Trinity Term
[2023] UKSC 19
On appeal from: [2021] EWHC 1465 (Comm)

JUDGMENT

JTI POLSKA Sp. Z o.o. and others (Respondents) v Jakubowski and others (Appellants)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Briggs
Lord Sales
Lord Hamblen
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
14 June 2023

Heard on 28 February 2023

Appellants
John Kimbell KC
Maya Chilaeva
(Instructed by DWF Law LLP (Birmingham))

Respondents
Stewart Buckingham KC
Ben Gardner
(Instructed by Kennedys Law LLP (London))

LORD HAMBLEN (with whom Lord Reed, Lord Hodge, Lord Briggs, Lord Sales, Lady Rose and Lord Richards agree):

Introduction

1. The question in this appeal is whether the road carrier is liable for excise duty of £449,557 levied by His Majesty's Revenue and Customs ("HMRC") on the owner of 289 cases of cigarettes which were stolen at a service station on the M25 during the course of carriage by road from Poland to England.

2. The road carriage was undertaken subject to the Convention on the Contract for the International Carriage of Goods by Road 1956 ("the CMR"). The CMR has the force of law in the United Kingdom under the Carriage of Goods by Road Act 1965 and its terms are contained in the Schedule thereto. The CMR is a United Nations Treaty which has been adopted by 58 states including all EU member states. CMR is the acronym for the title of the Convention in French: "Convention relative au Contrat de Transport International de Marchandises par Route: CMR".

3. Article 23.4 of the CMR provides that in the case of the loss of goods the cargo claimant may claim "carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods", in addition to the value of the goods. The issue of interpretation raised is whether the excise duty is recoverable as "other charges incurred in respect of the carriage of the goods".

4. Courts in CMR jurisdictions have interpreted the phrase "other charges incurred in respect of the carriage of the goods" in article 23.4 in two main but different ways. The "broad interpretation" is that it encompasses charges incurred because of the way that the goods were actually carried and lost, so that the cargo claimant can recover excise duty levied on goods stolen in transit. The "narrow interpretation" is that it is limited to those charges which would have been incurred if the carriage had been performed without incident and so does not include excise duty levied as a result of the loss of the goods in transit through theft.

5. In *James Buchanan & Co. Ltd v Babco Forwarding & Shipping (UK) Ltd*. [1978] AC 141 (*Buchanan*), another case involving excise duty levied on goods stolen in transit, the House of Lords decided by a 3:2 majority (Lord Wilberforce, Lord Salmon and Viscount Dilhorne) that the broad interpretation should be adopted (Lord Edmund-Davies and Lord Fraser of Tullybelton dissenting). It was held that the words were wide enough to cover charges arising in consequence of the way in which the

goods had been carried or miscarried. The decision was handed down on 9 November 1977.

6. The appellants contend that *Buchanan* was wrongly decided both as a matter of the natural and ordinary meaning of the words used and because of the structure and purpose of article 23.4 within the compensation regime in chapter IV of the CMR. They submit that the narrow interpretation is to be preferred and that this court should exercise its power to depart from the *Buchanan* decision pursuant to the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 ("the 1966 Practice Statement").

The factual and procedural background

7. The first appellant (the first defendant in the court below) is a road haulier. He is a sole trader based in Poland. The second and third appellants/defendants are his trading names.

8. The respondents (the claimants in the court below) buy and sell tobacco products internationally. The first respondent is based in Poland, the second respondent is based in England and the third respondent is based in Switzerland. They are all part of the Japan Tobacco International group of companies.

9. In March 2019 the parties entered into a contract for the carriage by road of a consignment of 1,429 cases of cigarettes ("the consignment") from the first appellant's premises in Gostkow, Poland, to the second respondent's premises in Crewe, England.

10. On 5 March 2019, the first respondent sold the consignment to the third respondent on Free Carrier ('FCA') Gostkow terms. On 6 March 2019, the third respondent sold the consignment to the second respondent on Delivered at Place ('DAP') Crewe terms ("the sales").

11. The consignment was subject to tobacco excise duty when released for commercial consumption. The sales were subject to a European excise duty suspension arrangement. As a result, the application of excise duty was suspended until such time as the consignment was released for commercial consumption, or was deemed to have been released for commercial consumption as in the case of an irregularity occurring during its movement such as non-delivery or partial delivery due to theft.

12. The appellants' driver accepted the consignment at Gostkow on 5 March 2019. He drove to England, where he parked at Clacket Lane Services on the M25 motorway at about 01:33 on 8 March 2019. Whilst the vehicle was parked there overnight, thieves gained access to the consignment by cutting a hole in the side of the vehicle. They stole 289 cases of cigarettes ("the stolen cigarettes"). The stolen cigarettes were not recovered. They had a market value of £72,512 (excluding excise duty).

13. HMRC was notified of the theft and on 20 March 2019, HMRC assessed the second respondent as being liable to pay excise duty in the sum of £449,557 ("the Excise Duty") under section 12A of the Finance Act 1994 in combination with section 116 of the Customs and Excise Management Act 1979. The Excise Duty was levied by HMRC on the basis that the stolen cigarettes were deemed to have entered into circulation within the UK following the theft. The Excise Duty was paid to HMRC by the second respondent on 11 April 2019.

14. The respondents claimed compensation from the appellants under the CMR. The sums claimed comprised the value of the stolen cigarettes, excluding excise duty (£72,512), the pro rata wasted freight costs (€602.19), survey fees (£1,975) and the Excise Duty (£449,557), together with interest and costs. The parties have settled the claim save as to the Excise Duty. The Excise Duty is claimed by the respondents under article 23.4 of the CMR. For the purposes of this appeal, and without prejudice to the parties' prior settlement of parts of the claim, it is agreed that the respondents have title to sue in respect of any sums recoverable.

15. The trial of the respondents' claim for the Excise Duty was heard by Judge Pelling KC ("the judge"), sitting as a High Court Judge, on 26 May 2021. The appellants accepted that in light of the *Buchanan* decision the judge was bound to hold that the Excise Duty was recoverable under article 23.4 of the CMR but they contended that the decision was wrong and should be departed from. They accordingly made an application for a certificate under section 12 of the Administration of Justice Act 1969 that the case was suitable for an appeal directly to the Supreme Court. The judge granted the certificate, principally on the basis of criticism of *Buchanan* by the leading English commentators on the CMR and the uncertainty created by the decision of the Court of Appeal in *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] QB 1270 (*Sandeman*). In that decision *Buchanan* was criticised and distinguished and it was stated that the decision should not be "applied any more widely by the courts of this country than respect for the doctrine of precedent requires" (para 38).

16. On 6 May 2022 the Supreme Court (Lord Kitchin, Lord Burrows and Lady Rose) granted permission to appeal and gave directions, including that submissions be provided as to "the impact, if any, that that decision [in *Buchanan*] has had on the drafting of contractual terms (eg has there been any 'contracting round' the decision) or on the taking out of insurance".

17. The parties produced a Joint Statement in answer to this direction, setting out points of agreement and of disagreement. In summary, in relation to contractual terms the parties agreed that:

> "The parties to contracts of carriage in the international road haulage market do not refer to *Buchanan* expressly or seek to avoid its consequences by agreement".

In relation to insurance it was agreed that:

> "…the recovery of excise duty payable on excise goods under article 23.4 of the CMR in addition to the value of the goods as defined in articles 23.1 to 23.3 in some jurisdictions but not others is one of the many variables which might affect the insurer's exposure under a policy covering international carriage of goods by road. Insurers of carriers and cargo interests both recognise the risk that they might be liable for the full value of the cargo, including excise duty (where applicable), and underwrite on that basis".

