CHINA PACIFIC S.A.

APPELLANTS

v.

FOOD CORPORATION OF INDIA

RESPONDENTS

1981 Oct. 5, 6, 7, 8; Nov. 12

Lord Diplock, Lord Simon of Glaisdale, Lord Keith of Kinkel, Lord Roskill and Lord Brandon of Oakbrook

Solicitors: *Constant & Constant; Stocken; Lambert.*

Admiralty-Salvage-Salvage agreement-Vessel stranded-Part of cargo salvaged and brought to safe port-Off-loaded and stored at salvors' expense to avoid deterioration - Whether cargo owner liable to salvors as bailees.
Lien-Common law-Expenses incurred by lienee-Whether recoverable from lienor.
Ships' Names-Winson

The defendant cargo owner chartered a vessel to carry a cargo of wheat from a United States port to Bombay. The vessel was duly loaded, but during the voyage, on January 21, 1975, it stranded on a reef in the South China Sea 420 miles from Manila. On January 22 the ship's managing agents in Hong Kong signed a Lloyd's. Standard Form of Salvage Agreement No Cure-No Pay, which provided that the salvors would use their best endeavours to salvage the vessel and/or the cargo. By clause 16 the master signed the agreement on behalf of the property to be salved and entered into the agreement as agent for the vessel, her cargo and freight and the respective owners thereof and bound each to the performance thereof. The salvors salved 15,429 tons of wheat, in six parcels, between February 10 and April 20, 1975, and took them in barges to Manila where each parcel was off-loaded and stored at the salvors' expense. On February 25, 1975, the salvors' solicitors wrote to the cargo owner's solicitors advising them that salvage work was being carried on and asking them to ask the cargo owner to make arrangements to accept delivery of the cargo at Manila. There was no answer to that letter. On April 24, the shipowner abandoned the voyage and notified the cargo owner accordingly. Subsequently, the cargo owner accepted responsibility for the salvors' storage charges for the period from April 24 to August 5, 1975, but it refused to pay the storage charges incurred by the salvors between February 10 and April 24, 1975. The salvors claimed those expenses in an action against the cargo owner, and Lloyd J. held that the cargo owner was liable for them. The Court of Appeal allowed an appeal by the cargo owner.

On appeal by the salvors:-

Held, allowing the appeal, (1) that where in the course of salvage operations cargo was off-loaded and conveyed separately from the vessel, the subject of the salvage, to a place of safety by means provided by the salvor the direct relationship of bailor and bailee was created between the cargo owner and the salvor as soon as the cargo was loaded on to the vessels provided by the salvor to convey it to a place of safety and all the mutual rights and duties attaching to that relationship at common law applied save in so far as any of them were inconsistent with the express terms of the salvage agreement; that, assuming *(sed quaere)* that the salvage services which the salvors had contracted to render to the cargo owner had come to an end as respected each parcel of salved wheat when it had arrived at a place of safety in Manila Harbour, the legal relationship between them of bailor and bailee had continued to exist as a gratuitous bailment (subject to the question of the salvors' right to the

provision of security before its removal) until possession of the wheat had been accepted by the cargo owner from the depositories who had been the salvors' subbailees; that, accordingly, the salvors had owed a duty of care to the cargo owner to take such measures to pre serve the wheat from deterioration as an ordinary prudent man would take for the preservation of his own property; that they would have been liable in damages to the cargo owner for breach of such duty; and that, accordingly, they had a correlative right to charge the cargo owner with the expenses reasonably incurred in fulfilling that duty (post, pp. 959A-B, 960C-F, 963D,966B-D).

Notara v. Henderson (1872) L.R. *7* Q.B. 225; *Cargo ex Argos* (1873) L.R. 5 P.C. 134, P.C.; *Garriock v. Walker* (1873) 1 R. 100 and *Great Northern Railway Co. v. Swaffield* (1874) L.R. 9 Ex. 132 applied.

Per curiam. Inability to communicate with the owner of the goods is not a condition precedent to the bailee's right to reimbursement of his expenses; the bailor's failure to give instructions when apprised of the situation is sufficient (post. pp. 962A, 963D, 966B-D). Salvors are under a duty at the conclusion of the salvage services to deliver up possession of the salved cargo to the cargo owner or in accordance with his directions, at any rate when a salvage contract in Lloyd's open form is entered into on behalf of a sole owner of a bulk cargo (post, pp. 960B, 963E-F, 966B-D). Observations as to agency of necessity (post, pp. 958E-F, 964H-966B, D).
(2) That where a lienee remained in possession of goods in the exercise of his right to lien only, he could not recover from the lienor loss or expenses incurred by him exclusively for his own benefit in maintaining his security as lienee and from which the lienor derived no benefit as owner of the goods; but that on the facts the salvors had retained possession of the wheat throughout the relevant period in the capacity only of gratuitous bailees of the cargo owner since no demand for delivery of any of the wheat had been made by the cargo owner until after security had been provided on April 22, 1975, and all requests for delivery thereafter had been complied with; accordingly, they had never had occasion to decide whether or not to exercise any lien to which they might have been entitled (post, pp. 962G - 963C, D, 966B - D).

Somes v. Directors of British Empire Shipping Co. (1860) 8 H.L. Cas. 338, H.L.(E.) considered.

Quaere. As to the extent to which any possessory lien that a salvor would be entitled to exercise at common law is capable of surviving, or is modified by, the provisions of clauses 4 and 5 of Lloyd's open form (post, pp. 962D-E, 963D, 966B-D).

Decision of the Court of Appeal [1981] Q.B. 403; [1980] 3 W.L.R. 891; [1980] 3 All E.R 556 reversed.

The following cases are referred to in their Lordships' opinions:

Cargo ex Argos (1873) L.R. 5 P.C. 134, P.C.
Garriock v. Walker (1873) 1 R. 100.
Great Northern Railway Co. v. Swaffield (1874) L.R. 9 Ex. 132.
Morris v. C. W. Martin & Sons Ltd. [1966] 1 Q.B. 716; [1965] 3 W.L.R. 276; [1965] 2 All E.R. 725, CA.
Notara v. Henderson (1872) L.R. 7 Q.B. 225.
Petrinovic & Co. Ltd. v. Mission Francaise des Transports Maritimes (1941) 71 Ll.L. Rep. 208.
Prager v. Blatspiel, Stamp and Heacock Ltd. [1924] 1 K.B. 566.
Somes v. Directors of British Empire Shipping Co. (1860) 8 H.L. Cas. 338, H.L.(E.).

The following additional cases were cited in argument:

Australasian Steam Navigation Co. v. Morse (1872) L.R. 4 P.C. 222, P.C.
Blenheim, The (1885) *10* P.D. 167.
Bradley v. H. Newsom, Sons and Co. [1919] A.C. 16, H.L.(E).

Cito, The (1881) 7 P.D. 5, C.A.
Craven-Ellis v. Canons Ltd. [1936] 2 K.B. 403; [1936]. 2 All E.R. 1066, C.A.
Falcke v. Scottish Imperial Insurance Co. (1886) 34 Ch.D. 234, C.A.
Gilchrist Watt and Sanderson Pty. Ltd. v. York Products Pty. Ltd. [1970] 1 W.L.R. 1262; [1970] 3. All E.R. 825, P.C.
Greenwood v. Bennett [1973] Q.B. 195; [1972] 3 W.L.R. 691; [1972] 3 All E.R. 586, C.A.
Hain Steamship Co. Ltd. v. Tate & Lyle Ltd. (1936) 41 Com.Cas. 350. H.L.(E.).
Hingston v. Wendt (1876) 1 Q.B.D. 367.
Katingaki, The [1976] 2 Lloyd's Rep. 372.
Raisby, The (1885) 10 P.D. 114.
Societe Franco Tunisienne d'Armement v. Sidermar S.p.A. [1961] 2 Q.B.278; [1960] 3 W.L.R. 701; [1960] 2 All ER. 529.

APPEAL from the Court of Appeal.

This was an appeal by the plaintiffs, China Pacific S.A., the salvors, by leave of the House of Lords from the decision of the Court of Appeal (Megaw, Bridge and Cumming-Bruce L.JJ.) on April 30, 1980,by which they allowed an appeal by the defendants, the Food Corporation of India, the cargo owner, from a judgment of Lloyd J. [1979] 2 All E.R. 35 in favour of the plaintiffs. The Court of Appeal refused the plaintiffs leave to appeal from their decision, but on July 23, 1980, the Appeal Committee of the House of Lords (Lord Wilberforce, Lord Salmon and Lord Russell of Killowen) granted them leave.

The facts are set out in the opinion of Lord Diplock.

