Neutral Citation Number: [2014] EWCA Civ 1135

Case No: A3/2013/2395

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, COMMERCIAL COURT
MR JUSTICE FIELD
2010 Folio 1383

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 7th August 2014

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE DAVIS
and
LADY JUSTICE GLOSTER

- - - - - - - - - - - - - - - - - - - -

Between :

(1) AMLIN CORPORATE MEMBER LTD (on its own behalf and on behalf of all other members of Syndicate 2001 at Lloyd's in relation to policy reference B0738MC000720B) **(2) TALBOT 2002 UNDERWRITING CAPITAL LTD (on its own behalf and on behalf of all other members of Syndicate 1183 at Lloyd's in relation to the aforesaid policy)** **(3) LIMIT (No.2) LIMITED (on its own behalf and on behalf of all other members of Syndicate 1036 at Lloyd's in relation to the aforesaid policy)** **(4) AEGIS ELECTRIC & GAS INTERNATIONAL SERVICES LTD (on its own behalf and on behalf of all other members of Syndicate 1225 at Lloyd's in relation to the aforesaid policy)** **(5) NOAVE CORPORATE UNDERWRITING LTD (on its own behalf and on behalf of all other members of Syndicate 2007 at Lloyd's in relation to the aforesaid policy)** **(6) BRIT UW LTD (on its own behalf and on behalf of all other members of Syndicate 2987 at Lloyd's in relation to the aforesaid policy)**	**Claimants/ Respondents**
- and -	
ORIENTAL ASSURANCE CORPORATION	**Defendant/ Appellant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Roger Ter Haar QC and Ms Caroline McColgan (instructed by **Browne Jacobson LLP**) for the **Appellant**
Mr Peter MacDonald Eggers QC (instructed by **Norton Rose Fulbright LLP**) for the **Respondents**

Hearing dates: Monday 17th March 2014
Tuesday 18th March 2014

Judgment
As Approved by the Court

Lady Justice Gloster:

Introduction

1. On 18 March 2014 this court dismissed the appeal by the defendant, Oriental Assurance Company ("Oriental"), against the judgment of Field J dated 31 July 2013. By that judgment Field J granted the claimants, Amlin Corporate Member Limited and other syndicates at Lloyd's which subscribed to policy reference B0738MCOOO720B ("Reinsurers"), a declaration to the effect that, by reason of a breach of a typhoon warranty in a reinsurance contract between Reinsurers and Oriental, Reinsurers are not liable to indemnify Oriental in respect of cargo liabilities relating to the loss of the vessel *MV Princess of the Stars* ("the Vessel"), off the coast of Romblon in the Philippines, on 21 June 2008, as a result of its encounter with Typhoon Frank.

2. These are my reasons as to why I considered it appropriate to dismiss the appeal.

3. The issues in the case relate to the construction of the relevant typhoon warranty clause and whether, in the events which happened, Oriental was in breach of warranty.

Background facts

4. Oriental is an insurance company established in the Philippines which insured the owner of the Vessel, Sulpicio Lines Inc ("Sulpicio"), a Philippine shipping company, in respect of its liability in the period 31 December 2007 to 31 December 2008 for loss of or damage to cargo.

5. The cover provided under the policy of insurance as between Oriental and Sulpicio ("the Original Policy") was expressed to be "within Philippine Territorial Limits" and was in respect of 22 scheduled vessels. The Original Policy contained a typhoon warranty clause in the following terms:

> "TYPHOON WARRANTY CLAUSE
>
> Notwithstanding anything contained in the Policy or Clauses attached hereto, it is expressly warranted that the Vessel carrying subject shipment shall not sail or put out of sheltered Port when there is a typhoon or strom [sic- should be "storm"] warning at that port nor when her destination or intended route may be within the possible path of a typhoon or storm announced at port or [sic - should be "of"] sailing, port of destination or any intervening point. Violation of this warranty shall render this policy "VOID".
>
> However, should the vessel have sailed out of port prior to there being such a warning, this warranty, only in so far as the particular voyage is concerned, shall not apply but shall be immediately reinstated upon arrival at safe port."

6. The Original Policy incorporated wordings which are expressed to be governed by English law. Although Oriental argued that the Original Policy was governed by Philippine law, it was common ground that there is no material difference between

English law and Philippine law with respect to policy interpretation and the effect of a breach of warranty. In any event, there was no evidence of Philippine law before the court in relation to these aspects.

7. Oriental reinsured the Original Policy with Reinsurers ("the Reinsurance Policy") subject to an Annual Aggregate Limit of

> "PHP 450,000,000 covering all vessels, excess of PHP 50,000,000 any one accident or occurrence each vessel each section inclusive of original policy deductible of PHP 2,500,000 anyone [sic] accident or occurrence each vessel."

8. The Reinsurance Policy, which is governed by English law, contained a "follow the settlements" condition in the following terms:

> "To follow all terms, conditions and settlements of the original policy issued by the Reinsured to the Insured, for the period specified herein, in respect of sums and interests hereby insured."

9. The Reinsurance Policy contained a typhoon warranty in what was for all relevant purposes identical terms to the typhoon warranty clause in the Original Policy, save that the second paragraph (starting "However ....") had been omitted. The clause read:

> "Notwithstanding anything contained in this policy or clauses attached hereto, it is expressly warranted that the carrying vessel shall not sail or put out of Sheltered Port when there is a typhoon or storm warning at that port nor when her destination or intended route may be within the possible path of the typhoon or storm announced at the port of sailing, port of destination or any intervening point. Violation of this warranty shall render this policy void."

10. The Reinsurance Policy also contained a claims control clause in the following terms:

> "In the event of a claim arising under the Original Policy the Reassured shall give immediate notice thereof to the Underwriters and the Reassured shall not make any settlement of any claim without the consent of Underwriters hereunder."

11. As Field J described in paragraphs 6 and 7 of his judgment, one of the scheduled vessels under the Original Policy was the Vessel, a Ro-Ro vehicle and passenger ferry of 23,824 gross tonnage built in 1984. At 20:04 on 20 June 2008 the Vessel left Manila on a scheduled trip to Cebu, an island to the South East. The cargo had a total weight of 2,978 tons and included lorries and containers stowed in the cargo deck and cars and SUVs stowed on the car deck. There were 713 passengers on board and 138 crew. At about 09:00 on 21 June 2008, the Vessel sailed into the eye of Typhoon Frank, about 8 nautical miles from Aklan Point on Panay Island. By 11:00 she was listing 40º to port and had become unmanoeuvrable. The wind was very strong and the waves 20 foot high. At around 12:00 the Master, Captain Florencio Marimon ("the Master"), gave the order to abandon ship and shortly thereafter the Vessel capsized

South West of Sitio Cabitangahan, Brgy Taclobo, Sibuyan. Tragically, over 800 lives were lost and only 32 of those on board survived. The Master was among those who died. I emphasise that the policies the subject matter of this case only relate to cargo claims and do not relate to any claims for loss of life or loss of the Vessel.

12. As Field J described in paragraph 8 of his judgment (which I gratefully adopt), there had been a number of bulletins in relation to the development of Typhoon Frank. It had started on 18 June 2008 as a low pressure area at about 830 kms East of Mindanao. At 17:00 that day the Philippine Atmospheric, Geophysical and Astronomical Services Administration ("PAGASA") reported in a Severe Weather Bulletin ("SWB") No 1 that the low pressure area had developed into a tropical depression named "Frank" whose centre at 16:00 was estimated to be 670 kms East Northeast of Hinatuan Surigao del Sur. The forecast movement was West Northwest at 15 kph. At 23:00 on 19 June 2008, PAGASA reported in SWB No 5 that, as at 22:00 that day, the centre of Frank was estimated to be 330 kms East Southeast of Guiuan, Eastern Samar, with maximum winds of 85 kph and forecast to move Northwest at 15 kph. On 20 June 2008, PAGASA issued SWB No 6 and SWB No 7 at 04:00 and 11:00 respectively, giving Frank's estimated location, the strength of the wind and stating that it was forecast to move West Northwest. At 16:45 on 20 June 2008 PAGASA issued SWB No 8. This contained a Public Storm Warning Signal ("PSWS") No 1 in relation to Manila. A copy of SWB No 8 was in the Master's hands before the Vessel departed for Cebu at 20:04. It read as follows:

