

## COURT OF APPEAL

14–17 October 2014; 22 January 2015

GARD MARINE & ENERGY LTD  
 v  
 CHINA NATIONAL CHARTERING CO LTD  
 CHINA NATIONAL CHARTERING CO LTD  
 v  
 DAIICHI CHUO KISEN KAISHA  
 (THE "OCEAN VICTORY")

[2015] EWCA Civ 16

Before Lord Justice LONGMORE,  
 Lady Justice GLOSTER, and  
 Lord Justice UNDERHILL

**Charterparty (Time) — Safe port warranty — Port taking precautions against existing dangers — Whether safe as a result — Negligent navigation — Bareboat charterparty — Whether demise charterers liable to ship owners for breach of safe port warranty — Insurance — Assignment — Subrogation — Barecon 89 Standard Bareboat Charter.**

The vessel *Ocean Victory*, a bulk carrier, was owned by Ocean Victory Maritime Co. On 8 June 2005 she was demise-chartered to an associated company, Ocean Line Holdings Ltd on the terms of the Barecon 89 Standard Bareboat Charter. Pursuant to clause 12 of the demise charter, the demise charterers insured the vessel for the respective rights and interests of themselves and the owners under an agreed value policy for US\$70 million.

On 2 August 2006 the demise charterers time-chartered the vessel to China National Chartering Co Ltd, the intermediate charterers, who on 13 September 2006 sub-time-chartered the vessel to Daiichi Chuo Kisen Kaisha, the charterers. Each charterparty contained a safe port warranty whereby it was undertaken to trade the vessel between safe ports.

In September 2006 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 20 October and berthed at the Raw Materials Quay. She began discharging her cargo but that had to stop on 23 October due to strong winds and heavy rain. 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 force 9 winds. On 24 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.

The insurers paid for a total loss. On 15 October 2008, one of the insurers – Gard Marine & Energy Ltd – took an assignment of the rights of both the owners and demise charterers. Gard commenced proceedings against the intermediate charterers for damages for breach of the safe port warranty. The intermediate charterers joined the charterers to the proceedings. The charterers denied that there was a breach of the safe port warranty, because the conditions on 24 October 2006 were an abnormal occurrence and that, even if the port was unsafe, the cause of the loss was the master's navigational decision to leave the port, not the port's unsafety. The charterers further said 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.

At first instance ([2014] 1 Lloyd's Rep 59), Teare J held that there was a breach of the safe port warranty. Teare J ruled that the combination of two weather conditions on the casualty date, namely the phenomenon of swell from long waves, and a very severe northerly gale, was not to be characterised as an abnormal occurrence, notwithstanding that the coincidence of the two conditions was rare, because both conditions were physical characteristics or attributes of the port. The learned judge also ruled that the cause of the casualty was the breach of the safe port warranty and not the master's navigational decision to put to sea in extreme conditions. Finally, Teare J held that the joint names insurance did not confer immunity upon the demise charterers for loss caused by breach of the safe port warranty, so that they had a liability to the owners and thus had suffered a loss which could be recovered from the intermediate charterers and by them from the charterers.

The charterers appealed. Three questions arose: (i) whether as a matter of law in the circumstances there had been a breach of the safe port warranty; (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; 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

## The "Ocean Victory"

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respect of insured losses, notwithstanding that such losses may have been caused by a breach of the safe port warranty.

———*Held*, by CA (LONGMORE, GLOSTER and UNDERHILL LJJ), that the appeal would be allowed.

(1) There was no breach of the safe port warranty.

(a) It was common ground that the damage sustained by the vessel at Kashima on 24 October 2006 was caused by an "abnormal occurrence" (*see* para 14);

———*The Eastern City* [1958] 2 Lloyd's Rep 127, applied.

(b) A charterer did not assume responsibility for unexpected and abnormal events which occurred suddenly and which created conditions of unsafety after he had given the order to proceed to the relevant port. Those were the responsibility of the ship's hull insurers (if owners have insured) or of owners themselves. Moreover the concept of "safety" was necessarily not an absolute one (*see* para 52);

———*The Saga Cob* [1992] 2 Lloyd's Rep 545, *The Evia (No 2)* [1982] 2 Lloyd's Rep 307; [1983] 1 AC 736, referred to.

(c) In order to determine what constituted an abnormal occurrence it was necessary to have regard to whether the event had occurred sufficiently frequently so as to become a characteristic of the port (*see* para 54);

———*The Mary Lou* [1981] 2 Lloyd's Rep 272, applied.

