Neutral Citation Number: [2015] EWCA Civ 16

Case No: A3/2013/2960 & A3/2013/3011

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE TEARE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2015

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LADY JUSTICE GLOSTER
and
THE RIGHT HONOURABLE LORD JUSTICE UNDERHILL

- -

Between:

GARD MARINE & ENERGY LTD	**Respondents /Claimants/ insurers**
- and -	
CHINA NATIONAL CHARTERING CO LTD	**Intermediate charterers**
- and between –	
-	**Intermediate charterers**
CHINA NATIONAL CHARTERING CO. LTD	
- and -	
DAIICHI CHUO KISEN KAISHA	**Charterers/ Appellants**

- -
- -

Mr Dominic Kendrick QC, Mr David Goldstone QC and Mr Gavin Geary (instructed by **MFB Solicitors**) for the **Appellants**
Mr Michael Davey QC (instructed by **Winter Scott LLP**) for the **Intermediate Charterers**
Mr Jeremy Russell QC, Mr Jeffrey Gruder QC and Mr James Turner QC (instructed by **Ince & Co LLP**) for the **Respondents**

Hearing dates: 14th, 15th, 16th & 17th October 2014

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Approved Judgment

This is a judgment of the court handed down by Lord Justice Longmore:

Introduction

1. This is the judgment of the court to which all members of the constitution have contributed.

2. The Ocean Victory ("the vessel" or "Ocean Victory") was a Capesize bulk carrier[1] which went aground at the port of Kashima in Japan on 24th October 2006; she subsequently broke up and became a total loss in December of that year. She was owned by Ocean Victory Maritime Co. ("the owners") who on 8th June 2005 had demise chartered her as a new building to an associated company in the same group, Ocean Line Holdings Ltd ("the demise charterers"). On 2nd August 2006 the demise charterers time-chartered the vessel to China National Chartering Co Ltd (whom we will refer to as "the intermediate charterers" as necessary), who on 13th September 2006 sub-time-chartered the vessel to Daiichi Chou Kisen Kaisha (whom we will refer to as "the charterers")[2]. Each charterparty contained an undertaking to trade the vessel between safe ports.

3. On 12th or 13th September 2006 (depending upon the time zone), the charterers ordered the vessel to Saldanha Bay in South Africa to load a cargo of iron ore for carriage to Kashima in Japan. She arrived at Kashima on 20th October and berthed at the Raw Materials Quay. She began discharging her cargo but that had to stop on 23rd October due to strong winds and heavy rain. Thereafter the situation rapidly deteriorated; there was a considerable swell (as a result of a phenomenon known as long waves) affecting the vessel's berth at the Raw Materials Quay and high winds rising to Force 9 on the Beaufort Scale. In circumstances which we will have to examine, on 24th October the Master decided to leave the berth for open water, but lost control of the vessel while leaving the port and the vessel was driven back onto the breakwater wall, and subsequently became a total loss.

4. The owners and demise charterers claimed that the port of Kashima was unsafe. The demise charterers had insured the vessel for the respective rights and interests of themselves and the owners pursuant to clause 12 of the demise charter and in due course hull insurers paid $70,000,000 being the agreed value of the vessel. On 15th October 2008 one of the insuring companies, Gard Marine & Energy Limited ("Gard"), took an assignment of both the owners' and the demise charterers' rights in respect of the grounding and the total loss of the vessel.

5. The charterers denied that the port was unsafe saying that the conditions on 24th October 2006 were an abnormal occurrence and that, even if the port was unsafe, the

[1] So called because the vessel's size requires it to sail round the Cape in South Africa as it is unable to navigate either the Suez or the Panama Canals. Ocean Victory herself was 289 metres long.

[2] The charterers had chartered the vessel as substitute for another vessel under its contract of affreightment dated 23 June 2005 with Sumitomo Metal Industries Limited.

cause of the loss was the Master's navigational decision to leave the port not its unsafety. They said further that clause 12 of the demise charter provided for joint insurance without any right of recovery (by way of subrogation or otherwise) by the owners against the demise charterers, who, being under no liability to the owners, had no liability to pass down the chartering chain to the charterers, not having themselves suffered any loss.

6. No proceedings were ever brought by the owners, or by Gard, as assignee, against the demise charterers for breach of the safe port warranty in the demise charter, nor was any extension of time granted in respect of such claim.

7. On 21st April 2010 Gard, as assignee, issued proceedings in the Commercial Court against the intermediate charterers for damages arising out of the loss of the ship. The intermediate charterers in turn brought third-party proceedings against the charterers.

8. On 30th July 2013, after a lengthy trial, Teare J ("the judge") held[3], in the first action, that the intermediate charterers were liable to the demise charterers for breach of the safe port warranty in the time charter, and likewise, in the third-party proceedings, that the charterers were liable to the intermediate charterers for breach of the safe port warranty in the sub-charter. He rejected the charterers' argument that the cause of the casualty was not the breach of the safe port warranty, but rather the master's navigational decision to put to sea in extreme conditions. He also rejected the charterers' contention that the demise charterers, were not, even assuming a breach of the safe port warranty, liable to the owners in respect of the loss of the vessel, and that, in the circumstances, the demise charterers had suffered no loss in respect of the loss of the vessel, and accordingly had no claim to pass on to the intermediate charterers, or, in turn, the charterers.

9. As a result of the judgment, Gard (as assignee) was (subject to any appeal) entitled to damages from the demise charterers (and the demise charterers were entitled to damages from the charterers) agreed in the following amounts:-

   i) US$ 88.5 million in respect of the loss of the vessel (which was its agreed market value);

   ii) US$ 12 million in respect of the cost of salvage services;

   iii) US$ 35 million in respect of the cost of wreck removal; and

   iv) US$ 2.68 million in respect of loss of earnings.

10. Although, formally, the demise charterers' claim was against the intermediate charterers, in circumstances where the ultimate liability (if any) fell on the charterers, the charterers defended the claim and prosecuted the appeal before us.

The issues arising on the appeal

11. There were three principal issues arising on the appeal. These were:-

[3] [2013] EWHC 2199 (Comm).

i) whether as a matter of law in the circumstances there had been a breach of the safe port warranty ("the safe port issue");

ii) whether, even on the assumption that there had been a breach of the safe port warranty, the cause of the casualty was not the breach, but rather the Master's navigational decision to put to sea in extreme conditions, rather than to stay at the berth ("the causation issue"); and

iii) whether, on the true construction of the terms of the demise charterparty, the demise charterers, who had insured the vessel at their expense, had any liability to the owners in respect of insured losses, notwithstanding that such losses may have been caused by a breach of the safe port warranty ("the recoverability issue").

12. The judge gave the charterers permission to appeal the recoverability issue. On 25th February 2014, Aikens LJ on paper gave the charterers permission to appeal the safe port issue and the causation issue. However, he dismissed the charterers' application to appeal against the judge's findings of fact: (a) that it had not been safe for the vessel to remain alongside her berth on 24th October 2006; and (ii) that the master had not been negligent in his navigation of the vessel at 1512 on 24th October 2006. The charterers did not renew their application to appeal in respect of those issues.

Representation on the appeal

13. Mr Dominic Kendrick QC, Mr David Goldstone QC and Mr Gavin Geary appeared on behalf of the charterers; Mr Jeremy Russell QC, Mr Jeffrey Gruder QC and Mr James Turner QC appeared on behalf of the owners; and Mr Michael Davey appeared on behalf of the intermediate charterers. Although he was instructed to attend the appeal, Mr Davey did not present any separate argument to the court.

The safe port issue

14. It was common ground between the parties that if the damage sustained by the vessel at Kashima on 24th October 2006 was caused by an "abnormal occurrence" then the charterers would not have been in breach of the safe port warranty. That common ground was based on the classic dictum of Sellers LJ in The Eastern City [1958] 2 Lloyd's Rep. 127 at 131 that:-

> "A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good seamanship and navigation".

15. What was in dispute between the parties on the appeal in relation to this issue was:-

i) what, as a matter of law, was the correct test for an abnormal occurrence;

ii) in particular, whether the judge was correct to hold[4] that the combination of two weather conditions on the casualty date (namely the phenomenon of swell

[4] See paragraphs 110, 127 -128, 132 and 134 of the judgment.

from "long waves," which might have forced the vessel to leave the berth, and a very severe northerly gale which meant that the vessel could not safely exit the port) was not to be characterised as an abnormal occurrence, notwithstanding that the coincidence of the two conditions was "rare"[5], because both conditions were physical characteristics or attributes of the port; and

iii) whether, on the facts as found by, or undisputed before, the judge, the weather conditions on the casualty date amounted to an abnormal occurrence.

The facts

16. The principal facts can be stated, largely non-contentiously, as follows[6]. We specifically mention where a finding or conclusion by the judge was challenged on appeal.

The port

17. Kashima is a large, man-made, modern port, construction of which began in 1969 and continued for many years thereafter. It lies north east of Tokyo and appears to be one of the largest ports in Japan. The port contains over 9 miles of wharves serving an industrial zone. There are iron and steel works, an oil refinery, chemical works and a foodstuffs industry within the port.

18. The port is entered from the sea, via a specially constructed channel known as the Kashima Fairway, which runs almost due North-South, bounded on one side by the South Breakwater and on the other by the land. One of the fairways within the port is the Central Fairway which runs in a NE/SW direction from the southern end of the Kashima Fairway. Along its northern shore is the Raw Materials Quay, owned by Sumitomo Metal Industries Limited ("SMI"), with three berths A, B and C. The Ocean Victory had been moored at berth C on the Raw Materials Quay for the purposes of discharging her cargo. A vessel leaving the port via the Central Fairway, as the Ocean Victory did, proceeds in a north easterly direction and turns to port into the Kashima Fairway. The eastern side of the fairway is bounded by the South Breakwater which extends 1.75 miles north and affords a measure of protection from the swell coming in from the Pacific Ocean.

19. The port serves a variety of vessels from smaller coastal ships to VLCCs[7] (up to 280,000 DWT) and Capesize bulk carriers (up to 230,000 DWT) as well as LPG[8] and chemical tankers. Between 1971 and 2006 some 1254 VLCCs and some 5316 Capesize vessels had visited the port. Throughout the period of the port's operation, prior to 24th October 2006, there had been no history of incidents such as that which befell the vessel on that date. Indeed the evidence demonstrated that the port's safety

[5] As he held at paragraphs 127 -128 of the judgment.

[6] This summary is largely based on the facts as found in the judgment, the facts as stated in the respective skeleton arguments and in the agreed chronology and on certain of the evidence to which we were referred during the hearing of the appeal.

[7] "VLCC" stands for "Very Large Crude Carrier".

[8] "LPG" stands for Liquefied Petroleum Gas.

record had been impeccable. No ship had ever broken free from her moorings at the port and there had never been an accident in the Kashima Fairway when vessels were departing, despite the facts that: it was the only way into, or out of, the port; that it was used by all ships including all Capesizes and VLCCs; and that in conditions of severe northerly gales, the Kashima Fairway could be unsafe for large vessels to navigate (as to which see below). Moreover although about 170 Capesize bulk carriers a year use the adjacent Raw Materials Berths B and C, as did the Ocean Victory, there had never been a casualty at the Raw Materials Berths, whether as a result of the swell from long waves or otherwise.

20. It was common ground between the parties that, as the judge stated in paragraph 103 of the judgment:-

> "103. It is well established that a port can be safe notwithstanding that the vessel may have to leave it in certain circumstances but if departure is required that must be capable of being safely performed; see The Eastern City [1958] 2 Lloyd's Reports 127 at p.131 and 133. Thus the fact that a vessel may have to interrupt discharge and leave the port of Kashima on account of a typhoon, bad weather from a non-tropical depression or long waves does not make the port unsafe. "

21. The critical issue as to whether Kashima was a safe port depended on whether the coincidence of two weather conditions on 24th October 2006, namely (i) the phenomenon of swell from "long waves," which might have forced the vessel to leave the berth, and (ii) a very severe northerly gale, which meant that the vessel could not safely exit the port via the Kashima Fairway, could be characterised as an abnormal occurrence. It was common ground that neither condition on its own rendered the port unsafe. If long waves affected a Capesize when moored at its berth, and its movement could not be controlled by moorings or tugs, the vessel could leave. If northerly gales affected the port, a Capesize did not need to transit the Kashima Fairway: it could safely stay at berth, if it had already entered, or wait outside the port, if it had not.

22. We turn now to describe these two features.

Long waves

23. Kashima, like many other Japanese and other ports bordering the Pacific, is on infrequent occasions subject to the impact of "long waves". "Long" in this context connotes the period of time which elapses between the full height of one wave and the next; typically there is a period of between 30 seconds to 5 minutes between the height of one long wave and the next. Long waves are different from normal waves created by the wind and prevailing conditions; long waves are usually much smaller in vertical height than the latter. *Long period swells* are not technically the same as *long waves* (although on occasions the judge appears to have used the expressions interchangeably[9]). Long period swell is part of the primary wave spectrum, where that spectrum has a period of up to about twenty seconds between waves. Long waves can penetrate the harbour and the swell from such waves can cause problems to

[9] See e.g. paragraph 14 of the judgment.

moored vessels at the Raw Materials Berths and, in particular, can disrupt the discharging of cargo. The evidence showed that long waves affected the Raw Materials Berths at Kashima two to three times a year.[10]

24. The judge described the phenomenon, and the impact which long waves had on moored vessels, as follows:-

> "11. In addition to such waves created by the wind and prevailing swell there were also "long waves", that is, waves typically with periods of 30 seconds to 5 minutes but with a small significant height. Such waves are associated with storms of long duration or travel long distances across the ocean. In open sea they travel with groups of swell waves and are bound to them. But nearshore and in port they are released from the group and behave independently from swell waves. Long waves can be diffracted more easily around a breakwater and with little loss of energy because of their long wavelength. The master of ordinary skill and care may not be familiar with this oceanographic phenomenon and would not "observe" them.
>
> 12. It was common ground that such long waves affected the Raw Materials Quay on 24th October and were of about 0.2m. significant wave height. The Owners' wave expert considered that they had a period of about 50-100 seconds. The Charterers did not have a wave expert as such but suggested that they had a period over the full spectrum of 30 seconds to 5 minutes. The view of the Owners' wave expert is to be preferred. Perhaps unusually these long waves may have been generated by the local low pressure system. This is suggested by the circumstance that the wave gauge outside the port recorded an increase in the height of such waves between 23rd and 24th October 2006. Although long waves are usually much smaller in amplitude than swell waves they tend to cause greater ranging or surging of a vessel moored alongside a berth than swell waves. This is because the surge motion of moored vessels can be amplified by long period waves. From at least 1998 studies have been made of long waves (sometimes called "infra-gravity" waves) and their effects at Japanese ports including Kashima. The pilots at the port were aware of the phenomenon of long waves at Kashima and of their potential effect on vessels moored at the Raw Materials Quay. So was Captain Yamauchi, the Charterers' representative at the port."

