CA on appeal from Commercial Court (Mrs Justice Gloster) before Sir Anthony Clarke MR; Longmore LJ; Sir William Aldous. 7th March 2008

Sir Anthony Clarke MR:

Introduction

1. This appeal raises two separate issues arising out of a charterparty substantially on the terms of the Asbatankvoy form between AIC Limited ('the charterers') and Marine Pilot Limited ('the owners'). Under the charterparty, which was dated 27 October 2004, the mt ARCHIMIDIS ('the vessel') was initially chartered for three consecutive voyages loading gasoil or unleaded Mogas at one safe port Ventspils with discharge at 1/2 safe ports in the UK Continent Bordeaux/Hamburg range. The original fixture was extended by three addenda, dated 26 November 2004, 21 December 2004 and 12 January 2005, to cover a total of eight voyages and a wider range of discharge port options was agreed.

2. A number of disputes arose between the parties which were referred to arbitration before Robert Gaisford, David Macfarlane and Christopher Moss. It was agreed that the arbitrators should determine four questions as preliminary issues. The arbitrators determined those issues in an interim declaratory award dated 16 May 2006. Permission to appeal against that award in respect of two issues was granted by Christopher Clarke J. The two issues arose out of the sixth voyage under the charterparty and may be called the *'deadfreight issue'* and the *'safe port issue'* respectively. They were the subject of the third and fourth declarations made by the arbitrators as follows:

   "(iii) that the owners are in principle entitled to claim deadfreight in respect of the difference between the minimum contractual quantity under the charterparty and addenda thereto and the quantity of cargo loaded on the sixth voyage; and

   (iv) that there is no objection in principle to the owners bringing a claim for damages for breach of a safe port/berth warranty in the alternative to their claim for deadfreight."

   The arbitrators thus decided both issues in favour of the owners.

3. The appeal came before Gloster J ('the judge') and on 17 May 2007 she allowed the charterers' appeal against the third declaration but dismissed their appeal against the fourth declaration. On the same day the judge granted permission to appeal to both parties. This is the hearing of those appeals. Although the two issues are different, they arise out of the same underlying facts.

The charterparty

4. The charterparty provided, so far as relevant to the issues in this appeal, as follows:

   "Special provisions:

   3 consecutive voyages following basis:

   Cargo:

   Minimum 90,000 metric tonnes always consistent with 45 feet fresh basis arrival Northwest Europe. No deadfreight to be for Charterer's account provided minimum quantity supplied. ….

   Load one safe port Ventspils. Discharge 1/2 safe ports United Kingdom Continent Bordeaux/Hamburg range.

   …

   AIC TERMS:

   …

   11. LIGHTERING CLAUSE

   …

   If Charterers request Vessel to load/discharge via lightering/ship-to-ship transfer (weather permitting and always subject to Master's approval which [is] not unreasonably to be withheld) at anchor off any load/discharge port.

   Charterers will provide at their cost and expenses all suitable fenders, hoses and any other equipment to safely perform the load/discharge operation.

   All time commencing from Vessel's arrival at the lighterage ship-to-ship location until Vessel's break free, shall run continuously weather permitting or not, without interruption and shall count as full laytime used or demurrage if vessel already on demurrage…."

   PART II (of printed Asbatankvoy form):

   …

   3. DEADFREIGHT

   Should the Charterer fail to supply a full cargo, the Vessel may, at the Master's discretion, and shall upon request of the Charterer, proceed on her voyage, provided that the tanks in which cargo is loaded are sufficiently filled to put her in seaworthy condition. In that event, however, deadfreight shall be paid at the rate specified in Part 1 hereof on the difference between the intake quantity and the quantity the Vessel would have carried if loaded to her minimum permission freeboard for the voyage.

   …

   9. SAFE BERTHING – SHIFTING

   The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto and lie at and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. …

19. GENERAL EXCEPTIONS CLAUSE

The Vessel, her Master and Owner shall not unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: - any … peril, danger of accident or the sea or other navigable waters; …..And neither the Vessel, nor Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss of [sic] damage or delay or failure in performing hereunder, arising or resulting from: - … perils of the seas..."

