HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 23

on appeal from: [2005] EWCA Civ 1418

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Datec Electronics Holdings Limited and others (Respondents)
v.
United Parcels Service Limited (Appellants)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

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Hearing dates:
14 and 15 March 2007

ON
WEDNESDAY 16 MAY 2007

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[2007] UKHL 23

LORD HOFFMANN

My Lords,

1. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Mance and agree that this appeal should be dismissed.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Mance. I agree with it, and for the reasons he gives I too would dismiss the appeal. I wish to add only a few observations of my own on the first issue: was there a contract for the carriage of goods by road within the meaning of article 1 of the Convention on the Contract for the International Carriage of Goods by Road ("CMR").

3. The reach of article 1 of CMR is very wide. It applies to every contract for the carriage of goods by road, provided it is a contract for reward and the place of taking over the goods and the place designated for delivery, as specified in the contract, are situated in two different countries of which at least one is a contracting country. The place of residence and the nationality of the parties are irrelevant. All the qualifications as to the kind of contract that the article contemplates are

met in this case. The questions are whether, in the events that happened, the three packages that UPS's driver uplifted from Datec's premises in Milton Keynes for delivery to Incoparts' agents in Amsterdam were being transported under a contract and, if so, whether it was a contract of carriage. It is not disputed that, if there was a contract of carriage, CMR applies to it.

4. The underlying facts point strongly towards there having been a contract between the parties of some kind. UPS's driver presented himself at Datec's premises in response to a computer booking for the transportation of the packages to Amsterdam. This was to be done in consideration of a transportation charge for which Date was to be billed through its account with UPS. He accepted the packages and carried them by road to Luton. From there they continued on their journey by air to Cologne and then on by road to Amsterdam. The essential elements of a contract were all present. I think that the surrounding circumstances indicate that the transaction was being undertaken on both sides with reference to the framework agreement which the parties entered into on 8 March 2001. This was a standard form contract to which terms and conditions of carriage ("the conditions") were attached. The problem arises, as Lord Mance has explained, because each of the three packages exceeded the limit of value set out in clause 3(a)(ii) of the conditions.

5. Clause 3 of the conditions begins with these words:

> "This section sets out various restrictions and conditions which limit and govern the extent of the service UPS offers. It also explains what the consequences are of the shipper presenting packages which do not meet these requirements."

The conditions must, of course, be read as a whole. So the provisions which follow must be read in the light of the guidance as their purpose which is to be found in these two opening sentences.

6. Various service restrictions and conditions are set out in para (a). These include restrictions on the size, value and contents of packages. Among these restrictions is para (a)(iv). It provides that packages must not contain goods which might endanger human or animal life or any means of transportation or which might otherwise taint or endanger

other goods being transported by UPS. Para (a) also makes the shipper responsible, among other things, for the accuracy and completeness of the particulars inserted in the waybill and for ensuring that all packages set out adequate contact details for the shipper and receiver of the package. A breach of the limits set by some of the restrictions and conditions may be capable of being identified by inspection at the outset before any carriage takes place: see para (a)(i), which relates to the weight and size of packages. Others may not be discovered until something happens: see para (a)(iv), which relates to packages which may damage other goods being transported by UPS.

7. The consequences of a failure to meet the requirements of para (a) are set out in paras (c), (d) and (e). If it comes to the attention of UPS that any package does not meet any of the restrictions or conditions set out in para (a), it may suspend carriage and hold the package or shipment to the shipper's order: para (c)(i). It may also do this if, among other things, it has been given an incorrect address for delivery. The shipper is responsible for the reasonable costs and expenses of UPS and for all claims against UPS because a package does not meet any of the restrictions and conditions in para (a): para (d). UPS is not liable for any losses which the shipper may suffer arising out of UPS's carrying packages which do not meet the restrictions and conditions set out in para (a): para (e).

8. The service which UPS offers is an express package and document service which is designed to handle high volumes with the minimum of delay and inconvenience to customers. The commercial purpose of the framework agreement is to allocate responsibility between the parties in events which may be expected to happen in contracts of that kind. Two situations are contemplated by clause 3(c), which is headed "refusal and suspension of carriage". To these a third must be added, which is this case. The first is where the fact that package does not meet any of the restrictions or conditions comes to the attention of the driver at the outset before it is accepted for carriage by UPS. In this situation UPS may "refuse to transport" the package. The second is where this fact comes to the attention of UPS after carriage has begun and while the package is still in transit. In this situation UPS may "suspend carriage". The third is where carriage has begun and the fact does not come to the attention of UPS until the package is lost or damaged before or at the point of delivery.

9. In the first situation there is no contract. The package does not meet the terms of UPS's offer, so UPS is entitled not to accept it. In the

second and third situations, however, I do not think that it can be said that there was no contract. The package has been handed over and accepted, and it is being or has been carried. The conditions explain how the transaction is then to be regulated. In the case of suspension, the package is held for the shipper's order and may be returned to the shipper at the discretion of UPS: para (c)(iii). In the case of suspension or where loss or damage occurs, UPS is relieved of any liability to the shipper by para (d). The fact that the conditions are designed to deal with these situations indicates that a transaction which gets this far falls within the contract of carriage and is regulated by it. It is, of course, obvious that the conditions cannot mean one thing when they are applied to domestic carriage and other when they are applied to carriage which is international. I would have expected UPS to have wished to take advantage of the conditions if the carriage which was being undertaken was internal to the UK. It is the disadvantage that flows from the application of CMR that lies behind the contention that there was no contract of carriage in this case.

10. In the result I would construe the conditions in the framework agreement in this way. If UPS is made aware at the outset that a package that it is asked to carry does not meet any of the restrictions or conditions, it may refuse to accept it. The framework agreement permits it to do this. There is no contract of carriage. But if UPS accepts the package and the undertaking to transport it is performed to any extent, there is a contract of carriage. This is what the framework agreement itself contemplates, and its actions must be taken to be referable to a contract of carriage that has been made under it. The consequences are those which the framework agreement sets out, as modified by CMR if the contract is one to which article 1 of CMR applies.

LORD WALKER OF GESTINGTHORPE

My Lords,

11. On the first issue in this appeal I am in full agreement with the reasoning and conclusions of my noble and learned friends Lord Hope of Craighead and Lord Mance, whose opinions I have read in draft.

12. On the second issue (the judge's conclusion that wilful misconduct had not been proved on the balance of probabilities) I feel

real doubt whether the Court of Appeal had sufficient grounds for reversing the trial judge, who had the advantage of seeing and hearing the witnesses. He set out his findings fully and clearly and nothing in his judgment suggests to me that he failed to make full use of that advantage. In principle there are clear distinctions between findings of primary fact, factual inferences and the evaluation of factual matters, but in practice they often start to run into one another. An appellate court should be cautious about differing from the trial judge in any of his findings, for the reasons explained by my noble and learned friend Lord Hoffmann in a passage in *Biogen Inc v Medeva Ltd* [1997] RPC 1, 45 which is so well known as not to need repetition.

