THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 315/05

In the matter between:

IMPALA PLATINUM LIMITED Appellant

and

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ NV First Respondent

NORTHWEST AIRLINES INC Second Respondent

Coram: *Howie P, Farlam, Navsa, Cloete JJA et Cachalia AJA*

Date of hearing: **11 May 2006**

Date of delivery: **30 May 2006**

Summary: **International air carriage – lost cargo – title to sue in terms of Warsaw Convention – essential character and purpose of Convention discussed – held that in cases of successive carriage Convention entitled consignor or consignee to sue.**

Neutral citation: This judgment may be referred to as *Impala Platinum v KLM* [2006] SCA 69 (RSA).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] This appeal concerns the application of The Convention for the Unification of Certain Rules to International Carriage by Air (generally referred to as the Warsaw Convention), as ratified by s 2 of the Carriage by Air Act 17 of 1946 (as amended by Proclamation R294 of 1967). It is directed against a judgment of Goldstein J in the Johannesburg High Court, in terms of which he held that the appellant company had no *locus standi* to sue for the loss of cargo and consequently dismissed its claim and ordered it to pay costs including the costs of two counsel.

[2] The background to the appeal, derived in the main from the parties' agreement in the court below to separate an issue for determination in terms of Rule 33(4) of the Uniform Rules of Court, is set out hereafter.

[3] On 18 June 2001 the appellant company (Implats), which has its principal place of business in Houghton, Johannesburg, was, in terms of two written agreements of air carriage as set out in two properly completed waybills, the consignor of two parcels containing platinum sponge and thirteen parcels containing palladium sponge. The carriage in terms of the waybills constituted international carriage within the meaning of article 1(2) of the Warsaw Convention (the Convention). The consignee of the aforesaid cargo was Johnson Matthey Incorporated of Westchester, Philadelphia, United States of America.

[4] On 18 June 2001 the cargo was to be transported by air as follows:
(a) From Johannesburg International Airport to Amsterdam, in the Netherlands, by the first respondent, Koninklijke Luchtvaart Maatschappij NV (KLM), an Amsterdam company conducting business as an international carrier styled as KLM Cargo at Johannesburg International Airport;
(b) From Amsterdam to Minneapolis, USA by KLM;

(c) From Minneapolis to Philadelphia USA by Northwest Airlines Incorporated (Northwest), an American company conducting business in Minnesota USA.

[5] KLM or Northwest failed to deliver the platinum and one of the parcels of palladium. To date delivery has not been effected.

[6] Insofar as the platinum was concerned, it had, in fact, been sold to Delphi Automotive Systems LLC in terms of a written precious metals supply agreement dated December 2000, which provided that the delivery would be 'CIP [carriage insurance paid] any International Airport'. Payment was made by Delphi on 3 July 2001. The loss of the platinum was only reported to Implats on 10 August 2001. Implats had, at own expense, insured the cargo and on 29 October 2001 its insurers paid Delphi for the loss of the platinum.

[7] The palladium, on the other hand, had been sold to Sumitomo Corporation Europe in accordance with a written precious metals supply agreement (also 'CIP') which wrongly stipulated the place of delivery as Tokyo airport instead of Philadelphia airport. The loss of the palladium was determined prior to payment by Sumitomo. The cargo had been insured at own expense by Implats, which, after submitting a claim, was indemnified by its insurers.

[8] Implats sued KLM and Northwest jointly and severally for payment of US$ 298 665-00 and US$ 155 116-00, being the alleged value of the lost platinum and palladium respectively. It is common cause that Implats suffered no financial loss.

[9] The parties agreed, in terms of Rule 33(4), to separate the issue of whether, on the facts referred to earlier, Implats had *locus standi* in terms of the Convention to sue for the value of the lost cargo. Following an order in that regard Goldstein J, as stated above, decided the matter against Implats. He held, after referring to this court's decision in *Pan American Airways Incorporated v SA*

Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A) (the *Panam* case), that the right afforded to sue for lost cargo vests in the consignor or consignee *who has in fact* suffered loss and that a nominal consignor or consignee who suffered no loss does not have title to sue. The learned judge concluded that as Implats had suffered no loss it had no claim and consequently dismissed the plaintiff's claim in the terms set out in para [1]. It is against that decision that Implats appeals with the leave of the court below.

