

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
(Exercising its Admiralty Jurisdiction)**

CASE No. **AC 100/2007**

Name of Vessel: **MV *Banglar Mookh***

Before: **Mr Justice A.G. Binns-Ward**

In the matter between:

THE OWNERS OF THE MV *BANGLAR MOOKH*

Plaintiff

and

TRANSNET LIMITED

First Defendant

THE NATIONAL PORTS AUTHORITY OF SA

Second Defendant

JUDGMENT

delivered on 12 OCTOBER 2010

BINNS-WARD J:

[1] On the morning of 5 September 2005, during the course of a voyage from Ho Chi Minh City to Gambia, the MV *Banglar Mookh*, a vessel belonging

to the Bangladeshi Shipping Corporation, put in to Cape Town to take on water. It is common ground that there was a strong north-westerly wind of 30 to 40 knots blowing at the time and that the sea state was consistent with Beaufort Wind Force Scale 7 conditions. Cape Town is a compulsory pilotage port. Accordingly, during its approach to the harbour, the vessel was boarded by a pilot in the service of Portnet, a division of Transnet Limited. The pilot was Captain Tadeusz Grelecki. He came on board when the vessel was still some distance out from its intended berth alongside the Eastern Mole of Duncan Dock.

[2] The entrance to Duncan Dock lies between two 'knuckles', which mark the respective end points of the A berth Wall to the west and the Eastern Mole to the east. The waterway between the two knuckles is 180 m wide. During the vessel's passage through the entrance to Duncan Dock, while it was being piloted by Mr. Grelecki, the starboard side of the bow came into a glancing collision with the knuckle of the A Berth Wall. As a consequence of the collision, the vessel sustained certain structural damage and was delayed in Cape Town while repairs were effected.

[3] The current proceedings are the trial of the action for damages subsequently instituted by the owner of the vessel against Transnet Limited.¹ The claim is a 'maritime claim' as defined in paragraph (e) of the definition of the term in s 1 of the Admiralty Jurisdiction Regulation Act, No. 105 of 1983 ('the AJRA'). The action is one brought *in personam* within the meaning of s 3

¹ It was agreed that Transnet Limited was the party which would be responsible in the event of a basis for liability being established by the plaintiff. I have therefore referred to that company in this judgment as if it had been the only party cited as a defendant.

of the AJRA. The determinative effect on the claim of the incidence of item 10(7) of Schedule 1 ('the Schedule') to the Legal Succession to the South African Transport Services Act 9 of 1989 means that South African law is the applicable law for the purpose of the determination of liability. This follows from the provisions of s 6(2) of the AJRA. Cf. *MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* 2003 (2) SA 473 (SCA),² at para. [6]. During the course of the trial, which was limited to the issue of liability, the quantum of damages in issue was agreed in the amount of US\$399 576,55.³

[4] Although a claim based on the alleged negligence of the port authority was pleaded in the particulars of claim, the evidence led by the plaintiff was relevant only in respect of the alleged gross negligence of the pilot. Unsurprisingly therefore, counsel for the plaintiff did not advance any argument in support of the claim premised on alleged negligence by the port authority.

[5] Item 10 of the Schedule provides:

10 **Harbours**

- (1) The harbours of the Company⁴ are compulsory pilotage harbours with the result that every ship entering, leaving or moving in such a harbour shall be navigated by a pilot who is an employee of the Company, with the exception of ships that are exempt by statute or regulation.

² Also reported at SCOSA A59 and [2003] 1 All SA 286 (SCA).

³ Mr Wragge SC, who appeared for the defendant, pointed out that both sides had employed expert witnesses in respect of the issue of quantum, in respect of whom notices in terms of rule 36(9) had been filed. He submitted - without opposition from the plaintiff's counsel on this point - that the qualifying fees of the successful party's expert on quantum should be allowed as part of the awarded costs.

⁴ Transnet Limited is identified in the Legal Succession to the South African Transport Services Act, by definition, as 'the Company'.

- (2) It shall be the pilot's function to navigate a ship in the harbour, to direct its movements and to determine and control the movements of the tugs assisting the ship under pilotage.
- (3) The pilot shall determine the number of tugs required for pilotage in consultation with the Port Captain, whose decision shall be final.
- (4) A master shall at all times remain in command of his ship and neither he nor any person under his command may, while the ship is under pilotage, in any way interfere with the navigation or movement of the ship or prevent the pilot from carrying out his duties except in the case of an emergency, where the master may intervene to preserve the safety of his ship, cargo or crew and take whatever action he deems necessary to avert the danger.
- (5) Where a master intervenes, he shall immediately inform the pilot thereof and, after having restored the situation, he shall permit the pilot to proceed with the execution of his duties.
- (6) The master shall ensure that the officers and crew are at their posts, that a proper look-out is kept and that the pilot is given every assistance in the execution of his duties.
- (7) The Company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot.
- (8) For the purpose of this item, 'pilot' shall mean any person duly licensed by the Company to act as a pilot at a particular harbour.

[6] The applicability of the exemption from liability in item 10(7) of the Schedule to the current claim was not in contest. In *Yung Chun Fishery Co Limited v Transnet Limited t/a Portnet* (unreported judgment in case no. AC30/97, delivered on 1 September 2000), this court (per Davis J, sitting alone) held that 'wilful, reckless or grossly negligent acts or omissions on the part of the pilot fall outside the exemption' provided in terms of item 10(7). The KwaZulu-Natal High Court subsequently adopted the same restrictive interpretation of item 10(7); see the judgment of Booysen J in *Owners of the*

MV Stella Tingas v MV Atlantica and Another (Transnet Ltd t/a Portnet and Another, Third Parties) 2002(1) SA 647 (D).

[7] The High Court's finding in the *Stella Tingas* that the pilot in that matter had been grossly negligent was subsequently reversed on appeal: see *MV Stella Tingas: Transnet Ltd v Owners of the MV. Stella Tingas and Another*, supra. The Appeal Court's judgment, however, left unaffected the High Court's construction of the applicable statutory exclusion of liability for negligence. The Appeal Court assumed, without deciding, that the exemption provided by item 10(7) of the Schedule would not apply if the pilot were found to have been grossly negligent.⁵

[8] The defendant proceeded in the current matter on an assumption of the correctness of the construction of item 10(7) of the Schedule applied in the cases just cited. The proper construction of item 10(7) is a question of law and the aforementioned assumption by the defendant is therefore neither binding, nor determinative. Thus, in the event of my being convinced that the two High Court judgments mentioned earlier were premised on an incorrect interpretation of the statutory provision, I would be bound to depart from them.⁶ Despite some reservations whether item 10(7) has been properly construed,⁷ and because of the conclusions I have reached on the facts of the

⁵ See para. [7] of the SCA judgment.

⁶ Cf. *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para. 67 and the authority cited in fn. 40 to the judgment of Ngcobo J (as he then was).

⁷ Cf. *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA), in which a contractual clause excluding liability by one of the parties for negligence was held to afford no foundation for a restrictive application on the basis of a distinction between *culpa levis* and *culpa lata*; with the result that the exemption applied effectively also to gross

case, I have been able to determine the action assuming that the provision falls to be construed in accordance with existing authority, and without the necessity, which would otherwise have arisen, to call for argument in order to give the issue fresh consideration.

[9] The pleaded particulars of the pilot's negligence were widely cast. I agree with the submission by the defendant's counsel that, as developed during the trial, the relevant allegations came down to these (the summary is taken broadly, with some re-arrangement, from the defendant's heads of argument):

1. The pilot obtained and maintained a relatively high speed in the approach channel as the vessel came closer to port which was inappropriate in the circumstances.
2. Had the vessel been piloted correctly, it should have been placed in the channel considerably to starboard; so as to pass close to the end of the breakwater in order to counter the eastward drift occasioned by the 'easterly set' experienced by the vessel as a consequence of wind and sea effect as it came up the channel.
3. The pilot failed to line the vessel up properly in the approach channel taking into account the prevailing conditions.
4. As the vessel approached the entrance to the port of Cape Town (being a line drawn between the edge of the breakwater and

negligence. See also *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA) at para. [30].

buoy no. 4) the uncorrected effect of the easterly set resulted in it coming much too close to the North Wall so that the pilot was forced to give reactive orders both so as to avoid a collision with the North Wall and to attempt to regain the leading line of approach into the Duncan Dock.

5. After failing to line up the vessel properly, the pilot was unable to regain control of the vessel and should have aborted the entry before the vessel passed the breakwater.
6. The continuation of a high speed of advance and a growing loss of control of navigation was in direct contradiction of a need to slacken the speed of advance in the channel and thus gain sufficient control to take the forward way off the vessel after passing the breakwater and allowing the tugs the chance to make fast in an orderly fashion so as to render timely assistance.
7. The progress of the vessel was 'headlong over-fast, un-cautious and almost helter skelter'⁸ with a singular lack of control.
8. Having failed to line up the vessel correctly, and thereafter increased speed recklessly, the pilot compounded the problem by attempting to enter the port without the tugs being made fast, which he should not have done.

⁸ The somewhat colourful description is taken from the expert witness summary of the evidence of Captain Stuart McAllister, who testified at the trial at the instance of the plaintiff.

9. The speed of the vessel played a role in the inability of the tugs to make their lines fast before the vessel reached the entrance to the Duncan Dock.
10. At the time that the vessel experienced a sheer to starboard within the harbour basin within the breakwater and outside the entrance to the Duncan Dock, whatever the cause, any effort to regain control by use of tug/and/or wheel and/or engine was doomed to failure by reason of the excessive speed of the vessel.