> "W E A T H E R R E P O R T
>
> SEVERE WEATHER BULLETIN NO.8
>
> TYPHOON FRANK ISSUED AT 445PM JUNE 20/2008
>
> TYPHOON FRANK HAS MADE LANDFALL OVER EASTERN SAMAR AND IS NOW HEADING TOWARDS BICOL REGION.
>
> AT 4PM TODAY THE EYE OF TYPHOON WAS LOCATED AT THE VICINITY OF WESTERN SAMAR OR 50KMS SE OF CATBALOGAN CITY COORDINATE 11.5N 125.1E WITH MAX SUSTAINED WINDS OF 140KPH NEAR THE CENTER AND GUSTINESS OF UP TO 170KPH. IT IS FORECAST TO MOVE WNW AT 19KPH.
>
> FORECAST POSITION:
>
> TYPHOON FRANK IS EXPECTED TO CROSS SAMAR TODAY AND WILL BE OVER CAMARINES NORTE BY TOMORROW AFTERNOON. BY SUNDAY AFTERNOON IT WILL BE AT 50KMS NW OF BALER AURORA AND AT 30KMS NW OF LAOAG CITY BY MONDAY MORNING.
>
> PSWS NO.3 - OVER CAMARINES NORTE, CAMARINES SUR, ALBAY, INCLUDING BURIAS ISLAND

> SORSOGON, CATANDUANES, MASBATE, SAMAR PROVINCES, LEYTE, INCLUDING BILIRAN ISLAND.
>
> PSWS NO.2 - OVER QUEZON, INCLUDING POLILIO, MARINDUQUE, ROMBLON, NORTHERN CEBU AND SOUTHERN LEYTE.
>
> PSWS NO.1 - OVER AURORA, RIZAL, LAGUNA, BATANGAS, CAVITE, MINDORO PROVINCES, METRO MANILA, ANTIQUE, AKLAN, CAPIZ, ILOILO, REST OF CEBU, BOHOL, NEGROS PROVINCES, GUIMARAS, DINAGAT AND SIARGAO ISLAND.
>
> E N D
>
> 1735HRS
>
> ((PAGASA WEATHER FORECAST JUNE 20/2008))

13. PAGASA issued SWB no. 9 at 23:00 on 20 June 2008: see paragraph 34 of the judgment. It announced that PSWS no. 3 had been hoisted on the Usual Route. The evidence demonstrated that the Master was likely to have received a copy of this bulletin over the radio by midnight on 20-21 June 2008.

14. PSWSs are graded 1, 2, 3 or 4 by PAGASA depending on the wind speeds and expected time before arrival as follows:

> "No. 1 – winds of 30-60 kph expected in locality in at least 36 hours.
>
> No. 2 – winds of greater than 60-100 kph up to 100 kph expected in locality in at least 24 hours.
>
> No. 3 – winds greater than 100 kph up to 185 kph expected in locality at least 18 hours usually accompanied by heavy rains.
>
> No. 4 – winds greater than 185 kph expected in locality in at least 12 hours usually accompanied by heavy rains."

The various proceedings in the Philippines

15. A considerable number of claims by, or on behalf of, cargo owners or cargo insurers were brought in the Philippine courts against Sulpicio and Oriental. Those claims are currently working their way through the Philippine Courts. In those proceedings Oriental has necessarily taken the point that the insurance was vitiated by breach of the typhoon warranty in the Original Policy. I say "necessarily" because, in circumstances where Reinsurers are denying liability under the Reinsurance Policy, Oriental has little option but to deny liability under the Original Policy. Oriental invited Reinsurers to take over the defence of the Philippine proceedings by exercising their rights under the claims control clause, but to date Reinsurers have declined to do so.

16. There were also other proceedings in the Philippines In very brief summary, these included:

i) A Board of Marine Inquiry ("the BMI") which was constituted immediately after the casualty on 21 June 2008. This investigated the cause of the casualty and issued its report on 18 August 2008. It was constituted by, amongst others, two master mariners and two chief engineers; its report was based on a hearing at which a number of witnesses were heard; the report's findings were adopted by the Decision of the Commandant of the Philippine Coast Guard on 26 August 2008. The BMI concluded, amongst other things, that the Master intended to take the Vessel's usual route from Manila to Cebu (as to which see below) and failed to fully assess the weather conditions and to follow the general policy of a circular HPCG Memorandum 04-07 issued, as to which also see below. Mr Roger ter Haar QC, leading counsel for Oriental, pointed out that, whilst the BMI had the advantage of investigating immediately after the incident, the BMI was not focussed on the insurance issues the subject of this appeal, Oriental was not represented at the BMI and the gathering of evidence was in the control of the Board.

ii) The Department of Transport and Communications ("DOTC") reviewed and modified the findings of the BMI by a resolution issued on 28 August 2009. Although the DOTC found, without the benefit of any oral evidence, that the Master intended to take an alternate route from Manila to Cebu (as to which see below) it also found that the Master "with erroneous judgment and lack of sufficient foresight took a calculated option of maintaining [the usual route] while the vessel was already underway".

iii) The National Prosecution Service of the Department of Justice ("DOJ") issued a resolution on 22 June 2009. This resolution was based on a hearing at which a number of witnesses were heard. By this resolution, it was recommended that the Master (posthumously) and Mr Edgar S. Go, one of the owners, and a Vice-President, of Sulpicio (and others), be indicted for reckless imprudence resulting in multiple homicide, physical injuries and damage to properties.

iv) However, on appeal, on 22 March 2013, the Philippine Court of Appeals (15th Division) granted a petition to review by Mr Go and annulled and set aside the DOJ resolution insofar as it recommended the indictment of Mr Go, on the ground that there was insufficient evidence that Mr Go had participated in the decision allowing the Vessel's departure and that the Master in any event had the overriding authority to decide whether or not to sail. The posthumous indictment of the Master was not disturbed. We were informed that, despite that dismissal, there is currently an appeal by interested parties against such dismissal.

The Commercial Court proceedings

17. On 22 November 2010 Reinsurers issued proceedings in the Commercial Court for negative declarations: (i) that they were not liable to indemnify Oriental pursuant to the Reinsurance Policy in respect of cargo claims arising from the casualty, as a result of a breach of the typhoon warranty in the Reinsurance Policy; and (ii) that Oriental, likewise, was not liable to indemnify Sulpicio under the Original Policy. The basis of

Reinsurers' claim was that the departure of the Vessel from Manila for Cebu on 20 June 2008 constituted a breach of the typhoon warranty. As Field J explains, that action was pre-emptive in the sense that, to date, Oriental has made no claim against Reinsurers for an indemnity.

18. Shortly after the Commercial Court proceedings were issued, Oriental applied for a case-management stay pending the resolution of the cargo and other claims in the Philippine courts. It argued, inter alia, that: (i) the former were premature on the basis that, if the final resolution of the various cargo claims was in Oriental's favour, there would be no loss to Oriental requiring indemnification from Reinsurers; (ii) without such a stay there would be a risk of inconsistent decisions in the English and Philippine courts which could pose difficulties for Oriental, especially if the English court found that the typhoon warranty was breached and the Philippine court found that it and/or the typhoon warranty in the Original Policy was not; (iii) it was invidious that Oriental was being placed in a position in which it would have to assert in England the opposite of its case in respect of the typhoon warranty in the Original Policy in the Philippines; that might undermine the credibility of Oriental's defence in the Philippines and in consequence place it under greater pressure to compromise the proceedings there; and (iv) the claimants were proposing to rely on hearsay statements made in the course of different enquiries and adjudications in the Philippines for the purpose of proving that the Master intended to take the usual and not an alternative route to Cebu on 20 June 2008; yet that issue had not been finally and conclusively determined in the Philippines and might be determined differently there than in England. However, in the exercise of his discretion, Andrew Smith J refused the application to stay and his decision was upheld on appeal by a constitution of this Court: see [2012] EWCA Civ 1341. We were told at the hearing of this appeal that no decision of the Philippine court in relation to the cargo claims was likely to be given for another 3 to 5 years.

19. Although at the hearing of the appeal Mr Roger ter Haar QC attempted, in the course of his written and oral submissions, to revisit certain of these matters and to complain about the course taken by Reinsurers in pressing for a decision in the English Commercial Court proceedings, whilst the Philippine proceedings (both civil and criminal) were ongoing, those issues were not relevant to our determination of this appeal and I do not mention them further.

The trial before Field J

20. At the trial before Field J it was common ground (as indeed it was before us), that the typhoon warranty in the Reinsurance Policy contains two limbs:

    i) limb 1: "the vessel shall not sail or put out of Sheltered Port when there is a typhoon or storm warning at that port....."; and

    ii) limb 2: "the vessel shall not sail or put out of Sheltered Port .... when her destination or intended route may be within the possible path of the typhoon or storm announced at the port of sailing, port of destination or any intervening point."

    It was also common ground that, in the event of a breach of either limb 1 or limb 2, the policy was rendered void.

