Privy Council Appeal No. 30 of 1989

(1) Mobil Oil Hong Kong Limited and
(2) Dow Chemical (Hong Kong) Limited — *Appellants*

v.

Hong Kong United Dockyards Limited — *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE

*[Delivered by **Lord Brandon of Oakbrook**]*

On 9th September 1983 the full force of typhoon Ellen struck Hong Kong, causing many casualties in the harbour there. One ship which suffered a serious casualty was the Huan Lien ("the ship"), a roll-on roll-off car and passenger ferry of 9,317 gross registered tons, owned by Taiwan Ferry Company Limited ("the owners") and registered in Taiwan. Before the approach of typhoon Ellen the ship had been lying afloat as a dead ship, that is to say a ship without power of any kind, in the respondents' ship repair yard on Tsing Yi Island. On the approach of typhoon Ellen on 8th September 1983 the respondents caused the ship to be moved from their yard to a typhoon buoy in the harbour and secured to such buoy by one shackle length of her port anchor chain and a D shackle. At 07.45 on 9th September 1983, when Hong Kong was at the centre of the typhoon, the ship's port anchor chain, which had previously run out to its last shackle, snapped and the ship went adrift. At 11.17 the ship, after various vicissitudes, fetched up on the foreshore of the first appellants' oil jetty terminal on Tsing Yi Island, causing severe damage to the jetty and its appurtenances and also to a pipeline and associated handling facilities situated on or near the jetty and owned by the second appellants.

In 1984 the first appellants and in 1985 the second appellants each brought an action against the respondents in the High Court of Hong Kong, claiming that the breaking adrift of the ship and the damage suffered by them in consequence of it had been caused by the negligence of the respondents, first in failing to take proper precautions to safeguard the ship against typhoon risks before typhoon Ellen occurred and, secondly, in failing to ensure that the ship was properly secured to the typhoon buoy to which the respondents caused her to be taken when typhoon Ellen approached.

The two actions were consolidated and by agreement the issue of liability was tried first, leaving the issue of damages to be tried later if necessary. The trial of the issue of liability came before Macdougall J. assisted by one nautical assessor during 37 days in July and August 1987. On 8th October 1987 Macdougall J. gave judgment for the appellants with costs. The respondents appealed to the Court of Appeal of Hong Kong (Cons V.-P., Kempster and Clough JJ.A.) which after a hearing lasting 8 days in October 1988 by an order dated 2nd November 1988 allowed the appeal, set aside the order of Macdougall J. and gave judgment for the respondents with costs in both courts. The appellants now bring a further appeal against the order of the Court of Appeal to this Board.

The question for decision on this appeal is whether the respondents owed a duty of care to the appellants in respect of the matters which caused the ship to go adrift and do the damage to the appellants' property which she did. Macdougall J. decided that the respondents did owe such a duty of care to the appellants; that they were in breach of it in a number of respects; that the damage suffered by the appellants was caused by those breaches; and that the respondents were accordingly liable to the appellants for that damage. The Court of Appeal, while not differing significantly from the trial judge's findings of fact with regard to the matters which caused the casualty, held that the respondents owed no duty of care to the appellants in respect of those matters and were accordingly under no liability to them. It was common ground before their Lordships that the question whether the respondents owed the relevant duty of care to the appellants fell to be decided by reference to all the circumstances of the case.

Before examining in detail the circumstances leading up to the casualty suffered by the ship on 9th September 1983 it will be helpful to give some account, first, of the exposure of Hong Kong harbour to typhoons; secondly, of the system used by the Marine Department to give warnings of the approach and arrival of typhoons; and, thirdly, of the precautions prescribed by it for the safeguarding of dead ships

under repair during typhoon conditions and for the mooring of ships in general in strong winds.

The harbour of Hong Kong is exposed to the risk of typhoons from May to December in each year. Warnings of the approach and arrival of typhoons are given by the hoisting of storm signals by day and the display of corresponding lights by night. Signal no. 1 means gales within 400 miles; signal no. 3 means strong winds; signal no. 8 means gale or storm force winds; signal no. 9 means the approach of the centre of the typhoon; and signal no. 10 means typhoon force winds (over 64 knots) from any direction.

