submissions for the purposes of the First Award in June 2007 at paragraph 18, which I have already recited in the judgment.

9. The correspondence ran on between the parties, in which more of the same was said on both sides, and, in particular, reference was made to paragraph 4 of the Second Award by Churchgate's solicitors. The significant letter towards the end of the run of correspondence which attached, as I understand it, a good many of the academic, and other, authorities which

have been put before me today, was a letter of 4 February 2009 by Pace's solicitors. They put in a P.S. by which they emphasised that:

> "-- the submissions closed with the exchange of closing submissions. Any directions for further submissions on the substantive issues will undermine the very direction for exchange of final submissions ordered by the Tribunal in the e-mail from Mr Harris, dated 29th March 2007".

So, that is a point by which it was intended primarily to discourage the Arbitrators from ordering any further submissions, but presumably which, at least implicitly, sought to indicate that, as far as Pace was concerned, the contents of the informative and voluminous correspondence to which I have referred should not be regarded as submissions, because it would be in breach of the direction that there should not be any more submissions. Something was made of that by Mr Bailey QC for Pace today and, of course, as I have already indicated, there is no basis on which I could consider any matters which might otherwise fall within s68, which is not before me. But, it seems to me that it is unrealistic to suggest that, albeit that there may have been a direction for one set of submissions back in 2007, the Arbitrators should be blinkered from accepting, whether in the form of submissions or in the form of argumentative letters, the kind of arguments that were put before them in this exchange of correspondence in 2009.

10. In any event, the way that the matter was left by Pace's solicitors was in this paragraph in their letter of 4 February:

> "So long as it is understood that [Pace] protests the jurisdiction of the tribunal at this very late stage to deliberate upon the new case which [Churchgate] advances and which, so we maintain, has ceased to exist by virtue of the Hague Rules time bar, we are content that the Tribunal should determine matters as it thinks fit. Whether that is by way of a further preliminary determination or as part of the overall Award we are content to leave to the Tribunal".

11. In the meanwhile Pace had sought permission to appeal the Second Award, which was refused by Teare J. on 31 July 2009.

12. The Third Award was then made, as I have described. By a unanimous decision, as I understand it, in this respect, all of Churchgate's claims, other than in respect of the value of the cargo, were dismissed - that is, various consequential losses - bank charges, survey costs, legal expenses, etc. Further, and also, as I understand it, unanimously, the Arbitrators concluded that the owners of the cargo were NBIC. Paragraph 119 recites:

> "We have found, first, that NBIC were the owners of the goods; and, second, that [Churchgate has] title to sue. The claim is for shortage, not for wrongful delivery at Lagos of bags that should have been delivered at Port Harcourt".

In paragraph 129, by the majority to which I have referred, the Arbitrators then concluded that Churchgate (albeit not the owner of the goods), was entitled to an Award in respect of the cargo itself, in the sum of $228,197.38 plus interest.

The Arbitrators made no mention of the argument about s2(4) in their Award. Consequently Pace made an application under s57 of the Arbitration Act for a correction of the Award, in more than one respect, but, as far as is material to this application, on that ground. Although I do not have a copy of the application, Mr Buckingham's chronology recites that the tribunal was

requested to deal with Pace's contention that the only claim advanced by Churchgate was "a claim in their own name and right", and that any claim under s2(4) had not been advanced and would be time-barred.

13. The Arbitrators' ruling on the s57 application, which stood as a correction of the Award by a majority, is effectively what has led to this appeal. It is set out on 22nd February, 2010 as follows:

> "As regards the application [concerning] s2(4) of CoGSA 1992, whilst we did not give specific consideration to this, we do not think it necessary for the [bill of lading] holder to plead s2(4). This section simply provides that the rights of suit under s2(1) are exercised for the benefit of whoever has actually borne the impact of the loss and damage complained of. [Churchgate's] shield analogy is, in our view, correct".

This has not been developed before me. It is really a reference to their having the fallback alternative case.

