Insurance Corporation of Belize Ltd v Kahtal Resorts International Ltd

Jurisdiction: Caribbean States

Judge: Burgess J , Rajnauth-Lee J , Jamadar J , Barrow J , Saunders P

Judgment Date: 01 March 2024

Reported In: BZ 2024 CCJ 3

Docket Number: CCJ Appeal No BZCV2023/004

Court: Caribbean Court of Justice

BETWEEN
Insurance Corporation of Belize Limited
Appellant
and
Kahtal Resorts International Limited
Respondent

[2024] CCJ 5 (AJ) BZ

Before:

Mr Justice Saunders, President

Mme Justice Rajnauth-Lee

Mr Justice Barrow

Mr Justice Burgess

Mr Justice Jamadar

CCJ Appeal No BZCV2023/004

BZ Civil Appeal No 1 of 2021

IN THE CARIBBEAN COURT OF JUSTICE

APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

Contract — Construction — Marine Insurance — Interpretation of commercial contracts — Application of exclusion clauses — Contra proferentem rule — Natural and ordinary meaning of words — Specialised definition of words — Respondent vessel damaged by thunderstorm — Insurance contract between parties contained exclusion clause against coverage when vessel in commission is moored — Whether vessel moored within meaning of exclusion clause — Meaning of 'moored' and 'docked'.

Cases referred to:

A-G v Wright [1897] 2 QB 318; *Alletta, The and Company, The* [1965] 2 Lloyd's Rep 479; *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) BB; *Association of British Travel Agents Ltd v British Airways Plc* [2000] 2 All ER (Comm) 204; *Beaufort Developments (NI) Ltd v Gilbert Ash Ltd* [1999] 1 AC 266; *Bhasin v Hrynew* [2014] 3 SCR 494; *Blairmont Rice Investments Inc v Kayman Sankar Co Ltd* [2021] CCJ 7 (AJ) GY, [2021] 5 LRC 433; *Buller v Harrison* (1777) 2 Cowp 565, 98 ER 1243; *Carter v Boehm*

(1766) 3 Burr 1905, 97 ER 1162; ***Caye*** *International Bank Ltd v Rosemore International Corp* [2023] CCJ 4 (AJ) BZ; *Cornish v Accident Insurance Co* (1889) 23 QBD 453; *Cozens v Brutus* [1973] AC 854; *Dart Harbour and Navigation Authority v Secretary of State for Transport, Local Government and the Regions* [2003] 2 Lloyd's Rep 607; *Dairy Containers Ltd v Tasman Orient Line CV* [2005] 1 WLR 215; *Evans v Godber* [1974] 1 WLR 1317; *General Assurance Society Ltd v Chandmull Jain* (1966) 3 SCR 500; *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715; *Housen v Nikolaisen* [2002] 2 SCR 235; *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2017] AC 73; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Johnson v American Home Assurance Co* (1998) 192 CLR 266; *Lexi Holdings plc v Stainforth* [2006] EWCA Civ 988; *Lighthouse Reef Resort Ltd v Regent Insurance Co* BZ 2005 SC 25 (CARILAW), (31 May 2005); *Liverpool and North Wales Steamship Co Ltd v Mersey Trading Co Ltd* [1908] 2 Ch 460; *Manchester College v Trafford* (1678) 2 Show 31, 89 ER 774; *McGraddie v McGraddie* [2013] 1 WLR 2477; *McMahons Tavern Pty Ltd v Suncorp Metway Insurance Ltd* [2004] SASC 237; *Moore v British Waterways Board* [2013] Ch 488; *Morley v United Friendly Insurance Plc* [1993] 1 WLR 996; *Oxonica Energy Ltd v Neuftec Ltd* [2008] EWHC 2127; *Persimmon Homes Ltd v Ove Arup & Partners Ltd* 172 Con LR 1; *Rainy Sky SA v Kookmin Bank* [2012] 1 All ER 1137; *Robertson v French* [1803-13] All ER Rep 350; *Sandy Lane Hotel Co Ltd v Cato* [2022] CCJ 8 (AJ) BB; *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep 339; *Sushilaben Indravadan Gandhi v New India Assurance Co* (2021) 7 SCC 151; *Taberna Europe CDO II plc v Selskabet AF1* [2017] QB 633; *United Insurance Co Ltd v Pushpalaya Printers* (2004) 3 SCR 631; *Wood v Capita Insurance Services Ltd* [2017] AC 1173.