21. At the trial before Field J, Reinsurers contended that the departure of the Vessel from Manila on 20 June 2008:

i) constituted a breach of limb 1 of the typhoon warranty in that there was a typhoon or storm warning at Manila, namely PSWS No 1, announced in SWB No 8, issued at 4:45 pm on 20 June 2008 by PAGASA ("the relevant Storm Warning"), a copy of which was in the Master's hands before the Vessel departed for Cebu at 8:04 pm; and

ii) constituted a breach of limb 2 of the typhoon warranty in that the Vessel's intended route was within the possible path of the typhoon or storm announced at the port of sailing.

22. Oriental, on the other hand, contended that:

i) as to limb 1:

a) the typhoon warranty had to be construed in the context of "Revised Guidelines on Movements of Vessels During Heavy Weather" issued by the Headquarters of the Philippine Coast Guard ("HPCG") applicable to each level of PSWS, as contained in HPCG Memorandum Circular 04-07 issued on 27 June 2007 ("the Circular") (as described in paragraphs 10-12 of the judgment), and in the light of how an experienced insured under the Original Policy would have understood the relevant Storm Warning at the port of sailing;

b) because there was no storm or typhoon warning "prohibiting" or "advising against" the Vessel's departure, limb 1 of the typhoon warranty had not been breached, as an experienced insured under the Original Policy would not have understood the relevant Storm Warning at the port of sailing as prohibiting departure from Manila;

ii) as to limb 2:

a) as a matter of construction of limb 2, the word "announced" qualified the words "the possible path", so that regard had to be had to *the announced predicted* path of the typhoon or storm when determining whether the intended route of the Vessel might have been in the possible path of the typhoon or storm;

b) that the intended route of the Vessel on 20 June 2008 was not its usual route from Manila to Cebu (namely, east of Banton and Tablas Islands, through the strait of Romblon, and directly south towards Cebu, but approaching the port of Cebu from the North) ("the Usual Route"); but rather an alternate route (passing west of Tablas Island and down the western coast of Panay so that the Vessel would approach the port of Cebu from the South) ("the Alternate Route");

c) since the announced predicted path of the typhoon or storm was Northwest, not West Northwest, the intended route of the Vessel,

namely the Alternate Route, was not in the "possible path" that the typhoon or storm might take; and

d) that, accordingly, there had been no breach of limb 2 of the typhoon warranty.

23. In the alternative, Reinsurers submitted that, even if the typhoon warranty had to be construed by reference to the Circular, as Oriental contended, the guidance given in the whole of the Circular was potentially relevant, not merely the specific guidelines applicable to the different levels of PSWS. Reinsurers submitted that, by reference to such guidance, there would nonetheless have been a breach of limb 1 if the Vessel had departed:

i) (as here) when a PSWS of whatever level was hoisted or expected to be hoisted within the origin, route or destination of the Vessel; and/or

ii) (as here) if the area of origin, route or destination of the Vessel was within the "Danger Sector" as defined in the Circular; and/or

iii) (as here) the Master of the Vessel decided to depart from the area of origin in circumstances where it was imprudent and/or unreasonable for the Master so to do, having regard to the safety of the lives on board on the Vessel and the property at risk.

In the circumstances Reinsurers argued that, on that alternate basis, there had been a breach of the typhoon warranty.

24. At trial the underlying facts were largely agreed between the parties or their experts. Oriental called no evidence, either factual or expert, as to the legal effect or as to the practices or customs in the Philippines relating to the effect of typhoon warnings in the Philippines. In its statements of case, the only identified matter arising in the Philippines, against the background of which Oriental argued that the Reinsurance Contract was to be construed, was the Circular. Nor did Oriental call any oral evidence directed to determination of the issue whether there had been a breach of the typhoon warranty or not.

25. However there were two factual issues in dispute, namely:

i) What was the path of Typhoon Frank as forecast by PAGASA?

ii) What was the Master’s intended route when the Vessel departed from Manila on 20th June 2008; was it the Usual Route or the Alternate Route?

Field J's judgment

26. In a careful and comprehensive judgment Field J dealt with the various arguments put forward by the respective parties on a number of alternative bases. In respect of virtually every argument, he found in favour of Reinsurers and contrary to the submissions put forward by Oriental. I summarise his conclusions as follows.

Limb 1

27. Field J held that Oriental was in breach of limb 1 of the typhoon warranty. He rejected Oriental's contention that the typhoon warranty fell to be construed in accordance with the Circular, and in the light of how an experienced insured under the Original Policy would have understood the warning at the port of sailing. He held that the typhoon warranty had simply to be construed according to its plain terms, against the relevant factual matrix. On the basis of that interpretation of limb 1, and on the basis that it was common ground that on 20 June 2008 the Vessel had sailed out of Manila bound for Cebu at a time when there was at Manila a storm warning, the typhoon warranty was thereby breached and, in consequence, the Reinsurance Policy was avoided.

28. The relevant paragraphs of Field J's judgment in relation to his conclusions on this aspect of limb 1 are paragraphs 28 to 36. It is useful to quote them in full.

> "**The meaning and effect of limb 1 of the Warranty**
>
> 28. Lord Hoffmann's first rule of construction in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912-913 was:
>
> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."
>
> 29. In this case the relevant background knowledge includes: (i) the prevalence of typhoons in the Philippines from the end of May to October; (ii) the grave danger typhoons pose to shipping; (iii) the routine issuance by PAGASA of PSWSs [Public Storm Warning Signals] and SWBs [Severe Weather Bulletin]; and (iv) guidelines issued by HPCG from time to time on movements of vessels when there are warnings of storms and typhoons.
>
> 30. The words of the warranty must be given their ordinary and natural meaning unless the background indicates that such meaning was not the intended meaning[2]. It also has to be remembered that a continuing warranty is a draconian term: its breach produces an automatic cancellation of the cover, regardless of whether a loss is causally connected to the breach of warranty; accordingly, it is up to the underwriters in whose favour the warranty has been included to ensure that the protection they want is expressed in clear terms[3]. Also, where the language used has more than one potential meaning, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other, see *Rainy Sky SA & Ors v Kookmin Bank* [2012] 1 Lloyd's Rep 34 at paras 21 and 30. However, where the parties have used

unambiguous language, the court must apply it, however improbable the result[4].

31. Mr MacDonald Eggers QC for the claimants submitted that the Warranty was clearly and simply phrased. If a scheduled vessel sailed from a port where there was a typhoon or storm warning, the warranty was breached. PSWS No 1 is the lowest of the four Storm Warning Signals issued by PAGASA, but the PSWS No 1 at Manila issued at 4:45 pm on 20 June 2008 was nonetheless a "public storm warning"; indeed, in the context of Typhoon Frank, it was a warning of a typhoon rather than a storm and as such was to be taken seriously. It predicted winds of 30-60 knots within 36 hours. When it was issued at 4:45 pm Typhoon Frank was approximately 310 miles away from Manila. When the *Princess of the Stars* departed for Cebu at 8:04 pm, the typhoon had moved approximately 40 miles closer to Manila. The PSWS No 1 was a clearly a "typhoon or storm warning at that [sheltered] port" within limb 1. Accordingly, there had been a clear breach of limb 1.

32. Mr ter Haar QC for Oriental argued that the Warranty had to be construed in the context of the Circular and in the light of how an experienced insured under the original policy would understand the warning at the port of sailing. If, having regard to the Circular, such an insured would have understood the warning as prohibiting or advising against setting sail in the circumstances, there would be a breach of the Warranty if the vessel set sail; if, on the other hand, he would have understood the warning as in no way advising against or prohibiting setting sail, then there would be no breach of limb 1.

33. Mr ter Haar submitted that the claimants' interpretation would lead to absurd consequences. Thus, on their construction, there would be a breach where: (i) a PSWS No 1 signal had been hoisted and a scheduled vessel left port intending to make a voyage of one hour's duration even though no bad weather was expected until the next day or the day after; and/or (ii) a vessel of more than 2000 gross tons (like the *Princess of the Stars*) sailed from a port where there was a PSWS No 2, even though under the specific guidelines putting out of the port in these circumstances was not forbidden.

34. I prefer Mr MacDonald Eggers' submissions to those advanced by Mr ter Haar, notwithstanding that the claimants' construction may mean that to avoid a breach of the Warranty some of the scheduled vessels might have to remain in a port for some hours when the port is not predicted to be in imminent danger from a typhoon. The manifest object of the Warranty is to protect the reinsurers from liability arising from the grave danger of typhoons that can travel at varying speeds and in directions that cannot be reliably predicted. A PSWS No 1 at a

particular location can be followed in a matter of hours by a PSWS No 2[5] at the same location, as evidenced by the issuance of SWB No 9 at 11.00 pm on 20 June 2008, 6 ¼ hours after the earlier PSWS No 1 was announced for Manila. It follows that the underlying policy of the Warranty is "safety first" and the possible commercial consequences for scheduled vessels of the claimants' construction are not such, in my opinion, as to show that the guidelines in the Circular were intended to be the touchstone for determining a breach of the Warranty.