Anthony Clarke Q.C. and *Jeremy Russell* for the salvors. As a matter of law the plaintiffs put their case in a number of ways. A. When the salvage services rendered under Lloyd's form terminated the salvors had implied authority from the cargo owner to take care of the cargo, and therefore an implied right to be paid by the cargo owner, such implication arising from the terms of Lloyd's form. B. When the salvage services under Lloyd's form terminated and the salvors remained in possession of the cargo (whether as bailees or as sub-bailees) they owed a duty to the cargo owner to take reasonable care of the cargo and had a correlative right to be, paid their reasonable expenses by the cargo owner. C. In storing the cargo at Manila the salvo acted as agent of necessity on behalf of the cargo owner and as such are entitled to their reasonable costs of so doing. D. It was the duty of the cargo owner both at common law and under Lloyd's form (or the necessary implication therefrom) to accept redelivery of its cargo from the salvors. In breach of that duty the cargo owner failed or refused to accept redelivery whereby the salvors have suffered loss in the amount of the expenses reasonably incurred. E. In storing the cargo at Manila when the salvage services terminated and thereby preserving it from deterioration and damage, the salvors conferred a benefit on the cargo owner in circumstances where the cargo owner itself would in practice have otherwise had to look after the cargo. Consequently, the salvors are entitled to their reasonable expenses from the cargo owner in accordance with the general law of restitution.

Both at common law and under Lloyd's form the liability of the shipowner and the cargo owner to pay salvage is several. The shipowner is not liable to pay salvage in respect of the salvage of the cargo. 'The rule is that the property actually benefited is alone chargeable With the salvage recovered: *The Raisby* (1885) 10 P.D. 114, 117 and *Kennedy, Civil Salvage,* 4th ed. (1958), pp. 273-274. That the same principle applies under Lloyd's form is clear from clause 16. It follows from clause 16 that the contractual relationship between the salvors and the cargo owner is distinct from that between the salvors and the shipowner. The correctness of the above proposition, although not in dispute, is fundamental to the salvors' case in that a logical application of. the arguments advanced by the cargo owner, and accepted by the Court of Appeal, would result in the conclusion that the shipowner, and shipowner alone, is primarily liable to pay salvage. That is not, and never has been the law. It follows that the salvors' relationship with the cargo owner is separate from their relationship with the shipowner. This is so both at common law and under Lloyd's form. For example, the shipowner's and cargo owner's liability to pay salvage to the salvors is several. So is their obligation to put up security to the salvors under clause 4 of Lloyd's form. The shipowner has

no obligation to put up security for the cargo owner. Equally, the salvors' duties to the cargo owner are separate from those owed to the shipowner. This is desirable because the salvors are not and cannot be concerned with the relationship between the cargo owner and the shipowner. They will not know whether that relationship is governed by the terms of a charterparty or of one bill of lading or of many hundreds of bills of lading. Nor will they know whether the shipowner still has a duty to on-carry or merely an option to do so, or, if the latter, whether that option has been exercised. Similarly, the salvors will, not know whether the contract or contracts between the shipowner and the cargo owner has or have been frustrated. Nor will they ordinarily know whether the shipowner has abandoned or intends to abandon the voyage. In what may be a confused and uncertain situation, the only person whom the salvor can be certain will still be interested in the cargo and its ultimate fate will be the cargo owner. For these reasons, the law of salvage, which is concerned with the saving of property and not with the commercial and contractual relationships between the owners of that property, has always treated ship and cargo separately.

On A, when Lloyd's form was signed a direct contractual relationship came into existence between the salvors and the cargo owner. When the salvors took possession of the cargo during the salvage services they became bailees of it, alternatively, sub-bailees. In either event a direct bailor-bailee relationship came into existence between the salvors and the cargo owner. Lloyd J. [1979] 2 All E.R. 35, 41 correctly held that the salvors were bailees and not sub-bailees but that it would make no difference if they were sub-bailees. In the Court of Appeal the cargo owner accepted that it made no difference. The salvors' case on this point is concisely set out in the judgment of Lloyd J, at p. 41. Lloyd J. was correct. The Court of Appeal nowhere expressly considered this principle. They ought to have done so, and if they had they would or ought to have upheld Lloyd J. on this point. The salvors' case does not depend upon the answer to the accept redelivery of cargo at the termination question " who is obliged to accept of the salvage service?" It derives from the direct contractual and bailment relationship between the salvors and the cargo owner.

B is based on general principles of the law of bailment. It does not depend on answering the question "who is obliged to accept redelivery of the cargo?" It is akin to A but does not depend on the contractual relationship between the salvors and the cargo owner. It depends only on the bailor - bailee relationship between them whether created directly or by way of sub-bailment. It is well settled that a bailee in possession of goods owes a duty to the owner of those goods to take reasonable care of them. The same is true of a sub-bailee. He too owes a duty to the owner of the goods to take, reasonable care of them: *Halsbury's Laws of England,* 4th ed., vol. 2 (1973), para. 1541; *Morris V. C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716 and *Gilchrist Watt and Sanderson Pty. Ltd. v. York Products Pty. Ltd.* [1970] 1 W.L.R. 1262. A bailee who incurs reasonable expenses pursuant to his duty to take reasonable care of the goods bailed has a correlative right to be paid those expenses by the owner of the goods, particularly when the bailment has come to an end. It is clear that Lloyd J. either did accept or would have accepted that proposition. The Court of Appeal [1981] Q.B. 403, 423 held that the bailee's right to be paid "depends on there being something which can properly be called an element of necessity that the bailee should so act in order to preserve the goods." That is to put the test too high. No element of necessity is required. It is sufficient that the bailee acts reasonably in pursuance of his duty to take reasonable care of the goods. The salvors' case on this point is supported by cases such as *Cargo ex Argos* (1873) L.R. 5 P.C. 134; *Great Northern Railway Co. v. Swaffield* (1874) L.R. 9 Ex. 132; *Hingston v. Wendt* (1876) 1 Q.B.D. 367 and *Petrovinic & Co. Ltd. v. Mission Francaise des Transports Maritimes* (1941) 71 Ll.L. Rep. 208. In *Cargo ex Argos* the Privy Council had to consider (inter alia) a claim by a shipowner for expenses incurred by him in respect of cargo after the termination of the contractual voyage: see at p. 165. That reasoning was followed in *Great Northern Railway Co. v. Swaffield,* L.R. 9 Ex. 132, where a railway company, having, on delivering a horse to a specified station and finding the owner not there to receive it, put the horse into a livery stable. Were held to be entitled to recover the cost of so doing: see *per* Pollock B. at p. 137. Pollock B. went on to consider whether the company could recover the expenses of caring for the horse: see at p. 138. If those principles are applied to the facts of this case, the salvors are entitled to recover from the cargo owner their reasonable costs of storing the cargo. They owed a duty to the cargo owner to take reasonable care of the cargo. That duty was recognised by the salvors. It was also expressly recognised by the cargo owner. In pursuance

of that duty, the salvors stored the cargo and incurred expenses. They accordingly have a correlative right to be paid by the cargo owner.

On C, "necessity" in this context was defined by Sir Montague Smith in *Australasian Steam Navigation Co. v. Morse* (1872) L.R. 4 P.C. 222, 230. Judged by those criteria, wheat being a perishable cargo and the cargo owner being unwilling to give instructions, it was clearly necessary for the salvors to take reasonable steps to store and preserve the wheat that they had salved. In the Court of Appeal Megaw L.J. appears to have concluded that inability to obtain instructions that inability to obtain instructions was not or might not be sufficient to create agency of necessity. It is true that the case cited affords little, if any, support for the contrary proposition in *Goff and Jones, The Law of Restitution,* 2nd ed. (1978), p. 226. This point was not debated in the Court of Appeal because it was not appreciated until their reply that it was being taken on behalf of the cargo owner. However, the proposition stated by Lloyd J. is supported by principle and by authority: see, e.g., *Garriock v. Walker* (1893) 1 R. 100; *Prager v. Blatspiel, Stamp and Heacoc, Ltd.* [1924] 1 K.B. 566, 571, per McCardie J. In the circumstances, the salvors satisfy the tests for agency of necessity propounded by *Goff and Jones, The Law of Restitution.* 2nd ed. pp. 264-267. It follows that, having acted as agents of necessity for the cargo owner in landing and storing the cargo, they are entitled to reasonable remuneration therefor.

The Court of Appeal gave no reasons for their conclusion that the vital question in the case was to whom the cargo was deliverable at the termination of the salvage services. It is not. Propositions A, B and C are valid independently of the answer to this question. They depend on the direct relationship between the salvors and the cargo owner and would be valid even if it were held that at the end of salvage services the cargo should be redelivered to the shipowner. This is particularly so in relation to propositions B and C, which are concerned with the saving of property and the relationship between the salvors and the owners of property.