Legislation referred to:

Belize - Port Authority Act, CAP 233; **United Kingdom** - Marine Insurance Act 1906.

Other sources referred to:

Beale H (ed), *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) vol 1; Bennett H, 'The Marine Insurance Act 1906: Reflections of a Centenary' (2006) 18 SAcLJ 669; Birds J, Lynch B and Paul S, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015); *Coke's Commentary on Littleton* (1628); Cserne P, 'Policy Considerations in Contract Interpretation: the Contra Proferentem Rule from a Comparative Law and Economics Perspective' (Hungarian

Association for Law and Economics, No 5, Working Papers 2007); Dear I C B and Kemp P, *Oxford Companion to Ships and the Sea* (2nd edn, Oxford University Press 2006); Garner B (ed), *Black's Law Dictionary* (8th edn, Thomson West 2004); Gilman J and others, *Arnould Law of Marine Insurance and Average* (20th edn, Sweet and Maxwell 2021); *Halsbury's Laws of England* (5th edn, 2023) vol 60; Hawkins J M and Allen R (eds), *The Oxford Encyclopedic English Dictionary* (Oxford University Press 1991); Hinz E R, *The Complete Book of Anchoring and Mooring* (rev 2nd edn, Cornell Maritime Press 2009); *Lamart N, 'Certainty v Equity: A Case for Reform of the Duty of Utmost Good Faith?'* (2018) 32 A&NZ Mar LJ 59; Ocean Magazine, 'Keeping it Shipshape with Maritime Insurance' (Vaarzon-Morel Maritime Lawyers, 19 May 2017) < https://vaarzonmorelsolicitors.com.au/keeping-shipshape-maritime-insurance/> accessed 7 January 2024; 'Online Etymology Dictionary' (11 December 2020) < https://www.etymonline.com/word/dock> accessed 4 February 2024; Port Authority of Trinidad and Tobago, 'Glossary of Maritime Terms' < https://www.patnt.com/content/Glossary_of_Maritime_Terms.pdf> accessed 4 February 2024;

Ravi O N, 'The Contractual Interpretation Rule - Contra Proferentem: It's Relevance in Modern Law' (2020) 2 CMR Univ J Contemp Legal Aff 112; Walcott L A, *Commonwealth Caribbean Insurance Law* (Routledge-Cavenish 2019); Yalim A N K, *Interpretation and Gap Filling in International Commercial Contracts* (Intersentia 2019); Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996).

Appearances

Mr Darrell S Bradley, Ms Julie-Ann Ellis-Bradley and Ms Kimberly Wallace for the Appellant

Ms Magali Marin Young SC and Mr Allister Tre Jenkins for the Respondent

Burgess J (Rajnauth-Lee J **concurring**)

Concurring: Jamadar J

Dissenting: Barrow J (Saunders P **concurring**)

Burgess J

Introduction

1 This is an appeal from the Court of Appeal of Belize. The Respondent, Kahtal Resorts International Ltd claimed before the High Court indemnity from the Appellant, Insurance Corporation of Belize Ltd, for damage sustained by the Respondent's marine vessel, a parasailing boat, as a result of a thunderstorm. The marine vessel sunk while docked afloat at Tom's Boatyard, San Pedro, **Ambergris Caye**, Belize, and it sustained damage having been submerged in water. The Appellant denied liability based on an exclusion clause in the terms of the policy of insurance exempting the Appellant's liability for: 'Loss and or damage while vessel is moored unless such loss damage results from collision with another vessel'.

2 In the High Court, the trial judge found in favour of the Appellant that, based on the interpretation of the word 'moored' in the exclusion clause, the policy applied to limit liability to indemnify the Respondent for the damage suffered. The Respondent thereafter appealed successfully to the Court of Appeal. The Appellant has now filed an appeal of the decision of the Court of Appeal before this Court.