35. I would add that if it had been the parties' intention to prohibit a scheduled vessel from departing only when the Circular prohibited or advised against it, they could have easily so provided, and the fact that they did not tells strongly against Oriental's construction, even though the Circular is part of the contractual background. Also, the issuance in the Philippines of public storm and typhoon warnings by PAGASA on which limb 1 of the Warranty is predicated, is a phenomenon that exists independently of the Circular and the HPCG, and thus the Warranty's reference to storm and typhoon warnings is not a strong pointer to an intention to incorporate the Circular's guidelines.

Conclusion on limb 1

36. Accepting as I do the claimants' interpretation of limb 1, and it not being disputed that on 20 June 2008 the Princess of the Stars sailed out of Manila bound for Cebu at a time when there was at Manila the PSWS No 1 referred to in SWB No 8, I find that the Warranty was thereby breached and in consequence the reinsurance contract was avoided.

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[2] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913, per Lord Hoffmann.

[3] *Hussain v Brown* [1996] 1 Lloyd's Rep 627 at p 630, per Saville LJ.

[4] C*ooperative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97, approved by the Supreme Court in *Rainy Sky SA & Ors v Kookmin Bank* [2012] 1 Lloyd's Rep 34 at para 16.

[5] The specific guideline in the Circular for a PSWS No 2 forbids all vessels of 2000 gross tons or less from leaving port except to take shelter."

29. In the alternative, in relation to limb 1, the judge held that, even if the typhoon warranty fell to be construed in accordance with the Circular, in the manner contended for by Oriental, there was nonetheless a failure to comply with the entirety of the guidance contained in the Circular. He concluded that there would be a breach of the Warranty if the Vessel put out when: (i) PSWS No 1, 2 or 3 had been hoisted or was expected to be hoisted within the area of origin, route or destination of the Vessel; and/or (ii) the area of origin, route or destination of the Vessel was within the "Danger Sector" as defined in the Circular. He declined to determine the issue whether, if the typhoon warranty were to be interpreted against the background of the Circular as a whole, there would have been a breach of the typhoon warranty, if it had been imprudent and/or unreasonable for the Master to have sailed, having regard to the safety of the lives on board the Vessel and the property at risk. He held that it was unnecessary for the just disposal of the claim and stated that he had serious misgivings about embarking on the proposed enquiry when he had received no expert evidence as to local maritime practice. Accordingly he held that, on the basis of his finding that the Usual Route was the intended route (because, as the experts agreed and he accepted, PSWS No 3 had been hoisted on the Usual Route at Masbate, as reported in SWB No 8), even on Oriental's construction of limb 1, there was still a breach of the typhoon warranty. He also held that, because, as the experts agreed and he accepted, PSWS No 1 had been hoisted on the Alternate Route, even if the Alternate Route had been the intended route, limb 1 of the typhoon warranty would have been breached, even if the warranty were construed as Oriental argued it should be. He also held that since all three experts agreed that both the Usual Route and the Alternate Route were within the Danger Sector, whether the Danger Sector was calculated by reference to the West Northwest path or the Northwest path of the storm or typhoon, there had been a breach of the warranty for this additional reason even if the warranty were to be read in the context of the Circular, as Oriental contended. The judge's conclusions in relation to these issues are set out at paragraphs 61 to 68 of the judgment.

Limb 2

30. The judge also held that Oriental was in breach of limb 2 of the typhoon warranty. He held that the Master's intended route was the Usual Route and that, since it was not in dispute that, if the Usual Route was the Vessel's intended route, then that route was within the possible path of Typhoon Frank, there had been a breach of limb 2 of the typhoon warranty. His analysis of the evidence and his conclusion appear at paragraphs 38 to 48 of the judgment:

> "G. Was the usual route the intended route?
>
> 38. The usual route for a trip by the Princess of the Stars to Cebu from Manila took the vessel through the Verde Islands passage, east of Banton Island, through the Sibuyan Sea, the Visayan Sea and the Camotes Sea, crossing west of Marinduque, Romblon, Masbate and Leyte before proceeding to Cebu. It is not in dispute that if the usual route was the vessel's intended route, then that route was within the possible path of Typhoon Frank and there was a breach of limb 2 of the Warranty. The first question therefore is whether the usual route was the intended route.

39. One of the procedures to be completed by a master of a vessel before it leaves port in the Philippines is the swearing of an Oath of Safe Departure based on a proforma document which states, inter alia, that his vessel is seaworthy in all respects to sail for the stated destination. Captain Marimon swore an Oath of Safe Departure for the trip to Cebu on 20 June 2008 and wrote under the attestation clause: "ETA 1645 hrs", indicating that the expected arrival time at Cebu City was 16:45 hours the following day.

40. The BMI report states that Petty Officer (First Class) Felix Sardan of the Philippine Coast Guard testified as follows. He inspected the Princess of the Stars in Manila port at 7:30 pm on 20 June 2008 to verify Captain Marimon's Oath of Safe Departure and he advised the Master of the prevailing weather condition along the route of the vessel. The Master informed him about an alternate route he would use for the intended voyage west of Tablas, South of Negros Oriental and Southern Cebu. PO1 Sardan said that in this alternate route no PSWS No 3 had been hoisted and hence there was no prohibition against the vessel sailing. PO Sardan informed the Commander of the Coast Guard at Manila of the Master's intention to depart and use the alternate route.

41. Sulpicio's Port Captain at Manila, Captain Eugenio, testified before the BMI that at about 6:00 pm he discussed the weather report with Captain Marimon on board the Princess of the Stars and when he asked him what he thought about the weather, Captain Marimon replied that if the weather is really, really bad he had another plan to pass West of Tablas Island. Captain Marimon added that the captain has the final decision for anything on the ship when the ship travels.

42. Sulpicio's Port Captain at Cebu, Captain Ponteres, testified to the BMI that Captain Marimon told him by radio at 11:00 pm on 20 June 2008 that he was going to pass Western Tablas because of the prevailing Typhoon Frank at Eastern Samar.

43. It is common ground that the first 150 nautical miles of both the usual route and the alternate route followed the same path and that Captain Marimon would have had to choose between the usual route and the alternate route between 03:00 and 04:00 hours on 21 June 2008 when the vessel was off Dumali Point.

44. At 10:00 pm on 20 June 2008, after the vessel's departure two hours earlier, the Master informed Sulpicio by telegram that the ETA at Cebu was 17:45 hours on 21 June 2008. This ETA and the ETA noted in the Oath of Safe Departure are consistent only with vessel taking the usual route. The alternate route would have taken five hours longer than the usual route.

> 45. There is no documentary evidence of a voyage plan for the alternate route. Further, a survivor of the casualty testified that no announcement was made to the passengers before departure that arrival would be delayed.
>
> 46. When the Princess of the Stars sailed into the eye of Typhoon Frank it was well past Dumali point and proceeding along the usual route.
>
> 47. In my judgment, given the above matters, it is to be safely inferred that Captain Marimon intended to follow the usual route but would depart from it if the weather became really, really bad before the latest point when the vessel could take the alternate route west of Tablas Island. Does it follow that the usual route was the intended route for the purposes of limb 2? In my opinion it does. As I have said, the policy of the Warranty is "safety first" and a route intended to be taken subject only to the possibility of a change of course if the weather is going to be bad, is, in my view, the intended route for the purposes of limb 2.
>
> 48. Accordingly, I find that limb 2 of the Warranty was also breached. "

31. But even on the basis that the Alternate Route had been the intended route, the judge rejected Oriental's construction argument that the word "announced" qualified the words "the possible path" in limb 2, so that regard had be had to the "announced" predicted path of the typhoon or storm when determining whether the intended route of the vessel may have been in the possible path of the typhoon or storm: see paragraph 49 of the judgment. On this basis, since two of the experts agreed (and the judge accepted) that both the Usual Route and the Alternate Route were within the possible path of Typhoon Frank, there had been a breach of limb 2 of the typhoon warranty: see paragraph 50 of the judgment. He also accepted Reinsurers' submission that the "Danger Sector" as defined in the Circular afforded a straightforward way of determining whether the intended route was in the possible path of the storm or typhoon. He concluded, again accepting the evidence of the experts, that, since both the Usual Route and the Alternate Route fell within the Danger Sector, there had been a breach of limb 2 on that basis as well: see paragraphs 51 to 52 of the judgment. Moreover he went on to hold that, even if Oriental's construction argument in relation to limb 2 were correct, on an analysis of the relevant factual materials, the full version of the PAGASA announcement contained two "announced" predicted paths: one West Northwest and the other Northwest; and that on the basis of the parties' expert evidence, which he accepted, both the Usual Route and the Alternate Route, as intended routes, "may be within the possible path of the typhoon or storm announced…" within limb 2. Accordingly he held that limb 2 was breached, even if Oriental's construction argument were correct: see paragraphs 53 to 60 of the judgment.