The answer to the question as to whom the cargo was deliverable is and ought to be that it was deliverable to the cargo owner, not to the shipowner whether or not the shipowner had abandoned the voyage. The main considerations that lead to both these conclusions are as follows: (a) The c salvors are concerned with the saving of property. It is for that reason that their relationship vis-á-vis cargo is with the cargo owner and vis-á-vis ship with the shipowner. (b) The salvors should not be concerned with the relationship between the shipowner and the cargo owner. That relationship may be governed by a charterparty or by one or many hundred bills of lading. There may be many contracts of carriage governed by many different laws. The salvors will have no knowledge of any of this. (c) The salvors will not know whether the contract or contracts of carriage has or have been abandoned or frustrated. Nor will they know whether any purported abandonment is lawful or in breach of contract. Disputes between shipowners and cargo owners on these questions are often both protracted and complicated. The salvors should not be concerned with whether the voyage has been lawfully abandoned or not. (d) As Lloyd J. held [1979] 2 All E.R. 35, 42-43, there should be a simple rule that the salvors should look to the cargo owner to accept delivery of the cargo. (e) The Lloyd's form was made directly between the cargo owner and the salvors; the cargo owner is liable to put up security and to pay the salvage award directly to the salvors; the salvors' lien is only oil cargo in respect of his claim for salvage of cargo; the salvors owe a duty to the cargo owner to use their best endeavours to salve the cargo and to take reasonable care of it while it is in their possession; they accordingly owe a duty to redeliver such cargo to the cargo owner. (f) No difficulty arises for the shipowner because in most cases the cargo will be redelivered to the master who will accept it on behalf of the cargo owner and will again become bailee of it. If the salvors redeliver directly to the cargo owner and the shipowner wishes to continue the voyage, he will have a contractual right enforceable against the cargo owner to do so. (g) The cargo owner will always be interested in the preservation of the cargo, whereas the shipowner may not be. The shipowner will certainly do nothing if he is considering abandoning the voyage. In those circumstances, Lloyd J. was right and the Court of Appeal were wrong in that they placed too much emphasis on the relationship between the shipowner and the cargo owner, with which the salvors neither are nor should be concerned.

The Court of Appeal appear to have held on the facts that the salvors could and should have redelivered the cargo to the shipowner. That view is unrealistic. The shipowner would only have been interested in taking delivery of the cargo if it had decided to continue the voyage. It must have been apparent to all that the voyage was likely to be abandoned and that the shipowner would not take delivery of the cargo until it decided whether or not to abandon it. On January 30, 1975, the average adjusters expressed the view that it was likely that it would do so. Until it was decided whether or not to do so there was no realistic prospect of the shipowner being willing to accept delivery of the cargo. The salvors had to store the cargo oil its arrival at Manila. Otherwise it would have deteriorated. If the shipowner had decided not to continue the voyage it would not have been interested in the storage of the cargo, would not subsequently have taken delivery of tile cargo and would certainly not have paid the storage charges between the time of arrival of the cargo in Manila and the time of abandonment of the voyage. If the Court of Appeal are correct, the salvors would have been left with a claim against the shipowner which many cases such as the present would not in practice be enforceable. The shipowner was a oneship Panamanian company. Its only asset was stranded. If it were not salved, the shipowner would have no physical assets from which to satisfy the storage charges. Even if it were salved, its value was likely to be so small that the salvors would be unable to satisfy both their legitimate salvage claim and their claim for storage charges. In those circumstances, the salvors naturally looked to the cargo owner to take delivery of the cargo. The Court of Appeal were wrong in holding that they could or should have looked to the shipowner or that, if they had, the shipowner would have taken delivery. It is inconceivable that it would have done so.

The Court of Appeal [1981] Q.B. 403, 422 held that the salvors had not required the cargo owner to make arrangements for the cargo on its own account. They further held, at p. 424, that the salvors' conduct in landing and storing the cargo was not founded on or related to any necessity or emergency or to any benefit to the cargo owner. They held that, if it had been, the salvors would have asked the cargo owner to make arrangements to receive the cargo or to take over responsibility for it. They further held, at p. 425. that the reason for landing and storing the cargo was to maintain their lien for salvage in respect of it. They were wrong. In the circumstances it cannot fairly be said that the salvors did not ask the cargo owner to take over responsibility for the cargo. They did so expressly. Nor can it fairly be said that the salvors were not acting under any relevant necessity. It was necessary to store the cargo because it was perishable. If it had not been properly stored it would have deteriorated. Although it is true that the salvors would not have allowed the cargo to leave Manila without being given security for their salvage claim, it does not follow that the reason for storing the cargo was the exercise of a lien. This is demonstrated by the fact that, after security was put up on April 23, 1975, the salvors continued to store the cargo. They could not then have been exercising a lien. Both before and after security was put up the salvors were storing the cargo because it was necessary to do so for its preservation.

On E, the basis of the salvors' case under this head is that the cargo owner has been unjustly enriched at the salvors' expense. It therefore follows that (subject to the rule against double recovery) it is irrelevant that the salvors might in law have (as the cargo owner alleges) a valid claim in respect of their expenses against the shipowner. The salvors recognise that the English courts do not accept as a general proposition that a person is entitled to remuneration or recompense merely because he has conferred a benefit on another: see,e.g., *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234, 248, per Bowen L.J. However, Bowen L.J. recognised an exception to that general principle: see at p. 249. Statements of general principle reflecting that exception are not easy to find, but the right to recover does not depend in the modern law on the concept of implied contract. With the guidance of *Chitty on Contracts,* 24th ed. (1977), vol. 1, para. 1879 and of *Goff and Jones The Law of Restitution,* 2nd ed., pp. 267-272, 278-279, tile following principle can be deduced from the authorities. Where there is a pre-existing relationship between A and B and where A performs services for the benefit of and/or at the implied request of B which (a) B has an opportunity to reject but fails to reject, (b) B knows were not intended to be performed gratuitously and (c) B would have had to engage some other to perform, *then* the law imposes an obligation on B to pay A reasonable remuneration for such service. This principle falls squarely within the "exception" referred to by Bowen L.J. In *Craven-Ellis v. Canons Ltd.* [1936] 2 K.B. 403, the Court of Appeal held that the fact that the plaintiff had done the work under an agreement that was in

fact void did not disentitle him from recovering on a quantum meruit see *per* Greer L.J., at p. 412. Similar reasoning led three of their Lordships to suggest (albeit obiter) in *Hain Steamship Co. Ltd. v. Tate & Lyle Ltd.* (1936) 41 Com.Cas. 350 that a shipowner who carried goods to their destination following a deviation would be entitled to remuneration on a quantum meruit basis: see *per* Lord Atkin, at p. 358; Lord Wright M.R., at pp. 367-369; Lord Maugham, at p. 373. Again. Similar reasoning led Pearson J. to hold that a shipowner was entitled to remuneration on a quantum meruit basis after the contract of carriage had been terminated by frustration: *Societe Franco Tunisienne d'Aripietpteptt v. Sidermar* S.P.A. [1961] 2 Q.B. 278, 312-314. Although none of those cases is on all fours with the present, the principle to be applied is the same. Thus the question is whether, on the facts of the present case the salvors can fulfil the requirements set out above. They can. Thus: (a) there was here a pre-existing relationship-under the terms of Lloyds form-which had come to an end. (b) The cargo owner was kept informed of the salvors' intentions. Thus it had an opportunity to reject the post-salvage services performed by the salvors, but it failed to do so. (c) The cargo-owner knew that the services were not intended to be performed gratuitously. (d) If the salvors had not landed and stored the wheat, it is self-evident that the cargo owner would have had to engage some other person or organisation to do so. In those circumstances, the law imposes on the cargo owner an obligation to pay the salvors' reasonable expenses.

The salvors also rely on the broader principle of unjust enrichment. The cargo owner has received a benefit in circumstances such that it is just that it should be made to pay the salvors' reasonable expenses: *Greenwood v. Bennett* [1973] Q.B. 195.

Lloyd J. [1979] 2 All E.R. 35, 44 held that the above arguments were correct and that the salvors were entitled to succeed under the general law of quasi-contract or restitution. There is no reference to them in the judgements of the Court of Appeal. The Court of Appeal ought to have given express consideration to them.

For the above reasons, the salvors are entitled to recover the agreed sum of U.S. $110,982.25 from the cargo owner together with interest, subject to the lien point. As to this, the cargo owner contended that in storing the cargo the salvors had merely been preserving their lien for salvage and, therefore, that they could not recover their expenses from the cargo owner. It relied on *Somes v. Directors of British Empire Shipping* Co. (1860) 8 H.L.Cas. 338 and *The Katingaki* [1976] 2 Lloyd's Rep. 372, which shows that the test as to whether the storage is for the benefit of the cargo is objective. The principle in those cases only applies where a lienor retains possession of a chattel for his own benefit, not where he does so for the benefit of the owner of the goods. That is not the case here. Despite the view expressed by Megaw L.J. [1981] Q.B. 403, 425, it is plain that the salvors stored the cargo for the benefit of its owner. They received security for their salvage claim on April 23, 1975, but continued to store the cargo at their expense until the cargo owner finally accepted delivery of it between June and August 1975. If they had been storing the goods merely in order to maintain their lien for salvage, they would have stopped doing so as soon as they obtained security. In the alternative, the principle laid down in *Somes* applies only to possessory liens and not also to maritime liens. Thus, although no doubt the salvors would have been reluctant to allow the wheat to leave Manila before security in respect of their claim for salvage had been put up, they could, if asked to do so by the cargo owner, have given up possession of the wheat (and their possessory lien) secure in the knowledge that they could, if necessary, exercise their maritime lien against it before it left Manila. In the further alternative, if it were held that the expenses were the expenses of maintaining the salvors' maritime lien, the salvors would contend that they fall within clause 5 of Lloyd's form and are recoverable thereunder. The lien point was not pleaded or developed in any detail on behalf of the cargo owner before Lloyd J. If it had been, the salvors would have put their case in the alternative under clause 5 of Lloyd's form. If necessary, they should now be allowed to do so. This point was not taken at the salvage arbitration because of representations made by the cargo owner that give rise to an estoppel against them. In the further alternative, the House should reconsider *Somes* and hold that when a lienor incurs reasonable expenses in the proper exercise of his lien he should be entitled to recover those reasonable expenses from the owner of the goods liened. Such a principle would be consistent with both justice and common sense.

