

**IN THE SUPREME COURT OF BELIZE, A.D., 2018**

**CLAIM NO: 573 of 2016**

**BETWEEN**

**GERORGE ORELLANA**

**CLAIMANT**

**AND**

**HOME PROTECTOR INSURANCE CO. LTD**

**DEFENDANT**

**Keywords:** Marine Insurance; Comprehensive Hull and Marine Liability Insurance Policy; Hurricane Damage to Vessel: Disputed Claim for Total Loss; Fabricated Claim of Physical Loss to the Vessel;

**Before the Honourable:** Mr. Justice Courtney A. Abel

**Hearing Dates:** 08<sup>th</sup> May, 2018  
01<sup>st</sup> June, 2018  
08<sup>th</sup> June, 2018.

**Appearances:**

Mrs. Agnes Segura-Gillett for the Claimant.

Ms. Audrey Matura and Ms. Erin Quiroz for the Defendant.

**WRITTEN JUDGMENT**  
**Orally Delivered on the 8<sup>th</sup> day of June 2018**

**Introduction**

- [1] This is a disputed claim relating to a marine policy of insurance between the Claimant (“Orellana”) and the Defendant (“HPI”) in relation to a vessel, The GEORGE I, which allegedly was wrecked as a result of the passage of Hurricane Earl, a Category 1 hurricane, in Belize City on the night of Wednesday, 3<sup>rd</sup> August 2016.
- [2] Orellana, the policy holder with HPI, is arguing that the latter breached the policy of insurance by refusing to compensate him in the sum of BZ\$780,759.00, for the damage and loss caused to his vessel, pursuant to the policy of insurance.
- [3] HPI is alleging that the claim is a totally fabricated claim and that as a result Orellana is not entitled to any sum.

**Background**

- [4] Orellana is in the business of providing marine cargo transportation and mooring services. He owns a number of watercrafts, including the GEORGE 1.
- [5] The GEORGE I is a tug vessel licensed by the Belize Port Authority, bearing License No. BZ-0715 and which had a Sea-Worthiness Certificate issued by the Belize Port Authority on 8<sup>th</sup> January 2016 for a year.
- [6] Since April 2011, Orellana also held a Comprehensive Hull and Marine Liability Insurance Policy (Policy No. HM – 120) (“the Policy”) from HPI in respect of the GEORGE I. The Policy was renewed annually by Orellana.
- [7] Every year, prior to renewing the Policy, an agent of HPI, Mr. Aldo Reyes, would inspect the GEORGE I and advise Orellana of the depreciated value for the vessel. The last time that Orellana renewed Policy No. HM-120 was on 9<sup>th</sup> October, 2015.
- [8] The GEORGE I was insured for the sum of 780,759.00, for the period of October 9<sup>th</sup> 2015 to 8<sup>th</sup> October, 2016.

- [9] Orellana had various insurance policies with the Defendant Company in respect of his vessels, home, pier and motor vehicles and other than a small claim for a damaged propeller in respect of the GEORGE I, Orellana made no other claims from HPI. The vessels were usually docked at his pier.
- [10] Pursuant to the express terms and conditions of Section I of his Insurance Policy No. HM-120, the Defendant agreed to pay for the physical loss to the property; that is, GEORGE I together with engines. Furthermore, Endorsement 4 – Comprehensive Hurricane, which is attached to the said policy, specifically states that the policy is extended to cover loss or damage to the vessel insured as a result of typhoon, hurricane, volcanic eruption or earthquake.
- [11] Pursuant to Policy No. HM-120, HPI also agreed to cover the reasonable cost incurred in the removal of the wrecked watercraft.
- [12] On the night of Wednesday, 3<sup>rd</sup> August, 2016, Hurricane Earl, a Category 1 hurricane, was expected to make landfall in Belize City.
- [13] Robinson Point is one of many safe harbors in Belize and the one used by Orellana’s tugboats and other large vessels. The Robinson Point lagoon is approved by the Belize Port Authority.
- [14] What happened to George 1 between 9.00 a.m. 3<sup>rd</sup> August, 2016 and the following day is disputed by the HPI. HPI is alleging that Orellana’s case, as supported by the testimony of his witnesses “never occurred and is a total fabrication”.
- [15] This Court has to decide who to believe Orellana or HPI.
- [16] In any event undoubtedly the storm passed Belize between 11:30 pm 3<sup>rd</sup> August and 1:00 am 4<sup>th</sup> August
- [17] During the Storm Orellana’s pier was destroyed.
- [18] The week following the incident, Orellana visited the Defendant’s office and notified them of his losses (verbally and in writing) in respect of the GEORGE I, his pier and residence, all of which were insured by HPI.