The course of the appeal

32. By its grounds of appeal, Oriental basically presented the same arguments as it had done before the judge. In particular it claimed that the judge had erred because:

> "1. In construing the Reinsurance Policy [the judge] failed to give any or any sufficient weight to the way in which Typhoon Warnings were understood and acted upon by the maritime community in the Philippines; and
>
> 2. In failing to give any or any sufficient weight to the need in construing the Reinsurance Policy to arrive at a construction which was likely to be the same as the construction to be given to the underlying Insurance Policy in the Philippines;
>
> 3. In holding that [Oriental] was in breach of Limb (1) of the Typhoon Warranty in the Reinsurance Policy by reason of the fact that there was a storm warning in place at the Port of Manila without having regard to how that Warning would and should be understood and acted upon by the shipowner insured under the underlying policy;
>
> ……
>
> 7. In holding that even if the Master's intention was to take the Alternate Route, there was a breach of the Typhoon Warranty either by reference to a Danger Sector determined in accordance with Circular 04-07 or by reference to a West North West path of Typhoon Frank particularly when neither of these were points raised as points of criticism of the Master or shipowner by any of the parties in any of the proceedings in the Philippines, from which the learned Judge should have inferred that the Philippine maritime community would not have understood or acted upon the Typhoon Warning in the way contended for by Reinsurers and upheld by the learned Judge."

33. Likewise, on appeal, Reinsurers largely relied on the arguments which they had made to Field J, although by their Respondents' notice dated 1 November 2013 they sought to rely on certain additional or different reasons in so far as they were not relied on by the judge. However Reinsurers did not seek to have determined on appeal the issue which the judge, as stated in paragraph 70 of his judgment, refrained from deciding: namely, if Oriental's primary interpretation of limb 2 were correct, whether the Master's decision to sail was unreasonable or imprudent and therefore constituted a breach of the typhoon warranty.

34. Because Oriental had to overturn numerous conclusions of the judge in order to succeed on its appeal, the court directed at the start of the hearing of the appeal that it would, at least in the first instance, only hear arguments in relation to the construction issues arising on limb 1 of the typhoon warranty and the specific factual issue arising on limb 2, namely whether the judge was entitled to conclude on the evidence that the intended route was the Usual Route.

Discussion and determination in relation to the construction of limb 1

35. Oriental's first submission was that the typhoon warranty in the Reinsurance Policy was: (i) to be construed in the same way as, or "back to back" to, the typhoon warranty in the Original Policy; and (ii) that the only sensible way in which that warranty could be construed was "by reference to what would be understood by the typhoon warranty in that particular jurisdiction". I am prepared to accept that, as Mr ter Haar submitted, in the circumstances of this case, where the typhoon warranty in the Original Policy was in almost identical terms to the warranty in the Reinsurance Policy, where there was a follow the settlements clause and it was common ground that there was no material difference between English law and Philippine law with respect to policy interpretation or the effect of a breach of warranty, the two clauses should be construed identically: see in this context *Forsikringsaktieselskapet Vesta v Butcher* [1989] 1 A.C. 852 at pages 892 and 895; *Groupama Navigation et Transports and others v Catatumbo C.A. Seguros* [2000] 2 Lloyd's Rep. 350 at paragraphs 19 and 20; *WASA International Insurance Co. v Lexington Insurance Co* [2009] UKHL 40; [2009] 2 Lloyd's Rep. 508 at paragraphs 55 and 56.

36. However there was no evidence, expert or otherwise, adduced as to what would be understood in the Philippines by a typhoon warranty in the terms in which the warranty was expressed in either policy, or as to how the typhoon warranty in the Original Policy might be interpreted as a matter of Philippine law. In those circumstances Mr ter Haar's submission led nowhere. Accordingly this court has to construe the clause in the Reinsurance Policy in accordance with its terms and in accordance with English law.

37. Oriental's second submission, as developed in argument by Mr ter Haar, was that the typhoon warranty should be construed by reference to the way in which typhoon warnings were generally understood and acted upon by the maritime community in the Philippines; that meant, in the context of the Circular, as part of the relevant factual matrix, by reference to the way in which the relevant Storm Warning in place at the Port of Manila (namely PSWS No 1 announced in SWB No 8, issued at 4:45 pm on 20 June 2008) would, and should, have been understood and acted upon by the insured under the Original Policy.

38. Mr ter Haar referred to the relevant specific guidelines in the Circular applicable to PSWSs, which were as follows:

> "1. Movements of any craft/vessel is left to the decision and responsibility of its master/shipowner if PSWS number 1 is hoisted within the vessel's point of origin, the route, and destination.
>
> 2. No vessel of 2,000 gross tons or below shall sail except to take shelter if PSWS number 2 is hoisted within its point of origin, the route, and point of destination.
>
> 3. No vessel shall sail except to take shelter if PSWS number 3/PSWS Number 4 is hoisted within its point of origin, the route, and point of destination.

> 4. Vessels allowed to sail or to take shelter or ride out the storm as covered by paragraphs 2 and 3 of this section, shall depart without passengers or cargo on board.
>
> 5. The Boarding Team must advise the vessel on the current weather report and forecast prior to departure of the vessel."

39. Mr ter Haar submitted that one therefore had to ask whether the relevant Storm Warning would have been understood as advising against setting sail either (a) absolutely or (b) conditionally; only if an experienced insured would have understood the warning as advising against setting sail in all circumstances (i.e. absolutely), would there have been a breach of the typhoon warranty if the Vessel had set sail. If, on the other hand, an experienced insured would have understood the relevant Storm Warning as "in no way advising against setting sail", then there would have been no breach of limb 1. It was therefore relevant to look at the evidence in the various proceedings in the Philippines in order to answer the question as to what an experienced insured would have understood by the relevant Storm Warning. Mr ter Haar referred to certain evidence in such proceedings to support his submission that the evidence was consistently to the effect that no criticism was made of the Vessel leaving Manila when a PSWS No. 1 or No. 2 was hoisted at Manila. He submitted that the relevant Storm Warning did not "prohibit" or "advise against" the Vessel's departure and would not have been understood as having done so. In those circumstances there was no breach of limb 1 of the typhoon warranty.

40. Mr ter Haar gave examples of what he asserted was the commercial absurdity of Reinsurers' position being correct. He suggested, for example, that, on Reinsurers' construction, it would be a breach of warranty if a PSWS No. 1 were given a day before the typhoon was about to hit, and the vessel set sail, not southwards in the direction of the oncoming typhoon, but northwards at a speed faster than that of the approaching typhoon. It would be absurd if, in those circumstances, where the vessel was taking the sensible precaution of leaving harbour and departing from the area which the hurricane was due to hit, there was nonetheless a breach of the typhoon warranty. That was simply ignoring what the storm warning actually said.

41. In support of his submission that the construction of the typhoon warranty required consideration of the terms of any warning or announcement and an objective factual examination of whether an experienced insured would have regarded the warning as prohibiting or advising against sailing, Mr ter Haar sought to rely on the decision of the Court of Appeal of Victoria in *Neuchatel Swiss General Insurance Co. Ltd. v Vlasons Shipping Inc. ("The Biyayang Ginto")* [2001] VSCA 25.

42. Principally for the reasons put forward by Mr Peter MacDonald Eggers QC, leading counsel for Reinsurers, in his written and oral submissions, I reject Mr ter Haar's submission that the typhoon warranty has to be construed by reference to, or in the context of, the Circular or by reference to what an experienced insured would have understood the relevant Storm Warning to have meant, with the result that only in circumstances where the warning advised against, or prohibited, departure from the relevant port, would the warranty have been breached. My reasons are as follows.