The evidence

[10] The plaintiff adduced the evidence of the master of the vessel at the time of the collision, Captain Shahidul Islam, and that of Captain McAllister, a master mariner. Captain McAllister gave evidence as an expert. Captain Mohamed Rahman, the general manager of the plaintiff company also gave evidence, but his evidence was limited to explaining that certain of the crew members of the vessel who might have been expected to testify were no longer in the plaintiff's employ and that, despite the engagement of tracing agents, it had proved impossible to locate them. The plaintiff also called Mr. Kieron Cox. Mr. Cox's evidence was also not contentious. He is an expert on the vessel traffic service (VTS) provided by the port. He explained what records of the vessel's movements and speed the system used by the port would have provided and how it would have been within the ability of the defendant to have preserved these for discovery in the trial. He also

explained how exhibit E was compiled; and in connection therewith, in particular, how he had adjusted the times reflected on the tapes of the radio transmission voice recordings to times more consistent with true time. This resulted in a three minute fifty second forward synchronisation of the recorded times at which the several transmissions audible on the tapes commenced.⁹ With regard to the adjusted times thus determined, the witness also worked out the times at which the various statements made in the transmissions were made during each transmission. The results of the exercise would not give a precisely true indication of the timing of events, but certainly one that appears to me, when correlated with the available records, to be true probably within a deviance of less than 60 seconds.

[11] The defendant called five witnesses. These were the pilot; the master of one of the two tugs deployed to assist in bringing the vessel alongside, Captain Le Blond; the engineer on the other tug, Mr. Anthony Stein; Captain Woodend, a master mariner and erstwhile port captain of Cape Town harbour, who gave evidence as an expert; and Mr. Hendrik Hickman.

[12] In essence there are two conflicting versions of how the collision occurred.

[13] On the plaintiff's version, which is founded on the evidence of the master of the vessel, the pilot found himself obliged, during the crossing of the basin that lies inside the breakwater but outside the entrances to the Ben

⁹ I have referred to 'tapes' for convenience. The radio exchanges are in fact recorded by computer in a series of audio files. These were copied to a CD, which was produced in evidence as Exhibit D.

Schoeman and Duncan Docks, to order the execution of a turn hard to starboard because the vessel was approaching too close to one of the outer structures of the harbour, identified on the charts as the 'North Wall'. According to the master, the effect of the turn hard to starboard was to then place the vessel on a course, within the relatively narrow confines of the basin, which required a subsequent corrective hard to port manoeuvre if the vessel was to avoid another hard structure, known as the 'North Spur', on the opposite side of the basin. Captain Islam's evidence had it that while the turn hard to port resulted in a successful clearance by the vessel of the North Spur the vessel was, however, thereby put on the course that resulted in the glancing blow of the starboard bow against the A berth knuckle when the ship passed into the Duncan Dock. The opinion evidence of Captain McAllister, a master mariner with vast experience, was adduced to confirm or establish the feasibility of Captain Islam's account. Captain McAllister's evidence was also led by the plaintiff with the object of establishing that the pilot's causal negligence in the collision was of a gross degree.

[14] The defendant's version, established principally through the evidence of Pilot Grelecki, also had the vessel turning sharply to starboard when it entered the basin after passing the breakwater. On the defendant's version, this occurred involuntarily, due to the effect of prevailing conditions, and was corrected by putting the vessel hard to port and back on the leading line through the entrance to Duncan Dock. Grelecki's evidence is that because the vessel was to be berthed alongside the Eastern Mole (also known as 'landing wall 1'), which would be to the portside as the vessel entered the

Duncan Dock, he gave the helmsman orders to move the wheel gradually to port as the ship approached the entrance to the dock. According to Grelecki, he noticed, however, that the bow of the vessel instead started to veer to starboard. He shouted orders of 'hard to port' to correct this. He simultaneously rushed over to the wheel from the position at which he had been standing, on the port side of the bridge, only to find that the helmsman had swung it hard to starboard. Grelecki testified that he had then pushed the helmsman aside and himself swung the wheel hard to port, but too late to avoid the glancing collision with the A-berth knuckle.

[15] The defendant called Captain Woodend, a master mariner with extensive experience as a pilot in various southern African harbours, including Cape Town, as an expert witness with the purpose of providing objective confirmation of the reasonableness of Pilot Grelecki's conduct in regard to bringing the vessel into harbour.

[16] It was common ground that two tugs had been sent out to assist with the docking of the vessel and that it had been the intention that the tugs make fast as the ship traversed the basin before reaching the entrance to Duncan Dock. It was also common ground that the tugs in fact were able to make fast only after the collision and at a time when the vessel had already passed inside the Duncan Dock.

[17] To understand the evidence, it is necessary to have an idea of the physical interrelationship of some of the salient features around the harbour basin outside the entrance to Duncan Dock. What the parties referred to as

'the basin' is defined on its seaward aspect by the breakwater on the north western side and by the North Wall, which is part of the seaward wall of the Ben Schoeman Dock, to the south east. The breakwater runs out from the land at an angle in a north easterly direction, while the North Wall runs outward from the seaward boundary of the Ben Schoeman Dock in a north westerly direction, pointing towards the end of the breakwater wall on the opposite side of the mouth of the basin. A vessel sailing in an easterly direction so as to pass the breakwater from the west, as did the *Banglar Mookh*, would ordinarily turn to starboard at an obtuse angle to cross the basin following the leading line into Duncan Dock. The North Wall and the entrance to the Ben Schoeman Dock would be on the vessel's port side as it crossed the basin; and the North Spur on its starboard side. The part of the basin immediately outside the entrance to Duncan Dock is characterised by the North Spur, which is a wall running out in a north easterly direction from the seaward side of the A Berth wall of Duncan Dock and, on the southern aspect, by the South Spur, being a wall running out in a generally north westerly direction from the end of the quay that comprises the boundary between the southern edge of the Ben Schoeman Dock and what is known as the Eastern Mole of Duncan Dock. The walls of the North Spur and the South Spur define, in effect, an inner basin immediately outside the entrance to Duncan Dock. As mentioned, the entrance to Duncan Dock is between the knuckle of the A Berth wall and the knuckle of the Eastern Mole.¹⁰

¹⁰ The locality of the knuckles at the entrance to the Duncan Dock is indicated by the notations FG and FR, respectively, on chart 1846 at Exh. A194, being the layout document most frequently referred to in the course of the evidence during the trial.

[18] Captain McAllister used the Google Earth internet program and the nautical charts to establish the following measurements of the distances between the salient points. The differences between the measurements obtained using these sources were minor, but those determined with reference to the Google Earth programme were, with rare exception, either the same as, or consistently a little bit longer than those derived from the charts. As the longer distances favour the defendant when it comes to calculations directed at estimating the average speed of the vessel as it traversed the basin, I shall set out and refer only to the Google Earth based measurements¹¹ or the only longer chart based one. These were:

- (a) from the end of the A Berth knuckle to the end of the breakwater 1071,5m
- (b) from the end of the breakwater to the end of the North Wall 722m
- (c) from the end of the breakwater to the end of the North Spur 851m
- (d) from the end of the North Wall to the end of the North Spur 509m
- (e) from the end of the North Spur to the end of the A Berth knuckle 230m
- (f) from the end of the North Wall to the end of the A Berth knuckle 676,3m
- (g) from the No. 4 buoy to the end of the A Berth knuckle 1180m

(These distances were calculated in straight-line measurements between the given points; in other words, as the proverbial crow would fly.)

[19] It is also of assistance in understanding the evidence to have regard to the distance a vessel will cover travelling at various speeds. A table was produced in evidence describing these distances at constant speeds varying between 5 knots and 9,5 knots.¹² It suffices for present purposes to give three

¹¹ See Exh. G.

¹² See Exh. F1 and F2.

examples which afford a sufficiently illustrative insight: at a constant speed of 5 knots a ship covers 154m a minute; at 7 knots, 216m a minute and at 9 knots, 278m a minute.

Captain Islam

[20] Captain Islam is a young man; he was born in December 1973 and therefore only 31 years of age at the time of the incident. After leaving school, he had undergone two years training at a maritime academy in Bangladesh, whereafter, in 1995, he had commenced employment with the plaintiff as a deck cadet. He had worked his way up the ranks, serving on a variety of types of vessels, until he was given command of the *MV Banglar Mookh* in July 2005. The collision occurred during the vessel's first assignment under his command. Captain Islam was still in the employ of the plaintiff at the time he gave evidence. He had retained command of the *Banglar Mookh* for a year or so after the collision and then gone on to command three other vessels, including a container ship and a tanker.

[21] The general import of Captain Islam's evidence has already been summarised. He testified, with reference to extracts from the ship's logs and charts, that the pilot had come on board at 10h54, when the vessel was outside the southern approaches to the Cape Town harbour somewhere off a marker described on the charts as 'the fairway buoy'. Islam's evidence was that the instructions received from port control advised him to prepare for the pilot to board on the port side. He stated that a radio message from the pilot boat subsequently countermanded this advice and indicated that the pilot

would board instead from the starboard side. His evidence was that due to the rough sea conditions the pilot was unable to board on his first attempt and succeeded in doing so only during a second pass by the pilot boat. I should mention that Pilot Grelecki (supported by Mr Hickman) disputed this evidence and maintained that he had boarded on the first (and only) pass of the pilot boat. The conflict is curious, but nothing turns on it.

[22] Captain Islam testified that he met the pilot on the bridge and, in accordance with usual practice, handed the pilot an information sheet ('pilot card') which set out the salient characteristics of the vessel, including its mass and dimensions and the manoeuvring speeds at the various settings of the engine. A copy of the pilot card allegedly handed to Grelecki was produced in evidence. (The handover of the pilot card was not minuted in the ship's bridge log, as required by the owner's standing instructions.) The pilot card reflected the full sea speeds of the vessel in loaded condition as follows in knots:

'Full ahead	9.0
Half ahead	7.5
Slow ahead	6.5
Dead slow ahead	4.5'

(The speeds were also given in respect of movements astern, but these were indistinguishable from the speeds in respect of movements ahead.) Captain Islam testified that he had also explained to the pilot that the engine operated in such a manner that if the vessel was travelling at a speed higher than 3 to 4 knots it was impossible to alter the engine movements from ahead to astern without first stopping the engine.

