

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
London EC4A 1NL
Date: 31/07/2013

Before :

MR JUSTICE FIELD

Between :

(1) Amlin Corporate Member Limited

(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 Limited

(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
Limited**

(on its own behalf and on behalf of all other members of
Syndicate 1225 at Lloyd's in relation to the said policy)

(5) Novae Corporate Underwriting Limited

(on its own behalf and on behalf of all other members of
Syndicate 2007 at Lloyd's in relation to the said policy)

(6) Brit UW Limited

(on its own behalf and on behalf of all other members of
Syndicate 2987 at Lloyd's in relation to the said policy)

Claimants

-and-

Oriental Assurance Corporation

Defendant

Peter MacDonald Eggers QC (instructed by **Norton Rose Fulbright LLP**) for the **Claimants**
Roger ter Haar QC and Caroline McColgan (instructed by **Browne Jacobson LLP**) for the
Defendant

Hearing dates: 11,12 & 20 June 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FIELD

Mr Justice Field:

Introduction

A. The primary and re-insurance cover for cargo risks—the Typhoon Warranty

1. Under a contract of reinsurance¹ governed by English law and subject to an exclusive English jurisdiction clause, the Claimants are the reinsurers of the Defendant insurance company in respect of an original policy of insurance under which the Defendant (“Oriental”) agreed to indemnify 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.
2. The cover provided under the original policy was expressed to be “within Philippine Territorial Limits” and was in respect of 22 scheduled vessels.
3. The reinsurance contract contained a clause (“the Warranty”) under the heading “Express Warranties” which provided:

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.
4. It will be seen that the Warranty consists of 2 limbs. Limb 1 contemplates a scheduled vessel sailing out of a sheltered port when there is a typhoon or storm warning at that port. Limb 2 contemplates a scheduled vessel sailing out of a sheltered point 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.
5. The original policy contained a very similar provision (“the OP Warranty”) in these terms:

TYPHOON WARRANTY

Notwithstanding anything contained in this 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 storm warning at that port nor when her destination or intended route may be within the possible path of a typhoon or storm annouced [sic] at port or [sic] sailing, port of destination or any intervening point. Violation of this warranty shall render this Policy “VOID” ...

B. The casualty

¹ Contained in policy no. B0738MC000720B

6. One of the scheduled vessels under the original policy was the *Princess of the Stars*, a Ro-Ro vehicle and passenger ferry of 23,824 gross tonnage built in 1984. At 8:04 pm on 20 June 2008 the *Princess of the Stars* 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. The passengers numbered 713 and there were 138 crew.
7. At about 9:00 am on 21 June 2008, the *Princess of the Stars* sailed into the eye of a typhoon, Typhoon Frank, about 8 nautical miles from Aklan Point on Panay Island. By 11:00 am she was listing 40° to port and had become unmanoeuvrable. The wind was very strong and the waves 20 foot high. At around 12:00 noon the Master, Captain Marimon, gave the order to abandon ship and shortly thereafter the *Princess of the Stars* capsized SW of Sitio Cabitangahan, Brgy Taclobo, Sibuyan. Only 32 of the 851 on board survived. Captain Marimon was among those who died.

C. Severe Weather Bulletin No.8

8. Typhoon Frank had started on 18 June 2008 as a low pressure area at about 830 kms East of Mindanao. At 5:00 p m that day the Philippine Atmospheric, Geophysical and Astronomical Services Administration (“PAGASA”) reported in a Severe Weather Bulletin (“SWB No1”) that the low pressure area had developed into a tropical depression named “Frank” whose centre at 4:00 pm was estimated to be 670 kms East Northeast of Hinatuan Surigao del Sur. The forecast movement was West Northwest at 15 kph. At 11:00 pm on 19 June 2008, PASASA reported in SWB No 5 that as at 10:00 pm 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 4:00 am and 11:00 am respectively giving Frank’s estimated location, the strength of the wind and stating that it was forecast to move West Northwest. SWB No.8 was issued by PAGASA at 4:45 pm on 20 June 2008. A telexed or faxed version in the following terms was in Captain Marimon’s hands before the *Princess of the Stars* departed for Cebu at 8:04 pm. 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))

9. "PSWS" stands for "Public Storm Warning Signal". Such signals 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.