(d) The judge had erred: by failing to formulate the unitary question whether the simultaneous coincidence of the two critical features – the long waves and gale force winds – was an abnormal occurrence or a normal characteristic of the port of Kashima; by treating something which was theoretically foreseeable as qualifying as a characteristic of the port; and by holding that the combination of two individual dangers, which he had held were normal characteristics or attributes of the port, was also a normal characteristic or attribute of the port. It was necessary 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 led to wholly unreal and impractical results (*see* paras 54, 58, 59 and 62);

———*The Eastern City* [1958] 2 Lloyd's Rep 127, *The Saga Cob* [1992] 2 Lloyd's Rep 545,

applied; *The Mary Lou* [1981] 2 Lloyd's Rep 272, explained.

(e) 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, there was no breach by the charterers of the safe port obligation (*see* paras 61 and 64).

(2) In the light of the conclusion that there was no breach by the charterers of the safe port obligation, it was unnecessary to consider 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 (*see* para 65).

(3) 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 (*see* para 92).

(a) Whether or not there was joint names insurance, if a loss occurred as a result of a breach of contract or negligent conduct on the part of the party who paid the premium, then since insurance was usually intended to cover an insured for any breach of contract or duty on his part, if the party paying the premium faced liability then he would not have secured the insurance cover he was entitled to expect (*see* para 74);

———*The Evia (No 2)* [1982] 2 Lloyd's Rep 307; [1983] 1 AC 736, *Mark Rowlands Ltd v Berni Inns Ltd* [1985] 2 Lloyd's Rep 437; [1986] QB 211, applied.

(b) It was vital to construe the underlying contract between the parties in order to see if there was truly an intention that the insurance was for the joint benefit of the parties. But if there was an agreement that the insurance was to be "in joint names as their interest may appear" the agreement was likely to be construed as being an agreement to insure for the parties' joint benefit. That would normally mean that the parties had agreed on an insurance solution without any rights of subrogation. The prima facie position where a contract required a party to that contract to insure should be that the parties had agreed to look to the insurers for indemnification rather than to each other. That would be all the more so if it was agreed that the insurance was to be in joint names for the parties' joint interest or if there were other relevant circumstances (*see* paras 78 and 83);

—Surrey Heath Borough Council v Lovell Construction Ltd (1990) 48 BLR 108, Hopewell Project Management Ltd v Ewbank Preece Ltd [1998] 1 Lloyd's Rep 448, Cooperative Retail Services Ltd v Taylor Young Partnership Ltd [2002] Lloyd's Rep IR 555; [2002] 1 WLR 1419, Scottish and Newcastle plc v GD Construction (St Albans) Ltd [2003] Lloyd's Rep IR 809, Rathbone Brothers plc v Novae Corporate Underwriting Ltd [2015] Lloyd's Rep IR 95, applied; Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd [2008] Lloyd's Rep IR 617; [2008] BLR 285; [2008] 2 All ER (Comm) 584, considered.

(c) In the present case the demise charter did not expressly exclude of the right of subrogation but 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 had happened in the present case, the insurance was paid and the insurers were discharged from liability, the contractual scheme had been accomplished. Further, the owners and demise charterers were associated companies and the safe port obligation was contractual so there was no reason to apply the principle that clear words were required to exclude liability for negligence (see paras 81 and 84).

The following cases were referred to in the judgment:

*Cooperative Retail Services Ltd v Taylor Young Partnership Ltd* (HL) [2002] UKHL 17; [2002] Lloyd's Rep IR 555; [2002] 1 WLR 1419;  
*Hopewell Project Management Ltd v Ewbank Preece Ltd* [1998] 1 Lloyd's Rep 448;  
*K/S Penta Shipping A/S v Ethiopian Shipping Lines Corporation (The Saga Cob)* (CA) [1992] 2 Lloyd's Rep 545;  
*Kodros Shipping Corporation v Empresa Cubana de Fletes (The Evia) (No 2)* (CA) [1982] 1 Lloyd's Rep 334; (HL) [1982] 2 Lloyd's Rep 307; [1983] 1 AC 736;  
*Leeds Shipping Co Ltd v Societe Francaise Bunge (The Eastern City)* (CA) [1958] 2 Lloyd's Rep 127;  
*Mark Rowlands Ltd v Berni Inns Ltd* (CA) [1985] 2 Lloyd's Rep 437; [1986] QB 211;