Factual Background

3 The Respondent owned a parasailing boat called 'Cast Away Flyer' which was insured by the Appellant under a written insurance policy. The policy is contained in 12 pages with the first page being the cover letter. Pages 2 to 3 contain the section on 'Definitions Used in this Policy.' It is to be noted here that nowhere in the definition section is there any definition of 'in dock' or 'moored.'

4 After the definition section on page 3 there are agreements as to coverage changes, policy continuing post the death of insured person, cancellation and renewal rights, and concealment and fraud.

5 Page 4 is entitled 'Section 1 Coverage: Your Property, Property Insured' and reads in the relevant parts:

> We insure your vessel, machinery and equipment as described on the declaration page.
>
> PERIL 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 inland water or in port, docks, marinas, on way, pontoons, or at a place of storage ashore,
>
> 2) While laid up out of commission, including lifting or hauling and launching, while being moved in shipyard or marina, dismantling, fitting out, over hauling, normal maintenance or while under survey.
>
> EXCLUSIONS
>
> No claim shall be allowed in respect of:
>
> 1. Outboard motor dropping off or falling overboard.
>
> 2. Wear and tear, marring, scratching; gradual deterioration; inherent vice; rust; corrosion; mold; wet and dry rot.
>
> 3. Personal effects. 4. Consumable stores; fishing gear ...
>
> 15. Loss and or damage while vessel is moored unless such loss damage results from collision with another vessel. ...
>
> 22. No claim shall be allowed in respect of loss or damage to the vessel or liability to any third party or any salvage services caused by or arising from the vessel being stranded, sunk, swamped, immersed or breaking adrift, while left moored or anchored unattended off an exposed beach or shore.

6 Page 5 of the policy contained a section dealing with 'Additional Coverage.' Pages 6 to 8 has 'Section 1 Conditions' and pages 8 to 9 have 'Section II Passenger Liability Third Party Liability.' Page 9 has 'Section II Conditions.' Lastly, page 10 has a Declaration by the Appellant's Insurance company and page 11 contains the Certificate of Insurance.

7 On the night of 19 April 2019, there was a thunderstorm which caused the vessel to sink while it was docked afloat at Tom's Boatyard in San Pedro Town, **Ambergris Caye**, Belize. While docked, the vessel was tied to the dock at Tom's Boatyard. At the time of the damage to the vessel, it was insured under the policy for the total sum of BZD100,000.

8 When the Respondent requested indemnification under the policy for the loss and damage suffered by the vessel, the Appellant refused to honour the Policy and denied liability based on exclusion clause 15 in the terms of the policy exempting the Appellant's liability for loss and or damage while vessel is moored unless such loss damage results from collision with another vessel. The Respondent therefore instituted proceedings against the Appellant, seeking damages for breach of the policy, and for loss arising from the loss of the use of the vessel.

At trial, upon an application to bifurcate the issue of liability and damages and to try the issue as to coverage and liability as a preliminary issue, the High Court tried the issues as contained in an Agreed Statement of Facts and Issues. The major questions raised in the Agreed Statement of Facts and Issues were what was the effect of the exclusion clause on the scope of the cover provided under section I of the policy and whether the vessel was moored at the material time?

10 Upon the hearing of the preliminary issue, the court dismissed the Respondent's claim, having found that the exclusion clause applied to deny the Appellant's liability, as when the Vessel was in dock at Tom's Boatyard, it was 'moored.' The Court of Appeal found that the vessel was not 'moored' when it was in dock, and that the exclusion clause in the Policy therefore did not apply.

Issues Raised Before This Court

11 The Appellant sought and obtained leave from the Court of Appeal to appeal to this Court. Before us, five grounds of appeal were raised in the appeal against the decision of the Court of Appeal. These are (i) wrongful interference by it with the proper exercise of the trial judge's discretion; (ii) wrongful application by it of a specialised definition; (iii) error by it in selecting a restricted/specialised meaning; (iv) wrongful reliance by it on its own opinion; and (v) wrongful application by it of the *contra proferentem* rule.