[10] In arriving at the conclusion referred to in the preceding paragraph, Goldstein J relied on the following dictum of Steyn CJ from the *Panam* case (at 166C-D):

'[T]he nominal consignor or consignee would not be able to sue because he would have suffered no damages . . .'

With respect, the learned judge erred in his reliance on that case as being decisive of the question before him. In the *Panam* case the question addressed was whether the respondent, an insurance company that was the cessionary of a diamond merchant who had dispatched a parcel that had been lost, allegedly negligently, had *locus standi.* The question in that case was thus whether, in the circumstances of the case, someone other than a consignor or consignee had a right of action in terms of the Convention. It is a very different question from the one the learned judge in the court below was required to address, namely, whether a named consignor had standing to sue for loss of cargo even though it suffered no loss. The statement by Steyn CJ, on which Goldstein J relied, must be understood in the light of what preceded it and be related to the conclusion arrived at. Steyn CJ dealt with the proposition by counsel for the airline, that in terms of article 24 of the Convention, the right to bring any action for damages in respect of goods was limited to consignors and consignees. He doubted the correctness of this proposition but, for the purposes of the case before him, was willing to assume that a right of action in terms of the Convention was so limited.[1] He went on to consider article 8 which requires that an air consignment note

[1] At 164A-G.

should contain a statement that the carriage is subject to the rules relating to liability established by the Convention. He related this requirement to the provisions of article 9 which then read as follows:

'If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in art 8(*a*) to (*i*) inclusive and (*q*), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.'[2]

He reasoned that this meant that, where a consignment note did not comply with article 8 (in the present case we are dealing with a duly completed and regular consignment note), a carrier's liability was not restricted to the consignor or consignee as provided for in the Convention. He thus concluded that, since a consignment note complying with article 8 was a prerequisite for a carrier to avoid liability to persons other than a consignor or consignee, and considering that the onus rested on the carrier in this regard, the plea disclosed no defence as it failed to allege that essential fact.[3] En route to that conclusion the statement on which the court below relied was made *en passant*.

[11] An examination of the written argument by counsel in the *Panam* case reveals that the issue of whether or not a nominal consignor or consignee (or put differently, a consignor or consignee that did not suffer loss) could sue, was not addressed. None of the other three judgments in that case dealt pertinently with that issue. They refer to a consignor or consignee in unqualified terms albeit with some indication that who those persons are might need definition. Seen in proper perspective the judgment in the *Panam* case does not assist to resolve the issue before us.

[12] Turning to the Convention itself in order to answer the question posed, its terms should be viewed in the context of its essential character and purpose. A consideration of relevant decisions in other countries is useful for a proper appreciation of how the Convention should be approached and applied.

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[2] Article 9 has since the *Panam* case been amended.
[3] At 167A-B.

[13] More than thirty years have passed since the decision in *Panam*. Since then there have been further developments in international jurisprudence concerning the application of the Convention. The cases are not always harmonious but there are judgments which commend themselves for their persuasiveness and their useful summary of developments since the Convention's inception.

[14] We were referred to numerous foreign cases and authorities in relation to the application of the Convention involving the loss of cargo or involving personal injury during air transportation and which deal mainly with the question of whether the right to sue for loss extends beyond a consignor or consignee, so described in the waybill. In none that we have been referred to, or could find, was the present problem addressed. That is a significant aspect to which I will return in due course.

[15] The cases to which we were referred, including the *Panam* matter, reveal that, from the earliest times, courts in different countries stressed the desirability of attempting to attain uniformity in relation to international air transportation when the provisions of the Convention were considered in relation to the issues they were called upon to address.