> "Perhaps at greater length than necessary [Churchgate] analyses things correctly. The Act does not give rise to different causes of action according to whether or not the [bill of lading] holder has suffered the loss."

That is the central dispute before me. Mr Harris' minority view was recorded by Mr Leach in the same letter (and Mr Harris has not wished to expand on it) as follows:

> "It was necessary for [Churchgate] to plead a separate course of action in relation to s2(4)".

14. Although Mr Bailey puts his case today on the basis of four interlocking submissions, it seems to me that the central one is his third one - namely, a reliance on the *World Era* case, upon which his clients have relied throughout, to establish the proposition that the claim in this case, by reference to s2(4), amounts to a separate cause of action. If he is right about that, of course, it has consequences:

> (i) that there ought to have been an application for amendment to add such a separate cause of action to the Arbitration proceedings;
> (ii) that if such application had been made it would have been opposed on two bases: first, that it was statute-barred in the sense of the Hague Rules, to which reference has been already made, and secondly that, in any event, it was far too late to make the application, even assuming that it would have been made, as he submits it should have been, in that correspondence to which I have referred, or certainly if made even later than that. Effectively he is submitting that it is one of those cases where, if an amendment application was made, it would have been opposed as prejudicial by virtue of a combination of a delay and of Churchgate's effectively electing against making such an amendment, despite having had that opportunity over a lengthy period.

15. Consequently, if Mr Bailey is right, then he would submit that after success for Pace on the appeal before me, on the basis of there being a separate cause of action, which is the issue for me effectively to decide, the case should not be remitted, because it would be unjust to do so or be bound to lead to failure before the Arbitrators. That is a proposition which is not accepted by Mr Buckingham, his primary case being that there is no requirement for separate pleading of a separate cause of action, but if he were to lose on that, he submits that, even were an amendment to be sought, it falls plainly within the terms of the original reference and thus not be statute-

barred, and, no doubt he would submit, discretion would be a matter for the Arbitrators to exercise. However, in the light of my having heard Mr Bailey's primary submission on the question of the existence of the separate cause of action and indicated that I was against him, I did not call upon Mr Buckingham, and there was thus no need for me to consider, or for either of them to argue, the question of consequences.

16. I turn then to consider the fundamental question, which is whether s2(4) does create a separate cause of action, in the sense that the claimant, under the Bill of Lading, who has suffered no loss in the circumstances when s2(4) is triggered because of not having been, or no longer being, the owner of the goods, is entitled, pursuant to s2(4), to "exercise those rights [being the rights under s.2(1)] for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised".

17. Mr Bailey submits that, if *World Era* is not conclusive of the issue, and in any event, of course, it is a judgment which is only persuasive rather than binding on me, being a judgement of Hobhouse J, who, however eminent, nevertheless was then simply a judge of the Commercial Court - I should nevertheless come to the same conclusion as he reached, because, effectively, of the identity of the issue that he was deciding with that which I am now deciding.

18. I shall therefore turn to consider, as briefly as I can, the context of the *World Era*. That was a case in which Petrolsea, the charterers, issued arbitration proceedings. Some time after the arbitration was commenced, a draft amended points of claim was submitted, to which was added an additional allegation, that the charterparty was made by Petrolsea as agents for undisclosed principals, Marc Rich. I leave aside any further references to other parties which were not considered relevant in the event. So, the headnote recites, "The claim for damages was recast. It was alleged that Petrolsea and/or their principals Marc Rich had suffered loss and damage." The allegation then read:

> "... Petrolsea in their own right [and then, by way of amendment] or in the right of East Coast or of Marc Rich are entitled to recover that loss and/or expense as agents for undisclosed principals".

Hobhouse J deals with that history at p49ff. In particular he recites the final pleading:

> "Further or alternatively if contrary to the claimants' case, the claimants were not agents for Marc Rich and able to claim their loss on their behalf, the claimants were principals and the loss arising out of the respondent's breach of contract was suffered by them as such".

