IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO. 673 OF 2019

BETWEEN

KAHTAL RESORTS INTERNATIONAL LIMITED CLAIMANT

AND

INSURANCE CORPORATION OF BELIZE LIMITED DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Decision
26th November, 2020

Appearances:
Mr. Rene Montero, Counsel for the Claimant.
Mr. Eamon Courtenay SC with Mrs. Julie-Ann Ellis Bradley, Counsel for the Defendant.

Keywords: Insurance Law - Policy - Exclusion Clause - Effect - Interpretation of the Word Moored - Boat Sinks While Tied to Dock - Thunder Storm - Cover Excluded.

JUDGMENT

1. During the night of April 19th, 2019, there was a thunderstorm. The docked vessel *"Cast Away Flyer"* sank at Tom's Boatyard in San Pedro. At the time of

this disaster, the boat was owned by Kathal Resorts International Limited (Kathal) and was covered by a valid insurance policy held with the Insurance Corporation of Belize Limited (the Insurers). This policy was for a total insured sum of $10,000.00 being $60,000.00 for the engine and $40,000.00 for the hull.

2. The parties agree that there had been no collision with another vessel and that all damage or loss alleged had been caused by entry of water into the vessel and by virtue of its submersion.

3. When Kathal tried to recover $100,000.00 under the policy, the Insurers denied the claim saying the particular loss suffered was not covered. They determined that being overcome by rough seas was not a peril for which the boat had been insured. They also relied on an exclusion clause in the policy which they say disallows any claim for *"Loss or damage while vessel is moored unless such loss damage results from collision with another vessel."* Kathal has now approached the Court seeking damages for breach of contract. The Insurers, on the other hand, ask that the claim be dismissed in its entirety with costs.

4. The Court, with the agreement of the parties, has bifurcated the trial. This judgment will deal exclusively with the interpretation of certain sections of the policy and other related documents only if they are found to be relevant.

5. The parties have agreed the issues as follows:

a. What is the effect of Section I, item 1 of "In Commission and Laid up: The vessel is covered subject to the provisions of this insurance: While in commission at sea or inland waters or in port, docks, marinas, on ways, pontoons, or at a place of storage ashore."

b. What is the effect of Section I, Exclusions 15 on the scope of cover provided under Section I of the policy?

c. Whether the vessel was moored or docked at the material time?

d. Whether the Hurricane Questionnaire forms part of the policy?

e. In any event, would Exclusion 15 operate to preclude cover in the circumstance?

6. The parties also agreed the following documents for consideration:

a. Vessel Proposal Form dated January 23rd, 2017

b. Hurricane Questionnaire dated January 23rd, 2017

c. Marine Vessel Insurance Policy: MHL/0011726 dated January 23rd, 2017

d. Certificate of Insurance attaching to Marine Vessel Insurance Policy No. MHL/011726 dated January 23rd, 2017

e. Renewal Certificate attaching to Marine Vessel Insurance Policy No. MHL/011726 dated January 11th, 20118

f. Renewal Certificate attaching to Marine Vessel Insurance Policy No. MHL/011726 dated January 23rd, 2019

There were also two (2) pictures of the boat on the morning it was discovered submerged.

7. **The Policy:**

Under the heading *"Perils Insured"*, the policy provides that the vessel is insured for any *"Direct Physical Loss or Damage to the property from any external cause, subject to the exclusions and conditions of this policy."* It also covered the vessel *"subject to the provision of this insurance*

1) While in commission at sea or inland waters or in ports, docks marinas, on ways, pontoons or at a place of storage ashore."

Such an exclusion was that *"No Claim shall be allowed in respect of*

> *15. Loss and or damage while vessel is moored unless such loss damage results from a collision with another vessel."*

What is the effect of Section I, item 1 of "In Commission and Laid up: The vessel is covered subject to the provisions of this insurance: While in commission at sea or inland waters or in port, docks, marinas, on ways, pontoons, or at a place of storage ashore."

8. **The Claimant:**

The Claimant sought to make an issue with whether or not the Cast Away Flyer was in commission i.e. in working condition and ready for use, on that fateful night. The Court may eventually have to consider all of this if it finds that the exclusion clause is inapplicable. But at this junction this is simply not an issue with which it ought to occupy its time. Moreover, it will be an issue of fact where evidence must be scrutinized in the usual way before any such determination could be attempted. There is really no issue here and the Defendant submitted as much. The Court refrains from making any determination at this time.

What is the effect of Section I, Exclusions 15 on the scope of cover provided under Section I of the policy?