25. This phenomenon is not necessarily associated with strong winds operating on Kashima itself. The evidence showed that it could be the case that the wind at Kashima would be at ordinary levels when long waves occurred.

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[10] So far as the frequency of swell from long waves is concerned, the owners' expert estimated that there would on average be one such event a year at a figure of >0.3m, or three per year at the lesser figure of >0.2m.

26. It was common ground on the appeal that long waves were not predictable, or, at least, there was no evidence that there were systems in place in 2006 (whether at Kashima or elsewhere) for predicting the onset of long waves[11]. The judge however does not appear to have made any express finding about the predictability of long waves. Certainly there was very limited data relating to long waves. Moreover, the effect of long waves on a particular Capesize vessel at its berth was also unpredictable. Technically, an adverse effect depends upon a coincidence of the particular vessel's 'resonant period in surge' with that of the wave period. Accordingly, even when it occurs, this phenomenon may affect only some vessels at a particular quay, or none.

27. If a vessel is affected by long waves, the steps available to deal with it are, in sequence: improve the mooring configuration (including ballasting down to lessen the angle on the ropes); replace any mooring ropes which break; call for tug assistance to hold the vessel from moving; consider leaving the port.

28. Accordingly, a vessel which stayed at berth might incur the work and cost of adjusting its mooring and renewing any broken or chafed mooring ropes. Tugs would minimise or remove the risk of such breakage, even where they could not keep the vessel still enough for discharge work to resume. Further, as Mr Kendrick submitted a master might choose to leave the berth for a day or so until the swell from long waves subsides, if he thought it pointless, and perhaps arduous, work, to remain at the berth adjusting ropes etc. when discharge could not occur, although the judge considered this unlikely; see paragraph 14 of the judgment.

29. At trial, the owners postulated that a different and much more extreme kind of danger, however, would arise if, due to long period swell from long waves, all mooring lines broke at the same time, tugs could not hold the ship, and she would then drift in danger within the port. This was referred to as a 'mooring break out' at trial. The evidence demonstrated that nothing like that had ever occurred in Kashima prior to 24th October 2006 and indeed it did not occur on 24th October, either.

The difficulty facing large vessels leaving the port in conditions of severe northerly winds and swell

30. It was common ground that, in conditions of severe northerly winds and swell[12], it would not be safe for very large vessels such as Capesize vessels to attempt to leave the port by the Kashima Fairway. That was because, in winds of Beaufort Scale 8 and above, a Capesize vessel, whose engine is designed to maximise fuel economy, and whose size restricts manoeuvrability, lacks the power capacity to overcome such severe conditions in restricted waters such as a port. In the absence of swell from long waves affecting the Raw Materials Quay, the bad weather associated with low pressure is itself not a problem for a vessel at berth at Kashima: the evidence showed that vessels regularly stayed on the berth without problems.

31. In paragraph 8 of the judgment, the judge described the problem that large vessels might face leaving the port by the Kashima Fairway in periods of northerly swell:-

[11] See lines 17 to 24 of page 28 of the appeal hearing transcript of 15 October 2014.
[12] I.e. from ordinary waves, wind and weather conditions and not from long waves.

> "8. The Admiralty Pilot Book states that entering and leaving the port at night is only permitted in exceptional cases. It also notes that in the outer part of the fairway there is frequently a heavy swell and that in bad weather breaking seas overrunning the breakwater may cause it to be totally obscured on radar screens. The Guide to Port Entry notes that during periods of northerly swell the entry channel is fully exposed and that vessels at low speed generally have difficulty in steering."

32. In paragraphs 9 and 10 he described the conditions in the Kashima Fairway on 24th October 2006 as follows:-

> "The weather on 24th October 2006
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> 9. The conditions which were experienced in the Kashima Fairway on 24th October 2006 have been considered by meteorological and wave experts. Their findings may be summarised as follows.
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> i) The fairway was exposed to north to north-north-westerly winds of about Beaufort scale 9 caused by a low pressure system. Although there was a difference of view as to how likely it was that the wind reached force 10, it was common ground that there were gusts of up to about 52 knots, that is, about force 10 (although it is strictly inaccurate, I was told, to refer to "gusts of force 10").
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> ii) The prevailing swell from the north east penetrated the breakwater by diffraction and by reflection from the coastline. There would also have been a component due to overtopping of the breakwater.
>
> iii) At the inward end of the breakwater the significant wave height (that is, the average height of the highest one third of the waves) would have been about 1.5-2m.
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> iv) As the vessel passed the seaward end of the breakwater she was likely to have encountered a significant wave height of 5.5-6.5m. with a period of around 11 seconds.
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> 10. The circumstances in which the vessel came to leave her berth for the open sea are the subject of some controversy and so the same experts, together with experts on ship movement, have considered the conditions which were probably experienced by the vessel as she lay alongside the Raw Materials Quay, starboard side to. They concluded that the wind could potentially have been from directions both abeam and astern due to distortions caused by structures and topography ashore. The waves were likely to have been onto the stern of the vessel and to have had a significant wave height of about 0.65m with a significant period of 10-11 seconds."

33. In paragraph 110 the judge summarised the evidence relating to low pressure systems giving rise to gale force northerly winds in the Kashima Fairway. He also addressed the risk that long waves might occur at the same time as a low pressure system giving rise to gale force northerly winds in the channel. He said:-

> "110. The next question is whether there was a real, as opposed to a fanciful, risk that long waves might occur at the same time as a low pressure system giving rise to gale force northerly winds in the channel. Low pressure systems off the coast of Japan cannot be regarded as unusual; the record of "alerts" issued by the port authority expressly refers to low pressure systems. Such systems will from time to time generate gale force winds from the north. The researches of Mr. Blackwood showed that between 1986 and 2010 there were 22 storms caused by a low pressure system which produced gale force winds from the northerly quadrant. These matters suggest to me that there was a risk that northerly gales might be present in the channel at the same time that long waves are affecting vessels berthed at the Raw Materials Quay. Indeed, counsel for the Charterers accepted that the conditions experienced in the Kashima Fairway on 24th October 2006 were "at the upper end of what might be expected from a non-tropical system." Counsel also submitted, based upon the expert evidence of Mr. Lynagh, that the storm which affected Kashima on 24th October 2006 was exceptional in terms of its rapid development, its duration and its severity. That may be so but there must have been, in my judgment, a clear risk of gale force winds from the northerly quadrant in the Kashima Fairway at the same time as long waves were affecting the Raw Materials Quay. The low pressure system which produced gale force winds from the northerly quadrant on 24th October 2006 was not an unusual meteorological event. "

34. It was common ground at the trial and on the appeal that, for various reasons, which it is not necessary to rehearse, the records and information relating to typhoons and tropical storms[13] were not relevant to the safe port issue, nor were data relating to storms which produced gale force winds from other directions, since the latter would have no effect on the navigability of the Kashima Fairway. The judge's conclusion as to the number of low pressure storms (as opposed to typhoons or tropical storms) was based on a table produced by Mr Turner summarising information contained in Mr Blackwood's report. There was some debate before us as to whether the judge was correct to take a figure of 22, since on proper analysis of the evidence, that figure was somewhat too high and should have been 17. But the difference in our judgment is immaterial in the context of the 24 year period to which the table related. Whilst Mr Kendrick did not seek to go behind the judge's findings that "Low pressure systems off the coast of Japan cannot be regarded as unusual", he pointed out that on the figures as shown in the table such low pressure storms only occasionally occur.

[13] Despite the assertion to the contrary at paragraph 51(1) of the owners' skeleton.

Indeed Mr Russell agreed and accepted that the records showed that strong northerly winds only affected the port about once a year.[14]

35. Although not mentioned by the judge, the table also shows that many of the low-pressure storms were of few[15] hours duration as compared with the low pressure storm which occurred on 24th October which lasted some 15 hours. (For the sake of completeness we mention that the information on the schedule in relation to long waves was incomplete as measured long wave data was only available for the period January 2005 to January 2008 and, in some cases, even during this period was missing.)

The evidence relating to the circumstances in which vessels had left the Raw Materials Quay in previous years to avoid bad weather

36. In paragraphs 13-15 of the judgment the judge set out his findings in relation to the circumstances in which vessels had left the Raw Materials Quay in previous years either to avoid bad weather or to avoid swell caused by long waves:

> "The port "set-up"
>
> 13. There was a system in the port by which the harbour master instructed vessels to leave the port in the event of a typhoon. The standard form warned of an approaching typhoon and urged masters to take precautionary measures and, if necessary, to "prepare to seek a refuge outside the port". There was also a system in the port by which the harbour master gave advice to vessels in the event of bad weather. The standard form urged care in berthing and unberthing operations and gave advice about anchoring. There was also, it seems, a practice whereby local weather forecasts were brought to moored vessels by both the vessel's agent and by Captain Yamauchi, the Charterers' agent. 7 tugs were operated in the port. In addition to such tugs being available to assist with berthing and unberthing and to assist vessels entering or leaving the tugs were also available to hold vessels at their berth should that be required. There was evidence that that had been required on 7 occasions in 2005 and on 11 occasions in 2006.
>
> 14. Studies of recorded data and other statistics suggested that from time to time vessels moored at the Raw Materials Quay had to leave the port. Mr. Ikeyama, a Japanese lawyer, carried out research which suggested that between 1996 and 2005, during 13 periods of strong NW to NE winds combined with substantial swell, only two vessels (or perhaps only one) appear to have interrupted discharge and left the Raw Materials Quay. However, this study does not appear to have been

[14] See lines 4-5 of page 160 and lines 10-18 of page 168 of the transcript of the appeal hearing on 14 October 2014.

[15] Many were between one and three hours duration. Of the 22 identified by the judge, it appears that 14 lasted between one and two hours.

> comprehensive. Data collected by the TST Corporation[16] suggested that between 2001 and 2006 some 8 or 9 vessels had to leave the Raw Materials Quay because of bad weather and return when the weather improved. The precise circumstances in which such shifts took place were not stated but a list of evacuation alerts issued by the Kashima port authority for the period 2003 – 2006 suggested that 4 vessels left on account of evacuation alerts consequent upon a typhoon. **The other 4 or 5 appear to have left the port without an evacuation alert.** One of those was the ELLIDA ACE, a Capesize vessel, which left the port on 6 September 2006 in circumstances where the berth was affected by long waves generated by a typhoon a long distance away (described by the Charterers in their Closing Submissions as a "prime example" of such waves). It seems likely that the other vessels must have left either in similar circumstances or where there was particularly bad weather. Thus a senior pilot at the port confirmed that when the berth was affected by long swell mooring lines were liable to break and a decision might be taken to move the vessel out of the port. At an investigation into the OCEAN VICTORY casualty a manager of Sumitomo Metal Logistics, the ship's agent at the port, said that he was aware of vessels which had left the port in winter in circumstances where movement at the berth could not be stopped by the use of tugs though he was not aware of a vessel having to depart in the autumn as the result of an approaching low pressure system. It was suggested that where discharge was suspended on account of bad weather the vessel would leave, not because it was unsafe to stay, but because there was no purpose in the vessel remaining on the berth. This seems unlikely since it would require the costs of tugs and a pilot to be incurred.
>
> 15. My conclusion from the totality of this evidence is that whereas the port, represented by the harbour master, had a system of issuing evacuation alerts on account of typhoons, the port, represented by the harbour master, did not have a system (before the OCEAN VICTORY casualty) of issuing such alerts in other circumstances, in particular, when the berth might be affected by long swell or by particularly bad weather. That does not mean that vessels did not leave the port in such circumstances. On the contrary the evidence suggests that they did. But such departures appear to have been the result of *ad hoc* decisions." [Our emphasis.]

37. In paragraph 23 he dealt further with the incident in September 2006 affecting the Ellida Ace:-

> "23. On 4th and 5th September 2006, whilst ELLIDA ACE, a Capesize bulk carrier, was moored alongside the Raw Materials

[16] This was evidence adduced on behalf of the owners.

> Quay in Kashima, 6 mooring lines broke as a result of what was described in the vessel's statement of facts as "heavy swell". Two tugs sought to assist the vessel, but "in vain" according to a contemporaneous email, and the vessel left port "to take refuge at sea". Although Captain Barber had suggested that the cause of this incident was not long waves he accepted in cross-examination that the ELLIDA ACE incident in September 2006 was "an examplar of the type of problems which can occur in this port, at this quay, due to long waves". Thus, by the time of closing submissions, it was common ground that the heavy swell was wholly or in part made up of long waves associated with a typhoon some distance off the port. "

38. As Mr Kendrick submitted, the points to emphasise, based on what was common ground as to the underlying evidence supporting these conclusions, are: first, that the four departures from the Raw Materials Quay because of evacuation alerts due to a typhoon were not relevant for the purpose of the safe port issue; second, that there was nothing in the owners' evidence (or elsewhere) to suggest that the four to five departures from the Raw Materials Quay recorded in the period 2003 to 2006 – even on the assumption that the departure was necessitated by swell caused by long waves – occurred in bad weather conditions where northerly winds made navigation out of the port through the Kashima Fairway difficult or dangerous; and third, that in September 2006, in the incident referred to by the judge, the Ellida Ace did not leave the port in severe weather conditions or at a time when navigation in the Kashima Fairway was dangerous; on the contrary, the wind and weather conditions in Kashima that day were fair, with winds, according to the meteorological data, in the upper reaches of Beaufort Scale 4[17], and accordingly the Ellida Ace had no difficulty in leaving the port.