10. The Headquarters Philippine Coast Guard has issued Revised Guidelines on Movements of Vessels During Heavy Weather which contain guidelines applicable, inter alia, to each level of PSWS. These guidelines are contained in HPCG Memorandum Circular 04-07 issued on 27 June 2007 (“the Circular”), which rescinded previous guidelines contained in Memorandum Circular 03-98. The relevant specific guidelines applicable to PSWSs are:

(No. 1) Movements of any craft/vessel is left to the decision and responsibility of its master/ship owner if PSWS number 1 is hoisted within the vessel’s point of origin, the route, and destination.

(No. 2) No vessel of 2,000 gross tons or below shall sail except to take shelter if PSWS is hoisted within its point of origin, the route, and point of destination.

(PSWS number 3/ PSWS Number 4) No vessel shall sail except to take shelter if PSWS number 3 / 4 is hoisted within its point of origin, the route, and point of destination.

11. The Circular’s stated Purpose and Scope are:

To prescribe policies and procedures in order to enhance maritime safety especially during the occurrence of a tropical depression or typhoon that makes sea travel dangerous

This policy applies to all vessels that may be affected by the prevailing weather disturbance.

12. The Circular also provides, inter alia:

IV DEFINITION OF TERMS

E Danger Sector – is defined as the area where a typhoon may possibly pass during the next 48 hours graphically constructed as follows:

1. From the last known position of the typhoon, draw lines 40 degrees on both sides of the typhoon track.

2. Take the maximum predicted distance that the typhoon travel during the next 48 hours.

3. Using the last known position of the typhoon as the center, draw an arc with a radius equal to the predicted distance determined in para E2 above. The area bounded by the arc and the two radial lines drawn in para E1 above is the DANGER SECTOR.

V. POLICY

A. General:

1. Safety of Life at Sea should take precedence at all times. Whenever there is a weather disturbance within the Philippine area of responsibility (AOR), the PCG Station Commander (from whose AOR any vessel is scheduled to depart) and the operator/master of the vessel should study carefully the typhoon movement to ensure that the vessel will not be within the area directly affected by typhoon signals 1, 2, 3, and 4 or within the danger sector until they reach their destination ...

3. Due to the distinct geographical characteristics of the different areas in the country, effects of any particular typhoon signal varies from one place to another whenever it is hoisted. As such, responsibility and discretion is left to the ship owners/masters for the decision to sail when PSWS Nr 1 is hoisted in an area that would affect the vessel. It is expected that ship owners/masters of the vessels will act according to their best judgment in order to save lives and property ...

VI. PROCEDURES

A. Every Master and any person in charge of the vessel shall ensure that the latest weather bulletin is received and the track of the typhoon is plotted on the weather chart aboardship...

D. It is the responsibility of the master of the vessel to take the necessary precaution to avoid danger to his ship and injury to his crew and passengers...

VII. RESPONSIBILITY:

D. Shipping Owners/Operators:

1. Ensure that all vessels are properly informed of the weather update, to include the areas where typhoon signals are hoisted.

2. Discourage any vessel's movement except for sheltering purposes especially when typhoon signals are hoisted or expected to be hoisted within the area of origin, the route and the destination ...”

E. The claim and a summary of the submissions of the parties

13. In this action, the claimants seek a declaration that the departure of the *Princess of the Stars* from Manila bound for Cebu on 20 June 2008 constituted a breach of the Warranty and in consequence they are not liable as the reinsurers of Oriental in respect of the loss of and/or damage to the cargo on the *Princess of the Stars* occurring by reason of Typhoon Frank on 21 June 2008.
14. The claimants contend that the departure of the *Princess of the Stars* from Manila on 20 June 2008: (a) constituted a breach of limb 1 of the Warranty in that there was a

typhoon or storm warning at Manila (the PSWS No 1 announced in SWB No 8)) when the vessel departed; and (b) constituted a breach of limb 2 of the Warranty in that the vessel's intended route was within the possible path of the typhoon or storm announced at the port of sailing.

