

IN THE COURT OF APPEAL OF BELIZE A D 2023

CIVIL APPEAL NO 1 OF 2021

KHATAL RESORTS INTERNATIONAL LIMITED

Appellant

v

INSURANCE CORPORATION OF BELIZE LIMITED

Respondent

BEFORE:

The Hon Madam Justice Woodstock-Riley	-	Justice of Appeal
The Hon Madam Justice Minott-Phillips	-	Justice of Appeal
The Hon Mr Justice Foster	-	Justice of Appeal

Allister T Jenkins for the appellant.

Julie-Ann Ellis Bradley for the respondent.

Hearing: 21 October 2022

Date of promulgation/handing down: 24 February 2023

JUDGMENT

WOODSTOCK-RILEY, JA

[1] I have read the draft judgment of my sister, Minott-Phillips, JA. I agree with the proposed orders.

WOODSTOCK-RILEY, JA

MINOTT-PHILLIPS, JA

[2] This is an appeal of the judgment of the Hon Madam Justice Sonya Young given on the 26 November 2020 dismissing the Appellant's claim of entitlement to compensation from the Respondent for damage to a marine vessel pursuant to a contract of insurance entered into between them.

[3] The marine vessel owned by the Appellant, Kahtal Resorts International Limited ("Kahtal") and insured by the Respondent, the Insurance Corporation of Belize Limited ("the insurer") was a 28ft parasailing boat known as the "*Cast Away Flyer*".

[4] It was Kahtal's case that on the night of April 19, 2019 there was a thunderstorm and the vessel sunk while docked afloat at Tom's Boatyard in Sam Pedro, Ambergris Caye. Kahtal alleged the loss resulted from entry of water into the vessel and as a result of it being submerged in sea water.

[5] The loss did not result from collision with another vessel. This becomes an important fact because of the material terms of the insurance policy that are at the core of the parties' dispute. The terms provided that,

“Perils insured

We will pay for Direct Physical Loss or Damage to the property from any external cause, subject to the exclusions and conditions of this policy.

In Commission and Laid Up

The vessel is covered subject to the provisions of this insurance:

- (1) **While in commission** at sea or on Inland waters or **in port, docks, marinas, on ways, pontoons, or at a place of storage ashore.**
- (2) *While laid up out of commission.....[not applicable]*

Exclusions

No claim shall be allowed in respect of:

1

2

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

[6] The parties, in their agreed Statement of Facts and Issues, considered the main issues to be determined to be, whether the loss is covered by the policy of insurance and if the insurer is liable to indemnify Kahtal. They identified 8 sub-issues to be resolved by the court in determining those overarching issues. Primary among them, from the perspective of the trial judge (and her judgment was concerned with them exclusively) were:

- a. What is the effect of Section I, Exclusion 15 on the scope of cover provided under Section 1 of the policy? and
- b. Whether the vessel was moored or docked at the material time.

[7] The approach taken by the trial judge was to first determine whether the vessel was moored or docked at the material time. She said there was no doubt in her mind that

being tied to the dock as Kahtal's boat was, "constitutes mooring" and went on to "conclude in the affirmative that [the vessel] most definitely was moored".

[8] Having reached that conclusion she needed no more than a paragraph or two to address the effect of exclusion 15 which she did as follows:

"39. 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 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."

[9] One of the orders made by the court on 4 August 2020 and leading up to the trial was for issues 1, 2, 3, 4 & 8 of the Agreed Statement of Facts and Issues dated 3 July 2020 to be addressed as preliminary issues. Those issues were:

1. 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."

2. What is the effect of Section I, Exclusion 15 on the scope of cover provided under Section I of the policy?
3. Whether the vessel was moored or docked at the material time?
4. Whether the Hurricane Questionnaire forms part of the policy?
- ...
8. In any event, would Exclusion 15 operate so as to preclude cover in the circumstances?

[10] In disposing of the case in the way she did (by first determining if the vessel was moored at the relevant time and then determining that exclusion 15 applied) the trial judge found it unnecessary for her to address any sub-issue other than 2 & 3 above (and, possibly, consequentially, 8).

[11] The main grounds of Khatal's notice of appeal challenge the trial judge's conclusions as follows:

- a. The Learned Trial Judge erred in her interpretation of the Marine Vessel Insurance Policy ("the Policy") and meaning of the terms "*docked*" and "*moored*" in the Policy.
- b. The Learned Trial Judge also misdirected herself in finding that the Exclusion Clause in the Policy applied to the loss sustained by the vessel "Cast Away Flyer" when it was docked at Tom's Boat Yard, San Pedro Town, Ambergris Caye, Belize, and failing to find that while the vessel was docked, it was in commission.

[12] The orders Khatal seeks from this court are:

- a. That the Exclusion Clause in the Policy in relation to the vessel “Cast Away Flyer” did not apply, since the vessel was docked and in commission at the time of the damage by submersion, and not moored;
- b. That the Respondent honours the Policy by paying to the Appellant the sum of \$100,000, being the total sum insured in the Policy for the vessel “Cast Away Flyer”, and the loss suffered by the Appellant; and
- c. That costs in the appeal and in the court below be awarded to the Appellant.

The first main ground of appeal

[13] It follows from all I’ve recited above that the first issue we needed to determine in considering the first main ground of appeal was whether the trial judge was correct in her conclusion that the vessel was moored at the time the submersion damage from the thunderstorm occurred while it was in dock.

[14] It is my view that this conclusion by her was wrong. In construing the policy the court is not so much concerned with how the word “moor” is used loosely, as it is with its strict meaning.