13. But I do not think it necessary to press my doubt to the point of dissent. I too would dismiss this appeal.

LORD MANCE

My Lords,

Introduction

14. This appeal raises, first, a legal issue of general interest relating to the Convention on the Contract for the International Carriage of Goods by Road ("CMR"), scheduled to the Carriage of Goods by Road Act 1965 and, secondly, a factual issue on which the courts below have differed. The appellants, United Parcels Service Limited ("UPS"), perform a parcels delivery service on a worldwide basis. On Thursday, 25 July 2002, the first respondents, Datec Electronics Holdings Ltd ("Datec"), as consignors handed over to UPS in Milton Keynes three packages of Pentium IV computer processors, with a view to their delivery next morning to L & A Freight BV ("L&A"), as agents for the second respondents, Incoparts BV ("Incoparts"), in Amsterdam. The packages reached UPS's hub (or feeder) premises in Amsterdam, but the judge, Andrew Smith J, found that they were never delivered to L&A.

15. The issue of law arises because the packages were carried partway by road internationally. UPS took them first by road to Luton Airport, then by air to Cologne (apparently by UPS's own cargo service) and from there by road to Amsterdam. The leg between Cologne and

L&A in Amsterdam is international carriage within the potential scope of CMR. The respondents' primary claim is that CMR applied to this leg, that UPS is liable for the loss of the packages during this leg under article 17(2) and that the probable cause of loss was wilful misconduct by UPS or its agents or servants within article 29, displacing the limitation of liability otherwise available to UPS under article 23(3) of CMR.

16. UPS rely in response on their standard terms and conditions (which I shall for convenience call "UPS's conditions"). These were incorporated in an umbrella or framework agreement which Datec and UPS made on 8 March 2001 to regulate their frequent dealings. Further, when making the computer booking for this particular consignment on 25 July 2002, Datec had to click on a box expressly confirming acceptance of UPS's conditions. Under such conditions UPS sought to ensure that it did not carry any individual package worth more than US$50,000. The three packages each had a value well in excess of that limit. Their total value was US$377,856. The processors were stored within them in eight smaller boxes – two boxes in one package which weighed 17kg, and three boxes in each of the other two packages which each weighed 25kg. Each box had a value of US$47,232.

17. In these circumstances, UPS's case is that that there was never any contract at all relating to the three packages or that, if there was, it was not a contract for carriage. On the former analysis, UPS accept that they were bailees, but invoke exemptions in their conditions as the terms of the non-contractual bailment. On the latter analysis, they maintain that there was a contractual bailment on the terms of the same exemptions. The respondents deny that UPS's standard conditions have either alleged effect. If that be wrong, however, they submit that nothing in UPS's conditions exempts UPS from liability for the loss which occurred.

18. On the issue whether CMR applied, the respondents succeeded both before the judge, Andrew Smith J: [2005] 1 Lloyd's Rep 470, and before the Court of Appeal (Brooke V-P and Sedley and Stephen Richards LJJ: [2006] 1 Lloyd's Rep 279). The factual issue then arose whether the respondents had discharged the burden on them of establishing wilful misconduct under CMR. The judge held that they had not. The Court of Appeal disagreed and held UPS liable for the full amount of the respondents' loss. Against this decision, UPS now appeal. I wish to express my appreciation for the quality of the written and oral submissions on both sides in what may, for its subject-matter, be

regarded as an unusually difficult case. I take the two broad issues in turn.

The contractual issue

19. UPS's conditions provide as follows:

> "**UPS TERMS AND CONDITIONS OF CARRIAGE**
>
> **1 Introduction**
>
> A These terms and conditions ('terms') set out the basis on which United Parcel Service ('UPS') will transport packages, letters and freight ('packages'). These terms are supplemented by the service details appearing in the current applicable UPS Service and Tariff Guide ('the Service and Tariff Guide') relating to the particular service the shipper has chosen. The Service and Tariff Guide contains important details about the services of UPS which the shipper should read and which form part of the agreement between UPS and the shipper.
>
> B Where carriage by air involves an ultimate destination or stop outside the country of origin the Warsaw Convention may apply ….. Notwithstanding any clause to the contrary, international carriage by road may be subject to the provisions of the Convention on the Contract for the International Carriage of Goods by Road signed at Geneva on 19 May 1956 ('the CMR Convention').
>
> C Depending on the country where the shipment is presented to UPS for carriage, the terms 'UPS' will mean and the shipper's contract will be with whichever of the following companies is applicable. That company will also be the (first) carrier of the goods for the purposes of the Conventions referred to in paragraph B.
>
> UK – UPS Limited; …..
>
> D UPS may engage sub-contractors to perform services and contracts both on its own behalf and on behalf of its servants, agents and sub-contractors each of whom shall have the benefit of these terms.
>
> In these terms, 'Waybill' shall mean a single UPS waybill/consignment note or the entries recorded against the same date, address and service level on a pick-up record. All packages covered under a Waybill shall be

considered a single shipment. A shipment may be carried via any intermediate stopping places that UPS deems appropriate.

2 Scope of Service

Unless any special services are agreed, the service to be provided by UPS is limited to the pick up, transportation, customs clearance where applicable and delivery of the shipment. The shipper acknowledges that shipment will be consolidated with those of other shippers for transport and that UPS may not monitor the inbound and outbound movement of individual shipments at all handling centres.

3 Conditions of Carriage

This section sets out various restrictions and conditions which limit and govern the extent of the service UPS offers. It also explains what the consequences are of the shipper presenting packages for carriage which do not meet these requirements.

(a) Service Restrictions and Conditions

UPS does not offer carriage of packages which do not comply with the restrictions in paragraphs (i) to (iv) below.

(i) Packages must not weigh more than 70 kilograms (or 150 lbs) or exceed 270 centimetres (or 108 inches) in length or a total of 330 centimetres (or 130 inches) in length and girth combined.

(ii) The value of any package may not exceed the local currency equivalent of USD 50,000. In addition the value of any jewellery, other than costume jewellery, in a package shall not exceed the local currency equivalent of USD 500.

(iii) Packages must not contain any of the prohibited articles listed in the Service and Tariff Guide including (but not limited to) articles of unusual value (such as works of art, antiques, precious stones, stamps, unique items, gold or silver), money or negotiable instruments (such as cheques, bills of exchange, bonds, savings books, share certificates or other securities) and dangerous goods.

(iv) Packages must not contain goods which might endanger human or animal life or any

means of transportation, or which might otherwise taint or damage other goods being transported by UPS, or the carriage, export or import of which is prohibited by applicable law.

The shipper shall be responsible for the accuracy and completeness of the particulars inserted in the Waybill and for ensuring that all packages set out adequate contact details for the shipper and receiver of the package and that they are so packed, marked and labelled, their contents so described and classified and are accompanied by such documentation as may (in each case) be necessary to make them suitable for transportation and to comply with the requirements of the Service and Tariff Guide and applicable law.

(b) Perishable and temperature sensitive goods will be transported provided that the shipper accepts that this is at its risk. UPS does not provide special handling for such packages.

(c) Refusal and Suspension of Carriage

(i) If it comes to the attention of UPS that any package does not meet any of the above restrictions or conditions or that any COD amount stated on a COD Waybill exceeds the limits specified in paragraph 8, UPS may refuse to transport the relevant package (or any shipment of which it is a part) and, if carriage is in progress, UPS may suspend carriage and hold the package or shipment to the shipper's order.

(ii) UPS may also suspend carriage if it cannot effect delivery at the third attempt, if the receiver refuses to accept delivery, if it is unable to effect delivery because of an incorrect address (having used all reasonable means to find the correct address) or because the correct address is found to be in another country from that set out on the package or Waybill or if it cannot collect amounts due from the receiver on delivery.

(iii) Where UPS is entitled to suspend carriage of a package or shipment, it is also entitled to return it to the shipper at its own discretion.