The facts

5. Since the arbitrators are the sole judges of the facts, I must take the facts from the arbitrators' reasons, which form part of the award. The vessel is an Aframax tanker of 94,999 mt deadweight, with a fully laden draft of 13.47 metres. On the sixth voyage she loaded only 67,058 mt of diesel oil as opposed to the contractual minimum of 90,000 mt. The owners accordingly claimed deadfreight. The reason that the vessel only loaded a limited amount of cargo was that, as a result of what were said to be altogether exceptional conditions at Ventspils, the available water in the dredged channel was reduced to the extent, as the arbitrators put it in paragraph 6,

"that, when asked for his advice as to the quantity of cargo which the vessel could load on the available draft, the Master informed the Charterers that she would be able to load no more than 67,000 mt."

The vessel was duly instructed to load up to the maximum permissible sailing draft and did so.

6. It was agreed between the parties that for the purposes of determining the issues of principle arising out of the claim for deadfreight the arbitrators should assume:

i) that, as a matter of fact, the vessel could not have safely proceeded to Ventspils, loaded the minimum contractual cargo of 90,000 mt and departed safely with that cargo on the sixth voyage; and

ii) that it would have been possible for a ship-to-ship transfer ('STS') in deep water to have taken place off Ventspils in a location which would not have involved the subsequent use of the dredged channel with the draft limitation.

7. It is convenient to refer to the further findings of fact of the arbitrators in the context of the deadfreight issue, to which I now turn.

The deadfreight issue

8. The arbitrators' findings on this part of the case, which were quoted by the judge, were as follows:

"25. We have referred to the importance assumed at the hearing by the arguments relating to possible STS transfer of the balance of the minimum contractual cargo. Indeed, for our part, by the conclusion of the hearing we were satisfied that the possibility of an STS transfer represented an insuperable obstacle so far as the Charterer's attempt to avoid liability for the deadfreight claim was concerned.

26. In a nutshell, we could see no answer to the submission made on behalf of the Owners that there was no obstacle to the Charterers completing loading by STS in accordance with Clause 11 of their own Terms. All that was required to initiate the STS procedure was a 'request' – although it was true that an STS transfer could only take place weather permitting and always subject to the Master's approval (which was not to be unreasonably withheld). Thus, as it was put by Counsel for the Owners ***'there was no legal obstacle to their loading a full contract quantity and thus no legal answer to their deadfreight liability.'***

27. The only answer offered on behalf of the Charterers to this argument was that although there was a contractual entitlement to call for an STS transfer, there could be no obligation on them to do so. They accepted that, at the time, the Owners had referred to the possibility of the Charterers contemplating 'filling up' the vessel in another port. The Owners had confirmed that if this was in the Charterers' mind, they were willing to assist. However, the Charterers emphasised that no one at the time had even suggested an STS transfer.

28. Given that we had to assume for the purpose of this application that it would have been practicable for the vessel to have 'topped off' on the sixth voyage with an STS transfer, we accepted as correct the submission made on behalf of the Owners that whilst this was indeed no more than an option (so that the Charterers were not obliged to exercise it) if they failed to do so they could not escape liability for any freight lost by the Owners as a result. We were bound to conclude that it was an available means of performing the Charterers' obligations under the charter to load the minimum contractual quantity and that the Charterers could not therefore rely on their own deliberate decision not to exercise this option in order to avoid liability for a prima facie breach.

29. It is implicit from the comments made above that we rejected the Charterers' argument that they had not failed to supply or furnish the minimum contractual cargo. Their argument that they could rely upon the fact that the Master had only called for 67,000 mt of cargo was not one that impressed us. It was clear so far as we were concerned that when the Master tendered Notice of Readiness stating that he expected to load a cargo of 'approximately 67,000 mt, he was doing no more than providing a technically informed statement from the Vessel of the maximum quantity of cargo which her staff felt could [be] lifted in the prevailing physical circumstances known to all. On no sensible legal or commercial view could the Master's NOR be taken to have varied the term of the charterparty or to have given rise to an estoppel in the Charterers' favour.