The CMR Convention

18. The provisions of the CMR which are most relevant to the appeal are set out in the appendix to this judgment.

19. Chapter IV of the CMR addresses the liability of the carrier for loss, damage or delay to the goods carried. The relevant provisions concerning liability for total or partial loss of the goods may be summarised as follows:

(1) The carrier is liable for total or partial loss of the goods (article 17.1) unless it can show that the loss resulted from the cargo interests' fault, inherent vice or circumstances that the carrier could not avoid and consequences which it could not prevent (article 17.1 and 17.2).

(2) In the event of loss for which the carrier is liable under article 17, the carrier must pay the cargo claimant the value of the goods at the place and time that they were accepted for carriage (article 23.1), fixed by reference to the commodity exchange or market price or normal price of the goods (article 23.2).

(3) Article 23.4 provides:

> "In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damages shall be payable."

(4) The claim for the value of the goods under article 23.1 (but not the claim for charges recoverable under article 23.4) is subject to a weight limitation (article 23.3). The original weight limitation was 25 francs per kg, although that was revised in a 1978 Protocol to 8.33 units of account per kg (currently £9.24).

(5) The weight limitation does not apply if the sender, against payment of a surcharge, declares a higher value in the consignment note (articles 23.6 and 24) or if the loss resulted from the carrier's "wilful misconduct" or "such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct" (article 29).

(6) The sender may also declare an amount reflecting a special interest in delivery in the consignment note, upon payment of a surcharge (to be agreed upon) and after securing the agreement of the contractual carrier, which can be recovered in addition to the sums identified in article 23 (articles 23.6 and 26).

(7) The parties to a contract subject to the CMR cannot contract out of its provisions (article 41). Proceedings may be brought before the designated courts or tribunals of a contracting state, or the domicile of the defendant, or the place where the carriage began or the place designated for delivery (article 31).

20. Article 23.4 defines the only compensation, in addition to the value of the goods lost, which is recoverable by cargo interests for loss of the goods. Higher compensation is only available if the cargo claimant has made a declaration of special interest in the consignment note under article 26. The position is the same under the CMR even if there has been wilful misconduct (or such default as is, under national law, considered to be its equivalent) on the part of the carrier (article 29). However, in such a case, the exclusion of "further damages" by article 23.4 would not apply, and therefore other losses, including excise duty, could potentially be recovered pursuant to any remedy available under national law.

21. The 1978 Protocol was agreed on 5 July 1978. It changed the weight limitation from 25 francs per kg to 8.33 units of account per kg and amended article 23.3 and added a new article 23.7 to define the units of account (Special Drawing Rights, as defined by the International Monetary Fund). The UK signed the Protocol on 25 September 1978 and it was enacted into UK law by the Carriage of Goods by Road and Air Act 1979. No further relevant changes have been made to the CMR since the 1978 Protocol, although in 2008 a Protocol was adopted to deal with electronic consignment notes. The UK has yet to ratify the 2008 Protocol.

The approach to interpretation of the CMR

22. Lord Wilberforce's judgment in *Buchanan* is one of the leading authorities on the proper approach to the interpretation of international conventions. In the context of the CMR he made the following points:

(1) The CMR is in two languages, English and French, each text being equally authentic (p152C).

(2) The "correct approach is to interpret the English text, which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation: *Stag Line Ltd*. v. *Foscolo*, *Mango and Co. Ltd*. [1932] AC 328 *per* Lord Macmillan, at p 350" (p152D-E).

(3) It is legitimate to look for assistance to the French text whenever assistance is needed, and not only in cases of ambiguity (p152F). No rules should be laid down as to the manner in which reference to the French text may be made (p152H).

(4) The expressed objective of the CMR is to produce uniformity in all contracting states (p152D) and the court should try to harmonise interpretation, if possible (p153F).

(5) To that end it is appropriate to have regard to the case law of other contracting states.

23. Since *Buchanan* was decided there has been an increasing recognition by English courts of the role of the rules of interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (1969) (Cmnd 4140) ("the Vienna Convention") – see, for example, the decision of the Court of Appeal in *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] EWCA Civ 114, [2004] 1 All ER (Comm) 865; [2004] 1 Lloyd's Rep 460 which was cited with approval by this court in *Gard Marine and Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35, [2017] 1 WLR 1793; [2017] 1 Lloyd's Rep 521. Although the CMR predates the Vienna Convention, its principles of interpretation reflect customary international law and therefore bind states in the interpretation of earlier treaties – see *Fothergill v Monarch Airlines Ltd* (*Fothergill*) [1981] AC 251, 282 (per Lord Diplock); *Revenue and Customs Comrs v Ben Nevis (Holdings) Ltd* [2013] EWCA Civ 578, [2013] STC 1579 at para 17 (per Lloyd-Jones LJ).

24. Articles 31 and 32 of the Vienna Convention provide:

"Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm

> the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

25. It is now generally recognised that the "broad principles of general acceptation" by reference to which international conventions should be interpreted include these rules of interpretation – see, for example, *The CMA Djakarta* at para 10; *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2021] UKSC 6; [2021] 1 WLR 1436 at paras 38-39. This means that it is appropriate not only to apply the principles set out in articles 31 and 32 but also to follow the structured approach which they establish.

26. Article 31 focuses on seeking to ascertain the ordinary meaning of the relevant terms of the treaty having regard to their context and the object and purpose of the treaty. This is to be done by reference to the text of the treaty and to the material set out in article 31.2 to 31.4, such as its preamble, as a "single combined operation".

27. As Lord Kerr of Tonaghmore explained in *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901, para 64:

> "It would be wrong to read article 31 as reflecting something like the so-called 'golden rule' of statutory interpretation where one starts with the ordinary meaning of the words and then moves to other considerations only if the ordinary meaning would give rise to absurdity. That is not international law. The International Law Commission made clear in its commentary to the draft treaty, at p 219, that, in accordance with the established international law which these provisions of [the Vienna Convention] codified, such a sequential mode of interpretation was not contemplated: 'The commission, by heading the article "General rule of interpretation" in the singular and by underlining the connection between paras 1 and 2 and again between para 3 and the two previous paragraphs,

> intended to indicate that the application of the means of interpretation in the article would be a single combined operation.'"

28. Article 32 then allows for recourse to be had to supplementary material, including the preparatory work of the treaty and the circumstances of its conclusion, in order "to confirm the meaning" which results from the application of article 31 or in order "to determine the meaning". Such material may only be used to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

29. In the present case there was an issue between the parties as to the circumstances in which the court may have regard to the preparatory work or travaux préparatoires to confirm the ordinary meaning of the words used in article 23.4. The appellants contended that this may be done in any case whereas the respondents contended that it was permissible only where they clearly and indisputably point to a definite legislative intention.

30. In *Fothergill* at p 278B Lord Wilberforce stated that the use of travaux préparatoires should be "cautious" and only where two conditions are fulfilled:

> "...first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention".

Lord Wilberforce explained that limiting the use of travaux préparatoires in this way would largely overcome the objections "relating to later acceding states" and "that individuals ought not to be bound by discussions or negotiations of which they may never have heard".

31. In *Jindal Iron and Steel Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2004] UKHL 49; [2005] 1 WLR 1363, para 20, Lord Steyn stated by reference to article 32 of the Vienna Convention and *Fothergill* that the use of travaux préparatoires is "a well established supplementary means of interpretation". He also stated that they can only assist if, as stated by Lord Wilberforce, they "clearly and indisputably point to a definite legislative intention", and not merely if the "general thrust" of the travaux préparatoires supports a particular interpretation. In *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605,

623D Lord Steyn said that this means that: “Only a bull’s eye counts. Nothing less will do”.