The events leading up to the casualty of the Ocean Victory

39. As already stated, on about 12th September 2006, the charterers directed the vessel to load cargo[18] in South Africa and then discharge at Kashima. The vessel arrived in Kashima on 20th October, berthed at the Raw Materials Quay and started discharging its cargo.

40. The judge set out his detailed findings in relation to the events of 23rd and 24th October in paragraphs 30 to 92 of the judgment. We do not repeat them here but merely summarise them as follows[19]:-

    i) Captain Yamauchi was the charterers' permanent Kashima representative. He was an experienced captain of Capesize and VLCC vessels. He had a liaison role with SMI, who apart from owning the Raw Materials Quay, was also the

[17] Mr Russell sought to rely on evidence from a deck officer to the effect that the winds were at Beaufort Scale 7 and were "boisterous"; but apart from the fact that the meteorological evidence was more objectively reliable than the evidence of the ship's officer, the difference was in fact immaterial, because it was well below the cut-off of Scale 8 which made the Kashima Fairway unsafe for Capesizes to navigate.

[18] This was 170,000 tonnes of iron ore.

[19] Much of the summary of the events which occurred on 23rd and 24th October is relevant to the causation issue, but needs to be set out so as to give a coherent picture.

charterers' biggest customer, and would also assist masters visiting the port. In an email dated 18th October the charterers told the master of the Ocean Victory ("the Master"):-

> "In case of forecasting bad weather, please discuss with him [Captain Yamauchi] in advance and follow his instructions".

ii) Cargo operations ceased at 0650 on 23rd October when discharge was stopped as a result of heavy rain. On the same date the Ellida Ace berthed at the Raw Materials Quay starboard side to and aft of the Ocean Victory.

iii) Captain Yamauchi first visited the vessel at about 1000 on 23rd October 2006. He brought with him the local weather forecast, which at that time was for bad, but not severe, weather. He explained the local issue of long period swells occasionally affecting this berth, and told the Master of the experience of the Ellida Ace in September 2006; see paragraph 34 of the judgment. He advised the Master to add additional mooring lines and keep his engine on standby in case of an emergency or it was necessary to seek shelter in the open sea. Further email advice was given to the Master during the course of the day. The judge held that this was advice rather than an instruction. The relevant word in Japanese was "shiji". At paragraphs 42 to 44 the judge said:-

> "42. Captain Yamauchi insisted that he never gave instructions to the master and only made suggestions. He accepted that he had used the Japanese word "shiji" in his email at 1238 on 23rd October 2006 which has been translated as "instruction". He said that "shiji" had an "informal" usage. The interpreter agreed that "shiji" could mean instruction or advice. The word did not have a strong sense of "command" but some sense of an "indication".
>
> 43. The interpreter's evidence led to further evidence on "shiji" being adduced in writing by the Owners and then by the Charterers. The Owners' expert linguist, Mr. Jones, said that "shiji" meant instruction, direction, command or order and was quite different from other words which meant advise, suggest or recommend. He said that the person issuing "shiji" would naturally assume that the recipient would comply and that the interpreter's advice to the court was mistaken. Masako Murphy, however, agreed with the interpreter and said that "shiji" had a neutral meaning of conveying a message in the sense of an indication, denotation, pointing out, instruction or direction.
>
> 44. The precise meaning intended by the use of the word "shiji" must depend upon its context. Words cannot be divorced from the context in which they are used. Captain Yamauchi had no power to instruct, in the sense of command, the master as to the steps he must take as master of his vessel. It is likely that he regarded himself as giving advice to the master. Daiichi themselves understood that Captain Yamauchi had "advised" the master to prepare an additional mooring line. However, it is

> clear that Captain Yamauchi expected that his advice would be followed. For he requested that steps be taken to confirm with the masters that measures had been taken to respond to the strong winds. Thus it seems likely to me that when he used the word "shiji" Captain Yamauchi used it in the sense of advice which he expected to be followed. Daiichi, in their email to the master on 18th October, had requested the master to "follow" Captain Yamauchi's "instructions". I do not consider that they used the word instruction in the sense of a command because neither they nor Captain Yamauchi had power to command the master in such matters. However, it is clear that they expected that such advice would be followed."

iv) The judge went on to describe what next happened on 23rd October in the following terms:-

> "45. A further local weather forecast, timed at 1400, was downloaded by Captain Yamauchi in the afternoon of 23 October. It indicated that the weather was expected to worsen on 24 October with the most severe weather (17 m/s or force 7-8 and gusts of 34 m/s) expected at 1800 on that day. Both the wave height and period were also expected to worsen.
>
> 46. Captain Yamauchi was not able to visit either OCEAN VICTORY or ELLIDA ACE because of flooding and so, shortly after 1700, he emailed the forecast (complete with his own manuscript explanations) to the masters of those vessels. The master of OCEAN VICTORY expected that discharge would be completed and that the vessel would have left the port before the very bad weather had developed. He drew the attention of the chief officer and chief engineer to the local weather forecast and instructed them to take additional precautions throughout the night. As a result additional officers and crew were put on standby.
>
> 47. At 1721 Captain Yamauchi informed various parties by email that with regard to the bulldozer in the hold of OCEAN VICTORY
>
> "although difficulties may be expected, we have requested that it be taken out if the wind dies down in the middle of the night. If it can be taken out, moving out into the open sea tomorrow will be considered. Tugs will also have to be laid on."
>
> 48. It seems likely that active consideration had been given by Captain Yamauchi to removing the bulldozer in preparation for the vessel to move out into the open sea after the later weather forecast had been received in the afternoon of 23rd October; removal had not been mentioned in Captain Yamauchi's email sent at 1238 that day.

> 49. The afternoon weather forecast had also caused Captain Yamauchi to discuss with Mr. Niibori of the ship's agents SML that it might be necessary for OCEAN VICTORY to leave the berth to seek shelter in the open sea on 24th October. They agreed that early the next day SML's duty staff member would discuss the matter with the masters of the vessels moored at the Raw Materials Quay."

v) Having adopted the additional safety measures, the ship encountered no problems that day or during the night of the 23rd/24th October.

vi) At 0412 and 0810 warnings of high seas, heavy rains, gales and storm surges were issued by the Mito Meteorological Observatory. These included a warning of high sea waves from before noon on 24th October reaching maximum size in the afternoon.

vii) At about 0900 on 24th October, the ship's agent (Mr Oda) and Captain Yamauchi went on board the Ocean Victory. All discussions between the Japanese representatives and the Chinese master were in English. The agent and Captain Yamauchi had brought local weather forecasts with them. Although the Kashima forecasts predicted improving conditions throughout the day, the actual weather conditions at the time of this attendance were less good than predicted, but were good enough at that time for the vessel to leave in safety. Mr Oda also informed the master of the Mito forecasts

viii) Captain Yamauchi and the agent advised the Master to leave the berth in case swells should affect the vessel at the berth, since there was no prospect of the discharge of cargo resuming for the next day and a half, whatever the weather, because of a power outage at the berths (paragraphs 52 and 58). The judge found this was advice which Captain Yamauchi expected to be followed, but was not given as a command; navigation was for the Master and the final decision was for the Master (paragraph 44). The Master knew he had the option to stay or go (paragraph 56).

ix) At trial the owners did not assert that the advice given by Captain Yamauchi at 0900 on the morning of 24th October was wrong. Discussion on the Ocean Victory at 0900 was about the local conditions at the berth and the possible effect on the ship, and the fact of no discharge even if the ship stayed. There were no discussions about any danger in the ship leaving. In any event, the conditions at 0900 were acceptable for departure and the local forecast did not indicate differently. It was common ground or, at any rate apparent from the evidence, that had the ship left in the conditions prevailing when the discussions took place on the morning of 24th October or shortly afterwards, there would have been no danger in departure which was beyond good ordinary navigation.

x) According to the charterers' evidence (although not subject to a finding by the judge) Captain Yamauchi and the agent both considered the Master to be indecisive and found him difficult to understand. Eventually, they understood the Master to say that, if the Capesize on the adjoining berth decided to leave, he too would leave.

xi) Captain Yamauchi and the ship's agent then visited the Ellida Ace, which was the Capesize vessel on the adjoining berth. Again Captain Yamauchi advised the Ellida Ace's master to leave the berth and he decided to do so.

xii) The ship's agent then returned to the Ocean Victory and informed the Master that the Ellida Ace had decided to leave. The Master decided to leave and orders were given to deballast No.6 hold.

xiii) Consequent upon the decisions of the two masters, between about 0945 and 1015 arrangements were made by the ships' agent, SML, for the Ellida Ace to depart at 1200 and the Ocean Victory to depart at 1300.

xiv) At 1037 an email was sent by the ship's agent SML to the Master of the Ocean Victory setting out the terms of a notice issued by the Japanese Coast Guard. It referred to the expected northerly wind lasting until 26 October and advised that caution be exercised when berthing or unberthing. Other advice was given but there was no instruction or advice from the Coast Guard to evacuate Kashima. The agent ended by saying:-

"Of cause [sic], the final decision will be made by master".

As the judge held at paragraph 67 of the judgment, it was clear that this notice was not an evacuation alert or anything similar. It did not cause the Master to alter or question his decision to depart.

xv) The weather deteriorated rapidly during the course of the morning of 24th October. By 1110 the northerly wind offshore reached 46 knots (the equivalent to Force 9 on the Beaufort Scale); see paragraph 139 of the judgment.

xvi) Notwithstanding the arrangements which had been made for the vessels to depart at 1200 and 1300, they did not leave at those times. By 1140 the pilots at the port had postponed the departures because of high winds and poor visibility. They took the view that, because the speed of the wind recorded on the roof of the pilot office was between 20 and 30 m/s (which was indicative of force 8-10), and the visibility was so bad due to rain that a buoy just 250m. from the pilot office could not be sighted, there would be real difficulty in unberthing the vessels and turning them 180 degrees in such wind conditions. According to the judge's findings, however, the pilots did not consider that departure from the port would be difficult. The pilot in his statement said that all that was:-

> "required is merely to proceed in Kashima Waterway with a course maintained and speed increased. No special skill and local knowledge of a pilot is required any longer at that stage."

The departure of the Ellida Ace was postponed to 1400 and the departure of the Ocean Victory was postponed to 1500.

xvii) At 1150 the ship's agent informed the Master of the postponement of the shifting though, oddly, not of the revised times for departure. At 1200 the

Master confirmed to the agent that he had received and noted the ship's agent's message.

xviii) By 1200 the northerly winds offshore had reached 59 knots (force 11 on the Beaufort Scale); see paragraph 139 of the judgment. By this time the vessel was ready for departure and was standing by; see paragraph 71 of the judgment.

xix) By 1300 the wind and swell had increased and the vessel began to roll and range alongside the berth. One of the aft breast lines parted and the other mooring lines started to chafe on the shell plating. The Master ordered the lines to be greased. He also requested the agent to obtain two tugs to assist in holding the vessel safe alongside. At 1319 he sent an email to the agents and Captain Yamauchi reporting that the vessel was rolling and pitching and that two lines were broken. The Master requested "tug to push my ship asap."

xx) Two tugs arrived pursuant to this request and began to push on the portside of the Ocean Victory. Crew members were able to go ashore and reset the after-breast line which had parted. The Master said that at this stage he believed that neither his vessel nor the berth were any longer in danger. The mooring experts were agreed, however, that the use of tugs to hold a vessel at berth was an indication of severe conditions for vessel mooring.

xxi) The judge found that, although a note made by the ship's agent suggested that the Master had requested an "immediate departure", that was definitely not the case and that what had happened was that the ship's agent had decided, at about 1330, that, in the light of the information given to him by the Master concerning the parting of two mooring lines, the Ocean Victory should be taken out of the port ahead of the Ellida Ace.

xxii) By this time the pilots had decided that they could unberth the vessels because the wind had "calmed down" to about 18-20 m/s (about Force 8 on the Beaufort Scale) and the other side of Kashima Fairway could now be seen from the pilot's office; see paragraph 74 of the judgment.

xxiii) At about 1400, the pilot boarded the vessel with two further tugs sent to join those already holding the vessel against the berth, with the intention of unberthing the Ocean Victory. The Master was surprised because he had not been informed of the revised departure time. The judge found that the pilot "informed him that the vessel must leave the port for safety reasons." The Master formed the (erroneous) view that the port authorities required his vessel to leave and that he had no option but to comply. His own preference was to stay. In cross-examination he said that with the wind and high seas "it would be very dangerous to shift offshore" and that with tugs his position at berth was "relatively secure. If I could stay, surely I would stay, I would.":- see paragraph 75 of the judgment.

xxiv) The sailing plan was briefly discussed with the master. Four tugs would assist the vessel off the berth and the vessel would follow the course of the leading lights marked on the chart towards the anchorage keeping outside the 20m. depth contour. The vessel was drawing 9m. forward and 10.5 m. aft.

xxv) At 1430 the vessel departed from the Raw Materials Quay.

xxvi) At 1439 the vessel was exposed in the Kashima Fairway to N to NNW winds at Force 9, gusting Force 10 on the Beaufort Scale. By this time, all but one of the tugs had been released. The vessel proceeded along the Central Fairway towards the Kashima Fairway. The vessel, with the pilot on board, safely accomplished the port turn into the Kashima Fairway. Unexpectedly, so far as the Master was concerned, the pilot disembarked at the southern end of the breakwater onto the remaining tug. Before disembarking the pilot advised the Master to proceed on a course of 005 degrees and, when past buoy no.1, to steer north-east to the open seas. The course advised by the pilot was just to the east of the line of the leading lights marked on the chart. This was to keep the vessel more on the starboard side of the fairway. After the pilot had disembarked the engines were put at manoeuvring full ahead.

xxvii) At 1518 the vessel grounded on the breakwater. The Master lost control when the vessel had just entered open water in the Kashima Fairway, and the vessel was driven back onto the breakwater wall. The vessel became a total loss.

xxviii) Likewise the Ellida Ace also sought to leave Kashima on 24th October 2006 and failed to accomplish her departure in safety. After the pilot had disembarked from the Ellida Ace, that vessel sought the assistance of tugs because she was drifting to port. She subsequently grounded and was only refloated after a lengthy salvage operation.