9. **The Claimant:**

The Claimant begun by asking the Court to look at the policy as a whole and not certain clauses in isolation. He quoted from Stair Memorial Encyclopedia**,** INSURANCE, Volume 12 at paragraph 843 in support:

> *"When considering the effect of a policy term, that term should not be looked at in isolation from the rest of the contract, rather the policy should be looked at as a*

whole in order to ascertain the effect of the term in question. It is submitted that this approach, which is adopted in relation to exception terms found in contracts."

10. Counsel then guided the Court through the Definition section of the Policy and the meaning of external cause being *"a force independent of an item which damages the item…"* He also highlighted the term Perils of the Sea which was defined therein as *"Fortuitous Accidents - or casualties of the sea - ordinary action of wind and wave1s is not a peril of the sea Collision, stranding, heavy weather are perils of the sea"*. He then discussed at some length the proximate cause of the loss and what constitutes a peril of the sea all in an effort to prove that the Claimant's loss was as a result of a covered peril. For reasons which will become clear soon, I find no need in repeating any part of his well-researched submissions here.

11. **The Defendant:**

Senior Counsel for the Defendant was swift in explaining that the issue was not simply the proximate cause. The operative words with which the Court ought to concern itself are *"subject to the provisions of this insurance"* and *"subject to the exclusions and conditions of this policy."* This would mean that the cover provided is qualified by details within the policy itself. He too agreed that to understand the full scope and effect, the policy must be read as a whole and not through the interpretation of any stand-alone provision.

12. He ventured further by stating that *"any assertion that the exclusions relied on by the insurer is inconsistent with the cover provided under the terms identified above denies or ignores the purport and effect of the qualifying terms 'subject to the provisions of this insurance' and 'subject to the exclusion and condition as of this policy'."*

13. The Court's attention was then directed to the effect an exclusion clause as described in **Marine Insurance Law and Practice 2004** at page 343, where reference was made to **CT Handelsbanken Norwegian Branch of Svenska Handelshanken AB (Publ) v Dandridge (the Aliza Glacial) [2002] 2 Lloyd's Rep 42**;

> *"The effect of an exclusion, as with any contract term, is a matter of construction. However, where there is inconsistency between the cover provided by the policy and the exclusion, the exclusion generally prevails."*

Consideration:

14. The Court also agrees with both the Claimant's and the Defendant's submission that the entire contract has to be considered as a whole. But the Court is also aware that an exclusion removes cover for something which may otherwise be covered. The issue really is whether the claim is excluded by section 15 of the exclusion clause outlined in the policy. So while the Court may, on thorough consideration of the evidence, have no difficulty in making certain findings about whether or not being overcome by rough seas and/or abnormally high waves and rain produced by a thunderstorm was a peril covered, the issue continues to be the effect of the exclusion clause and particularly the meaning of the term moored. A consideration of Issue 3 has direct impact here so we will consider issue three at this time.

Whether the vessel was moored or docked at the material time?

15. Counsel for the Claimant offered the description given by Lord Esther M.R. in **Attorney General v Wright [1897] 2QB 318** at **320**:

> *"It is such a mode of anchoring a vessel by means of fastening in the ground, either an anchor or something heavy, and a chain and buoy, as will allow of the vessel picking up the buoy when she returns to it, and so coming to rest."*

He goes on to explain

"In this particular case everyone knows who knows anything about navigation that there are two ways of anchoring a ship. There is the temporary anchoring by means of an anchor, which is lifted when necessary, and there is the more permanent mode by means of moorings. For an example of this latter, there is the Victory when she lay in Portsmouth Harbour, where she was at moorings. So the yachts in Cowes Roads have moorings, which they take up wherever they return thereto, passing a chain or rope through the ring of the buoy which indicates the mooring. There is, therefore, this mode of bringing a ship to rest and keeping her so for a time, which is within the ordinary courses of navigation. This is not a right of any individual: it is a general right to use the waters for navigation in any ordinary way, and to anchor in either of the two well-known ways, either by means of an anchor or of a mooring."

Rigby LJ at pg 324 described the particular manner of mooring in evidence as consisting of *"..... a beam or beams of wood inserted in the soil, and some apparatus for connecting that, by a chain, cable or hawser, with craft in question. The beam or the mooring - to use the general term - is marked by a buoy with a view to that same vessel returning and using it again."*

16. Counsel also relied on the **Oxford Companion to Ships and the Sea** which defined moor as:

"in its strict meaning of condition of a ship when it lies in a harbour or anchorage with two anchors down and the ship middle between them."