32. The appellants do not suggest that the travaux préparatoires disclose a “bull’s eye” but Mr John Kimbell KC for the appellants submitted that this was only required where they are used to “determine” rather than to “confirm” the meaning resulting from the application of article 31. I accept that submission. The use of supplementary material to confirm a meaning is not subject to the restrictions set out in article 32(a) and (b). They only apply when the material is relied upon to determine the meaning. Moreover, confirmation may consist of finding support for a given meaning. It does not necessitate the identification of a “definite legislative intention”. It may, for example, include material which helps to identify the object and purpose of the treaty or provisions within the treaty. That will be a useful aid to interpretation but it is unlikely to disclose a definite legislative intention.

33. In relation to the CMR there are no published travaux préparatoires. The appellants have therefore sought to put together documents which they say should be regarded as comprising them. It is by no means clear that these meet the requirement of being public and accessible but I am prepared so to assume.

34. It is not possible to be categorical about what documents may properly be regarded as comprising preparatory work or travaux préparatoires but they are most likely to be part of the formal record of the Convention rather than expressions of opinion or policy made during the process leading to treaty agreement. Examples include official explanatory reports, agreed conference minutes, published proceedings of conferences and earlier drafts of the treaty.

35. The documents need to demonstrate the common intention or understanding of the parties to the treaty, not those of third parties or of the drafters. As stated by Jacob and Etherton LJJ in *Grimme Landmaschinenfabrik GmbH & Co KG v Scott (trading as Scotts Potato Machinery)* [2010] EWCA Civ 1110, para 96:

> “…the travaux relevant to construction of a treaty do not include any intention of the actual draftsman who provided the text for the legislators to consider. One only goes to the travaux to try to find out what the legislators intended, not what someone else intended…”.

36. A number of the documents sought to be relied upon by the appellants reflect opinions of expert bodies, such as the 1948 preliminary study of the International

Institute for the Unification of Private Law and the Bureau International des Transports par Autocar et Camion and the 1949 Explanatory Note produced by a committee of experts from the International Institute for the Unification of Private Law, the International Road Transport Union and the International Chamber of Commerce. Others set out the results of consultations which were produced to assist the parties to the CMR, such as the 1950 Note by the Secretariat of the Inland Transport Committee of the UN Economic Commission for Europe ("the Inland Transport Committee"), reporting back to the Working Party dealing with Legal Questions on a specialist consultation. Others reflect the intentions of only some of the parties, such as a 1955 communication from the Swiss Government to the Secretariat of the Inland Transport Committee, which includes a short addendum from the French Government. It is doubtful that documents of this nature can be of any assistance in identifying a common intention or understanding of the parties.

The 1966 Practice Statement

37. In the 1966 Practice Statement it was emphasised that precedent was the "indispensable foundation" of the common law, which promoted certainty and the orderly development of legal rules. It was nevertheless recognised that too rigid adherence to precedent risked "injustice in a particular case" and could "unduly restrict the proper development of the law". It was accordingly resolved that while House of Lords decisions (and now Supreme Court judgments) will be "normally binding" they could be departed from "when it appears right to do so". It was further expressly stated that when considering whether to depart from previous authority, the court will "bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into".

38. As Lord Hodge explained in giving the judgment of the Board in *Chandler v Trinidad and Tobago* (*Chandler*) [2022] UKPC 19; [2023] AC 285, para 64:

> "The reasons why a court of final appeal must be very slow to depart from an earlier ruling are well known. One of the principal advantages of stare decisis is its contribution to legal certainty. It promotes the predictability of the law and assists the planning of human activity. In private law it assists the giving of legal advice and the settlement of disputes. It enables people to carry out commercial and other transactions with some confidence that their arrangements are not going to be undermined retrospectively …"

39. Certainty and predictability are of particular importance in the context of English commercial law, all the more so given the frequent choice of English law as the governing law in international commercial transactions. As stated by Lord Bingham of Cornhill in *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 UKHL 12, [2007] 2 AC 353, para 23:

> "The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at any rate since the judgment of Lord Mansfield CJ in *Vallejo v Wheeler* (1774) 1 Cowp 143, 153, and has been strongly asserted in recent years in cases such as *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529, 540–541, [1983] 2 AC 694, 703–704; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715, 738; *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2005] 1 WLR 1363, 1370."

40. As this court has emphasised, it will be "very circumspect before accepting an invitation to invoke the 1966 Practice Statement" – *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] AC 908, para 23. It is not possible to be categorical about when it will do so, but examples include where previous decisions "were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy": per Lord Reid in *R v National Insurance Comr, Ex parte Hudson* [1972] AC 944, 966 (*Hudson*); or where they have created uncertainty in the law: *Chandler* at para 59; or where there has been a material change in circumstances: per Lord Wilberforce in *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 1 WLR 1345, 1349 *(Fitzleet Estates)*. In the context of a decision on an international trade law convention (the Hague Rules) Lord Steyn stated in *The Jordan II* at para 16 that it may be appropriate to do so "where that decision has been demonstrated to work unsatisfactorily in the market place and to produce manifestly unjust results".

41. It is well recognised that there is less scope for reconsideration of a decision involving a question of interpretation, whether of a statute or other document, than one involving a common law rule – see, for example, *Chandler* at para 61. An important reason for this is that interpretation is a matter of impression in relation to which it will rarely be possible to say that one view is demonstrably right or wrong. As stated by Lord Reid in Hudson at p 966:

> "… I would venture the opinion that the typical case for reconsidering an old decision is where some broad issue is involved, and that it should only be in rare cases that we should reconsider questions of construction of statutes or other documents. In very many cases it cannot be said positively that one construction is right and the other wrong. Construction so often depends on weighing one consideration against another. Much may depend on one's approach…".

As Lord Pearson stated in the same case at p 996:

> "… The decision of such questions depends largely on an impression as to the meaning of words in their context, and often different minds have different impressions so that a divergence of opinion results…".

42. It will always be necessary to do more than to persuade the present panel of Justices that the prior decision is wrong – see, for example, *Fitzleet Estates* at p 1349 (Lord Wilberforce), p 1350 (Viscount Dilhorne), p1350 (Lord Edmund Davies); *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307, para 29 (Lord Bingham); *Chandler* para 59. The fact that the decision is by a bare majority does not weaken the authority of the decision. Indeed, it may be strong evidence that both sides of the argument are tenable – *Chandler* at para 63. As Lord Wilberforce explained in *Fitzleet Estates* at p 1349:

> "… Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."

43. A previous decision on interpretation will not be departed from if it reflects a tenable view. As Lord Pearson stated in *Hudson* at pp 996-997:

> "If a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal. Finality of decision would be utterly lost."

44. In the light of the authorities on the 1966 Practice Statement, the appellants accepted that they had to show that *Buchanan* was untenable or manifestly wrong and that this is an appropriate case for the court to exercise its power under the 1966 Practice Statement.

Buchanan

45. In *Buchanan* the road carrier agreed to carry a series of consignments of whisky from Scotland to Iran. The carriage was subject to the CMR. During the carriage of one consignment, 1,000 cases of the whisky were stolen in Woolwich, London. The value of the whisky in bond was £7,000. The goods owner was charged excise duty of £30,000 under the Customs and Excise Act 1952. The issue was whether these charges were recoverable under article 23.4.

46. The Court of Appeal [1977] QB 208 held that the charges were recoverable. Lord Denning's principal reason for so doing was that he considered that there was a "gap" in the CMR and that it was appropriate for the court to fill that gap by reference to what he understood to be the purpose of the provision, which was to compensate the claimant "for any additional expense that he incurred directly by reason of the loss" (p 214). Roskill and Lawton LJJ so concluded because of the broad and general wording of the French text – "les autres frais encourus a l'occasion du transport de la merchandise".