43. It was common ground before us, as indeed it was before the judge, that the "typhoon or storm warning at that port" referred to in limb 1 of the typhoon warranty would

have been understood as certainly including a reference to a warning issued by PAGASA. That was because the risks underwritten in the Reinsurance Contract related to risks associated with a Philippine fleet operating principally in Philippine territorial waters. As the judge correctly identified in paragraph 29 of the judgment, the relevant background knowledge against which the typhoon warranty fell to be interpreted, in accordance with well-established rules of construction articulated in cases such as *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, per Lord Hoffmann at 912-913, included: (i) the prevalence of typhoons in the Philippines from the end of May to October; (ii) the grave danger typhoons pose to shipping; (iii) the routine issuance by PAGASA of PSWSs and SWBs; and (iv) guidelines issued by HPCG from time to time on movements of vessels when there are warnings of storms and typhoons.

44. In accordance with well-established principles of construction, the typhoon warranty should be construed having regard to the language actually chosen by the parties and giving those words their ordinary natural meaning, unless the background indicates that such meaning was not the intended meaning; see e.g. *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 384, 388; *Investors Compensation Scheme Ltd supra* at 912-913. Whilst in a case where the language used has more than one potential meaning, the court is entitled to prefer the construction which is consistent with business commonsense and to reject the other, where the parties have used unambiguous language, the court must apply it even though the results may be commercially improbable; see e.g. *Rainy Sky SA & Ors v Kookmin Bank* [2012] 1 Lloyd's Rep 34, [2011] UKSC 50, at paras 21 and 23; *Cooperative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97, approved in *Rainy Sky SA* at para 23. (Although a point made on behalf of Reinsurers was that the wording was actually provided by Oriental, that is not a factor which has in any way affected my approach to the construction of the warranty.)

45. The court is reluctant to introduce words not used in the actual contractual provisions as part of the construction exercise, unless the court is satisfied that the words selected by the parties are commercially nonsensical and it is clear that the parties intended some other purpose. As Chadwick LJ said in *City Alliance Ltd v Oxford Forecasting Services Ltd* [2001] 1 All ER (Comm) 233, at para. 12-13:

> "13. ……. It is not for a party who relies upon the words actually used to establish that those words effect a sensible commercial purpose. It should be assumed, as a starting point, that the parties understood the purpose which was effected by the words they used; and that they used those words because, to them, that was a sensible commercial purpose. Before the Court can introduce words which the parties have not used, it is necessary to be satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it, and (ii) that they did intend some other commercial purpose which can be identified with confidence. If, and only if, those two conditions are satisfied, is it open to the court to introduce words which the parties have not used in order to construe the agreement. It is then permissible to do so because, if those conditions are satisfied,

> the additional words give to the agreement or clause the meaning which the parties must have intended."

46. The wording of limb 1 of the typhoon warranty in the present case is clearly and simply stated:

> "it is expressly warranted that the carrying vessel shall not sail or put out of Sheltered Port when there is a typhoon or storm warning at that port …".

47. Whilst, as Mr MacDonald Eggers submitted, it could be said that there are two possible meanings for the phrase "a typhoon or storm warning at that port", namely:

i) a typhoon or storm warning applicable to Manila; or

ii) a typhoon or storm warning issued or available at Manila relating to the contemplated voyage,

that is not a relevant ambiguity for the purpose of the issue under consideration, namely whether the warranty has to be construed in the context of the Circular. In my view the point does not matter but, if it does, I take the view that the first meaning is the correct one since, if the second meaning were correct, there would be considerable, if not complete, overlap or duplication with limb 2.

48. However what is absolutely clear is that, on the plain reading of the words used by the parties, there is no ambiguity as to the requirement of the existence of a typhoon or storm warning. There is no reference to the Circular, or to any specific level of PSWS or type of storm or typhoon warning, let alone to any distinction between warnings which "prohibit" or "advise against" vessels leaving port and those which do not. The warranty simply refers to typhoon warnings and storm warnings without distinction. Had it been the parties' intention to provide that the warranty required the Vessel not to sail only if the Circular prohibited or advised against the Vessel's departure, or only if (which is a somewhat different criterion) objectively an experienced insured would have understood the warning to prohibit or advise against such departure, it would have been the easiest thing for the warranty to have spelled out such a proviso. Similarly the warranty could have expressly referred to specific types of PSWSs, viz. types 3 and 4 (which prohibit vessels from sailing). But the warranty simply and unambiguously refers to a "typhoon or storm warning", without limitation.

49. In the circumstances I see no principled or legitimate basis for construing the warranty as subject to the type of conditions and provisos for which Mr ter Haar contends. To do so would require the introduction of words as part of the construction process in circumstances not justified by the authorities to which I have referred.

50. I also agree with the view expressed by the judge at paragraph 35 of his judgment where he said:

> "Also, the issuance in the Philippines of public storm and typhoon warnings by PAGASA on which limb 1 of the Warranty is predicated, is a phenomenon that exists independently of [the Circular] and the HPCG, and thus the

> Warranty's reference to storm and typhoon warnings is not a strong pointer to an intention to incorporate [the Circular's] guidelines".

51. Nor was I persuaded by Mr ter Haar's submissions in relation to the un-commerciality of some of the hypothetical scenarios which he posited. The commercial purpose of the typhoon warranty in the context of the Reinsurance Policy was clear. As Mr MacDonald Eggers submitted, the warranty clearly occupied a centrally important place in the Reinsurance Policy. Its commercial purpose was to ensure that no unnecessary risks were taken which would trigger Oriental's and Reinsurers' liability under their respective policies. The purpose of the typhoon warranty was clearly to ensure that cover depended on the scheduled vessels not sailing when there was *the possibility* - the concept used in the typhoon warranty - of encountering a typhoon or storm. The "safety first" intention of the policy can be seen from the fact that the warranty applied not only to typhoon warnings but also to storm warnings, which are less severe than typhoons. Thus I agree with the judge's views as expressed in paragraph 34 of his judgment that:

> "I prefer Mr MacDonald Eggers' submissions to those advanced by Mr ter Haar, notwithstanding that the claimants' construction may mean that to avoid a breach of the Warranty some of the scheduled vessels might have to remain in a port for some hours when the port is not predicted to be in imminent danger from a typhoon. The manifest object of the Warranty is to protect the reinsurers from liability arising from the grave danger of typhoons that can travel at varying speeds and in directions that cannot be reliably predicted. A PSWS No 1 at a particular location can be followed in a matter of hours by a PSWS No 2[5] at the same location, as evidenced by the issuance of SWB No 9 at 11.00 pm on 20 June 2008, 6 ¼ hours after the earlier PSWS No 1 was announced for Manila. It follows that the underlying policy of the Warranty is "safety first" and the possible commercial consequences for scheduled vessels of the claimants' construction are not such, in my opinion, as to show that the guidelines in the Circular were intended to be the touchstone for determining a breach of the Warranty.
>
> [5] The specific guidelines in the Circular for a PSWS No 2 forbids all vessels of 2000 gross tons or less from leaving port except to take shelter. "

52. Accordingly, I agree with the judge that the typhoon warranty has to be construed in such a way so as to prevent the vessel from sailing when there was any possibility of an encounter by the scheduled vessel with a typhoon or storm. Or, in the words of the learned judge, "*safety first*"; see paragraph 34 of his judgment.

53. I was not persuaded that the two Australian cases cited by the parties, namely *The Biyayang Ginto* and *Vlasons Shipping Inc v Neuchatel Swiss General Insurance Co Ltd ("The Aquarius Bright")* [2002] VSC 509 provided any real assistance to the construction of the typhoon warranty in the present case, in particular since one of the

critical issues in those cases was whether the master had knowledge of the relevant typhoon warning. I take that view, notwithstanding that the typhoon warranty in the Australian cases was in similar terms to that in the present case. However some support for the approach advocated by Reinsurers in this case is to be found in the judgment of Byrne J in *The Aquarius Bright* at paragraphs 37-38. He said:

> "37. What was put in answer to this was that the typhoon clause does not contemplate such an exercise involving judgment on the part of the master based on experience of the behaviour of these cyclonic systems. It will be recalled that the clause requires an assessment to be made at the time of sailing of the likely behaviour of the typhoon and its proximity to the vessel, assuming she follows her projected voyage. **It may be supposed that no competent master would put to sea in circumstances where he or she expected that the vessel would encounter a typhoon, so that the clause seeks to protect the underwriters from the claim where the master, having received an applicable typhoon warning as to the future position of the cyclonic system, nevertheless puts to sea on the basis of a judgment, based on his or her own experience or some other information, that the warning will prove to be inaccurate. In such an event, the clause operates, so that the risk of such a judgment is not borne by the underwriters. Moreover, the clause should be construed so that the master making the decision to sail should be able to know with a reasonable degree of certainty that the ship is or is not then off risk. This is not achieved by construing the typhoon clause to involve a conclusion which an experience and competent mariner might reasonably draw by the application of his or her meteorological experience and expertise to the published information. Typhoons are notoriously erratic and their future movements are difficult to predict.**
>
> 38. ….. It is true that Captain Sampan and his officers did undertake the task of attempting to predict the likely future movements of the typhoon before leaving port, using only the three surface analysis reports which they had received. It may be supposed that he and they brought to bear their collective experience and expertise in so doing. Captain Sampan said that, having done this, he felt comfortable in putting to sea for an encounter between his intended path and the typhoon was possible, but not probable. If he had been asked and if he had thought about it, he may have considered that the information in the three charts did not give rise to a conclusion that his projected voyage might be expected to encounter the storm force winds produced by the typhoon. He may have been wrong in so concluding, even negligently wrong. This is not for me to say. It is, to my mind, wholly unsatisfactory that a construction of the typhoon clause should involve such an

> assessment, usually after the event, in order to determine whether the vessel was off risk when it left port." [My emphasis.]