The precautions prescribed by the Marine Department for the safeguarding of dead ships under repair during typhoon conditions are set out in paragraph 2.2.2 of a booklet entitled "Shipmasters' Guide" usually made available to the masters of ships coming to Hong Kong. These precautions are as follows:-

"A dead ship under repair is required:

(a) to take up a berth as and when directed by the Director of Marine;

(b) when berthed at a special typhoon buoy to be secured by a cable (led through the hawse pipe) of a size not less than that required by Lloyd's rules for the class of ship, and in addition to have the second bower anchor available for dropping underfoot;

and in addition is required to:

(c) have on board at least half the sea-going complement of the deck and engine room department including officers or such greater number as may be required to ensure the safety of the ship having regard to the circumstances pertaining thereto;

(d) have on board a qualified master during the period that any local storm signal is hoisted;

(e) have auxiliary power available capable of working anchors, windlass and ballast pumps;

(f) have alternative means of working anchors in the event of the windlass being under repair;

(g) maintain V.H.F. radiotelephone equipment in workable condition and have personnel on board trained in its use;

(h) have all watertight doors securely closed;

(i) have all ballast tanks, including deep tanks, as are available, completely filled in an effort to reduce windage ...;

(j) have towing lines available fore and aft ready for use;

(k) have the spare bower anchor prepared and ready for releasing at the discretion of the master;

(l) have a harbourphone installation on board;

(m) ..."

Paragraph 4.1.2. of the "Shipmasters' Guide" further advises masters as follows:-

"The attention of shipmasters is invited to the fact that it is prudent, in the event of strong winds affecting the port, for the ship's anchor cable to be veered until a reasonable catenary is effected in the chain cable. The length of cable necessary to achieve this purpose has to be left to the discretion of each individual shipmaster as the length, draught and trim of the ship must be taken into account when making a decision on this point. However, experience over the years has indicated that for the average ocean-going cargo vessel, at least two shackles of cable 'on deck' is required on the majority of occasions."

It is against this background that their Lordships proceed to examine in detail the circumstances which led up to the casualty suffered by the ship on 9th September 1983, as found by the trial judge or appearing from the documents in the case.

On 19th April 1983 the ship, whilst operating off Taiwan, struck a submerged rock and was so badly damaged, with flooding of various spaces including the engine room, that she was beached by the salvors who came to her assistance in order to avoid the possibility of her sinking. Subsequently she was refloated and towed to the port of Keelung in Taiwan, where the damage done to her was extensively examined by representatives of various ship repairers, including in particular the respondents who were anxious to obtain the contract for her repairs. Following the examination the owners, in agreement with the respondents, instructed the salvors to tow the ship, which was without any power and therefore a dead ship, to Hong Kong and place her at a berth in the respondents' ship repair yard there. The owners' intention was that the respondents should carry out certain emergency repair work on the ship first and that the ship should then remain in their yard while the owners invited and considered tenders for permanent repairs to her.

On 25th May 1983 the ship left Keelung for Hong Kong under tow by the salvors. On 26th May 1983 there was a meeting at the office of Captain Shearman of the Hong Kong Marine Department in order to make

arrangements for the ship's arrival. That meeting was attended by, among others, Mr. Temple, the respondents' Senior Project Manager. It was agreed that, on the arrival of the ship at the respondents' yard, a D shackle should be fitted to her port anchor chain in order to enable her, in the event of Hong Kong being struck by a typhoon, to be moved from the respondents' yard and secured to a special typhoon buoy in the harbour. On 27th May 1983 there was another meeting at the respondents' office at which Mr. Temple agreed with representatives of the salvors that, on the ship's arrival in the respondents' yard, she would become their responsibility. The owners had by then appointed Eastern Worldwide Shipping Corporation ("Eastern") as their agents in Hong Kong.

On 28th May 1983 the respondents sent a copy of their Standard Conditions to the owners' Hong Kong solicitors. These contained the following among other conditions:-

"Clause 9

Any works done which are not expressly included or provided for in the agreed contract price shall nevertheless be paid for by the Customer and be subject to these Conditions. An invoice or invoices signed by a Senior Executive shall in the absence of fraud or manifest error be conclusive evidence of the amount to be paid by the customer.