15. Oriental contends that: (a) the Warranty must be construed in the context of the Circular and as there was no storm or typhoon warning "prohibiting" or "advising against" the vessel's departure, limb 1 of the Warranty was not breached; (b) as to limb 2, the word "announced" qualifies the words "the possible path", so that regard must be had to the announced predicted path of the typhoon or storm, and here the predicted path was Northwest, not West Northwest, which was not a "possible path" which the intended route (which was not the usual route) might take.
16. In the alternative, the claimants submit that if the Warranty is to be construed in the context of the Circular there is a breach of limb 1 if the vessel departs: (i) when a PSWS of whatever level is hoisted or expected to be hoisted within the origin, route or destination of the vessel, which was the case here; and/or (ii) (as here) if the area of origin, route or destination of the vessel is within the "Danger Sector" as defined in the Circular; and/or (iii) (as here) the Master of the vessel decides to depart from the area of origin in circumstances where it was imprudent and/or unreasonable for the master to so to do, having regard to the safety of the lives on board on the vessel and the property at risk.
17. It is for the claimant reinsurers to establish the pleaded breaches of the Warranty.

E. The evidence before the court

18. The oral factual evidence called before me was not directed to matters relevant to determining whether there had been a breach of the Warranty or not.
19. Most of the primary facts relating to events leading up to the casualty and the casualty itself are not in dispute. They are derived from: (1) the report of the Philippine Board of Marine Inquiry ("the BMI") dated 18 August 2008 into the capsizing of the *Princess of the Stars* before whom witnesses gave evidence and whose report was affirmed by the Commandant, Philippine Coast Guard, on 26 August 2008. The BMI concluded that the immediate cause of the capsizing of the *Princess of the Stars* was the failure of the Master to exercise extraordinary diligence and good seamanship; another cause was the failure of Sulpicio to exercise extraordinary diligence in preventing or discouraging the Master from leaving port. (2) A Resolution promulgated by the National Prosecution Service of the Philippine Department of Justice on 22 June 2009 ("the DOJ Resolution"), following a hearing at which evidence was taken from witnesses, which recommended that the Master, Captain Marimon, and Mr Edgar S Go of Sulpicio be indicted for reckless imprudence resulting in multiple homicide. (3) The judgement of the Philippine Court of Appeals (15th Division) dated 22 March 2013 setting 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 Master's decision allowing the vessel's departure from Manila, and on the further ground that in any event the Master had overriding authority to decide whether to sail or not. (4) The Resolution of the Philippine Department of Transport and Communications dated 28 August 2009 modifying the findings of the BMI and the decision of the Commandant of the

Philippine Coast Guard to the effect that: (i) the casualty was caused by the Master maintaining his regular passage to Cebu despite the area and its vicinity being earlier identified to be affected by Typhoon Frank; and (ii) there was no convincing proof that Sulpicio had been guilty of manifest negligence.

20. Where the facts are in dispute, reliance is placed by the claimants on, inter alia, statements made by various witnesses in the course of the hearings conducted by the BMI, the National Prosecution Service of the Philippine Department of Justice, in the Criminal Case No 09-269169 *The People v Marimon, Edgar Go & Ors* and a number of civil suits brought against Sulpicio alone and jointly with Oriental.
21. I heard from three expert witnesses: Mr Norman Lynagh, a Chartered Meteorologist and a Fellow of the Royal Meteorological Society, called by the claimants; Mr Stephen Tierney, an Extra Master Mariner, also called by the claimants; and Mr David R Duffield, called by Oriental, who spent 17 years at sea from 1967 as a deck officer and who was a Chief Officer during the last seven years of that period.