47. The House of Lords upheld the Court of Appeal's decision but for different reasons.

48. In his judgment Lord Wilberforce set out the proper approach to interpretation of an international convention such as the CMR, as set out above (at para 22). He referred to a decision of the Court of Appeal of Paris which had concluded that excise duty was recoverable and a decision of the Amsterdam

Arrondissementsrechtbank which had concluded that it was not. In view of these differing decisions he observed, at p 154, that: “These cases show that there is no universal wisdom available across the Channel upon which our insular minds can draw. We must use our own methods following Lord Macmillan's prescription” (ie applying “broad principles of general acceptation”). He held that the language used in article 23.4, in both the English and French versions, was “loosely drafted” being “drawn with a broad brush” and was not “language of precision or consistency”. He noted that it had been found that the duty became chargeable because of the way in which the goods were carried. He concluded that the words “in respect of” are “wide enough to include the way in which goods were carried, miscarried or lost” and that the excise duty was accordingly recoverable. Given its importance, Lord Wilberforce’s reasoning (at p 154) should be fully set out:

> “The crucial words occur in an international Convention a reading of which at once shows that it is not drafted in language of precision or consistency - see, for example, the varied expressions used in article 6 paragraph 1 (i), as compared with article 23, paragraph 4. In it we have the phrase ‘other charges incurred in respect of the carriage’ which is on the face of it uncertain. We can see, with the minimum of linguistic skill, that the French version ‘frais encourus a l'occasion du transport’ is equally a phrase drawn with a broad brush. Are we to give the words a narrow meaning so that they cover and only cover such charges as arise from the carriage ‘such as it should have been performed’ *(British-American Tobacco Co. (Nederland) B. V.* v. *van Swieten B. V.* (unreported)) or a broad meaning so as to cover charges arising in the course of the removal from the failure to carry in accordance with the carriage. We must decide this without any presumption in favour of a ‘liberal’ interpretation, for, even if such a presumption exists, it cannot help us to decide, as we must, whether the carrier, or the owner, is to bear the loss. Whichever decision prevails will be claimed as liberal by one side and illiberal by the other.
>
> My Lords, I take from the judgments of Roskill L.J. and Lawton L.J. the approach that these words, appearing in this international Convention, as both texts show, are loosely drafted and cannot be expected to be applied with taut logical precision. With this approach, I find that the judgment of Master Jacob carries conviction. The duty, he

> says, became chargeable having regard to the way in which the goods were carried by the defendants. "In respect of" is wide enough to include the way in which the goods were carried, miscarried or lost. I think this is right - and I do not consider that it is answered by saying that the charge would not have arisen if the thieves had exported the goods or if the whisky had flowed away. No doubt this is true but the fact that an exemption might have arisen does not prevent the charge which did arise from being 'in respect of the carriage.' The carriers' duty was to carry the whisky to the port of embarkation-their failure to do so might, or might not, bring a charge into existence. But if it did, I think it right to say that the charge was in respect of the carriage".

49. Viscount Dilhorne reached the same conclusion. He noted that the narrower interpretation involved treating the words "other charges in respect of the carriage of the goods" in article 23.4 as meaning other charges "for" carriage (p157E-F). He considered that they must be given a wider meaning than that because "carriage charges" are expressly covered and because he found it difficult to accept that the words were inserted merely to secure the refund by the carrier of sums paid "for packing the goods, for insuring them, for certificates of quality, etc" (p157G). He observed that the goods were lost "in consequence of what occurred during the carriage" and concluded that the words "in respect of" should not be construed as meaning "for" but that in context they should be given the meaning "in consequence of" or "arising out of" (p 158B).

50. Lord Salmon was the third member of the majority. He observed that the relevant wording of article 23.4 was "flexible and somewhat imprecise" and that it should be construed "sensibly and broadly". So construed, he concluded (at p 160) that:

> "…they are wide enough to include 'in consequence of the way in which the goods were carried by the appellants.' They were certainly carried in such a way as caused the respondents to be charged with £30,000 in respect of excise duty".

He considered that this conclusion accorded with "both reason and justice" as the excise duty became chargeable as a result of the fault of the road carrier (p 161).

51. In his dissenting judgment Lord Edmund-Davies held that excise duty did not belong to the "class" or "genus" of "… charges incurred in respect of the carriage of the goods". That would cover charges such as for packing, insurance or a certificate of quality but not a liability to pay duty which "was in no sense incurred 'in respect of the carriage of the goods'" but "arose as a consequence of their having been irretrievably lost through theft before their transit in this country was completed" (p168B). He noted that the claimants could have been covered for the loss had a declaration of special interest been made under article 26.1. He also cited from and approved the reasoning of the Dutch Court decision referred to by Lord Wilberforce, namely that excise duty on stolen goods was not a charge "incurred in direct connection with the carriage such as it should have been performed" but was "more of a subsequent levy or administrative fine than an item of charges in respect of carriage" (pp 169 F-170 B).

52. Lord Fraser agreed with the reasoning and conclusion of Lord Edmund-Davies. He concluded that "other charges" in article 23.4 meant "charges directly connected with the carriage and intended to facilitate it" (p 170).

Criticism of *Buchanan*

53. The appellants pointed out that *Buchanan* was criticised from the outset. They referred to a contemporaneous article by Adrian Hardingham, a leading solicitor specialising in this area – *Damages under CMR – The decision of the House of Lords* [1978] LMCLQ 51. He noted that equating "in respect of" with "in consequence of" might comprehend charges which would be too remote as a matter of English common law, such as liability of the cargo owner to the purchaser of the goods under a liquidated damages clause.

54. The appellants also referred to and relied upon the comments made in the leading UK textbooks on the CMR: *Messent and Glass: CMR: Contracts for the International Carriage of Goods by Road* (*Messent and Glass*) (now in its 4th edition (2017)) and *Clarke: International Carriage of Goods by Road* (*Clarke*) (now in its 6th edition (2014)).

55. In the first edition of *Messent and Glass* in 1984 (then known as *Hill and Messent*) it was observed that the test of the majority "could extend the scope of the carrier's potential liability considerably beyond that under the normal common law rules of remoteness" (p136). It was also noted that it might call into question recovery of "items as the costs of packing, insurance and quality certificates, which might properly be thought to be "charges in respect of the carriage", since they arise

not “in consequence of” the carriage but more in preparation for it”. These criticisms have been maintained in later editions.

56. In the first edition of *Clarke* in 1982 it was stated (at p 149):

> “It was probably the intention of those who drafted the CMR to exclude by the closing words of Article 23.4 recovery of consequential loss, unless specifically declared in accordance with Article 26; if so, this intention has been defeated. … Buchanan … brings in a rule of remoteness or causation but without indicating which rule”.