Clause 19

(a) The Customer shall be responsible at all times for ensuring that the Vessel is kept safe from the effects of all external forces, such as fire, weather, wind including typhoons, currents and all other perils of the sea. The Customer warrants that at all material times its agents and/or servants will take all proper and necessary steps and/or decisions for the safety of the Vessel and in particular for the navigation and management of the Vessel including ... the security of the Vessel's moorings, keeping a weather and fire watch, heeding typhoon warnings, putting out additional lines or anchors, shifting her place of mooring, employing tugs, closing openings and valves and maintaining the vessel's buoyancy and stability."

The defendants also issued a document entitled "Schedule of Rates and Charges". Paragraph 8 of that schedule provided:-

"All necessary costs and charges associated with typhoon or inclement weather precautions will be for Owners' account."

On 29th May 1983 the ship, after being towed to Hong Kong, was placed at no. 2 berth in the respondents' dockyard and a formal acceptance of the transfer of her custody from the salvors to the respondents in writing was signed by Mr. Temple and also by the Salvage Master.

It was the established practice of the respondents to require any ship to leave their yard when typhoon signal no. 3 was hoisted or displayed. After the ship had arrived in their yard they accordingly took certain precautions against the risk of that situation arising. First, they ranged and hung out one shackle length of the ship's port anchor chain and further attached a D buoy shackle to it as required by the Marine Department in order to enable her, after leaving the yard, to be moved to a typhoon buoy in the harbour. Secondly, they carried out a simulated drop of the ship's starboard anchor in order to ensure that it was in proper working condition.

On 1st June 1983 the Marine Department gave written permission, addressed to the owner or master or other person having custody of the ship, to carry out repairs to her subject to a number of specified safety requirements. On the same day the ship was put into dry dock by the respondents, from which she was refloated, after certain work had been done on her, and returned to her berth on 6th June 1983.

On that day there was a meeting at the respondents' office at which there were present, among others, representatives of the owners and the respondents. Among the owners' representatives was Mr. Shopin Tsu, their vice-chairman, and among the respondents' representatives was Mr. Temple. A large number of matters were discussed and dealt with, but it will be sufficient to refer to only four of them. First, it was stated that Mr. Shopin Tsu was fully authorised to act on behalf of the owners in all matters. Secondly, it was agreed that the owners would ask Eastern to arrange for such number of certificated officers and crew to attend the ship as were necessary to comply with the requirements of the Marine Department. Thirdly, it was agreed that the owners would appoint a local company to prepare a specification for the repair of the ship. Fourthly, Mr. Shopin Tsu approved and signed a list of all work done on the ship by the respondents to date. Following that meeting the owners on the same day appointed Mr. Wort, of D.J. Wort & Co., a consulting marine engineer, to prepare the specification for the repairs.

On 10th June 1983 the Marine Department notified the respondents that the minimum crew required for the ship in her dead ship condition was a properly certificated master, a qualified bridge watch-keeper, a mechanic and a sufficient number of competent deck

hands to handle the windlasses and anchor cables if called upon to do so. On 14th June 1983 Eastern, having been notified of these requirements, informed the respondents by telex that they had arranged for a master, second officer and engineer, two watchmen and two ordinary seaman to attend "watching the ship"; and that there would be three of these on board the ship at any one time. The telex ended with a statement that Eastern had instructed the master, Captain Pang Yan-Wing, to sign a letter, to be prepared by the respondents, assuming responsibility for the safety of the ship.

On 16th June 1983 the skeleton crew engaged by Eastern went to the ship and took over the watch on her which had previously been kept by security guards employed by the respondents. Upon the taking over being effected Captain Pang Yan-Wing and Mr. Temple both signed a letter in these terms:-

> "This is to certify that Capt. Pang Yan-Wing has accepted transfer of custody of the motor vessel 'HUA LIEN' on behalf of Owners, Taiwan Ferry Co. Ltd., the vessel at present being berthed alongside HUD Tsing Yi yard berth No. 3."

On the same day Mr. Wort, having prepared a specification of repairs, informed the owners' solicitors that his provisional estimate of the cost was US$3,500,000.

