Neutral Citation Number: [2023] EWHC 2203 (Comm)

Case No: LM-2022-000084

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 September 2023

Before:

HIS HONOUR JUDGE KEYSER KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

(1) JB COCOA SDN BHD **(2) JB FOODS GLOBAL PTE LTD** **(3) BALOISE BELGIUM NV/SA** **(4) XL INSURANCE COMPANY SE,** **SUCCURSALE FRANCAIS**	**Claimants**
- and -	
MAERSK LINE AS **trading as Safmarine**	**Defendant**

- -
- -

Andrew Leung (instructed by **Birketts LLP**) for the **Claimants**
Thomas Steward (instructed by **Campbell Johnston Clark**) for the **Defendants**

Hearing dates: 13, 14, 15 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 September 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

H.H. Judge Keyser K.C. :

Introduction

1. The claimants claim from the defendant €185,355.78 as damages arising out of damage to a cargo of cocoa beans ("the Cargo", or sometimes for clarity "the Chennai Cargo") carried under a bill of lading ("the Bill of Lading") issued at Lagos, Nigeria, on 26 September 2017 on board the M/V Maersk Chennai ("the Vessel") from Lagos to Tanjung Pelepas, Malaysia. The Cargo was discharged by 1 October 2017 but was not collected until around 28 November 2017, when it was found to be suffering from condensation and mould damage.

2. The first claimant ("JB Cocoa") claims as the alleged owner of the Cargo. The second claimant ("JB Foods") claims as the lawful holder and indorsee of the Bill of Lading. The third and fourth claimants (together, "the Insurers") claim as the insurers who, having indemnified JB Cocoa for its losses, are said to be the assignees under French law of JB Cocoa's claim. The defendant was the carrier.

3. In brief summary, the claimants' case is that the damage to the Cargo was caused by the defendant's breach of its duty to take reasonable care of the Cargo until the point of delivery, in particular from the time of discharge until the time of delivery. The essence of the defendant's case is that the terms of the Bill of Lading exempt it from any liability and that in any event it took proper care of the Cargo, which probably deteriorated on account of inherent vice. The defendant also either disputes or does not admit the standing of the defendants to claim damages for the condition of the Cargo.

4. The trial was heard over three days. The claimants called one witness of fact, namely Mr Romuald Djossou, General Manager of JLB Expertises Togo ("JLB"), an inspection and survey company. They also relied, as hearsay evidence, on the witness statement of Mr Kuek Hong Chieh, JB Cocoa's Assistant Costing Manager, who is based in Malaysia. The defendant called one witness of fact, namely Ms Candyz Chua, a Customer Experience Partner in its employ. The witness statement of a further witness, Captain Kyaw Thu, the Master of the Vessel, was admitted as unchallenged evidence, as the claimants did not require him to attend for cross-examination.

5. Each party also adduced written and oral expert evidence in respect of the damage to the Cargo. The claimants' expert was Dr Roger Bancroft, a forensic plant pathologist. The defendant's expert was Mr Christopher Ellyatt, a biologist specialising in forensic analysis of incidents concerning marine cargo. Both experts were properly qualified to express expert opinions in this case and, on the whole, each gave his evidence fairly and with proper regard to his duties to the court.

6. I am grateful to counsel, Mr Andrew Leung for the claimants and Mr Thomas Steward for the defendant, for their submissions, the length, detail and rigour of which were not constrained by the limited value of the claim.

7. The remainder of this judgment is structured as follows.

    - Factual narrative, based mainly on the documents: paragraphs 8–47
    - Summary of the expert evidence: paragraphs 48-50
    - Relevant contractual terms: paragraphs 51-54

- Summary of the parties' respective cases: paragraphs 55-57
- Discussion (paragraphs 58-126) comprising
    - Relevant law: paragraphs 59-66
    - Standing of the claimants: paragraphs 67-74
    - Condition of Cargo at time of loading: paragraphs 75-85
    - Condition of Cargo at time of devanning: paragraph 86
    - Cause of the damage: paragraphs 87-92
    - Duration of the defendant's responsibility: paragraphs 93-105
    - Liability if the defendant remained responsible: paragraphs 106-109
    - Loss if the defendant remained responsible: paragraphs 110-119
    - Mitigation of loss: paragraphs 120-123
    - Separate claim for short delivery: paragraphs 124-125
- Summary of reasons and conclusions: paragraphs 126-128

Narrative

8. There is in evidence an unsigned Purchase Order dated 23 June 2017 from JB Cocoa to JB Foods for the purchase of 300 metric tons (tonnes) of Nigeria Cocoa Beans – Mid Crop. The bean specification included a maximum moisture content of 7.5% and maximum "Moldy + insect damage" of 6%. The Purchase Order was for shipment in June to July 2017, c.i.f. Tanjung Pelepas, Malaysia. The payment terms were "Cash Against Document".

9. On 26 June 2017 JB Foods contracted to buy from DIT SA ("DIT") 300 tonnes of Nigerian cocoa beans, with the same specification, for shipment June to July 2017, c.i.f. Tanjung Pelepas or Surabaya, Indonesia, at Buyer's option. The contract was expressed to be subject to the FCC [Federation of Cocoa Commerce] Contract Rules for Cocoa Beans, which were deemed to incorporate the FCC Quality Rules, the FCC Sampling Rules, the FCC Weighing Rules and the FCC Arbitration and Appeal Rules. The payment obligation was "Cash Against Documents at first presentation."

10. DIT in turn contracted to buy 300 tonnes of Nigerian cocoa beans from WACOT Ltd ("WACOT"). The contract specified a maximum of 7.5% moisture and a maximum of 7% (rather than 6%) for defect.

11. On 1 August 2017 DIT instructed JLB to carry out an analysis of the cocoa beans it was buying from WACOT. The instructions forwarded by JLB's head office at Marseille to its office in Nigeria and its laboratory at Lomé, Togo, included the following:

> "1. Sampling/Analysis: … As the lots have to be agreed before stuffing, the samples must be numbered carefully … if no ref of lots from the shipper.
>
> 2. Weighing: Only when quality of lots will be agreed by DIT.
>
> 3. Stuffing: … You will have to take moisture contents in 100% of the bags."

Mr Djossou explained that the instructions required two separate laboratory analyses: first, approval analyses before loading in containers, in order to validate the batches; second, further quality analyses in order to enable the official quality certificates to be issued at the time of loading at the warehouse.

12. JLB's first laboratory analysis was carried out in the first week of August 2017. The consignment at the warehouse at Ibadan, Nigeria, comprised 300 tonnes contained in a total of 4,800 bags divided into 24 Lots. One sample, weighing 2000 grams, was taken from each 100-tonne part, comprising 1600 bags. The samples were sent to the laboratory in Lomé and were analysed by Mr Djossou, who on 7 August 2017 prepared Cocoa Analysis Reports Nos. 1, 2 and 3. Report No. 1 related to the sample from Lots 1 to 8. Report No. 2 related to the sample from Lots 9 to 16. Report No. 3 related to the sample from Lots 17 to 24. Of relevance to this case are the results for mould and moisture content. The percentage of mouldy beans was recorded as 5.67% (Report No. 1), 5.33% (Report No. 2) and 7% (Report No. 3). The moisture content of each sample was recorded as 6.5%. In cross-examination, Mr Djossou said that he had tested each of the three samples three times using DICKEY-john equipment and that each of those nine tests produced the same result, namely 6.5% moisture. Each Report recorded of the sample: "Typical cocoa smell, No contamination or off odour detected."

13. On 9 August 2017 DIT sent an email to hauliers, copied to the defendant:

> "We have finalized a 300t cocoa beans contract with WACOT ltd in Nigeria, goods are ready for shipment and we have authorized the shipper to use our account number to proceed with the freight booking with SAFMARINE, for final destination Tanjung Pelepas.
>
> I would appreciate it if you could request your office in Lagos to prioritize urgently the delivery of the 12x40' TC to: Wacot warehouse … together with the adequate material for the proper dressing of the containers."

14. JLB produced a Stuffing and Loading Inspection Report, which records the following information. Twenty-two Lots—Lots 1 and 2 and 5 to 24—containing 4,430 bags were delivered to the WACOT warehouse in Ibadan on 21 August 2017, as were eleven 40' dry containers. The bags were in "good condition"; they are recorded elsewhere to have been new jute bags. The containers were lined with single-face corrugated cardboard by lorry drivers on 22 August; 48 dry bags were also hung. The containers were fumigated on 22 to 25 August. Stuffing operations commenced at 10.35 a.m. on 22 August and were completed at 6.20 p.m. on 24 August 2017. Eight containers were stuffed with 400 bags each, and three containers were stuffed with 410 bags each. Weather conditions were sunny, with an outside temperature of 30°C. "The moisture contents of the 22 Lots were controlled with an Aqua-Boy KPM of KAOI type no. 000655". Moisture contents were checked on 21 to 24 August and were recorded by reference to pairs of Lots. For each pair, the minimum recorded moisture content was 5%. The maximum recorded moisture content was 8% in Lots 5 and 6, Lots 7 and 8, Lots 9 and 10, Lots 13 and 14, and Lots 23 and 24; for all other pairs of Lots, the maximum recorded moisture content was 7.5%. The average recorded moisture content was 7.07% for Lots 7 and 8 and 7.11% for Lots 9 and 10; for all other pairs of Lots it was within the range 6.35% to 6.86%. The overall average was 6.67%.

15. The chronology recorded in the Stuffing and Loading Inspection Report gives rise to several difficulties and cannot be entirely correct. Stuffing of the containers cannot have been carried out on 22 to 24 August if the containers were being fumigated from 22 to 25 August. A Phytosanitary Certificate issued by Nigeria Agricultural Quarantine Service (Plant Health) on 22 September 2017 recorded that the Cargo had been fumigated for 72 hours; the date of treatment is simply shown as 19 August 2017. The same details are shown on a Phytosanitary Certificate, also issued on 22 September 2017, in respect of the Cameroun Cargo. The same fumigation date of 19 August 2017 was certified by the Federal Produce Inspection Service of the Federal Ministry of Industry, Trade and Investment in respect of both the Cargo and the Cameroun Cargo on 25 September 2017. However, if the bags and the containers were delivered to the WACOT warehouse only on 21 August, fumigation cannot have taken place on 19 August. If fumigation was undertaken on 19 August, stuffing must have occurred before that date. The precise chronology is confused[1].

16. JLB's second laboratory analysis was carried out by Mr Djossou on 30 August 2017 using three samples taken at the WACOT warehouse. He produced three further Cocoa Analysis Reports: No. 4, relating to Lots 1 to 8; No. 5, relating to Lots 9 to 16; and No. 6, relating to Lots 17 to 24. The percentage of mouldy beans was recorded as 3% (No. 4), 3.33% (No. 5) and 3.33% (No. 6). The moisture content in each sample was recorded as 6.5%. In cross-examination Mr Djossou said that he had tested each of the three samples three times and that the result of 6.5% had been achieved on each occasion. His evidence, therefore, was that on every one of 18 occasions when the six samples were tested the identical result of 6.5% had been achieved. As had been the case with Reports Nos. 1 to 3, Reports Nos. 4 to 6 each recorded of the sample: "Typical cocoa smell, No contamination or off odour detected."

17. The containers arrived at Apapa port on 25 August 2017.

18. According to the Stuffing and Loading Inspection Report, the Vessel arrived at Apapa on 6 September 2017. This date, too, appears to be incorrect, because an email on 5 September indicates that by then WACOT already knew that only 11 and not 12 containers had been loaded onto the Vessel.

19. The Vessel sailed from Nigeria on 8 September and proceeded to Malaysia via the Cape of Good Hope and the Indian Ocean.

20. For reasons which are not apparent, a twelfth container, containing the balance of the 300 tonnes of cocoa beans ("the Cameroun Cargo"), was not shipped on the Vessel but instead was loaded onto the MV "Maersk Cameroun", which sailed on 15 September 2017 and followed a similar course to Tanjung Pelepas to that taken by the Vessel.

21. On 19 September 2017 DIT requested that certain alterations be made to the bill of lading in respect of the Cargo, which had yet to be issued, "so we can cool down our buyer in Malaysia." That remark alluded to JB Foods' irritation at initial delay in shipping followed by the omission of the twelfth container from the Vessel.

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[1] Matters are not helped by the fact that, after a complaint by DIT that its instructions regarding fumigation had not been complied with, a new Phytosanitary Certificate was issued in respect of the Cargo to show that fumigation had been carried out over 120 hours (not 72 hours as previously shown). The production of this new Phytosanitary Certificate appears, on the information available, to be highly irregular.

22. On 26 September 2017 the defendant issued the Bill of Lading. (It appears that WACOT had submitted a draft bill of lading in respect of the 12 containers on 30 August but that the matter was delayed by discovery of the short-shipment.) The Bill of Lading was on a "Safmarine" standard form for ocean transport. It named the shipper as "WACOT Ltd", the consignee as "To Order", and the notify party as "DIT S.A.". The particulars furnished by the shipper recorded 11 40' containers said to contain 4,430 bags of Nigerian cocoa beans in new jute bags, with a gross weight of 280,920 kg and a net weight of 276,490 kg. I shall set out the further material provisions of the Bill of Lading below.

23. The Vessel arrived at Tanjung Pelepas without incident after an uneventful voyage with no particularly bad weather and within the usual anticipated timeframe. The Cargo was discharged from the Vessel on 30 September and 1 October 2017. Following discharge from the Vessel, the defendant stored the Cargo, presumably in the marshalling yard of the Free Zone container facility. It is this storage that gives rise to the claim.

24. On 8 October 2017 the Cameroun Cargo was discharged at Tanjung Pelepas.

25. On 26 October 2017, as the Cargo had still not been collected, Ms Chua sent an email to a Mr Ang, apparently at a Malaysian Cocoa Manufacturer:

> "As per checking, we found out there have one DIT SA shipment was discharged at TPP since 30th Sept. Due to no local consignee/notify party detail, thus and caused this lot shipment was delay at TPP exceeding 26 days.
>
> Seeking your urge[nt] follow up with trader DIT SA to confirm who is the correct consignee for this lot shipment as all port storage and detention/demurrage are incurring now."

The reply on Friday 27 October was: "I think the shipment not for us. Pls check with DIT to confirm."

26. On 27 October Ms Chua sent an email to a Mr Elling in the defendant's Nigerian Export Team:

> "There have an import shipment out from Apapa to TPP under notify party: DIT SA and consignee stated 'To Order'. This shipment was arrived TPP on 30th Sept and not clear from TPP port yet. As there is no local consignee detail and notify party, destination office unable to proceed further follow up. All of these containers was laying at port almost 1 month.
>
> Herewith attached OBL copy for your perusal.
>
> Seeking your urge[nt] follow up with supplier and contractual customer DIT S.A to advice consignee to clear containers asap."

Mr Elling replied that day that he would "check with CEP and our team about actual steps we did" and would then call the customer and revert with his findings. The Nigerian Export Team promptly sent an email to DIT: "Please urgently advise the

consignee details for the subject booking. Cargo is at the destination port Tanjung Pelepas from last 1 month." That same evening, DIT replied:

> "Communication on your intranet is far from efficient.
>
> Collection of above contract has been delayed due to late receipt of shipping documents from origin.
>
> Final receiver is: JB Foods Global Pte Ltd".

The address and contact details, apparently of the final receiver, were then set out. However, the contact was one Yee Zheng Lee of JB Cocoa.

27. On Monday 30 October 2017 Ms Chua continued the email chain with an email to JB Cocoa; the subject line was, "Long Outstanding shipment at TPP – DIT Shipment – 769988025 – Urgent":

> "Been advised by your customer / DIT SA that one of the shipment 769988025 is under your good company. Shipment was export from Apapa to TPP, containers arrived at TPP on 1st October. Arrival notice was sent as per confirmation from DIT SA. Herewith attached arrival notice and OBL copy for your container clearance purpose."

It may be that the "confirmation from DIT SA" referred to by Ms Chua was just DIT's email of 27 October; I do not know what else it could have been. The "attached arrival notice" mentioned by Ms Chua was marked "Archive Copy" and had a print date of 30 October 2017. (No such document had been sent previously.) It identified DIT as the Notify Party and WACOT Ltd as the Shipper, but it did not identify the vessel, the port of loading, the port of discharge or the particulars of the goods. A subsequent email that day from Ms Chua to JB Cocoa corrected the arrival date from 1 October to 30 September and attached an Arrival Notice, again marked "Archive Copy", that showed the Vessel, the port of loading, the port of discharge and the particulars of the goods; it had a print date of 9 October 2017, although there is no evidence that an Arrival Notice had been sent out on that date or at all before 30 October 2017.