(d) The shipper will be responsible for the reasonable costs and expenses of UPS (including storage), for

such losses, taxes and customs duties as UPS may suffer and for all claims made against UPS because a package does not meet any of the restrictions or conditions in paragraph (a) above or because of any refusal or suspension of carriage or return of a package or shipment by UPS which is allowed by these terms. In the case of the return of a package or shipment, the shipper will also be responsible for paying return transport charges calculated in accordance with the prevailing commercial rates of UPS.

(e) UPS will not meet any losses which the shipper may suffer arising out of UPS carrying packages which do not meet the restrictions or conditions set out in paragraph (a) above and, if UPS does suspend carriage for a reason allowed by these terms, the shipper shall not be entitled to any refund on the carriage charges it has paid.

(f) UPS reserves the right, but is not obliged, to open and inspect any package tendered to it for transportation at any time.

……

9 Liability

9.1 Where the Warsaw or CMR Conventions or any national laws implementing or adopting these conventions apply (for convenience referred to as Convention Rules) or where (and to the extent that) other mandatory national law applies, the liability of UPS is governed by and will be limited according to the applicable rules.

9.2 Where Convention Rules or other mandatory national laws do not apply, UPS will only be liable for failure to act with reasonable care and skill and its liability shall be exclusively governed by these terms and (save in the case of personal injury or death) limited to proven damages of:

(a) £75 … per shipment, or

(b) if greater, £10 … per kilo of the goods affected up to a maximum per shipment of the local currency equivalent of USD5,000

unless a higher value has been declared by the shipper under paragraph 9.4 below.

…..

9.4 Subject to the provisions of paragraph 9.5, UPS operates a facility for the shipper to obtain for a shipment the benefit of a greater limit of liability than UPS provides under paragraph 9.2 above or than is provided by Convention Rules or other mandatory national law. The shipper may use this facility by declaring a higher value on the Waybill and paying an additional charge as stated in the Service and Tariff Guide. The value of the goods concerned shall not in any event exceed the limits specified in paragraph 3(a)(ii).

…..

15 Governing Law

These terms and any contract concluded which incorporates these terms shall in all respects be governed by the laws of the country where the shipment is presented to UPS for carriage."

20. UPS's Service and Tariff Guide, referred to in clause 1A of UPS's conditions, contains further references to the $50,000 restriction. Under the heading "Sending and receiving shipments. Declared value charge for insurance", the Guide mentions the facility to increase the limit of UPS's liability by declaration, but adds that "The value of the goods concerned should not however in any event exceed US$50,000 (US$500 in the case of jewellery other than costume jewellery) …. as UPS does not offer carriage for goods with values above these amounts". A later provision headed "Service restrictions" reads: "The maximum value or declared value per package is US$50,000 ….". A further statement headed "Prohibited articles" lists various articles as "prohibited from shipment to all countries" including "Articles of exceptional value (e.g. works of art, antiques, precious stones, gold and silver)" and "Dangerous goods/Hazardous materials".

21. There was originally common ground on the pleadings that UPS had entered into a contract for the carriage of the three packages of processors. But, by amendment at the trial, UPS pleaded that under their conditions they did not offer, and so had never agreed, to carry these packages, which were accordingly not "goods" for the purposes of CMR. The amendment was permitted on the basis that it involved no new allegations of fact. The judge emphasised the limited ambit of the new argument [2005] 1 Lloyd's Rep 470, para 116:

> " ….. it is directed only to the effect of the UPS terms. No argument was advanced about the authority of any person making a contract on behalf of UPS, nor was it said that a contract was vitiated for mistake on UPS's part, nor that the contract should be rescinded for misrepresentation (although UPS do plead that the claimants and T&B misrepresented that the packages were in compliance with the UPS terms and that otherwise UPS would not have carried them)."

22. The first issue is ultimately a short one. Under section 1 of the Carriage of Goods by Road Act 1965, the provisions of CMR have the force of law

> "so far as they relate to the rights and liabilities of persons concerned in the carriage of goods by road under a contract to which the Convention applies".

Article 1 of CMR states:

> "This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a Contracting country, irrespective of the place of residence and the nationality of the parties".

Here, UPS had discretion as to the route and means (cf clause 1D of their conditions), and they chose to perform as an international road carrier between Cologne and the final destination in Amsterdam. The $50,000 question apart, it is common ground that CMR would apply as between UPS and the respondents to the international road carriage which UPS was entitled, and chose, to undertake: cf *Quantum Corpn Inc. v. Plane Trucking Ltd.* [2002] EWCA Civ 350; [2002] 2 Lloyd's Rep 25. Whether CMR in fact applied thus depends on whether there was any "contract for the carriage" of these packages from Milton Keynes to Amsterdam.

23. The umbrella agreement did not cover the despatch of particular packages - indeed it did not oblige Datec to despatch any packages at all. In the case of packages conforming to UPS's conditions, a contract for carriage would come into existence either when a shipment was booked by computer or at latest when it was collected pursuant to such a booking. That some form of contract was intended by UPS's conditions even in respect of packages not meeting UPS's restrictions seems clear. The "consequences" of a shipper presenting non-conforming packages for carriage were stated to involve rights on the part of UPS to suspend carriage (clause 3(c)(i) and (ii)), to retain any carriage charges paid (clause 3(e)) and to open and inspect any package tendered to it for transportation (clauses 3(c)(i) and (ii) and (f)). The conditions also include a positive obligation on the part of the shipper to be responsible for costs and expenses, for losses, taxes and customs duties suffered and for claims made against UPS because of the non-compliance (clause 3(d)). This last is an obligation which one can well envisage UPS wishing to be able enforce against a shipper – for example, in the case of dangerous goods damaging other goods or damaging the carrying vehicle itself, or in the case of goods prohibited for import, which resulted in UPS incurring a customs penalty or costs. The critical question is to my mind whether the contract was *for carriage* subject to such rights and obligations, or was for some form of bailment capable of conversion into a contract for carriage only if UPS discovered the non-conformity and decided to proceed with, rather than suspend, the actual carriage.

24. Short though the issue is, it is not an easy one. But I have come to the conclusion that the courts below were correct. I would adopt the reasons given succinctly by Andrew Smith J in paras 118-119 of his judgment, when he said:

> "118. …. I acknowledge that paragraph 3 of the UPS Terms refers to restrictions upon the service that UPS 'offers', and to a lawyer this terminology has connotations of the rules about contracts being concluded through an offer and acceptance, and of the need for them to correspond. However, the issue is about the meaning of the UPS terms in a commercial contract made between businessmen, and they are to be interpreted in that context. I consider that UPS's submission places too much weight upon the reference to what UPS 'offers', and, more importantly, the UPS terms expressly state that paragraph 3 explains the consequences of the shipper presenting packages that do not meet UPS's restrictions

> and conditions. The paragraph does not explain that there will be no contract of carriage if such a package is presented and accepted: on the contrary, sub-paragraph (c) provides that the effect of the shipper presenting a package that does not meet the restrictions is that UPS have the right to refuse to carry it or, if carriage is in progress, to suspend carriage. The implication is that unless and until UPS exercise their right, there is a contract that UPS will carry the package. It does not seem to me that UPS's argument is assisted by paragraph 9.4: that provision is directed to placing a limit upon the value that a shipper may declare under a waybill. Nor, in my judgment, does the Guide provide any support for UPS's argument: it reflects the UPS terms in referring to 'Prohibited articles and Service restrictions', but it does not purport, as the UPS terms do, to stipulate the consequences if the shipper does not observe those restrictions.
>
> 119. I consider that this interpretation of the UPS terms is in accordance with commercial reality and the business expectations of the parties. After all, UPS's argument would, I think, apply by parity of reasoning even if the consignor and UPS were both unaware that the consignment contained a package worth more than US$50,000 and understood that the consignment complied with the UPS terms."