On its arrival in Manila, the cargo had to be stored by someone. It could not simply be left. The salvors had possession of it. No one claimed it at that stage. There was no practical alternative but to store it. Having stored it, it is just that the charges should be paid by the cargo owner. The cargo owner will always be interested, whether the contract of carriage is still in existence or not. The shipowner may only be interested if he continues the voyage. On the facts, the attitude of the cargo owner at the time when the salvage services were going on was not very helpful to the salvage services. If the cargo owner does nothing, the salvor ought not to be burdened with the cost of doing what a prudent cargo owner would have done.

The fallacy of the cargo owner's argument and of the decision of the Court of Appeal is that they concentrate on the wrong relationship, between the shipowner and the cargo owner, whereas one is properly concerned with the relationship between the salvors and each interest. The relationship between the shipowner and the cargo owner is not the starting point, as the cargo owner contends, though it is not irrelevant. The question is whether it is necessary to imply any term to make the contract work if a term is to be implied. It must be the minimum necessary term. The shipowner is under a duty to take care of the cargo. There is no difference between the shipowner's and the salvor's duty to do so. The cargo having been in the possession of the salvors when in Manila, they would have had a maritime lien over it. They had possession of it as bailees. [Reference was made to *Garriock v. Walker,* 1 R. 100.] The salvors rely on *Notara v. Henderson* (1872) L.R. 7 Q.B. 225 in support of their propositions B and C. It does not really support the proposition for which it is cited by the cargo owner.

Assuming that the salvors were bailees, not sub-bailees, that under mines a good deal of the reasoning of the Court of Appeal. The judgment of the Court of Appeal is a result of their conclusion that the salvors' duty was to tender the cargo to the shipowner. Once that is gone, the basis of the judgment falls away. Once it is held that there was a direct bailment, it is difficult to see how they could have concluded that there was a duty to deliver to the shipowner. [Reference was made to *Carver, Carriage by Sea,* 12th ed. (1971), vol. 2, para. 1014.]

The salvors' submissions D and E are genuine alternatives to A, B and C.

[LORD DIPLOCK. Tile salvors need not deal with the question of estoppel for the present.]

Gordon Pollock Q.C. and *Simon Crookenden* for the cargo owner.

The cargo owner agrees with the Court of Appeal that the crucial question is to whom the cargo had to be delivered. There will be different relationships depending on the answer to be given to this question, and a different inquiry as to the facts.

The cargo owner's submissions are as follows.

1. On a proper analysis of the cases, the shipowner is a bailee of the cargo. He is intended to have possession (by himself or his agents, etc.) throughout the contractual service. That service is expected to continue despite temporary interruptions in his physical control of the goods, whether such temporary interruptions are brought about by emergencies or otherwise. The shipowner will wish to retain possession and will retain possession, or at least will expect the cargo back if he has to part with possession. As a matter of law, he is entitled to be in that position.

2. Thus, one can deduce this principle in relation to salvage that when a disaster occurs that requires the services of salvors, the matter should be analysed in this way: where during the course of the voyage, which at that stage has not been abandoned or otherwise terminated, there is a temporary interruption in the performance of the carriage during which a third party, i.e. salvors, render specialised and temporary services (they will be rendered separately to the ship and cargo as a matter of common law and the Lloyd's form, but as a matter of performance they will often be rendered jointly), those services to ship and cargo may require,

but will by no means necessarily require, that the salvors take over control or custody or possession (possessory possession) of the ship, or the ship and the cargo, or the cargo. In the event that it is necessary for the ship and the cargo to be separated, what should the salvors do with the cargo? This is an issue of general application, so the principle adopted to solve it must also apply where the ship and the cargo are salved together, or are separated temporarily but brought to the same place of safety at approximately the same time.

3. In answer to the question what term is to be implied into the salvage contract between the salvors and the cargo owner, one should pay particular attention to these four considerations. (1) The shipowner has the right to retain possession of the cargo and to complete the voyage with it. (2) Conversely, the cargo owner is obliged to allow the shipowner to preserve his right to possession. (3) The shipowner has an obligation to look after and care for the cargo for at least so long as the contract of carriage exists (i.e. remains wholly or partly executory). (4) The cargo owner has a right to look to the shipowner for the performance of that obligation of care and/or preservation of the cargo.

4. If one pays attention to those four factors, it is plain that a proper term to imply into the cargo owner's salvage contract is that the cargo will be delivered on completion of the salvage services to the shipowner.

There is nothing inherently unlikely in a bailee handing goods over on the basis that they will be handed back to him. If the cargo is taken out of the ship and stored, not just for the benefit of the cargo itself but to repair the ship, the cost of loading and reloading it will form part of general average: see rule 10 of the York-Antwerp Rules. There is no logical reason to assume that because the goods are owned by the cargo owner therefore their destination must be the cargo owner. The salvors' argument has the basic defect that it ignores entirely the purposes for which the relevant services are being rendered and the nature of the relationship between the shipowner and the cargo owner into which the salvage contract is merely a temporary intrusion. There would be nothing surprising about an express term requiring the cargo to be redelivered to the shipowner.

The term that should be implied into the salvage contract is that the salvors will redeliver the cargo on the termination of the salvage services to the shipowner unless the shipowner has indicated to them that he will not accept such delivery or is unable to do so. (The proviso could perhaps be left unexpressed.) The cargo owner does not want to accept too readily some such variation as "unless circumstances show" or "or unless it otherwise becomes apparent."

It is significant that: (i) the salvage remuneration has been; (ii) the salvors have successfully performed their obligation under the salvage contract; (iii) the salvors are obliged to deliver up the cargo to whomsoever ought to receive it, subject only to any rights of lien that they may have and seek to exercise; (iv) the persons who are to recover the cargo, whoever they may be, are bound and ought to receive it; (v) the cargo owner became obliged to put up security.

Clause 5 of the Lloyd's form does not give a possessory lien. The general law is that one does not have a possessory lien if one has a maritime lien.

The starting point is to consider the relationship between the shipowner and the cargo owner in general, not in any particular case. It does not follow that where goods are handed over by a bailee to an independent contractor the independent contractor must hand them back to the owner.

The cargo owner makes the following propositions. 1. The occurrence of a maritime casualty, unless the cargo and the ship actually perish, does not itself bring the contract of carriage between the ship owner and the cargo owner to an end. This principle holds true even if the carrying vessel is itself so severely disabled as to be disabled from carrying the cargo to the destination either at all or within a frustrating period. The reason for this rule lies in the principle that where the vessel is so disabled the shipowner has the right and option to

substitute another bottom and to carry the cargo in that other bottom to the destination. This is not a right and option that has vanished through obsolescence, though it does not often happen.

2. The contract of carriage does not come to an end until there is a formal abandonment of the voyage. (It cannot be frustrated until the owner has exercised his option not to transship or until a reasonable time for exercising that option has expired so that he is deemed to have abandoned the voyage.)

3. Before the voyage contract can be said to have ended one needs to know (1) "whether the carrying vessel is a constructive total loss, or whether the initial voyage is incapable of further performance" (2) if it is, or if it is so incapable, whether the owner abandons or elects to tranship. By "constructive total loss," the cargo owners do not mean such a loss in the strict maritime insurance sense but that the position of the vessel is such that it cannot be repaired, or cannot be repaired without excessive expense, or cannot be repaired in time without the frustration of the charterparty. A further subqualification to (2) is that one would have to know whether, if the election had not been declared, a reasonable time for it had expired.

In the present case, that position was not likely to be reached until the cargo had come ashore.

4. As long as the contract of carriage continues in existence, (a) it is the shipowner's duty to preserve and safeguard the cargo; (b) it is the cargo owner's right to expect and require the shipowner to fulfil that function; (c) the shipowner is entitled as between himself and the cargo owner to possession of the cargo, and the cargo owner has no right to possession.

By way of deduction from the above propositions, the cargo owner has no right to possession as against the shipowner even though the goods have passed into the hands of independent contractors. Their obligation is to return the goods to the shipowner.

If what is pleaded here is based on an implied term, the salvors' claim cannot be raised under the salvage contract, because that has gone to arbitration and been decided against the salvors and cannot be raised now. It was said on the arbitration that it could not be raised on the arbitration because it fell outside the salvage contract.

The question is as to the duty of a bailee. The cargo owner agrees that the situation would be the same whether it were a question of the Lloyd's form or of common law bailment.

Seeking to make the cargo owner's propositions good by reference to authority, see, first, *Notara v. Henderson,* L.R. 7 Q.B. 225, and *The Blenheim* (1885) 10 P.D. 167*.* It follows that where an independent contractor comes into possession during the course of the voyage the law leans in favour of giving the shipowner rather than the cargo owner the right against that third party.

No principle has ever been held to exist in English law to the effect that, if a bailee is under a duty to take reasonable care of the goods, and does so, he is thereby entitled to be paid for doing so, unless there was necessity or emergency. There is no distinction as regards a bailee for reward and a gratuitous bailee: *The Cito* (1881) 7 P.D. 5 and *Bradley v. H. Newsom, Sons and Co.* [1919] A.C. 16.