And mooring as:

"a permanent position in harbours and estuaries to which ships can be secured without using their own anchors. For large ships, a mooring comprise two or three large anchors laid out on the bottom and connected with a chain bridle, from the centre of which a length of chain cable leads upwards to a large mooring buoy, usually cylindrical in shape, to the ring of which a ship can lie in safety by shackling on its own cable.'"

17. He submitted that since mooring is within the ordinary course or right of navigation, which is a public right of way over tidal water, then the likelihood of a collision occurring with another vessel may be greater and the exclusion clause would make sense under those circumstances.

18. Docking on the other hand, he submits, has a different meaning. According to the Cambridge dictionary *"if a ship docks, it arrives at a dock and if someone docks a ship, they bring it into a dock."*

19. He continued that if the Court were to find that docked and moored were synonymous or docked was a type of mooring then that would create an inconsistency within the policy. This inconsistency he says arises where the policy provides that *"the vessel is covered while it is in commission at sea or inland waters or in port, docks, marinas."*

20. Counsel then relied on **Izzard v Universal Insurance Co. Ltd [1973] 3 All ER** and urged the Court to allow the positive terms of the policy to prevail if indeed there was an inconsistency. **Izzard**, however, dealt with a term in a proposal and a term in the policy which were inconsistent. It was found that although, ordinarily, the proposal and the policy must both be read together, if there was a direct inconsistency then the positive and express term of the policy must prevail.

21. Counsel next considered addressing the issue as one of ambiguity, where the term moored ought to be construed contra proferentem. He drew the rules of construction in this regard from **Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd (1982) SC (HL) 14**:

> *"The rules of construction which apply to exclusion of liability clauses equally apply to clauses which purport to limit liability. The provisions are strictly construed contra proferentem, and ambiguity operates against the interests of the proferens."*

"Further that

'Exclusion clauses most, of course, be strictly construed, and if any particular liability is to be excluded by negligence on the part of the proferens, must be shown clearly and unambiguously, either by express words or by necessary implication from the language used. That the words used must be read contra proferentem, and that in order to escape from a particular liability including one's own wrongdoing, clear words are necessary, is well established.'"

22. Finally, he asked the Court to consider the intention of the parties and whether it would be fair or reasonable to allow the Defendant Insurers to rely on the exclusion resulting in a vessel not being covered while docked. He referred the Court to **Photo Production Ltd v Securicor Transport Ltd [1978] 3 All ER146** where Lord Denning stated:

"in order to decide whether the exemption or limitation clause applied, you must construe the contract, not in the grammatical or literal sense, or even in the natural and ordinary meaning of the words, but in the wider context of the 'presumed intention' of the parties, so as to see whether or not, in the situation that has arisen, the parties can reasonably be supposed to have intended that the party in breach should be able to avail himself of the exemption or limitation clause. That was pointed out by Lord Wilberforce in the Suisse Atlantique case ([1966] 2 All ER 61 at 93, 94, [1967] 1 AC 361 at 434), coupled with his illuminating observation in Recardon Smith Line Ltd v Hansen-Tangen ([1976] 3 All ER 574, [1976] 1 WLR 989 at 996):

> *'When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.'*

In other words, in order to ascertain the 'the presumed intention' of the parties you must ask this question: if the parties had envisaged the situation which has

happened would they, as reasonable persons, have supposed that the exemption or limitation clause would apply to protect the wrongdoer?"

Lord Denning continues:

"Although the clause in its natural and ordinary meaning would seem to give exemption from or limitation of liability for a breach, nevertheless the court will not give the party that exemption or limitation if the court can say. 'The parties as reasonable men cannot have intended that there should be exemption or limitation in the case of such a breach as this'. In so stating the principle there arises in these cases the figure of the fair and reasonable man; and the spokesman of this fair and reasonable man, as Lord Radcliffe once said, is and must be the court itself: see Davis Contractors Ltd v Fareham Urban District Council ([1956] 2 All ER 145 at 160 [1956] AC 696 at 729)."

23. **The Defendant:**

Senior Counsel outlined the three elements to the exclusion in issue *"a. There is a loss and damage asserted, b. The vessel was moored at the time of the event giving rise to the loss or damage and c. The damage did not arise from the collision with another vessel* (the court would prefer to say "a collision" rather than "the collision").

24. He reminded the Court that it is agreed between the parties that while the boat was docked at a boatyard, it was partially submerged during a thunderstorm with consequential loss occurring. Since this loss was not occasioned in the circumstances of a collision with another vessel, the Defendant asserted that, it is not obligated to pay the Claimant for the loss. He reiterated that what the Court is ultimately being asked to consider is whether the vessel was moored.