Hobhouse J concluded that the amendment to add the alternative case that Petrolsea was entitled to claim damages in the right of Marc Rich was the addition of a separate cause of action and, on the facts of that case, both statute-barred and outside the reference. He said as follows at p52,

> "… I consider that in one respect Petrolsea, although still putting themselves forward as the only claimant in the Arbitration, does purport to raise a new or different cause of action. This is the allegation that they are entitled to recover not only in their own right but in the right of East Coast and Marc Rich ... When one comes to the clause which pleads the loss and damage, insofar as the Claimants allege that they have incurred a liability to indemnify East Coast and/or Marc Rich [for] the losses suffered by either or both of those entities, there are matters which are properly pleaded and are relevant to the claim of Petrolsea. Insofar as Petrolsea also allege that: 'their principals Marc Rich,'

> have suffered loss and damage, in my judgment Petrolsea are going beyond, as a matter of allegation, what they can claim by virtue of the cause of action which they are asserting. …
> To recover in the right of another is to assert a cause of action of that other person. Such a cause of action had at no time been referred to directly or indirectly prior to the delivery of the draft amended pleading in 1990. On the face of it it is a new cause of action not included in the original reference which only included claims based upon a cause of action of Petrolsea and losses which Petrolsea was entitled to recover in its own right".

Then he concludes:

> "Firstly, the principle under which there are rights of suit by or against an undisclosed agent or his principal depend upon there being only a single contract and therefore only a single cause of action by or against the agent and principal …
>
> … All [Marc Rich] has done is to cause its agent, Petrolsea, to make a claim not in Petrolsea's right, but in the right of Marc Rich. That is not, in my judgment, permissible within the existing reference".

19. That was, of course, a perfectly standard consideration of the common law issues of rights of action, both as principals and as agents and under contract. It did not begin to consider the effect of the statutory scheme which I am considering and which was not before Hobhouse J.

20. Mr Buckingham sets out his stall very shortly by way of conclusion in his skeleton argument where he says as follows:

> "35. In *The World Era* it was … the allegation that the claimant was entitled to recover 'not only in their own right but in the right of East Coast and Marc Rich' that Hobhouse J considered gave rise to a new or different cause of action which was outside the scope of the arbitration reference …
>
> 36. That, however, is self-evidently not this case. [Churchgate does] not seek to advance the rights or the claim of anyone but themselves. [Churchgate's] <u>own</u> rights entitle them to recover damages for the benefit of NBIC".

21. Section 2(4) arose in the context that there was concern that the holder of a Bill of Lading entitled to sue could find itself unable to recover losses, and, of course, conversely, that the real loser, without the benefit of a straightforward recourse under the Bill of Lading, would be left with a much more difficult case to make.

22. It was the subject of consideration by the Law Commission with whose Report I have been supplied by the parties, and which formed part of the correspondence which was submitted to the Arbitrators. The Law Commission Report, which led to CoGSA 1992, was laid before Parliament in March 1991. In the section headed up "Recovery by those who have not suffered loss" the following passages appear:

> "2.24 Transferring rights of suit to the holder of a bill of lading, regardless of the passage of property in the goods to which the bill relates, may give rights of action to those who have actually suffered no loss ...

> 2.25 ... Our policy is to give rights of action to holders of bills of lading ... We do not think it satisfactory that a sea carrier should be able to question the entitlement to sue of the consignee or endorsee by raising a technical point that the loss may ultimately fall on someone else.
>
> 2.26 Although it is a general rule that one person cannot recover another person's loss, there are exceptions. In addition to cases such as trustees recovering their beneficiaries' losses and bailees recovering where the ultimate loss falls on the bailor, the House of Lords in *The Albazero* recognised in principle that a consignor of goods could recover damages against the carrier where he had entered the contract for the benefit of the ultimate consignee, although not where the consignee had rights under the Bills of Lading Act.
>
> 2.27 ... Sometimes a forwarding agent or a bank is named as the consignee in a bill of lading. In those cases, we do not see anything wrong in the agent or bank suing and then holding any proceeds on account ... However, the general rule of English law is that where the plaintiff has suffered no financial loss he will not recover substantial damages. Thus, clause 2(4) of the Bill provides that where a person with an interest or right in respect of goods to which the document relates is not the holder of the bill of lading, the holder shall be entitled to exercise the statutory rights of suit to the same extent that they could have been exercised if they had been vested in the person for whose benefit they are exercised".