25. To these reasons, I would add that the assumption behind the concluding words of clause 3(e) is that, where carriage occurs without the non-conformity being detected or the carriage being suspended, carriage charges are without more due contractually. An argument that they are due as reward for carriage inadvertently performed under a bailment which was not *for* carriage seems to run into the commercial unreality which the judge had in mind in para 119. To the case of mutual ignorance which the judge postulated in the second sentence of para 119, one may also add that many situations can be conceived in which there was room for disagreement or mistake about whether some of the restrictions applied. Differences of view or mistakes could well arise as to whether articles were of "unusual value" or "might …. taint or damage other goods being transported by UPS". Finally, it is material to note that clause 3 regulates some situations where there is on any view a contract for carriage: cf the concluding sentence of clause 3(a), clause 3(b), clause 3(c)(ii) read with (iii) and the last words of clause 3(e) as well as clause 3(f). The more natural inference is, in my view, that the whole of clause 3 provides a contractual regime governing carriage of non-conforming goods.

26. It is well to remember that, in many circumstances, particularly in cases of domestic carriage and carriage not subject to mandatory rules, this conclusion, and the first issue, would not be significant. There would be no problem about UPS restricting its liability, whether or not there was a contract for carriage. Whether clause 3(e) would be sufficient to do this is a different matter. Mr Reeve for the respondents submitted that it would not be, because loss by failure to take due care or worse cannot be regarded as loss "arising out" of UPS carrying non-conforming packages. The word "loss" was not amplified by the usual phrases to embrace loss caused "howsoever" or by negligence, still less by employee misconduct or theft (cf *Canada Steamship Lines Ltd. v. The King* [1952] AC 192, 208, per Lord Morton). However, I would reserve any opinion on the correctness of Mr Reeve's submission, at least in relation to loss or damage by negligence, in circumstances where, under clause 9.2 and apart from situations governed by Convention or mandatory national rules, UPS would not anyway be liable except for negligence. I should mention that Mr Flaux QC representing UPS disclaimed any submission that clause 9.2 could apply if there was no contract for carriage. UPS's argument that there was no contract for carriage of the three packages was aimed solely at invoking clause 3(e).

27. UPS's difficulties in relying on clause 3, if there was a contract for carriage of the three packages, arise from the application to international carriage of the Warsaw Convention in the case of air transport and (more pertinently in this case) of CMR in the case of road transport. These Conventions regulate the liability of international carriers by air and road for loss of or damage or delay to goods in terms from which no derogation is permissible: cf in particular Chapters IV and VII of CMR. For the benefit of carriers, they also include certain exclusions and strict limits on the extent of liability (8.33 units of account, about £10, per kilogram in the case of CMR: article 23(3)); and these apply in relation to extra-contractual as well as contractual claims against the carrier, its servants and agents and others of whose services the carrier makes use: article 28(1) and (2). In most situations, therefore, the application of the CMR regime to the carriage of non-conforming packages would not expose UPS to unlimited exposure. But the CMR exclusions and limits are not available if the claimant is able to prove wilful misconduct or its equivalent: article 29(1). The carrier is then exposed to unlimited liability. Hence, in the present case, UPS's concern to establish that CMR is inapplicable.

28. Exposure to unlimited liability in respect of wilful misconduct of its servants or agents is not normally a matter in respect of which a

carrier can expect sympathy. But a carrier is entitled to refuse to carry particular goods or to require the shipper to give an undertaking as to the nature or qualities of goods which it agrees to carry. A carrier who unwittingly receives and carries goods which do not comply with stated restrictions is unlikely to be the ordinary carrier whom the drafters of CMR had in the forefront of their mind. It is relevant to consider whether the fact that goods did not conform to the carrier's restrictions retains any relevance if CMR applies. There are various ways in which it might do so, some of them discussed before the judge.

29. First, if the non-conforming nature of the goods (e.g. excess weight) itself led to damage to the goods themselves, this could be relevant under article 17(2) of CMR both to show that the damage occurred through circumstances which the carrier could not avoid and, quite possibly, to show that it was caused by wrongful act or neglect of the claimant. In the present case, UPS advanced before the judge the more ambitious contention that the loss was caused by wrongful act or neglect of the respondents through despatching goods worth more than US$50,000. The judge at para 127 was not persuaded that the despatch of excess-value packages was a "wrongful act" by Datec, and he did not regard it as necessary or permissible to interpret the contract as containing an implied undertaking not to despatch such packages. I have considerable doubts about this part of the judge's reasoning. But the judge also rejected UPS's contention for the more persuasive reason that the excessive value of the packages did not in any way cause the loss. The packages were not, in other words, lost because of their individual value (although, as will appear, they may well have been targeted because of the value of their contents). The judge further found that, had Datec not ignored the package value restriction, it could and would in any event have despatched the contents of the packages (that is the eight boxes each having a value of less than US$50,000) as separate packages via UPS.

30. Article 41 of CMR renders null and void "any stipulation which would directly or indirectly derogate from the provisions of this Convention", adding that "the nullity of such a stipulation shall not involve the nullity of the other provisions of the contract". So far as the first part of clause 3(e) of UPS's conditions purports to remove liability for loss, damage or delay which UPS would otherwise incur under article 17 of CMR, clause 3(e) is null and void. But CMR does not supersede all aspects of the contractual or legal relationship between a carrier and those contracting for the carrier's services. It is at least arguable that clause 3(d) of UPS's conditions would enable UPS to cross-claim, against those contracting for UPS's services, in respect of

any excess exposure over and above US$50,000 per package which UPS could show that they only incurred as a result of the shipment of non-conforming packages. Before the House, the possibility that there might be or have been some relief based on an implied misrepresentation or misstatement of the characteristics of the packages being despatched was also raised. The limited scope of the first issue (cf paragraph 21 above) means that the validity of these arguments has not been tested. But, if they are not sound, the harsh, but clear-cut position will be that, where a carrier contracts unwittingly to carry non-conforming goods and chooses to perform internationally by road, CMR applies with its benefits and burdens, and that the carrier's restrictions will be relevant only if and in so far as they may assist the carrier to avoid liability under article 17(2).

31. I would therefore reject UPS's challenge to the application of CMR to the carriage of the three packages. The issue of wilful misconduct thus arises for consideration.

Wilful misconduct

32. Some further facts need stating. The three packages bore barcode labels with separate identification numbers. These labels were all twice scanned at about 7.30 a.m. on Friday, 26 July 2002 shortly after the packages arrived at UPS's hub premises in Amsterdam. The hub premises consisted of a yard surrounded by a 3 metre fence with one pedestrian and two vehicular gates. Inside the yard was a large secure warehouse, with gates on one side against which incoming vehicles reversed in such a way as to make it "virtually impossible" for anyone to enter or leave the warehouse along either side of the vehicles. Short feeder conveyors were extended into the backs of incoming vehicles, and staff called "unloaders" used these to discharge packages to a main conveyor belt inside the shed. The barcodes were scanned first on "import" and then, on reaching the main conveyor belt, as "out for delivery". Staff called "splitters" manually directed packages off the main conveyor onto one of two conveyor belt spurs, alongside each of which between five and perhaps ten loading vehicles destined for different delivery areas were backed up. Packages were unloaded from the spurs either by the driver for the relevant vehicle or by "pre-loaders". Loading was a quick operation giving very little time to assess what packages contained or their value (although Mr van Beusekom of UPS said in his written statement that a driver loading his own vehicle "might have more of an opportunity to assess" such matters). Loaded vans left the warehouse through roll-doors opened by "proximity" card.