*Rathbone Brothers plc v Novae Corporate Underwriting Ltd* (CA) [2014] EWCA Civ 1464; [2015] Lloyd's Rep IR 95;

*Reardon Smith Line Ltd v Australian Wheat Board (The Houston City)* (PC) [1956] 1 Lloyd's Rep 1; [1956] AC 266;

*Scottish and Newcastle plc v GD Construction (St Albans) Ltd* (CA) [2003] EWCA Civ 16; [2003] Lloyd's Rep IR 809;

*Surrey Heath Borough Council v Lovell Construction Ltd* (CA) (1990) 48 BLR 108;

*Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep 272;

*Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* (CA) [2008] EWCA Civ 286; [2008] Lloyd's Rep IR 617; [2008] BLR 285; [2008] 2 All ER (Comm) 584;

*Uni-Ocean Lines Pte Ltd v C-Trade SA (The Lucille)* [1983] 1 Lloyd's Rep 387.

This was an appeal by the charterers against the decision of Teare J, holding that the insurers were entitled to recover damages for breach of a safe port warranty from the intermediate charterers, and that the intermediate charterers were entitled to recover an indemnity from the charterers.

Dominic Kendrick QC, David Goldstone QC and Gavin Geary, instructed by MFB Solicitors, for Daiichi Chuo Kisen Kaisha, the charterers; Michael Davey QC, instructed by Winter Scott LLP, for China National Chartering Co Ltd, the intermediate charterers; Jeremy Russell QC, Jeffrey Gruder QC and James Turner QC, instructed by Ince & Co LLP, for Gard Marine & Energy Ltd, the insurers.

The further facts are stated in the judgment of Longmore LJ.

Thursday, 22 January 2015

## JUDGMENT

### Lord Justice LONGMORE:

#### Introduction

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

2. *Ocean Victory* (“the vessel” or “*Ocean Victory*”) was a Capesize bulk carrier<sup>1</sup> which went aground at the port of Kashima in Japan on

<sup>1</sup> 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 m long.

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

(b) secondly, the sudden deterioration in conditions meant that discussion and decisions made earlier on 24 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 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<sup>21</sup>. 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 *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<sup>22</sup>.

#### *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, secondly, 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"<sup>23</sup>, 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"<sup>24</sup>, and accordingly the port was unsafe because, this concurrence of "long waves and gale winds must be 'at least foreseeable' in Kashima"<sup>25</sup>. 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 paras 126 to 129 and 134:

"126. *Wilford on Time Charters*, 6th Edition, 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 paras 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 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 24 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

<sup>21</sup> Judgment para 75. See also para 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".

<sup>22</sup> See para 138(iii) of the judgment. Indeed shortly after the incident he said that it was his agent who had given him the order.

<sup>23</sup> See para 127 of the judgment.

<sup>24</sup> See para 128 of the judgment.

<sup>25</sup> See para 129 of the judgment.

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 *Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep 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' (at page 278 col 2). 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 24 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 (*Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou)* [1981] 2 Lloyd's Rep 272 at page 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; *Kodros Shipping Corporation v Empresa Cubana de Fletes (The Evia) (No 2)* [1982] 1 Lloyd's Rep 334 (CA) at page 338, per Lord Denning MR; [1983] 1 AC 736 (HL) at page 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; *Reardon Smith Line Ltd v Australian Wheat Board (The Houston City)* [1956] AC 266 at page 279; *The Evia (No 2)* [1983] 1 AC 736 at page 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 Edition, at paras 10.39 and 10.41.

(v) The correct question which the court had to ask is: "what was the source of the unsafety?"; see *Uni-Ocean Lines Pte Ltd v C-Trade SA (The Lucille)* [1983] 1 Lloyd's Rep 387 at page 394; [1984] 1 Lloyd's Rep 244 (CA) at pages 250 and 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 foreseeability. An abnormal occurrence was more of a *deus ex machina* event than what occurred at Kashima on 24 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<sup>26</sup>, 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 QC relied upon the cross-examination of Captain Yamauchi<sup>27</sup>. Mr Kendrick QC 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 6 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 *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."<sup>28</sup>

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

(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

<sup>26</sup> See the judgment at para 128.

<sup>27</sup> AB4/27.