The Law Commission goes on to recognise that that will mean that discovery - as it then was, now disclosure - could be obtained against a stranger to the action, i.e. the actual loser, even if thus not a party to the action, because of the vesting of the cause of action in the holder of the bill of lading.

23. There has been discussion in the academic works, again all, or most, of which were submitted to the Arbitrators in the correspondence. In **Aikens, Lord & Bools - Bills of Lading** (2006 Edition) at paragraph 8.82, in commenting upon s2(4), the authors said:

> "This is a necessary part of the scheme that separates rights of suit from property, and it arises from the general rule in English law, which is that if a person sues in contract he can only sue for his own loss. It prevents the potential injustice which would occur if a person were to acquire title to sue under the Act, only to be met with a plea that it was a different party without such title who had suffered the relevant loss".

24. Similarly, in **Carver on Bills of Lading**, edited by Treitel & Reynolds (2nd Ed. 2005) it is stated at 5-075 that:

> "The purpose of [s2(4)] is to avoid the consequences which might, but for the sub-section, flow from the general principle of English law that damages in a contractual action can be recovered only in respect of the Claimant's own loss".

25. A helpful article in the [1991] **Lloyd's Maritime & Commercial Law Quarterly**, written by Mr Beatson before his appointment, but which he no doubt had well in mind when he delivered the judgment in this case, is called "Rights of suit in respect of carriage of goods by sea". He and his co-author, Mr Cooper, state at p204:

> "The issue raised by cl 2(4) proved a difficult one. It deals with the scenario where someone has suffered loss or damage but does not have rights of suit and allows the

person with rights of suit to exercise those rights [my emphasis] for the benefit of the person who has suffered the loss or damage in question".

26. Mr Bailey has referred to the latest edition of **Benjamin - Sale of Goods**, 8th Ed (2010), which includes a similar passage at 18.162 to that which was referred to the Arbitrators under the heading "No duty to sue for benefit of another", but also 18.161, which was not expressly referred to the Arbitrators, under the heading "Extent of rights exercised for and to the passage" which says:

> "Where rights are "vested" in A, by virtue of s2(1) "those rights" can, in the circumstances specified in section 2(4), be exercised by A for the benefit of B 'to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised", i.e. in B as if he had been a party to the contract of carriage. The assumption (or fiction) that B is a party to the contract of carriage (when actually he is not) most obviously covers the case where B is not and never has been a party to that contract".

The editors then give various examples. I am entirely clear that that adds nothing different from what is set out and analysed in the rest of the academic research. It is plain that what is important, as of course he argued by reference to the first of his four submissions, is that the loser will not be compensated if that loser does not have a cause of action, or cannot show that it was a party to a contract of carriage in respect of the goods. However, nothing in **Benjamin** contradicts, and everything in the rest of the authorities to which I have referred shows, that the central question is, for the purpose of s2, whether the holder of the bill of lading has a cause of action. If he does, then he, or it, can exercise those rights not only for the benefit of himself, or itself, but also for the benefit of the loser who is not pursuing a cause of action in the relevant proceedings.

27. Of course, that leads, as Mr Bailey points out by way of his fourth submission, to difficulties and consequences, some of which were foreseen in the Law Commission Report, and which are addressed:

> (i) As I have already indicated, it means that, in the proceedings brought by the holder of the bill of lading, there may be a call for disclosure by, or against, or in respect of, a third party, which of course may lead to difficulties in an arbitration, as opposed to legal proceedings;
> (ii) there will be questions of double jeopardy or issue estoppel because, of course, it would still be open, or might still be open, for the original loser to bring his, or its, own action by reference to ordinary laws of contract and not by reference to the bills of lading;
> (iii) for the same reason there may be special defences which are available to a defendant against the real loser - set off, or other defences of that kind - which would need to be set up against the holder of the bill of lading who is suing for the benefit of that other.