On 24th June 1983 there was a meeting between representatives of the owners and the respondents at which the question whether the repair contract should be given to the respondents was discussed but not decided. On 27th June 1983 the respondents submitted to the owners a tender for the repairs in the sum of HK$ 21,000,000 which was not accepted.

On 11th July 1983 the respondents, without prior consultation with Mr. Wort or the master, commenced ballasting with water the ship's no. 1 and no. 9 deep tanks in order to improve her stability in view of the approach of typhoon Vera. Mr. Temple later told Mr. Wort about this, who asked that the master should be kept informed of any change in the ballasting arrangements. On the same day the respondents notified Mr. Wort of their quotation of HK$771,778 for a further drydocking of the ship to enable inspection work to be carried out and for removing the propellers, rudder and stabiliser fins, blanking off openings and doing various dismantling work on the engines propeller control units and steering gear.

On 12th July 1983 Mr. Wort requested the respondents, in the event of typhoon signal no. 3 being hoisted, to put on board food boxes for the crew.

On 16th July 1983 typhoon signal no. 3 was hoisted for typhoon Vera. The respondents, in accordance with their established practice, then caused the ship to be towed out of their yard by tugs and moored to a typhoon buoy in the harbour. Typhoon Vera, however, passed by harmlessly without any higher typhoon signals having been hoisted and the ship was then towed back to her berth in the respondents' yard.

On 19th July 1983 the respondents submitted to the owner a revised tender for the repairs to the ship in the sum of HK$15,983,400. This was accepted by the owners, subject to various conditions, and the owners' action in the matter was approved by the Salvage Association on behalf of the hull underwriters concerned. On 24th July 1983 typhoon Wayne approached Hong Kong and typhoon signal no. 1 was hoisted. The alarm, however, did not last long because the typhoon then veered away from Hong Kong. Since only typhoon signal no. 1 was hoisted the respondents allowed the ship to remain at her berth in their yard.

On 28th July 1983 the ship went into dry dock again for a further inspection and the taking of keel and deck sights. On 2nd August 1983 she was refloated and returned to her berth alongside. On 4th August 1983 Mr. Wort, as a result of his findings during that further inspection in dry dock, advised the owners that the ship was not worth repairing and was therefore a constructive total loss. On 19th August 1983 the owners were reported to have given notice of abandonment to the hull underwriters which was not accepted. On 24th August 1983 Mr. Wort requested the respondents to ballast one of the ship's starboard tanks in order to correct a list of 4° to port.

During July and August the respondents presented to the owners a number of accounts for work done on the ship. The first account was for HK$1,908,693 for work done during the period 29th May to 21st July 1983. The second account was for HK$1,001,590 in respect of work done during the period 22nd July to 31st August 1983. The third account, described as a supplementary account, was for HK$54,630 in respect of work done during the period 1st July to 31st August 1983. It appears that all three accounts were paid by the owners.

Their Lordships now come to the sequence of events which began with the approach of typhoon Ellen on 7th September 1983 and ended with the serious casualty to the ship and the consequent damage to the appellants' property on 9th September 1983. A short outline of these events was given at the beginning of this judgment, but it is now necessary to give a fuller and more detailed account of them.

On 7th September 1983, when it became apparent that typhoon Ellen was threatening Hong Kong, Mr. Temple informed Mr. Wort that, upon typhoon signal no. 3 being hoisted, the ship would have to be moved from her berth on the respondents' yard to a typhoon buoy in the harbour. At 13.15 on the same day the Marine Department issued a removal order addressed to the master or other person in charge of the ship and directing him to move her to the Western Anchorage within two hours of typhoon signal no. 3 being hoisted.

At 10.15 on 8th September typhoon signal no. 3 was hoisted. The respondents then caused the ship to be moved by three tugs employed by them from her berth in their yard to typhoon buoy A42 in the harbour, which the Marine Department had finally allotted to her; and thereafter to be secured to that buoy by one shackle length of her port anchor chain, which the respondents had rigged and hung out soon after her arrival in their yard in May 1983, and by the D shackle which they had also, in compliance with the requirements of the Marine Department, provided for the ship at that time. On board the ship were the master, two officers and three crew. At 16.45 typhoon signal no. 8 was hoisted.