30. Although the Charterers formally 'tendered' for loading a quantity of 93,410.495 mt, since all concerned were aware that it would not be possible for the vessel at that particular time to load this quantity, that was a gesture without legal significance. As Counsel for the Owners argued, in this context the Charterers' obligation to 'tender' or 'furnish' required them to have the cargo alongside the vessel for loading. Since that would have meant that she

would not have been able to proceed out of the port for an indefinite period following completion of loading, the fact that the quantity of cargo 'tendered' was available in the port was not, in our view, relevant to the question of whether the Charterers had complied with their obligation with regard to the minimum cargo size. …

32. It was not realistic in our view to argue (as the Charterers sought to do) that this was not a case involving a breach of the obligation to furnish a cargo of minimum size but a case where a ship had deliberately failed to call for the full amount of cargo because her staff were aware that she would be unable to load it. In answer to the arguments put forward on behalf of the Charterers as to the contractual allocation of risk as it appeared from a true construction of the contract, Counsel for the Owners submitted that what the parties had essentially agreed was that Charterers could load whatever quantity they required but that they would pay freight on a minimum cargo size of 90,000mt. We agreed. On the evidence it struck us that what had happened here was that when confronted with this unfortunate situation the Charterers had decided that of the available options open to them (one of which would have been to have awaited the dredging of the channel which was referred to in the contemporaneous documents as a matter of urgency) they had decided that the least unattractive option was to have the vessel sail away with less than the minimum contractual quantity.

33. On a true construction of the provisions of the contract we were therefore satisfied that there was no answer to the Owners' deadfreight claim and that it was unnecessary (as Counsel suggested on their behalf at the hearing) for us to get into the realm of possible unsafety. However, out of deference to the care with which the arguments on this point were presented at the hearing and because Counsel for the Owners submitted that this case reinforced the correct conclusion on the construction of the contract, we shall refer briefly to these arguments"

9. The essential reason why the judge held that the arbitrators erred in law on the deadfreight issue can be seen from [18] and [19] of her judgment as follows:

"18. What precisely happened factually, and in what order, is unfortunately not clear from the Award. What is clear, however, is that this court is bound by such findings of fact as the Tribunal has reached. The critical feature, in my judgment, is that the Tribunal found as a fact (whatever the Tribunal's purported legal characterisation of the tender as "a gesture without legal significance") that the Charterer had indeed "formally" tendered for loading a quantity of 93,410.495mt. I do not see how, as a matter of law, in the light of that finding, i.e. a finding of actual tender of full contractual performance, the tender can be stripped of legal significance merely because the parties knew: ***"that it would not be possible for the Vessel at that particular time to load that quantity"*** *(see paragraph 30 of the Award).*

19. The mere fact that both parties knew that such a quantity could not be loaded does not, in the absence of some express contractual provision, mean that the tender of performance had no legal validity. By finding that the Charterer had tendered for loading the minimum quantity, the Tribunal was concluding that the Charterer had indeed indicated that it was ready and willing to perform its part of the contract. Moreover, the Tribunal also held (see paragraphs 6 and 29 of the Award) that the Master told the Charterer that the Vessel would be able to load no more than 67,000 mt (emphasis supplied). Whether the NOR was served before or after the Charterer's tender, it was clear that the Tribunal found that the Master had indicated that he was only prepared to load 67,000 mt. Once there has been a finding that one party had indicated that it was not prepared to load the full amount despite the tender ***"for loading"****, I cannot see that it can be said that there was nonetheless a breach of contract, or* ***"failure"*** *on the part of the Charterer in not having the cargo of mogas alongside, or, as Mr. Young submitted, in failing actually to try, or ask, to pump more than 67,058 mt on board. Moreover, even on the assumption that the Charterer's obligation was to pump the mogas on board, the finding that there had been a tender of performance by the Charterer obviated the need actually for it to do so, in circumstances where the Master had indicated, or was indicating, that the maximum that he would load was 67,000 mt."*

Mr Young submits on behalf of the owners that the judge was wrong to hold that the arbitrators, as she put it, made a finding of actual tender of full contractual performance.

10. For my part I would accept the submission that the arbitrators did not hold that the charterers tendered full contractual performance. The findings of fact in the reasons must not be considered in self-contained compartments. They must be considered as part of a whole. Viewed in that way, it seems to me that they can be summarised thus:

i) Everyone knew that as a result of what were said to be exceptional conditions in Ventspils the available water in the dredged channel was reduced to the extent that, when asked for his advice as to the quantity of cargo which the vessel could load on the available draft, the master informed the charterers that she would be able to load no more than 67,000 mt: paragraph 6.

ii) When the master tendered a notice of readiness ('NOR') stating that he expected to load a cargo of "*approximately 67,000 mt*", he was doing no more than providing a technically informed statement from the vessel of the maximum quantity of cargo which her staff felt could be lifted in the prevailing physical circumstances known to all: paragraph 29.