57. In the current edition of *Clarke* the narrow and the broad interpretation of article 23.4 are summarised as follows at pp 303-304:

> “The narrow view was that “other charges” referred only to items such as the cost of packing, obtaining insurance and certificates of quality, i.e., charges incurred “in respect of carriage” or “with a view to or for the purpose of carriage”. Here, carriage means the carriage contracted for. This interpretation rules out charges consequential on the way it was actually performed by the carrier in breach which, ex hypothesi, was not the way contracted for. On this basis, for example, it has been held in Austria that the cost of a survey on damaged goods does not arise out of the carriage but out of the damage, and is thus not recoverable under Article 23.4. Indeed, given the apparent intention to promote commercial certainty, by ruling out recovery of consequential loss of bargain unless it is declared as a special interest under Article 26, it is not obvious why the claimant should have been intended to recover consequential loss or expense under Article 23.4. On the contrary, given that the scheme of compensation in the CMR is modelled on that of the CIM, the travaux préparatoires of the CMR suggest that it was intended to limit to a foreseeable level the normal level of the carrier’s liability.
>
> The broad view, which was the basis of the majority decision in the Buchanan case, was that the excise duty “became chargeable having regard to the way in which the

> goods were carried by the defendants. 'In respect of' is wide enough to include the way in which the goods were carried, miscarried or lost." Moreover, "the right meaning to give (the words) is that in the context in which they appear they mean 'in consequence of' or 'arising out of'".

58. The following comments on and criticisms of the broad interpretation are made:

> "The broad view is broad in three different places. First, instead of construing 'charge' narrowly as 'payment for goods or services rendered', the majority in James Buchanan construed it broadly as 'pecuniary burden'. Second, instead of construing 'in respect of' narrowly and, some would say, normally, as 'with a view to' or 'in relation to', the majority construed it broadly as 'in consequence of'. In particular, the judges who mentioned it thought the French equivalent, 'à l'occasion de', could be translated as 'on the occasion of', whereas, it is submitted, a better rendering is the narrower phrase 'with a view to'; this emerges more clearly from the German translation. Third, instead of construing 'carriage' narrowly as "the kind of carriage contemplated by the contract", the majority construed it broadly as 'carriage in the manner in which it was actually carried out'.
>
> The trouble with the broad view is that it makes it difficult for the carrier to estimate exposure to liability".

59. By contrast, the respondents rely on the report of Professor Roland Loewe, an Austrian academic. Professor Loewe was commissioned by the Inland Transport Committee of the Economic Commission for Europe to produce a commentary on the Convention. Professor Loewe did so in 1975, based on "preparatory work, on personal notes and recollections of the negotiations, and on the logic and spirit of the Convention itself": Commentary on the Convention of May 19 1956 on the Contract for the International Carriage of Goods by Road (CMR) (1975) 11 ETL 311. The report was not intended to be an official interpretation but was stated by the Inland Transport Committee in a Note by the Secretariat to provide "useful information on certain aspects of the background of its provisions". It has been referred to in a number of English authorities, such as *Michael Galley Footwear Ltd v Iaboni* [1982] 2 All ER 200 (Hodgson J) at pp 205, 206 and 207; *Buchanan* in the Court

of Appeal (Roskill LJ) at p216 and the Supreme Court decision in *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2016] AC 262, paras 13, 27, 42. As the last case illustrates, his views have not always been followed.

60. Professor Loewe's understanding, as stated at para 193 of his report, is that "other charges" in article 23.4 include "costs occasioned by an accident", provided that they have been incurred "reasonably". Although he does not expressly address the issue of liability for excise duty, this is consistent with the approach of the majority that article 23.4 covers charges which arise because of "the way in which the goods were carried, miscarried or lost".

61. The appellants say that this is a minority view and that most continental commentators support the narrow interpretation.

The *Sandeman* decision

62. The researches of counsel show that, aside from *Sandeman*, *Buchanan* has been applied in five subsequent CMR cases: *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] WLR 1470, 1474 (Neill J); *ICI plc v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354 (Staughton J); *M Bardiger Ltd v Halberg Spedition Aps* (unreported) 20 October 1990 [1990] Lexis Citation 130832 (Evans J); *Philip Morris Products SA v Smidl SRO* (unreported) 17 November 2017 [2017] WLUK 43033 (Judge Waksman KC) and in the present case. It is not suggested that any of these cases have given rise to difficulties of application. Most have concerned charges such as survey expenses, insurance premiums and the cost of returning damaged goods.

63. *Sandeman* concerned the carriage of paper tax seals which, when affixed to bottles, would indicate that the requisite Spanish excise duty had been paid. They were lost during carriage. As a result, the Spanish tax authorities were entitled to call on a guarantee given by the claimant for the safe arrival of the paper tax seals, which was equivalent to the duty that would have been payable on whisky to which the seals would have been attached.

64. The trial judge, Judge Hegarty QC, held that sum claimed was a charge incurred in respect of carriage, applying the broad interpretation that "in respect of" includes the consequence of miscarriage. However, he further held that to be recoverable the sum claimed had to satisfy the English law of remoteness. His reason for imposing this requirement was that both of the leading CMR textbooks said that some kind of restriction was required if "in respect of" in article 23.4 was to be treated as "in consequence of" the carriage.

65. The Court of Appeal disapproved the judge's decision to import the domestic law test of remoteness. It held, however, that the guarantee liability was not an "other charge" under article 23.4 because it was not "a duty payable in respect of the goods carried", but rather "it arose as a result of the inability … to account for the seals". This liability was to be contrasted with excise duty on goods carried, of the sort addressed in *Buchanan*, which was "an automatic consequence of the loss of the goods within the jurisdiction" and was "similar in kind to the customs duty payable upon importation of the goods into another country" (para 39).

66. In *obiter* remarks the Court of Appeal made it clear that they preferred the decision of the minority in *Buchanan*. Their principal reasons for so concluding were as follows:

> "35. For present purposes, the crucial issue was that raised by the plaintiffs as an alternative argument. Was the liability to duty recoverable as falling within 'the carriage charges, customs duties and other charges incurred in respect of the carriage of the goods' under article 23(4)? In the absence of authority, we would have answered this question in the negative. It seems to us that one object of the Convention is to make a clear apportionment of risk arising in the course of international carriage by road, so as to facilitate insurance and avoid double insurance. A natural reading of article 23 would seem to us to impose liability on the carrier for the value of the goods when the carriage begins, subject to the article 23(3) limit, together with charges incidental to the carriage of the goods, including customs duties. Such charges, typically, are foreseeable and form an increment to the value of the goods. Article 23(6) refers to entitlement to higher compensation under articles 24 and 26. Article 26 would seem designed to enable a consignor to impose liability on the carrier for a value exceeding the article 23(3) limit and for possible consequential loss – a liability compensated for by a surcharge and which, by virtue of being declared, can be insured against by the carrier."

67. The Court of Appeal also noted at para 37 that the majority made no reference to article 26 and at para 38 that the decision had been critically discussed in *Hill & Messent* 3rd ed (2000) and *Clarke* 3rd ed (1997) and that it does not lie "happily with the approach to the ambit of article 23 of the courts of most other signatories to the Convention". It then stated (para 38):

> "For our part we do not consider that the decision should be applied any more widely by the courts of this country than respect for the doctrine of precedent requires."

Decisions in other CMR jurisdictions

68. The parties' researches reveal that in most CMR jurisdictions it is not known whether or not excise duty is recoverable under article 23.4.

69. In those jurisdictions where the position is known, the broad interpretation has been adopted in Denmark (*A/S Walther Hansen-Transport v Dansk Søassurance A/S* (1987) U.1987.481) (Supreme Court); Italy (*Transuniverse Forwarding NV v Amlin NV* (2019), judgment no. 359 in case 1794/2017)(Court of Appeal); The Czech Republic (Case No. 23 Cdo 3530/2019)(Supreme Court); Lithuania (*Trans Group LT v BUAD Glikasta* (2011), Case 3K-3-301/2011) (Supreme Court) and, the respondents contend, but this is disputed, Belgium (*Transport van Laer NV v Comesas Benelux NV* (2002) (C.99.123.N/1) (Court of Cassation), as well as the UK. In the Supreme Court decisions in Denmark, The Czech Republic and Lithuania reliance was placed upon the reasoning and decision in *Buchanan*. In the Belgian Court of Cassation decision it was held that excise duty was recoverable as "costs necessarily linked to the carriage the carrier was obliged to perform" and as a "normal consequence of the negligence of the carrier". In the Italian Court of Appeal decision it was held that an "all inclusive term was deliberately used in the Convention in order to indemnify all costs connected with the transport, including the cost of excise duties".