[23] Pilot Grelecki denied having been handed a pilot card and stated that Islam had answered his enquiry as to the vessel's speed at dead slow ahead by giving the vessel's speed at that engine setting as 7.5 knots. Grelecki's evidence at one stage was that he had discounted this advice as obviously incorrect. There might easily have been a misunderstanding in communication between the two witnesses on the point. English is the first language of neither; and it was indeed sometimes difficult during the evidence of both witnesses to decipher some of what they were saying. On any basis, I am surprised, in the context of his rejection of the reliability of what his understanding of Islam's intimation was, that Grelecki did not ask for a pilot card, or some similar objective indication of the vessel's handling characteristics. Under cross-examination, Grelecki sought to assert that he had in fact asked for a pilot card. His evidence in this respect was unconvincing. It is improbable that he would not have testified to this effect during his evidence in chief had his instructions to the defendant's legal representatives indeed been as he claimed under cross-examination. I also have little doubt that the proposition that Grelecki had asked the master for a pilot card would have been put to Captain Islam had the defendant's counsel been so instructed.

[24] Grelecki's version was in any event undermined by his later statement under cross-examination that he did in fact accept the correctness of the information passed to him by the master. This altered position was later changed yet again when Grelecki, in further evidence under cross-examination, subsequently sought to revert to his initial version that he had

not believed the master's advice. His inconsistency under cross-examination makes it difficult to accept his assertion that he took the vessel up the channel at 6-7 knots at half ahead, which is a speed less than the 7,5 knots it should have reached with the engine at half ahead if performance was in accord with that indicated in the pilot card. I was left with the impression that Pilot Grelecki was in fact in no position to reliably state the speed at which he took the vessel up the approach channel.

[25] The relevant approach channel towards the breakwater at the harbour mouth is designated by four markers, being buoys no.s 2 and 4 on the portside of vessels approaching the harbour and buoy no.1 and the end of the breakwater wall on the starboard side. Buoy no. 4 is directly opposite the end of the breakwater. Captain Islam described that the vessel entered the channel under the pilot's control with the no.2 buoy on its port side. He described that the vessel proceeded up the channel at half ahead. The wind conditions had the effect of driving the vessel to the east (i.e. towards the port side) while it made its way up the channel (the so-called 'easterly set'). Captain Islam said that the pilot countered this by a combination of speed changes and helm movements to keep the ship inside, but nevertheless towards the eastern (i.e. seaward) side of the channel. In cross-examination it was put to the witness that the pilot would deny that the vessel had tended to drift to the east as it made its way up the channel. There is nothing in the engine log to support the making of changes to the speed of the vessel at this stage, but it would appear from the evidence that slight alterations of course would, by themselves, have the effect of steadying, or diminishing the speed.

[26] The master testified that the vessel had passed the breakwater at 11h16. There was some confusion and uncertainty apparent when his testimony in this regard was tested under cross-examination. It seems probable that the witness fixed the time by reference to the entry to that effect made by the duty officer in the ship's record, rather than by direct and contemporaneous observation, or independent recollection. One has no idea on the evidence precisely what was denoted by the passing of the breakwater; that is whether the ship was regarded as having passed the breakwater when its bow was abreast the breakwater, or whether it was when the breakwater was amidships, or only when the stern passed by the breakwater. This was of some significance in respect of the calculations to reconstruct the vessel's average speed during the approach, but, having regard to the vessel's overall length of only 159 m, I consider that the determination of the debate is hardly critical in the context of the evidence assessed in its totality. It is convenient to mention at this point that there was also some suggestion by the defendant's counsel that the port authority regarded the breakwater line as a line drawn obliquely across the harbour basin towards the north wall rather than in a straight line from the end of the breakwater across to buoy no. 4. The evidence confirms, however, that the concept that the breakwater line fell to be drawn obliquely is somewhat esoteric; and may only be applicable for the purpose of the calculation of port fees. In my view it is evident that the ordinary person would draw the line to buoy no.4; and it seems that is most

likely to have been the line the duty officer would have had in mind when recording the passage of the vessel past the breakwater.¹³

[27] Captain Islam does not appear to have been disconcerted or alarmed by the speed at which the vessel travelled up the approach channel. Nor does he appear to have taken exception to the hard to starboard manoeuvre he described as having been executed at the pilot's instruction to clear the North Wall. (It was put to him in cross-examination that Grelecki would deny having given an order of hard to starboard.) However, Islam does appear to have been concerned about the speed of the vessel thereafter as it bore down on the North Spur. In fact he says he checked on the speed just before the collision and noticed that it was about 9 knots. According to his evidence, he asked Grelecki whether the anchor should not be dropped to break the vessel's forward movement. On Islam's evidence it would appear that it was apparent to him for some time after the vessel had entered the basin that there was a danger of collision with the harbour walls.

[28] Captain Islam maintained that he remained in the pilot's company and engaged in how the ship was being navigated at all times. This evidence was contradicted by Pilot Grelecki, who testified that the master of the vessel showed no interest in what he was doing and stood aside talking to one of his fellow officers during the passage towards the harbour entrance. Whatever the actual situation, it is clear that the master took no steps to assert command as he was legally entitled to do, and also enjoined to do in terms of

¹³ Defendant's counsel seems to have accepted as much for the purposes of treatment of the evidence in his submissions at the conclusion of the evidence; cf. the quotation from his heads of argument in para. [4], above.

the plaintiff company's standing instructions, in the event of his perceiving that the pilot was putting the ship in danger. Captain Islam's explanation was that when it became apparent that matters were going awry there was no time for him to intervene effectively. In this regard I consider that the evidence does suggest that when the likelihood of a collision became imminent, Pilot Grelecki appears to have taken the appropriate measures to avoid it, and when, notwithstanding these measures, a glancing blow with the A Berth knuckle nevertheless occurred, Grelecki acted expeditiously and appropriately to avoid the stern of the vessel also coming into collision with the harbour structure as the ship cleared the entrance to Duncan Dock. The ship's master's failure to take back control of the ship from the pilot when he became conscious of impending danger therefore does not seem to have played any causative role in the unfolding events. Indeed, it is apparent from the evidence of Grelecki, as well as of both the expert witnesses, McAllister and Woodend, that by the time Islam became concerned, the approach to the entrance of Duncan Dock could not feasibly have been aborted.¹⁴

[29] Captain Islam testified that the helmsman and duty officer punctiliously complied with the pilot's instructions. He denied that the helmsman had at any stage steered hard to starboard in contradiction of an instruction from Pilot Grelecki to steer to port. He pointed out that Grelecki should at all times have been able to observe the course being steered by the helmsman by

¹⁴ Captain McAllister thought that it might have been viable, in theory, to arrest the movement of the vessel towards the entrance by dropping anchor, but it is evident that that option would probably have been feasible only if tug assistance had also been available. As already mentioned, the tugs made fast to the vessel only after she had passed inside the Duncan Dock.

referring to the rudder indicator set in the deckhead in the bridge room and replicated outside the bridgeroom on both the port and starboard wings. He disputed the proposition put to him in cross-examination that the rudder indicator was impossible to read from Grelecki's position in the bridge room and uttered the opinion that basic requirements of naval design would render it imperative that the rudder indicator be readily visible from all positions on the bridge. He disputed that Grelecki had at any stage physically taken control of the wheel and swung it over from a hard to starboard to a hard to port position.

[30] When asked as whether Grelecki had at any time complained about the helmsman in connection with the collision, Islam confirmed that there had been such a complaint. He said that the complaints had been uttered shortly before and then again after the collision. The record of the radio voice transmissions confirms that Grelecki complained about the helmsman after the collision. The nature of any complaints he made before the collision was not explored. I shall treat presently with Grelecki's evidence in this regard.

[31] Captain Islam testified under cross-examination that Pilot Grelecki had returned to the vessel on the evening of the day of the collision and had wandered about the vessel taking photographs. He noticed that Grelecki was behaving strangely and was giving off what Islam regarded as an unpleasant odour. Islam expressed the opinion that Grelecki may have been intoxicated. It is common cause that Grelecki returned to the vessel and took some

photographs. Some of them were produced in evidence and I shall refer to them in the discussion of Grelecki's testimony.

[32] The master of the vessel confirmed that as a result of inspections by the maritime safety authority in the port, the ship was issued with a detention notice until certain defects in the vessel and its equipment had been rectified. Captain Islam was reluctant to admit that these faults were serious enough to warrant the action taken, but pointed out that nothing is ever served by arguing against a port authority's requirements, the priority, instead, being to do whatever might be necessary enable the ship to resume its voyage as soon as possible.

[33] It was evident that the defendant's counsel sought to emphasise the defects found in the vessel, not to suggest that they were directly relevant to the collision, but to support the evidence by the defendant's witnesses that suggested general incompetence and neglect of duty by the ship's crew. The incidence of such incompetence, if established, would, as I understood the defendant's case, tend to support the delay in making the tugs fast and the probability of the truth of Grelecki's claim that the helmsman acted in absolute contradiction of his course directions.

[34] Captain Islam, despite some faults, made a reasonably good impression in the witness box. An assessment of his performance was complicated by evident language difficulties. His English was quite good, but so heavily accented that there were frequent occasions when both counsel and I struggled to decipher his answers. Our evident difficulties must have

been rather disconcerting for him. He also had apparent problems, which I perceived to be linguistically based, with lengthy or hypothetical questions. He was, however, clearly discomforted under cross-examination at times; most notably, when the flaws in his evidence concerning the document setting out the manoeuvring characteristics of the vessel (Exh. A192) were exposed. He also showed signs of holding a cynical view of the attitude of the port authorities, including the maritime safety inspectors. In some respects this evident cynicism was probably unjustified; on the other hand, however, the failure by the port management, despite its undertaking to do so, to preserve the vessel tracking service information that would have confirmed the exact movements of the vessel in its approach to Duncan Dock did afford a cogent basis for this detectable attitude on the part of Captain Islam. Islam's description of the vessel's approach to the port and the collision was not marked by any noticeable confabulation and was not upset in cross-examination.