[15] In numbered paragraph 38 of the insurer’s written submissions to this court the following is stated,

*“... We take no issue and would adopt the definition of moor and moorings supplied by learned counsel for the Appellant as extracted from **The Oxford Companion to Ships and the Sea**.....”*

[16] In Khatal's written submissions to us the definitions of moor and mooring extracted from *The Oxford Companion to Ships and the Sea* are set out in numbered paragraph 21 and their strict meaning is set out as follows:

“moor, to, In its strict meaning the condition of a ship when it lies in a harbour or at anchorage with two anchors down and the ship middle between them. When a ship is moored in this fashion it is usual to bring both cables to a mooring swivel just below the hawse-pipes so that the ship may swing to the tide without getting a foul hawse....”

“Mooring, a permanent position in harbours and estuaries to which ships can be secured without using their own anchors...”

[17] To my mind the strict meaning of 'moor' set out above (and accepted by both parties) connotes two fixed points (which can, but need not, be created by dropping two anchors) with the ship swinging to the tide between them. Where the points between which the ship swings to the tide are fixed (i.e. not created by way of dropping two anchors) those points are referred to as moorings. It follows from that view of the meaning of the words that a vessel is not moored when it is in dock. A vessel tied to the dock does not “*swing to the tide*”.

[18] When I dig deeper into the definition of what is a 'hawse' and a 'foul hawse' I find what I consider to be support for my interpretation. According to the very same authoritative text, *“The Oxford Companion to Ships and the Sea”*: “*When a ship lies to two anchors, it has a clear hawse when the two cables grow from the ship without crossing; when they do cross, the ship has a foul hawse. The normal practice in ships when they lie to two anchors is to insert a mooring swivel between the two cables so that the ship swings in a restricted circle without the cables becoming crossed.*” I cannot see how it would be possible for a ship tied to a dock to swing in a circle, be it complete or restricted.

[19] My interpretation of the policy is favourable to the policy holder. It would make exclusion clause 15 inapplicable because when in dock the vessel could not be considered moored within the strict meaning of that word. In my view if the policy is capable of such an interpretation (and I conclude it is) it should be so interpreted in keeping with the *contra preferentem* rule that applies to contracts such as the contract of insurance the court was interpreting, so as to give the policy holder the benefit of any ambiguity.

[20] The first main ground of appeal therefore succeeds.

The second main ground of appeal

[21] That the second main ground of appeal also inevitably succeeds on account of my determination that the trial judge erred in concluding the vessel was moored at the relevant time.

[22] As the vessel was not moored when in dock, I find that exclusion 15 did not apply to negate recovery under the policy and that, in concluding otherwise, the trial judge also erred.

The relief sought on appeal

[23] Because the case below was determined solely upon the trial judge's findings on those two issues, the success of the appeal does not, without more, entitle Khatal to the relief it seeks from us of an order from this court that the Respondent honour the policy by paying to it the sum insured of \$100,000. That is because there were other issues in the claim that could have a bearing on whether or not payment under the policy was triggered, which issues have not yet been adjudicated upon by a court of first instance.

[24] A look at the parties' agreed statement of facts and issues dated 3 July 2020 shows a total of 9 issues (the first 8 of which were agreed, with the 9th not being agreed by the insurer) as follows:

- i. 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.*"
- ii. What is the effect of Section I, Exclusion 15 on the scope of cover provided under Section I of the policy?
- iii. Whether the vessel was moored or docked at the material time?
- iv. Whether the Hurricane Questionnaire forms part of the policy?
- v. Whether the Hurricane Questionnaire is applicable based on the nature of the weather at the time of the loss (i.e. thunderstorm)?
- vi. If applicable, was the response at A of the Hurricane Questionnaire a warranty?
- vii. If so, was the Claimant in breach of such warranty (whether there was a threat of storm)?
- viii. In any event, would Exclusion 15 operate so as to preclude cover in the circumstances?
- ix. What is the effect of "We will pay for Direct Physical loss or Damage to the property from any external cause, subject to the exclusions and conditions of this policy"?

[25] The findings by this court that the trial judge erred in her conclusions that the vessel was moored at the material time and that Exclusion 15 applied, disposes of issues ii, iii & viii above only. Six other issues remain for determination by a court of original jurisdiction.

[26] For that reason, I am of the view that the appropriate order in this appeal is that:

- a. The appeal is allowed;
- b. The order of the trial judge pronounced on the 26 November 2020 is set aside;
- c. This court declares that:
 - i. The vessel was not moored at the time the damage occurred;
 - ii. Exclusion 15 to the policy of insurance does not apply to negate coverage under the policy.
- d. The case is remitted to the Supreme Court for its determination of the remaining issues not yet considered and pronounced upon by a court of original jurisdiction.
- e. The security for the Respondent's costs of this appeal in the sum of \$20,000 put up by the Appellant pursuant to an interlocutory order of this court made on the 23 March 2022 is to be released to the Appellant.
- f. The Appellant is awarded its costs of the appeal which are to be assessed if not agreed.

- g. The Appellant is also awarded the agreed sum of \$20,000 on account of its costs incurred before the court below in relation to the two issues subject of this appeal. Other costs in relation to the proceedings below are reserved to the court of original jurisdiction that is to determine the remaining issues in the action.

MINOTT-PHILLIPS, JA

FOSTER, JA

[27] I have read the draft decision of my learned sister Minott-Phillips, JA and I concur with her reasons and the order made.

FOSTER, JA