70. The narrow interpretation has been adopted in Germany (BGH 13.02.1980 IV ZR 39/78; VerR 522; NJW 1980 2021) (Supreme Court); The Netherlands (Rechtbank Amsterdam 30 March 1977, S&S 1978/36 (BAT/Van Swieten), *Philip Morris v. Van der Graaf Hoge Raad* 14 July 2006, S&S 2007/30) (Supreme Court); Sweden (*HZ Logistics BV v Thomsen & Streutker Logistics BV* NJA 2022) (Supreme Court) and Austria (*OGH* 7 Ob 698/89, RS0073931). The appellants contend, but this is disputed, that it has also been adopted in Switzerland (Bezirksgericht Werdenberg 22.09.98 TranspR 2001.132), Latvia (City of Riga Padaugava Court 25.08.2017, No C28280616), Russia (Kalingrad Arbitration Court No A21-9324/2016) and Ukraine (IDIT case no 41456, 29.01.2007).

71. The narrow interpretation has been clearly established in Germany since the Supreme Court's 1980 decision and is widely supported in German academic literature – see, for example, *K. H. Thume and others*, *Kommentar zur CMR* (3rd edition) (2013). In the Dutch Supreme Court decision it was held that "other charges" only cover "costs which, for the cargo interest, are directly related to (the normal

performance of) the carriage as such". In the German, Dutch and Swedish Supreme Court decisions reliance was placed on the importance of predictability and insurability of "other charges" which may be incurred and also on the CMR system of compensation for loss of the goods.

72. France has not adopted either interpretation but excise duty has been held to be recoverable as part of the value of the goods under article 23.1, an approach rejected by the entire House of Lords in *Buchanan*.

73. When considering the weight to be given to foreign court decisions on an international convention, in *Sidhu v British Airways plc* [1997] AC 430, 443C-D Lord Hope observed as follows:

> "… much must depend upon the status of each court and of the extent to which the point of issue has been subjected to careful analysis. Material of this kind, where it is found to be of the appropriate standing and quality, may be of some help in pointing towards an interpretation of the Convention which has received general acceptance in other countries. But the value of the material will be reduced if the decisions conflict with each other or if no clear line of approach appears from them after they have been analysed."

74. Unfortunately, the decisions in other jurisdictions on the correct interpretation of article 23.4 do conflict and there is no clear or agreed line of approach. As at the time of *Buchanan*, there is no "universal wisdom" (per Lord Wilberforce at p 154) or "uniform corpus of law" (per Lord Salmon at p 161). Indeed, the lack of consensus has, if anything, become more pronounced.

The narrow interpretation

75. The principal arguments advanced by the appellants in support of the narrow interpretation were as follows.

76. First, the appellants submitted that the ordinary meaning of "other charges" in article 23.4 is charges which are closely related to the carriage in a similar way to "carriage charges" (ie freight costs) and "Customs duties". "Excise duty" is not a "Customs" duty or a "charge incurred in respect of carriage". Excise duty is different

in nature and incident to “Customs duties”. Examples of “other charges” are the wasted costs of packing, insurance, quality certificates or of a police escort to accompany the goods. They do not extend to charges, such as excise duty, which arise as a consequence of the goods having been stolen and which are not a carriage related expense.

77. Secondly, this interpretation is supported by the context. Although “other charges incurred in respect of the carriage” are not defined in the CMR Convention, article 6.1(i) provides a clear indication of what is meant by those words. It provides that the consignment note shall contain particulars of:

> “(i) charges relating to the carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery);”

78. The “other charges” which are intended to be “refunded” under article 23(4) in the case of partial or total loss are the same types of charges “relating to carriage” as are being referred to in article 6.1(i) as charges to be entered on the CMR consignment note. The similar language of article 6.1(i) and article 23.4 is not a coincidence.

79. Thirdly, it is supported by the object and purpose of the CMR and chapter IV. The Preamble to the CMR Convention states that the primary objective of the drafters was to “standardize the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage and to the carrier's liability”. Standardisation of the conditions governing liability would achieve greater commercial certainty for contracting parties and facilitate insurance of the parties’ respective risks and thereby encourage trade.

80. The principal aims of the liability provisions in chapter IV, articles 17 – 23 of the CMR are:

> (1) To achieve an equitable distribution of risk between the shipper/cargo owner on the one hand and the carrier on the other to promote the cost effectiveness of the road transport regime;

(2) To provide a presumed fault system with the aim of reducing the number of road transport cargo claims coming to court, thereby resulting ultimately in decreased cargo insurance premiums (and freight rates); and

(3) To impose a limit of liability applicable in most cases so that the carrier can ascertain the likely extent of their liability at the point of dispatch to assist with risk management and insurance.

81. Consistently with the aims of the CMR in general and chapter IV in particular, article 23(4) is part of a system of liability which provides the shipper/consignee with monetary compensation for loss of or damage to the goods (under article 23) or delay in delivery (under article 25). It does not seek to restore the claimant to the financial position they would have been in if the goods had not been lost or damaged, or their delivery delayed.

82. The system of compensation is based on the dispatch value of the goods, and not their destination value. Consequently, the shipper/consignor's potential loss of profits (at the place of destination) is excluded from the system of compensation.

83. Article 23.4 expressly provides that "no further damages shall be payable." The intention is to exclude from compensation any types of loss or damage not expressly covered by article 23.

84. The carrier is liable only for the dispatch value of the goods and a limited category of costs closely related to the carriage (and interest pursuant to article 27), unless a special declaration has been made (pursuant to articles 23(6), 24 or 26) and a corresponding surcharge has been paid.

85. Read in this context, the words "other charges incurred in respect of the carriage" in article 23.4 refer to carriage-related costs and expenses which would have been incurred if the contract had been properly performed but have been incurred in vain because the goods have been lost, damaged, or delayed. In particular, it does not cover excise duty which, as this case illustrates, may often greatly exceed the dispatch value of the goods.

86. Fourthly, this meaning is further supported by the travaux préparatoires. However, even if one assumes that the documents relied upon by the appellants are properly to be regarded as admissible travaux préparatoires or "preparatory work of the treaty", they do not identify any common intention or understanding of the

parties as to the meaning of "other charges" in article 23.4, as the appellants acknowledge. As such, they do not confirm the appellants' suggested ordinary meaning of that provision.

87. They do, however, provide some support for the appellants' summary of the object and purpose of the CMR and chapter IV as set out in paras 79 and 80 above. They also show that the International Convention on the Transport of Goods by Rail adopted in 1952 ("CIM 1952") provided a model for the drafting of the CMR, including in relation to the system of compensation for loss of the goods.

88. Fifthly, it is supported by the CIM model. CIM provided a system of compensation for the total or partial loss of goods based on despatch value of the goods with a cap and a right of refund for additional transport or carriage charges, customs duties and other disbursements or expenses. Its origins lay in the Berne Convention of 1890 and it was carried through into later CIM Conventions. The analogous provision to article 23.4 of the CMR in CIM 1952 was the last paragraph of article 31.1 which provided:

> "In addition, carriage charges, customs duties and other expenses paid in respect of the missing goods shall be refunded, but no further damages shall be payable".