Pilot Grelecki

[35] Mr. Grelecki is Polish by birth. He received a formal training in seamanship at an academy in Poland, graduating with the equivalent of a degree or a diploma. He saw service on ships in Poland until the consequences of his political affiliation with the anti-government Solidarity Movement during the 1980's led him to defect to what was then West Germany. After a short time in Germany, he secured a position working with the harbour tugs at the port of Cape Town and immigrated to South Africa.

He has worked as an employee of the port authority at Cape Town since January 1990. He became a tug master in Cape Town in 1995. He obtained his first pilot's licence for vessels with a gross tonnage of up to 10 000 tons in 1997 and started to act as a pilot in 2000. At the time of the incident which gave rise to the current litigation, Mr. Grelecki was licensed to pilot vessels of up to 30 000 tons. He had been carrying out the duties of a pilot in the port fulltime since May 2005; and was formally appointed as a fulltime pilot in November 2005. At the time of the trial, in May 2010, Mr. Grelecki continued to hold the position of pilot; and had by then obtained a licence to pilot vessels with a gross tonnage of up to 80 000 tons.

[36] I have already indicated in broad outline earlier in this judgment the version of events given by Pilot Grelecki and also discussed some of his evidence in the context of treating with that of Captain Islam. Grelecki took no issue with the entries in the ship's records indicating that he had boarded the vessel at 10h54. He accepted that he had come on board shortly before 11h00; he had no reason to note the time precisely. Grelecki testified that the helmsman, under his instruction, turned the ship to starboard to enter the approach channel at the point between buoys no. 1 and 2 and made steady progress up the middle of the channel at a speed of 6-7 knots. The steady course was maintained with minor movements on the wheel. He testified that he was completely satisfied with the helmsman's response to the given course instructions. He described that the *modus operandi* was that he would call out the course instruction and that as it was executed the helmsman would repeat the instruction to confirm that he had understood it. There were no problems

with communication.

[37] Mr. Grelecki testified that at the stage the vessel crossed the breakwater line (which he defined, consistently with what have indicated I would expect most people would do, as being the line between the end of the breakwater and buoy no.4) it was sailing in the middle of the approach channel. He said that as the vessel passed the breakwater he gave an instruction that the engine be set at full ahead. He explained that this was what he usually did at that point to counteract the swell effect at the end of the breakwater, which he described as tending to push the bow of the vessel towards the breakwater (i.e. to the starboard side). Grelecki had earlier testified that this particular type of vessel steered more easily at speed and the intended effect of the order to full ahead at the passing of the breakwater was to improve the handling of the vessel in the context of the aforementioned swell effect. He described the position as using a burst of the engine. The ship's records suggest that the engine was kept at full ahead for nearly two minutes, which seems to me to be something quite different from a burst of the engine.¹⁵ When he was testifying under cross-examination, however, Grelecki testified that the veer to starboard just past the breakwater had taken him by surprise and stated that he had ordered the wheel to be turned hard to

¹⁵ In evidence given by Captain Woodend under cross-examination it was stated that in order to 'kick' the vessel in a certain direction, by which was meant increasing the revolutions of the engine so as to accentuate the effect of a rudder position, an engine burst of approximately 20 seconds would be used. Captain Woodend said that such use of the engine would result only in an accentuated angle of movement and not an increase in the speed of the vessel. It is evident that the relatively extended periods at which Mr. Grelecki maintained the engine at full ahead while crossing the basin did not correspond with the method of giving the vessel a 'kick' described by Captain Woodend. Captain Woodend stated that increased speed for longer periods could be used to improve steerage, a quite different concept from accentuating a sharp rudder effect.

port, which he found it expedient to assist with increased engine speed, hence the order at that stage to set the engine at full ahead.

[38] According to Grelecki, the vessel was met by the two attending tugs as it reached the breakwater. Grelecki explained that the tugs remained within the harbour basin and had not ventured out into the approach channel because it would have been unsafe for the tugs' deck crews to work in the prevailing rough sea conditions outside the basin. Neither of the tugs had been able to make fast as the vessel passed into the harbour basin. Mr. Grelecki ascribed this to the incompetence of the vessel's crew; the relevant deck stations, fore and aft, having reportedly concentrated their attention on the bridge instead of on the tugs close alongside waiting for the heaving lines to be thrown down to them from the vessel.

[39] The failure of the tugs to make fast did not concern Grelecki. He claimed that in respect of vessels the size of the *MV Banglar Mookh*¹⁶ in eight cases out of ten the tugs made fast only inside the dock. If this is indeed the case, no explanation was given as to why the two tugs awaited the vessel at the breakwater, or as to why they made valiant attempts to make fast to the ship before it entered through the entrance into Duncan Dock. As will become apparent presently, it is evident from Grelecki's radio messages to the forward tug at a stage when it had become apparent that matters had gone seriously awry he was under the impression (or at least hoped) that the tug was made fast and he sought to invoke its assistance to avoid the collision. Indeed, I

¹⁶ The vessel has a gross tonnage of 13125 tons, a summer draft of 9,016 metres, overall length of 159 metres and is 22,86 metres in breadth.

consider that the concession by Captain Woodend, who was called by the defendant, to the effect that the tugs ideally should have made fast with the vessel during the crossing of the basin was properly made. I also accept Woodend's evidence that Grelecki should have been conscious of this and, in ordinary circumstances, should, when it became apparent during the crossing and before entry into the Duncan Dock that the tugs had not made fast, have concerned himself with finding out the reason why the tugs had not made fast.

[40] Pilot Grelecki testified that once he had taken the vessel beyond the breakwater line he was committed to proceeding into the Duncan Dock and would be unable to abort the approach. His evidence was that after he had regained the leading line, having corrected the spontaneous veer to starboard that had occurred just inside the breakwater, the vessel proceeded smoothly across the basin towards the entrance to the Dock, being maintained on the approach line by minor course changes of no more than 5 to 10 degrees either to port or starboard. As he anticipated entering the Dock and thereafter turning to port to reach the berth station, Grelecki gave orders during the approach to the entrance for the vessel to commence a general and gradual turn to port, but was disconcerted that, notwithstanding his instructions to the helmsman, the bow was turning to starboard. He rushed over to the wheel and saw that the vessel was being steered to starboard. Defendant's counsel twice asked him whether the wheel was hard to starboard and Grelecki answered on both occasions that he could not remember. He said that he took hold of the wheel and swung it hard to port. The vessel started to correct itself, but too slowly to avoid a glancing blow with the knuckle of the A Berth

wall. Grelecki was adamant that when he took the wheel and swung it to port the danger of imminent collision was with the knuckle, and not with North Spur.

[41] I have to say that I perceived that Grelecki was noticeably discomforted in the witness box during his evidence in chief when describing the vessel's approach across the basin to the point of collision. He became more so under cross-examination. I also found that his description of the events markedly vague. It is clear that the collision was a traumatic event in Mr. Grelecki's life. He showed every sign of still finding difficulty working through the experience nearly five years after the event.

[42] His professed inability, during his evidence in chief, to recall whether the wheel had been turned hard to starboard was perplexing and appeared to be inconsistent with the answers counsel expected to elicit. As a matter of inherent probability the detail of the cause of the incident would be one deeply engrained in the witness's mind. On Grelecki's version it was the alleged putting of the wheel to starboard, instead of steering to port, that was the fundamental cause of the collision. If Grelecki had indeed seen the wheel swung hard to starboard, I consider it most improbable that he would have forgotten the fact. Grelecki's written report to the port authority made on the day of the collision, or the day thereafter, describes the wheel having been swung hard to starboard.

[43] A further difficulty with Grelecki's allegation of a turn to starboard in conflict with an order to steer to port is that such an action by the helmsman

would be unlikely if the helmsman had repeated the order in the manner described earlier. In his written report to the port authority Grelecki stated that he had repeated the instruction three times and that the helmsman had confirmed the instruction. Such a blatant and persistent error on the part of the helmsman with whom there had been no communication problems whatsoever in the preceding 20 minutes or so of sailing is improbable. That said, the radio transmissions between Grelecki and port control and the tug boats show that he referred more than once in the few minutes after the collision to the helmsman having swung hard to starboard instead of to port. In one of those of those transmissions Grelecki said the helmsman had swung the wheel to starboard despite having repeated Grelecki's instruction to turn to port. In his comments on the radio Grelecki suggested that the helmsman had turned hard to starboard when he had been instructed to turn hard to port. In the context of his evidence in chief, however, the order hard to port was given only in reaction to the bow having already noticeably veered to starboard, in other words after the helmsman had already steered the vessel in the wrong direction. This, in turn, was in contradiction of the import Grelecki's reports soon after the collision.

[44] All in all Mr. Grelecki's evidence in respect of the alleged error by the helmsman was vague and inconsistent. As a result it falls to be regarded as unsatisfactory and unconvincing.

[45] As already mentioned, equally unsatisfactory was Mr. Grelecki's evidence in respect of the speed at which he piloted the vessel into the basin.

He gave inconsistent answers on the issue of whether or not he had accepted what he testified was the information given to him by the master as to the speed of the vessel fully loaded at dead slow ahead. He stated that he had used his wrist watch and the estimated distance of the vessel from various fixed points to work out the speed of the vessel. He also said that he had a 'feel' for what would be a comfortable speed and that he had the ability, by adjusting the engine speed, to either slow down or accelerate the approach should he at any time consider it necessary. He estimated that he achieved a speed of between 6 and 7 knots in the approach channel. He did not at any stage have regard to the GPS instrumentation on board, which would have given him an accurate reading of the speed at which the vessel was covering the ground.

[46] Having maintained the vessel at half ahead throughout the voyage up the approach channel, it seems probable that the vessel would have achieved, or closely approximated, the speed of 7,5 knots indicated in the vessel's pilot card as the speed attainable at that engine setting. The relatively short period at the end of that transit during which the engine was set at dead slow ahead is unlikely to have taken much speed off the vessel's advance because of the effect of its forward way, or momentum. The evidence of Captain McAllister, which seemed to me in this respect to be fully in accord with what might be expected, was that the combined wind and sea conditions would have tended to slightly assist the forward movement of the vessel up the channel thereby slightly increasing the speed at which it travelled.