28. JB Cocoa replied on 30 October:

> "Regret to informed [sic] that we not recognized the shipment, due to the consigned not under our name. Please revert to the booking contract holder on the matter."

Ms Chua replied:

> "As per our tele-con earlier, this import shipment 769988025, term and condition was established in between Trader DIT SA and your good company JB Cocoa.
>
> Suggest that you have mutual agreement with DIT SA to solve and clear this shipment from port to avoid more and more liner and port storage charges incurred."

29. It was also on 30 October 2017 that DIT complained that its requirements regarding fumigation had not been complied with. It demanded the issue of new phytosanitary certificates, modified to show compliance with its requirements, and threatened that it would seek to recover losses caused by any delay in the authorities admitting the Cargo into Malaysia on account of the terms of the original certificates. As I have mentioned, new certificates were indeed issued on 3 November 2017.

30. On 6 November 2017 the Cameroun Cargo was released to JB Foods.

31. On 7 November 2017 operatives of GIM Services SA, a survey and inspection company, attended at JB Foods' warehouse to weigh and sample the cocoa beans in the Cameroun Cargo during the unstuffing of the bags from the container. The survey report recorded that the cargo was infested with live insects. The recorded percentage of full sound bags was 100%. A comparison of the total outturn weight with the weight on the bill of lading showed a loss of 1.14%. The survey report recorded that joint sampling was carried out with JB Foods' representative; samples were drawn with a sampling probe from 30% of the bags and were then mixed to form one bulk sample, of which one quarter was retained by JB Foods and three quarters were analysed by GIM Services on 8 November. The analysis showed an average of 7% mouldy beans and an average moisture content, measured with an Aqua-boy moisture meter, of 6.9%.

32. On 13 November 2017 DIT sent an email to WACOT.

> "For your information, the vessel MAERSK CHENNAI discharged the cocoa beans in Tanjung Pelepas on **01.10.2017**.
>
> The original documents have been received in bank on **19.10.2017**.
>
> Kindly note that we will revert to you later with demurrage costs for late shipping docs presentation."

On the same day DIT emailed the defendant:

> "In order to avoid any kind of obstacle, please find attached LOA [Letter of Authorization] completed to allow you to deliver the cargo under B/L 769988025 [i.e. the Bill of Lading] to JB Cocoa Sdn Bhd."

The Letter of Authorization was a pro forma document, completed in manuscript. It identified the shipment and said, "Further to the above mentioned shipment, kindly release eDO [electronic delivery order] to our forwarding agent JB COCOA Sdn Bhd. We hereby indemnify you against any claims and liabilities arising from doing so."

33. A witness statement from Mr Lewis Woodcock, a senior director of the defendant, states his understanding that the Cargo suffered a delay at the discharge port between 13 and 24 November 2017 "because of problems with Maersk's computer systems at

the time which required the cargo to be manually released." Mr Woodcock states that the problems were due to the NotPetya cyber attack.[2]

34. On 17 November 2017 JB Cocoa provided to the defendant an "Authorization for Release of EDO & CMO" in respect of the Cargo. It stated:

> "We are the rightful owner for all shipments designated by the shipper as Receiver of goods as per mentioned in the Bill of Lading. *[Details set out.]*
>
> We hereby authorize [the defendant] [to] release the CDN / EIR / CMR / Delivery Order / Electronic Delivery Order to our appointed forwarding/clearing agent whose details appended below:
>
> Company: AS PER CONSIGNEE".

No address was given for the forwarding/clearing agent, but the contact details appear to be applicable both to JB Cocoa and to JB Foods.

35. On 20 November 2017 JB Cocoa wrote by email to DIT, copying in the defendant:

> "Regret to inform you that mentioned consignment unable to released, due to shipper yet settle liner charges. Attached message from liner.
>
> Please coordinate with the counterpart to get consignment released soonest possible. We consignee will not responsible for any risks and charges, all will under seller custody."

In the same email chain, DIT wrote to the defendant that same day:

> "We are receiving every week tens of your invoices duplicated, in wrong currency, etc. but we don't have this one on our records and it is not even mentioned in your last statement received last week.
>
> Could you please check and release the cargo immediately?"

Ms Karin Lenz, a Customer Experience Partner with the defendant, replied promptly:

> "[I]t seems there are some Problems with this Shipment.
>
> Pricing can not be completed. Have seen in SAP 2 Credit Notes have been created in Nigeria.

[2] The defendant did not call Mr Woodcock, but the claimants referred to and relied on the evidence in his statement. Mr Woodcock's statement that the defendant's computer problems resulted from a cyber attack would have formed supporting evidence for a line of defence to be raised by amendment, for which permission was refused at a previous hearing.

> Pls note that DIT is Credit Customer, but no Invoice in our System.
>
> Thanks to advise how to proceed with Release."

On the evening of the same day, 20 November 2017, DIT responded to Ms Chua:

> "As per below message from your colleague, can you please release immediately all these containers to JB Cocoa?
>
> Please confirm once it's been done."

36. On the morning of 21 November 2017 Ms Chua sent an email to colleagues at the defendant:

> "Hi Karin / Manuel,
>
> Destination here is no issue and awaiting Nigeria office to close all the export task due to wrong payer party updated earlier. Separate email and ISR was raised but still no response from them. In order to solve DIT SA coming shipment, pls ensure TOP/TNP to be filed in system to avoid any cargo releasing delay.
>
> Hi Adekunle / Maureen ir.
>
> Pls expertise [expedite?] this case 1711-49471856 and revert urgently."

37. That same morning, Adekunle Afikode sent an email to colleagues: "Kindly help close export task – 769988025. This needs to be close urgently." That afternoon he sent those colleagues an email, saying, "Kind reminder!!"

38. On the evening of 22 November 2017, DIT sent an email to the defendant:

> "Could you please advise if cargo has been already delivered to JB Cocoa?
>
> Note that we reserve our rights and refuse to pay extra detention incurred due to problems with your system, SAP or whatever."

39. On 23 November 2017 JB Cocoa sent an email to Ms Chua at the defendant and to DIT:

> "Dear Candy
>
> We hereby would like to follow up on the released consignment, please express the released.
>
> Hi DIT team member,
>
> Please follow up closely the released, we buyer will not [be] responsible for any risks and charges on the consignment. Till

> today minus 5 days to 2 MONTHS container have stay in POD port.
>
> We are reserved right to hold full responsibility of seller as per FCC rule.
>
> Your full attention and action toward the matter is highly appreciated."

A few hours later Adekunle Afikode replied to Ms Chua and to JB Cocoa: "The AFR task is now closed. I have contacted the shipper for the NXP number in other to dummy close IOTD. The shipper promised to provide the NXP number in the next 60 minutes." However, that evening Karin Lenz emailed in the following terms:

> "NXP already updated and Original already presented at Destination. Only Dummy print should Be done. But not possible due to Routing missing. Following Message received in GCSS:
>
> Load port not defined for TPDoc 769888025
>
> Shipment releated [sic] to the TPDoc do not have same vessel/voyage/loadport.
>
> Arrange cargo release is open.
>
> Malaysia import: Pls urgently release cargo.
>
> Thanks to confirm once done."

40. Early on the morning of Friday 24 November 2017 Ms Chua emailed Karin Lenz, again copying in DIT and JB Cocoa:

> "All export tasks are still open under 769988025 and destination office not feasible to close it as per screen shot attached. [The screen shot was an error message, reading: "Load port not defined for Transport Document '769988025'. Shipments related to the transport document do not have same vessel/voyage/loadport."]
>
> Pls expertise to close all tasks IAVC/MOTD/IOTD/AVR which enable us to proceed cargo releasing by today to close this case."

Karin Lenz replied, "cannot IOTD, because Routing is missing and can not be added. Should System issue". Ms Chua replied, "We are in the midst of arranging one off manual EDO release for this shipment 769988025. Will keep you posted once done." Loh Chiew Lean of JB Cocoa replied to Ms Chua, "If the container released today and will proceed clearance and collect by coming Monday. As preview in port system the container still under on hold status." Shortly afterwards Ms Chua replied, "Kindly be informed that manual EDO release done few minutes ago. Pls check and confirm." Someone from JB Cocoa replied, "Shipment confirmed released in order. Thanks."

41. Delivery of the Cargo was probably completed on 28 November 2017, though it is possible that it had been completed on 27 November.

42. On 28 November 2017, Loh Chiew Lean of JB Cocoa emailed DIT:

> "Please be informed mentioned consignment were received with VERY BAD CONDITION with high mouldy and stain bags. Attached part of picture for your attention.
>
> The problem due to the cargoes been storage in port TWO MONTHS and cause the cargoes condensation issue. Said consignment under supervision of GIM Services and believe there will advise and reporting very soon.
>
> We buyer will hold full responsible on the matter due to the late present document and longstanding cargoes in POD container yard."

43. On 29 November 2017, Loh Chiew Lean emailed the defendant:

> "Please be informed that we have unloaded mention import consignment, were cargoes received serious condensation with high mouldy issue.
>
> Attached complete report with picture for your attention.
>
> For liner interest you are welcome to joint inspection for said consignment at our premises …"

The defendant's Customer Service Representative replied:

> "Thank you for your mail. We regret we cannot proceed with joint surveyor as containers were already gated in empty (returned). We suggest to process with your own surveyor. Sincere apologies for all inconvenience caused to you."

44. On 4, 6 and 7 December 2017, JLB carried out a survey of the Cargo at JB Cocoa's premises, in the presence of representatives of the shipper and JB Cocoa. The JLB survey report recorded:

> "<u>15 - Apparent condition and weight of packages at time of survey</u>
>
> 2 127 sound bags weighing: 136 267.02 kg net
>
> 2 291 wet and stained bags weighing: 119 785.00 kg net
>
> 4 418 bags
>
> 24 Jumbo bags of sweepings weighing: 15 186 kg net
>
> 12 bags missing.

> 16 - Findings
>
> *16-1 Scope of survey*
>
> On 29/11/2017, we were informed that during unloading 11 x 40' containers from MAERSK CHENNAI, it was found that half of the bags stowed on the top layer and against the walls were more or less severely moldy.
>
> *16-2 Joint survey*
>
> A joint survey was organized at Consignee's premises in Port of Tanjung Pelepas on 04/12/2017, on the damaged bags.
>
> All containers were unstuffed prior to our attendance. They were not anymore available for inspection; however, they were said to be in apparent good order and condition except for normal wear and tear.
>
> During his attendance, it was shown to our Surveyor, damaged bags which were separated from sound bags. However, he noticed that some sound bags were mixed with damaged bags and requested JB Cocoa to segregate them.
>
> On 06 & 07/12/2017, during our Surveyor's attendance, it was noted that segregation was done."

45. The report recorded that 2,127 bags (48.1%) were sound and that 2,291 (51.9%) were damaged (wet and stained). Samples taken from the damaged parts of the damaged bags showed that 41.2% of the beans in the sample were mouldy: "This percentage is very high, even for the damaged part and shows that the beans were in contact with water for a long period of time in the containers."

46. JLB's report records that, at a meeting on 6 February 2018, JLB proposed to JB Cocoa that "sorting could be done between the slightly/medium damaged bags which could be skimmed and the heavily damaged bags - most of them with packing decayed, which would be sold for salvage", but that JB Cocoa "argued that they had no space for such handlings or operations", and that as a result JLB organised a salvage sale "with opening of the offers on 15th of March, so that local buyers as well as European buyers had time to go and inspect the damaged bags before giving a bid." Offers were invited for the purchase of the damaged Cargo, which was eventually sold for €950 *per* tonne.

47. A stamped but undated Subrogation Form records JB Cocoa's acknowledgment of receipt of £131,629.11 from the Insurers as underwriters in respect of its claim under an insurance policy in respect of Cargo and "that by virtue of such payment the [Insurers] became subrogated (as and to the extent provided by the law of the contract of insurance) to all our rights and remedies in and in respect of the said Goods."

The Expert Evidence

48. The expert evidence was directed principally to the probable causes of the spoilage of the Cargo devanned in Malaysia. At present I shall focus on that issue; other matters considered by the experts, such as mitigation of damage, will be mentioned later.

49. There was a large measure of agreement between the experts. The following matters were not in issue.

1) The preliminary processing of cocoa beans involves a period of fermentation and subsequent drying. This will result in the beans being naturally dusted with a rich micro-flora of moulds, yeast and bacteria.

2) Dried cocoa beans are hygroscopic: depending on the relative humidity to which the beans are exposed, they can take up (by adsorption) or release (by desorption) moisture from or into the adjacent atmosphere. In a stable environment, an equilibrium (Equilibrium Moisture Content, "EMC", expressed as a percentage) will become established between the amount of water vapour in the air in contact with the beans (Relative Humidity, "RH", expressed as a percentage relative to the maximum amount of water vapour the same air could hold at the same temperature) and the amount of moisture held within the beans. For each EMC there is a corresponding Equilibrium Relative Humidity ("ERH", also expressed as a percentage).

3) Active mould growth occurs on dried, fermented cocoa beans when the temperature and humidity are conducive. Extended voyages, characterised by significant and repetitive diurnal fluctuations in temperatures, render cargoes of such beans susceptible to damage by mould. The dusting of mould found on the surface of all cocoa beans does not pose a threat to the integrity of sound cocoa beans if they are stored below critical levels of relative humidity. However, if they are exposed to elevated humidities for more than a few days, or if they become repeatedly wetted by condensation, visible moulds are liable to develop. If moist conditions persist, over time fungi will enter the beans and they become damaged for commercial purposes. Changes in temperature will influence relative humidity. If the decline in temperature progresses beyond the point where the air can hold moisture as vapour, condensation results. The temperature at which condensation forms is called the dew point. If the temperature of the metal fabric of the container drops below the dew point of the relatively warm air around the cargo, condensate will be deposited on the metal surfaces ("container rain"). Occasionally, the temperature of the cargo may drop below the dew point of the ambient air within the containers, resulting in condensation on or in the cargo itself ("container sweats"). Bags damaged by container rain are most often found adjacent to the sides of the container and in the upper layer of the stow where condensate is deposited from the ceiling. Damage caused by container sweats can be more extensive.

4) Factors that influence the risk of condensation include the temperature and moisture content of the cargo at stuffing, the temperature difference between the inside and the outside of the containers, and the duration of storage in containers. The extent of damage will reflect the length of time that adverse conditions persisted.

5) According to JLB's Cocoa Analysis Reports and Stuffing and Loading Inspection Report, the average moisture content values of the Cargo prior to and at stuffing were within FCC Guidelines and the contractual specifications.

6) Some bags in the Cargo had been wetted by condensation at some point during storage in the containers, and the direct wetting of the bags by condensation was a cause of mould growth.

7) While in transit in the cooler conditions off southern Africa for some days, particularly around the Cape of Good Hope, the temperature differentials between the Cargo and the shell of the containers could have been substantial and would have given rise to a risk of increased humidities and container rain and, possibly, container sweats.

8) The method of transportation of the Cargo was appropriate: in standard, conventional, dry-van containers, with bags of desiccant deployed in the headspace to absorb water vapour , and dunnage in the form of corrugated paper or cardboard used to line the inside of the container in order to soak up any condensation. However, once the desiccants become saturated the ability to modify moisture levels in a container is lost. In the present case, high humidities and condensation degraded the Cargo and, therefore, the desiccants must have eventually proved insufficient to counter the volume of water vapour that developed in the containers between stuffing and devanning.

9) There is a heightened risk of excessive condensation when containers have been discharged from a vessel and then exposed to sunlight for extended periods before being stripped. The FCC emphasises the need to avoid undue delays and recommends that at the port of discharge container doors be opened and unstuffing completed within 48 hours of arrival at place of final delivery and in any case should not exceed seven days of discharge of the vessel. Between discharge at Tanjung Pelepas and devanning, the Cargo remained in the containers and will have been exposed to the ambient environment. Neither the locations of the containers nor the precise weather conditions are known. As the containers were non-ventilated, no action could be taken to manage the absolute humidity within the containers prior to opening.

50. Within this agreed framework, there were significant points of disagreement between the experts, including disagreement on the following matters.