25. His definition of the verb moor was drawn from the Cambridge Dictionary as being "*to tie a boat so that it stays in the same place" "to attach a boat or ship to*

something on land or to the surface under the water to keep it in place."

26. He also referenced an online blog www.boats.net which he referred to as authoritative. There, Docking was defined as *"the mooring of a ship to a pier, quay or similar fixture….."* A mooring was described by Wikipedia.org as "*any permanent structure to which a vessel may be secured. Examples included buoys, wharfs, jetties, piers, anchor buoys, and mooring buoys. A ship is secured to a mooring to forestall free movement of the ship on the water. An anchor moorings fixes a vessel's position relative to a point on the bottom of a waterway without connective the vessel to shore. As a verb, mooring refers to the act of attaching a vessel to a mooring."* A definition for Dock was also taken from www.boats.net which explained that *"when used as a noun, a dock is defined as: A structure or structures to which a boat can be moored, or the water adjacent to that structure. When used as a verb, a dock is defined as: To moor a ship to a fixture, such as a pier or quay."*

27. He asked the Court to find that the Claimant's own pleadings admitted that the vessel was indeed moored to the dock. Since the vessel was moored, the exclusion clause applied and the risk occasioned would not be covered.

28. Senior Counsel also discussed the principles applicable to construing policies of insurances as a background to the interpretation of the terms and issues examined. He encouraged the court to allow the words of the policy to have their natural, ordinary and commonly used meaning and offered helpful guidance on the general principles applicable to the construction of policies from **MacGillivray on Insurance Law p293 [11-001]**:

> *"Insurance policy are to be construed according to the principles of contraction generally applicable to commercial and consumer contracts. The lack of a tribunal endeavoring to interpret a contract of insurance is to ascertain and give effect to the intention of the parties in relation to the facts in dispute. Their intention is, however,*

to be gathered from the wording chosen to express their agreement in the policy itself and from the wording of any other documents incorporated in it, so that,

> *'The methodology is not to prove the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by referrals to express rather than actual intention. The question resolves itself in a search for the true meaning of language in its contractual setting'."*

There is a long established and settled presumption that words in a policy should be given their natural and ordinary meaning:

> *"There is a presumption that the words to be construed should be construed in their ordinary and popular sense, since the parties to the contract must be taken to have intended, as reasonable men, to use words and phrases in their commonly understood and accepted sense. This presumption can be rebutted in certain circumstances which are examined later in this chapter, but it is frequently the case that there is no reason from the ordinary meaning of the words in question."*

The learned authors referred to the statement of Upjohn LJ in the **Starfire Diamond Rings LTD v Angel** decision regarding the words 'left unattended' wherein he commented *"I deprecate any attempt to expand the meaning or further to define words such as these which are common words in everyday use, having a perfectly ordinary and clear meaning'.* The learned authors went on the conclude *"It follows that, if a word or phrase has an accepted popular meaning, that meaning should prevail rather than a more limited scientific or technical meaning unless the context demands the latter… Similarly, the words in policy will be construed on the footing that the parties intended the ordinary rules of grammar to apply to them."*

Consideration

29. The Court having considered the policy as a whole agrees with Senior Counsel for the Defendant that there is nothing ambiguous or inconsistent. The cover extended was at all times made expressly and clearly subject to the exclusions. One of those exclusions referred to a vessel in a moored state and explained that cover would be excluded unless the loss was occasioned

by a collision with another vessel. That too is clear.

30. When the Court considers the definitions for moor or mooring as presented by both Counsel, the Court finds itself more attracted to those presented by the Defendant. The main one presented by the Claimant (**Wright** case (ibid)) is from the late 19th century where perhaps moored and what constituted moorings may have had a more specific meaning than it does now.

31. In fact, just a few years later in **Liverpool and North Wales Steamship Co. Ltd v Mersey Trading Co. Ltd. [1908] 2Ch 460** the court was asked to determine the meaning of mooring in the context of a provisional order of the Board of Trade, made under the provisions of the General Pier and Harbour Act, 1861. The **Wright** case (ibid) was presented as authority for the meaning but the learned Judge stated his finding thus; "*Evidence has been called on both sides which has satisfied me that "mooring" has no technical meaning other than its general meaning in the English language, and that some seafaring persons would apply it to every case in which a vessel is made fast in any way, while others would not.* The court then went on to hold that the temporary fastening of a boat to a dock for persons to embark and disembark was not mooring.

32. While this case does not say specifically that docking a boat is in fact mooring it certainly takes the definition beyond anchoring or making fast by chains, cable or hawser to a beam or beams of wood inserted into the seabed. It also allows an interpretation which goes no further than the ordinary English meaning and fully appreciates that seafaring persons may well have varying views.