41. We have set out the chronology of events as found by the judge (and in certain instances, by reference to the evidence). In addition, Mr Kendrick submitted that the following were significant points to note:-

i) First, as the judge appears to have accepted in paragraphs 110 and 128 of the judgment, the expert evidence was that the storm which affected Kashima on 24th October 2006 was: "exceptional in term of its rapid development, its duration and severity" (paragraph 110, 128[20]).

ii) Second, the storm became very much worse in a very short period after the 0900 morning conversation. None of the forecasts predicted the subsequent rapid deterioration and there was no suggestion that they could or should have done. Mr Kendrick submitted that this deterioration was significant for two reasons.

a) first, it represented a further, rare, meteorological factor which was necessary to create the danger which the judge had identified; and

b) second, the sudden deterioration in conditions meant that discussion and decisions made earlier on 24th October were superseded by events.

iii) At trial, the owners' complaint was that on that morning Captain Yamauchi or the ship's agent led the Master to believe that all ships were being ordered out

[20] The expert evidence was that taken as a whole it was, as at 2006, the most severe non-tropical storm to have struck Kashima since the port was founded "by a substantial margin". Indeed it was one of the three most severe storms of any kind to have struck the port in its history (the other two being typhoons or tropical storms).

and evacuated, when the Master would not otherwise have decided to leave. However the judge rejected this argument. He held that the Master wanted to stay at berth if he possibly could[21]. The Master's navigational judgment was to stay, and only what he thought was an evacuation order made the difference.

iv) The charterers made no suggestion at trial or on the appeal that the Master of the Ocean Victory was lying: the Master's grasp of English was poor and at trial he gave evidence through a translator. It was clear from the judgment that the Master simply misunderstood the situation. He thought he was being given an evacuation order, and had no choice but to go. He thought that he was not allowed to make a navigational decision[22].

The judge's findings on the safe port issue

42. The judge held that the port was unsafe because of the possible coincidence of two events: first, the phenomenon of swell from long waves, which might have forced the vessel to leave the berth, and, second, a very severe northerly gale which meant that the vessel could not safely exit the port. Although he held that "it may well be a rare event for these two events to occur at the same time"[23], he went on to hold that: "Even if the concurrent occurrence of those events is a rare event in the history of the port, such an event flows from the characteristics or features of the port[24]", and accordingly the port was unsafe because, this concurrence of "long waves and gale winds must be 'at least foreseeable' in Kashima"[25]. Accordingly the judge held that the port of Kashima was unsafe, because the concurrence of long waves and a severe northerly gale preventing a vessel from leaving the port, could not be characterised as an "abnormal occurrence" so as to prevent a breach of the safe port warranty.

43. The critical paragraphs of the judgment which set out the judge's ratio in relation to the safe port issue are paragraphs 126 to 129 and 134:-

> "126. *Wilford on Time Charters* 6thed. describes an abnormal occurrence as one "which is unrelated to the prevailing characteristics of the port" or to put the matter another way, "a port will be unsafe only if the danger flows from its own qualities or attributes"; see paragraphs 10.39 and 10.41. This statement of principle, based upon authorities to which the learned editors referred, was not challenged.
>
> 127. The danger facing OCEAN VICTORY was one which was related to the prevailing characteristics of Kashima. The danger flowed from two characteristics of the port, the

[21] Judgment paragraph 75. See also paragraph 63 of the Master's statement: "In the circumstances, leaving the berth would have been near to being the last option to consider. This is because if the weather conditions were so severe that this became necessary, it was likely to be very difficult to manoeuvre the ship in those same conditions. In my judgment, the ship was always likely to be safer if she stayed in berth and was held against the berth by tugs if needed."

[22] See paragraph 138 iii) of the judgment. Indeed shortly after the incident he said that it was his agent who had given him the order.

[23] See paragraph 127 of the judgment.

[24] See paragraph 128 of the judgment.

[25] See paragraph 129 of the judgment.

vulnerability of the Raw Materials Quay to long swell and the vulnerability of the Kashima Fairway to northerly gales caused by a local depression. It may well be a rare event for these two events to occur at the same time but nobody at the port could, I consider, be surprised if they did. There is no meteorological reason why they should not occur at the same time. Long waves were clearly a feature of the port (as they must be of any port facing the Pacific) and low pressure systems generating gale force winds cannot, in my judgment, be regarded as abnormal. I do not consider that the juxtaposition of long waves and a low pressure system generating gale force winds from the north amounts to an abnormal occurrence unrelated to the characteristics of Kashima. Long waves may give rise to a need for a vessel to leave the port. It may be a matter of chance whether at that time there is also a low pressure system generating gale force winds from the north but I am unable to accept that such winds are so rare that they cannot be said to be a feature of the port. It is not without significance that the Guide to Port Entry notes that during periods of northerly swell the entry channel is fully exposed and that vessels at low speed generally have difficulty in steering.

128. It may be that the storm which affected the port on 24th October 2006 was one of the most severe storms to have affected Kashima in terms of severity, speed of deterioration and duration as suggested by Mr. Lynagh's analysis of its characteristics. But the relevant characteristics are those which give rise to the danger, namely the occurrence of long waves and northerly gales. Neither long waves nor northerly gales can be described as rare. Even if the concurrent occurrence of those events is a rare event in the history of the port such an event flows from characteristics or features of the port.

129. I was referred the observations of Mustill J. in the Mary Lou [1981] 2 Lloyd's Reports 272. He said that an abnormal occurrence was not something which "could be said, if the whole history of the port were regarded, to have been out of the ordinary". If "events of the type and magnitude in question are sufficiently regular or at least foreseeable to say that their occurrence is an attribute or characteristic of the port" then they will not be an abnormal occurrence. (The decision of Mustill J. in the Mary Lou that the breach occurred only at the moment of nomination was overruled in the Evia (No.2) but Mustill J.'s explanation of an abnormal hazard was not criticised.) Long waves and northerly gale winds must be "at least foreseeable" in Kashima.

……..

134. I have therefore concluded that when the Charterers ordered the vessel to discharge her cargo at Kashima that port

> was prospectively unsafe for OCEAN VICTORY. There was a risk that the vessel might have to leave, or be advised to leave, the port on account of long waves or bad weather (because it was feared that she could not be restrained by her moorings or the use of tugs) at a time when the wind and sea conditions in the channel were such that more than ordinary seamanship and navigation were required to enable the vessel to leave the port safely. There was no system to ensure that when any such departure was necessary or advised the vessel could safely leave."

The charterers' submissions as to why the judge was wrong in relation to the safe port issue

44. The following is a summary of the submissions made by Mr Kendrick QC on behalf of the charterers:-

i) There was no breach of the safe port undertaking. By the safe port undertaking, the charterers did not assume responsibility for loss from every foreseeable risk at the port to which the ship was ordered. They assumed responsibility only for risks which were sufficiently regular or sufficiently foreseeable to amount to an attribute or feature of the port.

ii) The prospective nature of the undertaking was material to the test, because the right way to approach this test was to imagine a charterer with full knowledge of the port giving the order on the relevant day. He had to ask himself: "will the port be safe for the ship to reach, use and depart from?" If he could say "yes", then, barring some abnormal occurrence, there was no breach. So a charterer did not assume the risk of loss from an unusual event which was not characteristic of the port at the time when the ship should be there. The obligation to give indemnity for loss from such unusual events lay properly and legally with the owner's hull insurers.

iii) The phrase "abnormal occurrence" was not a term of art. An occurrence was just an event - something that happened on a particular time at a particular place in a particular way. "Abnormal" was something well removed from the normal. It was out of the ordinary course and unexpected. It was something which the notional charterer would not have in mind.

iv) A rare event could not be "an attribute" of a port. It was, in the language of the cases, an "abnormal occurrence" and so outside the undertaking. The judge erred in law in holding that a rare event was a feature of the port.

v) The judge erroneously held that it did not matter if the event was rare or unexpected, provided it arose from the combined occurrence of two or more characteristics or attributes of the port.

vi) Words such as "characteristic" or "attributes of the port" were tools to help identify what arose in the ordinary course. They were not intended to bring events well out of the ordinary course into the scope of the charterers' undertaking.

vii) The judge went wrong by breaking down the question into components instead of asking one unitary question, namely: would it be an unexpected event for Capesize vessels calling at Kashima to find it necessary to leave the berth due to danger from a long-wave swell at the very time when it was dangerous to transit the Fairway? The judge's approach was to consider whether long waves and strong northerly winds from low pressure storms affecting navigation in the Kashima Fairway were respectively "attributes" of the port. Having reached the conclusion that they were "attributes", he wrongly assumed that it did not matter how rare their combination was.

viii) On the facts, the combination of the two weather events (namely long waves and strong northerly winds from low pressure storms) had never apparently happened in the previous 35 years preceding the instruction to proceed to Kashima. Accordingly the conditions on 24th October were an abnormal occurrence for which the charterers were not liable.

Gard's submissions as to why the judge was right

45. The following is a summary of the submissions made by Mr Russell QC on behalf of the owners:-

i) An occurrence was not abnormal just because, having regard to the whole history of the port, it was out of the ordinary (The Mary Lou [1981] 2 Lloyd's Rep. 272 at p. 278 col. 2).

ii) What was relevant was whether the risk of the event occurring arose from attributes of the port or its set-up (The Mary Lou, *loc. cit.*; The Evia (No. 2) [1982] 1 Lloyd's Rep. 334 CA at p. 338, *per* Lord Denning MR; [1983] 1 AC 736 at p. 757E, *per* Lord Roskill).

iii) If events of the type and magnitude of the occurrence were, having regard to the port's characteristics, attributes or set-up, "sufficiently regular or at least foreseeable", then the charterer's choice of port "involve[s] a choice by the charterer of the risks of this … event … " (The Mary Lou, *loc. cit.*; The Houston City [1956] AC 266 at p. 279; The Evia (No. 2) [1983] 1 AC 736 at p. 757E).

iv) Thus "a port will be unsafe only if the danger flows from its own qualities or attributes"; see Wilford on Time Charters (6th ed.) at §§ 10.39 and 10.41.

v) The correct question which the court had to ask is: "what was the source of the unsafety?"; see The Lucille [1983] 1 Lloyd's Rep. 387 at p. 394, [1984] 1 Lloyd's Rep. 244 CA at pp. 250-251, where Bingham J. asked in effect whether the loss (in that case, the trapping of the vessel) was caused by the acknowledged unsafety of the port (the outbreak of hostilities) or some different source. His approach, upheld by the Court of Appeal, was simply an application of normal principles of contractual causation. If the loss was caused by the unsafety of the port, it was not, and could not be, caused by an abnormal occurrence.

vi) The judge was correct in the approach which he took to the characterisation of the port's attributes and their forseeability. An abnormal occurrence was more of a *deus ex machina* event than what occurred at Kashima on 24th October 2006.

vii) The judge was correct in his conclusion that the concurrence of long waves and northerly gales was not an abnormal occurrence. The judge's reasoning and conclusion was underpinned by the history of long waves at the port; the port's exposure to and the frequency of northerly gales; and the law.

viii) In his analysis[26], he correctly identified that:-

> "the relevant characteristics are those which give rise to the danger, namely the occurrence of long waves and northerly gales";

not the frequency of the particular weather event itself. Although the charterers had emphasised, for example, the storm's unusual duration, that was an irrelevant factor. As the casualty occurred at a fairly early stage of the storm, its duration was always irrelevant.

ix) For the danger in question to arise, all that was required, so far as safe navigation was concerned, was a combination of wind and waves of severity and duration sufficient to pose a danger to safe navigation by a Capesize in the Kashima Fairway. The evidence showed that such combinations did indeed arise at Kashima fairly frequently. In this context Mr Russell relied upon the cross-examination of Captain Yamauchi[27]. Mr Kendrick was wrong to submit on the evidence that the combination of events had never happened in the 35 year history of the port. Certainly the combination was known. Indeed there had been an incident on 6th October 2006 when a vessel had had to depart the port because of long waves in severe weather conditions.

x) It could therefore fairly be considered to be a characteristic of Kashima port that wind and waves do from time to time combine to make navigation out of the port unsafe for vessels like the Ocean Victory. It was unnecessary that long waves should be sufficiently severe as to cause mooring breakout, given the evidence that the local response was to evacuate vessels on an *ad hoc* basis before things got that far. As the judge correctly remarked, there:-

> "is no meteorological reason why [long waves and northerly gales] should not occur at the same time" and "nobody at the port could … be surprised if they did."[28]

Indeed, long waves and strong winds from the northerly quadrant had occurred in combination as recently as 6th October 2006.

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[26] See the judgment at paragraph 128.

[27] AB4/27.

[28] See paragraph 127 of the judgment.

xi) The charterers' argument that the combination of these two characteristics of the port was rare and thus abnormal was misguided. The correct analysis as a matter of law was that both were characteristics of the port. Ordering the vessel to Kashima therefore exposed her to the (if relevant, sufficiently) foreseeable danger of their co-incidence. There was no system in place at the port to address that danger (as there was with typhoons and tropical storms) and so the order was the effective cause of her loss.

Discussion and determination

Overview

46. As Mr Kendrick submitted, at first sight the judge's conclusion seems somewhat surprising. It has the result that a modern port, with a first-class safety record and with a large volume of ships and major industrial entities using it, was unsafe in 2006 and had been unsafe for 40 years previously, notwithstanding that there had been no previous casualty of a similar nature[29]. Since 1971 5,316 Capesize vessels had safely called at and departed the port, without relevant incident. No ship had ever broken free from her moorings at the port; there had never been an accident in the Fairway when vessels were departing. We agree with Mr Kendrick that the casualty could rightly be described not merely as "remarkable"[30] but also as unprecedented.