iii) The charterers formally '*tendered*' for loading a quantity of 93,410.495 mt: paragraph 29.

iv) It was formal in the sense that everyone knew that it would not be possible for the vessel to load that quantity at that time if she were to proceed down the channel: paragraph 29.

v) This was not a case in which the ship deliberately failed to call for the full amount of the cargo but a case in which the charterers had failed to furnish a cargo of a minimum size (or tonnage): paragraph 32.

vi) The charterers had two ways in which they could furnish a full cargo to the vessel, either by loading some 67,000 mt at the berth, proceeding down the channel and thereafter loading the remainder by STS cargo or by loading the full cargo at the berth: paragraphs 27-29 and 32.

vii) The charterers chose neither of the ways of loading a full cargo but chose to load only 67,000 mt; paragraph 32.

11. The thrust of the arbitrators' conclusions was in my opinion, not as the judge held, that the charterers tendered full contractual performance, if by that was meant loading a full cargo at the berth and then proceeding to sea, but that the charterers decided that *"the least unattractive option was to have the vessel sail away with less than the minimum contractual quantity*." As I read it, that finding is inconsistent with the conclusion that the arbitrators held that the charterers tendered full contractual performance. The reason that the other options might have appeared less attractive was no doubt that to stay at the berth would have involved unpredictable delay, which might well have been at charterers' expense, and that an STS operation would have been at charterers' expense under the charterparty.

12. It seems to me to be likely that the reason the arbitrators said in paragraph 30 that the charterers formally "*tendered"* for loading a quantity of 93,410.95 mt and that that was a gesture that was without legal significance was not that they misunderstood the legal effect of what they were saying but that there was in fact no formal tender of performance which was intended to be acted upon. As they said, everyone knew that it would not be possible for the vessel to load that quantity, by which they plainly meant, if the vessel was to proceed down the channel before it was dredged. It was, as I see it, for that reason that they put *"tendered"* in inverted commas. There is I think some significance in the fact that it was *"tendered"* that they put in inverted commas and not *"formally"*, and that it is not quite right to say, as the judge did at [18], that they found as a fact that the charterers had indeed *"formally"* tendered for loading a quantity of 93,410.95 mt.

13. For these reasons I would hold that the judge erred in finding that there was an actual tender of full contractual performance on the part of the charterers. On the contrary the arbitrators held that they did not tender full contractual performance but simply brought forward cargo which would enable the vessel to proceed immediately down the channel and on her voyage. If the charterers had tendered full contractual performance, they would in practice have had to have done so on the basis of one or other of the two options referred to above, which the arbitrators expressly held in paragraph 32 they did not.

14. The charterers' obligation to pay deadfreight under clause 3 of the printed conditions in the Asbatankvoy form was to pay deadfreight on cargo where less than the minimum was supplied. The arbitrators held that less than the minimum was supplied and that it followed that deadfreight was in principle due. I detect no error of law in that conclusion.

15. Before the judge this issue was divided into two. The first issue was whether the charterers "*failed to supply a full cargo"* notwithstanding its "*formal tender of 93,410.495 mt"*. In her [20-22] the judge considered a number of aspects of this question but, as I read them, they all depended upon what she described in [18] as the critical feature, namely that the arbitrators found as a fact that the charterers had "*formally"* tendered the full quantity. Given my conclusion that, when their reasons are viewed as a whole, the arbitrators did not hold that the charterers made an actual tender of full contractual performance, those further aspects of the case seem to me to lose their significance.

16. The second issue was whether, if such a tender would prima facie have satisfied the charterers' obligation to furnish or supply the cargo the existence of the option to load by STS meant that they could not escape any liability for their failure to load the contractual quantity. Again, that issue seems to me to be irrelevant in the light of the conclusion I have reached because at [26] the judge shows that it depends upon the conclusion that the charterers had tendered supply of the contractually supplied minimum at the berth.

17. For the reasons I have given I would allow the owners' appeal on the deadfreight issue and reinstate declaration (iii) granted by the arbitrators, which I have quoted in [2] above.

The safe port issue

18. The issue raised by this part of the appeal raises one principal question. The question is whether, where a charterparty provides that the vessel shall load at a single named safe port, the charterers warrant the safety of the port or whether, by using that form of words, the parties agree that the named port is safe. Both the arbitrators and the judge held that a charterparty in such a form contains a warranty by the charterers that the port is safe. The question is whether they were right so to hold.