<sup>28</sup> See para 127 of the judgment.

both were characteristics of the port. Ordering the vessel to Kashima therefore exposed her to the (if relevant, sufficiently) foreseeable danger of their co-occurrence. 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 QC 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<sup>29</sup>. 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 QC that the casualty could rightly be described not merely as "remarkable"<sup>30</sup> 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<sup>31</sup>. Yet no similar incidents to that befalling *Ocean Victory* and *Ellida Ace* as they sought to leave Kashima on 24 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) – ie 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 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"<sup>32</sup>. 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<sup>33</sup> that, apart from ships evacuating the port due to typhoon warnings (which both parties' experts agreed were irrelevant to the issue), in the five to six-year period 2001 to 2006 only four to five vessels left the Raw Materials Quay, departed the port and then returned. It was clear from the evidence at trial that *Ellida Ace* had departed the port on 6 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 three or four 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."<sup>34</sup>

(v) However, apart from the one instance referred to in the charterers' evidence relating to the period 1996 to 2005 (which the judge in any event rejected), there was no evidence that any of the four or five departures from port in the period 2001 to 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/north-easterly quadrant (ie Beaufort scale 8 or above). Thus, when *Ellida Ace* left port because of long waves affecting her berth at the Raw Materials Quay, there were good weather conditions (Beaufort

<sup>29</sup> 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 a shore gantry crane contacting a continuous unloader which then hit the ship.

<sup>30</sup> See para 2 of the judgment.

<sup>31</sup> See paras 130 and 131 of the judgment.

<sup>32</sup> 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 para 14 of the judgment.

<sup>33</sup> See for example para 14 of the judgment and the evidence referred to therein.

<sup>34</sup> See para 14 of the judgment.

scale 4) and she had no difficulty in navigating the Fairway. Moreover, the 6 October 2006 incident, upon which Mr Russell QC sought to rely in his argument, was, on analysis, irrelevant. It related to weather conditions created by a tropical storm Bebinca, 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 QC submitted, the incident received very little attention at trial. The judge did not refer to it in his judgment.

(vi) Nor was there any evidence in relation to these four or five departures (other than in relation to *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 four or five 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/north-easterly 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/north-easterly 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 (ie 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/north-easterly 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 *Ocean Victory* and *Ellida Ace* on 24 October 2006 had happened previously. Contrary to Mr Russell QC'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 para 110 of the judgment and appears in fact to have accepted), the storm which affected Kashima on 24 October 2006 was exceptional in terms of its rapid development, its duration and its severity. Mr Lynagh stated at para 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 to 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 paras 127 to 129 of the judgment (which we have already summarised and quoted in paras 42 and 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"<sup>35</sup>;

(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"<sup>36</sup>, 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 force 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 the storm which affected Kashima on 24 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"<sup>37</sup>;

(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 Rep 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 749:

"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 LJ in *Leeds 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 LJ (as he then was) in *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd (The Stork)* [1955] 2 QB 68. Sellers LJ said, at page 131:

'a place will not be safe unless, in the relevant period of time, the particular ship can reach it, remain in it and return from it without, in the absence of some abnormal occurrence, being exposed to danger.'

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

<sup>35</sup> See para 127 of the judgment.

<sup>36</sup> See para 128 of the judgment.

<sup>37</sup> See para 128 of the judgment.

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 page 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 *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corporation (The Saga Cob)* [1992] 2 Lloyd's Rep 545 at page 551 col 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 page 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 page 550 col 2, to page 551 col 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 charterparty entitling him to refuse. The charterers expressly disclaim any arguments that by entering into the charterparty 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 everyone 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 Rep 272, at page 278 col 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: for 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 example, 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."<sup>38</sup>

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/north-easterly 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

<sup>38</sup> 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 para 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 eg *The Evia (No 2)* at page 763B to D.

long waves and gale force northerly winds which, in fact, occurred.

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/north-easterly 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 24 October, but the nature of the event (ie 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";<sup>39</sup> 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".<sup>40</sup>

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 be 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 page 278 col 2<sup>41</sup>, which the judge selectively quotes in para 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 foreseeability of 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, foreseeability on its own was sufficient. Whether or not, as Mr Kendrick QC 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<sup>42</sup>, 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 characterised as an

<sup>39</sup> See para 127 of the judgment as well as para 110.

<sup>40</sup> See para 128 of the judgment.

<sup>41</sup> For the full passage see the citation at para 54 above.

<sup>42</sup> See para 53 above.

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 para 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 gives no cogent reason for rejecting) that the storm which occurred on 24 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 paras 55 and 56 above, what the judge had to decide was whether "the concurrent occurrence of those events" (ie 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 24 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 24 October 2006 was indeed an abnormal occurrence.

64. For the above reasons we conclude that the conditions which affected Kashima on 24 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 counterfactual 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