47. Indeed on the judge's conclusion, the port remains unsafe to date, since the changes to port procedures made since the casualty would not have prevented it had they been in place in 2006[31]. Yet no similar incidents to that befalling the Ocean Victory and the Ellida Ace as they sought to leave Kashima on 24th October 2006 have occurred subsequently.

The essential facts

48. Reduced to their bare minimum, the essential facts, whether as found by the judge or otherwise appearing from the evidence adduced at trial, can, we consider, usefully be summarised as follows:-

i) Long waves affected the Raw Materials Berths at Kashima about two to three times a year. Their incidence was not predictable.

ii) Low pressure systems off the coast of Japan could not be regarded as unusual. From time to time storms caused by low pressure, non-tropical storms, produced gale force winds from the northerly/north-easterly quadrant which made the Kashima Fairway unnavigable by Capesize vessels. The evidence showed that in the period 1986 to 2010 there had been approximately 22 such storms (or possibly fewer) – i.e. fewer than one a year.

iii) Sometimes, for whatever reason (for example, long waves or bad weather), vessels were advised to leave the Raw Materials Quay and to exit the port to

[29] For example the only reference in the evidence to an incident involving loss of life at the Raw Materials Quay was to an incident in 2003 caused by shore gantry crane contacting a continuous unloader which then hit the ship.
[30] See paragraph 2 of the judgment.
[31] See paragraphs 130-131 of the judgment.

take refuge in the open sea. There was no evidence at trial to suggest that there had historically been any actual incident of "mooring break out"[32]. But the reasons for leaving port were clearly related to the practical difficulties, dangers and expense involved in keeping the vessel moored at the berth, when there was no possibility of discharge of cargo taking place. The dangers included the risk that a vessel might not be restrained at berth by the use of her moorings or tugs or might be damaged.

iv) The evidence showed[33] that, apart from ships evacuating the port due to typhoon warnings (which both parties' experts agreed were irrelevant to the issue), in the 5/6 year period 2001-2006 only 4-5 vessels left the Raw Materials Quay, departed the port and then returned. It was clear from the evidence at trial that the Ellida Ace had departed the port on 6th September 2006 in circumstances where the berth had been affected by long waves generated by a typhoon far away. It was not clear from the evidence whether the other 3-4 departures were occasioned by swell from long waves or bad weather. As the judge said:

> "It seems likely that the other vessels must have left either in similar circumstances or where there was particularly bad weather."[34]

v) However, apart from the one instance referred to in the charterers' evidence relating to the period 1996-2005 (which the judge in any event rejected), there was no evidence that any of the 4-5 departures from port in the period 2001-2006 occurred at a time when the weather conditions in the Kashima Fairway were severe, let alone at a time when navigation of the Fairway was dangerous or impossible for Capesize vessels, because of gale force winds from the northerly/northeasterly quadrant (i.e. Beaufort scale 8 or above). Thus, when the Ellida Ace left port because of long waves affecting her berth at the Raw Materials Quay, there were good weather conditions (Beaufort scale 4) and she had no difficulty in navigating the Fairway. Moreover, the 6th October 2006 incident, upon which Mr Russell sought to rely in his argument, was, on analysis, irrelevant. It related to weather conditions created by a tropical storm (Bebinka), which the experts agreed (and the judge appears to have concluded) was outside the relevant cohort of incidents to consider. Moreover, apart from the departure having occurred after the date of the Charterers' order for the vessel to proceed to Kashima, the vessel in question was a larger vessel (a VLCC), it left from a different, more exposed berth (the Raw Materials Quay having not apparently been affected on that occasion) and it appeared to have had no difficulty in navigating the Kashima Fairway in a Force 7 near gale. For these reasons, as Mr Kendrick submitted, the incident received very little attention at trial. The judge did not refer to it in his judgment.

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[32] However there was evidence that: "a senior pilot at the port confirmed that when the berth was affected by long swell mooring lines were liable to break and a decision might be taken to move the vessel out of the port. At an investigation into the OCEAN VICTORY casualty a manager of Sumitomo Metal Logistics, the ship's agent at the port, said that he was aware of vessels which had left the port in winter in circumstances where movement at the berth could not be stopped by the use of tugs though he was not aware of a vessel having to depart in the autumn as the result of an approaching low pressure system." See paragraphs 14 of the judgment.

[33] See for example paragraph 14 of the judgment and the evidence referred to therein.

[34] See paragraph 14 of the judgment.

vi) Nor was there any evidence in relation to these 4-5 departures (other than in relation to the Ellida Ace) as to the degree of danger or damage (if any) to which any of the vessels were subject, in remaining at their berths at the Raw Materials Quay in periods of swell from long waves.

vii) Most significantly, there was no evidence adduced either at trial, whether directly, or indirectly by reference to the evidence adduced at the inquiry by the authorities in Japan into the casualty, which established:-

a) that any of these 4-5 departures from port had occurred in circumstances where: (i) there were long waves affecting the Raw Materials Quay to such a degree that it was unsafe to stay at the berth because of the risk of mooring break out or damage; *and* (ii) the weather conditions in the Kashima Fairway were so severe as to make navigation of the Fairway dangerous or impossible for Capesize vessels, because of gale force winds from the northerly/northeasterly quadrant ("the critical combination");

b) that there had been any previous incident in the port's 35 year history where it had been unsafe for a vessel to remain at the Raw Materials Quay because of the swell from long waves and, simultaneously, unsafe for that vessel to leave port because gale force winds from the northerly/northeasterly quadrant made navigation of the Kashima Fairway dangerous; in particular, there was no evidence that on any such occasion:

i) a Capesize vessel had been "trapped" in dangerous conditions at its berth and suffered damage or mooring break out; or

ii) a Capesize vessel had left the Raw Materials Quay because of the danger of the swell from long waves but had nonetheless successfully navigated the Fairway despite the dangerous conditions; or

iii) a Capesize vessel had left the Raw Materials Quay because of the danger of the swell from long waves, had unsuccessfully navigated the Fairway in dangerous conditions and had come to grief, whether becoming a total casualty or suffering lesser damage;

c) (apart from the evidence referred to above as to the frequency of low pressure storms, long waves and departures from the Raw Materials Quay etc.), that the critical combination (i.e. long waves affecting the Raw Materials Quay making it unsafe for a vessel to remain at berth occurring simultaneously with conditions in the Kashima Fairway being so severe as to make navigation of the Fairway dangerous or impossible for Capesize vessels, because of gale force winds from the northerly/northeasterly quadrant), was a regular, periodic or even an occasional occurrence.

viii) Indeed there was no evidence, expert or otherwise, as to the frequency or regularity (if any) of the critical combination of the two dangers, other than the negative evidence that no incident similar to those which had befallen the Ocean Victory and the Ellida Ace on 24th October 2006 had happened previously. Contrary to Mr Russell's submission, nothing in the cross-examination of Captain Yamauchi addressed this particular issue. If it had done so, the judge no doubt would have referred to it. He did not do so.

ix) According to the evidence of the charterers' weather expert, Mr. Lynagh (which the judge refers to at paragraph 110 of the judgment and appears in fact to have accepted), the storm which affected Kashima on 24th October 2006 was exceptional in terms of its rapid development, its duration and its severity. Mr Lynagh stated at paragraph 15.11 of his report:-

> "15.11 Taking account of both magnitude and duration, my conclusion is that the 3 most severe events over coastal waters in the vicinity of Kashima in the period 1960-2006 were the "Ocean Victory" event, the "Bebinca" event and the "Oscar" event. These were substantially more severe than any others during the period. The "Bebinca" event appears to have been slightly more severe than the "Ocean Victory" event though the difference is small. The "Oscar" event was more severe than the "Ocean Victory" event in terms of wind but less severe in terms of wave height. Of the 3 events, only the "Ocean Victory" event was unrelated to a tropical cyclone. In the 47 year period 1960-2006 the "Ocean Victory" event was, by a substantial margin, the most severe event in the vicinity of Kashima not related to a tropical cyclone. In that sense it was a unique event in the history of the port from the time of its opening up to the time of the "Ocean Victory" incident. The port was opened in 1969."

The judge's approach

49. It was in that evidential context that the judge concluded that the casualty did not occur as a result of an abnormal occurrence. The core of his reasoning appears from paragraphs 127 to 129 of the judgment (which we have already summarised and quoted in paragraphs 42-43 above). On analysis his approach appears to have been that, in deciding whether the casualty resulted from an abnormal occurrence:-

i) he did not need to consider the evidence relating to how "rare" the critical combination of the two component dangers was, although, without analysing the evidence in any detail, he was prepared to hold that "it may well be a rare event for these two events to occur at the same time"[35];

[35] See paragraph 127 of the judgment.

ii) he did not need to consider whether the critical combination was rare, because "Even if the concurrent occurrence of those events is a rare event in the history of the port[36]," what mattered was that:-

a) separately the two component features of the critical combination were characteristics or attributes of the port;

b) looked at separately, neither of the two component features could be said to occur "rarely"; long waves and northerly gale winds were at least foreseeable in Kashima;

c) there was no meteorological reason why the two component features should not occur at the same time; despite the fact that that the storm which affected Kashima on 24th October 2006 may have been exceptional in terms of its rapid development, its duration and its severity, there was a clear risk of gale force winds from the northerly quadrant in the Kashima Fairway at the same time as long waves were affecting the Raw Materials Quay;

d) therefore, it was necessarily foreseeable that at some stage the critical combination would occur and nobody could be surprised if it did; and

e) the critical combination was accordingly an event which "….. flow[ed] from the characteristics or features of the port[37]";

iii) accordingly, in those circumstances the critical combination could not be said to be an "abnormal occurrence"; in the language of Mustill J (as he then was) in the Mary Lou [1981] 2 Lloyd's Reports 272, the critical combination was not something which "could be said, if the whole history of the port were regarded, to have been out of the ordinary"; again, adopting Mustill J's words, long waves and northerly gale winds were "events of the type and magnitude in question [which were] sufficiently regular or at least foreseeable to say that their occurrence is an attribute or characteristic of the port", so as not to amount to an abnormal occurrence; the critical combination flowed from those characteristics and therefore could not be an abnormal occurrence .

Critique of the judge's approach

50. We consider with all due respect that the logic of the judge's approach to the issue of abnormal occurrence is flawed. Our reasons may be stated as follows.

51. The nature of a charterer's safe port warranty is well established. As Lord Diplock said in The Evia (No. 2) [1983] 1 AC 736 at 149:-

> "For my part, I would regard the nature of the contractual promise by the charterer that a chartered vessel shall be employed between safe ports ("the safe port clause") as having been well settled for a quarter of a century at the very least. It was correctly and concisely stated by Sellers L.J. in Leeds

[36] See paragraph 128 of the judgment.
[37] See paragraph 128 of the judgment.

> Shipping Co. Ltd. v. Société Francaise Bunge (The Eastern City) [1958] 2 Lloyd's Rep. 127 in a classic passage which, in its reference to "abnormal occurrence," reflects a previous statement in the judgment of Morris L.J. in Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp and Paper Mills Ltd. (The Stork) [1955] 2 Q.B. 68. Sellers L.J. said, at p. 131:-
>
> "a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship …"
>
> It is with the prospective safety of the port at the time when the vessel will be there for the loading or unloading operation that the contractual promise is concerned and the contractual promise itself is given at the time when the charterer gives the order to the master or other agent of the shipowner to proceed to the loading or unloading port."

Lord Roskill (in a speech to which Lord Brandon had contributed and with which the other members of the committee agreed) amplified the nature of the promise, and of the "abnormal occurrence" exception, in his speech at 757:

> "In order to consider the scope of the contractual promise which these eight words impose upon a charterer, it must be determined how a charterer would exercise his undoubted right to require the shipowner to perform his contractual obligations to render services with his ship, his master, officers and crew, the consideration for the performance of their obligation being the charterer's regular payment of time charter hire. The answer must be that a charterer will exercise that undoubted contractual right by giving the shipowner orders to go to a particular port or place of loading or discharge. It is clearly at that point of time when that order is given that that contractual promise to the charterer regarding the safety of that intended port or place must be fulfilled. But that contractual promise cannot mean that that port or place must be safe when that order is given, for were that so, a charterer could not legitimately give orders to go to an ice-bound port which he and the owner both knew in all human probability would be ice-free by the time that vessel reached it. Nor, were that the nature of the promise, could a charterer order the ship to a port or place the approaches to which were at the time of the order blocked as a result of a collision or by some submerged wreck or other obstacles even though such obstacles would in all human probability be out of the way before the ship required to enter. **The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question and in my view means that when the order is given that port or place is prospectively safe for the ship to get to, stay**

> **at, so far as necessary, and in due course, leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if, in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial. So to hold would make the charterer the insurer of such unexpected and abnormal risks which in my view should properly fall upon the ship's insurers under the policies of insurance the effecting of which is the owner's responsibility** under clause 3 unless, of course, the owner chooses to be his own insurer in these respects." [Our emphasis.]

52. The import of these passages is clear. A charterer does not assume responsibility for unexpected and abnormal events which occur suddenly and which create conditions of unsafety after he has given the order to proceed to the relevant port. These are the responsibility of the ship's hull insurers (if owners have insured) or of owners themselves. Moreover the concept of "safety" is necessarily not an absolute one. As the Court of Appeal said in The Saga Cob [1979] 1 Lloyd's Rep. 548 at 551, column 2, in the context of political risk:-

> "In the latter case [the safe port warranty] one is considering whether the port should be regarded as unsafe by owners, charterers, or masters of vessels. It is accepted that this does not mean that it is unsafe, unless shown to be absolutely safe. It will not in circumstances such as the present be regarded as unsafe unless the "political" risk is sufficient for a reasonable shipowner or master to decline to send or sail his vessel there."