[16] In a recent decision in England, namely, *Morris v KLM Royal Dutch Airlines, King v Bristow Helicopters Ltd* [2002] 2 All ER 565 (HL), Lord Hobhouse (para 146 at 610g-611a) considered the historical context in which the Convention was set and described its essential character and purpose:

The historical context in which the Warsaw Convention of 1929 is set was not only the emergent business of commercial international carriage by air of passengers and goods but also the framework of existing international conventions and agreements covering carriage by sea which was at the time and was, for the following decades, to continue to be the dominant means of international transport. The Warsaw Convention substantially incorporated the same scheme and the same features as those earlier conventions. Thus there is a recognition of the basic contractual relationship pursuant to which the transport is being performed and the requirement of

the compulsory application of the internationally agreed terms to the contracts of carriage and the compulsory inclusion of statements to that effect into the contractual documentation. . . .
It provides uniformity and certainty; conflicts of laws problems are avoided as far as possible; the incidents of where any accident or litigation may occur are sought to be removed as far as possible; the negotiation and acceptance of the " five freedoms" of international air transport were facilitated.'

In *Sidhu and others v British Airways plc, Abnett (known as Sykes) v British Airways plc* [1997] 1 All ER 193 (HL) at 204d-e Lord Hope stated:

'The convention describes itself as a "Convention for the Unification of Certain Rules relating to International Carriage by Air". The phrase "Unification of Certain Rules" tells us . . . the aim of the convention is to unify the rules to which it applies. If this aim is to be achieved, exceptions to these rules should not be permitted, except where the convention itself provides for them.'

Later, at 204g-h:

'It is clear from the content and structure of the convention that it is a partial harmonisation only of the rules relating to international carriage by air. That is sufficient to give content to the phrase "Certain Rules". I do not find in that phrase an indication that, in regard to the issues with which the convention does purport to deal, its provisions were intended to be other than comprehensive.'

At 212d-e the following appears:

'I believe that the answer to the question raised in the present case is to be found in the objects and structure of the convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the High Contracting Parties without reference to the rules of their own domestic law. The convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals ─ and the liability of the carrier is one of them ─ the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.'

[17] The dictum referred to at the end of the preceding paragraph was cited with approval in *Morris* (at 611 b-c). Lord Hobhouse went further and said the following (at 611c-d):

'It is not right to attempt to construe the words of the convention by reference to the rules of any domestic law, English, American, German or even French. We know that those rules were and are not all identical. The purpose of uniformity means that it is the duty of the national court to put to one side its views about its own law and other countries' laws. Quite apart from defeating

uniformity, such a course can only lead to the complication of simple issues, the inadequately informed investigation of other legal systems and, most importantly, to uncertainty.'

[18] In a case in the United States Supreme Court ─ *El Al Israel Airlines Limited v Tsui Yuan Tseng* (1999) 525 US 155, USSC ─ a passenger claimed that she had sustained psychosomatic injuries as a result of an intrusive body search. It was accepted that there was no bodily injury within the meaning of that expression in the Convention but the passenger contended that she was not precluded from pursuing a separate action for damages under domestic law. The court said the following (at para 6):

'To allow passengers to pursue claims under local law in circumstances when the Convention does not permit such recovery, could produce several anomalies. Carriers might be exposed to unlimited liability under diverse legal regimes but would be prevented in terms of the treaty from contracting out of such liability. Passengers injured physically in an emergency landing, might be subject to the liability caps of the Convention, while those merely traumatized in the same mishap would be free to sue outside of the Convention for potentially unlimited damages.'

The court held that the Convention precluded a passenger from pursuing an action for personal injury and damages under domestic law when the claim did not satisfy the conditions for liability under the Convention.

[19] As in the *El Al* case the aforesaid two decisions of the House of Lords dealt with claims different from the claim before us.

[20] In the *Sidhu* case the issue was whether, in relation to injuries sustained whilst in an airport terminal in Kuwait during the Iraqi invasion of that country, passengers could claim for damages from the carrier transporting them from London to Malaysia via Kuwait. The question to be addressed was stated as follows (at 201j):

'So the stark issue which is before us in this appeal is whether a passenger who has sustained damage in the course of international carriage by air due to the fault of the carrier, but who has no claim against the carrier under art 17 of the convention, is without remedy.'

As can be deduced from what was stated earlier, the House of Lords took the view that the Convention provides the exclusive cause of action and sole remedy

for passengers and, since the claims were not within the terms of the Convention, the claimants in *Sidhu* were held to be without a remedy.