50.1 *The critical ERH and moisture content for mould growth in cocoa beans*

- Dr Bancroft's primary evidence was that certain moulds can begin to develop where the relative humidity is at or above 75% ERH, at which the moisture content of beans would be 7.45%. As a general rule it is advised that the moisture content of cocoa beans should not exceed 8%, and that the relative humidity in stores should not exceed 80% ERH for extended periods of time.

- In cross-examination Dr Bancroft said that, although mould can grow on the beans when the moisture content is 7.5%, it actually predates the inside of the beans when the moisture content is 8% or higher; so the contractual specification of 7.5% provides a buffer. He accepted that, if JLB's readings

were correct, the moisture content for some lots was 8%, which was at the maximum permitted, and that the moisture content of lots 5, 6, 7, 8, 9, 10, 13, 14, 23 and 24 was above the contractual specification of 7.5% and getting into "dangerous territory". He accepted that the margin of error for readings with an Aqua-Boy might be of the order of 0.2% either way, so that it was possible that some lots had a higher moisture content than 8%, at which level the beans were biologically unstable. He maintained, nevertheless, that, on the reasonable assumption that the cargo contained a normal population of cocoa beans with uniform distribution from the mean, the appropriate working hypothesis would be that each container would contain at most a few bags containing beans with a moisture content above 7.5% and that approximately 98% of the bags would have been biologically stable; although he conceded that the analysis in his second report did not demonstrate that conclusion firmly, he did not resile from it. He was challenged over his reliance on an ERH of 75% as providing equilibrium for beans with a moisture content of 8%. He ultimately accepted that, if the ERH calculations were done correctly, lots 9 and 10 had an ERH above 75% and would be biologically unstable, and that there was "potentially" cargo in the containers that was conducive to self-heating at the point of loading.

- Mr Ellyatt's evidence was that the risk of mould growth on cocoa beans existed at an ERH of 70% or above; Dr Bancroft's suggested figure of 75% ERH was not supported by the weight of the literature.

50.2 *The moisture content of the Cargo at the time of stuffing*

- Dr Bancroft said that, as JLB is a professional surveying firm that relies on the quality and integrity of its work, and as the second JLB analysis on 30 August 2017 was referred to as the "official quality certificates", the results in the Cocoa Analysis Reports Nos. 4, 5 and 6 should be taken as properly representative of the status of the Cargo immediately prior to stuffing. These results showed that the beans adhered relatively well to the specifications required by JB Foods (in particular, the mean moisture content of the beans was 6.5%, safely within the contractual limit of 7.5% and the critical moisture content of 8%) and were in accord with other international standards. Although the consistent 6.5% moisture reading is "statistically … probably unlikely", it is probably due to simple human fallibility or faulty calibration, and it is very unlikely that the results were out by as much as 1%: overall, the readings are probably a "relatively true reflection" of the true position. The decrease in mould content in the second batch of Cocoa Analysis Reports is probably to be explained by natural background variation across different representative samples; it does not indicate that the readings are unreliable. There is nothing in the results to suggest that the bulk of the beans would support mould growth. Similarly, the JLB Stuffing and Loading Inspection Report showed a moisture content safely below 7.5%. Dr Bancroft specifically rejected the suggestion that the FCC Contract Rules for Cocoa Beans showed that average moisture content should not be used: all bags with a moisture content above 8% should be removed (they could not be permitted to remain on the basis that the cargo average nevertheless did not exceed 8%), but when assessing the condition of a cargo and its propensity to self-heat it was both appropriate and necessary to look at the average moisture content. Accordingly, the Cargo was sound and biologically

stable and there was no immediate risk to the beans from microbial spoilage, and this would have remained the case unless and until the humidity of the environment increased. As JLB's instructions were to sample each of the 4,430 bags and to remove any bags with a moisture content of above 8%, and as the sampling was done by an independent supervisor in purported compliance with FCC Guidelines, it is to be assumed that the instructions were followed.

- Mr Ellyatt did not consider that there was reliable information as to the condition of the Cargo at the time of stuffing. He said that there was no evidence that JLB complied with its instructions to test the moisture content of every bag or that the shipper complied with the guidance in section 3.2 of FCC's "Guidelines for Shipment of Cocoa Beans in Containers". He regarded the JLB Cocoa Analysis Reports as unreliable, in particular because (a) the analyses on 30 August 2017 (Reports Nos. 4 to 6) showed a very significantly smaller proportion of mouldy beans than was shown in the analyses on 7 August 2017 (Reports Nos. 1 to 3), and (b) the unvaried results for moisture content represented an implausible level of consistency. Similarly, the technical data in JLB'S Stuffing and Loading Inspection Report are also suspect and unreliable, for reasons additional to the incoherence of the chronology it provides. Despite the fact that 400 or 410 bags were loaded into each container on the Vessel, the minimum moisture content recorded for every one of the 11 containers was 5% and the maximum moisture content in every case was either 7.5% or 8%—a very unlikely level of consistency, especially if JLB's surveyor complied with the instruction to "take moisture contents in 100% of the bags" (4,430 bags in all). However, if the moisture content readings are taken at face value, they indicate that five of the 11 containers loaded onto the Vessel contained bags with a moisture content outside the contractual specification and the other six contained bags precisely at the maximum contractual specification for moisture content. These maximum values were sufficiently high to indicate that some of the cargo may have been liable to self-heating, depending on the cargo temperature at stuffing.

50.3 *The conditions within the Cargo and the containers at the time of stuffing*

- Dr Bancroft's evidence was that, when the containers were sealed, the air in the headspace above the cocoa beans would have had the same attributes as the ambient air, namely a temperature of 30ºC and a probable prevailing relative humidity of about 73% to 83%. It is probable that the air temperature within the bags of cocoa would have been the mean atmospheric temperature that had prevailed in the environment over the previous several weeks, namely (on the best available comparable figures) 25ºC, because the thermal conductivity of the cocoa beans would have been fairly low and the temperature within the bulk of the cocoa beans would not have varied markedly with the diurnal rhythms of the day but would have remained reasonably stable. (When challenged in cross-examination about the data and dates he had used for making his inference as to the likely temperature of the Cargo, Dr Bancroft staunchly maintained his opinion.) The relative humidity within the Cargo would probably have been about 66% RH.

- Mr Ellyatt considered it remarkable that no measurements of cargo temperature had been recorded. The cargo temperature is likely to have been at least as high as the ambient air temperature and may have been higher. It is plausible that the ambient air temperature was 30°C at the time of stuffing, as recorded in the Stuffing and Loading Inspection Report.

50.4 *The condition of the Cargo at the time of devanning*

- Dr Bancroft referred to photographs taken at the end of November 2017 and showing parts of the Cargo.[3] These show mould growth on and in bags that had been wetted by condensation by being adjacent to the container doors or walls or by container rain from above. There was internal aggregation of cocoa beans caused by the spread of fungal hyphae within the jute bags. There were also water-soaked areas of dunnage in contact with the container walls. Not all regions of a stow showed obvious signs of mould growth; Dr Bancroft said that the pattern of the main visible damage to the Cargo showed that it was due to the condensate and high levels of humidity that developed adjacent to the shell of the container. However, this did not mean that microbial spoilage would only be active where there were clear signs of aggregations. To determine precisely which beans were and which were not internally affected by mould growth would be very challenging and time-consuming, and any reconditioning exercise would have been expensive. Professional surveyors would have identified any active mould away from the areas of condensation and would not have classed such bags as wetted; as they had not made any such record, they cannot have identified inherent vice. A commercial importer of cocoa beans, such as JB Cocoa, would know the risk of taint and of increased free fatty acids in beans that appeared to be undamaged but had been in contact with damaged beans.

- Mr Ellyatt said that there was no systematic sampling or inspection after devanning and no measurement of cargo temperatures, and the JLB survey report at outturn was almost devoid of relevant information and contained only low-resolution photographs without captions. The only sample that JLB inspected (by a cut test, as described in section 8.3 of the FCC's Sampling Rules, so as to observe the nib of the bean) was taken, apparently months after unstuffing, from the damaged part of the damaged bags and so was limited to the very worst of the cargo. It contained 41.2% mouldy beans, but this cannot be related to the average quality of the entire shipment. The consignee segregated 2,291 bags of cocoa beans, comprising approximately 52% of the Cargo, as damaged and therefore rejected, but the presence of staining on the bags does not mean that anything like 100% of the beans in the bags were damaged. Further, the GIM Services Survey Report, which purportedly evidences the condition of the Cargo at discharge, contains no photographs and does not provide an adequate basis for the assessment of the condition of the Cargo.

[3] I find that all of the photographs are of the relevant containers and Cargo. A question arose in this regard, because some of the photographs showed jute bags bearing the name of a different shipper. However, those photographs appear to be part of a sequential series of the same consignment and were included in the trial bundle on that apparent basis. It is probable that use was made of bags of different origins.

50.5 *The cause of the damage*

- Dr Bancroft's evidence was to this effect. Although the reduced external air temperatures around the Cape of Good Hope would have generated increased humidities, creating a risk of container rain and (if the dew points were between 17 and 19ºC) container sweats, the desiccants, which provide a normally effective method of moisture-control, would have prevented substantial condensation at that time, and the dunnage would have helped to absorb condensation in the form of container rain. After discharge, the containers were exposed to the elements in Tanjung Pelepas. The data from hourly measurements taken fairly nearby show that during the period 1 October to 3 December 2017 the maximum, minimum and mean atmospheric air temperatures were 33.7ºC, 23ºC and 27.1ºC respectively. There were 11 extended condensation episodes in the period 1 October to 6 November 2017 (discharge of the container on the Maersk Cameroun) and a further 13 such episodes, approximately, before 27 November 2017. These episodes would have triggered periods of elevated humidities and container rain, causing the desiccant bags to become saturated. The damage to the cocoa beans occurred during the period between discharge and devanning. Although Dr Bancroft did not purport to attribute blame for the damage, he said that, in the event of any delay in devanning, containers should be stacked away from direct sunlight and the container doors should be opened to permit the ventilation of the cargo and the egress of warm moist air from the cargo.

- Dr Bancroft explained why, in his opinion, the defendant's contention that the mould damage was due to inherent vice in the Cargo was to be rejected. First, the defendant's reliance on maximum reported moisture content at stuffing as showing that the Cargo suffered from inherent vice is misplaced. Relative to the greater bulk of the cargo, the absolute volume or weight of cocoa beans potentially susceptible to mould growth would have been very small in relation to the Cargo as a whole and the equilibration of moisture within the stack would have nullified any threat of mould growth if it ever existed. Further, the damage actually observed on outturn did not correlate to the maximum or maximum mean moisture contents. Second, if mould infestations were or had become active in many bags of cocoa beans, then after 96 days of containerisation the distribution of damage at out-turn would have been within a great many of the bags and distributed within the entire stack within each container, whereas in fact most of the damage was associated with condensation against the wall of the container. Third, if the Cargo had not been stable, the rate of mould predation would have been greater than it was at the time of devanning. Fourth, there is the comparison with the Cameroun cargo. Although the Cameroun Cargo had begun to deteriorate by the time of devanning and had a raised incidence of mould damage, indicating that the relative humidity adjacent to at least some of the cocoa beans had been higher than the critical 75% RH, it showed no obvious signs of damage from condensation and its commercial value had not been degraded to any great extent. The comparatively large amount of condensation damage in the Chennai Cargo shows that the levels of humidity in the containers discharged from the Vessel must have been persistently higher than that found in the Cameroun Cargo. There is no reason to suppose that the post-harvest storage potential of the cocoa bean

consignments in the two vessels differed markedly from one another; further, they underwent similar voyages from Nigeria to Malaysia. Therefore, they ought to have ended up in broadly similar conditions. What differentiated the two cargoes was the length of time between discharge and devanning. (Mr Ellyatt was of the opinion that there was insufficient evidence—as to the origins and handling of the respective cargoes and as to their conditions on discharge or devanning—to permit a useful comparison to be made, though he accepted that the deterioration of the Chennai Cargo was doubtless increased by the delay in devanning.)

- Mr Ellyatt's opinion as originally expressed was that the causes that might have contributed to the damage were, in decreasing order of likelihood: (i) condensation, which was inevitable on the voyage and would have been made more likely by the presence of some bags with moisture contents exceeding 7.5%; (ii) delay in unstuffing of the containers after arrival at Tanjung Pelepas; (iii) lack of segregation and skimming by the consignee; (iv) self-heating of the Cargo as a result of the temperature and the moisture content of parts of the Cargo, though the extent and severity of any self-heating is unknown. Mr Ellyatt tentatively suggested that the damage might have been exacerbated by the use of less desiccant material than was recommended in the FCC Guidelines. However, on this point I prefer Dr Bancroft's conclusion that the lining of the containers and the use of desiccants were both adequate. Further, although the lining and desiccants were placed in the containers by the lorry drivers, they were actually provided by the defendant. Dr Bancroft said that, because of the lack of reliable analysis results at the time of stuffing the containers and the lack of data concerning cargo temperature, it was very difficult to determine the propensity of the Cargo for microbiological deterioration and self-heating. The cargo temperatures may have been higher than 30°C at the time of stuffing, and the high diurnal temperature variation that would have occurred in the course of the voyage would have created a high probability of the temperature of the container surfaces falling below the dew point of the internal atmosphere, resulting in the formation of condensation on the steelwork and the wetting of the bags. This probably commenced in the vicinity of the Cape of Good Hope, and the mould growth would have spread during the remainder of the voyage and the subsequent delay in storage. He wrote (1st report, paras 4.32, 4.33, 4.36, 4.37, 4.38):

> "Cocoa beans loaded at an ERH above 70% would have been liable to self-heating during the voyage and in particular during the subsequent lengthy delay in Malaysia. This corresponds to beans with a moisture content above 7.5 – 8.0% at typical temperature in the growing regions, or alternatively beans that were significantly hotter than normal at the time of stuffing. To the extent that any containerload may have included bags with ERH above 70%, those bags may have self-heated, which over the course of time could have spread to surrounding bags. This in turn would have exacerbated any condensation forming in that container, possibly significantly so. … [S]elf-heating may have exacerbated condensation formation with[in] the containers.

> … The duration of storage of the cargo within the containers and the subsequent duration of storage after unstuffing operations would have exacerbated any damage … It is impossible to determine the rate at which wetting, mould growth, moisture migration and any self-heating may have been occurring at any given point during in (sic) the timeline of events. … On the balance of probabilities, the unusual length of the duration of storages was almost certainly an important factor in the severity and extent of damage as reported by the claimants. …"

- In his second report, Mr Ellyatt said: "I consider that the cargo was at high risk of condensation, mould growth, self-heating and associated deterioration before the containers arrived in Malaysia" (para 3.22). "[T]here is no attributable relationship between the quantum of damage and the position of the container in the stowage plan on Maersk Chennai. Since the other variables, such as the voyage route, container type, dunnaging/desiccant material and duration of storage were approximately the same for all containers carried on this vessel, the only logical remaining factor which could have influenced the variable quantum of damage at outturn was variation in the inherent properties of the cargo in each container at the time of stuffing" (para 3.26). In cross-examination, he accepted that the recorded mould content on loading did not differentiate between active mould growth and past fungal activity and that mould would only become active if moisture content combined with cargo temperature to generate a favourable ERH. He also accepted Dr Bancroft's contention that there was no correlation between moisture content and damage, but he said that this was no evidence against inherent vice, because the extent of the damage as identified by the surveyors depended solely on the number of bags wetted by condensation. When it was put to him that the desiccants would have been effective to prevent condensation while the Vessel was rounding Africa, Mr Ellyatt said that he did not know what would have been found if the Cargo had been devanned immediately upon arrival: it was possible that the bags might have been in an acceptable condition if the containers had been opened immediately after discharge, but that was not inconsistent with inherent vice, because there was indeed a delay between discharge and devanning and no ventilation in the meantime. He was critical of Dr Bancroft's assumption of normal distribution, which he said was relevant to mean moisture contents among various countries, not to measurements within particular consignments. Although the majority of bags would have had lower moisture contents than the maximum permitted, the risk of condensation would be increased by even a small proportion of bags containing beans with the maximum moisture content. He said that, in the light of Dr Bancroft's cross-examination concerning ERH, he was confirmed in his opinion that the Cargo was prone to self-heating, and he maintained his position that 70% ERH gave rise to the danger of mould growth.