19. Unless I am bound by authority to the contrary, I would hold that the arbitrators and the judge are correct and that the reference to "load one safe port Ventspils" imports a warranty by the charterers that Ventspils is a safe port. I have reached that conclusion for two main reasons. The first is that those words do not stand alone. The provision reads:

"Load one safe port Ventspils. Discharge 1/2 safe ports United Kingdom Continent Bordeaux/Hamburg range."

It is not in dispute that the words "*discharge 1/2 safe ports …"* import a warranty on the part of the charterers that the port or ports of discharge are or will be safe. It would I think be odd to construe the words *"load one safe port Ventspils"* as having any different meaning and, in particular as having the meaning that it is agreed the Ventspils is or will be safe. The natural meaning of the whole provision is that the charterers warranted that both Ventspils and the one or two discharge ports are or will be safe.

20. My second reason is that the word *'safe'* must have some meaning in the expression "*1 safe port Ventspils*". Mr Berry suggests that it means that the parties have agreed that the vessel will load at Ventspils and that Ventspils is a safe port. However, that does not seem to me to be a natural construction. It would have the effect that the vessel must load at Ventspils whether the port was in fact safe or unsafe. There would be no need to describe Ventspils as safe if that was what was agreed. A much more natural construction is that the charterers were warranting that Ventspils was a safe port.

21. It is perhaps relevant to note in addition that the charterparty also provides in clause 9 of the printed form (quoted above) that the vessel was to *"... load and discharge at any safe place or wharf ..."*. That is a warranty on the part of the charterers that the place or wharf to be chosen for loading will be safe. Although Ventspils is named as the loading port, there can I think be no doubt that the charterers chose Ventspils (albeit before the charterparty was entered into), just as they subsequently chose the place or wharf where the vessel was to load.

22. The judge also noted at [32] that the words "*1 safe port Ventspils*" were not part of the printed words of the Asbatanvoy charterparty but were specifically agreed. It is well settled that specifically agreed words should be given some effect. Their natural effect here was that the charterers were warranting the safety of the port and that the owners were agreeing to load their vessel there on condition that it was safe. There is no dispute that the meaning of safe in this context is that described by Sellers LJ, giving the judgment of this court in ***Leeds Shipping Company Limited v Société Française Bunge*** [1958] 2 Lloyd's Rep 127 at 131:
"If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship, it would probably meet all circumstances as a broad statement of the law."

23. I turn to the authorities. In my opinion, they support the conclusion which I have reached without them. I take them chronologically. The first is the dissenting judgment of Dixon CJ in ***Reardon Smith Line Limited v Australian Wheat Board ("The Houston City")*** [1954] 2 Lloyds Rep 148 at 153, where he said this:
"When the charterer is prepared at the time of taking the charter to specify the place where the cargo will be available or the place at which he desired it delivered, the shipowner must take the responsibility of ascertaining whether he can safely berth his ship there or will take the risk of doing so. If he agrees upon the place, then, subject to excepted perils, his liability to have his ship there is definite. But where the charterer cannot specify the place of loading or discharge at the time of the charter, the shipowner must agree to submit his ship to the charterer's orders. The orders are normally given directly to the master. When the charter limits the choice of safe ports or safe berths, the purpose is to impose upon the charterer the necessity of doing in the interest of the ship what the shipowner would have done if the charterer had been prepared to nominate to him a port of loading or discharge at the time of proposing the charter, namely, avoiding an unsafe port. The fulfilment of the duty of naming the port of loading is inseparably connected with the fulfilment of the duty of providing the cargo. The charterer must provide the cargo at the named port and he must accordingly name a port where he can provide the cargo. If the safety of the port is in doubt, it seems better to suppose that the charterer must bear the responsibility of his choice, if it is a wrong one, and if the master is not prepared to take the extreme step of declining to lift the cargo because of the dubious security of the port. To place the master in the position of having to decide at his peril whether to take the risk of a doubtful port or berth as an alternative to refusing to come in and lift the cargo operates to the undue advantage of a charterer who in fact has named an unsafe port. For if the master of the ship decides not to frustrate the entire adventure but to take the risk, then on that construction of the clause the master would, by his decision, relieve the charterer of all responsibility; whereas, had the decision of the master been the contrary, the charterer would, because the port was unsafe in fact, be liable for all the damage flowing from failure to provide a cargo according to the conditions of the charter. The point may be stated concisely be saying that the charterer promises that he will provide a cargo and that it will be at a port which is safe or by saying that he promises that he will name a port which is safe."