89. This provision was later replaced by article 40.3 of CIM 1980 which provided:

> "The railway shall in addition refund carriage charges, customs duties and other amounts incurred in connection with the carriage of the goods".

90. In 1999 article 30.4 was amended to expressly exclude liability for excise duties. It now provided:

> "The carrier must, in addition, refund the carriage charge, customs duties already paid and other sums paid in relation to the carriage of the goods lost except excise duties for goods carried under a procedure suspending those duties."

91. The appellants submitted that this confirmed the general understanding of the meaning of the provision and that it is desirable that there be harmony between CIM and the CMR.

The broad interpretation

92. The principal arguments of the respondents in support of the broad interpretation were as follows.

93. First, the language of the English and French texts of article 23.4 is general and imprecise. The word “charge” (“frais”) is broad enough to encompass excise duty and does not indicate that a particular type of charge was envisaged. The words “in respect of the carriage” (“encourus à l'occasion du transport”) are also broad, sufficiently so to cover charges brought into existence by the manner in which the carriage is performed, and thus the failure to carry the goods to their destination. In their ordinary meaning they do not state nor suggest a legislative intent to restrict article 23.4 to only those charges which would be incurred in the ordinary course of carriage and to exclude charges incurred because of the way that these particular goods were carried by the carrier.

94. Secondly, three matters of context are of particular relevance. (1) The phrase “other charges” (“les autres frais”) must be given a meaning distinct to, and separate from, “carriage charges” (“prix du transport”) in the opening part of article 23.4. A difficulty with the narrow interpretation is that it collapses this distinction: see *Buchanan* at p 154 (Lord Wilberforce) and p 157 (Viscount Dilhorne). (2) There must also be content to “other charges”. Charges which are incurred before loading should generally be encompassed by the market or normal value of the goods. For example, goods which have been packed or issued with a certificate of quality ready for export will typically have a higher value than goods that have not undergone these pre-requisites for international carriage. Whilst there may be potential expenses recoverable as other charges on the narrow interpretation (for example insurance costs), it is implausible to suggest that this is the mischief towards which this widely drawn category is directed. (3) The drafters of the CMR used different and more precise language in article 6.1(i) - “charges relating to the carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery)” - to describe those charges which would be incurred during uneventful carriage and which should be included in the consignment note. If the same meaning was intended in Article 23.4, one would expect the same language to be used (which it was not). The differences are marked, and it is those differences which relate to the “other charges” in question. Further, the travaux préparatoires relied upon do not disclose any relevant guidance.

95. Thirdly, in relation to object and purpose, there is no satisfactory basis for treating customs duties and excise duties differently for the purposes of the carrier’s liability. Customs duties are incurred on passing a frontier, whereas excise duties are

incurred because a certain type of product has been produced. However, both are taxes payable by the sender of the goods and irrecoverable from customers because the goods were stolen: see the analysis of the Italian Court of Appeal in *Transuniverse v Amlin* (*supra*) at pp 13-14.

96. Further, it is reasonably foreseeable that the sender will incur excise duties on cigarettes or alcohol stolen during carriage by road in Europe because it is (or should be) well known amongst hauliers that there is a European excise duty suspension regime under which such products are typically carried. Where the carrier acts negligently, or with wilful misconduct, it is far from obvious why the innocent sender, and not the carrier, should bear these costs incurred because of that negligence or wilful misconduct. One would expect clearer words than those found in article 23.4 to exclude a loss that would, outside of the CMR context, fall on the carrier.

97. Fourthly, as regards supplementary material, the amendment of the CIM 1980 by the 1999 Protocol was specifically to exclude excise duty, thereby confirming that other costs incurred because of the way the goods were handled and lost are recoverable. Accordingly, comparison with the equivalent provision of CIM 1952, on which the CMR was based, supports the broad interpretation of article 23.4.

Is the broad interpretation tenable?

98. As Lord Wilberforce acknowledged in *Buchanan* at p 151E, there are "powerful arguments" in favour of the narrow interpretation. In particular, I consider that there is considerable force in the arguments based on the object and purpose of chapter IV and the structure of the compensation scheme for loss of goods under the CMR. I find it impossible to hold, however, that the broad interpretation is not tenable.

99. The fact that it is tenable is supported by the fact that it reflected the conclusion of the judges at all levels in *Buchanan* (other than the minority in the House of Lords) and that reached by the Supreme Courts of Denmark, the Czech Republic, Lithuania and (arguably) Belgium as well as the Italian Court of Appeal.

100. It is also supported by the various arguments of the respondents as set out above and by the reasoning of the majority in *Buchanan*, and in particular that of Lord Wilberforce.

101. As to ordinary meaning, there can be little doubt that the relevant wording is widely drawn. “In respect of” is commonly understood as equating to “in connection with”. As a matter of language it is very difficult to say that a loss which occurs during the course of road carriage and as a result of the way in which that carriage is performed is not connected with that carriage. By contrast, the narrow interpretation invariably involves importing words to explain its meaning. For example, in respect of the carriage “… if it had been properly performed” (the appellants), or “such as it should have been performed” (Lord Edmund-Davies), or “contracted for”/“contemplated by the contract” (*Clarke* at para 98), or “if the transport had been carried out correctly” (German Supreme Court), or “directly related to (the normal performance of) the carriage” (Netherlands Supreme Court).

102. There is also force in the contextual point that the wording of article 23.4 is different to that in article 6.1(i). Charges “incurred from the making of the contract to the time of delivery” are more readily understood as charges incurred for the purpose of carriage. That formulation was not, however, used in article 23.4.

103. I also consider that some of the criticisms of the broad interpretation are unjustified or overstated. The main criticisms identified by the Court of Appeal in *Sandeman* were (i) the need for a clear apportionment of risk to facilitate insurance and avoid double insurance; (ii) the potential exposure to unforeseeable losses; (iii) the availability of article 26 to make declarations covering possible consequential loss and (iv) the approach of the courts of most other signatories to the CMR.

104. As to the need for a clear apportionment of risk to facilitate insurance and avoid double insurance, the Joint Statement shows that in practice double insurance is taken out regardless of the *Buchanan* decision. The cargo and carrier liability insurers of high value items such as alcohol and tobacco tend to be specialist insurers. Specialist insurers for both cargo and carrier liability usually rate risk on the basis of the full cargo value, taking into account excise duty for excise goods carried under an excise suspension regime. Specialist carrier liability insurers are aware that it is easier to break article 23 limits in some countries than others, due to the manner in which the wilful misconduct test under article 29 is applied, and that in some jurisdictions excise duty is recoverable in addition to the cargo value whereas in others it is not, and they tend to assess risk and set premia for alcohol and tobacco products on the basis of liability beyond article 23.3 limits because of these uncertainties.

105. Specialist carrier liability insurers therefore insure for full cargo value, including excise duty, because they recognise that there is the potential for liability in excess of article 23 limits, not just because the broad interpretation is applied in a

number of countries and may be applied in others, but also because such liability may arise depending on how the goods are actually carried and on where the matter is litigated under article 31, which are unpredictable matters. Reversing *Buchanan* would not remove these uncertainties.

106. As to the potential exposure to unforeseeable losses, excise duty is a reasonably foreseeable liability. The same applies to the other charges which have been held to be recoverable under the broad interpretation in the case law, such as survey costs, salvage costs and the costs of return carriage. There have been no examples of the extreme type of case envisaged by some commentators, such as a liability under a contractual penalty clause. Indeed, the only case in which remoteness has been an issue is *Sandeman* although Professor Clarke has expressed the view in an article that it was a liability to be expected - "*Charges recoverable under CMR: Scotch Mist in the Court of Appeal*" Journal of Business Law (2004), 378-381.