53. A similarly realistic approach has in our view to be adopted to the determination of the essentially factual question whether the event giving rise to the particular casualty is to be characterised as an "abnormal occurrence" or as resulting from some "normal" characteristic of the particular port at the particular time of year. We emphasise the word "normal" in the term "normal characteristic". It was used by Lord Diplock when he observed in The Evia (No. 2) at 749 that:-

> "…it is not surprising that disputes should arise as to whether damage sustained by a particular vessel in a particular port on a particular occasion was caused by an "abnormal occurrence" rather than resulting from some normal characteristic of the particular port at the particular time of year."

The term was also used in The Saga Cob at 550, column 2, to 551, column 1, in an illuminating passage which emphasises that the fact that an event (in that case a guerrilla attack) was theoretically foreseeable did not make it an "normal characteristic" of the port:-

"Be that as it may, there is no evidence whatever that the system introduced after the *Omo Wonz* had any defects until the attack on Saga Cob itself when at anchor four or five miles outside the port. This cannot in our judgment be regarded as other than an abnormal and unexpected event unless it is to be said that as from the *Omo Wonz* incident, any vessel proceeding to or from Assab or Massawa was proceeding to an unsafe port. This in our judgment is untenable. The situation in this case was drastically different from that in *The Lucille* when the Shatt-al-Arab had become the centre of hostilities. All that can be said in this case is that since a guerrilla attack may take place anywhere at any time and by any means, that the guerrillas had two boats and that they had made one seaborne attack 65 miles away, it was foreseeable that there could be a seaborne attack either en route from Assab to Massawa or in the anchorage at Massawa. If this were enough it would seem to follow that, if there were a seaborne guerrilla or terrorist attack in two small boats in the coastal waters of a country in which there had been sporadic guerrilla or terrorist activity on land and which had many ports, it would become a normal characteristic of every port in that country that such an attack in the port or whilst proceeding to it or departing from it was sufficiently likely to render the port unsafe. This we cannot accept. *Omo Wonz* was itself clearly an isolated abnormal incident and, until the order to proceed to Massawa almost three months later, nothing further had occurred to suggest that the risk of further attack on the Assab/Massawa voyage or in the anchorage at Massawa had not been contained. In such circumstances, to say that such an attack or even the risk of such an attack was a normal characteristic of the port, is in our view impossible.

As to the letter of the master immediately after the *Omo Wonz* incident we do not consider that it can be regarded as of any importance. The master was no doubt at the time alarmed but thereafter he visited Massawa on several occasions despite the provisions of the charter-party entitling him to refuse. The charterers expressly disclaim any arguments that by entering into the charter-party the owners accepted the risks but it appears to us that the master's actions indicate clearly that whatever he may have thought immediately after the *Omo Wonz* incident he, like every one else, considered that Massawa was a safe port.

We further consider that what occurred subsequently is relevant on the question whether Massawa was a safe port.

We accordingly hold that on the Aug. 26. 1988 Massawa was a safe port."

54. Likewise, Mustill J in the Mary Lou [1981] 2 Lloyd's Reports 272, at 278, column 2, in his description of what constitutes an abnormal occurrence, implicitly recognised the need to approach the identification of an abnormal occurrence realistically and having regard to whether the event had occurred sufficiently frequently so as to become a characteristic of the port:-

> "The abnormal nature of the occurrence which causes the loss is also relevant in a different way, in that it bears upon the question where there is a breach of warranty if the ship does comply with the order and suffers damage in the port. The mere happening of the casualty does not necessarily imply a breach. The warranty does not involve a guarantee that a properly navigated ship will be in all circumstances free from danger in the port. Certain accidents are due to misfortunes which are not the direct consequence of the order to the port, for instance, if a storm of unprecedented violence catches the ship in the nominated port and drives her ashore. The choice of port is an indirect cause of the loss for the ship would have escaped loss if she had not been ordered to some other port. But it is not the direct cause, for the choice of port does not involve a choice by the charterer of the risk of this unexpected event. In this context, also it is not easy to find a turn of phrase which accurately expresses the notion. It may be said that the loss is not recoverable unless events of this type and magnitude are sufficiently regular or at least foreseeable to say that their occurrence is an attribute or characteristic of a port, or it may be said that abnormal or casual events do not found a claim."[38]

55. In our view the judge went wrong in his analysis in a number of respects. First of all he failed to formulate the critical – and *unitary* – question which he had to answer: namely, whether the simultaneous coincidence of the two critical features, viz. (a) such severe swell from long waves that it was dangerous for a vessel to remain at her berth at the Raw Materials Quay (because of the risk of damage or mooring break out) and (b) conditions in the Kashima Fairway being so severe because of gale force winds from the northerly/northeasterly quadrant), as to make navigation of the Fairway dangerous or impossible for Capesize vessels, was an abnormal occurrence or a normal characteristic of the port of Kashima? Or put even more simply, was it an abnormal occurrence or a normal characteristic of the port that a vessel might be in danger at her berth at the Raw Materials Quay but unable at the same time safely to leave because of navigation dangers in the Kashima Fairway arising from the combination of long waves and gale force northerly winds which, in fact, occurred.

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[38] Although Mustill J's decision that the safe port warranty connoted an absolute continuing contractual promise by charterers that not merely at the date of nomination, but at no time during her chartered service would the vessel find herself at any port which was, or had become, unsafe, was overruled by the House of Lords in *The Evia,* his description of an abnormal occurrence was not criticised. The judge at paragraph 129 of the judgment appears to have been confused when he stated: "The decision of Mustill J. in the *Mary Lou* that the breach occurred only at the moment of nomination was overruled in the *Evia (No.2).*" It was the House of Lords which held that whether there had been a breach of the warranty had to be decided at the date of nomination: see e.g. *The Evia (No.2)* at 763 B-D.

56. On the contrary, instead of asking the unitary question directed at establishing the correct characterisation of the critical combination (abnormal occurrence or normal characteristic of the port), the judge merely addressed the respective constituent elements of the combination (swell from long waves making it dangerous for a vessel to remain at the Raw Materials Quay and gale force winds from the northerly/northeasterly quadrant making navigation of the Fairway dangerous or impossible for Capesize vessels) separately. He looked at each component and decided that, viewed on its own, neither could be said to be rare and both were attributes or characteristics of the port. That was the wrong approach; what mattered was not the nature of the individual component dangers that gave rise to the events on 24th October, but the nature of the event (i.e. the critical combination) which gave rise to the vessel (on the judge's findings) effectively being trapped in port.

57. He then compounded his previous error by concluding that, even if the critical combination was rare, nonetheless it was a characteristic of the port, apparently for two reasons:-

i) first, because, although:-

> "It may well be a rare event for these two events to occur at the same time but nobody at the port could, I consider, be surprised if they did. There is no meteorological reason why they should not occur at the same time";[39] and

ii) secondly, because:-

> "Even if the concurrent occurrence of those events is a rare event in the history of the port such an event flows from characteristics or features of the port". [40]

Both reasons in our view are fallacious.

58. The first reason ("nobody at the port could, I consider, be surprised if they did.") appears to based on the idea that, provided an event is theoretically foreseeable as possibly occurring at the relevant port, because of the port's location, then that is enough to qualify the event as a "characteristic of the port". The judge appears to have derived this test from dicta from the judgment of Mustill J in The Mary Lou at 278, column 2[41], which the judge selectively quotes in paragraph 129 of the judgment, where he refers to long waves and northerly gale winds as being "at least foreseeable". But satisfaction of the test of mere "foreseeability" is *per se* clearly not sufficient to turn what the judge himself described as "a rare event in the history of the port" into a normal characteristic or attribute of the port. The error of the judge, in our view, was to pick up on the words "at least foreseeable" in his citation from Mustill J's judgment, and to use minimum foreseeability, without more, as some sort of litmus test for establishing whether an event was a characteristic of a port, without having any regard to significant factors such as the actual evidence relating to the past history of the port, the frequency (if any) of the event, the degree of forseeability of

[39] See paragraph 127 of the judgment as well as paragraph 110.
[40] See paragraph 128 of the judgment.
[41] For the full passage see the citation at paragraph 54 above.

the critical combination and the very severe nature of the storm on the casualty date. In doing so, the judge departed from the orthodox and practical approach by Mustill J, as set out in the full passage of his judgment quoted above, and indeed that of Lords Diplock and Roskill in The Evia (No.2), to the question of whether an event was abnormal, which necessarily includes an examination of the past history of the port and whether, in that evidential context, the event was unexpected, but also took the phrase "at least foreseeable" as used by Mustill J out of context. In our view it is clear, when the passage is read in context, that Mustill J certainly was not suggesting that mere, theoretical, forseeability on its own was sufficient. Whether or not, as Mr Kendrick suggested, Mustill J intended the adverb "sufficiently" to modify the word "foreseeable", Mustill J was not setting up some sort of alternate test which excluded considerations of questions such as the frequency of past occurrences of the particular event, or the degree of likelihood that the event was to occur in the future.

59. Moreover, as the Court of Appeal emphasised in The Saga Cob in the passage cited above[42], one has to look at the reality of the particular situation in the context of all the evidence, to ascertain whether the particular event was sufficiently likely to occur to have become an attribute of the port, otherwise the consequences of a mere foreseeability test lead to wholly unreal and impractical results. That point may be illustrated by examples given by charterers in their written argument: does the mere fact that it is "foreseeable" from the location of San Francisco that earthquakes may occur in its vicinity, or from the location of Syracuse, beneath Mount Etna, that there may be volcanic explosions in its vicinity, predicate that any damage caused to vessels in those ports from such events, were they to occur in the future, would flow from the "normal characteristics or attributes" of those ports, and therefore necessarily involve a breach of any safe port warranty? The answer is obviously not; whether, in such circumstances, there would be a breach of the safe port warranty, or the event would be a characterised as an abnormal occurrence, would necessarily depend on an evidential evaluation of the particular event giving rise to the damage and the relevant history of the port.

60. Perhaps most significantly under this head, the judge provides no evidential basis for his apparent factual conclusion that "nobody at the port could, I consider, be surprised" if the crucial combination occurred, or for the conclusion reached earlier in paragraph 110 of the judgment that "there must have been… a clear risk of gale force winds from the northerly quadrant in the Kashima Fairway at the same time as long waves were affecting the Raw Materials Quay."

61. In the light of the evidence to the effect that no vessel in the port's history had been dangerously trapped at the Raw Materials Quay, with a risk of damage or mooring break out, at the same time as the Kashima Channel was not navigable because of gale force winds, it is difficult to see how he reached this conclusion. This may be because he did not adequately focus evidentially on the particular situation which he had to consider, namely one where a vessel was effectively trapped, because the swell from long waves affecting vessels berthed at the Raw Materials Quay was so severe that it was dangerous for a vessel to remain there (as opposed to merely a situation where long waves caused swell and a vessel decided to leave the Raw Materials Quay) and the Kashima Channel not being navigable because of gale force winds. It may also be because he did not give adequate weight to the evidence of Mr. Lynagh (which he

[42] See paragraph 53 above.

gives no cogent reason for rejecting) that the storm which occurred on 24th October was exceptional in terms of its rapid development, its duration and its severity (see para 48 (ix) above).

62. The second reason given by the judge ("Even if the concurrent occurrence of those events is a rare event in the history of the port such an event flows from characteristics or features of the port") is, in our view, equally flawed. As we have already stated in paragraphs 55 and 56 above, what the judge had to decide was whether "the concurrent occurrence of those events" (i.e. the critical combination) was itself a normal characteristic of the port or an abnormal occurrence. That was the relevant event which the judge had to characterise. It simply did not follow, logically or otherwise, from the fact that that event arose from (or, as the judge said, "flow[ed] from") the combination of two individual dangers, which he had held were normal characteristics or attributes of the port, that the "concurrent occurrence of those events" was also a normal characteristic or attribute of the port.

63. In deciding whether the critical combination was itself a normal characteristic of the port or an abnormal occurrence, what the judge should have done was to evaluate the evidence relating to the past frequency of such an event occurring and the likelihood of it occurring again. He should have also, in our view, have taken into account what appears to have been the unchallenged evidence of Mr Lynagh referred to above relating to the exceptional nature of the storm that affected Kashima on 24th October 2006 in terms of its rapid development, its duration and its severity. Had he done so, then, on the basis of his own finding that "the concurrent occurrence of those events was rare", and on the basis of the evidence which we have summarised above, there would, in our view, have been only one conclusion which he could have reached – namely that the event which occurred on 24th October 2006 was indeed an abnormal occurrence.

64. For the above reasons we conclude that the conditions which affected Kashima on 24th October 2006 were an abnormal occurrence, that there was no breach by the charterers of the safe port obligation, and accordingly that the appeal should be allowed on this ground.

The causation issue

65. In the light of our conclusion that there was no breach by the charterers of the safe port obligation, it is strictly unnecessary for this court to consider the causation issue (namely whether the loss of the vessel was caused not by the unsafety of the port but by the Master's "wrong" decision to leave the port) and we do not propose to do so. Although we heard argument on the point, we do not consider it is an appropriate use of resources for this court to express any views on the issue. The judge reached his conclusion after a very careful consideration of the evidence and the arguments put forward by charterers that the chain of causation had been broken. His conclusion was clearly critically dependent upon his various factual findings including, in particular, that it had not been safe for the vessel to remain alongside the berth (against which there was no appeal) and on his conclusion that there had been a breach of the safe port warranty. In the circumstances (including our conclusion as set out below in relation to the recoverability issue) there is little utility in this court reviewing the judge's findings on the counter-factual hypothesis that there was a breach of the safe port warranty.

The recoverability issue

66. In the light of our conclusion that there was no breach by charterers of the safe port obligation, it is also strictly unnecessary to consider whether the terms of the demise charter prevent any recovery for breach of that obligation. But the point was fully argued and, like the judge, we should decide it. Unlike the causation issue it raises an important issue of principle in relation to the construction of the relevant charterparties.