[21] In the *Morris* case, art 17 of the Convention was considered yet again and in particular the expression 'bodily injury' as it appears therein. It was held that the expression did not cover a mental injury or illness which lacked a physical cause and that, since the Convention was the sole basis on which claims could be advanced, the claimants were without a remedy.

[22] In *Potgieter v British Airways plc* 2005 (3) SA 133 (C) the plaintiff and his male partner, during a flight to London, had kissed and hugged each other. According to the particulars of claim flight attendants approached them requesting them to desist from this behaviour as it offended other passengers. The plaintiff alleged that he was humiliated and that his dignity was impaired. He claimed damages without alleging any physical harm. Exception was taken to the claim on the basis that the Convention provided the exclusive cause of action to a passenger who claimed for loss, injury and damages sustained in the course of or arising out of his international carriage. Davis J followed the decisions in *Sidhu*, *Morris* and *El Al* and upheld the exception.

[23] In *Western Digital Corp and others v British Airways plc* [2001] 1 All ER 109 (CA), decided after *Sidhu* but before *Morris*, the Court of Appeal, in dealing with a claim for lost cargo, had to consider whether an owner of lost items who had not been named as consignor or consignee had *locus standi* to sue for loss in terms of the Convention. The court held that although the Convention did not in terms give specific rights to persons such as owners (who were not consignors or consignees) and, even though the nature and standard of any liability on the part of a carrier had to be decided in terms of the Convention, title to sue fell to be determined by domestic law. Consequently, owners and others with recognisable interests were not without remedy. The court was of the view that the decision in *Sidhu* did not preclude this conclusion.

[24] In *Gatewhite Ltd and another v Iberia Lineas Aereas de España SA* [1989] 1 All ER 944 (QB) (cited in *Western Digital*), Gatehouse J, after referring to judicial decisions in a number of countries (including United States of America[4], Guyana[5], Hong Kong[6], New Zealand[7] and South Africa[8]) said the following (at 950d-g):

'In my view the owner of goods damaged or lost by the carrier is entitled to sue in his own name and there is nothing in the convention which deprives him of that right. As the convention does not expressly deal with the position by excluding the owner's right of action (though it could so easily have done so) the lex fori, as it seems to me, can fill the gap. While bearing in mind the need to guard against the parochial view of the common lawyer, I see no good reason why the civil lawyer's approach to the construction of the convention, based on the importance of contract, should be of overriding importance. The fact is that the convention is silent where it could easily have made simple and clear provisions excluding the rights of the "real party in interest", had that been the framers' intention.

It would be a curious and unfortunate situation if the right to sue had to depend on the ability and willingness of the consignee alone to take action against the carrier, when the consignee may be (and no doubt frequently is) merely a customs clearing agent, a forwarding agent or the buyers' bank. It would seem artificial in the extreme to require a special contract in the air waybill itself under art 15(2) to provide the goods owner with a remedy in such a normal situation.'

The latter part of this passage is a recurrent theme in a number of cases which extended the right to sue beyond the consigner or consignee and, as will become apparent, is significant in addressing the issue in this appeal.

[25] In *Sidhu* the correctness of the approach of filling in the gaps in the Convention concerning title to sue by resorting to the lex fori was doubted but not

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[4] *Manhattan Novelty Corp. v Seaboard & Western Airlines Inc.* 137 N.Y.L.J. 6 (1957); *Parke Davis & Co. v B.O.A.C and Others,* 170 N.Y.S. 2 d 385 (1958); *Pilgrim Apparel, Inc. v National Union Fire Insurance Company and Others,* 1960 U.S. and Can. Av. Rep. 373.

[5] *Bart v British West Indian Airways Ltd.,* [1967] 1 Lloyd's Rep. 239.

[6] *Cordial Manufacturing Co. Ltd. v Hong Kong – America Air Transport Ltd. and Another* [1976] H.K.L.R. 555.

[7] *Tasman Pulp and Paper Co. Ltd. v Brambles J.B. O'Loghlen Ltd.,* [1981] 2 N.Z.L.R. 225.