The vans had automatic locks on the doors between the cabin and their rear, as well as padlocks to their rear doors. Drivers were instructed to apply these padlocks whenever they left the van, including when making a delivery. Drivers carried a electronic "DIAD" board to obtain the recipient's signature for each package delivered. The information on each DIAD board was down-loaded to UPS's mainframe computer each day. Any package not delivered should have been returned by the driver to the hub, where it should on "import" have been scanned and then placed in a secure "overgoods" area inside the warehouse, for identification and delivery as appropriate as soon as possible. There was some, but not complete, CCTV coverage inside the warehouse.

33. L&A's premises were in the Schiphol South East area about 15 km from the UPS hub. On 26 July 2002 the van due to make deliveries there was driven by a Mr Kadim. The last recorded sighting of the three packages was by a UBS employee, Mr Kharbouche, at the hub. He saw the packages stacked behind Mr Kadim's vehicle and checked their barcodes to make sure that they had been correctly sorted. But Mr van Beusekom, gave evidence that this did not mean that the packages were necessarily loaded into Mr Kadim's van. Being large packages, they might have been stacked there for stowage in an accessible part of the vehicle, or because there was no space for them on the vehicle, or in order to be loaded onto another vehicle.

34. Mr Kadim delivered only one package not the subject of these proceedings to L&A on the morning of 26 July 2002. By about mid-day, L&A were complaining of non-delivery of the three packages. L&A later also complained of non-delivery of a fourth package consigned by Datec to L&A as agents for Axxis Hardware BV ("Axxis"). UPS started their enquiries as soon as L&A complained about the missing three packages. Mr Kadim was telephoned on the evening of 26 July. He told UPS to contact their other drivers, some of whom, he said, had taken packages from his lorry. At trial, UPS did not call any evidence about the outcome of any such enquiries.

35. On Sunday, 26 July 2002 Mr Kadim flew back to his country of birth, Morocco. He already had a poor attendance record, and, when he did not appear for work on Monday, 29 July, UPS issued a notice dismissing him. Mr Kadim returned to Holland in late September 2002. After being informed by a friend that the police were looking for him, he went to the police, and in interview explained that he had gone to Morocco as a result of an urgent call from his mother at 11.30 p.m. on Friday, 26 July informing him that his father had been seriously ill. He

said that he "did not think it necessary to notify" UPS that he was in Morocco because he "knew that [his] contract was not going to be extended". He said that his van had been loaded on 26 July by pre-loaders, Sebastian (Roux) and Rob (Wiegant), and repeated that other drivers – three, whose names he did not know - had on 26 July taken parcels from his lorry to deliver themselves. Asked how he knew what was on his lorry and where to go, he said that he would look to see just before he set out, but that "since I no longer have the Sloterdijk route, I no longer know my way around very well". The evidence is that the Sloterdijk route had been his regular route, and he was not the regular driver for the Schiphol South East route which he was due to take on 26 July 2002. Mr van Beusekom's inspection of the CCTV footage and enquiries of the pre-loaders, Mr Roux and Mr Wiegant, yielded nothing relevant or abnormal. The loading of Mr Kadim's van could not be directly observed on the footage and Mr van Beusekom was not aware what the three packages looked like.

36. The judge had to consider whether the three packages, and so far as relevant the Axxis package, had been delivered to L&A. He was satisfied that they had not been. No DIAD signature existed for any of the packages except the fifth package which Mr Kadim did deliver, and it was improbable that the relevant barcodes had (all) been damaged in their pouches or become illegible. The nature of L&A's premises and procedures added to the unlikelihood of any loss occurring after delivery to L&A. The judge's finding of non-delivery was not appealed before the Court of Appeal or therefore the House.

37. On the basis that there was non-delivery, the judge turned to consider the likelihood of theft by an employee of UPS. Mr van Beusekom's evidence was that the hub had lost only eighteen packages due to theft between 1998 and 2002, with "17 of them being lost to a crime ring that was broken in March 2001", and that UPS's security systems were sound and UPS's approach to theft that it was always prosecuted. He also said that the hub lost 41 packages in July 2002 alone, an average of around 1 in every 2712 packages handled, and gave various possible explanations as to how packages could go missing "inexplicably" (as the judge put it). They included delivery without any record being made, mis-delivery and theft from a van on its rounds. So far as Mr van Beusekom in his witness statement expressed opinions as to what might have happened to the three packages, Mr Reeve did not cross-examine, taking the view that this was a matter for the experts called on either side (and the judge in a comment during cross-examination endorsed this approach).

38. Experts were called and examined on both sides, Mr Holmes for the respondents and Mr Heinrich-Jones for UPS. But it was for the judge to decide whether, in the light of all the evidence, any and if so what probable cause of loss could be determined. In the event, the judge found their evidence "of limited value". He went on

> "inevitably, they had formed their views on the basis of the material put before them, … whereas I must assess the evidence presented at trial. Although their information apparently largely coincided with the evidence, it was not entirely the same and in these circumstances I hesitate to place great weight upon their opinions." (paragraph 13)

The judge said later (in para 57):

> "57. Both expert witnesses agreed the paucity of evidence is such that it is difficult to say how the three packages came to be lost. Mr Heinrich-Jones concluded that, while it was possible that they were stolen by, or with the assistance of, an employee of UPS, it is impossible to conclude that that is the most likely cause of the loss. Mr Holmes thought it most likely that the packages were stolen by Mr Kadim or another UPS employee but his opinion was properly guarded: indeed, in cross-examination he acknowledged that he could not say that this was 'the probable cause of the loss'".

39. So far as the last sentence is relevant, I do not regard it as an accurate summary of the effect of Mr Holmes' evidence under cross-examination on 18 November 2004 (transcript pp. 76-80 and 85). Mr Holmes went on to make clear that he believed that he *had* said that the probable cause was theft by Mr Kadim or another UPS employee and that this was indeed both "highly likely" and the probable cause, although "one cannot be 100% certain". He was also plainly, and rightly, unhappy about being asked to decide questions on a balance of probabilities which he understood were "for the court to decide".