- [19] Thereafter, HPI's agent visited Orellana's premises and took incident reports from crew members of the GEORGE I and GEORGE II as part of their investigation.
- [20] On 10<sup>th</sup> August 2016 Martin Garcia contacted Orellana and took his report of the incident leading to the damage to the GEORGE I. He was informed that a damage assessment would not be conducted on the vessel by the Belize Port Authority since it was not damaged as a result of the operation of the vessel, but by a natural cause.
- [21] On 26<sup>th</sup> August 2016, Captain Celwin Castro and a team from the Instituto Tecnico Maritimo Banaport C.A. ("Banaport") visited Belize and attempted to repair the GEORGE I. Captain Celwin and other personnel from Banaport, along with Orellana and the crew of the GEORGE I, pumped the water out of the GEORGE I with the use of a two inch pump and a four inch pump.
- [22] After some time, the Banaport crew discovered that three of the seals from three of the suction pipes at the base of the GEORGE I were damaged and they managed to put a temporary seal in place to stop the water from going into the vessel. They also washed the entire engine room and generators with chemicals to prevent corrosion. However, the engine and generators had ceased functioning.
- [23] The Banaport crew was able to confirm that the engine, two generators, pumps and all electrical wiring of the GEORGE I were damaged beyond repair and would have to be replaced.
- [24] As stated above, the seal that is currently in place is only temporary.
- [25] Following the incident, Orellana contacted a number of marine surveyors and engineers in an attempt to get an estimate on the possible cost of repairing the GEORGE I. Based on the estimates received by him, he compiled a full estimate of the cost of salvaging, dry docking and repairing the GEORGE I and presented this to HPI on or about September 2<sup>nd</sup>, 2016. This was to see if they would cover the cost of repair since they did not seem inclined to pay for the replacement value.

- [26] After filing a claim for compensation with HPI, Orellana followed up with its employees by way of emails to check on the progress of his claim.
- [27] Initially, HPI's employees were cooperative, but later they started giving Orellana what he considered was the "run-around".
- [28] By letter dated 22<sup>nd</sup> August, 2016, HPI informed Orellana that it would not be paying compensation under Policy No. HM-120 because, in its view, there were discrepancies in the statements given to it by employees of Orellana.
- [29] HPI gave its reasons for refusing to pay compensation. In support of its assertions, they provided Orellana with two reports from two of the Company's paid consultants; that is, Trident Marine Limited and Macpherson & Associates.
- [30] One of HPI's arguments for not paying Orellana, as set out in HPI's Defence, is as follows:

*"it is impossible for the GEORGE I to have ended up where it is now, because the GEORGE I requires a depth of 13 ft of water to sail and no such depth exist in the water anywhere near where it is currently grounded."*

### **The Court Proceedings**

- [31] Orellana filed a Claim Form and Statement of Claim on 17<sup>th</sup> October, 2016.
- [32] A Defence was filed by HPI on the 9<sup>th</sup> November, 2016.
- [33] Orellana filed a Reply on the 28<sup>th</sup> November, 2016.
- [34] A case management conference ("CMC") was held on the 8<sup>th</sup> January, 2016 at which case management directions were given, including for disclosure, witness statements and expert evidence.
- [35] The case was further and extensively managed at CMC conferences and at a pre-trial conference before the case came on for hearing.
- [36] Written submissions were ordered to be filed.
- [37] Pre-trial Memoranda were filed by the Parties.