54. I agree with the proposition stated by Byrne J that it is wholly unsatisfactory that construction of a typhoon warranty should involve an after the event assessment as to whether, objectively, an experienced insured would have construed the relevant Storm Warning as prohibiting, or advising against, departure from the port, or whether, in all the circumstances, it would have been objectively reasonable for the vessel to have left port. Reinsurers are entitled to have the certainty of knowing that, on the happening of the stipulated event, namely the existence of a relevant storm or typhoon warning at the port of departure, a scheduled vessel is not going to leave port.

55. For the above reasons in my judgment Reinsurers succeed in upholding the judge's decision in relation to limb 1 on their first ground. Accordingly it was not relevant for the judge to examine the evidence in the various Philippine proceedings, or the findings of the various tribunals, for the purpose of considering whether the relevant Storm Warning prohibited or advised, or would have been understood to have prohibited or advised, the Vessel from departing Manila. There was thus a clear breach of limb 1 of the typhoon warranty since the Vessel set sail from Manila when the relevant Storm Warning was in place.

56. In the circumstances it is not necessary for me to address Reinsurers' alternative arguments in relation to limb 1 on the hypothetical basis that Oriental's argument that the typhoon warranty should be construed in the context of the Circular was correct. Suffice it to say, that, had it been necessary for me to do so, I would have agreed with the analysis carried out by the judge in paragraphs 61 to 68 of his judgment and would have concluded that there was a breach of the typhoon warranty on this alternative ground also.

57. I mention for the sake of completeness that we were not referred to any cases or other authorities specifically addressing the construction and effect of typhoon warranties, apart from the two Australian authorities referred to above.

Discussion and determination in relation to limb 2 - the intended route of the Vessel

58. I turn now to consider the specific factual issue arising on limb 2, namely whether Field J was entitled to conclude on the evidence that the intended route was the Usual Route. I have already quoted paragraphs 35 to 48 of his judgment where he analyses, and sets out his conclusions in relation to, the evidence on this issue. In essence the finding made by the judge was that the Master intended to take the Usual Route, but with a backup contingency plan to switch to the Alternate Route if the weather deteriorated. I repeat that no witnesses were called by either Oriental or Reinsurers in relation to the issue of the Master's intention as to which route to take. Both parties relied on documentary and transcript evidence given in certain of the Philippine tribunal hearings and other proceedings. The expert evidence given on behalf of the respective parties could not address the factual issue as to what was the Master's real intention, other than to assist indirectly in providing information in relation to marine matters such as journey times, direction of the typhoon, wind speed and identification of routes etc. For this reason this court was in as good a position as the judge to assess the written material and Civil Evidence Act material before him.

59. By way of introduction I emphasise two points. First, it is clear from the wording of limb 2 that the point of time at which the question of breach of the warranty has to be addressed is the time when the Vessel sails; accordingly the relevant intention is the intention of the Master as to which route to take, as at the time of the Vessel's departure from "Sheltered Port", namely Manila. There was no dispute that this was 20.04 on 20 June 2008. Second, there was no dispute before Field J or in this court that, if the Usual Route was the Vessel's intended route, then that route was within the possible path of Typhoon Frank and there was accordingly a breach of limb 2 of the Reinsurance Policy.

60. Mr ter Haar submitted before us that the judge's conclusion at paragraph 47 of the judgment (namely that "it is to be safely inferred that Captain Marimon intended to follow the usual route but would depart from it if the weather became really, really bad before the latest point when the vessel could take the alternate route west of Tablas Island") was directly contrary to the conclusion of the Departmental Resolution, which was that the Master declared his intention to take the Alternate Route, but changed his mind once at sea. Mr ter Haar claimed that the judge wrongly based his conclusion upon evidence recorded as having been given by a Captain Eugenio, as summarised in paragraph 41 of the judgment. Mr ter Haar complained that that passage had received virtually no attention in the proceedings in the Philippines and was not relied upon by Reinsurers in the court below. He further submitted that the judge's finding that the Master's true intention was a conditional one (namely to take the Usual Route unless prevented by the weather) had never been suggested in any of the various proceedings in the Philippines and was not Reinsurers' case, either in their pleadings or in their submissions. He submitted that the judge had based his conclusion on one passage of evidence which was directly in conflict with the other evidence given in the Philippines, which was summarised in an appendix to Oriental's skeleton argument. This included, but was not limited to:

i) evidence from a Captain Ponteres, Sulpicio's Port Captain in Cebu, that he spoke to the Master at about 17:35 (ahead of the Vessel's departure at 20:04) and was told by the Master that he was going to pass Western Tablas because of the prevailing Typhoon Frank at the Eastern Samar, which was evidence of an intention to take the Alternate Route;

ii) evidence from PO 1 Sardan of the Philippine Coast Guard that the Master told him that he intended to take the Alternate Route, given the terms of PAGASA's SWB no. 8;

iii) evidence from PO Sardan that he reported that that was the Master's intention to his superior, Commodore Tuason;

iv) other evidence from Captain Eugenio as to a conference on board the vessel at 18:00 on 20 June 2008 prior to departure, to the effect that he understood that the Master would pass west of Tablas.

61. Mr ter Haar further submitted that Reinsurers' case as presented at trial (namely that the Master's intention was to take the Usual Route unqualified by the conditional alternative postulated by the judge that he intended to take the Usual Route but to change to the Alternate Route "if the weather got really bad") involved a direct allegation that the Master was lying. It was a matter of concern that Field J came to a

conclusion which had never been explored with any of the witnesses in any of the Philippine proceedings. The judge should have accepted that the Master's stated intention to take the Alternate Route was his true intention, it being the overwhelming probability that the Master would not have lied about such a vital matter affecting the safety of the Vessel, her crew and the passengers onboard. The burden on Reinsurers to prove otherwise would be a high one.

62. I do not accept Mr ter Haar arguments in relation to limb 2. In my judgment Field J was entitled on the basis of the evidence before him to reach the conclusion which he did - namely that the Master's intention at the time of the Vessel's sailing from Manila was to take the Usual Route, but with a backup plan to change to the Alternate Route if the weather deteriorated. That, as Mr MacDonald Eggers correctly submitted, represented an intention to take the Usual Route at the time of departure. Nor, in my judgment, is it a relevant factor that Reinsurers' case on their pleadings was that the Master at the relevant time intended to take the Usual Route (without reference to any contingency plan to take the Alternate Route). Reinsurers at all times pleaded that the Master intended to take the Usual Route. Whether or not the Master had a contingency plan to take the Alternate Route if the weather deteriorated did not mean that the Master did not have an intention to take the Usual Route. Both formulations of the Master's intention (i.e. as articulated by Field J and by Reinsurers) represent an intention at the relevant time to take the Usual Route. Moreover Mr ter Haar's complaint that that the analysis articulated by Field J was only developed very late in the trial was not well founded. As Mr MacDonald Eggers pointed out, one of the joint memoranda submitted by the experts raised this analysis as a possibility and the issue was canvassed in evidence.

63. Moreover in my view the fact that, as Oriental complained, Captain Eugenio's evidence as summarised in paragraph 41 of the judgment, was not, apparently, referred to by any of the subsequent tribunals in the Philippines was irrelevant. It was nonetheless evidence (being a statement given to the BMI on 2 July 2008) upon which the judge was entitled to rely in coming to his conclusion, as he was in relation to other statements made in the various Philippine proceedings.