    That passage was subsequently approved by the Privy Council in the same case at [1956] AC 266 at 282 and also, before ***The Houston City*** reached the Privy Council, by this court in ***Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Limited*** [1955] 2 QB 68

24. As the judge correctly observed at [33], the problem for the charterers' argument with this passage is this. The charterparty which Dixon CJ was considering provided that the vessel should proceed to "*one or two safe ports in Western Australia*" and there load a cargo. It did not name the loading port and did not therefore provide that the vessel should proceed to and load at one safe named port, as here. Dixon CJ was simply saying that the charterers were in breach of the charterparty in nominating an unsafe port. The majority of the High Court of Australia held that they were not in breach of the charterparty but that they had simply failed to comply with a condition precedent. Dixon CJ's view prevailed in the Privy Council.

25. In these circumstances ***The Houston City*** does not seem to me to assist either party. The first two sentences of the extract from Dixon CJ's judgment quoted above would provide some support for the argument that, if the charterparty provided for the vessel to load at a single named port, the owners would have to take the responsibility of ensuring that the port was safe. However, that is not this case.

26. In ***St Vincent Shipping Co Ltd v Bock, Godeffroy & Co ("The Helen Miller")*** [1980] 2 Lloyd's Rep 95 Mustill J was considering a time charterparty which included a provision that the vessel would be engaged "*in such lawful trades between safe ports within Institute Warranty Limits*". In the course of his judgment Mustill J said at page 101:
"The next argument runs as follows. Where the charter-party expressly stipulates the place at which the vessel shall load or discharge the shipowner is regarded as having consented to the risk that the place will prove to be unsafe.

Equally, in the present instance the owners by giving the right to trade the vessel outside the limits impliedly agreed to take the risk that if the right was exercised the port would prove to be unsafe. I cannot accept this argument. I am sceptical about the analogy between a named port or range and an area as wide as that arrived at by paying an extra premium to open the Institute Warranty Limits. Moreover, whatever may be the law about implying a warranty of safety in the case of a named port, a matter not yet finally decided, I know of no authority to suggest that where the charter contains an express warranty it is in any way restricted by the naming of the port or range. The judgment of Sir Owen Dixon, CJ, in ***Reardon Smith Line v. Australian Wheat Board,*** *[1954] 2 Lloyd's Rep 148, at p 153, cannot be read as expressing a contrary view, since the learned Chief Justice went on to hold that the charterers were liable under the charter, albeit it named the port."*

27. That is a somewhat odd passage in that it states that the charterparty being considered by Dixon CJ *"named the port"* whereas it did not, but the earlier passage does seem to me to give some support to the owners' case. While it leaves open the question whether a warranty of safety would or might be implied into a charterparty which names the port, it suggests that a charterparty may contain an express warranty of safety in the case of a single named port as well as in the case of a range of ports.

28. In ***Transoceanic Petroleum Carriers v Cook Industries Inc ("The Mary Lou")*** [1981] 2 Lloyds Rep 272 Mustill J was considering, in a somewhat different context, a charterparty which provided that the vessel was to "*proceed to one or two safe berths one safe port US Gulf (excluding Brownsville) New Orleans/Ama/Reserve/Myrtle Grove/Destrehan counting as one port ….*" Mustill J said at page 281:

"The charterers also drew attention to the specific reference to New Orleans as a permissible loading port. This does show, I agree, that the making of a passage up the Mississippi River was regarded as a possible element of the voyage. If the river had attributes which made it permanently unsafe, or if it was known to be unsafe at the time of the charter, then the naming of the port might have been enough to nullify the requirement, added to the printed form, that the loading port would be safe. But this was not the case, and it is entirely consistent with the wording of the clause to say that the owners agreed that the ship would visit the named ports if, but only if, they proved to be safe at the material time."