[47] It follows from the fact that during most of the period when it was traversing the basin the vessel was piloted with the engine at full ahead that the speed reached during that part of the passage was probably in excess of the approximately 7,5 knots attained by the vessel when it passed the breakwater. Indeed, the evidence by Captain Islam that he noted that the speed of the vessel was 9 knots shortly before the collision is not implausible in the circumstances.

[48] Mr. Grelecki confirmed Captain Islam's evidence that he (Grecki) had returned to the vessel, then tied up alongside, on the evening of the date of the collision. He denied that he had been drinking. He brought with him his camera and took some photographs. The evidence focussed on his photographs of the rudder angle indicator inside the bridge room. The point of the evidence appeared to be to support the notion that the rudder angle indicator was positioned in a manner that it could not have been seen from the position Grelecki had taken up on the portside of the bridge room during the vessel's approach across the harbour basin. This notion, which, as I have mentioned, was ridiculed by Captain Islam, was contradicted by the following exchange between the defendant's counsel and Grelecki:

Q. You described, Mr. Grelecki, how as you were approaching the entrance to Duncan Dock you took up a position on the port side of the bridge?---That's correct, Sir.

Q. Why did [you] not take up a position nearer the helmsman or where you could see the rudder indicator?---Because I could see the rudder indicator whilst staying right on the portside of the bridge, the last window or the second window, because the superstructures of the cranes, they were obstructing my view and I couldn't see the bow if I would be standing by the helmsman, so I wouldn't be able to see where I am going to.

[49] Grelecki affirmed the correctness of the proposition put to him by the plaintiff's counsel, premised on Captain McAllister's opinion, that a pilot should position himself on the bridge in a position from which he could see and read not only the rudder angle indicator, but also the gyro compass repeater and the rpm counter. This is the so-called 'conning position'. Grelecki conceded that he had not taken up such a position during the time that the vessel proceeded past the breakwater and across the basin to the entrance to Duncan Dock. He denied that he had been negligent in this respect. His explanation was that he had been entitled to assistance from the bridge team, who should have alerted him to any matter for concern. This was hardly a satisfactory explanation in circumstances in which the pilot's evidence suggested he had no reason to repose any confidence in the expectation of assistance from the master or other officers on the bridge.

[50] I found Mr. Grelecki's evidence of the course of the vessel across the basin most unconvincing. He was unwilling to make concessions which objective factors impelled should have been made. He was extremely reluctant, for example, to concede that after the first veer to starboard described in his evidence the vessel must have been taken to the westward side of the approach line. He was at something of a loss, when taxed on the point by the plaintiff's counsel, to explain how his described manoeuvres allowed him to regain the approach line without a corrective turn to starboard after he had made what he described as his first turn hard to port. His description of where the vessel was in the basin at the time of the emergency allegedly caused by the helmsman's aberration was irreconcilable with the

distance the vessel must have covered during the final two to two and half minutes even if it were travelling at a speed of only about 5 knots at that stage, as maintained by Grelecki, and not at the much higher speed described by Captain Islam. His refusal to concede that the vessel was to the side of the approach channel furthest from the end of the breakwater as it came into the basin was inconsistent with his description to Captain Woodend that he had had the vessel steered on a course to put the no. 4 buoy 'fine on the port bow'.

Mr. Le Blond

[51] The defendant also adduced the evidence of Mr. Pierre Le Blond, who was the master of the tug boat, *Enseleni*, which was one of the two tugs despatched by port control to assist in the docking of the *Banglar Mookh*. The *Enseleni* was designated to attach itself to the rear or stern of the *Banglar Mookh*. This entailed bringing the tug up very close to the transom of the *Banglar Mookh* to receive the heaving line to be thrown down to the tug by the vessel's deck crew. In my judgment, Le Blond's evidence contributed nothing material to assist in the determination of liability in this case. It is evident that Le Blond's main concern during the material stages of the *Banglar Mookh's* approach across the basin towards the entrance to Duncan Dock was to secure an attachment to the vessel. There were problems in this regard, which Le Blond ascribed to incompetence on the part of the crew station posted for this purpose on the aft deck of vessel. Le Blond's forward view was entirely blocked by the bulk of the *Banglar Mookh*. Apparently, because

of that, and because his attention was focussed on the issue of making fast, Le Blond was unaware of the two sharp turns executed by the *Banglar Mookh* as it made its way across the basin. He was also unaware of anything unusual in the approach of the vessel to the entrance of Duncan Dock that might explain the occurrence of the collision. While he admitted that he was alerted by the content of radio transmissions by Grelecki during the two to three minutes before the moment of collision that some sort of emergency situation had arisen, he said that he was unaware of its nature, or what might have given rise to it.

[52] It would seem that the main purpose that the defendant sought to achieve through Le Blond's evidence was to contradict the evidence adduced by the plaintiff, which suggested that Grelecki had steered the vessel under pilotage at an excessive speed across the basin to the point of collision. While Le Blond testified that he recalled nothing untoward in the speed of the *Banglar Mookh*, it is apparent that he was taking no special notice of the speed and that it would have been well within the capacity of the tugs to follow the vessel at any speed up to that of 9 knots mentioned by Captain Islam. Under questioning in re-examination, Le Blond stated that he would have noticed if the vessel had been going 9 knots when it passed the breakwater because he would have had difficulty catching up with it before it reached a place well into the basin. I did not find this evidence particularly illuminating, as the evidence suggests that an increase in the speed of the vessel would have occurred after it had already entered the basin and at a time when it was being steered at full ahead; having passed the breakwater at a stage when

the engine was set to half ahead or dead slow ahead. As already observed, the increase in speed would have been one from an already relatively high rate of about 7,5 knots. Le Blond, perhaps because he was distracted for the reasons already mentioned, did not pertinently notice any increase in the speed of the vessel.

Mr. Anthony Stein

[53] The defendant also called the chief engineer of the forward tug, the *Pinotage*. (The master of the forward tug had passed away in the period intervening before the trial.) I do not consider it necessary to say much about the evidence of the engineer, Mr. Stein. His evidence was to the effect that at the time of the collision, the bow of the *Banglar Mookh* was still pointed to starboard. That observation is quite inconsistent with the evident mechanics of the collision and with the evidence of both Captain Islam and Pilot Grelecki. Stein's recollection that the bow of the *Banglar Mookh* sheered to starboard just after the bow passed the point of the North Spur is also irreconcilable with the evidence that a period of approximately two and a half minutes intervened between Grelecki's urgent call to the *Pinotage* to assist in pulling the bow to port and the moment of impact. The distance between tip of the North Spur and the tip of the A berth knuckle with which the starboard bow came into collision was about 230m and even had the vessel been moving at only 5 knots is a distance its bow would have traversed it in just a minute and a half.

Mr. Hendrik Hickman

[54] Mr. Hickman was the skipper of the pilot boat, '*Petrel*', which had delivered Mr. Grelecki to the *Banglar Mookh*. His evidence added nothing of substance. It is not necessary to describe it.

Captain Stuart McAllister

[55] Captain McAllister has been a master mariner since 1979. He was an employee of the erstwhile South African Marine Corporation (Safmarine) for many years – and between 1995 and 2000 was marine manger responsible for maritime safety on all the Safmarine vessels. Since 2000 he has worked continuously as a ship's master engaged in international trade in the employ of the international container shipping company, Maersk. He has extensive experience, as a ship's master, in bringing vessels in and out of the port of Cape Town.

[56] The essence of Captain McAllister's evidence was that it is important that a pilot should not bring a vessel into port at excessive speed. Captain McAllister pointed out that while proceeding at a relatively high speed might give rise to good steerage, it reduces the pilot's ability to control the vessel within the dangers presented by the confines of a harbour. The pre-eminent duty of a pilot, so testified Captain McAllister, to is to keep the vessel under full control and to manage its progress in a pro-active, rather than a re-active, manner.

[57] Captain McAllister had regard to the following information: the boarding of the vessel by the pilot at approximately 10h54, approximately one nautical mile distant from the fairway buoy indicated on chart 1846 (Exh. A 194), and the occurrence of the collision thereafter at a reported time of 11h20. He also had regard to the engine room log and bridge note book of the vessel, which recorded the engine room movements and corresponding engine orders. Captain McAllister also had regard to the voice recordings of exchanges between the pilot, the tugs and port control and, of course, to the layout of the port and the approach thereto, as apparent on the charts.¹⁷ (There are some inconsistencies between the engine room log and the bridge note book. There is also at least one demonstrable inaccuracy in the bridge note book. Nevertheless, read together, with appropriate caution, and in the context of the evidence as a whole, the documents do provide a source of relevant insight.) In formulating the opinion set out in the summary of his evidence delivered in terms of rule 36(9)(b), Captain McAllister had reference to what he was informed would be the evidence of Captain Islam. A synopsis of the report of Islam's evidence set out in paragraph 37 of the rule 36(9)(b) summary corresponded in essential respects with the evidence actually given by Islam, which has already been described.

[58] On the basis of the prevailing weather conditions, the description provided by Captain Islam and the cross-checking control afforded by the voice recordings, Captain McAllister opined that the vessel had been brought

¹⁷ The content of the documents and records in question were admissible in terms of s 6(3) of the AJRA; cf. *MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas*, supra, at para. [9].

up the easterly (seaward) side of the approach channel with the use of a combination of speed and steering to starboard to counter the easterly drift. In the witness's opinion the high speed of approach, coupled with the positioning of the vessel to the eastern side of the approach channel as it arrived at the position at which a turn to starboard was required to line up with the leading lights of the approach into the Duncan Dock, resulted in a loss of control manifested in the vessel's drift towards the North Wall on the eastern side of the basin, which necessitated reactive steps by the pilot in the form of an increase of speed to improve steerage and a hard turn to starboard. The limitations imposed by the physical confines of the basin required the last-mentioned manoeuvre to be followed by a turn hard to port to avoid the vessel coming into collision with the North Spur on the south western side of the basin.