[8] The *Panam* case.

finally pronounced upon. The following was stated (at 210 a-b) as regards *Gatewhite*:

'This decision, however, does not sit easily with the idea that the object of the convention, in the areas with which it deals, was to provide uniformity of application internationally.'

In *Sidhu,* the court noted (at 210b-c):

'[T]he rule in civil law countries is that only a party to a contract of carriage, or a principal for whom he was acting, is regarded as the appropriate plaintiff. In common law countries the proper plaintiff is the owner of the goods, whose right to sue depends on his interest in the goods, not on the fact that he may also be a party to the contract.'

The court held the following view (at 210c-d):

'It would seem to be more consistent with the purpose of the convention to regard it as providing a uniform rule about who can sue for goods which are lost or damaged during carriage by air, with the result that the owner who is not a party to the contract has no right to sue in his own name.'

[26] We are not called upon to decide whether the position adopted in the *Gatewhite* case sits happily alongside the decisions in *Sidhu* and *Morris*.[9] As will be demonstrated, the Convention caters for the facts of the present case. The approach that, where the Convention specifically deals with an issue it should be regarded as exhaustive and exclusive of domestic law, is in line with the exigencies of modern day international carriage by air and promotes uniformity and comity.

[27] Whilst the stated case is less detailed and specific than might be ideal, it nevertheless is sufficient to enable a decision on the limited issue we are called upon to decide. I turn to consider provisions of the Convention.

[28] Article 12 of the Convention provides:

'(1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by

[9] See *Shawcross and Beaumont Air Law* (4th ed reissue) vol 1 (Issue 102, December 2005) para VII (949) for a brief discussion on the issue.

calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignees named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.'

The rights of a consignor in this article are rights of disposition, the precise ambit of which it is unnecessary for present purposes to investigate.

[29] Article 13 deals with the rights of a consignee at the end of a journey:

'(1) Except in the circumstances set out in the preceding Article, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.'

[30] Article 14 enables the consignor and consignee to enforce the aforesaid rights either in their own name, in their own interests, or in the interests of others, provided that they carry out their obligations in terms of the contract of carriage.

[31] Article 18, without specifying who has title to sue, states the following:

'(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or trans-shipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.'

It is clear that the carrier's liability in the present case is liability of the kind envisaged by this article.

[32] Article 24(1) provides:

'In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.'

[33] Article 30 reads as follows:

'(1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, luggage or goods is subject to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.'

This article applies to the present case and on the face of it gives a consignor the right to sue for loss.

[34] In Giemulla/Schmid *Warsaw Convention* (2002) p 64, the authors state what one would consider to be the obvious meaning of the article:

'Thus, Article 30 clearly states who the entitled claimants are, albeit only in the exceptional case of successive carriage. The consignor and the consignee of the cargo are expressly named as the entitled claimants.'

The authors question whether there is any good reason why the consignor and consignee's rights should apply *only* in the exceptional case of successive carriage and not to ordinary carriage performed by one carrier. In the present case we are not concerned with that issue. The authors state the following (p 65):

'Due to the fact that, particularly in the carriage of cargo, forwarders frequently function as contractual consignor or consignee of cargo, without being its actual owner, we *often* find the situation that damage is not sustained by the person who is formally entitled to claim.'

(Emphasis added).

[35] In Philipson et al *Carriage by Air* (2001) under the heading *Title to sue* (para 8.34 p 116), the following is stated:

'The general rule at common law is that it is the owner of the cargo or baggage that is entitled to sue for damage or loss; by contrast in civil law jurisdictions, it is generally only the parties to the contract of carriage who have title. *Under the Convention, the consignor or the consignee expressly has title to sue*. Where the goods have already been sold, it is the consignee who has title to sue and the consignor is considered to have acted as the consignee's agent in arranging the contract for carriage.'

(Emphasis added).

At para 8.34 (p 116) the authors state:

'As for the title of third parties to sue the carrier, a number of foreign courts have come to the conclusion that the Convention gives title *only* to the consignor or consignee and no others.'

(Emphasis added).

The authors then continue with the discussion of the *Western Digital* case and the approach of 'filling in the gaps'.