40. Mr Julian Flaux QC for UPS stressed in his submissions that, based on an original list by Mr Heinrich-Jones, the experts had in a joint memorandum identified a range of 17 possibilities, grouped under four headings: (I) Misplaced, (II) Delivery Issues, (III) Labelling Issues and

(IV) Theft. Two such possibilities, "Delivered but no proof of delivery" under head II and "Bar code problems" under head (III). fall out of the picture in the light of the judge's finding that the packages were not delivered to L&A. There is nothing in Datec's or UPS's documentation or in the course of known events to suggest any likelihood of the remaining possibilities listed as "Labelling Issues" under head III, that is Incorrectly labelled, Incorrectly addressed or Over labelled. This is particularly so when (a) it would be a remarkable coincidence if three or four packages due for delivery to the same place all went astray on 26 July 2002 for such a reason, (b) all four packages were satisfactorily scanned both on import and as "out for delivery" at UPS's hub on the morning of 26 July 2002, and (c) Mr Kharbouche checked the labels on the three packages and found them visually in order just before they were due for loading on 26th July. Two possibilities under head IV (Theft by UPS Delivery Driver and by Unknown UPS Employee) involve wilful misconduct. The remaining possibilities listed under head IV were Third party theft from the hub, Theft following forcible entry, In transit theft from delivery vehicle and Theft by deception. Mr Heinrich-Jones considered that the security and operations at the hub effectively precluded the first two, that the third could not be eliminated as one of the likely causes of the loss, and that the last (in the form of deception persuading the driver to deliver the packages to unconnected third parties) was "possible". However, as he observed, there was no DIAD signature to suggest that Mr Kadim or any other driver was innocently deceived into any such mis-delivery. There was also no positive support for the possibility of theft from the delivery vehicle without the complicity of the driver. Even if one confines attention to the three packages (and the loss of the Axxis package would involve a remarkable coincidence, if due to some entirely different cause to that causing the loss of the three packages), an untargeted, adventitious theft of three heavy packages during an unguarded moment would be unlikely. It is far more likely, as Mr Heinrich-Jones recognised in paragraph 6.78 of his report, that any theft "would be a clear example of theft of high value targeted items". But, if these packages were targeted, it is also highly likely that there was collaboration or information as to their movement from within UPS. Consistently with this, the judge accepted (at paragraph 59) that "if they were stolen, it is probable that an employee of UPS was responsible for the theft".

41. The judge concluded that the probable cause of loss was not theft, but was accidental, so falling within one of the three possibilities given as under head I, Misplaced (viz Missorted, Mislaid or Damaged then thrown away) or within one of the remaining two possibilities under head II, Delivery issues (viz Failed delivery, Mis-delivery or Delivered in error). He said, [2005] 1 Lloyd's Rep 470, 481:

> "65. Once it is recognised that there are grounds to think that the packages might well not have been loaded in Mr Kadim's vehicle, but set aside with a view to being delivered by another driver, it seems to me that the claimants' argument that the packages were stolen by an employee of UPS loses much of its force. Of course, it is possible that they might have been stolen from the hub and never loaded on a delivery vehicle, but, although Mr Holmes described the hub as 'fertile ground for potential thieves among the employees', it does not seem to me that it would have been at all easy to smuggle such large packages out of the hub building. Again, it is possible that another driver loaded the packages and stole them from his van, knowing that there would be no record that they were loaded on it, but there is no evidence indicating this. It would have been extraordinary risky for another driver to plan such a theft: to offer to carry the valuable parcels to assist Mr Kadim with a delivery in Schipol South East and then to steal them. If, on the other hand, another driver had the goods for delivery by chance and stole them opportunistically, he was remarkably lucky either to be able to infer their value from the L&A address or to happen upon such valuable goods.
>
> 66. Having considered how the goods might have disappeared as a result of theft to which an employee of UPS was party, it seems to me more likely that they were lost accidentally: that, for example, the packages were delivered to the wrong address by a driver other than Mr Kadim; or that they were put into the hub's 'overgoods' either because they were returned by a driver who had failed to deliver them and they went astray, or because they were for some reason never loaded in any delivery vehicle."

42. Richards LJ gave the principal judgment in the Court of Appeal with which Brooke LJ agreed: [2006] 1 Lloyd's Rep 279. Richards LJ summarised the criticisms made of the judge's approach by Mr Reeve in his submissions as follows, at p 295:

> "55. [The claimants' submission is that] the judge asked himself the right question at para 59, namely 'whether the claimants have shown that theft by a UPS employee is more likely than accidental loss'.

56. The claimants' case, however, is that the judge went wrong in answering the question he asked himself. The primary focus of the argument is on para 66 of the judgment, where the judge stated that '[h]aving considered how the goods might have disappeared as a result of theft to which an employee of UPS was party, it seems to me more likely that they were lost accidentally: for example, the packages were delivered to the wrong address by a driver other than Mr Kadim; or that they were put into the hub's 'overgoods''. It is said that, although the judge considered how the goods might have disappeared as a result of employee theft, he did not consider how they might have disappeared as a result of either of the two accidental causes to which he referred. He made no attempt to analyse the series of steps required for either of those causes to have operated, or how his other findings and the undisputed evidence impacted on the likelihood of those steps having occurred. In fact, the cumulative improbability is such that neither cause can be regarded as plausible. The judge failed in this respect to take into account relevant factors. In addition, the judge was wrong in his assessment of the factors relevant to employee theft: he overestimated the extent to which they made it less likely and underestimated the extent to which they made it more likely. On any reasonably complete and balanced assessment, employee theft was more likely than any other cause and was proved on the balance of probabilities. The judge was therefore wrong to conclude in para 68 that it would be too speculative to hold that the goods were taken by or with the assistance of an employee of UPS, and to state in para 69 that there was not proper evidence to support the claimants' allegation.

57. As regards misdelivery, the points made in support of the implausibility of such a hypothesis are these: (1) The driver would, mistakenly, have had to have taken the packages to the wrong address despite the fact that each package bore a typed label displaying the true consignee and a unique UPS barcode: the judge found it improbable that all three labels were damaged or that the barcodes on all three were illegible (para 50). There was no separate delivery plan and the drivers had to read the labels. (2) If the label was legible, the driver would have been forced to read it when deciding where and whether to deliver it. If the labels had been illegible, the packages would have been returned to the warehouse. (3) A coincidental mistake would also have to have been made in respect of

the Axxis package which was due for delivery to L&A: the judge found that the package was scanned 'out for delivery' at the hub soon before its loss and it is therefore highly unlikely that the label was defective. (4) The chances of such a mistake being made in respect of four separate packages in two separate consignments are even less than in respect of the claimants' three packages. (5) The recipients would have had to make a similarly unlikely series of mistakes in accepting the packages when they were not the consignees named on them and had no reason to expect delivery. (6) The driver would have had to make further and coincidental mistakes in failing, contrary to his training, to obtain proofs of delivery for any of the packages. (7) As UPS's expert witness, Mr Heinrich-Jones, accepted in cross-examination, recipients of misdelivered goods usually re-deliver them or require them to be collected by the carrier. It is therefore a further improbability that they would have held on to them. (8) UPS called none of its drivers at the trial to say that they had carried the packages, let alone that they had misdelivered them or made such mistakes. (9) As the judge found (at para 40), UPS was put on notice on the day of loss that the claimants' three packages were missing. The claimants were told that they might have been loaded in error onto another delivery vehicle, but this was uncertain because some vehicles had not returned to the hub. Mr Kadim also suggested the same day that inquiries be made of other drivers. It is to be inferred that UPS contacted the returning drivers while their memories were still fresh and that no-one could recall these packages having been delivered or misdelivered. The fact of early inquiry and investigation makes the hypothesis of misdelivery even more remote.

58. As regards the overgoods area, Mr Reeve submits that there is uncertainty about the judge's precise hypothesis but that he was probably contemplating the possibility of *loss from* the overgoods area. In any event the points made in support of the implausibility of a hypothesis involving the overgoods area are these: (1) On the judge's findings and the undisputed evidence, the overgoods area is a secure area – 'a locked cage' (para 22). It would be a non sequitur to suggest, without further analysis of how the security might have failed, that an accidental loss from the overgoods area was plausible. (2) As the judge held (also at para 22), goods placed in the overgoods area were the subject of inquiries and investigation to see if they

could be delivered or returned; and it was only if they could be neither delivered nor returned that they were eventually sold at auction. In any event, goods sold at auction would have been accounted for. (3) UPS did not suggest, or call evidence to show, that there were any weaknesses in the system in respect of the overgoods area. (4) It was improbable that the packages went into the overgoods area in the first place. If the packages had been returned undelivered by one of the drivers, they would have been scanned on their return to the warehouse before they went into overgoods. There was no evidence of any such scans. (5) Furthermore, since UPS had been alerted before the drivers returned from their rounds on the day of the loss, it is implausible in the extreme that the three packages slipped into overgoods, past the staff whose responsibility it was to ensure the proper treatment of undelivered packages and despite the inquiries being made on that day. (6) The loss of the Axxis package as well as the claimants' three packages adds to the implausibility of the hypothesis of loss from the overgoods area.