At 01.00 on 9th September typhoon signal no. 9 was displayed. At 01.30 the ship's port anchor chain, by which she was moored to the buoy, began to run out from under the guillotine stopper by which it was intended that it should be safely secured, and continued so to run out progressively to the last of the chain's seven shackles, the other three shackles having been removed earlier by the salvors after the ship's casualty off Taiwan. At 02.00 typhoon signal no. 10 was displayed. At 06.25 the tug Lamma, in response to numerous requests for help made on VHF by those on board the ship, left her berth to assist the ship if possible. At 07.45 the ship's port anchor chain snapped, causing her to go adrift. Before this happened the crew had been trying to drop the starboard anchor underfoot but had difficulty in releasing the guillotine stopper by which the chain was secured. Ultimately this difficulty was overcome, but only after the port anchor chain had snapped. Despite the dropping of the starboard anchor the ship continued to drift. The Lamma assisted by pushing against the ship for about five minutes in order to prevent her drifting towards another vessel. However, in the absence of prepared towing lines either fore or aft on the ship's deck, which could have been used by the tug to establish a towage connection, the tug was unable to assist further. By 08.24 the ship had drifted to a position in the fairway off the Gulf Oil Terminal. At 10.07 typhoon signal no. 10 was replaced by signal no. 8. At 11.17 the ship fetched up on the foreshore and did the damage to the appellants' property referred to earlier. Shortly before the ship went ashore all her crew

escaped by lowering themselves on to the deck of the Lamma which had positioned herself close to the ship's stern.

On 11th October 1983 the ship, having been refloated, was returned to the respondents' yard. On 13th October 1983, on the approach of typhoon Joe, the ship was again moved to a typhoon buoy in the harbour. During the typhoon her port anchor chain snapped again but no serious casualty resulted.

The trial judge, in addition to being assisted by a nautical assessor, heard a great deal of expert evidence with regard to the likely causes of the casualty to the ship. He found that the precautions prescribed by paragraphs 2.2.2 and 4.1.2 of the Shipmasters' Guide, which their Lordships set out earlier, were no more than the precautions required by good seamanship, so that any breach of them would amount to failure to exercise proper skill and care by any person under a duty to do so.

The judge, after an extensive review of the copious factual and expert evidence adduced before him, found that the casualty had been caused by the following five principal matters. First, the securing pin for the guillotine stopper for the port anchor chain was missing and the hinges of the stopper were corroded, so that the whole mechanism was slack. Because of this the port anchor chain ran out from one shackle length to seven shackles length when a high strain came upon it. This was a grossly excessive length of chain to have out, allowing the ship to yaw so violently from side to side that the chain ultimately snapped. Secondly, one shackle length of chain as originally put out was insufficient to provide an adequate catenary for holding the ship in typhoon conditions. A proper length would have been two shackles. Thirdly, the guillotine stopper for the starboard anchor chain had been left in a state in which it was not readily free for releasing. Because of this the crew were unable to drop the starboard anchor underfoot until after the port anchor chain had snapped. Fourthly, the spare bower anchor, with an insurance wire secured to it, had not been rigged so as to be available for dropping in the event of the two other anchors not holding. Fifthly, there were no towing lines prepared for use either fore or aft on the ship. Because of this the tug Lamma could not establish a towage connection which, if it had been established, would on a balance of probabilities have enabled the tug to prevent the ship from drifting further.

The judge further found that in respect of all these matters the respondents were in breach of a duty of care owed by them to the appellants and that they were therefore liable to the appellants for the damage suffered by them.

As their Lordships indicated earlier, the Court of Appeal did not differ significantly from the judge's findings with regard to the causes of the casualty. The Court, however, held that the respondents owed no duty of care to the appellants in respect of those causes, and could not therefore be made liable to the appellants for the damage suffered by them.

The judge's conclusion on the question whether the respondents owed a duty of care to the appellants or not was expressed by him in this way:-

> "I find it difficult to come to any conclusion other than that the defendant exercised a measure of control over the vessel sufficient to give rise to a duty of care to the plaintiffs to ensure that when the vessel was sent out to be moored at a typhoon buoy all reasonable precautions had been taken to prevent her from creating a danger to life and property. In my opinion it is incontestable that it is just and reasonable that the defendant owed that duty of care to the plaintiffs."