The second part of this case concerns whether the cargo owner has the right to recover and the question of the exercise of a lien. One cannot approach the question by way of the salvors' propositions A to E without having come to a decision on the facts of the case. The salvors, have to persuade the House that the Court of Appeal were wrong and were wrong to overrule Lloyd J. They were right to do so: see [1981] Q.B. 403, 422. The evidence demonstrates that they were correct to conclude, contrary to what Lloyd J. had concluded, that there had been no time at which any relevant emergency or necessity had faced the salvors with regard to the disposal of the cargo when it arrived at Manila.

As long as the contract of carriage is on foot, it is the shipowner through the master who has to take any extraordinary measures for the preservation of the goods. It is entitled to do so without interference from the cargo owner: *Notara v. Henderson,* L.R. 7 Q.B. 225. It follows that the element of necessity that justifies such expenditure and recovery in respect of such expenditure from the cargo owner cannot include an inability to communicate with the cargo owner. This follows as logic if *Notara v. Hender*son is right. If the contract of carriage has ended, with the result that (subject to any question of lien) the cargo owner as against the shipowner is entitled to repossess the cargo, then the shipowner or the master will only be able to justify expenditure for the benefit of the cargo and claim reimbursement from the cargo owner for such expenditure if such expenditure was necessary for the benefit of the cargo and the master or shipowner could not communicate with the cargo owner. In that situation, an inability to communicate is an element in the necessity, because the contract of carriage has come to an end and the bailment (the holding by the shipowner) has become ex-contractual. The goods are simply in possession of the bailee who happens to have them; he ought to ask the owner what to do with them, but cannot. If, whether before or after the contract ends, the master wants to deal with the cargo in a way that will affect their ultimate title, he can only bind the cargo owner vis-á-vis a third party by showing that there was necessity and inability to obtain instructions. So, when these goods reached Manila, the contract of carriage was not over and it was the duty of the shipowner to take steps to see that the goods were properly stored. In law, the cargo owner had at that stage no right to interfere, whether by giving instructions or by giving or withholding consent, with the shipowner's performance of that duty. The shipowner would have had the right to look to the cargo owner for an indemnity, as in *Notara v. Henderson.* The shipowner never objected to what was done with the cargo and never asked for the cargo owner's instructions. There is nothing unusual in the shipowner being the one on the spot who directs the salvors as to what to do with the cargo pending a decision as to whether the carriage will continue.

A bailee has in law no right to charge a shipowner with expenditure that benefits the goods unless (1) there is an actual contractual promise by the owner of the goods to indemnify the bailee, or (2) the law imposes such an obligation. Where the expenditure is incurred after the contractual services on which the bailment is founded have or ought to have come to an end, the law will only impose such an obligation to indemnify in the case of necessity. In such a case, "necessity" means (a) a situation in which steps are plainly required to preserve or benefit the property and (b) a situation in which the owner of the property cannot be asked whether he wishes expenditure to be incurred.

The authorities relied on by the salvors are all cases where the element of necessity was present. It is particularly important to notice that the phrase "the correlative right of the bailee" to be reimbursed where there was a duty to take care and the bailee expended money in so doing arose in the plainest case of necessity. No principle or authority suggests that the correlative right of the bailee arises in any circumstances other than of necessity. There is no such doctrine in English law.

The salvors rely on the same cases whichever way the case is put, A or B. [Reference was made to *Hingston v. Wendt,* 1 Q.B.D. 367; *Cargo ex Argos,* L.R. 5 P.C. 134; *Great Northern Railway Co. v. Swaffield, L.R. 9* Ex. 132 and *Petrinovic & Co. Ltd. v. Mission Francaise des Transports Maritimes,* 71 Ll.L.Rep. 208.] All the cases conveniently fall under the rubric "agency of necessity" and go no further than the salvors' proposition C. It follows that in order that the salvors can claim that the cargo owner is bound to reimburse them they must show that they landed and stored the goods under the impetus of urgency or necessity as defined in the cases. It is not enough to say that they did what was reasonable. The only point that one can deduce from the cases is that where services are requested by one party from another on the expectation that the latter will be paid according to the contract between them, but the contract turns out to be invalid, the latter will be paid on a quantum meruit. The doctrine in *Craven-Ellis v. Canons Ltd.* [1936] 2 K.B. 403 and *Société Franco Tunisienne d'Armement v. Sidermar S.p.A.* [1961] 2 Q.B. 278 has nothing to do with the present case. Here, there was no contract. ineffective or otherwise, under which the services of landing and storing the cargo were to be performed by the salvors for the cargo owner's benefit.

As to lien, the salvors cannot recover the expenses if they were in curred in the preservation of the lien. They were not left remediless, because clause 5 of the Lloyd's form expressly provides that if the salvor exercises the machinery that the contract provides in order to preserve the maritime lien he may bring his expenses back into the arbitration and the arbitrator is empowered to award them as part of the salvage award.

The cargo owner makes the following propositions as to lien. 1. *Somes v. Directors of British Empire Shipping Co.,* 8 H.L.Cas. 338 is authority for the well established proposition that the lienor cannot charge the owner of the goods for the cost of exercising the lien (in the absence of any express contractual provision to the contrary). 2. As a matter of fact, the exercise of a lien will inevitably involve the lienor in the obligation to take proper care of the property liened. 3. Expenditure on the preservation and retention of the property will inevitably have a dual effect: (i) it enables the lienor to preserve his possession, to preserve his lien and to fulfil his duties as a bailee; (ii) it benefits the owner of the goods in the sense that the goods are preserved and looked after rather than being exposed to deterioration or loss. 4. It cannot. therefore, be right to say that, if the result of the storage is twofold in terms of the benefit that it confers, therefore the *Somes* rule does not apply. 5. The principle laid down in Somes may therefore be expressed thus: if possession of property is retained in order to exercise a lien, there can be no recovery of costs consequential on retaining the property, but if possession of property is retained not for the purpose of a lien at all but simply to benefit the owner of the goods then recovery may be had on ordinary restitutory or quasi-contractual principles. The distinction drawn by Lord Cranworth in *Somes* regarding whether the property was being retained for the benefit of the lienor is not a question of mixed purpose but a distinction between two wholly different categories. The question that *Somes* poses is not " what was the subjective purpose?" but "why was the possession retained?" If the salvor simply leaves the cargo on the quayside he will be liable. If, having taken possession of it to exercise his lien, he fails to take proper care of it, he will be liable. The salvors were not required to reply.

Their Lordships took time for consideration.

November 12. LORD DIPLOCK. My Lords, the *Winson,* a bulk carrier owned by a one-ship Panamanian company (" the shipowner") was chartered by the Food Corporation of India (" the cargo owner") to carry a full cargo of wheat from United States Gulf ports to ports in India under a voyage charterparty in the Baltimore Berth Grain Charter form with numerous special conditions. The cargo owner is a nationalised enterprise possessing separate legal personality which the Government of India uses for purchasing imports of foodstuffs needed for that country.

The cargo was loaded in December 1974 and on January 21, 1975, in the course of the voyage to India, the *Winson* stranded on the North Danger reef in the South China Sea. China Pacific S.A. (" the salvors "), who are professional salvors, were quickly on the scene and on the following day a salvage agreement with the salvors in Lloyd's open form was entered into on behalf of the shipowner and the cargo owner. In the course of carrying out the salvage services to both the shipowner and the cargo owner that the salvors by that agreement had undertaken with each separately to use their best endeavours to render, it was necessary to lighten the stranded vessel by off-loading part of the cargo into barges provided by the salvors and carrying it to a place of safety. This was done. and some 15,429 tonnes of wheat were off-loaded and carried to Manila which, it is not disputed, was a proper place of safety. The carriage was in six separate parcels which arrived in Manila at various dates between February 10 and April 20, 1975. The salvage operations at the site of the stranding were temporarily suspended on April 15, 1975, owing to fighting in the vicinity having broken out between the forces of North Vietnam and South Vietnam. It is not disputed that it never became practicable thereafter to resume the salvage operations and on May 20, 1975, the salvors gave formal notice of termination of their salvage services. The *Winson* with the remainder of the cargo of wheat still on board her eventually became a total loss.

Upon arrival of each parcel of salvaged wheat at Manila, where the salvors had no storage premises of their own, it became necessary for it to be stored in suitable accommodation under cover, if it were not to deteriorate rapidly from exposure to the elements during the

period before a decision as to what was to be done with it was reached by whoever at the time that such decision was in fact made was legally entitled to require its removal from the accommodation in which it was stored. The salvors arranged for the storage of the salvaged wheat as to part in a vessel, the *Maori,* lying in Manila Harbour, and as to the remainder in a bonded warehouse ashore. In doing so they incurred expenses for stevedoring and charter hire of the *Maori* and warehouse charges ashore and the stored wheat was held to their order by those in whose vessel and warehouse it was stored (" the depositaries "). These expenses which the salvors became personally liable to pay under the contracts that they made as principals with the depositaries continued to be incurred by them until the cargo owner had completed taking possession of the salved wheat-which it did not do until August 5, 1975.