59. In relation to the above points, Mr Reeve also emphasises the weight and size of the claimants' packages. These were substantial packages and it would have required a conscious decision to move them."

43. At paras 67 to 76, Richards LJ accepted the substance of Mr Reeve's criticisms. He said:

"67. In my judgment the case advanced by the claimants has considerable force to it. There is sufficient evidence about the three Datec packages and the surrounding circumstances to enable the court to engage in an informed analysis of the possible causes of the loss and to reach a reasoned conclusion as to the probable cause. The fact that the experts were unable to reach a conclusion of their own does not preclude the court from reaching such a conclusion on the totality of the evidence and in the light of the findings of fact.

68. I think it particularly important that the packages were recorded as reaching UPS's hub and as being 'out for delivery' on 26 July, and that they were identified by the floor supervisor as being stacked behind a delivery vehicle. Those established facts greatly reduce the scope

for uncertainty, and the inferences that can be drawn from them as to the condition of the packages and in particular as to their labelling assist in the assessment of the subsequent fate of the packages.

69. I also think it important that there was detailed consideration at the trial of all possible explanations for the loss. It was not suggested that there might exist any realistic possibility that the experts had failed to canvass. The court was in a position to look closely at the evidence for and against each of the possible explanations. In practice that could be done largely by reference to the broad possibilities identified by UPS's Mr van Beusekom.

70. In relation to those possibilities the judge gave compelling reasons for finding, first, that the packages had not been delivered to L&A (paras 49-53 of his judgment). That finding did not depend on where the burden of proof lay; and although the judge did not dismiss the *possibility* that the packages had been delivered to L&A and mislaid or stolen within L&A, he evidently and rightly considered it to be unlikely. His finding was firmly grounded on evidence not only about the Datec packages and UPS's delivery procedures, but also about L&A's own operation at Schipol.

71. The judge also gave compelling reasons for finding that theft by a third party was improbable (para 59 of his judgment). He dealt only briefly with third party theft from the hub itself, concentrating on the difficulty of gaining access without being recorded by the CCTV cameras (as to which, see paras 23 and 42 of the judgment). I would add that the overall security arrangements at the hub, as summarised at para 14 of the judgment, also militate strongly against the possibility of a third party gaining access and removing the packages undetected. As to theft by a third party from a delivery vehicle, I agree with the judge that it is improbable - I would say highly improbable - that a casual thief would have found by chance a delivery vehicle left accidentally unlocked (there was no evidence of any vehicle being broken into), have picked out three packages of the weight and size of these packages, and have removed them without detection.

72. The two examples of accidental loss mentioned by the judge at para 66 of his judgment were delivery to the wrong address (by a driver other than Mr Kadim) and placement of the packages in the overgoods area.

73. In my view the hypothesis of misdelivery is highly implausible, for all the reasons given by Mr Reeve in his submissions (para 57 above). It would require a most improbable combination of events for the packages to have been lost in this way, involving multiple errors by the UPS driver, errors by the recipient and a subsequent failure by the recipient to return the packages when the mistake was detected. The fact that prompt inquiries within UPS about the whereabouts of the packages produced nothing to support this hypothesis is a further factor telling against it.

74. The judge's second example, of placement of the packages in the overgoods area, provides an even less plausible explanation for the loss. Again I agree with the reasons advanced by Mr Reeve in his submissions (para 58 above). It is difficult to see how the packages might have got to the overgoods area in the first place, given the evidence that they had labelling sufficiently intact and legible to be scanned 'out for delivery' and to be identified by the floor supervisor. But if they had got to the overgoods area, the strong probability is that they would have been identified and delivered or returned or that they would have been sold and accounted for. The system does not admit of any sensible possibility of their simply disappearing accidentally and without trace.

75. Although the judge referred to those two possibilities of accidental loss as examples, there does not seem to me to be any other realistic way in which packages of this size and weight might have been lost accidentally, either from the floor of the hub or from one of the delivery vehicles.

76. That leaves for consideration the possibility of theft by one or more UPS employees. It should be noted at the outset that there is nothing inherently implausible about such an explanation: far from it. Although there were only 18 cases of established theft from the Amsterdam operation between 1998 and 2002, there was a large number of losses the causes of which had not been established (41 in July 2002 alone); and it would need only a relatively small proportion of such losses to be attributable to employee theft for the total losses from employee theft to run into the 100s over the same period. There was also evidence to support the view that the Datec packages might be targeted for theft or identified as containing high value items. Although there was no direct information about their value on their labelling or accompanying documentation, the contents were described

> as 'electronic components'. Moreover, L&A was known to handle high value items of this sort, so that the delivery address would have been significant to anyone 'in the know'. The experts acknowledged the possibility of targeted theft by organised criminals and agreed that, if the packages were stolen, it was probably a case of targeted theft."

44. It is right at this point to say a word about Mr Kadim's position, although I agree with Richards LJ that it is not ultimately critical. The judge in addressing Mr Kadim's position treated four considerations as casting "real doubt" on any contention that he had stolen the packages: the fact that Mr Kadim went voluntarily to the police, the fact that it was not obvious from the labelling and documentation that the packages were particularly valuable (and there was no evidence that Mr Kadim knew that they were, although it was "possible" that he did), the fact that he did deliver one package to L&A on 26 July 2002 and the absence of any convincing evidence that the packages were loaded on his vehicle. Richards LJ commented:

> "77. I am inclined to agree with Mr Reeve's submissions (para 60 above) concerning Mr Kadim's subsequent conduct and explanations to the police, and to place less weight on them than the judge did. But the explanation of employee theft does not depend for its cogency on putting the blame specifically on Mr Kadim or on other otherwise identifying the responsible employee or employees. The explanation fits well with the known facts even though the employee or employees concerned cannot be identified."

I agree with Richards LJ's comments. I do not regard either Mr Kadim's voluntary visit to the police, when he knew they were seeking to arrest him, or his delivery of one package to L&A as any particular indication of innocence. Mr Kadim's statement (quoted in paragraph 35 above) was also not that he was not on 26th July familiar with the Schiphol South East route – all that is known is that this had not been his regular route. But, as the judge said, the respondents' case does not depend on putting the blame on any specific employee of UPS. If Mr Kadim is right in suggesting that another unscheduled UPS driver may have taken these three (or presumably all four) missing packages for delivery, the questions arise why this driver took the packages and why he never delivered them.

45. Mr Flaux for UPS submits that the Court of Appeal, in concluding that employee theft was the relevant cause, paid insufficient attention to the primacy of the judge's findings, that it was lured into a process of elimination (which could at best arrive a conclusion as to which of many possible causes was the least unlikely, rather than a conclusion as to any cause which was more probable than all the others viewed together) and that, despite lip service to the need for clear and cogent evidence, it found wilful misconduct when there was an absence of any such evidence.