29. Mr Berry submits that the acceptance of Mustill J that, if the Mississippi River had attributes which made it permanently unsafe, then the naming of New Orleans "*might have been enough to nullify the requirement, added to the printed form, that the loading port would be safe*" supported his argument. There is some force in that but Mustill J was not considering a case like this, where the loading port was simply described as *"1 safe port Ventspils*". It seems to me to be unlikely that Mustill J meant to say something different from what he had said only 18 months or so earlier.

30. In ***Hyundai Merchant Marine Co Ltd v Furnace Withy (Australia) Pty ("The Doric Pride")*** [2006] EWCA Civ 599, [2006] 2 Lloyd's Rep 175, this court was considering the relationship between express an implied warranties. Rix LJ, with whom Brooke LJ and Sir Paul Kennedy agreed, said at [31]:

"31. Mr Cooper went on to cite examples of the effectiveness of an express safe port warranty, even in cases of charters to nominated ports such as ***The Helen Miller*** *[1980] 2 Lloyd's Rep. 95 at 101 and* ***The Mary Lou*** *[1981] 2 Lloyd's Rep. 272. Those citations are, in my judgment, again apposite. It is of course standard law that express warranties and provisions must be given their true effect, such as they are, and that there is only room for the implication of an indemnity clause to the extent that the express provisions do not allocate risks in other inconsistent ways."*

Rix LJ there treats the *dicta* of Mustill J as consistent with one another and perhaps provides some, albeit very limited, support for the owners' case. It certainly does not support the charterers' approach.

31. In ***Ullises Shipping Corporation v Fal Shipping Co Ltd ("The Greek Fighter")*** [2006] EWHC 172 (Comm), [2006] 1 Lloyd's Rep Plus 99, at [312] Colman J quoted the passage from ***The Helen Miller*** quoted above and said at [313]:

"313. This approach must be correct in principle because it gives effect to all the terms of the charter which are not inconsistent. The identification of a named port or anchorage, thereby limiting the charterers' choice as to the location of performance is not inconsistent with a warranty that it is safe, any more than the sale of goods by description would be inconsistent with an express term as to quality."

That passage is more directly in point than those to which I have referred above because, as it seems to me, it supports the proposition that a provision that the vessel will load at "*1 safe port Ventspils*" both limits the choice of the charterer to one port, namely Ventspils, and contains a promise by the charterer that the port is and will be safe in the sense described by Sellers LJ.

32. Finally, and most recently, in ***Stx Pan Ocean Co Ltd v Ugland Bulk Transport ("The Livanita")*** [2007] EWHC 1317 (Comm), [2007] 1 Lloyd's Rep Plus 97, Langley J considered a number of questions on appeal from an arbitration award. One of the questions was this. Where a charterparty expressly names a port and also contains, in a different section of the charterparty, a safe port warranty, does that safe port warranty apply to the named loading port? Langley J followed the decision of the judge in this case and, in doing so, he expressed his agreement with it. He referred to ***The Helen Miller, The Greek Fighter*** and ***The Doric Pride*** and said at [18]: *"In my judgment there is no principle of construction which permits a negative answer to the general question raised by this ground. There is no inherent inconsistency between a safe port warranty and a named loading or discharging port."*

I entirely agree.

33. We were referred to a number of textbooks, which support the owners' approach. So for example in the 20th edition of *Scrutton on Charterparties* Article 69 states:

"If the charter provides for the ship to go to a named port or berth, or to one or more as ordered out of a number of named ports or berths, ***but contains no provision as to safety****, it is doubtful whether the charterer will be under any obligation as to the safety thereof."*

The words which I have put in italics shows that the editors thought that the doubt only exists where the charterparty contains no provision as to safety. Thus, where there is such a provision in the other types of case referred to, which include the case where the charterparty provides for the ship to go to a named port or berth, there is a warranty of safety. A provision that the vessel load at "*1 safe port Venstspils"* would be a good example of a provision as to safety. The 5th edition of *Wilford on Time Charters* at paragraph 10.82 and the 3rd edition of *Cooke on Voyage Charters* at paragraph 5.8 are to the same effect.

34. We were also referred to a recent note on this very case in the Autumn 2007 edition of the London Maritime Arbitrators Association Newsletter by Colin Sheppard, who is a well-known maritime solicitor, approving the approach of the arbitrators and the judge on this part of the case (and preferring the approach of the arbitrators to that of the judge on the deadfreight issue).