The issues raised

67. For the purpose of this issue it is necessary to bear in mind that the claimant is Gard, suing as assignee of both the registered owners, and the demise charterers of the vessel. The question raised by the charterers is whether Gard, as assignee of the demise charterers, can claim the loss of the vessel from Sinochart, the intermediate charterers, so that Sinochart can in turn claim the loss from Daiichi, the sub-time charterers. This depends upon whether, assuming a breach of the safe port warranty, OLH, the demise charterers, are liable to OVM, the registered owners, in respect of the loss of the vessel. If the demise charterers are not so liable then they have suffered no loss in respect of the loss of the vessel and have no claim to pass on to the intermediate charterers. The case of both charterers (Sinochart and Daiichi) is that on the true construction of the terms of the demise charterparty it was not intended that the demise charterers, who had insured the vessel at their expense, should have any liability to the registered owners in respect of insured losses, notwithstanding that such losses may have been caused by a breach of the safe port warranty. The case of Gard is that the demise charterers were liable to the registered owner in respect of the loss of the vessel, whether for breach of the safe port obligation or, indeed, the redelivery obligation.

The terms of the demise charterparty

68. It is first necessary to set out the relevant terms of the demise charterparty between the registered owners and the demise charterers. This was on the form of an amended Barecon 89 Standard Bareboat Charter. Part I was in box form and Part II contained certain terms.

69. Part II Clause 5, Trading Limits, was deleted and replaced by additional clauses 29 and 30. Clause 29 provided that the vessel was to be employed "only between good and safe ports". Thus the demise charterer warranted the safety of the ports to which the vessel was sent.

70. Part I box 27 provided for the Insured Value of the vessel to be stated and for the parties to state whether clause 13 (by inference, of Part II) applied. Clauses 12 and 13 of Part II were alternative "Insurance and Repairs" terms. Part I box 27 stated US$70,000,000 and did not state that clause 13 applied. Since Part II clause 13 stated that it (clause 13) was optional and only applied if expressly agreed and stated in Box 27, in which event clause 12 should be considered deleted, it follows that clause 13 did not apply and that clause 12 did. The essential difference between the two clauses was that under clause 12 the demise charterers were to effect marine and war risks (as well as P and I risks) insurance whereas under clause 13 it was for the owners to

effect insurance against marine and war risks. Clause 12, entitled "Insurance and Repairs", provided as follows:-

> "12. Insurance and Repairs
>
> (a) During the Charter period the Vessel shall be kept insured by the Charterers at their expense against marine, war and Protection and Indemnity risks in such form as the Owners shall in writing approve, which approval shall not be unreasonably withheld. Such marine war and P. and I. insurances shall be arranged by the Charterers to protect the interests of both the Owners ands the Charterers and mortgagees (if any), and the Charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.
>
> If the Charterers fail to arrange and keep any of the insurances provided for under the provisions of sub-clause (a) above in the manner described therein, the Owners shall notify the Charterers whereupon the Charterers shall rectify the position within seven running days, failing which Owners shall have the right to withdraw the Vessel from the service of the Charterers without prejudice to any claim the Owners may otherwise have against the Charterers.
>
> The Charterers shall, subject to the approval of the Owners and the Underwriters, effect all insured repairs and shall undertake settlement of all costs in connection with such repairs as well as insured charges, expenses and liability (reimbursement to be secured by the Charterers from the Underwriters) to the extent of coverage under the insurance herein provided for.
>
> The Charterers also to remain responsible for and to effect repairs and settlement of costs and expenses incurred thereby in respect of all other repairs not covered by the insurance and/or not exceeding any possible franchise(s) or deductibles provided for in the insurances.
>
> All time used for repairs under the provisions of sub-clause (a) of this Clause and for repairs of latent defects according to Clause 2 above including any deviation shall count as time on hire and shall form part of the Charter period.
>
> (b) If the conditions of the above insurances permit additional insurance to be placed by the parties, such cover shall be limited to the amount for each party set out in Box 28 and Box 29, respectively. The Owners or the Charterers as the case may be shall immediately furnish the other party with particulars of any additional insurance effected, including copies of any cover notes or policies and the written consent of the insurers of any such required insurance in any case where the consent of such insurers is necessary.
>
> (c) Should the Vessel become an actual, constructive, compromised or agreed total loss under the insurances required under sub-clause (a) of Clause 12, all insurance payments for such loss shall be paid to the Mortgagee, if any, in the manner described in the Deed(s) of Covenant, who shall distribute the moneys between themselves, the Owners and the Charterers according to their

respective interests. The Charterers undertake to notify the Owners and the Mortgagee, if any, of any occurrences in consequence of which the Vessel is likely to become a Total Loss as defined in this clause.

(d) If the Vessel becomes an actual, constructive, compromised or agreed total loss under the insurances arranged by the Charterers in accordance with sub-clause (a) of this Clause, this Charter shall terminate as of the date of such loss.

(e) The Owners shall upon the request of the Charterers, promptly execute such documents as may be required to enable the Charterers to abandon the Vessel to insurers and claim constructive total loss.

(f) For the purpose of insurance coverage against marine and war risks under the provisions of sub-clause (a) of this Clause, the value of the vessel is the sum indicated in Box 27."

71. It is to be noted that (the unused) clause 13 provided in sub-clause (a) that when the owners insured the vessel, neither owners nor the insurers were to have any right of recovery or subrogation against the demise charterers:-

"13. Insurance, Repairs and Classification

(Optional, only to apply if expressly agreed and stated in Box 27, in which event Clause 12 shall be considered deleted).

(a) During the Charter period the Vessel shall be kept insured by the Owners at their expense against marine and war risks under the form of policy or policies attached hereto. The Owners and/or insurers shall not have any right of recovery or subrogation against the Charterers on account of loss of or any damage to the vessel or her machinery or appurtenances covered by such insurance, or on account of payments made to discharge claims against or liabilities of the Vessel or the Owners covered by such insurance. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.

(b) During the Charter period the Vessel shall be kept insured by the Charterers at their expense against Protection and indemnity risks in such form as the Owners shall in writing approve which approval shall not be unreasonably withheld. If the Charterers fail to arrange and keep any of the Insurances provided for under the provisions of sub-clause (b) in the manner described therein, the Owners shall notify the Charterers whereupon the Charterers shall rectify the position within seven running days, failing which the Owners shall have the right to withdraw the Vessel from the service of the Charterers without prejudice to any claim the Owners may otherwise have against the Charterers.

(c) In the event that any act of negligence of the Charterers shall vitiate any of the insurance herein provided, the Charterers shall pay to the Owners all losses and indemnify the Owners against all claims and demands which would otherwise have been covered by such insurance.

(d) The Charterers shall, subject to the approval of the Owners or Owners' Underwriters, effect all insured repairs, and the Charterers shall undertake settlement of all miscellaneous expenses in connection with such repairs as well as all insured charges, expenses and liabilities, to the extent of coverage under the insurances provided for under the provisions of sub-clause (a) of this Clause. The Charterers to be secured reimbursement through the Owners' Underwriters for such expenditures upon presentation of accounts.

(e) The Charterers to remain responsible for and to effect repairs and settlement of costs and expenses incurred thereby in respect of all other repairs not covered by the insurances and/or not exceeding any possible franchise(s) or deductibles provided for in the insurances.

(f) All time used for repairs under the provisions of sub-clause (d) and (e) of this Clause and for repairs of latent defects according to Clause 2 above, including any deviation, shall count as time on hire and shall form part of the Charter period.

The Owners shall not be responsible for any expenses as are incident to the use and operation of the Vessel for such time as may be required to make such repairs.

(g) If the conditions of the above insurances permit additional insurance to be placed by the parties such cover shall be limited to the amount for each party set out in Box 28 and Box 29, respectively. The Owners or the Charterers as the case may be shall immediately furnish the other party with particulars of any additional insurance effected, including copies of any cover notes or policies and the written consent of the Insurers of any such required insurance in any case where the consent of such Insurers is necessary.

(h) Should the Vessel become an actual, constructive, compromised or agreed total loss under the insurances required under sub-clause (a) of this Clause, all insurance payments for such loss shall be paid to the Owners, who shall distribute the moneys between themselves and the Charterers according to their respective interests.

(i) If the Vessel becomes an actual, constructive, compromised or agreed total loss under the insurances arranged by the

> Owners in accordance with sub-clause (a) of this Clause, this Charter shall terminate as of the date of such loss.
>
> (j) The Charterers shall upon the request of the Owners, promptly execute such documents as may be required to enable the Owners to abandon the Vessel to Insurers and claim a constructive total loss.
>
> (k) For the purpose of insurance coverage against marine and war risk under the provisions of sub-clause (a) of this Clause, the value of the Vessel is the sum indicated in Box 27.
>
> (l) Notwithstanding anything contained in Clause 9 (a), it is agreed that under the provisions of Clause 13, if applicable, the Owners shall keep the Vessel with unexpired classification in force at all times during the Charter period."

The parties' submissions

72. Mr Kendrick for the time charterers submitted that clause 12 of the demise charterparty contained a complete code for the treatment of insured losses as between the parties in the event of a total loss. Against that background, the parties cannot have intended that the demise charterers would have been liable to the registered owners for breach of the safe port warranty in respect of losses covered by the hull insurance taken out by the demise charterers at their expense in the joint names of both the registered owners and demise charterers. It was accepted, however, that SCOPIC and wreck removal costs, not being covered by hull and machinery insurance, would be recoverable.

73. Mr Russell on behalf of Gard submitted that the charterers' suggested construction of the charterparty was contrary to the express terms of the charterparty. There was an undoubted safe port warranty for breach of which the demise charterers would, all things being equal, be liable in damages. The parties, having expressly chosen to delete clause 13 which provided expressly that registered owners and/or insurers shall not have any right of recovery or subrogation against the demise charterers in respect of hull risks, cannot have intended that the registered owners and/or insurers should have no right of subrogation against the demise charterers, for there was no bar on subrogation in clause 12. Further, the suggested construction would mean that the safe port warranty in additional clause 29 would be ineffective.

Discussion and determination

74. We were not shown the terms of the actual insurance contract made between the demise charterers and the insurers but were invited to assume that a contract had been made in joint names in conformity with clause 12. Such contracts have been giving rise to problems in relation to subrogation for a number of years. Similar problems can also arise, in the absence of joint insurance, if one party to a commercial relationship is required to pay premiums for an insurance against loss or damage to the property insured. If a loss occurs as a result of a breach of contract or negligent conduct on the part of the party who pays the premium, can the insurer use the name of the "innocent" party to sue the "guilty" party once the insurer has paid for the loss?

Since insurance is usually intended to cover an insured for any breach of contract or duty on his part, it is generally thought that the answer to this question must be "No"; otherwise the party paying the premium has not secured the insurance cover he was entitled to expect.

75. Thus in The Evia (No. 2) [1983] 1 A.C. 736 clause 21 of the charter (the war risks clause) provided that if the vessel was ordered into a war risk zone, the owners were entitled to insure against the risk of loss or damage to the vessel and recover the premiums from the charterer. On the assumption (in fact rejected by the House of Lords) that there was a breach of the safe port obligation (in clause 2 of the charter), the question was whether the charterers, having paid for the extra war risk insurance, were freed from any liability that they had fo+r breach of that obligation. The House held that they were. Lord Roskill, in a speech to which Lord Brandon had contributed and with which the other members of the committee agreed, said at 766C- 767D:-

> "My Lords, whether clause 21 is a complete code and thus exhaustive of the owners' rights depends upon the construction of the time charterparty as a whole. But if the owners are right that clause 21 leaves the time charterers' obligations under clause 2 in full force and effect, one remarkable result follows. The time charterers are to repay to the owners the premiums for the extra insurance, including extra war risk insurance premiums. But if the dangers, against the risks on which they have paid those premiums, materialise and cause loss or damage to the ship, then war risk insurers, upon payment of the relevant claim, become subrogated to the owners' rights against the time charterers for the assumed breach of clause 2. My Lords, this result would no doubt be highly attractive to war risk insurers but the less fortunate time charterers would have paid the premiums not only for no benefit for themselves but without shedding any of the liabilities which clause 2 would, apart from clause 21, impose upon them. Of course, duplication of rights of recovery is not unknown. Indeed it is because of such duplication that subrogation rights can be enforced.
>
> …
>
> In the instant case clause 21 gives the owners an absolute veto upon employment which will imperil the ship in the various circumstances for which clause 21(A) provides. They can impose their own terms. Clause 21(B) also protects the owners in circumstances in which, as in the present case, they have not been able to impose a veto because the dangers have arisen too late for the consent to be required and given or refused. On this matter I respectfully and entirely agree with Lord Denning MR and Sir Sebag Shaw, and equally respectfully disagree with Ackner LJ and Robert Goff J. I should add that I regret that I am unable to follow the reasoning in the last sentence of paragraph 3 of the judgment of Ackner LJ [1982] 1 Lloyd's Rep. 334, 349, which deals with this issue, where he says that

> in construing clause 2 the insurance position must be ignored. This suggests that clause 21 is to be construed in isolation from clause 2. But clause 2 and any other relevant clause must be construed together, and with all respect to the learned Lord Justice, it is not the conditions of any insurance policy which matter but the fact that clause 21 makes provision for the effecting of extra insurance, including war risks insurance, at the time charterers' expense which is the relevant consideration."