[36] In Clarke *Contracts of Carriage by Land and Air* (2004) (para 3.194 p 358) under the heading *Entitlement to sue* the following is part of the commentary on

article 30 of the Convention:

'Are the consignee and the consignor, the only persons mentioned in Article 30, the only persons entitled to sue in respect of lost or damaged cargo? The question arose in *Western Digital*, in which the question was whether a claim could be brought by a cargo owner not named in the waybill. In line with an earlier English decision [*Gatewhite*] an affirmative answer was given by the Court of Appeal. A similar conclusion has been reached in New Zealand [*Tasman*]. In certain other countries, however, the decisions have been more restrictive [Court of Cassation and the *Panam* case].'

At para 3.195 the following appears:

'Article 30 is the only provision . . . that addresses the question of entitlement to sue, and then only in relation to successive carriage.'

[37] In *The Liability Regime of the International Air Carrier – A commentary on the present Warsaw System* (1981), Dr René H Mankiewicz states the following (para 209 p 177):

'The only persons entitled to claim compensation for damage to, or loss, destruction or delay of cargo are the persons designated as consignor and consignee, respectively, on the air waybill, and those persons who have succeeded into their rights. . .

Persons who are not named either as consignor or consignee in the air waybill have no standing in an action for damages, for instance: the buyer and ultimate recipient of the cargo; the bank which had financed the sale of the cargo and was to be notified of its arrival at the place of destination; the customs broker, the freight forwarder or agent of the consignee. . .'

This authority is dated and therefore does not include the more recent decisions extending the right to sue in specific instances beyond consignors and consignees.

[38] As stated earlier, the decisions to which we were referred including *Western Digital*, *Gatewhite* and those referred to in footnotes 4, 5, 6 and 7 were concerned with extending the right to sue to persons *other than* consignors and consignees. It appears to have been taken for granted that consignors and consignees had, without more, title to sue. The last part of the *dictum* in the *Gatewhite* case, set out in para [27] above, addressed the desirability of granting the right to sue to others who have recognisable interests so as to ensure that

persons such as true owners of lost cargo are not at the mercy of persons such as clearing or forwarding agents.

[39] In the *Tasman Pulp* case,[10] the High Court of New Zealand, stated the following (at 235 lines 12-16):

'The truth of the matter is that a right of action is expressly conferred on consignor and consignee in certain circumstances for the good and sufficient reasons that consignors and consignees with no proprietary interests could not, at common law, maintain any sort of action against the carrier. It does not at all follow that the right of the owner of the goods is therefore abrogated.'

In the *Western Digital* case the court (at 139-140) expressly approved the passage quoted in the preceding paragraph.

[40] It is therefore evident that textbook writers and courts have considered that consignors and consignees are frequently nominally involved and are entitled by the Convention to sue in order to vindicate the rights of others who have a recognisable interest in the cargo.

[41] In cases in which carriers resisted the extension of the right to sue beyond consignors and consignees, they did so on the basis that their liability should be restricted to the persons whose names appear on the waybill because this would lead to certainty as these are the persons with whom they have direct dealings. In the present appeal, no doubt further emboldened by the basis on which the matter was decided by the court below, the carriers are contending that they should not be liable on the previously preferred basis.

[42] In my view, it is clear why there is no case since the inception of the Warsaw Convention dealing with whether or not a consignor or consignee who in fact suffered no loss has title to sue ─ the answer is that the right to sue is obvious, not only because of the clear wording of the Convention, but because it is the basis on which the international air carriage industry operates. In decisions dealing with the extension of the right to sue it was readily and correctly assumed

[10] A case that Gatehouse J in the *Gatewhite* case found most persuasive.

to exist. To decide this matter in favour of the respondents would be to disregard the realities of modern day international air carriage, would make no commercial sense and would offend against the need for uniformity.

[43] For the reasons stated it follows that the court below should have decided the question of title in favour of Implats. The following order is made:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court below is set aside and for it is substituted the following:

'1. It is held that the plaintiff has title to sue.

2. The defendants are ordered jointly and severally to pay the plaintiff's costs incurred in the determination of the issue referred to in 1.'

_____
M S NAVSA
JUDGE OF APPEAL

CONCUR:

HOWIE P
FARLAM JA
CLOETE JA
CACHALIA AJA