[59] Captain McAllister submitted a number of calculations made with reference to the determined distances between various points on the chart (Exh. J). These suggested that the average speed of the vessel during the passage from the pilot pick up point to the point of collision was more than 7 knots. The witness did not suggest that these calculations were definitive. He could not do so because it was not possible to precisely determine various factors such as the exact place at which the pilot had boarded, the speed of the vessel when the pilot boarded and the precise course of the vessel. Captain McAllister also accepted that the times he had to work on, whether from the ship's records or those determined from the port's voice recordings, were also approximate, even if closely approximate. Despite these

acknowledged shortcomings, Captain McAllister suggested that the calculations provided a useful guide, which corroborated his assessment that the vessel had been brought in by the pilot at a speed which was excessive in the circumstances.

[60] Captain McAllister was further of the opinion that the aforementioned inappropriately high speed of advance was responsible for the failure of the tugs to make fast and be in a position 'to render timely assistance'.

[61] According to Captain McAllister, the pilot's errors were cumulative. This was an approach echoed in argument by the plaintiff's counsel, who submitted that it was the cumulative character of a succession of negligent acts that justified the characterisation of the alleged negligence of Pilot Grelecki as gross.

[62] Captain McAllister impressed as an articulate and self-confident witness, who succeeded in providing a rational and easily comprehensible foundation for the opinions which he ventured. He candidly conceded that his approach was reconstructive in nature – that he had worked backwards from the given fact of the collision to determine why it had happened. In assessing the witness's opinion I have been astute to caution myself against the danger of being led by it into judging the conduct of the pilot too stringently with the benefit of wisdom after the event.

Captain John Woodend

[63] Captain Woodend has been active in shipping for more than 50 years. He qualified as a master mariner (foreign going) in 1964. He immigrated to South Africa from England in 1966 and was an employee of the defendant and its various predecessors as the port authority in this country from then until 2000. During that time he served variously as a tug master and pilot in a number of ports in the Cape, including Walvis Bay. He has served as Port Captain/Manager in the ports of Saldanha and Cape Town. Since 2000 he has been in private practise as a marine consultant.

[64] Captain Woodend agreed with the proposition put by the plaintiff's counsel in cross-examination that the summary of events set out in paragraph 6 of the summary of evidence filed in terms of rule 36(9)(b) was premised on the version he had been given by Pilot Grelecki. Captain Woodend conceded that having listened to Grelecki's evidence in court there were certain differences between the version originally given to him by Grelecki, as he had understood it, and the latter's testimony in the witness box.

[65] In evidence Captain Woodend stated that there would have been nothing amiss about the vessel reaching the breakwater and entering the basin at a speed of up to 7,5 knots. This differed somewhat from the tenor of his expert summary, in which a speed of approximately 6 knots was given as the speed which the witness would have been comfortable with. I gained the impression from Woodend's evidence that the matter of speed was very much

one of value judgment on the part of the pilot, having regard to the manner in which a particular vessel handled in the prevailing conditions. Nevertheless the adjustment from 6 to 7,5 knots was but one of a number of indications of a tendency by Captain Woodend to tailor his opinion to support Grelecki's evidence, whichever version of the events such often inconsistent evidence might offer. Another example of this tendency was Captain Woodend's trenchant defence of Grelecki's failure to check the actual speed of the vessel on the available instrumentation rather than by relying on his observation of the passage of the vessel 'over its transit' relative to various fixed features. I found this really overdriven when Captain Woodend maintained he would himself not check the instrumentation even if he were in doubt about the given speed of the vessel as at dead slow ahead and half ahead provided by ship's master. The most glaring example of Captain Woodend's tailoring of opinion to fit the evidence of Mr. Grelecki was his indication of the point at which he thought the bow of the vessel would have been when the hard to port orders would have been given before the collision as being at the 'o' of the 'to' in the notation '*Dredged to 14,6m (1998)*' on chart 1846 (Exh. A 194), just outside the entrance to the Duncan Dock. That indication tallied with the indication marked with an 'F' by Grelecki on the chart (with reference to the adjusted time of 11h17 55 indicated in green on Exh. E). Captain Woodend did retreat from that indication when its non-feasibility was demonstrated to him with reference to the time of approximately two minutes between the time of that order and the collision, but it was extraordinary that he could initially have ventured the opinion which he did in this respect. The witness however then

compounded the adverse effect on the cogency of his testimony by subsequently reverting to his initially stated entirely untenable hypothesis. His explanation for doing so was that he had nothing to go by except the information given to him by Grelecki. He seemed extremely reluctant, when pressed, to question the reliability of what he had been told by Grelecki; even in the context of the difficulties posed for Grelecki's version by the objectively established considerations of time and distance.

[66] Captain Woodend confirmed that a course to set the vessel, during its approach up the channel, fine off the number 4 buoy (meaning less than half a point – i.e. less than five to six degrees off the buoy) would result in the vessel passing the breakwater on the eastern side of the approach channel. He also conceded that for the vessel to be in the position marked by Grelecki with the letter 'B' on the chart at Exh. A194, the vessel must have approached it from the eastern side of the channel.

[67] In my judgment, the effect of Captain Woodend's evidence was undermined by an *a priori* and generally inflexible presumption in favour of the factual correctness of Mr. Grelecki's version of events. Towards the end of his evidence, and in answer to a question from the court, Captain Woodend fairly conceded that his opinion would have been different in certain respects were it to have been premised on an acceptance of Captain Islam's evidence. Despite the identified shortcomings in Captain Woodend's testimony, I have been conscious, where it has been possible in the context of the factual findings, to weigh the judgments of the two expert witnesses against each

other remembering that Captain Woodend's evidence is that of an experienced pilot; an advantage not enjoyed by Captain McAllister.

The VTS records

[68] The material differences in the evidence of the two principal witnesses in respect of the vessel's approach in the lead up to the collision are by this stage clearly apparent. An objective and reliable record of the relevant detail should have been available in the form of the information collected by the vessel tracking service (VTS). The plaintiff's legal representatives sought insight into the VTS record on the very day of the occurrence of the collision. The port authority declined to allow the VTS record to be inspected, but undertook to ensure that a copy of the record was preserved for production at the appropriate time should litigation ensue. As it happened, for reasons that were not satisfactorily explained,¹⁸ the VTS record was not retained and was not available for production at the trial.

[69] Relying on a line of English authority reviewed in *Arrow Nominees Inc & Anor v Blackledge & Ors* [2000] EWCA Civ 200 (22 June 2000); [2000] 2 BCLC 167 (CA); [2001] BCC 591, at para.s 30-34, Mr. MacWilliam SC, counsel for the plaintiff, argued that the defendant's failure to preserve and discover the complete VTS records should result in the defendant forfeiting its

¹⁸ The explanation given was that there had been a problem with the recording drive mechanism in place at the time of the incident and that the radar system had subsequently been upgraded. Further, such recordings as may have existed had been lost when the port upgraded and replaced the VTS in the first quarter of 2006. The defendant extracted a concession from the plaintiff's witness, Mr. Cox that it would have been difficult to read the records today due to changes in technology, but in the context of the opportunity to make hard copy records by way of so called 'screen dumps' at the time, this hardly served as mitigation for the defendant's extraordinary and deplorable neglect to honour its undertaking to preserve the records.

right to defend the action and in judgment in the plaintiff's favour; effectively, as if by default. In this regard Lord Justice Chadwick, writing the principal judgment in *Arrow Nominees*, observed (at para. 54):

I adopt, as a general principle, the observations of Mr Justice Millett in *Logicrose Ltd v Southend United Football Club Limited* (*The Times*, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.

In *Arrow Nominees*, the petitioner had falsified documentary evidence in support of an application for a buy-out order in terms of the English Companies Act. When this was exposed, an application had been made for the striking out of the claim. The striking out application was refused and that refusal was, in part, the subject of the appeal heard by the Court of Appeal. It gave rise to a debate about the circumstances in which a court might exercise a power to strike out a claim or defence in circumstances such as one in which a party failed to make proper discovery, thereby prejudicing the

possibility of a fair hearing before the court. As Mr. MacWilliam illustrated with reference to other authority, including Australian and American cases, the concept of a striking out has not been restricted to deliberate or fraudulent conduct by the offending party. It has also been applied, irrespective of fault, to a party which, even for innocent reasons, fails to make discovery of material the production or availability of which is necessary for the conduct of a fair hearing. There is no South African jurisprudence directly on point; although, of course, rule 35(7) of the Uniform Rules does put a party in default of its discovery obligations in jeopardy of having its claim or defence struck out by the court in the exercise of its judicial discretion.

[70] I have found it unnecessary to decide whether, or how the approaches evident from the various foreign authorities referred to by Mr. MacWilliam should, or might be applied in this country. The plaintiff's counsel predicated his invocation of that authority on the 'fair hearing' component of the right enshrined in s 34 of the Constitution.¹⁹ I am not persuaded by the available evidence that the loss of the VTS records, culpable and inexcusable as it was, happened in bad faith. The notion that the inability of a party to make full discovery by reason of the negligent loss of documentation should result in the arbitrary adverse determination of the case against such party does not sit easily. In the current case it is possible to determine the facts on the basis of the available direct evidence by eye-witnesses, which is amenable to analytical scrutiny in the context of objective factors and the surviving records

¹⁹ Section 34 of the Constitution provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

in the form of voice transmission recordings. That the result might be less safe than it might have been if the VTS records been available is insufficient reason to hold that a fair hearing was not achieved. By way of analogy it might be observed that, ideally, the court would also have been assisted in arriving at a 'safe' result by a consideration of the evidence of the helmsman and the duty officer on board at the time of the incident. The fact that they could not be traced necessitated the determination of the case in less than ideal circumstances, but their absence did not exclude a fair hearing in the relevant sense. The conclusion to which I have come in this respect is, in my view, entirely consistent, albeit incidentally, with the approach enunciated in the *dicta* in *Arrow Nominees*, quoted above.²⁰ In the circumstances, it is also unnecessary to consider the argument by the defendant's counsel that in the absence of a substantive application by the plaintiff to strike out the defendant's defence it was incompetent for the plaintiff to contend for judgment on the basis that the defendant's defence fell to be struck out by reason of its failure to retain the VTS records.