76. Mark Rowlands Ltd v Berni Inns [1986] QB 211 was a rather similar case between landlord and tenant. The lease required the tenant to pay rent and "insurance rent" equal to the sum paid by the landlord to insure the premises pursuant to a landlord's covenant to insure. The premises were destroyed by fire caused by the tenant's negligence. The insurers paid the landlord and then brought an action against the tenant in the name of the landlord claiming damage for the tenant's negligence. Kerr LJ held that the insurance was effected for the benefit of both the tenant and the landlord and said (228E):-

> "However, in my view this does not decide the real issue between the parties. This is whether the terms of the lease, and the full indemnification of the plaintiff by its receipt of the insurance moneys, preclude it from recovering damages in negligence from the defendant, or whether the plaintiff's right to recover such damages remains unaffected. In the former case the plaintiff's insurer would obviously be equally precluded from bringing the present action in the name of the plaintiff by virtue of its rights of subrogation. The only English authority cited to the judge in this connection was the decision of Lloyd J in Petrofina (U.K.) Ltd v Magnaload Ltd [1984] Q.B. 127. That decision is of considerable importance to insurances in the field of the construction industry, but for present purposes it is at most only of indirect relevance and distinguishable on its facts. In that case Lloyd J followed with approval a decision of the Supreme Court of Canada in Commonwealth Construction Co. Ltd v Imperial Oil Ltd (1976) 69 D.L.R. (3d) 558 which he regarded as indistinguishable. The feature which distinguishes those cases from the present case and from the Canadian and American cases mentioned below is that the defendants were co-insured with the plaintiffs under the same policy. They were accordingly not restricted to the contention that the insurance had been effected in part for their benefit, as the defendant is in the present case. Being co-insured with the plaintiff under the same policy, it necessarily followed that the plaintiff's insurers in these two cases were unable to assert any right of subrogation."

He thus regarded it as axiomatic that in a case of co-insurance, insurers could not exercise rights of subrogation.

77. He then dealt with an argument that contracts should not be construed to exclude negligence unless clear words were used saying (232G):-

> "I would not accept this line of argument. An essential feature of insurance against fire is that it covers fires caused by accident as well as by negligence. This was what the plaintiff agreed to provide in consideration of, inter alia, the insurance rent paid by the defendant. The intention of the parties, sensibly construed, must therefore have been that in the event of damage by fire, whether due to accident of negligence, the landlord's loss was to be recouped from the insurance moneys and that in that event they were to have no further claim against the tenant for damages in negligence. Another way of reaching the same conclusion, on which Mr Harvey also relied, is that in situations such as the present the tenant is entitled to say that the landlord has been fully indemnified in the manner envisaged by the provisions of the lease and that he cannot therefore recover damages from the tenant in addition, so as to provide himself with what in effect be a double indemnity. Although the receipt of insurance moneys by an innocent party is of course normally no defence to a wrongdoer (see Bradburn v Great Western Railway Co. (1874) L.R. 10 Ex. 1), Mr Harvey relied on a number of passengers in Parry v Cleaver [1970] A.C. 1, 13 to show that considerations of "justice, reasonableness and public policy" (per Lord Reid) may require exceptions to this general principle. I do not think it necessary to elaborate upon this line of argument in the present case save to say that I accept it and regard it as complementary to the conclusion which is to be derived from the construction and effect of the terms of the lease itself, as indicated above."

Thus even in a case where there was no provision for joint insurance but the insurance was paid for by the "guilty" party, the insurance was held to cover the liability of that party and no rights of subrogation existed. Clear words to exclude that possibility were not required, once it was evident that the insurance was intended to be for the joint benefit of the parties.

78. Later cases have made it clear that it is vital to construe the underlying contract between the parties in order to see if there is truly an intention that the insurance is for the joint benefit of the parties. But if there is an agreement that the insurance is to be "in joint names as their interest may appear" the agreement is likely to be construed as being an agreement to insure for the parties' joint benefit. This will normally mean that the parties have agreed on an insurance solution without any rights of subrogation.

79. Although there has been discussion in the authorities about the basis of this principle of construction there is now no doubt that it exists. Some earlier cases favoured circuity of action or the true construction of the policy of insurance as being the basis of the principle but it is now clear that it ultimately depends on the underlying contract of the parties rather than on the terms of the insurance policy made pursuant

to that contract. As Dillon LJ said in Surrey Heath Borough Council v Lovell Construction Ltd (1990) 48 BLR 108, 121:-

> "The effect of the contractual agreement must always be a matter of construction. Parties are free to contract as they like. It may be the true construction that a provision for insurance is to be taken as satisfying or curtailing a contractual obligation, or it may be the true construction that a contractual obligation is to be backed be insurance with the result that the contractual obligation stands or is enforceable even if for some reason the insurance fails or proves inadequate."

80. In Hopewell Project Management Ltd v Ewbank Preece Ltd [1998] 1 Lloyd's Rep 448 the defendants provided engineering services to the claimant contractors in relation to the construction of a power station in the Philippines. The claimants had taken out a contractors' all risks policy pursuant to its obligations under the construction contract and the question was whether the defendants were co-insured under that policy with the claimants and the other contractors and sub-contractors on site. Mr Recorder Jackson QC (as he then was) decided that the defendants were not co-insured under the policy but, if they had been, he had no doubt that a subrogated claim in the name of the claimants could not be brought. He said (page 458):-

> "… it would be nonsensical if those parties who were jointly insured under the CAR policy could make claims against one another in respect of damage to the contract works. Such a result could not possibly have been intended by those parties. I have little doubt that they would have said so to the officious by-stander. If, therefore, I were wrong on the co-insurance point, I would have held that there was an implied term …"

This approach was resoundingly approved by the House of Lords in Co-operative Retail Services v Taylor Young Partnership [2002] 1 WLR 1419 (where, however, the underlying construction contract expressly excluded liability in the part of the contractor and its sub-contractors beyond the requirement of reinstatement); see paragraph 65 of the speech of Lord Hope of Craighead who prefaced that approval by saying that the true basis of the rule was to be found in the contract between the parties. The other members of the committee agreed with Lord Hope.

81. How therefore is clause 12 of the demise charter to be construed in this case? There is no express exclusion of the right of subrogation but it seems to us (as it seemed to Mr Recorder Jackson QC) that it would be nonsensical, in a case in which it was agreed that the parties were to be insured "in joint names as their interest may appear" and they further agreed that in the event of a total loss the demise charter would come to an end, that they envisaged that either party could sue the other for breach of contract, at any rate once the insurance money was paid and distributed in accordance with the interest of the parties as they appeared. Once, as has happened in this case, the insurance is paid and the insurers are discharged from liability, the contractual scheme has been accomplished.

82. In a recent authority touching on this issue Rix LJ (obiter) sounded an important note of caution. He said in Tyco Fire & Integrated Solutions (UK) Ltd v Rolls Royce Motor Cars Ltd [2008] 2 All E.R. (Comm) 584 at paragraph 76:-

> "… I can well see that a provision for joint names insurance may influence, perhaps even strongly, the construction of the contract in which it appears. It may lead to the carving out of an exception from the underlying regime so far as specified perils are concerned. But an implied term cannot withstand express language to the contrary. Moreover, if the underlying contract envisages that one co-assured may be liable to another for negligence even within the sphere of the cover provided by the policy, I am inclined to think that there is nothing in the doctrine of subrogation to prevent the insurer suing in the name of the employer to recover the insurance proceeds which the insurer has paid in the absence of any express ouster of the right of subrogation, either generally or at least in cases where the joint names insurance is really a bundle of composite insurance policies which insure each insured for his respective interest."

Rix LJ is no doubt referring to the principle of construction that clear words are needed to exclude liability for negligence and a provision for insurance in joint names may not be sufficiently clear for that purpose. There is, of course, no claim for negligence in the present case which is concerned only with the (contractual) safe port obligation in the demise charter. Nevertheless it must be remembered that one of the main reasons why parties take out insurance is that they need to be covered for the consequences of their own negligence and that the principle of construction, alluded to by Rix LJ, did not deter this court in Mark Rowlands v Berni Inns from holding that a negligent lessee who has paid the insurance premiums by way of insurance rent could not be sued for negligence by his landlord in a subrogated claim.

83. Although, therefore, we would not disagree with Rix LJ about the need carefully to construe the underlying contract between the parties making agreements about insurance, we would, like this court in GD Construction (St Albans) Ltd v Scottish & New Castle Plc [2003] EWCA Civ 16 at paragraphs 39 and 59, say that the *prima facie* position where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other. That will be all the more so if it is agreed that the insurance is to be in joint names for the parties' joint interest or if there are other relevant circumstances, as in the recent case of Rathbone Brothers v Novae Corporate [2014] EWCA Civ 1464, where the underlying contract consisted of an employer's indemnity granted to an employee.

84. In the present case there are the additional circumstances that the owners and demise charterers were associated companies in the same group of companies and, also, that the safe port obligation is a contractual obligation which exists regardless of any negligence on the part of the demise charterers. There is therefore no reason for the application of the principle that clear words are required to exempt liability for negligence.

85. If, therefore, clause 12 had stood alone in the demise charter we would have construed it as excluding a right of recovery by the registered owners of the vessel from the demise charterers in respect of loss covered by marine or war risks insurance. The judge, in coming to the contrary conclusion, was much influenced by the fact that in clause 13 of the charter, applying to the antithetical case of the owners (rather than the demise charterers) taking out the insurance, there was an express exclusion of the right of subrogation while in clause 12 there was no such exclusion.

86. This is an undoubtedly weighty consideration. But one has to remember that in long-term demise charters the chief interest in the vessel is usually that of the demise charterers and it is therefore natural that they should be the ones to insure. The instances when an owner will want to insure the vessel will be somewhat less frequent and may well arise in the context of shorter term charters when the owner is already insured. In such circumstances the demise charterers will be added to the existing policy of the owner and it might well be deemed necessary for it to be specifically provided in the demise charter that the owners and their insurers are to forgo rights of subrogation. That does not mean that it is not obvious that that is the position when the demise charterers take out and pays for the insurance.

87. This approach may sound speculative but it gains support from the BIMCO documentation preceding the introduction of the Barecon charter form in 1989. It is, in the first place, clear from Box 27 and clause 12(f) of the Barecon forms that the insured value of the vessel is to be inserted in Box 27; that box also provides that if clause 13 is to be used that must be stated in Box 27. No such statement was made in the OCEAN VICTORY charter, so clause 12 was the applicable clause. Clause 13 of Part II was in fact deleted in the document signed by the parties.

88. The sixth BIMCO bulletin published in December 1989 gives an account of how the Barecon 89 form came into existence, being an amalgamation of two previous forms, Barecon A for chartering of commissioned vessels (with or without mortgage) and Barecon B to be used especially for new buildings financed by mortgage. The new form contained clause 12 relating to insurance and repairs which was expected to be widely used. Clause 13 is described as "optional" and the bulletin then states:-

> "It has been felt that it may be useful to cover also the possibility which is believed may arise from time to time that a vessel is bareboat chartered for a short period, say, four to six months. This may sometimes happen, for instance, with passenger vessels bareboat chartered for a short cruise or for ferries hired just for a short summer season. It is believed that in such cases it is normal practice that the Owners carry on with the insurances for their own account."

In these circumstances one can well understand that an owner's current insurance, taken out before any question of bareboat chartering arises, will not at that stage be in joint names and will not either expressly or impliedly exclude rights of subrogation. The drafting committee would, however, naturally wish to exclude that right in the demise charter for the contemplated short period, by providing that owners are to have no right of recovery or subrogation against the charterers, even though owners have paid the premiums. So understood, the exclusion of rights of recovery or subrogation in clause 13 is, in our view, a confirmation rather than a negation of such exclusion in

the more usually adopted clause 12 for the longer term charters when it is the charterers who pay the premium.

89. We conclude, therefore, differing from paragraph 201 of the judgment, that the right construction of clause 12 is that the parties intended there to be an insurance funded result in the event of loss or damage to the vessel by marine risks (and war risks); or, to use Mr Kendrick's phrase, that clause 12 provides a code for what is to happen. This is partly because we have had regard to the BIMCO material which was not before the judge but also because the opposite conclusion would be, as Mr Recorder Jackson QC called it in Hopewell, nonsensical.

90. Mr Russell for the owners raised the question. What will happen if insurers do not pay? Surely, he submitted, the underlying right of the owners to sue for breach of the safe port obligation must still subsist and have always subsisted. The judge (in paragraph 202) thought that the reason why clause 13 differed from clause 12 may have been to cater for the risk of insolvency on the part of the insurers, that risk being intended to be on the charterers in clause 12 and on the owners in clause 13.

91. For our part we do not think that the clauses can be construed by reference to the possibility of insurers becoming insolvent or refusing to pay. In the first place, any insolvency before loss would result in the vessel being partly uninsured. Such lack of insurance would, in any event, constitute a breach of contract on the part of the party who had promised that the vessel "shall be kept insured" in sub-clause (a) of both clauses. Insolvency after a loss which has brought the demise charter to an end raises separate problems to which the answer will probably be that the loss stays where it falls. Delay in payment raises different problems again to which the answer will be that either party is at liberty to sue the insurers to judgment. But none of these considerations can, in our judgment, affect the right construction of the charter which has to be construed at the time when it is made and neither party contemplates insolvency or refusal to pay.

92. We would accordingly hold that, even if the demise charterers had been in breach of the safe port obligation in the charter, they were under no liability to the owners for that breach because the owners had agreed to look to the insurance proceeds rather than to the demise charterers for compensation. The demise charterers cannot therefore show that they have suffered any loss as a result of the time charterers' breach of their safe port obligation in the time charter and the time charterers have no liability to the demise charterers which they can pass on the sub-time charterers, to whom we have more usually been referring as "the charterers".

93. On one view the time charterers have thus escaped liability for the loss of the vessel on the technicality of an agreement between the owners and the demise charterers with which they (the time charterers) have nothing to do. But the result is not as unmeritorious as it might appear at first glance. Gard took an assignment of the rights of both owners and demise charterers. Those rights include rights in both tort and contract in respect of the vessel. A claim in bailment was originally formulated against the time charterers but was not pursued, no doubt because it would require proof of negligence. A contractual claim down a chain of charters does require that there should be a good contractual claim at the first stage so that it can then be passed down the chain. If there is no claim in contract at that first stage there is nothing to pass down. The fact, however, that one can have potentially different results

depending on whether a claim is brought in contract or in tort does not justify treating such claims as if they are one and the same so as to produce what some might think was a more meritorious result.

94. We do not therefore need to consider the further argument advanced by Mr Goldstone QC for the charterers that, in any event, any claim by the owners against the demise charterers became time barred 6 years after the casualty since no claim form seeking recovery from the demise charterers had been issued.

Disposition

95. As it is, we would allow this appeal and set aside the judge's order.