F. The difficult position in which Oriental finds itself

22. The action is pre-emptive in the sense that, to date, Oriental has made no claim against the claimants under the reinsurance, although it appears that at least 40 claims have been made against Sulpicio by cargo owners or their subrogated insurers and in at least 20 of those cases the cargo-owner has made a claim against Oriental as Sulpicio's insurer. Judgement on these claims is not expected for a number of years. It has also been asserted on behalf of Oriental that Sulpicio has settled a number of cargo claims totalling approximately PHP 320,000,000 by the use of set-offs against future freight.
23. Soon after the issuance of proceedings, Oriental sought a case-management stay of the action. It argued, inter alia, that: (i) without such a stay there was 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 Warranty was breached and the Philippine court found that it and/or the OP Warranty was not; (ii) it was fundamentally unfair 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 OP Warranty in the Philippines; and (iii) 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 Captain Marimon 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.
24. Andrew Smith J rejected Oriental's stay application on the ground that no sufficiently compelling case had been made out for the making of such an order. His decision was upheld by the Court of Appeal ([2012] EWCA Civ 1341), albeit with a possible degree of reluctance on the part of two of the three judges.

Typhoons and their prevalence in the Philippines

25. Typhoons are tropical cyclones that normally form on the equatorial side of the sub-tropical high pressure belt. They represent a very real danger to shipping. Within 80

miles of the centre of such a storm, the wind is often very violent and the seas high and confused. Typhoons are common in the Philippines during the rainy season from the end of May to October. In the NW Pacific they tend initially to move towards W-WNW: the deep tropospheric winds in this area are typically from E-ESE. However, the effect of the rotation of the earth on the winds circulating around a typhoon tends to drag a typhoon a little north of the track that would result solely from the steering winds. The result is that many typhoons have a characteristic curved track, initially towards W or WNW, then gradually turning to the right and eventually accelerating towards the NE. Many other cyclones remain within the E-ESE steering winds and maintain a track towards WNW throughout their lives. Such was the case with Typhoon Frank. Predicting whether or not a tropical cyclone will re-curve towards the NE and, if it does, exactly where it will do so are very difficult forecasting tasks.

26. Other factors affecting the track of a tropical cyclone are the sea temperature distribution and interaction of the circulation of the cyclone with land masses.
27. Although the accuracy of typhoon forecasting is improving year by year, inaccuracies remain inevitable and are not uncommon.

The meaning and effect of limb 1 of the Warranty

28. Lord Hoffman'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 and SWBs; 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 meaning². 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 terms³. 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*

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

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 result⁴.

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 2⁵ 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

⁴ *Cooperative 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.

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.

Further consideration of the parties' contentions

37. Given the importance of this case not only here in London but also in the Philippines, I propose to go on to consider: (i) the claimants' case as to whether there was a breach of limb 2 of the Warranty; and (ii) whether the Warranty was breached even if the touchstone is the Circular, as contended by Oriental.

Limb 2 of the Warranty

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 judgement, 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.

What if the intended route was the alternate route?

H. Oriental's construction argument rejected

49. Mr ter Haar contended that the word “announced” qualifies the words “the possible path” in limb 2, so that regard must 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. I reject this contention. In my judgement, Mr ter Haar’s proposed construction is not the natural and ordinary meaning of the words used in limb 2 and would be contrary to the object of the Warranty which, as I have already held, 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. In my view, if the parties had intended limb 2 to have the meaning contended for, they would have used the word “forecast” rather than “possible” and the words “may be” would have been unnecessary. As it is, the parties used the words “possible” and “may be” which are intended in my opinion to give to effect to the object of the Warranty.

I. Were the usual and the alternate route both within the possible path of the typhoon?

50. Mr Lynagh was of the opinion that both the usual and the alternate route were within the possible path of Typhoon Frank because “it was possible that the centre of “Frank” could have moved anywhere in the sector between due west and due north during the following 24-36 hours” after 4:45 pm on 20 June 2008. Mr Duffield, Oriental’s expert master mariner, agreed with this view. I accept this agreed expert evidence and accordingly find that there was a breach of limb 2 of the Warranty.
51. I also concur with the claimants’ submission that the Danger Sector referred to in the Circular affords a straightforward way of determining whether the intended route is in the possible path of the storm or typhoon. The Danger Sector is defined in the Circular as “the area where a typhoon may possibly pass during the next 48 hours.”
52. All of the expert witnesses agreed that both the usual route and the alternate route fell within the Danger Sector, and again I accept this evidence and find that on this basis, too, the Warranty was breached.