The Bill of Lading

51. As I shall have cause later to refer to some of the provisions of the Bill of Lading, it is convenient to set them out here, together with the relevant provisions of the Hague Rules.

52. The front of the Bill of Lading had a line stating, "15 days freetime at the discharge port". It also contained the following text:

> "SHIPPED, as far as ascertained by reasonable means of checking, in apparent good order and condition unless otherwise stated herein, the total number or quantity of Containers or other packages or units indicated in the box entitled 'Carrier's Receipt' for carriage from the Port of Loading … to the Port of Discharge …, such carriage being always subject to the terms, rights, defences, provisions, conditions, exceptions, limitations and liberties hereof (INCLUDING ALL THOSE TERMS AND CONDITIONS ON THE REVERSE HEREOF NUMBERED 1-26 AND THOSE TERMS AND CONDITIONS CONTAINED IN THE CARRIER'S APPLICABLE TARIFF) … Where the bill of lading is negotiable, the Merchant is obliged to surrender one original, duly endorsed, in exchange for the Goods ..."

The box entitled "Carrier's Receipt" read:

> "Total number of containers or packages received by Carrier.
>
> 11 containers"

53. The terms on the reverse of the Bill of Lading included the following:

> "**1. Definitions**
>
> > 'Carriage' means the whole or any part of the carriage, loading, unloading, handling and any and all other services whatsoever undertaken by the Carrier in relation to the Goods.
> >
> > 'Carrier' means Maersk Line A/S trading as Safmarine …
> >
> > …
> >
> > 'Holder' means any Person for the time being in possession of this Bill of Lading or to whom rights of suit and/or liability under this bill of lading have been transferred or vested."
>
> "**2. Carrier's Tariff**
>
> The terms and conditions of the Carrier's applicable Tariff are incorporated herein. Attention is drawn to the terms therein relating to free storage time and to container and vehicle demurrage or detention. Copies of the relevant provisions of the applicable Tariff are obtainable from the Carrier upon request.

In the case of inconsistency between this bill of lading and the applicable Tariff, the bill of lading shall prevail."

"**5. Carrier's Responsibility: Ocean Transport**

5.1 Where the Carriage is Ocean Transport, the Carrier undertakes to perform and/or in his own name to procure performance of the Carriage from the Port of Loading to the Port of Discharge. The liability of the Carrier for loss of or damage to the Goods occurring between the time of acceptance by the Carrier of custody of the Goods at the Port of Loading and the time of the Carrier tendering the Goods for delivery at the Port of Discharge shall be determined in accordance with Articles 1-8 of the Hague Rules save as is otherwise provided in these Terms and Conditions. These articles of the Hague Rules shall apply as a matter of contract.

5.2 The Carrier shall have no liability whatsoever for any loss or damage to the Goods, howsoever caused, if such loss or damage arises before acceptance by the Carrier of custody of the Goods or after the Carrier tendering the cargo for delivery. Notwithstanding the above, to the extent any applicable compulsory law provides to the contrary, the Carrier shall have the benefit of every right, defence, limitation and liberty in the Hague Rules as applied by clause 5.1 during such additional compulsory period of responsibility, notwithstanding that the loss or damage did not occur at sea."

"**8. General**

8.1 The Carrier does not undertake that the Goods or any documents relating thereto shall arrive or be available at any point or place at any stage during the Carriage or at the Port of Discharge or the Place of Delivery at any particular time or to meet any particular requirement of any licence, permission, sale contract or credit of the Merchant or any market or use of the Goods and the Carrier shall under no circumstances whatsoever and howsoever arising be liable for any direct, indirect or consequential loss or damage caused by delay. If the Carrier should nevertheless be held legally liable for any such direct or indirect or consequential loss or damage caused by delay, such liability shall in no event exceed the Freight paid.

…"

"**10. Application of Terms and Conditions**

The Terms and Conditions shall apply in any action against the Carrier for any loss or damage whatsoever and howsoever occurring (and, without restricting the generality of the foregoing, including delay, late delivery and/or delivery without

surrender of this bill of lading) and whether the action be founded in contract, bailment or in tort and even if the loss, damage or delay arose as a result of unseaworthiness, negligence or fundamental breach of contract."

"**11. Shipper-Packed Containers**

If a Container has not been packed by the Carrier:

11.1 This bill of lading shall be a receipt only for such a Container;

11.2 The Carrier shall not be liable for loss of or damage to the contents and the Merchant shall indemnify the Carrier against any injury, loss, damage, liability or expense whatsoever incurred by the Carrier if such loss of or damage to the contents and/or such injury, loss, damage, liability or expense has been caused by any matter beyond his control including, inter alia, without prejudice to the generality of this exclusion:

(a) the manner in which the Container has been packed; or

(b) the unsuitability of the Goods for carriage in Containers; or

(c) the unsuitability or defective condition of the Container; or

(d) the incorrect setting of any thermostatic, ventilation, or other special controls thereof, provided that, if the Container has been supplied by the Carrier, this unsuitability or defective condition could have been apparent upon reasonable inspection by the Merchant at or prior to the time the Container was packed.

11.3 The Merchant is responsible for the packing and sealing of all shipper packed Containers and, if a shipper packed Container is delivered by the Carrier with any original seal intact, the Carrier shall not be liable for any shortage of Goods ascertained at delivery.

11.4 The Shipper shall inspect Containers before packing them and the use of Containers shall be prima facie evidence of their being sound and suitable for use."

"**12. Perishable Cargo**

12.1 Goods, including Goods of a perishable nature, shall be carried in ordinary Containers without special protection, services or other measures unless there is noted on the reverse side of this bill of lading that the Goods will be carried in a refrigerated, heated, electrically ventilated or otherwise

specifically equipped Container or are to receive special attention in any way. The Merchant undertakes not to tender for Carriage any Goods which require refrigeration, ventilation or any other specialised attention without giving written notice of their nature and the required temperature or other setting of the thermostatic, ventilation or other special controls. If the above requirements are not complied with, the Carrier shall not be liable for any loss of or damage to the Goods howsoever arising."

"**13. Inspection of Goods**

The Carrier shall be entitled, but under no obligation, to open and/or scan any package or Container at any time and to inspect the contents. If it appears at any time that the Goods cannot safely or properly be carried or carried further either at all or without incurring any additional expense or taking any measures in relation to the Container or the Goods, the Carrier may without notice to the Merchant (but as his agent only) take any measures and/or incur any reasonable additional expense to carry or to continue the Carriage thereof and/or to sell or dispose of the Goods and/or to abandon the Carriage and/or to store them ashore or afloat under cover or in the open at any place, whichever the Carrier in his absolute discretion considers most appropriate, which sale, disposal, abandonment or storage shall be deemed to constitute due delivery under this bill of lading. The Merchant shall indemnify the Carrier against any reasonable additional expense so incurred. The Carrier in exercising the liberties contained in this clause shall not be under any obligation to take any particular measures and shall not be liable for any loss, delay or damage howsoever arising from any action or lack of action under this clause."

"**14. Description of Goods**

14.1 This bill of lading shall be prima facie evidence of the receipt by the Carrier in apparent good order and condition, except as otherwise noted, of the total number of Containers or other packages or units indicated in the box entitled 'Carrier's Receipt' on the reverse side hereof.

14.2 No representation is made by the Carrier as to the weight, contents, measure, quantity, quality, description, condition, marks, numbers or value of the Goods and the Carrier shall be under no responsibility whatsoever in respect of such description or particulars."

"**17. Lien**

The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract and for general average contributions to whomsoever

due. The Carrier shall also have a lien against the Merchant on the Goods and any document relating thereto for all sums due by the Merchant to the Carrier under any other contract whether or not related to this Carriage. The Carrier may exercise his lien at any time and any place in his sole discretion, whether the contractual Carriage is completed or not. In any event any lien shall extend to cover the cost of recovering any sums due and for that purpose the Carrier shall have the right to sell the Goods by public auction or private treaty, without notice to the Merchant. The Carrier's lien shall survive delivery of the Goods."

"**22. Notification, Discharge and Delivery**

22.1 Any mention in this bill of lading of parties to be notified of the arrival of the Goods is solely for information of the Carrier. Failure to give such notification shall not involve the Carrier in any liability nor relieve the Merchant of any obligations hereunder.

22.2 The Merchant shall take delivery of the Goods within the time provided for in the Carrier's applicable Tariff. If the Merchant fails to do so, the Carrier may without notice unpack the Goods if packed in containers and/or store the Goods ashore, afloat, in the open or under cover at the sole risk of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon all liability whatsoever of the Carrier in respect of the Goods or that part thereof shall cease and the costs of such storage shall forthwith upon demand be paid by the Merchant to the Carrier

…

22.5 Refusal by the Merchant to take delivery of the Goods in accordance with the terms of this clause and/or to mitigate any loss or damage thereto shall constitute a waiver by the Merchant to the Carrier of any claim whatsoever relating to the Goods or the Carriage thereof."

54. The following provisions of the Hague Rules, incorporated into the contract in the Bill of Lading, are relevant:

"**Article I**

In these Rules the following words are employed, with the meanings set out below:—

…

(e) 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."

"**Article II**

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."

"**Article III**

…

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

…

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

"**Article IV**

…

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

…

(i) Act or omission of the shipper or owner of the goods, his agent or representative.

…

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

> (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

> "**Article IV BIS**
>
> 1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort."

Summary of parties' contentions

55. The structure of the claimants' case as regards damage to the Cargo, as summarised by Mr Leung, is as follows:

    i. The Cargo was in sound condition at the time of loading.

    ii. The defendant was obliged to take reasonable care of the Cargo following discharge from the Vessel until delivery.

    iii. The Cargo suffered mould and wet damage because of prolonged containerisation up to the time of delivery. This amounted to a failure to take reasonable care of the Cargo.

    iv. The defendant is not entitled to rely on any exceptions or exemptions from liability.

    v. The claimants have suffered loss and damage.

    vi. There was no failure by the claimants to mitigate their loss.

56. The defendant's case as regards damage to the Cargo, as summarised by Mr Steward, is as follows:

    i. The defendant is not liable for any damage occurring after the point of discharge of the Cargo from the Vessel.

    ii. The claimants have failed to discharge the burden on them to prove that the Cargo was in sound condition on loading and damaged on discharge.

    iii. The defendant did everything required to take reasonable care of the Cargo.

iv. Any damage caused by delay in devanning was the fault of the claimants: the Bill of Lading was not presented until 17 November 2017, and the claimants were responsible for the delay.

v. The defendant is entitled to rely on various exceptions: in particular, clauses 5.2, 8, 11 and 12 of the Bill of Lading and/or the Hague Rules, Article IV, rule 2 (m), (n), (o), (p) and (q).

vi. The claimants failed to mitigate their losses.

57. There is also a subsidiary head of claim, for short delivery, which received little attention at trial and which I shall deal with separately.

Discussion

58. This section of the judgment will be structured as follows. First, I shall set out some of the applicable law. Second, I shall consider the standing of the several claimants to claim in these proceedings. Third, I shall consider the various issues that arise in respect of liability for damage to the Cargo. Fourth, I shall consider the claim for short delivery.

Relevant law

59. Section 2 of the Carriage of Goods by Sea Act 1992 provides in relevant part:

> "(1) Subject to the following provisions of this section, a person who becomes—
>
> (a) the lawful holder of a bill of lading;
>
> (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
>
> (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,
>
> 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.
>
> …
>
> (4) 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) subsection (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."

The effect of these provisions is that (i) JB Foods as the lawful holder of the Bill of Lading can sue in contract on the Bill of Lading as if it had been a party to it and (ii) JB Foods can also exercise its rights to sue under section 2(1) for the benefit of any other person who owned the goods at the time when they suffered damage and who sustained loss or damage by reason of a breach of the contract of carriage. In the second case, however, the recoverable damages would be subject to the terms of the Bill of Lading and to any statutory defences or limitations of liability in the Hague Rules.

60. Clause 5.1 of the Bill of Lading provides that the defendant's liability for loss of or damage to the cocoa beans between loading at Apapa and "the time of [the defendant] tendering the Goods for delivery at the Port of Discharge" is to be determined in accordance with Articles 1 to 8 of the Hague Rules, subject to any other provisions of the Bill of Lading. The relevant provisions of the Hague Rules have been set out above.

61. Relevant law was considered in *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2018] UKSC 61, [2019] AC 358, ("*Volcafe*"). The facts of that case were fairly similar to those of this case—a claim in respect of condensation damage to coffee beans carried in unventilated containers under a bill of lading that incorporated the Hague Rules—though the specific issue for the Supreme Court was the incidence of the legal burden of proof of the cause of the damage. It is of some importance to note that the damage in the case occurred before discharge; in the present case it is in issue whether the damage occurred before or after discharge. Lord Sumption, with whose judgment Lords Reed, Wilson, Hodge and Kitchin agreed, set the issue in its legal context of the common law of bailment.

> "8 The delivery of goods for carriage by sea is a bailment for reward on the terms of the bill of lading. Bailment is a transfer of possession giving rise to a legal relationship between the bailor and the bailee which is independent of contract, although in practice it is commonly contractual and the terms of the contract will commonly modify its incidents. Two principles of the common law of bailment are fundamental. The first is that a bailee of goods is not an insurer. His duty is limited to taking reasonable care of the goods. …

> 9 The second principle, which is equally well established, is that although the obligation of the bailee is thus a qualified obligation to take reasonable care, at common law he bears the legal burden of proving the absence of negligence. He need not show exactly how the injury occurred, but he must show either that he took reasonable care of the goods or that any want of reasonable care did not cause the loss or damage sustained. …"

In respect of this second principle, Lord Sumption referred to several leading authorities and observed that the burden of proof was a legal burden, not merely an evidential burden. He also noted that the principle regarding the burden of proof was not a peculiarity of the common law but was also found in the civil law. He then turned at [11] to the issue "whether the incidence of the burden of proof is different in a modern contract for carriage by sea incorporating the Hague Rules."

62. Lord Sumption considered first the question whether the legal burden of proving a breach of Article III, rule 2, rested on the cargo owner or whether, on the contrary, it was for the carrier, once loss or damage to the cargo had been ascertained, to prove compliance. He held that it was for the carrier to prove compliance. The following relevant extracts from his judgment must suffice.

> "15. … [T]he Hague Rules have effect only by virtue of their contractual incorporation into the bill of lading. Subject to the other terms of the contract, the Rules are a complete code on those matters which they cover. But they are not exhaustive of all matters relating to the legal responsibility of carriers for the cargo. As is well known, the background against which they were drafted was the attempt of (mainly British) shipowners in the late 19th century to limit their legal responsibility for cargo, and the attempt of other countries, notably the United States, Canada and Australia, to impose a minimum standard of performance by law. The purpose of the Rules was to standardise the obligations of the carrier and to limit the exceptions on which he should be entitled to rely. They are accordingly concerned almost exclusively with the standard of performance. Apart from certain articles, such as article IV, rule 1and article IV, rule 2(q), which deal in terms with the burden of proof for specific purposes, the Rules do not deal with questions of evidence or the mode of proving a breach of the prescribed standard or the application of an exception. These are matters which in accordance with generally recognised principles of private international law are for the law of the forum. They are part of the law of evidence and the rules of procedure, which are liable to vary from one jurisdiction to another.
>
> …
>
> 17. … Mr Rainey argued that the reason why at common law the bailee had the burden of disproving negligence was that at common law a bailee had a strict obligation to redeliver the

> goods in the same condition as when received. The position, he submitted, was different where the obligation was a qualified obligation to take reasonable care, as it is in article III, rule 2. However, as I have pointed out, the common law obligation of a bailee is not strict, save in the somewhat theoretical case of common carriers. His obligation is to take reasonable care. The common law has always treated that as consistent with a rule imposing on him the burden of disproving negligence. In the same way, the imposition of a corresponding duty of care on the carrier by article III, rule 2 is consistent with his bearing the burden of disproving negligence.
>
> 18. When one examines the scheme of the Hague Rules, it is apparent that they assume that the carrier does indeed have the burden of disproving negligence albeit without imposing that burden on him in terms. This is because of the relationship between articles III and IV. Article III, rule 2 is expressly subject to article IV. A number of the exceptions in article IV cover negligent acts or omissions of the carrier which would otherwise constitute breaches of article III, rule 2: for example article IV, rules 1 and 2(a). It is common ground, and well established, that the carrier has the burden of proving facts which bring him within an exception in article IV, and in the case of article IV, rules 1 and 2(q) this is expressly provided. It would be incoherent for the law to impose the burden of proving the same fact on the carrier for the purposes of article IV but on the cargo owner for the purposes of article III, rule 2. As will be seen below, a rather similar problem arises in relation to the exception for inherent vice.
>
> 19. Nothing in the Hague Rules alters the status of a contract of carriage by sea as a species of bailment for reward on terms. …
>
> 20 For these reasons I consider that in principle where cargo was shipped in apparent good order and condition but is discharged damaged the carrier bears the burden of proving that that was not due to its breach of the obligation in article III, rule 2 to take reasonable care. I say 'in principle' because it is next necessary to consider whether the authorities in cases governed by the Hague Rules point to a different rule. I turn, therefore, to the authorities."