- [38] Orellana testified at the trial in support of his case as well as Roque Escalante (his neighbor), James Palacio (a boat captain for BSI/ASR (Belize Sugar Industry), Mr. Elder Velasquez Chang (the Captain for George 11), and the expert witness Major H Gilbert Swaso (retired) who carried out a valuation of George 1.
- [39] HPI called two expert witnesses Major Lloyd Jones and Mr. Stephen Bradley.

### **Issues**

- [40] Whether the George 1 was damaged as a consequence of Hurricane Earl as alleged by Orellana, or as a result of the acts or omissions of the latter?
- [41] If the George I was so damaged to what sum is Orellana entitled?

### **Whether the George 1 was Damaged as a Consequence of Hurricane Earl or as a result of the Acts or Omissions of Orellana?**

- [42] This issue is almost entirely a question of fact which this court has to find based on the evidence and by drawing inferences from the facts.

### **Orellana's Case**

- [43] Orellana's case is as follows.
- [44] At about 9:00 a.m. on the 3<sup>rd</sup> August 2016, as was the custom when a storm is expected, GEORGE I and the GEORGE II departed from Orellana's private dock at Mile 4, George Price Highway, en route to the Robinson Point lagoon.
- [45] Each tug (GEORGE I and GEORGE II) was manned by a crew of three, comprising a Captain (Sandoval for GEORGE I and Velasquez for GEORGE II) and two deckhands.
- [46] Prior to their departure, Orellana instructed both Captains to secure the tugs to the mangroves on the periphery of the lagoon and to stay aboard the vessels and wait for the hurricane to pass. This was, apparently, their standing procedure when a storm was approaching. Although it was not a

requirement to keep a crew onboard the vessels while they are moored, Orellana decided to do this as an added precaution.

- [47] It took about 1 – 2 hours for George 1 and George 11 to get to Robinson Point.
- [48] Just before midday on 3<sup>rd</sup> August 2016 George 1 and George 11 arrived at Robinson Point; and by 1330 hours they were moored as testified by the witness James Palacio.
- [49] George 1 was secured to the mangroves.
- [50] Orellana remained in communication via cell phone with the captains of both George 1 and George 11.
- [51] Early in the night strong winds were felt by the crew of George 1 and 11, but it was about 12:30 a.m. on the 4<sup>th</sup> August that the full forces of the winds were felt. The winds shifted directions frequently and the tugs shifted from side to side.
- [52] On Thursday, 4<sup>th</sup> August 2016, at about 1:00 a.m., the Captain of the GEORGE I, Edwin Sandoval, informed Orellana that a shift in the direction of the storm had caused GEORGE I's bow lines to break and it was shifting from side to side in the mangroves. It was apparently in danger.
- [53] By about 1.30 a.m. two lines of George 1 had burst and following a conversation between the captains, the lines between the two vessels had to be loosed to prevent George 11 from capsizing.
- [54] George 1 was then getting in water from under its hull which by 4:00 a.m. water was going in faster and needed assistance.
- [55] Orellana became very concerned that the GEORGE I would sink and he was also concerned about its crew. He therefore instructed Captain Sandoval to utilize the portable bilge pump that was on the GEORGE II to try to keep the GEORGE I afloat.
- [56] At about 4:00 a.m. on 4<sup>th</sup> August, 2016 Orellana called Captain Sandoval to get a status update on the vessel and crew. By this time the winds had subsided somewhat. Orellana, obviously somewhat relieved, advised

Captain Sandoval to attempt to bring the tug back to the mainland as soon as the storm had passed and it was safe to do so.