33. In **The Alletta and The England [1965] Lloyd's Rep 479** the court again grappled with the meaning of mooring. At page 489 it was held that *"A mooring connotes .... the securing of a ship to some fixture, some permanent fixture, ashore or in the river..."* In **Evans and Goldberg [1974] 1 WLR 1317** Lord Widgery relied in part on **Liverpool and North Wales (ibid)** when he acknowledged that the meaning given to the words mooring and anchoring were becoming more lax.

34. The definition presented from the Oxford Companion to Ships and the Sea speaks to a strict meaning. It is therefore not an ordinary English meaning. Counsel omitted to emphasize the definition there which says that *"It is also used to describe a vessel which is secured head and stern to a 'quay'...."* The photographs of the vessel which forms part of the documents provided for the Court's use in this matter seems to show this very arrangement.

35. It is also noticeable that without explanation Counsel for the Claimant sought to draw his definition of docking from elsewhere, an English dictionary. It causes this court to wonder why a definition from this same reliable source was not used or why the definition for moor or mooring was not likewise extracted from the dictionary.

36. This Court is, however, obligated to place the term in today's context. The Oxford Dictionary defines moor as *"make fast (a boat) by attaching it by cable or rope to the shore or to an anchor."* By way of illustration it stated *"Twenty or so fishing boats were moored to the pier side." And "We moored along the jetty."* Dock was defined as *"a jetty or pier where a ship may moor."* As a verb, in relation to a ship, it meant *"to come into a dock and tie up at a wharf."* The phrase 'in dock'

was defined, for a ship, as being *"moored in a dock."*

37. The Merriam Webster defines moor as *"to secure a boat by mooring."* Mooring is then defined as *"an act of making fast a boat or aircraft with lines or anchors. It is also "a place where or an object to which something (such as a craft) can be moored or a device (such as a line or chain) by which an object is secured in place"* Moored is to *"secure a boat by mooring. To make fast with or as if with cables, lines or anchors."* Dock is said to be *"a usually wooden pier used as a landing place or moorage for boats.* As a verb, *"to come into or alongside a dock."*

38. There is no doubt in my mind that being tied to the dock as the Claimant's boat was, constitutes mooring. The Court found a definition which stated it quite effectively and words which The Court easily adopts. According to http://www.theshippinglawblog.com/, *"a docked ship is one connected to a dock, the business area of a pier. A moored ship is one that is secured by ropes to a permanent fixture. Usually this word describes ships "at moorings," areas of a harbor where ships and boats are tied to a fixed object on the seabed, like a large concrete block. A buoy is tied to the block and the ship tied to the buoy. So a docked ship is moored, but a moored ship isn't necessarily docked."*

39. The Court also finds Senior Counsel's words at paragraph 32 of his submissions fitting to conclude here. *"It is of no moment whether it was moored to a dock, a buoy or any other fixed object. The question of mooring relates to when the insurer is on risk and the type of risk covered."* I conclude in the affirmative that it most definitely was moored. As such Exclusion 15 applies and the Defendant is not allowed to claim. This means that the Claim herein must be dismissed.

40. In my mind, there is no ambiguity or inconsistency. The policy has always expressed its coverage to be subject to the Exclusions. Exclusion 15 became applicable once the boat was moored. This does not mean that the boat is not covered while it is in a dock, port or a marina. Rather its coverage while there moored is limited to collision. If it is not moored but perhaps maneuvering then its coverage would be different but still subject to any applicable exclusion.

41. Counsel for the Claimant says there is a certain unfairness and unreasonableness to such a finding. But this is a business transaction. One where the refusal to provide cover for damage to or even caused by moored vessels has been said to be one of the major areas of risk minimization amongst maritime insurance providers. Therefore, such a clause, as difficult as it may be for this insured, is nothing novel or outside the norm. It is important, if not incumbent, on any individual seeking coverage to make appropriate enquiries and checks when choosing a policy and to ensure that the policy will cover the types of loss which occurs through no fault of the insured. It is not for the Court to reinterpret the clear terms to make them more favorable for any party.

42. Having made the finding above, this Court finds no good reason to discuss the Hurricane Questionnaire and will offer a decision only if both parties insist upon it.

43. The Court takes this opportunity to thank Counsel on both sides for their agreement to bifurcate, their effort in determining the issues and their very helpful submissions.

Disposition:

1. **The Claim is dismissed**
2. **Costs to the Defendant in the sum of $20,000.00 as agreed.**

SONYA YOUNG
SUPREME COURT JUDGE