107. It should be stressed that the loss has to be a "charge" in order to be recoverable. This excludes the most obvious form of consequential loss claim, such as a claim for loss of bargain or expectation loss or other lost profits. This gives content to the concluding words of article 23.4 that "no further damage shall be payable". Some of the criticisms made of *Buchanan* focus on Viscount Dilhorne's suggestion that "in respect of" means "in consequence of" and it is said that this opens the door to a wide category of consequential losses. This, however, formed no part of the reasoning of Lord Wilberforce who relied on the wide ordinary meaning of "in respect of". As already stated, if a synonym is to be used, "in connection with" is more appropriate. Moving away from the synonym "in consequence of" would also remove any doubt that there might be as to the recoverability of charges such as the costs of packing, insurance and quality certificates on the broad interpretation.

108. As the respondents pointed out, other than *Sandeman* there is no case cited by either party in the history of the CMR in any jurisdiction in which a charge that was not reasonably foreseeable has either been recovered under article 23.4 or rejected on remoteness grounds. That is a good indication that this is not a real-world problem.

109. As to the availability of article 26 to make declarations covering possible consequential loss, in practice it is rare for a sender to make declarations under articles 24 or 26, as explained in *Clarke* (para 100). As pointed out by *Messent and Glass* (para 9.53), the carrier's insurance policy may well exclude liability under those articles unless notice is given and additional premium agreed. There is therefore a need for agreement both with the carrier and its insurers in respect of any

declaration made. Given the difficulty and delay which this may cause, and also the fact that, as *Clarke* observes, the excess will be covered by cargo interests' insurance, there is little incentive for the sender to make a declaration and to agree and pay for any applicable surcharge.

110. As to the approach of the courts of most other signatories to the CMR, as already explained, there is no consensus.

Is this an appropriate case for the court to exercise its power under the 1966 Practice Statement?

111. Even if this court concluded that *Buchanan* was wrong more would be needed to justify departing from that decision. What is that "extra thing" in this case?

112. In their written case this issue was barely addressed by the appellants. The main point made there was the uncertainty in the law resulting from the fact that the broad interpretation potentially allowed losses which would be too remote as a matter of English law to be recoverable and, to address this problem, encouraged the inappropriate adoption of national law standards, as was done by the first instance judge in *Sandeman.* As already explained, in practice this has not proved to be a problem. The charges which have been held to be recoverable under the broad interpretation have been reasonably foreseeable. The only example which the parties have identified in the caselaw over the past 45 years in which remoteness was an issue is *Sandeman* and the Court of Appeal decision in that case was that the claim was not one for charges.

113. The appellants also relied on the uncertainty created by the *Sandeman* decision as to the status of *Buchanan* in the light of the Court of Appeal's statement that it should not be "applied any more widely by the courts of this country than respect for the doctrine of precedent requires". Any uncertainty thereby created was, however, the result of this inappropriate statement by the Court of Appeal rather than the decision in *Buchanan.* That statement should not have been made and should not be followed.

114. The appellants further relied on the uncertainty exemplified by the decision in *Sandeman* which they characterised as a legally unsatisfactory decision driven by a desire to avoid the consequences of applying the broad interpretation. It is not necessary for the purpose of this appeal to determine whether or not *Sandeman* was correctly decided. It is sufficient to point out that it concerned very special facts. The goods effectively had no value other than in the subsequent use to which they could

be put and there was no excise duty on the goods themselves. There are likely to be very few cases in which the same facts are replicated.

115. In oral reply submissions Mr John Kimbell KC for the appellants submitted that there had been a material change in circumstances given (i) the *Sandeman* decision and the uncertainty created thereby; (ii) the chorus of academic disapproval; (iii) the German and Swedish Supreme Court decisions and (iv) the emergence of a settled view under CIM.

116. The *Sandeman* decision has already been addressed. The chorus of academic disapproval is not unanimous, as shown by Professor Loewe's report, and in any event it is somewhat muted and is not in itself a material change. The German and Swedish Supreme Court decisions have to be balanced against the contrary decisions reached by, for example, the Supreme Courts of Denmark, The Czech Republic and Lithuania. The fact of the matter is that there is no international consensus. The emergence of a settled view under CIM may be a reason for the parties to the CMR convening to consider making a similar amendment, but it does not inform the proper interpretation of article 23.4. It is also to be noted that no such amendment was considered necessary when article 23 was revised by the 1978 Protocol, which post-dated the decision in *Buchanan*.

117. It has not been shown that the *Buchanan* decision works unsatisfactorily in the market place. Parties do not attempt to contract around the decision. Liability for excise duty is a recognised risk and insurers of both cargo interests and carriers underwrite on the basis of the full value of the cargo, including excise duty. Reversing *Buchanan* is unlikely to change this as there remain many countries where the broad interpretation is adopted or where the approach is unknown. There is no evidence of concern among carriers or insurers about practical problems caused by the broad interpretation or of the industry asking for any change.

118. It is not suggested that *Buchanan* produces manifestly unjust results. If anything, as Lord Salmon observed in *Buchanan* (at p161), "reason and justice" point to the burden of paying the excise duty resting "on the shoulders of the carriers rather than those of the innocent exporters".

119. The strongest case for reconsideration of *Buchanan* would have been if an international consensus in favour of the narrow interpretation had emerged since the decision so that it was now an outlier. In the interests of uniformity that might well have justified a different view being taken. That is not, however, what has happened. If anything, the lack of consensus has grown.

120. It is no doubt desirable that there be a uniform view as to the proper interpretation of article 23.4. Reversing *Buchanan* is not going to achieve that. To do so it would be necessary to amend article 23.4 through a Protocol, as was done for CIM. If that was to be done there would be much to be said for adopting a similar approach to CIM so that the same liability regime applied throughout any combined transport. That, however, is a matter for the parties to the CMR.

Conclusion

121. For all these reasons I would dismiss the appeal.

ANNEX 1

“CHAPTER III
CONCLUSION AND PERFORMANCE OF THE CONTRACT OF CARRIAGE
Article 4
The contract of carriage shall be confirmed by the making out of a consignment note.
…
Article 6
1. The consignment note shall contain the following particulars:
…
(i) charges relating to the carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery);
…
2. Where applicable, the consignment note shall also contain the following particulars:
…
(b) the charges which the sender undertakes to pay
…
(d) a declaration of the value of the goods and the amount representing special interest in delivery
…
CHAPTER IV
LIABILITY OF THE CARRIER
Article 17
1. The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.

2. The carrier shall however be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.
…
Article 23
1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage.

…
3. Compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short.
4. In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damages shall be payable.
…
6. Higher compensation may only be claimed where the value of the goods or a special interest in delivery has been declared in accordance with articles 24 and 26.
…
Article 24
The sender may, against payment of a surcharge to be agreed upon, declare in the consignment note a value for the goods exceeding the limit laid down in article 23, paragraph 3, and in that case the amount of the declared value shall be substituted for that limit.
…
Article 26
…
1. The sender may, against payment of a surcharge to be agreed upon, fix the amount of a special interest in delivery in the case of loss or damage or of the agreed time-limit being exceeded, by entering such amount in the consignment note.
2. If a declaration of a special interest in delivery has been made, compensation for the additional loss or damage proved may be claimed, up to the total amount of the interest declared, independently of the compensation provided for in article 23, 24 and 25…
…
Article 29
1. The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct.
…
CHAPTER V
CLAIMS AND ACTIONS
Article 31
1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

(a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or
(b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.
…
CHAPTER VII
NULLITY OF STIPULATIONS CONTRARY TO THE CONVENTION
Article 41
1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.
2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void."