It is clear that the control of the ship to which the judge referred in that passage was control in relation to the reasonably foreseeable need, in the event of a typhoon threatening Hong Kong, of moving the ship to a typhoon buoy approved or allocated by the Marine Department. The purpose of such removal would be to prevent the ship going adrift in the respondents' yard and, having done so, causing serious damage both to herself and to the yard.

The structure of the judge's necessarily long and complex judgment is such that it is not easy to state with certainty all the matters which he relied on as evidence of the measure of control of the ship's removal to a typhoon buoy exercised by the respondents. It appears to their Lordships, however, that the following matters at least were among those to which he attached importance.

First, the respondents, by establishing a settled practice of removing ships to a typhoon buoy when typhoon signal no. 3 was hoisted, reserved to themselves the right to decide when such removal should take place. Secondly, the process of removal, when the respondents decided that it should take place, was effected by tugs employed by them. Thirdly, the respondents had all the heavy machinery and technical resources required to carry out on board the ship in advance the precautions necessary to ensure her safety if and when she had to be moved to a typhoon buoy. Fourthly, the small part-time crew engaged by Eastern for the owners to man the ship in compliance with the requirements of the Marine Department were manifestly incapable of carrying out most of the typhoon precautions necessary. This was recognised by the respondents who looked upon the crew, as indeed the

crew looked upon themselves, as no more than watchmen so long as the ship remained in the respondents' yard. Fifthly, the respondents were empowered by paragraph 8 of their Schedules of Rates and Charges, the terms of which their Lordships set out earlier, to carry out all necessary typhoon precautions on board the ship and later to charge the owners with the cost of their doing so. Sixthly, the respondents had, very soon after the ship's arrival in their yard on 29th May 1983, carried out of their own accord certain typhoon precautions on board her: first, the ranging and hanging out of one shackle length of the port anchor chain and the attachment to it of a D buoy shackle; and, secondly, a simulated drop of the starboard anchor. Seventhly, the respondents had on 17th July 1983, of their own accord and without prior consultation with any representative of the owners, increased the amount of water ballast in the ship's tanks in order to improve her stability in view of the approach of an earlier typhoon called Vera.

Their Lordships turn now to consider the decision of the Court of Appeal reversing that of the trial judge on the ground that the respondents owed no duty of care to the appellants. The principal judgment of the Court was delivered by Cons V.-P. who in it referred to the respondents as "HUD". He accepted the judge's view that, in order to put a person under a duty of care to others in respect of a situation, it was not necessary for him to have de jure exclusive control of such situation. It might be sufficient for him to have de facto joint control of it. Cons V.-P. went on to state what he perceived to be the reasons for the judge's conclusion that the control which the respondents had over the situation constituted by the presence of the ship in their repair yard before the arrival of typhoon Ellen was sufficient to put them under a duty of care to the appellants in respect of their exercise of that control. He stated those reasons in five paragraphs as follows:-

"1. The policy of the yard not to allow ships to lie alongside during typhoons, reflected in its internal instruction that ships under repair should, when a typhoon is likely to affect Hong Kong, be prepared for towing out to typhoon buoys, and in HUD's schedule of rates and charges which permit HUD to charge to the owners 'all necessary costs and charges associated with typhoon or inclement weather precautions'. Pursuant thereto HUD had on 7th September telexed Mr. Wort that it would be necessary to move the Hua Lien to a typhoon buoy as soon as the no. 3 signal was hoisted and the charges of moving would be against the owners' account;

2. Hua Lien was a dead ship that would be gravely hampered in a typhoon;

3. HUD had aggressively sought the contract for the full repair of the Hua Lien and had already enjoyed the benefit of emergency work thereon;

4. HUD had the heavy machinery and technical resources necessary to carry out the safety precautions; and

5. Mr. Byrne, who is an expert in anchoring and mooring systems and has some practical experience in a shipbuilding and repair yard, testified that he would expect the yard to be involved in the advance preparation of ships for typhoons, particularly dead ships."