What would be the position if Oriental’s construction argument were accepted?

53. Further and in any event, even if Oriental’s construction argument on limb 2 is well made, there would still in my judgement have been a breach of that limb of the Warranty.
54. The telexed or faxed version of SWB No 8 set out in paragraph 8 above was not the full document issued by PAGASA. The full document is set out below.

TROPICAL CYCLONE WARNING FOR SHIPPING

WTPH RPMM 200600
TTT TYPHOON WARNING 09

AT 0600 20 JUNE TYPHOON (FENGSHEN) (0806) WAS LOCATED BASED ON RADAR SATELLITE AND SURFACE DATA AT ONE ONE POINT FOUR NORTH ONE TWO FIVE POINT FOUR EAST FORECAST TO MOVE WEST NORTHWEST AT ZERO FIVE METRES PER SECOND ROUGH TO PHENOMENAL SEAS WITHIN THREE ZERO ZERO KILOMETER RADIUS WEST SEMI-CIRCLE TWO FIVE ZERO KILOMETER RADIUS ELSEWHERE ESTIMATED CENTRAL PRESSURE NINE SIX SEVEN HECTOPASCALS MAXIMUM WINDS THREE NINE METERS PER SECOND NEAR CENTER TWO FIVE METRES PER SECOND WITHIN ONE ZERO ZERO KILOMETER RADIUS ONE THREE METRES PER SECOND WITHIN THREE ZERO ZERO KILOMETER RADIUS WEST SEMI-CIRCLE TWO FIVE ZERO KILOMETER RADIUS ELSEWHERE FORECAST POSITIONS AT 210600 ONE THREE POINT NINE NORTH ONE TWO TWO POINT SEVEN EAST AT 220600 ONCE SIX POINT ZERO NORTH ONE TWO ONE POINT THREE EAST AND AT 230600 ONE EIGHT POINT FIVE NORTH ONE TWO

ZERO POINT FOUR EAST ALL SHIPS WITHIN TYPHOON AREA ARE REQUESTED TO SEND THREE HOURLY WEATHER REPORTS TO WEATHER MANILA PD

WEATHER MANILA

SEVERE WEATHER BULLETIN NUMBER EIGHT TROPICAL CYCLONE WARNING: TYPHOON "FRANK" (FENGSHEN) ISSUED AT 4:45PM, 20 JUNE 2008 (Valid for broadcast until the next bulletin to be issued at 11PM today)				
TYPHOON "FRANK" HAS MADE LANDFALL OVER EASTERN SAMAR AND IS NOW HEADING TOWARDS BICOL REGION.				
Location of eye/center:	At 4:00 PM today, the eye of Typhoon "FRANK" was located by radar, satellite and surface data in the vicinity of Western Samar or 50 kms southeast of Catbalogan City (11.5°N, 125.1°E).			Track of Typhoon "FRANK"
Strength:	Maximum sustained winds of 140 kph near the center and gustiness of up to 170 kph.			
Movement:	Forecast to move West Northwest at 19 kph.			
Forecast Positions:	Typhoon "FRANK" is expected to cross Samar today and will be over Camarines Norte by tomorrow afternoon. By Sunday afternoon, it will be at 50 kms northwest of Baler, Aurora and at 30 kms northwest of Laoag City by Monday afternoon.			
PUBLIC STORM WARNING SIGNAL				
PSWS#	Luzon	Visayas	Mindanao	Potential Impacts of the Winds
3 (Winds of 101-185 kph is expected in at least 18 hrs)	Camarines Norte, Camarines Sur, Albay including Burias Is., Sorsogon, Catanduanes and Msbate	Samar Provinces, Leyte including Biliran Is.		<ul style="list-style-type: none"> • Heavy damage to agriculture • Some large trees uprooted • Majority of nipa and cogon houses unroofed or destroyed, considerable damage to structures of light to medium construction • Moderate to heavy disruption of electrical power and communication services • Travel by land, sea and air is dangerous
2 (Winds of 61-100 kph is expected in at least 24 hrs)	Quezon including Polillo Is., Marinduque and Romblon	Northern Cebu and Southern Leyte		<ul style="list-style-type: none"> • Moderate damage to agriculture • Rice and corn adversely affected • Few large trees uprooted • Large number of nipa and cogon houses partially or totally unroofed • Some old galvanised Iron roofing may roll off • Travel by all types of sea vessels is risky • Travel by all types of aircrafts is risky
1 (Winds of 30-60 kph is expected in at least 36 hrs)	Aurora, Rizal, Laguna, Batangas, Cavite, Mindoro Provinces and Metro Manila	Antique, Aklan, Capiz, Iloilo, Rest of Cebu, Bohol, Siquijor Is, Negros Provinces and Guimaras.	Dinagat and Siargao Is.	<ul style="list-style-type: none"> • Twigs and branches of trees may be broken • Some banana plants may tilt or land flat on the ground • Rice in flowering stage may suffer significant damage • Some nipa and cogon houses may be partially unroofed • Sea travel of small seacrafts and fishing boats is risky
<ul style="list-style-type: none"> • Public Storm Warning #1 elsewhere is now lowered. • Typhoon "Frank" is expected to enhance the southwest monsoon and bring rains over Southern Luzon, rest of Visayas and Mindanao. Residents in low lying areas and near mountain slopes are advised to take all the necessary precautions against possible flashfloods and landslides. Likewise, those living in coastal areas under signal 2 and 3 are alerted against big waves or storm surges generated by this typhoon. • The public and the disaster coordinating councils concerned are advised to take appropriate actions and watch for the next bulletin to be issued at 11 PM today. 				