46. As to the correct approach in an appellate court to findings and inferences of fact made by a judge at first instance after hearing evidence, there was no disagreement between counsel. In *Assicurazioni Generali SpA v. Arab Insurance Group* [2003] 1 WLR 577, Clarke LJ summarised the position, referring also to a passage in a judgment of my own:

> "14. The approach of the court to any particular case will depend upon the nature of the issues kind of case determined by the judge. This has been recognised recently in, for example, *Todd v Adam (trading as Trelawney Fishing Co)* [2002] EWCA Civ 509, Lloyd's Rep 293 and *Bessant v South Cone Incorporated* [2002] EWCA Civ 763. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.
>
> 15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a 'rehearing' under the

Rules of the Supreme Court and should be its approach on a 'review' under the Civil Procedure Rules.

16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.

17. In *Todd's* case [2002] 2 Lloyd's Rep 293, where the question was whether a contract of service existed, Mance LJ drew a distinction between challenges to conclusions of primary fact or inferences from those facts and an evaluation of those facts, as follows, at pp 319-320, para 129:

> 'With regard to an appeal to this court (which would never have involved a complete rehearing in that sense), the language of "review" may be said to fit most easily into the context of an appeal against the exercise of a discretion, or an appeal where the court of appeal is essentially concerned with the correctness of an exercise of evaluation or judgment – such as a decision by a lower court whether, weighing all relevant factors, a contract of service existed. However, the references in rule 52. 11 (3) (4) to the power of an appellant court to allow an appeal where the decision below was "wrong" and to "draw any inference of fact which it considers justified on the evidence" indicate that there are other contexts in which the court of appeal must, as previously, make up its own mind as to the correctness or otherwise of a decision, even on matters of fact, by a lower court. Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellant court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I

> consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence. In the present case, however, while there was oral evidence, its content was largely uncontentious.'
>
> In the same case Neuberger J stressed, pp 305-306, paras 61 to 64, that the question whether there was a contract of service on the facts involved the weighing up of a series of factors. Thorpe LJ agreed with both judgments."

The judgment of Ward LJ in the *Assicurazioni Generali* case may be read as advocating a different test, which would equate the approach of an appellate court to findings of fact with its approach to decisions taken in the exercise of a discretion. As Waller LJ correctly pointed out in *Manning v. Stylianou* [2006] EWCA Civ 1655, that is not the correct test, and it is the judgment of Clarke LJ in the paragraphs quoted above from his judgment that gives proper guidance as to the role of the Court of Appeal when faced with appeals on fact.

47. In the present case, the judge's findings of primary fact have not been challenged. One or two small points have been made on factual matters, but they are of no or minor relevance and do not justify Mr Flaux's submission that the Court of Appeal exceeded its proper role in reviewing the judge's conclusions. Essentially, what have been in issue have been the inferences with regard to the causation of loss to be drawn from primary facts which are not in dispute. Mr Flaux, in my view correctly, accepted this was a correct analysis of the central issues, when opening the appeal. I note in parenthesis that Richards LJ appears to have treated as applicable the steeper appellate hurdle that would have applied if the appeal had been related to an evaluation or judgment or a decision analogous to the exercise of a discretion; even so he arrived at the conclusion he did on the basis that the judge had in his

paragraph 66 failed to take into account relevant considerations; in particular the judge had failed to follow through the two examples he gave of accidental loss and to consider what each involved and how plausible each might be (cf paras 85 to 87). I do not disagree with Richards LJ's latter comments, but in my view the situation is one where an appellate court is well placed and entitled to re-consider for itself the judge's findings as to what should or should not be inferred regarding causation from the primary facts which he found.

48. Nor do I accept Mr Flaux's submission that Richards LJ was lured, by a process of elimination, into accepting as the probable cause the least unlikely of a range of possibilities all of them unlikely. That was the error the House identified in the approach taken by the judge at first instance in *Rhesa Shipping Co SA v. Edmunds (The "Popi M")* [1985] 1 WLR 948. The reasoning of Sedley LJ in the present case may be open to criticism both for suggesting that sufficient was known for the court to base its conclusions on the least improbable cause and for doing this. But that of Richards LJ, with whom Brooke LJ agreed, is not.

49. Richards LJ summarised his conclusions as follows:

> "79. Looking at the matter overall, it seems to me that the judge did overstate the factors telling against employee theft and understate the factors telling in favour of it. I consider employee theft to be a much more likely explanation than the judge found it to be. Perhaps more importantly, I regard as implausible and improbable the explanations of accidental loss to which the judge referred when concluding that accidental loss was more likely than employee theft.
>
> 80. If conducting the exercise of evaluation for myself, I would conclude that theft by one or more UPS employees was the probable cause of the loss and that the claimants' case had therefore been proved on the balance of probabilities. That conclusion would lead in turn to a finding of wilful misconduct within article 29 of the CMR and the consequential disapplication of the limit imposed by article 23 on UPS's liability. (I should mention, for the sake of clarity, that I agree with the approach of Andrew Smith J at para 68 of his judgment towards *In re H (Minors)* [1996] AC 563 and its application to the standard of proof in this case. In the circumstances the burden on

> the claimants to prove their case is not a particularly heavy one.)
>
> 81. My conclusion does not depend on the separate loss of the Axxis package, but I accept the submissions by Mr Reeve that the loss of the Axxis package adds to the improbability of other possible causes and makes employee theft all the more probable.
>
> 82. I have borne very much in mind the observations of Brooke LJ in *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369 with which I am in respectful and total agreement, as to the need for a properly rigorous approach to the available evidence. It is the evidence, properly analysed, which in my view leads to the conclusion. That is also why I disagree with the judge's description of the claimants' case as 'too speculative'".

50. I find the reasons given by Richards LJ for reversing the judge compelling. None of the possibilities mentioned by the judge in para 66 affords any plausible explanation of the disappearance of the three packages, still less of all the four that were due for delivery to L&A on 26th July 2002. In their joint memorandum the two experts were in fact agreed that the possibilities of loss, Missorted, Mislaid and Damaged/thrown away/sold at auction, under head I were each "less likely than others", in view of the sighting of the packages by Mr Karbouche correctly stacked and labelled on the spur shortly before loading. None of these possibilities anyway offers any comprehensible explanation for the disappearance of three (or in fact four) large and valuable packages. The possibilities, Mis-delivered and Delivered in error, under head II run up, as previously stated, against the inherent implausibility of three or four separate packages due for delivery to L&A all being innocently misdelivered on the same day without any DIAD signature being obtained from anyone. The possibilities floated before the judge (but not even mentioned by him in his paragraph 66) under head II, Labelling issues, are remote in the extreme for the reasons given in paragraph 27 above. As to head IV, Theft, the joint memorandum categorised all the possibilities as "less likely", except for those involving a UPS driver or employees, and the judge found that, if the packages were stolen, it was probably by a UPS employee. Inevitably, any systematic consideration of the possibilities is subject to a risk that it may become a process of elimination leading to no more than a conclusion regarding the least unlikely cause of loss. But, as I have said, I do not consider that Richards LJ fell into that trap. I share, without hesitation, the view which he formed overall that theft involving

a UPS employee was shown on a strong balance of probability to have been the cause of this loss.

51. In agreement with the reasoning of the majority contained in the judgment of Richards LJ in the Court of Appeal, I would therefore dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

52. I have had the privilege of reading the draft opinion of my noble and learned friend Lord Mance and agree that this appeal should be dismissed.