Having referred to several leading authorities, Lord Sumption said at [25]:

> "… The true rule is that the carrier must show either that the damage occurred without fault in the various respects covered by article III, rule 2, or that it was caused by an excepted peril. If the carrier can show that the loss or damage to the cargo occurred without a breach of the carrier's duty of care under article III, rule 2, he will not need to rely on an exception."

63. Lord Sumption then considered the burden of proof under Article IV, rule 2. It was "well established" and not disputed that the carrier bears the burden of bringing himself within any of the exceptions in the rule. However, the carrier's case was that, once he had proved that the cargo suffered from an inherent vice, the cargo owner must positively prove that it was only because of the carrier's negligence that the cargo's vicious propensities resulted in damage: at [28]. Having considered the authorities, in particular *The Glendarroch* [1894] P 226, and subjected them to critical analysis, Lord Sumption concluded at [33]: "I consider that the carrier has the legal burden of disproving negligence for the purpose of invoking an exception under article IV, rule 2, just as he has for the purpose of article III, rule 2." He continued:

> "34. Even if I had thought that *The Glendarroch* was correct as applied to the exception for perils of the sea, I would not have regarded it as applicable to the exception for inherent vice. This is because the distinction between the existence of the peril and the standard of care required of the carrier is impossible to make in that context. A cargo does not suffer from inherent vice in the abstract, but only in relation to some assumed standard of knowledge and diligence on the part of the carrier. Thus the mere fact that coffee beans are hygroscopic and emit moisture as the ambient temperature falls may constitute inherent vice if the effects cannot be countered by reasonable care in the provision of the service contracted for, but not if they can and should be. …
>
> …
>
> 36. The effect of these statements [in further authorities cited], and others to the same effect, are accurately summarised in *Scrutton on Charterparties and Bills of Lading*, 23rd ed (2015), para 11-055:
>
> > 'By "inherent vice" is meant the unfitness of the goods to withstand the ordinary incidents of the voyage, given the degree of care which the shipowner is required by the contract to exercise in relation to the goods.'
>
> 37. It follows that if the carrier could and should have taken precautions which would have prevented some inherent characteristic of the cargo from resulting in damage, that characteristic is not inherent vice. Accordingly, in order to be able to rely on the exception for inherent vice, the carrier must show either that he took reasonable care of the cargo but the damage occurred none the less; or else that whatever reasonable steps might have been taken to protect the cargo from damage would have failed in the face of its inherent propensities."

64. In the light of *Volcafe*, *Voyage Charters* (5th edition) states that para 66.126 (footnote omitted):

> "The position now seems to be established as follows, at least for cases involving a bailment and not, for example, charterparty claims for delay:
>
> (1) Where there is cargo loss or damage on outturn (otherwise than as noted on the bill of lading) the legal burden is on the carrier to prove that he used reasonable and proper skill and care for the goods or that, even if he had used reasonable skill and care, there would still have been loss or damage as found on outturn.
>
> (2) The legal burden is also on the carrier to show that the loss/damage was caused by an excepted peril.
>
> (3) The cargo owner has no legal burden at all (beyond proving the existence of damage on outturn) although he may wish to seek to discharge the evidential burden to rebut the carrier's case."

65. In considering the issues in the present case, it is important to note that the Hague Rules govern the carrier's liability only between the point of loading and the point of discharge. The provisions of the Rules most relevant to this case are set out above; see in particular Article I (e) and Article II. In *Fimbank Plc v KCH Shipping Co Ltd ("The Giant Ace")* [2023] EWCA Civ 569 the Court of Appeal observed that "discharge" was not the same as "delivery" and held that the Rules applied only in respect of the period from loading to discharge, any liability for matters occurring before or after those points being a matter of contract. Males LJ, with whose judgment Popplewell and Nugee LJJ agreed, discussed both the original Hague Rules, which he referred to as "the Hague Rules", and the rules as amended ("the Hague Visby Rules"). The following passages are relevant.

> "30. Article III, rule 6 [of the Hague Rules] is the only provision in the Rules which refers to 'delivery' as distinct from discharge. It was common ground between the parties that, as explained by Lord Hobhouse in *The Berge Sisar* [2001] UKHL 17, [2002] 2 AC 205 at [36], discharge and delivery are distinct aspects of the international carriage of goods. While discharge is a physical operation to remove the cargo from the ship, delivery is a legal concept involving a full transfer of possession of the goods by the carrier to the receiver. Discharge and delivery may therefore occur at different times.
>
> …
>
> 42. As a necessary starting point, I consider first the terms of the original Hague Rules, as a matter of language and without reference to authority. In my judgment it is clear that the Rules apply only to carriage by sea, which begins on loading and ends on discharge of the cargo from the vessel, and that they have no application outside that period. Precisely when loading begins

or discharge ends may be open to debate on the facts of any given case, and there may be room for the view that events which are sufficiently 'related to' loading or discharging fall within these operations for the purpose of the Rules …

43. In my view the definitions in Article I play an important role in defining the scope of application of the Rules. The definition of 'contract of carriage' makes clear that even if a contract covered by a bill of lading or similar document of title extends beyond carriage by sea, the provisions of the Rules concerning contracts of carriage apply only insofar as the contract relates to the carriage by sea, while the definition of 'carriage of goods' spells out that this is limited to the period from loading until discharge.

44. As the drafters have taken the trouble to define these terms, it is then necessary to see what use of them has been made in the substantive provisions of the Rules. In fact there are only two places where the defined terms are used. The first is Article II, which refers to 'every contract of carriage of goods by sea'. Thus one important function of these definitions is to define the scope of the carrier's responsibilities and liabilities for which Article II provides. Its purpose is to make clear that the Rules apply, and only apply 'from the time when the goods are loaded on to the time they are discharged from the ship'. Thus Article II provides for responsibilities during that period which arise 'in relation to' the specified operations, that is to say the loading, handling, stowage, carriage, custody, care and discharge of the goods, but do not apply to other matters occurring outside that period, which has been called the Hague Rules 'period of responsibility'.

45. Mr Rainey submitted that although the carrier would have an obligation in relation to the 'custody' and 'care' of the goods during the period between loading and discharge, that obligation was capable of beginning before loading and continuing after discharge, so that the responsibilities and liabilities in Article III and the rights and immunities in Article IV would extend before loading and after discharge. However, when Article II is read in the light of the definitions in Article I, it is apparent that this is not so. The obligations to which the carrier may be subject prior to loading or after discharge, at least if not related thereto, will be a matter for the parties' contract or the law of bailment, but the Hague Rules themselves will not apply: 'custody' and 'care' in Article II refer to the custody and care of the goods between (and including) loading and discharge.

46. The second place in which the definitions are used is Article III, rule 8, which refers to clauses in a "contract of carriage" purporting to relieve the carrier from liability. The effect of the rule is that the carrier is not permitted to contract out of the

> responsibilities imposed by the Rules, that is to say those relating to the carriage of goods by sea which cover the period from loading until discharge, but is permitted freedom of contract in relation to matters outside the scope of the definition of 'carriage of goods'. Thus Article III, rule 8 defines the period during which the 'irreducible minimum for the responsibilities and liabilities to be undertaken by' the carrier applies.
>
> 47. This is confirmed by Article VII, which states that nothing in the Rules prevents the parties from entering into any agreement as to the carrier's responsibility before loading or after discharge. I would not read this Article as providing (as Mr Rainey submitted) that the Rules apply in the period between discharge and delivery unless the parties contract otherwise, but rather as confirming what is already apparent from the definitions in Article I and from Article II, that the application of the Rules is limited to the period from loading until discharge.
>
> 48. Accordingly the Rules do not apply to misdelivery of cargo stored on land after discharge, whether or not such misdelivery is a breach of the contract evidenced by the bill of lading, at least where the misdelivery is not related to the discharge operation.
>
> …
>
> 52. The cases on the Hague Rules broadly support the view which I have expressed based on the language of the Rules, although they are not unanimous. …"

(Males LJ considered that the position remained the same under the Hague Visby Rules. The one difference concerned the scope of an amendment to Article III, rule 6, and its application to cases of misdelivery occurring after carriage. That difference was relevant in that case, but it has not been contended that it is relevant in this case.)

66. The claimants contend that on the true construction of Clause 5.1 of the Bill of Lading, Articles 1 to 8 of the Hague Rules would continue to apply after discharge of the Cargo from the Vessel until the Cargo was tendered for delivery by the defendant to the party entitled to delivery. The defendant contends that the Hague Rules applied only as a matter of contract and only insofar as they were consistent with the express terms of the Bill of Lading and that they ceased to apply after the Cargo was discharged from the Vessel. In my judgment the defendant's contention on this matter is correct and the Hague Rules operate only in respect of the period until discharge from the Vessel. The reasons for that conclusion and its relevance to the present case will be set out below.

<u>The standing of the several claimants</u>

67. The defendant took a series of points with a view to impeaching the standing of the respective claimants to claim in these proceedings. It is convenient to deal with those points at this stage.

68. JB Cocoa sues in negligence as the owner of the Cargo. The chain of sales was: WACOT to DIT to JB Foods to JB Cocoa. To sustain a claim in negligence JB Cocoa must establish that it had either the legal ownership of or a possessory title to the Cargo at the time when the damage occurred: *The Aliakmon* [1986] AC 785 at 809. The defendant contends that JB Cocoa has not proved that it became owner before the cocoa beans were damaged or at any time prior to delivery of the Cargo. Mr Steward submits that, as the unsigned Purchase Order dated 23 June 2017 from JB Cocoa to JB Foods (paragraph 8 above) was for a sale on "c.i.f." terms, JB Cocoa can only have become owner (if at all) at some point after shipment. The contract between JB Foods and DIT (paragraph 9 above) was also on "c.i.f." terms, so that JB Foods cannot have become owner before shipment. No evidence has been adduced as to when or by what means property in the cocoa beans passed to JB Cocoa.

69. Mr Leung submitted that there were two clear answers to the defendant's case on this point. First, in the email exchange between the defendant and DIT on 27 October 2017 (paragraph 26 above) DIT identified JB Foods as the "final receiver" but gave a contact at JB Cocoa, and at no subsequent time did JB Foods assert ownership of the Cargo; all subsequent communications were consistent with property in the Cargo having already passed to JB Cocoa by that date, and the probability is that it had passed some time earlier, as DIT's confirmation was given only in response to a query by the defendant. Second, if JB Cocoa was not the owner, JB Foods must have been the owner, yet it has not asserted that it was the owner.

70. I do not find Mr Leung's submissions on this point persuasive, and I conclude that JB Cocoa has not proved that it became the owner of the Cargo at any time before the cocoa beans were damaged or, indeed, before delivery.

    1) The claimants have adduced remarkably little evidence on this point, as is shown by the manner in which Mr Leung's submissions rely on, at best, indirect grounds. For him to have to argue that a document suggests that property had passed to JB Cocoa by a certain date but that it is likely to have passed at some earlier but unspecified date only goes to show that the claimants are unable to identify when and by what means property actually did pass.

    2) The communication from DIT on 27 October 2017 does not assist JB Cocoa. It identifies the final receiver as JB Foods, not JB Cocoa. The provision of contact details for someone at JB Cocoa is hardly evidence that property in the Cargo had passed to JB Cocoa[4]. If all subsequent exchanges leading to the eventual release of the Cargo are consistent with JB Cargo being the Cargo owner (paragraph 88 of Mr Leung's written submissions), I cannot see that they establish that fact. The documentation as a whole is, in my view, perfectly explicable on the basis that JB Cocoa had contractual rights against JB Foods that would in the future give it ownership of the cocoa beans. As for the fact that JB Foods has not asserted that it owned the Cargo after 27 October 2017 or at any time after discharge from the Vessel: perhaps it ought to have done so; the fact that it did not do so does not seem to me to be evidence that it could not properly have done so.

[4] The postal address for JB Cocoa as shown in DIT's email is also the postal address shown elsewhere for JB Foods. Only the contact email address in the form @jbcocoa.com points to a contact specifically at JB Cocoa.

3) It is common ground between the parties and is confirmed by the documents that the Cameroun Cargo was delivered to JB Foods. As the Cameroun Cargo was part of the same contract as the Cargo on the Vessel, this fact tends to militate against the contention that property in the goods had passed to JB Cocoa at an earlier date; though I do not say that this has major probative value.

71. The practical significance of the attempt by JB Cocoa to claim damages lies in the claimants' contention that such a claim would lie solely in tort and would be unaffected by the terms of the Bill of Lading. The defendant contends that, if JB Cocoa were entitled to sue at all, it would be on the terms of the Bill of Lading. It further contends that JB Foods could not claim for losses said to have been suffered by JB Cocoa. As to the latter contention, section 2(4) of the Carriage of Goods by Sea Act 1992 has (in my opinion) the effect that any exercise of rights of action by JB Foods for the benefit of JB Cocoa would be on the basis of breach of contract, on the terms of the Bill of Lading, not in tort. The real question concerns the nature and extent of any right of action vested in JB Cocoa itself. Although in the light of my decision in the last preceding paragraph it is unnecessary to answer that question, I shall address it very briefly on the assumed basis that JB Cocoa was the owner of the cocoa beans when they were damaged. For JB Cocoa, Mr Leung submits that a simple right of action exists in negligence for damage caused to JB Cocoa's goods, and that as there is no contractual relationship between JB Cocoa and the defendant the Bill of Lading has no application. For the defendant, Mr Steward submits that, if JB Cocoa was indeed the owner of the Cargo, it was a bailor of the Cargo, and the defendant could owe no greater duty in negligence than it did as a bailee, its obligations in the latter respect being governed by the Bill of Lading. Mr Leung seems to me to be caught between a rock and a hard place. If, as he submits, there is no bailment but a simple right of action in negligence, the claim must fail on the basic principle that there is in general no liability in negligence for omissions and no positive duty to intervene to prevent loss. The claimants do not allege that the defendant did anything to damage the cocoa beans (crush them, burn them, contaminate them etc); it simply alleges that the defendant failed to deliver the cocoa beans in good condition because it left them in their containers and failed to take steps to prevent their deterioration in the containers: particulars of claim, paragraphs 11 to 16[5]. The answer to this would be to rely on voluntary assumption of risk in respect of more onerous responsibilities. However, no such assumption is pleaded, and I cannot see that an assumption of risk towards JB Cocoa could plausibly have been alleged on any basis other than a bailment subject to the terms of the Bill of Lading. Accordingly, if I had found as a fact that JB Cocoa was the owner of the cocoa beans at the time when they were damaged, I would not have held that it had any right of action broader than any arising under the Bill of Lading.

72. As for the Insurers, they sue as the insurers who indemnified JB Cocoa for its losses and are thereby entitled to pursue JB Cocoa's claim in tort. In the light of my conclusions as to JB Cocoa's position, the position of the Insurers falls away. If I had reached a different conclusion, the arguments about the Insurers' position would, in my view, have been futile, because JB Cocoa is a party to the case and could advance the claim on its own account. As it happens, I was not attracted to the technical point raised

[5] Mr Leung put JB Cocoa's claim accurately in paragraph 8 of his written closing submissions: "The simple point is that [the defendant] remained obliged to take reasonable care of the Cargo until they released it to JB Cocoa, and they breached this duty because the Cargo remained stuffed in containers and thus [scil. subjected] to the high levels of moisture and condensation-generated free water which resulted in mould damage."

against the Insurers' standing. It was objected that, although the pleaded case is that by reason of the indemnity they provided they are assignees under the French Insurance Code of JB Cocoa's claim, no evidence of the French law of assignment had been adduced and therefore the Insurers' entitlement to sue had not been proved. To the argument that in English law the Insurers would be subrogated to their insured's claim, Mr Steward responded that the particulars of claim did not rely on subrogation. However, in my view the plea of indemnity by insurers is sufficient to show a right to bring a subrogated claim according to English law and, in the absence of contrary evidence, I am entitled to assume that French law is not materially different. For reasons I have indicated, these points do not actually arise for determination.