PDN / NTS / NAC / GPN / RES / RBP / MFP / CFP / GMC

55. The first part of this composite announcement was an international warning issued for shipping and the times are GMT. It will be noticed that having given the typhoon's position at 0600, the warning states: "forecast to move west northwest"
56. The second part of the announcement is SWB No 8 in full. Towards the top appear the words: *Typhoon "Frank" has made landfall over Eastern Samar and is now heading towards Bicol region* which suggest that the typhoon is heading in a Northwesterly or possibly in a Northerly direction. Then, next to the heading "Movement", appear the words "Forecast to move West Northwest at 19 kph". However, the forecast positions given just below this are positions that represent a northwest track and not a west northwest track. Also, in the box to the right over the

words “Track of Typhoon “FRANK”” was a diagram showing the predicted path of the typhoon, including a deviation area in the shape of an inverted cone, which path was also in a northwest direction and not a west northwest direction.

K. What was the forecast path of the typhoon?

57. Mr ter Haar submitted that the forecast path of the typhoon was Northwest and on this basis the typhoon was not in the possible path of the alternate route. He submitted that if the predicted path had been West Northwest, then along that line there would be PSWS No 3 signals, but no such signals were hoisted by PAGASA. I decline to accept this submission. One cannot, in my view, just airbrush out of the announcement the statements made by PAGASA that speak of the typhoon moving in a West Northwest direction. In my judgement, the full version of the PAGASA announcement contains two forecast paths: one West Northwest and the other Northwest.

L. Were the usual and the alternate routes in the WNW forecast path and/or the NW forecast path?

58. Mr Lynagh and Mr Duffield agreed that: (i) both the usual and the alternate routes were within the West Northwest forecast path of the Typhoon Frank; and (ii) the usual and alternate routes were within the “wind circulation” of the Typhoon on the basis of the Northwest forecast path, which meant that winds of least 25 knot would have been experienced both on the usual and the alternate routes on the basis of the NW forecast. I accept this evidence.
59. Accordingly, I conclude that on either forecast, the vessel’s intended route -- usual or alternate -- “*may be*” within the forecast path of the typhoon and therefore limb 2 was breached, even if Oriental’s construction argument be correct.
60. I am also of the view that it was enough for there to have been a breach of limb 2 that the intended route alone was within the forecast West Northwest path of the typhoon. I say this because: (i) even if construed in the manner contended for by Oriental, limb 2 contemplates more than one forecast being made (“announced at the port of sailing, port of destination or any intervening port”); and (ii) both expert master mariners, Mr Tierney and Mr Duffield, agreed that where there is more than one predicted path, it is normal to assume the worst case scenario, and in this case the worst case scenario would be the West Northwest forecast path which was closer to the usual and alternate routes. It follows that on this approach the Warranty was breached, notwithstanding that it has the meaning Oriental argued that it had.