It is not disputed that storage under cover of the salvaged wheat upon its arrival at Manila was necessary to prevent its rapid deterioration: nor is it disputed that the storage obtained by the salvors at Manila was reasonably suited for that purpose or that the charges paid for it by the salvors to the depositaries were also reasonable.

The cargo owner has accepted liability for and paid the expenses in curred by the salvors for the storage of the wheat in Manila after the date on which the shipowner gave notice to the cargo owner on April 24, 1975, that he had abandoned the chartered voyage. By that date it was obvious that the completion of the carriage of the cargo in the *Winson* to its destinationshone under the charterparty, even if it were to become physically possible (which, in the event, it did not), would involve such long delay as would frustrate the adventure for which the charterparty provided. Assuming that this stranding was caused by an excepted peril (as to which I under stand there may be doubt) the shipowner had in law an option either to abandon the chartered voyage or to on-carry the salvaged wheat from Manila to its contractual destination in other bottoms. By giving formal notice of abandonment of the voyage the shipowner was divested of this latter option and it is undisputed that the contract voyage terminated on April 24, 1975. For some reason, which is not clear, the cargo owner paid the expenses incurred by the salvors for the storage of the wheat in Manila from April 15 instead of April 24, from which later date alone it acknowledges that it was under any legal liability to do so; but, so far as concerns any issue that your Lordships have to determine in this appeal, the relevant period for which the cargo owner disclaims liability to reimburse the salvors for the expenses that they incurred in providing covered storage for the salvaged wheat is from February 10, when the first barge-load of salvaged wheat arrived in Manila Harbour, until April 24, 1975, when, upon receipt by the cargo owner of the shipowner's notice of abandonment, the contract voyage terminated. The action was brought by the salvors against the cargo owner to obtain reimbursement of the expenses incurred by them during this period and the amount at stake is agreed at $110,982.

I hope that I do no injustice to the detailed and at times elaborate arguments addressed to your Lordships in this interesting and novel case if I say that, put in a nutshell, the main propositions on which the cargo owner's case was based were: (1) that, since by virtue of the contract of carriage created by the charterparty the immediate right to possession *as between shipowner and cargo owner* vested in the shipowner for so long as that contract of carriage had not been terminated by performance or otherwise, it was the shipowner and not the cargo owner to whom the salvors were under a duty to deliver each separate parcel of the cargo upon its arrival at Manila (subject to the provision to the Committee of Lloyd's of security for salvage remuneration if this were demanded by the salvors); and (2) that, accordingly, it was the shipowner, and not the cargo owner, who was liable to reimburse the salvors for any expenses reasonably incurred by them in preserving the cargo from deterioration during the period while the contract of carriage remained unterminated, if they were entitled to be reimbursed by anyone at all.

My Lords, the way in which I have ventured to summarise the cargo owner's main propositions which were rejected by Lloyd J. in the Commercial Court, but appear to have been accepted by the Court of Appeal, reflects an assumption that the salvage services rendered to the cargo owner under Lloyd's open salvage agreement came to an end separately in respect of each individual parcel upon arrival of the barge on which it was being carried at a place of safety in Manila Harbour. In each of the three courts through which it has

progressed the case has throughout been argued on that basis and, in the result, nothing that your Lordships have to decide in the instant appeal turns on whether this assumption was correct or not. I should not, however, wish to be taken as necessarily accepting that, in the absence of subsequent variation either express or to be implied from the conduct of the parties, where a Lloyd's open form of agreement is signed by the master on behalf of a single owner of the whole of a bulk cargo and the salvage services involve unloading it in whole or part and taking it to a place or places of safety separately from. the carrying ship, there is a "termination" of the salvage services within the meaning of Lloyd's open form until either the whole of the cargo has been brought to places of safety or further attempts to salve cargo that has not yet been brought to any. place of safety have been justifiably abandoned by the salvor.

The instant case came on for trial before Lloyd J. in July 1978. No oral evidence was tendered and the details as to what occurred between the time of stranding of the *Winson* and the completion of delivery to the cargo owner of the salved wheat from the depositaries have to be gleaned in the main from a series of contemporaneous telexes from persons on or near the spot reporting to the shipowner and the cargo owner, through their respective agents, what was going on. The learned judge's findings of fact based on this material are set out in his judgment, including citations of those passages in various telexes which he regarded as important to his decision. I do not find it necessary to repeat them here or to add to the brief summary that I have already given of them; except to add that throughout the relevant period from the arrival of the first parcel of salved wheat at Manila Harbour on February 10, 1975, until notice by the shipowner of abandonment of the charter voyage was received by the cargo owner on April 24, 1975, both shipowner and cargo owner were well aware that the cargo on its arrival in Manila Harbour had been put in store by the salvors to preserve it from deterioration and that neither shipowner nor cargo owner had made any request to the salvors for the delivery of the salved cargo or any part of it to either of them.

My Lords, it is not suggested that there is any direct authority on the question of law that is posed in this appeal. In my opinion the answer is to be found by applying to the unusual circumstances of the instant case well known and basic principles of the common law of salvage, of bailment and of lien.

In Part (1) of the cargo owner's main propositions, the statement about the contractual rights *as between shipowner and cargo owner* to possession of the cargo so long as the contract of affreightment remained afoot is unexceptionable; to use a convenient Americanism, it is hornbook law for which no citation of authority is needed. But it does not in my view follow that as *between salvors and shipowner* or as *between salvor and cargo owner* it was to the former and not to the latter or to their order that the salvors would have been under a legal obligation to deliver up posses sion of the salved wheat upon its arrival in Manila Harbour if such delivery had been demanded. (I leave aside for subsequent consideration the parenthetical reference to provision of security; for that relates to a separate and subsidiary argument which has been referred to as "the lien point" upon which the cargo owner would only seek to rely if its main propositions fail.)

Part (2) of the cargo owner's main propositions is predicated on the correctness of part (1). The Court of Appeal regarded the crucial question in the case as being whether part (1) was correct in law. If it were correct (as they held it was), they regarded part (2) as doing no more than state a necessary legal consequence of part (1). For my part, however, even if, contrary to my own view, part (1) of the main propositions were correct, I would not accept that it followed that part (2) also was correct. A person who holds possession of goods as sub-bailee of an original direct bailee of the owner of goods also owes some duty of care towards the owner: *Morris v. C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716.

My Lords. with modem methods of communication and the presence of professional salvors within rapid reach of most parts of the principal maritime trade routes of the world, nearly all salvage of merchant ships and their cargoes nowadays is undertaken under a salvage contract in Lloyd's open form. The contract is one for the rendering of services; the services to be rendered are of the legal nature of salvage and this imports into the contractual

relationship between the parties to the contract by necessary implication a number of mutual rights and obligations attaching to salvage of vessels and their cargo under common law, except in so far as such rights and obligations are inconsistent with express terms of the contract.

Lloyd's open form is expressed by clause 16 to be signed by the master "as agent for the vessel her cargo and freight and the respective owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof." The legal nature of the relationship between the master and the owner of the cargo aboard the vessel in signing the agreement on the latter's behalf is often though not invariably an agency of necessity. It arises only when salvage services by a third party are necessary for the preservation of the cargo. Whether one person is entitled to act as agent of necessity for another person is relevant to the question whether circumstances exist which in law have the effect of conferring on him authority to create contractual rights and obligations between that other person and a third party that are directly enforceable by each against the other. It would, I think, be an aid to clarity of legal thinking if the use of the expression " agent of necessity " were confined to contexts in which this was the question to be determined and not extended, as it often is, to cases where the only relevant question is whether a person who without obtaining instructions from the owner of goods incurs expense in taking steps that are reasonably necessary for their preservation is in law entitled to recover from the owner of the goods the reasonable expenses incurred by him in taking those steps. Its use in this wider sense may, I think, have led to some confusion in the instant case, since where reimbursement is the only relevant question all of those conditions that must be fulfilled in order to entitle one person to act on behalf of another in creating direct contractual relationships between that other person and a third party may not necessarily apply.

In the instant case it is not disputed that when the Lloyd's open form was signed on January 22, 1975, the circumstances that existed at that time were such as entitled the master to enter into the agreement on the cargo owner's behalf as its agent of necessity. The rendering of salvage services under the Lloyd's open agreement does not usually involve the salvor's taking possession of the vessel or its cargo from the shipowner; the shipowner remains in possession of both ship and cargo while salvage services are being carried out by the salvors on the ship. But salvage services may involve the transfer of possession of cargo from the shipowner to the salvors and will do so in a case of stranding as respects part of the cargo if it becomes necessary to lighten the vessel in order to refloat her. Where in the course of salvage operations cargo is offloaded from the vessel by which the contract of carriage was being performed and conveyed separately from that vessel to a place of safety by means (in the instant case, barges) provided by the salvor, the direct relationship of bailor and bailee is created between cargo owner and salvor as soon as the cargo is loaded on vessels provided by the salvor to convey it to a place of safety; and all the mutual rights and duties attaching to that relationship at common law apply, save in so far as any of them are inconsistent with the express terms of the Lloyd's open agreement.

On parting with possession of cargo to the salvor the shipowner loses any possessory lien over it to which he may have been entitled for unpaid freight, demurrage or general average. Whether the lien in respect of liabilities of the cargo owner that had already accrued due at the time of parting with possession would revive upon the shipowner's recovering possession of the cargo for on-carriage to its contractual destination is a question on which there appears to be no direct authority; but it does not arise for decision by your Lordships in the instant case. The shipowners neither obtained nor even sought repossession of any part of the salved wheat after it had been off-loaded from the *Winson* into the barges provided by the salvors on and before April 24, 1975.