73. The Bill of Lading was endorsed to JB Foods and I am satisfied that it has standing to claim as the lawful holder and indorsee of the Bill of Lading.

74. It follows that I am concerned hereafter with the claim of JB Foods. I shall deal first with the facts and then with the legal analysis.

Condition of the Cargo at the time of loading

75. There is no witness evidence relating directly to the condition of the Cargo at the time of loading, though Mr Djossou gave evidence regarding his analysis of samples provided to him. The principal source of evidence lies in the documents, especially the Cocoa Analysis Reports and the Stuffing and Loading Inspection Reports produced by JLB. (The serious problems with the Phytosanitary Certificates have already been mentioned, but fumigation is not relevant to the damage alleged by the claimants.) I have adverted to the problems regarding both chronology and analytical results arising from the documents. Significant though these are, however, the defendant overstates the conclusions to be drawn from them. I find as a fact that at the time of loading the Cargo was in good condition and such that after a normal voyage it would arrive sound at its destination. The reasons that support this finding relate both to direct evidence of the condition of the beans at the time of loading and to inferences, both negative and positive, that may be drawn from the nature and distribution of the damage after devanning; to that extent they include some matters relevant to further questions addressed below.

76. There does seem to me to be some tension in the defendant's case. On the one hand, it wants to say that there is insufficient evidence to enable the claimants to prove that the cocoa beans were in good condition when loaded. On the other hand, given that it is in truth perfectly obvious that the Cargo suffered significant damage between loading and devanning, it wants to say that it suffered from inherent vice. That is not a formal inconsistency—it is coherent to argue: no conclusions can be drawn from the evidence but, if on the contrary some conclusions can be drawn, they are adverse to the claimants—but resort to an argument of that form does tend to alert one to the possibility that at least one term of the argument is being advanced more in hope than in expectation. Indeed, the consequences of this tension surface in Mr Ellyatt's evidence, as I shall explain.

77. Mr Steward correctly observed that there was no witness evidence from those who inspected the Cargo to confirm such matters as the process of sampling and the calibration of the equipment. However, JLB is a reputable firm of professional surveyors operating in a commercial market; it is reasonable to start from the premise

that JLB knows its business and is generally competent and is therefore likely (albeit not certain) to have carried out its instructions and done so in a competent manner. That was Dr Bancroft's approach and, although Mr Steward criticised it as proceeding on the basis of unsubstantiated trust, it seems to me to be rational as a working premise. The problems with the chronology recorded in the Stuffing and Inspection Report must be taken into account when considering the reliability of other aspects of JLB's documentation, but the relevant issues relate to the analytical content of the documents, not to the chronology.

78. Mr Djossou's honesty and fairness as a witness were not challenged. Nor was any challenge made to, or evidence adduced to cast doubt on, his general professional competence. The two bases advanced for doubting the accuracy or reliability of the results in his Cocoa Analysis Reports were the improbable consistency of the moisture readings and the surprising difference between the mould readings.

79. As regards the mould readings, Dr Bancroft said that the apparent anomaly was probably to be explained by natural background variation within the Cargo. Mr Ellyatt said that there were three possible explanations: that the Cargo had been re-sorted between sampling operations; that the results were fabricated; and that the sampling was fundamentally unreliable. Of those three proposed explanations, the first and second are purely speculative, being unsupported by any evidence. In cross-examination, Mr Ellyatt appeared to equate Dr Bancroft's proposed explanation with his own third explanation, namely that the sampling was inherently unreliable. That equation would mean that there was nothing wrong with the manner in which the sampling exercise was done but that the exercise itself gave no reliable information as to the Cargo because there was too much variation within the Cargo: the sampling was unreliable, not because it was poorly performed (of which there is no evidence) but because by its nature it provided no reliable guide as to the larger bulk from which the samples were taken. It is in the nature of sampling from any bulk that is not entirely homogeneous that it can do no more than provide some measure of probability as to the composition of the whole. I accept the defendant's point that the difference between the mould contents recorded in Reports Nos. 1 to 3 and Reports Nos. 4 to 6 tends to reduce that degree of probability in the present case. However, the results are as they are, and both sets of results indicate that the mould content was well within the accepted tolerances. The evidence is not perfect but it is what we have. Dr Bancroft's stated opinion was that, even if the levels of mould were as shown on Reports Nos. 1 to 3, the mould would not have been active at the time of stuffing, and Mr Ellyatt accepted that mould would become active only if there were a favourable ERH.

80. As regards the moisture readings, the respective views of the experts are summarised in paragraph 50.2 above. There is an undoubted problem in the fact that 18 tests on six separate samples produced identical results; though, as Dr Bancroft observed, the DICKEY-john device reads only to the nearest tenth of a percent and thus obscures minor variations that a more sensitive device might reveal. Mr Djossou gave evidence as to the manner in which he obtained the readings. As he appeared to be a truthful witness who was doing his best to assist the court, and as Mr Steward did not challenge his honesty, I accept that the samples were tested and the moisture readings were obtained in the manner recorded by the Reports and explained by Mr Djossou. It is possible that he made some error in the carrying out of the tests, but he denied in cross-examination that he had not done "a good job" of performing the analysis and no

particular way in which he might have erred was put to him or explained in submissions—I have no idea quite how he might not have done a good job, and he seemed a little nonplussed at the suggestion. A problem with calibration seems a more likely explanation of the remarkable consistency of the results. Dr Bancroft expressed the view that any error in the readings was unlikely to have been as much as one percentage point, and I accept his evidence, having no reason to reject it. It may also be noted that the readings are broadly in line with the mean readings in the Loading and Stuffing Report. Although there must be a question as to the precise accuracy of the moisture readings in the Cocoa Analysis Reports, they stand as professionally obtained readings and I think they are probably broadly accurate.

81. Mr Steward made the point that there was no witness evidence to prove that JLB tested the moisture contents of all the bags, in accordance with their instructions. However, there is no evidence that they did not do what they were instructed to do, far less that their testing fell below standards normally accepted within the industry[6]. Anyway, the recorded moisture readings are part of the evidence; they are summarised in paragraph 14 above. These readings are significant because they were taken at the time of or immediately before stuffing. I accept Dr Bancroft's opinion that they indicate that the Cargo was in a stable condition. There are certainly matters that qualify the strength of that conclusion. One is the relative consistency of the recorded results (see Mr Ellyatt's observations, summarised in paragraph 50.2 above). Another is the fact, accepted by Dr Bancroft, that the accuracy of readings taken with the Aqua-Boy device may only lie within a few tenths of a percentage, and that therefore some Lots may have contained bags with a moisture content in excess of 8% (though they were not measured as such). However, the moisture content might equally well have been lower than was recorded. The readings are the best information we have. A third qualifying factor is Dr Bancroft's acceptance in cross-examination that it was possible that some bags in the Cargo were not stable. However, I accept Dr Bancroft's opinion that, even if the Stuffing and Loading Report indicates the possibility that some bags might have had a moisture content higher than 8%, the proportion of cocoa beans potentially susceptible to mould growth would have been very small in relation to the Cargo as a whole and the equilibration of moisture within the stack would have nullified any threat of mould growth if it ever existed. Mr Ellyatt accepted in cross-examination that the mean moisture content as measured (the accuracy of which he did not accept, of course) would indicate that the Cargo was sound at the point of stuffing, at least according to the FCC Guidelines. Mr Ellyatt modified this concession by observing that the FCC Guidelines referred only to moisture, not to temperature; however, it is implausible that the FCC's guidance disregarded the relevance of temperature, and I am anyway satisfied that Dr Bancroft's evidence regarding the temperature of the Cargo is to be preferred to Mr Ellyatt's (see paragraph 91 below).

82. In further agreement with Dr Bancroft, I consider that the lack of correlation between the damage to the beans and the high maximum and mean moisture recordings tends to

[6] The FCC Guidelines stated: "Shippers must endeavour to ensure that cocoa to be loaded is properly dry, ideally with a moisture level of 7.5% but not to exceed 8%. Average moisture level is not to be used as a measurement and any bag indicating moisture in excess of 8% should whenever possible be rejected. For shipment of cocoa beans in bags, ideally every bag should be tested for moisture, although for large quantities a minimum guide would be to randomly select 20% of the bags which are representative of the parcel and test using a moisture metre. If any bag is found to contain in excess of 8% moisture then an additional 20% of the bags should be tested and so on until the assessor is able to report accurately on the state of the parcel in terms of moisture. Bags having a moisture level of more than 8% should not be shipped in containers."

indicate that the Cargo was not prone to self-heating and was not inherently vicious. (This point relates to the incidence of damage across the Cargo; it is different from the point mentioned in paragraph 84 below.)

83. In addition to the JLB documentation, the statement in the Bill of Lading that the cocoa beans were shipped "as far as ascertained by reasonable means of checking, in apparent good order and condition unless otherwise stated herein" is some, albeit limited, evidence that the beans were in good condition at the time of loading and in my view suffices to answer Mr Steward's complaint that there were no photographs of the Cargo at the point of loading and no evidence or comment in the Stuffing and Inspection Report regarding the visual condition of the beans. Mr Djossou's recorded observations of the odour of the samples, though of course not relating to the greater bulk, is also relevant evidence.

84. Another reason for thinking that the Cargo was in sound condition when it was loaded is that much of it was ultimately accepted by JB Cocoa. Dr Bancroft's evidence was that, if the cocoa beans had had inherent vice, damage would have been more widespread and not confined to the directly wetted areas of the Cargo. Mr Steward submitted that the argument was circular, because the basis on which bags were rejected as damaged was precisely that they had been wetted. However, that does not seem to me to be a sufficient response, because as Dr Bancroft observed an experienced commercial buyer of cocoa beans and commercial surveyors would have been mindful of the risk of mould damage in unwetted parts of the Cargo and likely to have been able to identify it if it were widespread.

85. Further, in agreement with Dr Bancroft and disagreement with Mr Ellyatt, I consider that the comparison between the Chennai Cargo and the Cameroun Cargo is relevant. There was some delay between the discharge and the delivery of the Cameroun Cargo (see paragraphs 24 and 30 above), though it was much less than the corresponding delay in respect of the Chennai Cargo. The results of the survey of the Cameroun Cargo are summarised in paragraph 31 above. Unlike the Chennai Cargo, the Cameroun Cargo was accepted in full on delivery. Dr Bancroft opined that, although there had been an increase in mould content since loading, there would have been a significantly higher mould content if the cocoa beans had been inherently defective, and that the recorded moisture content of 6.9% shows that the Cameroun Cargo was biologically stable at the point of delivery. I accept that evidence. The Cameroun Cargo was separated from the Chennai Cargo only by chance. The defendant observes that there is no evidence as to the origin of the cocoa beans in any bag or container and that it is possible that the Cameroun Cargo differed in significant respects from the Chennai Cargo. It is quite true that we do not have information as to origins and that the natural background variation posited by Dr Bancroft may apply as between the Chennai Cargo and the Cameroun Cargo. However, on the available information this is speculative. What is not speculative is that at the respective times of devanning the Cameroun Cargo had suffered significantly less damage than had the Chennai Cargo and was acceptable to the receiver. This is some, albeit by no means conclusive, evidence tending to indicate that the Chennai Cargo probably did not suffer from inherent vice.

Condition of the Cargo at the time of devanning

86. There is and could be no dispute that the condition of the Cargo had significantly deteriorated by the time it was taken out of the containers. The experts were agreed

that high humidities and condensation caused degradation of the Cargo; the points at issue were the time when the degradation occurred and the reasons for the change of conditions in the containers—that is, whether the damage was caused by inherent vice in the cocoa beans or from prolonged containerisation or, if both causes operated, how much damage was caused by each.

Cause of the damage

87. My conclusions on this point have largely appeared from the previous sections. In his written opening submissions, which were incorporated without alteration into his written closing submissions, Mr Steward submitted:

> "111. Here, as explained below, there are really only two possibilities: either the Cargo was not in sound condition when it was loaded (or, at least, not fit to withstand the voyage), or the damage was a result of prolonged delay at the discharge port (or the damage was the result of a combination of the two). D's case is that Cs, not D, are responsible for either of those causes.
>
> …
>
> 116. Here, D will say that all of the damage was in fact caused by Cs' own fault (in breach of Clause 22) in failing to collect the Cargo when it arrived at Tanjung Pelepas at the end of September, until Cs finally presented the Bill of Lading on 17 November. If Cs wish to claim against D for some damage said to have [been] caused otherwise than by that fault, it is for Cs to prove."

That submission correctly identifies the fact that, if or to the extent that the damage to the Cargo was not caused by the unfitness of the Cargo to survive the voyage, that damage was caused by the delay between discharge from the Vessel and devanning. I find that the damage was caused by that delay. That indeed is consistent with Mr Steward's express submission, though, in fairness, that was not quite the way the defendant's case was advanced. It was common ground between the parties that the Cargo had suffered significant damage on account of prolonged containerisation after discharge from the Vessel. Mr Ellyatt's own evidence was that "the unusual length of the duration of storages was almost certainly an important factor in the severity and extent of damage as reported by the Claimants" and that the "requirement of minimal storage time within the containers cannot be emphasised enough for cocoa beans": 1st report, paras 4.38 and 4.39. The issue was whether significant damage had been caused during the voyage by reason of the inherent condition of the Cargo.

88. As I have already made clear, I find that such prior damage had not occurred and that the damage was caused by the prolonged containerisation of the Cargo at Tanjung Pelepas. Many of the reasons for my conclusions as to the cause of the damage have already been set out in the discussion of the condition of the Cargo on loading. Here I mention four particular points relating to Mr Ellyatt's evidence.

89. First, I considered that Mr Ellyatt, whose evidence was for the most part fairly given, was less than wholly objective in respect of the possibility of self-heating of the Cargo.

In his first report, para 5.7 (d), he listed this as the least likely (though still possible) of four possible causes of the damage to the Cargo:

> "Self-heating of the cargo may have started to occur as a result of the temperature and moisture content of parts of the cargo upon stuffing in Nigeria, wetting due to condensation and the delay. No cargo temperatures were measured at unstuffing, so the extent and severity of any self-heating is unknown."

In his second report, however, he referred to the evidence relating to moisture content in the bags and to temperatures and continued at para 3.22:

> "In view of this and combined with the haphazard documentary evidence from the country of origin, the unexplained change in analysis results provided on behalf of the Shipper, a voyage route that transited a much cooler ambient environment and quantities of desiccant material below the FCC Guidelines, I consider that the cargo was at high risk of condensation, mould growth, self-heating and associated deterioration before the containers arrived in Malaysia."

In my view, Mr Leung was correct to observe that the matters relied on in support of the robust conclusion in the second report had all been known at the time of the first report and did not explain the change of position or, at least, emphasis. In cross-examination Mr Ellyatt was given an opportunity to explain the difference between the two reports in this regard, but his answers were not illuminating. I fear that, on this point, Mr Ellyatt succumbed to the temptation to become an advocate for a cause.

90. Second, the first of the grounds of Mr Ellyatt's contention that there was (to put it neutrally) a significant risk of self-heating was the presence in the Cargo of some beans with a moisture content at or maybe even above 8%. However, I accept Dr Bancroft's view that there would, as a matter of probability though not certainty, have been a normal distribution of cocoa beans throughout the Cargo and that the beans with a relatively high moisture content would not have had a significant effect in the context of the whole load.

91. Third, the second of the grounds of Mr Ellyatt's case as to self-heating was the temperature of the Cargo: at para 3.21 of his second report he referred to "unknown cargo temperatures that were very likely to be at least as high as the ambient air temperature (reported by JBL to be 30°C)". However, I find that the temperature of the Cargo was very unlikely to be as high as 30°C. That was the ambient temperature at the time of stuffing and would probably have been the temperature of the air in the headspace above the cocoa beans in the containers; the temperature of the Cargo itself would have been several degrees lower, for the reasons given by Dr Bancroft: see paragraph 50.3 above.