[71] Fortunately, as mentioned, a record of radio transmissions between the pilot and the tugboats and port control did survive. It affords important assistance in any attempt to reconstruct the events; and also as a valuable crosscheck against the eye witnesses' testimony. The record of radio transmissions reflects the times that the transmissions were made. The time indications are not true however. I have already referred to the adjustments worked out by Mr. Cox so as to render a more accurate chronology. While the

²⁰ At para. [69].

precise moment of impact of the vessel against the knuckle cannot be established to the exact second, it is accepted by all parties that it was closely approximate to 11h20. The adjustments were predicated on the assumption that the collision had occurred at precisely 11h20. Therefore, while the adjusted radio transmission times offer material assistance, they do not suffice completely to compensate for the precisely accurate reflection of the chronology and sequencing of events and movements that the missing VTS records would have provided. The times are, of course, a true reflection of the relative times in abstract *vis à vis* each other of the respective radio transmissions. I shall hereafter refer to the transmission record with reference to the adjusted (or 'synchronised') times calculated by Mr. Cox, and indicated in green font on Exh. E.

[72] The radio transmission records do tend to confirm the accuracy, certainly to the nearest minute, of the material entries in the ship's records that would have been made as the vessel made its approach to the Duncan Dock.

[73] The initial exchanges between the pilot from the bridge of the *Banglar Mookh* and the pilot boat ('the *Petrel*') took place between 10h54,38 and 10h54,42, which confirms that the pilot probably came on board at about 10h54 as reflected in the ship's log.

[74] The first exchange between the pilot and the tugboats about making fast took place at 11h17,32. The master of the forward tug reported that his messenger line was going up at 11h17,36. Having regard to the evidence

that the tugs were expected to make fast after the *Banglar Mookh* had crossed the breakwater line and the evidence that the process of making fast ordinarily took between two and three minutes if efficiently carried out, the time of the exchange between the forward tugboat and the pilot supports the reasonable accuracy of the entry in the ship's bridge notebook reflecting that the vessel passed the breakwater at 11h16.

[75] The recording demonstrates that at 11h19,18 Grelecki was shouting (apparently to the forward tug, which it will be recalled had not made fast before the collision) 'Bow full to port' and that at 11h20,19 he instructed 'Pull the bow to starboard now. (Eh!) (an exclamation)'. This falls to be understood in the context of Grelecki's evidence, supported in this instance by Captain Islam, that the vessel was being put hard to port immediately before the collision and Grelecki's further evidence that immediately after the collision he put the bow of the vessel hard to starboard to avoid the stern also coming into collision with the hard structure of the harbour. The latter manoeuvre being one which everyone seems to have accepted as an appropriate and quick-witted decision by Grelecki in the circumstances immediately after the collision. These recordings therefore support the collision having occurred after 11h19,20 and before 11h20,19.

[76] Having regard to the measured distance in a straight line between the end of the breakwater and the knuckle with which the vessel came into collision (1070m), and bearing in mind that on either version the vessel must have traversed a greater distance than that in its passage between the

breakwater and the knuckle, it is evident that the average speed of the vessel during its transit of the basin was certainly in excess of 7 knots (assuming the transit took 5 minutes rather than four), and quite possibly as high as 9 knots (assuming the transit took precisely four minutes). Having regard to the slowing effect of two extreme rudder movements executed during the transit, the average speed is likely to have been higher than lower within that range.

Conclusions on the facts

[77] For the reasons given earlier in this judgment concerning its inherent improbability and lack of reliability, I reject the evidence of Mr. Grelecki that he was placed in a situation of sudden emergency as a consequence of the helmsman steering the vessel in direct contradiction of the helm orders.

[78] I also reject Mr. Grelecki's evidence as to the position of the vessel in the approach channel as it went by the breakwater. The evidence of Captain Islam that the vessel passed the breakwater close to the seaward boundary of the channel furthest away from the end of the breakwater, rather than in the middle of the channel as testified by Grelecki, is supported by the instructions given by Grelecki to Captain Woodend that he had steered a course up the approach channel so as to place the portside bow fine on the no. 4 buoy; and also by the position in which the vessel found itself, to the west of the leading line and bearing down on the North Wall, when the turn from the channel into the basin was commenced.

[79] Accepting that the vessel entered the basin from the approach channel in that position tends to exclude the sea effect at the end of the breakwater,

which Mr. Grelecki sought to ascribe as the most likely cause of what he alleged was the spontaneous veer to starboard just after the vessel had entered the basin. Instead, the description of events given by Captain Islam to the effect that the veer to starboard during the first part of the vessel's transit of the basin followed a helm order by Grelecki of hard to starboard coupled with an order to increase the engine speed impresses as being in accordance with the probabilities. This is because in the prevailing conditions it is apparent that by proceeding up the approach channel at half ahead for about 17 minutes it is probable that the vessel must have entered the basin at a speed of at least 7 knots. That the vessel must have been covering the ground at a speed exceeding 7 knots when it passed the breakwater is also supported by its achievement of the range of speed referred to earlier at which it can be calculated it crossed the basin between the breakwater and the point of collision. The combination of relatively high speed and the effect of the near gale force wind on the ship's accommodation as the vessel commenced a turn from a position on the seaward aspect of the approach channel to line up with the leading lights would quite feasibly result in a drift to the eastern side of the leading line with the vessel thereby being placed in the position of concern with regard to the North Wall, as described by Captain Islam.

[80] It is common ground that once Mr. Grelecki had commenced a turn to enter the basin, he was committed to proceeding and there could, at that stage, be no aborting the entry into the basin. In those circumstances a turn hard to starboard with increased speed would present as the obvious and necessary means of countering the easterly set which had put the vessel in

danger of collision with the North Wall. The difficulty, however, is that within the relatively narrow confines of the basin – the distance between the North Wall to the east and the North Spur to the west being of the order of only 500 metres – the turn to starboard would place the vessel on a bearing towards the North Spur. At a speed of 7 knots the vessel would cover the distance in approximately two minutes. The distance between the structures was too narrow to allow the vessel to be sufficiently slowed down because of the effect of its forward way. That would explain, as described by Captain Islam, why Grelecki, shortly after the turn hard to starboard had been executed, ordered a further turn hard to port.

[81] Having regard to the dimensions of the basin and the fact that the turn hard to port was ordered more than two minutes before the collision, and therefore at a time when, even accepting an average speed of 7 knots, the bow of the vessel was more than 430 metres steaming distance from the A berth knuckle, I am left in little doubt that Mr. Grelecki's immediate concern, at the time he gave the orders of hard to port, was to avoid a collision with the North Spur.

[82] If I am incorrect in this regard, and the position was instead, as maintained by Grelecki, a concern about a collision with the A Berth knuckle, the misdirection would be of little moment. It is evident from Grelecki's enquiries, commencing at 11h17:32, as to whether the forward tug had made fast that he already at that stage considered that tug assistance to move the bow to port to clear the entrance into Duncan Dock would be necessary.

Grelecki's evidence was that in ordinary circumstances he would not concern himself with whether the tugs had made fast during the transit of the basin and would wait for the tug masters to inform him of the fact rather than initiate an enquiry. This conduct is an impelling indication that Grelecki appreciated at least three minutes before the collision that the entry into Duncan Dock was not going to be uncomplicated. Indeed, listening to the voice recording (Exh. D), a tone of increasing anxiety is evident in Mr Grelecki's speech from the transmission at 11h18:12 (a stage when he had been informed he forward tug was not yet fast) until after the collision had occurred.

[83] I therefore hold, consistently with the opinion articulated by Captain McAllister, that the collision occurred as a consequence of a loss of control of the vessel by the pilot during its transit of the passage to the entrance to Duncan Dock. The loss of control was essentially a result of Mr. Grelecki having made the approach at an excessive speed in the circumstances. There is no doubt that Grelecki's conduct in this regard fell short of that expected of a pilot and that he was therefore causally negligent in respect of the damages sustained by the plaintiff as a consequence of the collision.

[84] The glancing nature of the collision suggests that with tug assistance the casualty would probably have been averted. It is common ground that in the ordinary course a tug should be able to make fast within two to three minutes. In the current case it is evident that it took much longer than usual for the tugs to make fast. I consider that it is probable that a number of factors contributed to this. The speed and course taken by the vessel over the basin

is likely to have hindered rather than assisted the process. This is exemplified by the fact that the forward tug had to take avoiding measures to escape being caught between the vessel and the harbour structures shortly before the collision occurred. I am also of the view that the making fast of tugs was impeded by inefficiency on the part of the crew of the vessel stationed fore and aft. There were adverse comments on this by the crew of the tug boats within the course of the radio exchanges on the voice recordings. Their tenor is consistent with the evidence of Captain Le Blond and Mr. Stein about their observations. However, in view of the result of the case, it is unnecessary to determine whether it has been proven that this inefficiency constituted contributory negligence as alleged in paragraph 10.2 of the defendant's amended plea.

Gross negligence

[85] It will be recalled from the discussion in the introductory section of this judgment that, in order for it to avoid the exemption from liability in terms of item 10(7) of the Schedule, read as construed in preceding cases, the plaintiff was required to prove that the pilot had been grossly negligent in a relevant sense.

[86] In *MV Stella Tingas: Transnet Ltd v Owners of the MV. Stella Tingas and Another*, supra, at para. [7], Scott JA noted that 'Gross negligence is not an exact concept capable of precise definition.' After describing the treatment of the concept in a number of judgments and also by textbook writers on Roman Law, the learned judge of appeal concluded:

'It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.'

Implicit in that statement in the current context, just as it was in the context of the *Stella Tingas*, is a caveat that in matters like this the court has to be astute not to render the applicable statutory exemption from liability nugatory.