- [57] At about 6:00 a.m. Captain Sandoval advised Orellana that he would attempt to get the GEORGE I and its crew back to his dock in Belize City. By that time, the winds had subsided and it appeared that the hurricane had passed. The GEORGE II would also be accompanying the GEORGE I back to Belize City.
- [58] At about 8:30 a.m., Orellana saw the GEORGE I and GEORGE II approaching his residence, in the distance. He was at the time standing by the seawall surveying the damage that had been done to his pier. The GEORGE I was in front, followed by GEORGE II. Orellana got on the phone with Captain Velasquez and advised him to proceed to the Old Belize Marina to dock the GEORGE II since the storm had demolished his pier.
- [59] Thereafter, Orellana called Captain Sandoval and instructed him to try to beach the GEORGE I in the vicinity where their pier was previously situated. It was his intention to continue pumping out the water, try to identify the damage, and attempt to repair to avoid further damage.
- [60] As the vessel came nearer to Orellana's property, he observed it took a slight turn to the right causing it to become lodged in the sand/mud. George 1 was beached in front of Orellana's residence and he went to the vessel immediately afterwards. Orellana took photos of the vessel lodged in the sea floor.
- [61] At this point the generator shut down, causing the electrical pump to turn off. Only the portable pump continued pumping but this was not enough to keep the water out of the vessel.
- [62] Orellana immediately started calling around in an attempt to borrow or rent another portable pump to help drain the GEORGE I. However, most persons were not even answering their phones, this being the morning after the hurricane had passed, and the ones that did, could not assist, despite his best efforts, he could not locate another portable pump.



- [63] Before long, the water inside the tug reached the level of the tide; it almost completely covered the engine and left the generator and electrical equipment submerged in salt water.
- [64] That same morning, Orellana contacted the Belize Port Authority, reported the incident and advised them of the situation with GEORGE I.
- [65] Orellana was referred to State Control Officer, Martin Garcia, who advised him that he would be contacted at a later date to give a written report. As there was no loss of life, and the Authority had more pressing matters to deal with at the time, the situation was not considered urgent by them.
- [66] Following the incident, Orellana also contacted his insurance agent, Mr. Aldo Reyes, and reported what had happened with the GEORGE I. Orellana was advised by Mr. Reyes that HPI's offices would not be functioning until the following Monday, at which time Orellana, was advised, he could go in and file a claim.
- [67] Thereafter, Orellana contacted his vessel maintenance company, Instituto Tecnico Maritimo Banaport C.A., ("Banaport") which is based in Guatemala, and requested that a technician be sent to Belize to assess and repair the damage on the GEORGE I. However, since they were booked up, Orellana was advised that a technician would not be able to go to Belize until the last week in August and an arrangement was made for this period.

#### HPI's Case

- [68] The case for HPI is entirely circumstantial and not based on any eye-witness account.
- [69] HPI relies on the following facts and matters:
- a. There is no report to the Port's Commissioner, as required by law, of the accident leading to the boat's casualty at sea.
  - b. There are no logbooks documenting the purported described journey.

- c. During the purported described ordeal there is no record of any distress call made to the Port Authority or to any other relevant Marine Authority.
- d. Given the described/purported journey taken by 'George 1' in the Statement of Claim, it is impossible for it, *George 1* to have ended up where it is now, because 'George 1 requires a depth of 13' Ft of water to sail and no such depth exists in the water anywhere near where it is currently grounded.

[70] HPI sought to bolster its defence of a fabricated case by Orellana, on the basis of the expert evidence of Major Lloyd Jones and Mr. Stephen Bradley.

#### Determination

[71] Having seen and heard the witnesses in the case, with all of them having been subjected to most intensive cross-examination, I have no hesitation in accepting the eye witness testimony of Orellana's witnesses as opposed to the circumstantial case of HPI.

[72] I find the evidence of Orellana's witnesses both compelling and believable and the witnesses are all credible witnesses.

[73] By contrast in their attempts to question or falsify the eye witness testimony of Orellana's witnesses, and in seeking to question the veracity of such witnesses, I found the expert evidence of Major Lloyd Jones and Mr. Stephen Bradley, somewhat partisan, highly speculative and not well reasoned.

[74] Incidentally, this Court did not find the evidence of the Stephen Bradley of any assistance. Indeed this Court considers that such evidence was poor, speculative, and totally unpersuasive and as a result has found little assistance in it in relation to the present issue.