My Lords, in the courts below and in argument before your Lordships there has been some discussion as to whether on their obtaining possession of the cargo from the shipowner the relationship of the salvors to the cargo owner was that of bailee or sub-bailee. A sub-bailee is one to whom actual possession of goods is transferred by someone who is not himself the owner of the goods but has a present right to possession of them as bailee of the owner. In the instant case Lloyd J. and the Court of Appeal were of the view that the salvors were

bailees of the cargo owner, and this was, in my view also, plainly right. They would only be sub-bailees of the cargo owner if the contract to render salvage services to the cargo under Lloyd's open form had been signed by the master as agent for the shipowner only. This was plainly not the case. The contract was one under which the salvors' remuneration in respect of salvage services to the cargo was a liability of the cargo owner, not of the shipowner, and security for such remuneration could be required by the salvors to be given by the cargo owner alone; so the only consideration for salvage services rendered to the cargo by salvors under Lloyd's open form came from the cargo owner. The only sub-bailments involved in the instant case were those effected by the salvors themselves with the depositaries when they deposited the salved wheat for safe keeping at Manila.

It follows from the existence of the legal relationship of bailor and bailee as a matter of general principle of the law of bailment, which may also be described as hornbook law, that as between the cargo owner and the salvors the latter as bailees were estopped from denying the title to the goods of the former as their bailor, including as an incident of that title its right to possession. Subject to the lien point, which I am deferring until later, the salvors could not resist a demand for possession of the salved wheat made by the cargo owner upon its arrival at a place of safety by relying upon justertii, viz. the shipowner's right to possession as against the cargo owner, at any rate until an adverse claim to possession had been made upon them by the shipowner. If demand for possession of the salved wheat had been made upon the salvors by the shipowner (which it never was), the salvors would have complied with it at their peril. Their only safe course would have been to interplead; whereas in returning possession to the cargo owner or in accordance with its directions before any demand for possession was made by the shipowner they would have run no risk of liability to the latter. So I agree with Lloyd J. that (at any rate, when, as in the instant case, a salvage contract in Lloyd's open form is entered into on behalf of a sole owner of a bulk cargo) salvors are under a duty at the conclusion of the salvage services to deliver up possession of the salved cargo to the cargo owner or in accordance with his directions. I thus differ in this respect from the Court of Appeal but, unlike them, I do not think that the point is crucial to the salvors' claim.

Upon the assumption, whether correct or not, to which I have already referred as being that upon which this case has been argued throughout, that the salvage services which the salvors had contracted to render to the cargo owner came to an end as respects each parcel of salved wheat when it arrived at a place of safety in Manila Harbour, the legal relationship of bailor and bailee between cargo owner and salvors nevertheless continued to subsist until possession of the wheat was accepted by the cargo owner from the depositaries who had been the salvors' sub-bailees. Subject always to the question of the salvors' right to the provision of security before removal of the salved wheat from Manila, with which I shall deal separately later, the bailment which up to the conclusion of the salvage services had been a bailment for valuable consideration became a gratuitous bailment; and so long as that relationship of bailor and bailee continued to subsist the salvors, under the ordinary principles of the law of bailment too well known and too well-established to call for any citation of authority, owed a duty of care to the cargo owner to take such measures to preserve the salved wheat from deterioration by exposure to the elements as a man of ordinary prudence would take for the preservation of his own property. For any breach of such duty the bailee is liable to his bailor in damages for any diminution in value of the goods consequent upon his failure to take such measures; and if he fulfils that duty he has, in my view, a correlative right to charge the owner of the goods with the expenses reasonably incurred in doing so.

My Lords, as I have already said, there is not any direct authority as to the existence of this correlative right to reimbursement of expenses in the specific case of a salvor who retains possession of cargo after the salvage services rendered by him to that cargo have ended; but Lloyd J. discerned what he considered to be helpful analogous applications of the principle of the bailee's right to reimbursement in *Cargo ex Argos* (1873) L.R. 5 P.C. 134, from which I have taken the expression "correlative right," and in *Great Northern Railway Co. v. Swaffield* (1874) L.R. 9 Ex. 132. Both these were cases of carriage of goods in which the carrier/bailee was left in possession of the goods after the carriage contracted for had terminated. Steps necessary for the preservation of the goods were taken by the bailee in default of any instructions from owner/bailor to do otherwise. To these authorities I would add *Notara v. Henderson* (1872) L.R. 7 Q.B. 225, in which the bailee was held liable in damages for breach

of his duty to take steps necessary for the preservation of the goods, and the Scots case of *Garriock v. Walker* (1873) 1 R. 100 in which the bailee recovered the expenses incurred by him in taking such steps. Although in both these cases, which involved carriage of goods by sea, the steps for the prevention of deterioration of the cargo needed to be taken before the contract voyage was completed, the significance of the Scots case is that the cargo owner was on the spot when the steps were taken by the carrier/bailee and did not acquiesce in them. Nevertheless, he took the benefit of them by taking delivery of the cargo thus preserved at the conclusion of the voyage.

In the instant case the cargo owner was kept informed of the salvors' intentions as to the storage of the salved wheat upon its arrival in Manila: it made no alternative proposals; it made no request to the salvors for delivery of any of the wheat after its arrival at Manila, and a request made by the salvors to the cargo owner through their solicitors on February 25, 1975, after the arrival of the second of the six parcels, to take delivery of the parcels of salved wheat on arrival at Manila remained unanswered and uncomplied with until after notice of abandonment of the charter voyage had been received by the cargo owner from the shipowner.

The failure of the cargo owner as bailor to give any instructions to the salvors as its bailee although it was fully apprised of the need to store the salved wheat under cover on arrival at Manila if it was to be preserved from rapid deterioration was, in the view of Lloyd J. sufficient to attract the application of the principle to which I have referred above and to entitle the salvors to recover from the cargo owner, their expenses in taking. measures necessary for its preservation. For my part I think that in this he was right and the Court of Appeal, who took the contrary ,view, were wrong. It is, of course, true that in English law a mere stranger cannot compel an owner of goods to pay for a benefit bestowed upon him against his will; but this latter principle does not apply where there is a pre-existing legal relationship between the owner of the goods and the bestower of the benefit, such as that of bailor and bailee, which imposes upon the bestower of the benefit a legal duty of care in respect of the preservation of the goods that is owed by him to their owner.

In the Court of Appeal Megaw L.J., as I understand his judgment with which Bridge and Cumming-Bruce L.JJ. expressed agreement, was of opinion that, in order to entitle the salvors to reimbursement of the expenses incurred by them in storing the salvaged wheat at Manila up to April 24, 1975, they would have to show not only that, looked at objectively, the measures that they took were necessary to preserve it from rapid deterioration, but, in addition, that it was impossible for them to with the cargo owner to obtain from him such instructions (if any) as he might want to give. My Lords, it may be that this would had been so if the question in the instant case had been whether the depositaries could have sued the cargo owner directly for their contractual storage charges on the ground that the cargo owner was party as principal to the contracts of storage made on its behalf by the salvors as its agents of necessity; for English law is economical in recognising situations that give rise to agency of necessity. In my view, inability to communicate with the owner of the goods is not a condition precedent to the bailee's own right to reimbursement of his expenses. The bailor's failure to give any instructions when apprised of the situation is sufficient.

So, on the cargo owner's main propositions of law in this appeal, I think it fails and that on these points the Court of Appeal was wrong in reversing Lloyd J.

Finally, I turn to the lien point. This point does not appear to have been developed before Lloyd J. it was developed before the Court of Appeal, who found it unnecessary to deal with it as they were in favour of the cargo owner on its main propositions with which I have so far been dealing. It was developed fully before your Lordships. The way in which it was put, if I have succeeded in following it aright, starts with the proposition that, in addition to the maritime lien that is expressly conferred upon the salvor (or, it may be, confirmed) by clause 5 of Lloyd's open form and which remains inchoate unless and until it is crystallised by arrest of the salved property in proceedings brought in a court exercising admiralty jurisdiction, a salvor who, after termination of salvage services, retains actual possession of the property either directly or through his sub-bailee is also entitled, either under clause 5 or independently of

that D clause, to a right, partaking of the legal nature of a possessory lien at common law, to refuse a demand by the owner for delivery up of possession of his salvaged property until the salvor's salvage remuneration has been secured or paid.