64. As summarised in Reinsurers' written and oral submissions, there was a significant amount of evidence to support the judge's conclusion that, when the Vessel departed from Manila at 20:04 hours on 20 June 2008, the Master intended to take the Usual Route, not the Alternate Route. This evidence included, but was not limited to, the following:

    i) The Vessel in fact pursued the Usual Route, not the Alternate Route, in that after the first 150 nautical miles, at the point of divergence between the two routes, the Master directed the vessel to take the Usual Route, not the Alternate Route. It was common ground that the Vessel's location at the time of her sinking was on the Usual Route after it and the Alternate Route had diverged at approximately 03:00 -04:00 on 21 June. That demonstrated, at the least, that at some stage, either when the Vessel originally sailed, or subsequently, the Master had the intention to take the Usual Route.

    ii) Other evidence strongly supported the conclusion that the Master's intention to take the Usual Route was formed before the Vessel left Manila. Of particular importance were the estimates of time of arrival ("ETAs") given by the

Master, which were recorded in documentary form or referred to in reports of the Phillipine proceedings.

iii) The Alternate Route would have taken the vessel 6 hours longer to complete than the Usual Route. The Master's Oath of Safe Departure sworn and signed by the Master and countersigned by the Philippine Coast Guard on 20 June 2008 and timed at 20:00 stated that the vessel's ETA at Cebu would be 16:45 (the following day). Indeed, the Master had informed Captain Ponteres, in Cebu, of this ETA as early as 18:00, even though, on Captain Eugenio's and Captain Ponteres' evidence, the Master was then aware of the SWB no. 8. The experts agreed that this ETA was consistent only with the Master having intended to take the Usual Route, not the Alternate Route. If the Master had intended to pursue the Alternate Route, the Vessel's ETA at Cebu would have been 22:00 (the following day).

iv) In addition, at 22:00 on 20 June 2008, two hours after the Vessel's departure, the Master signalled Sulpicio by telegram stating that the vessel's ETA at Cebu was 17:45 on 21 June 2008 ("*LEFT MANILA 2004HRS TONIGHT ETA CEBU 1745 HRS TMRW..*"). This was referred to in the DOJ resolution. This estimate was consistent only with the Master having intended to pursue the Usual Route, not the Alternate Route, as from the time of departure from Manila. There was no information received by the Master between the Vessel's departure at 20:04 and 22:00 which would have caused the Master to change his route.

v) There was no documentary evidence of a voyage plan for the Alternate Route having been prepared by the Master. No record of such a voyage plan having been prepared by, or provided to, Sulpicio was produced.

vi) There was no contemporaneous documentary evidence (in the form, for example, of records, emails, or internal notes) to support the Master having informed either PO Sardan or Sulpicio of his plan to take the Alternate Route. The only contemporaneous documentary evidence was that of the Master's own estimate of the time of arrival of the vessel at Cebu, which was consistent only with an intention to take the Usual Route.

vii) If the Master had intended, at the time of sailing from Manila, to take the Alternate Route, with the resultant delay to the ETA, one would have expected that an appropriate announcement would have been made to passengers prior to or at departure. There was no suggestion in the evidence from surviving passengers that any such announcement had been made at any time.

viii) If it were the case that the Master had originally intended to take the Alternate Route, then, on that hypothesis, the Master must have changed his mind and decided to take the Usual Route no later than 03:30 or 04:00 on 21 June 2008 (when the Usual and Alternate Routes diverged). However, if, as appeared probable from the evidence, the Master had received SWB no. 9 at 23:00 on 20 June 2008, it would have been foolish for him to have changed from the Alternate Route to the Usual Route, given that there was no further material information in SWB no. 9 that could possibly have caused him to decide to change route from the Alternate Route to the Usual Route. The experts agreed

that they did not understand that there could have been anything in the bulletin which would have induced the Master to change to the Usual Route, particularly in circumstances where the bulletin declared that PSWS no. 3 had been hoisted on the Usual Route; Oriental's expert agreed that if the Master had initially decided to take the Alternate Route, the receipt of SWB no. 9 would have discouraged the Master from proceeding on the Usual Route; not encouraged him to do so. Accordingly, the Master must have intended to take the Usual Route in the first place.

ix) When Captain Eugenio filed a marine protest following the casualty on 23 June 2008, he made the following declaration under oath that

> "That on June 20, 2008 at around 2004H our M/V PRINCESS OF THE STARS (the "vessel") left the port of Manila on a regular voyage to Cebu after it was inspected and cleared for departure by the Philippine Coast Guard".

Captain Eugenio made no reference to an alternative voyage plan in his protest.

x) Captain Eugenio, Sulpicio's port captain at Manila, gave evidence less than a fortnight after the casualty to the effect that the Master had informed Captain Eugenio that he intended to take the Usual Route, but would change course if the weather substantially deteriorated. Captain Eugenio's evidence was given to the BMI on 2 July 2008 and was as follows:

> "CAPT EUGENIO: Before departure I discussed with the master and we plotted the weather report in the chart, the master plotted the weather report in the chart. ATTY LIM: You yourself, does your office has the weather report. CAPT EUGENIO: I have sir presented that to the master, what I mean when he boarded the vessel at about six o'clock in the evening I discussed with the master about the weather and he plotted the course for Cebu and plan, I asked the master what do you think about the weather. ATTY LIM: What was his reply? CAPT EUGENIO: He said if this weather comes into a worst condition I have another plan or course of action. ATTY LIM: Did he indicate to you that other plan? CAPT EUGENIO: Yes, sir. ATTY LIM: What was it? CAPT EUGENIO: To pass west of Tablas Island, if the weather is really bad …"

This was the evidence referred to by the judge at paragraph 41 of the judgment.

65. There was therefore a conflict of evidence between, on the one hand, the contemporaneous documentary evidence, the actual passage of the Vessel and the evidence of Captain Eugenio given to the BMI on 2 July 2008 (demonstrating that the Master must have intended to take the Usual Route) and, on the other hand, the oral testimony of Captain Ponteres, PO Sardan and Captain Eugenio (alleging that the Master intended to take the Alternate Route). However, I accept Mr MacDonald Eggers' submission that the judge was clearly entitled, despite such conflict,

nonetheless to conclude that Reinsurers, upon whom the burden of proof lay, had established on the balance of probabilities that the Master's initial intention as at the time of sailing was to take the Usual Route. He was entitled to reach that conclusion because:

i) The contemporaneous documentary evidence was wholly consistent with the Master's intention to take the Usual Route. There was no corroborative contemporaneous documentary evidence that supported the analysis that the Master's initial decision had been to take the Alternate Route.

ii) The passage actually taken by the Vessel in the events which happened strongly supported that analysis.

iii) Captain Ponteres' evidence was based merely on a radio conversation at 17:35 hours, before the Master prepared his ETA in his sworn Oath of Safe Departure.

iv) The evidence of Captain Eugenio relied on by Oriental, given on 3 July 2008, was contradicted by his earlier evidence given on 2 July 2008, which supported the case that the Master intended to take the Usual Route.

66. Nor was I persuaded by Mr ter Haar's submission that it was an essential feature of Reinsurers' case that the Master had lied in his conversations with Captain Ponteres, PO Sardan and Captain Eugenio and that that placed a heavy burden on Reinsurers to discharge. This was not the case positively asserted by the Reinsurers, and, as Mr MacDonald Eggers submitted, it was not necessary for them to do so. In the circumstances there were any number of explanations as to why the contemporaneous evidence was at odds with the oral testimony of the three witnesses given in the Philippine proceedings upon which Oriental relied, including miscommunication, misunderstanding and lack of accurate recollection.

67. Accordingly I conclude that, on the evidence, Field J was clearly entitled to reach the conclusion that, at the time of the Vessel's departure from Manila, the Master intended to take the Usual Route. Indeed I would have come to the same conclusion on the evidence before the court. In those circumstances his conclusion that there had also been a breach of limb 2 of the typhoon warranty cannot be faulted.

68. By way of postscript I should mention that the judge was not bound to accept as evidence the differing (and on occasions inconsistent) conclusions of the various Philippine tribunals in relation to this issue or indeed any other issue. In the circumstances he was clearly entitled to look at the underlying evidence himself. The recent decision of the Court of Appeal in *Rogers v Hoyle* [2014] EWCA Civ 57; [2014] 3 WLR 148, upholding the decision of Leggatt J in the same case at [2013] EWHC 1409 (QB), demonstrates that the findings of tribunals may be admissible in evidence insofar as the findings reflect expert opinion. The court has a discretion to exclude the admission of such opinions, pursuant to CPR rule 32.1 and, if the court chooses to admit such evidence, it can decide how much weight should be accorded to it. Reinsurers did not seek to rely on the decision of any of these tribunals in support of its case. In so far as Oriental sought to do so in relation to limb 1, I have already expressed my view that such conclusions were irrelevant.

Disposition

69. For the above reasons, I considered that this appeal should be dismissed.

Lord Justice Davis:

70. I agree.

The Master of the Rolls:

71. I also agree.