[87] In assessing the extent of Mr. Grelecki's departure from the conduct reasonably to have been expected from a pilot properly fulfilling his duty I do not consider that the case is one in which it can fairly be said that Grelecki involved himself in what could be described as conscious risk taking. The evidence did not establish that Grelecki brought the vessel into the port conscious of a danger that his manner of piloting risked bringing the vessel into collision with the harbour structures, but unreasonably judging that the risk entailed in his method was justified by the means. Thus, in my view, the relevant enquiry is whether it has been established that there was a total failure to take care by Grelecki, such as to justify the categorisation of his negligence as extreme. In undertaking the exercise, it is, of course, necessary to do so on an established basis of fact. I should make it clear that, where there is a conflict in the factual evidence, my assessment is based on an acceptance of the account of Captain Islam, save only that I have been unable to determine, one way or the other, whether the pilot was handed a pilot card.

[88] Mr. Grelecki brought the vessel up the approach channel and dealt with the easterly set by using rudder movements to keep within the channel. Nothing about the speed of his approach, or his piloting method alarmed the master of the vessel at that stage. Taking into account the various factors to which reference has been made in the context of the summary of the evidence set out earlier, Captain McAllister concluded that the speed in the approach was excessive by reason of the fact that the collision occurred. He did not, however, venture what an appropriate or acceptable speed would have been, save to say that the approach should have been slower so as to allow the pilot latitude to deal safely with the unexpected and to give the tugs adequate opportunity to make fast before the entrance to the Duncan Dock was reached. The evidence of Captain Woodend, an experienced pilot, was to the effect that it was feasible to bring a vessel like the *Banglar Mookh* in at a speed of up to 7,5 knots. I gained the impression though that this opinion fell to be qualified by the effect of prevailing conditions and the angle of approach from the breakwater. It seems to me that in approaching the basin at or about the upper limit of what Captain Woodend would regard as an acceptable range of speed Grelecki failed to position the vessel within the channel so as to be able to line it up with the leading lights with a less acute turn to starboard than was required if the vessel were set to the seaward aspect of the space between the end of the breakwater and buoy no. 4. I have already described the effect of this error above. It is also pertinent to note that in venturing the opinion he did, Captain Woodend must be taken to

have implied that a pilot would be conscious of the speed at which the vessel under control was entering the basin.

[89] I consider that in the reasonable and professional discharge of his duty Grelecki should have had regard to the instrumentation to check his speed of approach. I have already held that Grelecki does not appear to have had a reliable estimation of the speed of approach. Captain Woodend opined that a pilot will have a 'feel' for the right speed and will not always have a need to consult the instruments. I have no reason to doubt that in the case of a highly experienced pilot like Woodend that might well hold true. It seems evident that Grelecki proceeded on the application of that school of thought, but without the depth of experience to sustain it. It was unreasonable of him not to have consulted the instrumentation to check the speed; more particularly, if, as he testified, he had not been handed a pilot card and his questions to the master on the performance of the vessel had been met with dubious responses. Had he done so there is every reason to believe he would have reduced the speed of advance. It is evident from Captain Woodend's witness summary that Grelecki must have indicated in the course of describing events to Woodend that the speed of the vessel up the channel was of the order of 6 knots. That, in my view, is an indication of what Grelecki no doubt would have considered an appropriate speed in the circumstances. Although one cannot precisely determine the speed, for the reasons discussed the probabilities are that he actually took the vessel up the channel appreciably faster than 6 knots. This happened because he took insufficient care, and by disregard of the tools available to him, exhibited foolhardy overconfidence.

Had he checked the speed at any time before committing the vessel towards a turn into the basin he could and should either have achieved a timeous reduction in speed, or if that were not possible, aborted attempting entry into the basin. In failing to do these things he was guilty of negligence in a substantial degree, but it does not automatically follow, accepting the facts to have been as described by Captain Islam, that the degree of negligence falls to be categorised as extreme.

[90] Had Mr. Grelecki's loss of control of the vessel been complete, or unmitigated, that would have been a compelling indication that he must have shown a total failure to take care. In the conclusion to his expert witness summary, Captain McAllister does characterise the pilot's loss of control as 'complete'. He regarded the loss of control as complete because the pilot had created a situation in which he was unable to correct the problem caused by his approach into the basin at excessive speed by the use of 'the rudder, engine or even anchors'. I understand the basis for Captain McAllister's characterisation. It is confessedly based fundamentally on the outcome of the approach to the port under the pilot's direction; that is that the pilot was unable to avert a collision. Captain McAllister's reasoning in this respect went along *res ipsa loquitur* lines: there was a collision, *ergo*, unless evidence is accepted of an external causative factor which the pilot could not reasonably have anticipated or overcome, the pilot must have failed in his duty to keep the vessel under control.²¹ (Of course, if that line of reasoning - which draws no

²¹ See para. 64 of Captain McAllister's summary; and, in particular, the first sentence: 'As the collision with the A Berth knuckle indicates, it is obvious that the pilot had totally lost control of the approach, a situation which he should never have allowed to happen.'

reasoned distinction between negligence and gross negligence - were applied in determining the case, the exemption provided in item 10(7) in the Schedule would be a dead letter.) The court's enquiry is a different one. Having found that the collision occurred as a result of the negligence of the pilot, with a resultant loss of control of the vessel, the court's task is to go further and ask itself did the conduct of the pilot in the circumstances evidence a total failure to take care, so as to justify categorising his causal negligence in the collision as extreme. To that end an assessment of the pilot's state of mind is relevant; cf. *S v Dlamini* 1988 (2) SA 302 (A) at 308D-E. The determination entails making a value judgment; see *Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) at 771 *fin*. I consider that in undertaking the exercise one has to look in the broad at Grelecki's conduct in regard to bringing the vessel into port. That seems to me the appropriate manner in which to provide the foundation for the required assessment of his state of mind so as to decide whether a finding of a total failure to take care is justified, or not.

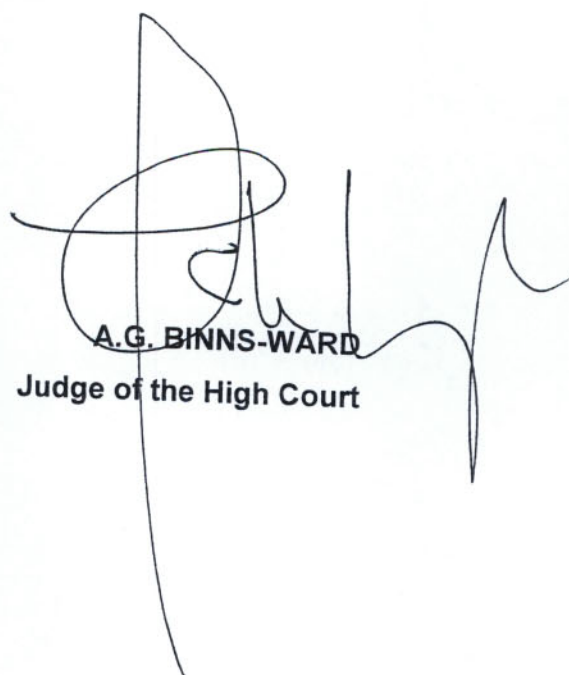
[91] The master's evidence confirms that Mr Grelecki concerned himself, as he should have done, with the workings on the bridge when he came on board. He walked around the bridge checking that instrumentation was operational. He interacted with the helmsman in bringing the vessel up the channel and kept the vessel at all times within the channel. As soon as the effect of the approach at an excessive speed became apparent, he took immediate remedial measures which, in fact, almost succeeded in averting the collision. To find in these circumstances that he was piloting the vessel with a total failure to take care would be do him an injustice. I consider that Grelecki

reacted expeditiously and generally appropriately to the crisis situation that had resulted from his negligently misjudged decision to take the vessel into the basin. It is unlikely that he would have been able to do so had he been showing a total failure of care to the task in hand. It was somewhat tentatively suggested by Captain McAllister that Grelecki could have dealt with the situation so as to avert the collision by dropping the anchors, or reversing the engine, but, for the reasons given by both Grelecki and Captain Woodend, I am not persuaded that these measures were feasible. On the contrary, I consider that in the circumstances they may have instead compounded the problem rather than alleviating it. I also consider that Captain McAllister's description of the increase in speed in and after the emergency turn hard to starboard as 'reckless'²² was inappropriate. The increase in speed should not be judged in isolation, but rather with regard to the context in which it was applied. Indeed, my impression is that had the increased speed not been applied at that stage a resultant lesser degree of turn and steerage would have reduced the prospect of the pilot succeeding in bringing the vessel into Duncan Dock with just a glancing blow to the hard structure at the entrance; in other words, the consequences, had increased speed not been applied at that stage, might have been worse. As I have already remarked, it is not disputed that once the glancing collision of the bow against the knuckle had occurred, Grelecki acted promptly and appropriately to avoid the stern also colliding with harbour structure.

²² See para. 56 of Captain McAllister's summary.

[92] I have found that the failure of the tugs to make fast in time to help avert the collision was probably in part related to the excessive speed of the *Banglar Mookh*, but also, in part, probably the consequence of unexplained delay and lack of efficiency of the deck crew on the vessel. Had the tugs made fast, and certainly it was within their capacity to have done so, it seems likely that the collision would have been narrowly averted by Grelecki's reactive measures, rather than narrowly achieved.

[93] Having regard to all the aforementioned factors, I am not persuaded that it has been established that Mr Grelecki's conduct evinced 'an entire failure to give consideration to the consequences of his actions, a total disregard of duty'; cf. *Rosenthal v Marks* 1944 TPD 172 at 180. In my judgment therefore the plaintiff has not succeeded in proving that the degree of negligence on the part of Mr. Grelecki was 'extreme' in the sense that it might properly be characterised as gross negligence. Consequent upon the exemption from liability afforded in terms of item 10(7) of the Schedule, the action is therefore dismissed with costs, including the qualifying fees of Captain John Woodend and Mr Paul Coxon.²³



A.G. BINNS-WARD
Judge of the High Court

²³ See fn. 3.