My Lords, the 'extent to which any possessory lien that a salvor would be entitled to exercise at common law is capable of surviving, or is modified by, the provisions of clauses 4 and 5 of Lloyd's open form raises difficult and hitherto undecided questions of law into which, in my view it is not necessary for this House to enter in the instant case-and it would be unwise for your Lordships to attempt to do so. The only reason why the cargo owner upon the failure of its main propositions sought by this subsidiary proposition, to reach some tabula in naufragio juridiciabile was in order to avail itself of the principle, which it contended was laid down by this House in *Somes v. Directors of British Empire Shipping Co.* (1860) 8 H.L.Cas.338, to the effect that, where a person entitled to a possessory lien over goods incurs expenses in maintaining possession of them in the exercise of his right of lien and preserving in the meantime their value as security for the owner's indebtedness to him, he cannot recover such expenses from the owner. That case is, in my view, authority for the proposition that, where a lienee remains in possession of goods in the exercise of his right of lien only (i.e., one who has refused a demand by the lienor for redelivery of the goods with which, in the absence of the lien, the lienee would be under a legal obligation to comply), he cannot recover from the lienor loss or expenses incurred by him exclusively for his own benefit in maintaining his security as lienee and from which the lienor derives no benefit as owner of the goods. I would not seek to suggest that this authority has become outdated for the proposition that was then laid down; but I would deny that it is authority for anything more and, in particular, for the further proposition that expenditure necessary for the preservation of the goods from deterioration from which the owner *does* derive benefit is irrecoverable, where such expenditure is made by a bailee at a time *before* possession of the goods has been demanded of him by the owner and his only right to retain lawful possession of them the renter rests upon his own election to continue in possession, after such demand, in the exercise of the rights of lienee.

However that may be, the short answer to the lien point in the instant case is that on the facts it never arose. The salvors retained possession of the wheat throughout the relevant period in the capacity only of gratuitous bailees of the cargo owner; they never had occasion to decide whether or not to exercise any possessory or maritime lien they might have had against the cargo owner or to retain possession adverse to the cargo owner in reliance on their rights as lienees; for no demand for delivery of any of the salved wheat to it or its order was made upon the salvors by the cargo owner until after security had been provided on April 22, 1975, by the Indian High Commissioner, and all requests for delivery of possession made thereafter were complied with by the salvors and the depositaries as their sub-bailees.

I would allow the appeal and restore the judgment of Lloyd J.

LORD SIMON OF GLAISDALE. My Lords, I have had the privilege of reading in draft the speech delivered by my noble and learned friend on the Woolsack. Since I am in general agreement with it, and particularly with its argument and conclusion that the salvor is entitled to succeed by reason of his bailment, what follows is by way of marginal comment.

The Lloyd's open form I would myself, like Lloyd L, also come to the same conclusion by implication from the salvage contract, the argument running closely parallel to that on bailment. It was common ground that the contract is incomplete without implication of a term stipulating to whom delivery should be tendered when cargo salved separately from its carrying vessel is brought to a place of safety. I agree with my noble and learned friend that, in the case of bulk cargo the owner of which is known to the salvor, the person entitled to delivery is the cargo owner. The shipowner, by becoming party to and implementing the salvage con tract, gives up his possessory lien; and I know of no principle entitling him to repossession merely to reassert a possessory lien: As for his option to on-carry, he can exercise it merely by communication with the cargo owner.

But there is a further matter requiring provision which is not covered by the express terms of the Lloyd's open form: namely, what is the duty of a salvor in respect of the cargo after it, or part of it, has been brought to a place of safety but before delivery to whoever is entitled to receive it? In my view, if cargo, or part of it, is salved separately from the carrying vessel, it is the duty of the salvor, owed to the cargo owner, to take reasonable steps on its arrival at the place of safety to prevent its deterioration. It is also, in my view, a necessary implication. that, if the salvor incurs expense in fulfilling that duty, he it entitled to be reimbursed by the cargo owner. What I venture to submit hereafter, under the heading of "*Bailment,"* about the correlation of the performance of the duty to A safeguard the goods on the one hand and the entitlement to reimbursement of expenses incurred thereby on the other, is relevant here; but it would be particularly unreasonable not to imply such correlationship in the context of the commercial nexus constituted by the Lloyd's open form.

Counsel for the cargo owner, in oral argument, urged that, as a matter of pleading, it was not open to the salvor to rely on this implied term in the Lloyd's open form. But the case has throughout proceeded on the, basis that the salvor could argue that a term providing for reimbursement could be implied from the salvage contract. In my view, it is far too late to raise any pleading point against it.

Bailment. Counsel for the cargo owner contended that, even if the salvor as bailee owed a duty to the cargo owner as bailor to take reasonable steps to safeguard his goods, there was no correlative right to claim reimbursement of reasonable expenses in so acting: neither a bailee for reward nor a gratuitous bailee has any such general right to indemnity. Counsel for the cargo owner adopted the view of the Court of Appeal that, apart from specific contractual obligation, a bailee's right to reimbursement

". . .depends on there being something which can properly be called an element of necessity that the bailee should so act in order to preserve the goods." [1981] Q.B. 403, 423.

I agree that the re is no general right of a bailee to be reimbursed expenses incurred in fulfilling his duty to safeguard bailed goods; and I agree that there was an element of necessity in the cases relied on by the salvor under this head. But I think that it puts it too narrowly to say that such are the only circumstances in which the law will import an obligation to reimburse unless indeed, one is prepared to go further and argue that only a bailee who is an agent of. necessity is entitled to reimbursement. No authority so stipulates. The relevance of necessity in the cases relied on by the salvor is, in my view, that justice calls for reimbursement in such circumstances: the emergency imposes obligations on the bailee beyond what will generally be contemplated. on a bailment. But such are not the only circumstances in which justice demands indemnity. In my view the following circumstances in the instant appeal import a correlative obligation to reimburse expenses: (1) the contract of bailment was a commercial one; (2) it came to an end when the salved goods were brought to a place of safety, which, it has been the common assumption, was the entry into the port of Manila (though I must not be taken as necessarily endorsing this view); (3) the bailee then continued in possession as a gratuitous bailee; (4) he incurred reasonable expenses in safeguarding and preserving the goods, to the benefit of the bailor; (.5) the bailor stood by, knowing that the bailee was so acting to his (the bailor's) benefit.

Agency of Necessity. Lloyd J. decided in favour of the salvor on the further ground that he was the cargo owner's agent of necessity and as such entitled to reimbursement of the expenses in issue. The Court of Appeal held that there was no agency of necessity.

One of the ways in which an agency of necessity can arise is where A is in possession of goods the property of B and an emergency arises which places those goods in imminent jeopardy: If A cannot obtain instructions from B as to how he should act in such circumstances, A is bound to take without authority such action in relation to the goods as B, as a prudent owner, would himself have taken in the circumstances. The relationship between A and B is then known as an "agency of necessity." A being the agent and B the principal. This was the situation descried by Lloyd J. and denied by the Court of Appeal.

Issues as to agency of necessity generally arise forensically when A enters into a contract with C in relation to the goods, the question being whether B is bound by that contract. The purely terminological suggestion that, in order to avoid confusion, "agent of necessity" should be confined to such contractual situations does not involve that other relevant general incidents of agency are excluded from the relationship between A and B. In particular, if A incurs reasonable expenses in safeguarding B's goods in a situation of emergence, A is entitled to be reimbursed by B: see *Bowstead on Agency,* 14th ed. (1976), art. 67; *Chitty on Contracts,* 23rd ed. (1968), vol. 2. para. 119; *Petrinovic Co. Ltd. v. Mission Francaise des Transports Maritimes* (1941) 71 Ll.L.Rep. 208, 220.

To confine "agent of necessity" terminologically to the contractual situations it justified by the fact that the law of bailment will often resolve any issue between alleged principal and agent of necessity, as it has done here. But sometimes the law of agency will be more useful: for example, if available here it would obviate any problem about the correlation of performance of a duty of care with a claim for reimbursement, since an agent is undoubtedly entitled to an indemnity for expenses incurred reasonably to benefit his principal.

However, I respectfully agree with the Court of Appeal [1981] Q.B. 403, 424 that

"The relevant time, for the purpose of considering whether there was a necessity, or an emergency . . . is . . . the time when the existence of the supposed emergency became apparent. The emergency would be the arrival, or expected arrival, of salved cargo at Manila, with no arrangements for its off-loading or for its preservation in proper storage having been made or put in hand. There never was, so far as one can ascertain from the evidential matter here, such an emergency."

In addition to the factual difficulty in treating the case as one of agency of necessity, there are legal difficulties in the way of the salvor. For an agency of necessity to arise, the action taken must be necessary for the protection of the interests of the alleged principal, not of the agent; the alleged agent must have acted bona fide in the interests of the alleged principal: *Bowstead on Agency, 14th* ed., p. 668: *Prager v. Blatspiel, Stamp and Heacock Ltd.* [1924] 1 K.B. 566, 571, 572, 573. The Court of Appeal [1981] Q.B. 403, 425 held that the salvor's purpose in storing the salved cargo was to maintain his lien on it. This was assuredly at least in part the salvor's purpose. The law does not seem to have determined in this context what ensues where interests are manifold or motives mixed: it may well be that the court will look to the interest mainly served or to the dominant motive. In view of the opinion I have formed on the rights arising by implication from the Lloyd's open form and from the common law bailment, it is unnecessary to come to any conclusion on these issues.

Nor is it necessary to express any view on the arguments based on quasi-contract or estoppel.

LORD KEITH OF KINKEL. My Lords, I have had the benefit of reading in draft the speech of my noble and learned friend, Lord Diplock. I agree that, for the reasons which he gives, the appeal should be allowed.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. For the reasons therein contained I agree that this appeal should be allowed and the judgment of Lloyd J. restored.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. I agree with it and would allow the appeal accordingly.