92. Fourth, Mr Ellyatt's evidence in cross-examination, as mentioned in paragraph 50.5 above, is important: he did not know what would have been found if the Cargo had been devanned immediately upon arrival; it was possible that the bags might have been in an acceptable condition if the containers had been opened immediately after discharge. Mr Ellyatt did not think that this was inconsistent with inherent vice. However, it means

that Mr Ellyatt was unable to state the opinion that any propensity to self-heat was such as to render the cocoa beans unfit to withstand the ordinary incidents of the voyage in acceptable condition. I return to this point later.

When did the defendant's responsibility for the Cargo end?

93. The defendant's pleaded case is that its responsibility for the cocoa beans ended upon discharge from the Vessel. Reliance is placed on Articles I(e) and II of the Hague Rules. As *The Giant Ace* makes clear, the Rules apply to contracts of carriage only between loading and discharge. That does not mean that carriers can have no responsibility before loading or after discharge: that will be a matter dependent on the terms of their contract. As Lord Sumption explained in *Volcafe*, the essential relationship is one of bailment. The incidents of the bailment will be modified by the contract. Therefore the provisions of the Bill of Lading fall to be considered. Clause 1 of the Bill of Lading provides a wide definition of "Carriage". Clause 5.2 and clause 22.2 contain provisions purporting to limit the temporal extent of the defendant's responsibility for the goods. The claimants accept that the defendant's liabilities in respect of the goods were capable of being temporally delimited. The defendant contends that its liabilities were so delimited and relies in that regard on clauses 5 and 22 of the Bill of Lading.

94. Clause 5 purports to limit the defendant's liability for damage to the goods to damage occurring up to the time of the defendant tendering the goods for delivery at the port of discharge. Clause 22.2 provides that, if the consignee fails to take delivery within the time provided for in the defendant's "applicable tariff", the defendant is entitled to store the goods and such storage shall constitute due delivery of the goods and the defendant shall have no ongoing liability for them. Mr Leung submitted that clause 22.2 was concerned with the situation where the consignee does not take delivery within the applicable tariff, but that clause 5.2 must be read as concerned with the situation where the consignee does take delivery. Mr Steward submitted that clause 5 related to discharge: "tendering for delivery" is different from "delivering" and is to be taken to refer to discharge from the vessel; that is the point at which liability ceases. He submitted further that clause 22 related to free time in the event of a failure by the consignee to take delivery and to the defendant's right, after expiry of free time, to store the goods as it wishes and without liability and at the consignee's expense.

95. The basic principles of contractual construction are well known. They have been set out by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, *Arnold v Britton and others* [2015] UKSC 36, [2015] AC 1619, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, and have been helpfully summarised by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [17]-[19]. I shall not recite those principles here. One aspect of the interpretation exercise is that a written contract is to be construed as a whole, with each provision having its meaning in the context of the entire document and the understanding of each provision being informed, at least in principle, by each other provision. It may be that, with the best interpretive will in the world, a contract contains inconsistent provisions. Nevertheless, that is not a conclusion lightly to be drawn, especially in the case of a professionally drafted commercial contract, such as the Bill of Lading clearly is. The working hypothesis that clause 5 and clause 22 are consistent with each other is verified by careful reading of the text.

96. The first sentence of clause 5.1, taken together with the definition of "Carriage" in clause 1 but otherwise by itself, would suggest that the carrier is responsible for all handling of the goods and other services provided in respect of the goods at the port of discharge, even if the handling or other services came after discharge. However, the second sentence of clause 5.1 has the effect that the carrier's liability for loss of or damage to the goods between two points in time—acceptance of custody at the port of loading, and tender for delivery at the port of discharge—shall be determined in accordance with Articles I to VIII of the Hague Rules. The Hague Rules do not regulate the liability of the carrier in respect of any period before loading or after discharge from the vessel; the references in Article II to "custody" and "care" relate to the period prior to discharge: *The Giant Ace*, especially at [45]. Discharge may or may not coincide with delivery; that is a question of fact: *The Giant Ace* at [30]. If "tendering the Goods for delivery" relates to any act after discharge, the Hague Rules can have nothing to say about liability. This suggests that acceptance of custody of the goods is being equated with the start of the loading process, and that "tendering the Goods for delivery" is being equated with discharge. I see no difficulty with that interpretation of the words "tendering the Goods for delivery": discharge concludes the actual carriage of goods by sea, and it is from discharge that the receiver has at common law a reasonable time within which to collect the goods. I see no difficult with equating "tendering for delivery" with discharge: it is at the point of discharge that the goods are available for collection, and receivers were able to know when their goods were discharged—quite apart from any ability to make enquiries, the defendant provided an electronic tracking system for its ships, so that shippers and consignees were able (if they so desired) to know when ships arrived at their discharge ports. On the other hand, it is hard to see how "tendering for delivery" can be the same as "delivering". If my proposed construction is right, the logic of clause 5.1 is clear: the carrier is contractually obligated to perform any acts in relation to the goods that he undertakes to perform (first sentence); insofar as those acts are within the scope of the Hague Rules (that is, up to the point of discharge), liability for damage is determined according to the Hague Rules. The words "save as is otherwise provided in these Terms and Conditions" do not weigh against that construction. They do not purport to alter the meaning of the Hague Rules as contractually incorporated. They only mean that the determination of liability for matters within the second sentence of clause 5.1 is to be determined in accordance with the Hague Rules unless some other provision of the Terms and Conditions provides otherwise.

97. On that basis, clause 5.2 falls into place. The first sentence of clause 5.2 means that the carrier is liable for loss and damage only within the limits of the Hague Rules, that is, from loading to discharge. Prior to and after those points in time, the goods are at the risk of the shipper or the consignee as the case may be. The second sentence simply means that, if the temporal delimitation of the carrier's liability is ineffective in law, the defences, limitations etc. under the Hague Rules will apply to this additional period of liability as they apply to the period governed by the Rules themselves. Indeed, in my view the second sentence of clause 5.2 serves to confirm the correctness of my interpretation of clause 5.1 and of the first sentence of clause 5.2, because it is clearly intended to extend (if necessary) the defences, limitations etc. in the Hague Rules outside their normal operation, which is confined to the carriage of goods by sea.

98. Clause 22.1 means that the defendant had no duty to give notice of arrival. The claimants correctly observe that they do not allege that the defendant is liable on the

basis of failure to give notification of arrival of the goods or that failure to give such notice was a breach of contract; rather, their case is that the defendant failed to take reasonable care of the goods; the failure to give notice of arrival had the effect of rendering the defendant subject to the ongoing obligation to take reasonable care of the goods. Indeed, the claimants contend that the defendant's failure to send an arrival notice is relevant not as a breach of contractual obligation but as a failure to tender the Cargo for delivery. It is common ground that it was the defendant's normal practice to send an arrival notice and that it did not do so in this case. The claimants contend that the arrival notice is critical, and they rely on the evidence of Ms Chua, who accepted in cross-examination that the arrival notice was an important document and helped to facilitate delivery. They contend that tender of delivery of a cargo requires more than mere discharge but also notice of arrival.

99. In my view, there are compelling objections to the claimants' case in this respect. First, in the light of what I regard as the true construction of clause 5, the premise of the argument—that the period of liability was extended by non-service of an arrival notice—is false. Second, it is not enough to insist that the claim is not based on failure to serve an arrival notice. The defendant was not obligated to serve an arrival notice at all. Therefore, whatever practical use or even importance an arrival notice may have had, at least in Ms Chua's eyes, it was not an integral part of delivery or of tender of delivery.

100. Clause 22.2 deals with the receiver's obligation to take delivery and the consequences of a failure to take delivery. The first sentence (the obligation to take delivery) is consistent with my construction of clause 5; although it does not positively require that construction, the apparent meaning of the obligation to take delivery within the time specified in an applicable tariff does tend to suggest that time starts running from discharge. (Whether or not any tariff was incorporated in this particular case is a distinct question, which will be discussed separately and briefly.) The second sentence entitles the carrier to take certain actions in respect of the storage of uncollected goods at the receiver's sole risk. This is straightforward: if the receiver does not take delivery within the permitted no-charge period, he has to pay container demurrage. The third sentence provides that such storage outside the applicable tariff period shall constitute delivery of the goods and shall be at the receiver's expense. The remaining provision of the third sentence of clause 22.2 is that "thereupon"—that is, upon the deemed delivery of the goods—"all liability whatsoever of the Carrier in respect of the Goods … shall cease". In my opinion, far from being inconsistent with my construction of clause 5, this provision of clause 22.2 tends to confirm it. It is not inconsistent with my construction of clause 5, because clause 5.2 countenanced the possibility of an "additional compulsory period of responsibility" after the tender of the cargo for delivery. It tends to confirm my construction of clause 5, because the deemed delivery in the circumstances provided for in clause 22.2 (non-collection after the expiry of the tariff period) must post-date both discharge and tender of delivery; therefore tender of delivery cannot be the same as delivery.

101. In my judgment, clause 8 of the Bill of Lading has no bearing on the matter. It concerns loss or damage caused by delay, not loss or damage caused by failure to take reasonable care of the goods.

102. To summarise the foregoing discussion:

1) Clause 5 of the Bill of Lading limits the defendant's liability for loss of or damage to the goods to loss or damage occurring in the period to which the Hague Rules apply, namely from loading to discharge. Liability for loss or damage occurring before or after that period is excluded.

2) Clause 22.1 has no direct bearing on the matter. However, it does show that the defendant had no obligation to serve an arrival notice and, therefore, that the service of an arrival notice was not necessary either to delivery or to "tendering … for delivery".

3) Clause 22.2 has no bearing on the matter in the circumstances. (See paragraph 106 below for further comment on clause 22.2 in an alternative scenario.)

4) Clause 8 has no bearing on the matter. It concerns loss or damage caused by delay, not loss or damage caused by a failure to take reasonable care of the goods.

103. The claimants disputed the construction of clause 5 set out above, but they did not dispute that it was open to the defendant to limit its liability in that manner by a contractual provision that had that effect. Accordingly, I hold that the defendant was not liable for loss of or damage to the cocoa beans after they were discharged from the Vessel.

104. The consequence is that the claim for damage to the Cargo must fail, because it is put on the basis of damage caused by a failure to take care of the Cargo between discharge and delivery. I consider that the damage was indeed caused between those two points in time. If the damage had occurred during the voyage, the defendant would clearly have had an answer to the claim under the Hague Rules.

105. I have not found it necessary to discuss the "applicable Tariff" mentioned in clause 22.2, because I do not consider that the point is relevant to the temporal delimitation of the defendant's liability for loss of or damage to the goods. Nevertheless, I shall comment on the point briefly now.

1) Mr Steward submits that there was a 7-day tariff, identified in the defendant's Demurrage and Detention Guidelines (effective from 1 January 2017) and incorporated by clause 2 of the Bill of Lading. In respect of incorporation he referred to the judgment of Blair J in *Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 811 (Comm) at [82]-[87], where the judge discussed the incorporation in the context of warehouse receipts and referred to the prior decision in the same proceedings by Teare J, who had said this ([2015] EWHC 25 Comm, at [16]):

> "As a matter of English law where terms are incorporated it must be shown that the party seeking to rely on the conditions has done what is reasonably sufficient to give the other party notice of the conditions; see *Chitty on Contracts* Vol.1 para.12-014 [see now paragraph 15-010 in the 34th edition]. Here, the first page refers to the warehouse certificate as being subject to the Terms and Conditions of Impala. At the base of the page the reader is invited to refer to the reverse of the page for

> additional conditions. On the reverse the reader is referred to Impala's web-site for its Terms and Conditions. Thus the holder of the warehouse certificate knows that the certificate is subject to Impala's Terms and Conditions. He is referred to the reverse of the certificate. On the reverse he is told where to find the Terms and Conditions. I consider that these steps are reasonably sufficient to give the holder notice of the conditions. In this day and age when standard terms are frequently to be found on web-sites I consider that reference to the web-site is a sufficient incorporation of the warehousing terms to be found on the web-site."

2) Mr Leung submitted, first, that the provenance and date of the document had not been established, but the nature of the document is clear, its genuineness has not been validly challenged, and the effective date of the document is stated within it. Mr Leung submitted, next, that clause 2 of the Bill of Lading was insufficient to incorporate the tariff into the contract. He relied on the judgment of Edwards-Stuart J in *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC) and in particular the following passages:

> "49. In the light of the authorities that I have discussed, it seems to me that a seller who wishes to incorporate his terms and conditions by referring to them in his acknowledgement of order—thus making it a counter offer—must, at the very least, refer to those conditions on the face of the acknowledgement of order in terms that make it plain that they are to govern the contract. Having done that, if the conditions are not in a form that is in common use in the relevant industry, the seller must give the buyer reasonable notice of the conditions by printing them on the reverse of the acknowledgement of order accompanied by a statement on the face of the acknowledgement of order that it is subject to the conditions on the back.
>
> 50. An alternative way in which the same end may be achieved (if the terms and conditions are not printed on the back of the order) is for the seller to send the buyer a copy of his terms and conditions, making it clear that they are the only terms and conditions upon which the seller is prepared to do business.
>
> …
>
> 53. I accept that the position may be different if the terms and conditions which the seller seeks to impose are those which are routinely applied to contracts of the type in question, because, for example, they are the terms and conditions of a particular trade association, as in the *Circle Freight* case. In those circumstances it may be sufficient for the seller simply to refer to those conditions on the face of the acknowledgement of order stating that copies are available on request - but that is not this case."

3) In my judgment, as subject to what follows, clause 2 of the Bill of Lading is clearly sufficient to give notice to the other parties of the terms sought to be incorporated. It would of course be known that the back of the Bill of Lading contained terms and conditions, and both those and the conditions in the applicable tariff were referred to in capital letters on the front of the Bill of Lading. Mr Leung's attempt to get around the obvious by portraying the tariff as unusual is, with respect, hopeless. That charges will apply if goods are not collected is obvious. (At common law, if the consignee or other holder of the bill of lading does not collect the goods within a reasonable time after arrival of the ship at the port of discharge, the master is entitled to warehouse them at the expense of the owner of the goods.) I do not know whether the particular free period and charges thereafter applied by the defendant are different from those applied by other carriers—there was no evidence on the matter; though the defendant's leading position in the market is not to be forgotten—but that is not the point.

4) However, in my judgment, the 7-day period in the tariff is displaced by the 15-day period specifically mentioned on the face of the Bill of Lading. See the final sentence of clause 2.

5) If, contrary to the view set out above, the defendant had remained responsible for the Cargo after discharge, its storage of the Cargo after the 15-day period (that is, after 16 October 2017) would by reason of clause 22.2 have constituted delivery and put an end to the defendant's responsibility. Having regard to the period of delay in the case of the Cameroun Cargo, I should not have found that the 15-day period was material to the damage to the Cargo.

<u>The position if (on the contrary) the defendant remained responsible</u>

106. If, contrary to my decision, the defendant remained responsible for the Cargo between discharge and devanning, I should have held it liable for the damage to the cocoa beans on the grounds that it failed to take reasonable care of them by opening the container doors to provide ventilation. It was common ground between the experts that it was important to minimise the amount of time during which cocoa beans were inside closed, unventilated containers. Dr Bancroft wrote (1st report, para 54; footnotes omitted):

> "On account of the risks associated with the international transport of cocoa beans it is evident that the transit period from produce source to processing site should be as short as possible. The FCC emphasises the need to avoid undue delays both at the at the port of loading and discharge. The threat of excessive condensation is often greatest when containers have been discharged from a vessel and then exposed to sunlight for extended periods before being stripped. At the port of discharge the FCC recommends that container doors be opened and unstuffing be completed within 48 hours of arrival at place of final delivery and in any case should not exceed 7 days of discharge of the vessel. If this should occur the bare minimum should be that the rear doors of the containers are opened to permit the ventilation of the cargo and the egress of warm most air from the cargo."

107. In my view, the defendant failed to provide any satisfactory answer to that evidence (except, of course, that it had no responsibility for the Cargo at the relevant time). First, it contended that it would have been impractical to open the doors, because they had a structural significance. However, it did not produce any evidence that the containers could not reasonably be stored other than in stacks. If safekeeping of the cocoa beans required the ability to open the doors, such storage ought to have been undertaken. Second, it contended that to open the doors of the containers would be to risk rodent infestation. No evidence was produced to show that this risk could not be avoided, and I am entitled to infer that there are several ways of keeping rodents out, including netting. Third, in reliance on clause 13 of the Bill of Lading the defendant contended that it was not obliged to open the container doors. That seems to me to be to ignore the meaning and purpose of clause 13 as a whole. The basic point of the clause is that the carrier is entitled but not obligated to open the containers to inspect the goods. That is not what is in issue here; rather the issue is that the defendant stored the goods in a manner clearly liable to lead to their deterioration.