M. The position if the Warranty is to be construed in the context of the Circular

61. I turn now to consider whether the Warranty would have been breached even if it is to be construed in the context of the Circular in the manner contended for by Oriental. We are here concerned only with limb 1. Oriental did not pray in aid the applicability of the Circular when responding to the claimants’ case on limb 2.
62. I agree with Mr MacDonald Eggers’ submission that if the Warranty is to be construed in the context of the Circular, this means that the whole of the Circular is

potentially relevant and not just the specific guidelines applicable to the different levels of PSWS.

63. Looking at the Circular in this way, Mr MacDonald Eggers submitted in his written argument that the elements that are relevant in addition to the specific PSWS guidelines are:
- (1) The shipowner, master and the Philippine Coast Guard should study the typhoon's movement, whenever there is a "*weather disturbance*" within the Philippines, in order "*to ensure that the vessel will not be within the area directly affected by typhoon signals 1, 2, 3, and 4 or within the danger sector until they reach their destination*". (See General Policy A 1.)
 - (2) When PSWS no. 1 is hoisted in an area that would affect the vessel, the responsibility and discretion is left to the ship owner and the master for the decision to sail. However, "*It is expected that ship owners/masters of the vessels will act according to their best judgment in order to save lives and property*". (General Policy A 3.)
 - (3) The vessel's movement should be "discouraged", except for sheltering purposes, "*when typhoon signals are hoisted or expected to be hoisted within the area of origin, the route and the destination*". (VII D 1. and 2.)
64. I accept this submission and agree 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.
65. Mr Tierney and Mr Duffield agreed that PSWS No 3 was hoisted on the usual route (at Masbate, as reported in SWB No 8). I accept this evidence and it follows, given my finding that the usual route was the intended route, that even on Oriental's construction of limb 1 there was still a breach of the Warranty.
66. Mr Tierney and Mr Duffield also agreed that PSWS No 1 was hoisted on the alternate route. Again I accept this evidence and it likewise follows that if the alternate route was the intended route, limb 1 would for this reason have been breached if construed as Oriental argued it should be.
67. Mr Tierney was also of the opinion that PSWS No 2 had been hoisted on the alternate route, but I decline so to find. Mr Tierney implicitly recognised that this signal could have been avoided by the vessel hugging the coast of Mindoro and on the evidence before me I cannot exclude the possibility that hugging the coast of Mindoro was part of the alternate route.
68. I have already recorded that all three experts agree that both the usual and the alternate routes were within the Danger Sector whether the Danger Sector is calculated by reference to the West Northwest path or the Northwest path. It follows that, if the Warranty is to be read in the context of the Circular, it was breached for this additional reason also.

69. The claimants also contended that if the Warranty is interpreted against the background of the Circular as a whole, there would be a breach if it was imprudent and/or unreasonable for the master to sail, having regard to the safety of the lives on board the vessel and the property at risk, and this is what had happened in this case.
70. Having already found that the Warranty was breached in several respects, whether it be construed as contended for by the claimants or in the manner contended for by Oriental, I decline to determine this yet additional alternative averment. I adopt this approach because: (i) the determination of this yet further alternative issue is unnecessary for the just disposal of the claim; (ii) I have serious misgivings about embarking on the proposed enquiry when I have received no expert evidence as to local maritime practice; and (iii) this judgement is long enough as it is;

Conclusions

- (1) The Warranty was breached in the manner and for the reasons set out above and the reinsurance contract between the claimants and Oriental was thereby avoided.
- (2) The claimants are entitled a declaration to the above effect.
- (3) I shall hear counsel on the precise wording of the declaration.