35. Mr Berry relies upon two London arbitration awards. The first is reported at (1986) 181 LMLN 18/86, where a vessel was chartered for one time charter trip "*via safe port or ports and safe berths, including Castellammare di Stabia, always afloat throughout US W Coast and Italy … to be employed for carrying bulk grain/grains between safe port and/or ports …".* It was held that the port of Castellamare di Stabia and/or the silo berth was or were unsafe. The arbitrators said that there appeared to be no authority regarding a named port in a charterparty which also included an express warranty of safety but held that, although the safe port warranty applied to the other ports it did not apply to Castellamare because, by agreeing to the named port in the charterparty the owners took upon themselves any risks attaching to the port in respect of safety. So far as Castellamare was concerned, the arbitrators seem to have been construing the charterparty as if it simply named Castellamare and did not describe it as safe. If that was their view, I am very doubtful whether it was correct. If they went further and treated the charterparty as describing the port as safe and then held that the charterers did not warrant the safety of the port, I respectfully disagree with them.

36. The second London arbitration award is reported at (1997) 463 LMLN 11/97. If the arbitrators there held that the provision that the vessel was to *"proceed to one (named) safe port and there load"* was not a warranty of safety, again I respectfully disagree with them. It is not, however, absolutely clear that they did because they considered whether the berth was safe and held that it was because the reason preventing the vessel from sailing from the berth immediately after completion of loading was the state of the tide for which she had to wait less than 10 hours. They held, as they put it, that by no stretch of the imagination could that be described as a danger which could not be avoided by ordinary good navigation or seamanship.

37. The view which I expressed earlier, in agreement with the judge, is to my mind broadly supported by the cases. For the reasons that I have given, which are I think in essence the same as those expressed by the judge, I would hold that the charterers warranted the safety of Ventspils. I would simply add that, in reaching that conclusion, I have not relied upon the presumption against surplusage, as Mr Berry suggested that the judge did. I have simply sought to construe the language of the charterparty.

38. Mr Berry has a further subsidiary point. He submits that, as a matter of law, a warranty of safety cannot include a warranty that the vessel can load a full cargo and depart safely from the port notwithstanding that, by the application of good seamanship in loading less than a full cargo, the master can avoid any threat of danger to the vessel.

39. In this regard the arbitrators said at paragraph 40: *"we agreed with the Owners that whilst in the present case there was no question of unsafety in the ordinary usage of that word, there is authority for the view that a port can be unsafe because of a need for lightering to get into or out of it."*

40. The judge said at [41] that she agreed with that conclusion. She added that, whether or not, as a matter of fact, and in accordance with the authorities, Ventspils was in fact unsafe, remained to be determined by the arbitrators. She accepted Mr Young's submission that *"safely"* means *"safely as a laden ship":* see *Scrutton on Charterparties* at Article 72 and *Cooke on Voyage Charters* at paragraph 5.73 *et seq*. She stressed the reference in Sellers LJ's classic definition quoted above that that the particular vessel must be able to reach, use *and return from* the warranted port.

41. I would not accept Mr Berry's submission that there could not be a breach of the safe port warranty in this case. However, whether there was such a breach is or would be a matter for the arbitrators to be determined by finding the facts and by applying the relevant principles to the facts found. It may well be that, in the light of our conclusions on the deadfreight issue, this will not be a live issue. However, if it is, I agree with the judge (and the arbitrators) that one question for consideration, no doubt among others, will be whether the weather and the consequential silting up of the channel, which led to the draft restrictions, was an *"abnormal occurrence"* since, if it was, it is accepted by the owners that the charterers would not be in breach of the warranty. Likewise, as the judge observed, it is or would be for the arbitrators to decide whether, in the circumstances, the charterers were entitled to rely, in the events which happened, upon the exclusion clause in clause 19 of the charterparty relating to *"perils of the seas",* which I have quoted above.

CONCLUSIONS

42. For the reasons I have given, I would allow the owners' appeal on the deadfreight point and reinstate declaration (iii) quoted at [2] above and I would dismiss the charterers' appeal on the safe port issue and leave declaration (iv), also quoted at [2] above, as it stands.

Lord Justice Longmore

43. I agree

Sir William Aldous

44. I also agree.

Mr Timothy Young QC (instructed by Messrs Eversheds LLP) for the Owners
Mr Steven Berry QC and Mr Edmund King (instructed by Messrs Holman, Fenwick & Willan) for the Charterers