108. I have adverted to what I regard as some tension in the defendant's case regarding damage: see paragraphs 76 and 92 above. The upshot of Mr Ellyatt's evidence seems to me to be, at its highest, that he cannot say whether or not the cocoa beans were in a damaged state upon discharge but that any damage that occurred to them between discharge and devanning was (or might have been) the combined effect of prolonged containerisation and a propensity to self-heat. On that basis, however, there would have been concurrent causes of the damage. In that event, it would be for the defendant to prove that all of the concurrent causes were within the exclusions from liability; this would require the defendant to show that it had exercised reasonable care to prevent the damage from prolonged containerisation (which, on the alternative scenario under consideration, but only on that basis, it would not have done): see *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd's Rep 210.

109. I make two points in conclusion. The first point is that, if the defendant had continuing responsibility for the goods, the other exceptions in Article IV (2) of the Hague Rules mentioned by the defendant do not assist it. Exception (i) does not apply if the defendant remained responsible for the goods. Exceptions (m) and (p) do not apply, for reasons already given. Exception (n) was not pursued, Mr Steward expressly disavowing reliance on insufficiency of packing. Exception (o) is irrelevant. Mr Steward attempted in his submissions to rely on exception (q), on the basis that Ms Chua's evidence was that part of the delay was due to computer problems being suffered by the defendant. That argument cannot avail the defendant because (a) it is unpleaded[7], (b) the defendant has not shown that the computer problems were not its fault, (c) the contention that the computer problems were not its fault because they were the result of a cyber-attack represents the defence for which permission to amend was previously refused by HHJ Pelling KC and would anyway beg the question why a cyber-attack in June was still causing problems in November, and (d) the exception would show only the existence of concurrent causes of damage and so would not provide any defence to the defendant. The second point is simply to reiterate that I do not consider that the

[7] Paragraph 19 of the Defence does refer to exception (q) but does not plead any facts relevant to the submission made by Mr Steward.

defendant was responsible for the goods after discharge. Therefore I do not in fact consider that it had any duty to open the container doors.

Loss and damage

110. For reasons already given, I do not consider that the defendant is liable to the claimants for any damage to the cocoa beans. This section of the judgment and the next section, like the last preceding section, addresses the alternative position.

111. The claimants claim the following heads of damage.

1) Diminution in the market value of the damaged cargo: €146,972.69

2) Diminution of value of the by reason of a reduction in the weight of the damaged cargo: €23,992.95

3) Value of cargo lost owing to reconditioning necessitated by the damage to the cargo: €5,084.61

4) Re-bagging costs: €1,749.44

5) Survey costs: €2,220

6) Commission on the sale of the damaged cargo: €3,775.32

7) Value of 12 short-delivered bags: €1,561.51

112. The first six heads of damage relate to the water damage to the Cargo. For the reasons set out above the claim to recover damages under those heads fails, though I shall comment on them briefly. The seventh head of damage rests on an entirely different basis and will be discussed separately below.

113. The primary loss claimed is in respect of the diminution in market value of 119.79 tonnes of damaged cargo. That is the weight recorded in the JLB survey report of 2,291 wet and stained bags (see paragraph 44 above). The claimed amount of €146,972.69 has been calculated by subtracting the salvage price for the damaged cargo (€950 *per* tonne) from the market value of undamaged cocoa beans as recorded in the JLB survey report (€2,031 *per* tonne). The only objection in principle that was made to this calculation at trial (apart from failure to mitigate loss, which is dealt with below) was that the evidence as to market value was solely as at the date of the salvage sale of the damaged cargo, several months after delivery, and was therefore not a proper basis on which to assess damages. There is limited force in the point. Clearly there was a loss resulting from the damage to parts of the Cargo. That loss was, in brief, the diminution in value (generally, but not necessarily, taken as at the date of the breach). We have the figures for the difference between the price achieved and the market price at the date of the sale. It is a reasonable assumption that this provides some guidance as to the likely difference between those two prices at a date some months earlier, even if the prices themselves were not the same. The basis of the calculation was set out clearly in paragraph 18 of the particulars of claim. The only evidence adduced by the defendant on the point was Mr Ellyatt's stated opinion (1st report, paragraph 4.10; joint memorandum, page 7) that if the salvage sale had been conducted more quickly the overall condition of the (damaged) cargo would have been better than it was when the

sale actually took place. The implication is that difference between the market price for cocoa beans and the price achieved on the salvage sale would have been less. That is not quite the point relied on by Mr Steward, and it was not put to Dr Bancroft that the damaged beans would have deteriorated materially before sale, such that the difference between the salvage price and the market price would have increased. Doing the best I can, I proceed on the basis of the claimants' figures.

114. The second head of loss also relates to the damaged bags. The claimants' case is as follows. The damaged bags actually weighed 119.79 tonnes, or an average of 52.29 kg each. The average weight of an undamaged bag was 64.07 kg. The difference (11.78 kg *per* bag) is 26.988 tonnes. That difference is said to result from two causes: (i) respiration and water loss by reason of mould growth; (ii) leakage of cocoa beans from the damaged bags. An allowance has been made for the weight of loose cocoa beans swept and collected from the containers. The resulting shortfall of 11.813 tonnes has been regarded as a loss from the damaged bags and is claimed at the price achieved on the salvage sale.

115. A number of arguments, of varying merit, were raised against this second head of loss. First, it was said that there are no relevant weighbridge or similar records. That is true, but the calculation is based on inferences to be drawn from average weights and the absence of records is not a critical objection. Second, it was said that the weights appeared to have been taken months after delivery (Mr Steward's written closing submissions, paragraph 172). That is incorrect: the JLB survey report gives the weights as having been taken "during discharge" (which probably means during devanning), albeit that there is no contemporaneous record of the weighing. Third, it was said that some of the shortage appeared to relate to leakages or spillages during handling or to beans being crushed during handling, for which the defendant should not be held responsible. However, as the shortages are calculated by reference to the average weights of damaged and undamaged bags, the available response is that such shortages occasioned by losses in handling after discharge resulted from the fact that the bags were damaged. Fourth, the defendant challenged the methodology of the claim, by reference to Dr Bancroft's evidence. In Table 7 in his first report, he set out a summary of net weights: in particular, the net weight at stuffing was 276,490 kg and the net weight landed, including sweepings, was 271,239 kg, giving a net weight not landed of 5.251 tonnes. In cross-examination, Dr Bancroft said that this last figure was "just what's missing, really, what can't be accounted for." It was put to him that this was "within a margin of error", and he replied, "Yes. I mean, yeah. Well, there's lots of things that could be put into that. Yeah." Neither the question nor the answer was ideally perspicuous, but the point is tolerably clear. Further, I accept Dr Bancroft's calculations. Mr Ellyatt's evidence (second report, paragraphs 4.17 to 4.20) provides some further assistance. He observed that the FCC Contract Rules for Cocoa Beans provided for a tolerance of 1.5% of the weight at time of shipment (which by my reckoning is 4.147 tonnes according to net weights). He also said that between 1% and 3% moisture loss is considered normal when shipping cocoa beans in containers. The FCC Contract Rules do not apply under the Bill of Lading, but the tolerance for which they provide and the evidence of normal moisture loss give some information in the light of which to consider Dr Bancroft's evidence. In the circumstances, in my judgment, the inference that the reduction in weight, as set out by him in Table 7, is to be attributed to the underlying damage to the Cargo is not established. It is explicable by reference to the hygroscopic qualities of cocoa beans. That is sufficient to dispose

of this head of loss. Fifth, the cocoa beans were carried in shipper-packed sealed containers. The probable inference is that the seals were only broken on delivery: there is no reason why they should have been broken earlier, and the claimants' very complaint is that the doors had not been opened; and the JLB survey report records that the surveyors were told that the containers were "in apparent good order and condition except for wear and tear." Accordingly, I should consider that any claim for shortage was precluded by clause 11.3 of the Bill of Lading.

116. Accordingly, I would have disallowed the second head of loss.

117. The third head of loss (cargo lost through necessary reconditioning) is assessed as follows. The combined weight of the damaged cargo and the spilled cargo that was recovered was 134.97 tonnes. But the combined quantity of these elements of the Cargo after re-bagging was 132.47 tonnes. Therefore there was a shortage of 2.5 tonnes. Dr Bancroft did not consider this amount of spillage in the re-bagging process to be excessive. Mr Ellyatt considered it to be "a very large quantity of cargo to have been lost during this operation" and thought it "indicative of a lack of care during the process". There was no evidence as to how the re-bagging operation was carried out. However, in the light of the ability of the prior exercise to recover some 15 tonnes of spilled cargo before re-bagging, I am not persuaded that the subsequent loss of 2.5 tonnes without recovery was a natural or reasonable incident of the re-bagging procedure. I would have disallowed this head of loss.

118. In principle, the re-bagging costs (subject to any question over the conversion rate from Malaysian currency), the survey costs and the commission on the sale of the damaged cargo would, in my judgment, be recoverable.

119. Accordingly, subject to questions of mitigation of loss and currency conversion, I would have allowed in respect of the claim for damage to the Cargo: (a) €146,972.69 for diminution in value; (b) €1,749.44 for re-bagging costs; (c) €2,220 for survey costs; and (d) €1,561.51 for commission costs: a total of €154,717.45.

Mitigation of loss

120. The defence pleads (paragraph 25) that the claimants failed to mitigate their losses. The one particular of this failure that is alleged is that the claimants failed or refused to skim or recondition the Cargo. (This particular is said to be relied on "*inter alia*" but no other things have been alleged in the statements of case.)

121. The basis of the plea is the following record in JLB's survey report:

> "We recommended [apparently on 6 and 7 December 2017] JB Cocoa to organize, a skimming / reconditioning as much as possible of the bags.
>
> However, JB Cocoa declared that they were not able to perform a skimming and that they wanted a salvage sale to be organized for all the damaged bags separated.
>
> After lengthy discussions, another meeting was organized on 06/02/2018. Our Surveyor suggested that a sorting could be

> done between the slightly / medium damaged bags which could be skimmed and the heavily damaged bags—most of them with packing decayed—which would be sold for salvage.
>
> Although, our Surveyor showed that many bags were in a condition that would allow the skimming of the small quantity of damaged beans contained, JB Cocoa refused everything and not even a test sorting with a test skimming of the first slightly damaged bags which would be separated.
>
> They argued that they had no space for such handlings or operations.
>
> Our Surveyor took some samples in the damaged part of the damaged bags. The cut test performed later at their office, showed a percentage of mouldy beans of 41.2%. This percentage is very high, even for the damaged part and shows that the beans were in contact with water for a long period of time in the containers.
>
> As the Receiver did not want to accept any other option than a salvage sale, we organized a tender …"

122. For the defendant, Mr Steward submitted that the recommendation of JLB was clear and that the only evidence of the claimants' inability to follow the recommendation was hearsay evidence of what JLB were told. He relied on Mr Ellyatt's evidence (1st report, paragraph 4.10) that JLB's report constituted "clear evidence that a considerable quantity of the allegedly damaged bags which were subsequently sold for salvage contained a large proportion of cocoa beans that were not in fact damaged", and that "[t]he sorting proposed by JLB could have significantly reduced the claim value, particularly (but not limited to) if the quantity of damaged cargo remaining after reconditioning could have been blended with sound cargo used in the manufacturing processes in Malaysia at a ratio which produced a product within the manufacturers' safety and quality tolerances (which are unknown)." Mr Ellyatt maintained that opinion in cross-examination. However, he accepted that cocoa beans considered to be sound after segregation would have to be dried and that he did not know the costs of the drying operation.

123. I do not accept the plea of failure to mitigate. First, the burden to establish the failure to mitigate rests on the defendant. Second, as the defendant is *ex hypothesi* the wrongdoer the court does not impose a high standard on the claimant as regards mitigation: he is only required to act in accordance with the ordinary course of business. Third, the proposed mitigation would involve a three-stage exercise: first, segregating (by hand, as I accept) the cocoa beans that were not apparently damaged; second, drying those cocoa beans; third, analysing the product for mould. As to the first stage, I accept Dr Bancroft's evidence to the effect that mouldy beans within a bag will taint adjacent beans and that visual inspection will not show whether or not they are tainted. I also accept his opinion that it was reasonable not to blend potentially tainted beans with sound beans. As to the second stage, Dr Bancroft's evidence was that drying the beans would have taken a very large area of drying tables. (Dr Bancroft thought that this area may exceed 1000m²: 2nd report, paragraph 64. I am inclined to think that this is an

overestimate, but the likely area would be at least several hundred square metres.) This would be an expensive exercise and logistically demanding. Dr Bancroft did not know what facilities were available to the claimants, but neither did Mr Ellyatt. Further, the exercise would be for uncertain financial benefit, because, unless JB Cocoa were willing to take the (unacceptable) risk of contaminating sound beans with tainted beans, the ultimate ability to blend the salvaged beans with the sound beans would depend on the uncertain results of analysis. Fourth, so far as I can see (though I do not think that the point was addressed in evidence), even a successful outcome would not result in pure gain. What actually happened was that all the cocoa beans in the damaged bags were sold *en masse*. If the segregation had taken place with the successful result posited by the defendant, the gain would have been offset at least to some extent by the reduced value of the visibly damaged beans, which would then have been either discarded or saleable only at a lower price to take account of the lower quality. This leads, fifth, to the fact that, even on its own case, the defendant does not establish the extent to which the claimants' loss could have been reduced by reasonable measures in mitigation.

The claim for short delivery

124. The claim for €1,561.51 does not relate to damage to the Cargo. It rests on a plea that the defendant delivered a total of 4,418 bags of cocoa beans, 12 bags fewer than were loaded: particulars of claim, paragraph 14 (1).

125. I reject this claim. The evidence is plainly insufficient to establish the implausible allegation that the defendant failed to deliver 12 bags that had been loaded onto the Vessel; further, the defendant would in my view have a contractual defence. First, the Cargo was in sealed containers. It is very hard to see how 12 bags can have gone missing before delivery. Second, the containers were stuffed by the shipper (WACOT), not by the defendant. Third, the Carrier's Receipt on the Bill of Lading only acknowledged receipt of 11 containers. It did not acknowledge or constitute evidence of receipt of any particular number of bags. See clauses 11.1 and 14.1. Fourth, the only evidence concerning the number of bags (4,418) is in the JLB survey report, which shows the number of bags at the time of the survey, namely 4, 6 and 7 December 2017, several days after delivery. All containers had been unstuffed prior to JLB's attendance at the survey on 4 December 2017; some limited segregation had apparently already been carried out before JLB's initial attendance, and the remaining segregation had been carried out by the time of JLB's attendance on 6 December 2017. There had therefore been much handling of the bags by the likely time of counting. Fifth, as it is probable that the containers remained sealed until delivery, clause 11.3 would preclude liability on the part of the defendant.

Conclusion

126. In summary:

1) The cocoa beans were damaged by prolonged containerisation between discharge and devanning at Tanjung Pelepas. They did not suffer from inherent vice.

2) JB Cocoa has no claim in negligence in respect of the damage, because (a) it has not proved that it was the owner of the cocoa beans when they suffered damage and (b), even if it had proved that it was the owner, it has not demonstrated any basis on which the defendant could be liable in negligence and outside the terms of the Bill of Lading.

3) JB Foods has no claim under the Bill of Lading, because the defendant's responsibility for the cocoa beans ended upon discharge from the Vessel.

4) If the defendant had remained responsible for the cocoa beans between discharge and devanning, it would have been liable to JB Foods on the basis that the damage to the cocoa beans had been caused by its failure to take reasonable care of the cocoa beans by ventilating the containers by opening the doors.

5) If I had found liability for damage to the cocoa beans, I would have assessed the quantum of damages for that damage at €154,717.45 and I would have rejected the defendant's contention that the claimants had failed to mitigate their loss.

6) The claim for damages for short delivery fails on the facts and would anyway have been subject of a good defence under clause 11.3 of the Bill of Lading.

127. In the event, the claim is dismissed.

128. I shall be grateful if the parties will agree appropriate terms of order for my consideration. If any matters require my further determination, I shall hear counsel at a short hearing.