28. But all those points that are made by Mr Bailey seem to me not to lead to the conclusion for which he contends. They do not lead to the conclusion that there is a separate cause of action which is being pursued by the holder of the bill of lading - rather the contrary. It is quite plain that he is pursuing his own cause of action, but recovering pursuant to that cause of action someone else's loss, albeit that he has no, or additional, loss himself, and that loss may be one, possibly the only one, of any heads of loss claimed or recovered.

29. What it does make plain is that there must be a proper particularisation of such a case. If and insofar as the majority of the Arbitrators is saying, when they say there is no requirement to plead s2(4), that there is no need for the case to be particularised, then I would respectfully disagree. There may be no particular need to mention the magic formula of s2(4) of the Act, but it seems to me quite clear that it must be sensible in the ordinary case, by way of original pleading or by way of further information, where a bill of lading holder is either directly, or (as it would have been in this case) in the alternative, seeking losses for the benefit of a third party, for that case to be pleaded, in order that the possible issues to which I have referred above can become clear. Thus, in this case, the sensible course would have been for Churchgate, who had asserted, as it did, and continue to do, although it lost in the end, that it was the owner of the cargo, and consequently had suffered both the loss of the cargo itself and other consequential losses, to have pleaded expressly in the alternative if, contrary to its contention, it was not the owner of the original cargo, then it claimed that loss for the benefit of that original owner, NBIC. That would enable the opposing party to raise special defences or to seek disclosure if such were appropriate.

30. That seems to me the right way of doing it, and it requires proper particularisation of the heads of losses, but it does not lead to the conclusion that the point of law raised by Mr Bailey is right. I am satisfied that it is not right. I am satisfied that ,on a proper construction of s2(4), the Defendant here was pursuing its own cause of action and, in the event that it did, as it did, lose on the issue about original ownership of the goods, it was entitled, pursuant to its own cause of action, albeit having suffered no loss, to recover, pursuant to its own cause of action, the loss suffered by NBIC and, in due course, no doubt, to account for it. That is the system that is permitted, and initiated, by s2(4), of the Act.

31. In the event in this case it may well be thought that it took a long time for Churchgate to realise that it needed to articulate that alternative case in the letter of 27 January 2009. S2(4) had been mentioned in the closing submissions, to which I have referred, in June 2007, and in the judgment of Beatson J. It seems that it was a belated realisation by Churchgate that it ought to be making that case in the alternative, although it continued very firmly throughout the correspondence to deny that that was its case. However, this is not, as I indicated at the outset, a s68 application in which any kind of case is put forward that there was misconduct by the Arbitrators in the sense of procedural unfairness. In any event, I am not satisfied that any prejudice whatever was suffered. If Pace is wrong on its main argument, as I conclude it is - which means that its arguments on statute bar and time limit would fall away - I do not believe there is, in the event, any prejudice in relation to lack of disclosure or absence of special defences. I am satisfied those would have been raised, if there had been any, in the correspondence to which I have referred. But, even if there were such prejudice, all that does not arise as a matter of relevance in a s69 application. I have simply taken the opportunity, in dismissing this appeal, of indicating that it appears to me, for all the reasons that have become clear in the course of this case and this judgment, that it is right and it is sensible for a s2(4) case to be particularised properly, so that, well before the outcome of the arbitration or court hearing, all parties know precisely what is being sought, and for whose benefit.

32. In relation to the particular issue that is before me, I conclude that Hobhouse J's case is not in point, and that nothing else supports the proposition that what was happening here was the bringing forward of a separate cause of action. I am satisfied that what happened here was that, on the basis of Churchgate's own "rights of suit", it recovered loss which in the event was found to be loss which it was not for it to retain, but was only recoverable on behalf of NBIC. In those circumstances this appeal is dismissed.