Cons V.-P. went on to examine and comment on each of these reasons. With regard to reason 1 he referred to certain provisions in the respondents' own Standing Instructions for Typhoon Season from which he recognised that, if they stood alone, it might be implied that the respondents were assuming responsibility for the carrying out on ships in their yard for repairs certain typhoon precautions, namely, the rigging of typhoon anchors and the fitting of buoy shackles. He went on to say, however, that those provisions did not stand alone but required to have set against them clause 19(a) of the respondents' Standard Conditions of Contract (the terms of which their Lordships set out earlier) and that the wording of that clause negatived any such implication. With regard to reason 2 he said that it simply indicated the need for extra care. With regard to reason 3 he said that it was irrelevant, and with regard to reasons 4 and 5 that they did little if anything to show that the yard had taken control of the ship. In the upshot he was unable to find that the factors referred to in the five reasons established that the respondents had assumed sufficient control of the ship to put them under a duty of care to the appellants.

With regard to this part of the judgment of Cons V.-P. their Lordships would observe that his analysis of the reasons for the judge's conclusion that the respondents exercised a sufficient measure of control over the ship to put them under a duty of care to the appellants differs widely from the similar analysis which their Lordships made earlier, although some degree of overlap exists. With respect to Cons V.-P., their Lordships consider that their analysis of the judge's reasons accords better with the terms of his judgment than does the analysis made by Cons V.-P. It follows that they cannot accept as necessarily valid the conclusion which he reached on the basis of his own analysis.

In a subsequent part of his judgment Cons V.-P. said:-

"When one considers the situation as it was, say towards the end of August, it is clear that HUD knew that no further precautions had been taken.

They had not been instructed to do so and without their assistance, the appropriate precautions would have been impossible. HUD knew too - so it follows from the judge's finding - that the master himself was taking no interest. If HUD had stepped in to take the precautions on its own behalf, they may have been able to rely upon Clause 8 of the Schedule of Rates and Charges to recover their outlay. In that situation it may well be that the fair and reasonable man, knowing that it was the season for typhoons, and of the risks inherent in mooring a dead ship to a buoy, would have said that HUD ought to have so stepped in.

But to that situation must be added the fact that maritime law has traditionally looked to the owners to be responsible for the safety of their ships, a position reinforced by Clause 19 of the Standard Conditions of HUD. Furthermore the owners had local agents in Hong Kong and had specifically appointed a local superintendent. It has been suggested that Mr. Wort was in reality no more than a technical adviser with regard to the repairs, but his insistence on the master being told about the ballasting operation, his requests to HUD with regard to food for the crew and other services, and his instructions to correct the slight list on the 28th August indicate that he took his duties to go further than that. There is no other yard now in Hong Kong from whom information as to standard practices could be sought, but it is pertinent, I think, to note that no evidence was called from yards in other parts of the world which are affected by typhoons, nor, which is also important, was there any suggestion in the immediate aftermath of Ellen, or of Joe, when the Hua Lien again broke free from its mooring, from either the Marine Department or the owners that HUD were in any way to blame.

In the end I find myself not persuaded that in all the circumstances of this case there did exist such close and direct relations as to give rise to a duty of care on HUD."

With regard to the three paragraphs of the judgment of Cons V.-P. set out above their Lordships would comment that the proposition that the owners owed a duty of care to the appellants is in no way inconsistent with the proposition that the respondents concurrently owed a like duty.

Kempster J.A., in agreement with Macdougall J. and Cons V.-P., regarded the question of control of the ship as the crucial question in the case. He considered, however, that from the time of the formal hand over of the ship by the respondents to the master on 16th June 1983 the owners, through their agents, superintendent

and crew, had the entire control of the ship to the exclusion of the respondents. It followed that it was the owners and not the respondents who owed a duty of care to the appellants in respect of the casualty to the ship during typhoon Ellen. With regard to that their Lordships would observe that, while the right to control is one thing, the de facto exercise of control is quite another.

Clough J.A. expressed his agreement with both Cons V.-P. and Kempster J.A.