[75] Frankly, even if HPI might have initially, for whatever reason, have had good reason for doubting the veracity of Orellana's claim, I am somewhat surprised, that following the cross-examination of his witnesses, that HPI persisted in maintaining that Orellana's version of its case (that George 1

and George 11 went to Robinson Point before the hurricane and remained there and returned to the vicinity of Orellana's pier and was beached), never occurred and is a total fabrication.

- [76] This Court, faced with credible eye witness accounts of witnesses with no apparent axe to grind, and some of whom were independent of Orellana and who corroborated Orellana's case in significant material particulars. This Court feels driven to the conclusion that Orellana's case is not only very convincing but leaves this Court with little option, whether on a balance of probabilities or otherwise, but to believe the case as presented by Orellana. Indeed this court looks with a great deal of unease, skepticism, if not incredulity, upon the circumstantial case of HPI as presented by them.
- [77] Further, this Court is not surprised that given the exigencies created by the passage of the hurricane and the emergency situation created by it, to accept as reasonable and understandable that the captain and crew of George 1 and George 11 and the reporting, as required by law, of the accident leading to the boat's casualty at sea, to the Port's Commissioner may not have taken place. That the existence of detailed and careful logbooks documenting the journey to safety which the vessels took is in the circumstances of the case entirely understandable as is also the case that there may have been no record of any distress call made to the Port Authority or to any other relevant Marine Authority. This Court considers that such omissions could, in the circumstances described by Orellana's witnesses, be forgiven and understood.
- [78] This Court considers that there is no merit in HPI's case that Orellana's case is fabricated.
- [79] Because of the findings which this Court has just made, it has somewhat coloured this Court view of HPI's case as to the cause of the damage to the George 1. However, despite the conclusion already reached, this Court has tried to disregard any prejudice which might seep into its consideration of the case in relation to the damage to George 1.

[80] In the absence of any clear explanation or finding as to the cause of the damage to George 1, this Court has concluded that such damage more likely than not had originally occurred at or about Robinson Point, when George 1 started to take in water, and may have worsened along the way back to Orellana's pier, and likely was worsened when it was beached.

**If George 1 was so damaged to what sum is Orellana entitled?**

Determination

[81] So the question now arises as to what sum is Orellana entitled?

[82] This Court finds that any allegation concerning failure to mitigate the damages by Orellana was not made out. This finding follows from much of what this Court has already found in relation to the previous issue.

[83] Indeed it is difficult to see how this Court could find otherwise based upon what was urged upon it by the Defendant, HPI, that Orellana failed to mitigate the damages or did anything which falls short of what was appropriate and reasonable mitigation in the circumstances.

[84] As this Court has already found, given the urgencies of the situation, it may be that there might have been an error of judgment in terms of the decisions taken that led to the beaching of GEORGE I. But in the agony of the moment when a decision had to be made fast, about what should be done with GEORGE I, to beach or not to beach, Orellana could be forgiven for making the wrong decision.

[85] That is not to say that this Court found that the decision to beach was the wrong decision. This Court simply doesn't know whether the correct decision was taken to beach GEORGE 1 as the evidence is unclear whether, in fact, the beaching exacerbated the damages which had already been caused.

[86] It seems to this Court, possible and likely that that did happen. But, this Court does not consider that Orellana should in any way be faulted for

making the decision to beach GEORGE 1; or that any deduction should be made from his claim against HPI in arriving at any such decision.

**Costs**

[87] Because Orellana has wholly succeeded, this Court has concluded that he is entitled to his costs to be agreed or on the basis prescribed by the rules. This Court has been told, that based on the value of the claim, and accepts, that prescribed costs amounts to BZ\$82,500.00.

**Disposition**

[88] This Court will therefore grant judgment to the Claimant, Orellana, for the sum of BZ\$705,559.00 which is the insured value at BZ\$788,759.00 minus the salvage value and the deductible. The salvage value is BZ\$30,759.00 and the deductible being BZ\$25,200.00.

[89] Because the Claimant has fully succeeded, he is entitled to his costs in the sum of BZ\$65,000.00

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**The Hon. Mr. Justice Courtney A. Abel**

**13th November 2018**