There have in recent years been a considerable number of decisions, both in England and in other Commonwealth countries such as Australia and New Zealand, on the difficult question whether one person owes a duty of care to another person to avoid causing to the latter purely economic loss, and references to some of those decisions are to be found in the judgments of both Macdougall J. and the Court of Appeal. In their Lordships' view, however, the essential feature of the present case is that the damage sued for is not purely economic loss but ordinary physical damage to property. It follows that the decisions relating to claims for purely economic loss to which their Lordships have referred have no relevance to the present case.

In most claims in respect of physical damage to property the question of the existence of a duty of care does not give rise to any problem, because it is self-evident that such a duty exists and the contrary view is unarguable. Typical examples are claims in respect of physical damage to property arising out of the driving of a motor vehicle on a road or the navigation of a ship in a river. With regard to the driving of a motor vehicle on a road it is self-evident that the driver owes a duty of care to the owners of other vehicles using the road to avoid damage to such vehicles, and a like duty to the owners of property bordering on or adjacent to the road to avoid damage to such property. With regard to the navigation of a ship in a river it is self-evident that the navigator owes a duty of care to the owners of other ships using the river to avoid damage to such ships, and a like duty to the owners of property bordering on or adjacent to the river to avoid damage to such property. In the case of a harbour such as that of Hong Kong similar considerations apply: it is self-evident that any person who navigates or moors a ship in the harbour owes a duty of care to the owners of other ships using the harbour to avoid damage to such ships, and a like duty to owners of property bordering on or adjacent to the harbour to avoid damage to such property.

To what extent and in what way are these propositions applicable or capable of extension to the present case? In order to answer that question there

are in their Lordships' view six factors which need to be considered and taken into account. First, the respondents knew that there was a substantial risk of a typhoon threatening Hong Kong while the ship was berthed in their yard. Secondly, it was the intention of the respondents, if that happened, that they would, partly for the protection of their own property, cause the ship to be removed from their yard and moored to a typhoon buoy in the harbour. Thirdly, the respondents intended that they, and only they, should have control of that operation, including the time at which it should be initiated. Fourthly, on the findings of the trial judge, the respondents knew or ought to have known that, unless proper typhoon precautions had previously been carried out on the ship, the intended operation would create a situation of danger in which there would be a serious risk of the ship's mooring to the buoy parting, of the ship then drifting out of control, and of her subsequently causing damage to other ships in the harbour or to property, such as jetties, piers, quays and other installations, bordering on the harbour. Fifthly, the respondents were the only persons with the heavy machinery and the technical resources to carry out proper typhoon precautions on board the ship. Sixthly, the respondents had power under paragraph 8 of their Schedule of Rates and Charges to carry out proper typhoon precautions on board the ship and charge the owners with the cost. Having considered and taken into account these six factors their Lordships are clearly of the opinion that the respondents owed a duty of care to the appellants to ensure that proper typhoon precautions were carried out on board the ship before she was moved by them to a typhoon buoy.

Cons V.-P. regarded clause 19(a) of the respondents' Standard Conditions as being inconsistent with their being under a duty of care to the appellants. In their Lordships' view, however, while clause 19(a) might well be material to the incidence of liability as between the respondents and the owners, who were in a contractual relationship with each other, it cannot have the effect of negativing a duty of care owed by the respondents to third parties arising out of the six factors discussed by their Lordships above.

Kempster J.A. considered that the formal written hand over of the ship by the respondents to the owners dated 16th June 1983 relieved the respondents as from that date of any duty of care to third parties in connection with the ship and put such duty on the owners exclusively. If the respondents had acted strictly in accordance with the terms of the hand over by transferring to the owners the exclusive control and management of the ship even in typhoon conditions, there might be great force in that view. The respondents, however, did not do that. On the contrary they reserved to themselves the right to exercise virtually complete control of the ship, by

causing her to be moved from their yard to a typhoon buoy in the harbour, at any time when typhoon signal no. 3 should be hoisted. By their conduct in this respect the respondents departed radically from the terms of the formal hand over. In these circumstances their Lordships cannot accept that the hand over letter had the effect which Kempster J.A. attributed to it.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal of 2nd November 1988 set aside and the order of Macdougall J. of 28th October 1987 restored. The respondents must pay the appellants' costs in the Court of Appeal and before their Lordships' Board.