12 In my judgment, these grounds revolve around the meaning of the word 'moored' in the context of the insurance policy. Accordingly, these grounds may be conveniently subsumed under two main issues and a sub-issue. The main issues are (i) whether the Court of Appeal erred in interpretation of the word 'moored' in the insurance policy; and (ii) whether the Court of Appeal erred in applying the *contra proferentem* rule of interpretation to exclusion clause 15. The sub-issue is whether the appeal before the Court of Appeal concerned an error in law and if so whether the Court of Appeal may have interfered with the findings of the trial judge.

13 I propose to deal with the sub-issue first and the main issues in turn in the next section of my judgment.

Analysis And Conclusions

Whether the Court of Appeal may have Interfered with the Findings of the Trial Judge

14 Relying on *McGraddie v McGraddie*, [1] the Appellant contends that the Court of Appeal ought not to have interfered with the findings of the trial judge and substituted its own opinion on the matter where there was no error of law or no error on any findings of fact or where the trial judge was not found to be plainly wrong in the exercise of her judicial discretion. There is no doubt that this is a correct statement of the test to be applied by an appellate court when it is faced with

an appeal on the finding of facts or the exercise of discretion. In my judgment, this test is not applicable in this appeal.

15 The principle adumbrated in *McGraddie*, [2] on which the Appellant relies revolved around findings of fact. However, this appeal is not concerned with findings of fact; it is concerned with the interpretation of the word 'moored' in the policy of insurance. According to the learned authors of *Chitty on Contracts* [3]*:* 'The construction of written instruments is a question of mixed law and fact'. Meantime, the Supreme Court of Canada's decision in *Housen v Nikolaisen*, [4] makes it plain that: 'Matters of mixed fact and law lie along a spectrum'. In my judgment, that decision supports the conclusion that it is only where the issue on appeal involves the trial judge's interpretation of the evidence that the *McGraddie*, [5] principle would be applicable.

16 The appeal before us is not that the Court of Appeal's decision related to an error of fact as no factual evidence was adduced before the trial judge and none formed part of the record other than the policy of insurance itself. The trial of the issue of liability and interpretation of the policy was bifurcated from the remainder of the trial, and no evidence was led on the issue of liability and interpretation of the policy. The Court of Appeal could therefore have interfered with the judgment of the trial judge on the basis of an error in law. I would add for completeness that there was certainly no error as to the exercise of discretion as none was exercised in the interpretation of the policy.

Whether Court of Appeal Erred in its Interpretation of the Word 'Moored'

(i) General Principles

17 Ultimately, the aim of interpreting a provision in a commercial contract, 'is to determine what the parties meant by the language used, [and this] involves ascertaining what a reasonable person would have understood the parties to have meant.' [6] The relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Very importantly, as Lord Hoffmann emphasised in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [7] 'words used in a commercial document are to be construed in their context.' As to this he said:

> ...the meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

18 In *Blairmont Rice Investments Inc v Kayman Sankar Co Ltd*, [8] this Court, after a comprehensive examination of the leading common law authorities on commercial contract interpretation culminating in *Wood v Capita Insurance Services Ltd*, [9] concluded that the modern approach to contractual interpretation was away from the traditional literalist approach and more to the objective and contextualist approach. This Court adopted the modern approach and settled the principles which will guide it as follows: [10]

> [71] In our judgment, the principles which should guide our courts, based as they are on the common law system, in the interpretation of a commercial contract, are those enunciated in *Wood*. Our courts must always have in mind that their function in interpreting a contractual term is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. Such ascertainment is achieved 'by depersonalising the
>
> contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be.'
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> [72] The foregoing does not mean that our courts should treat contract interpretation, in the words of Lord Hodge in *Wood*, as a 'literalist exercise focused solely on a parsing of the wording of a particular clause'. Rather, it should be viewed as requiring consideration of the contract as a whole and, depending on the nature, formality, and quality of its drafting, more or less weight should be given to elements of the wider context in reaching its view as to that objective meaning. The interpretation of a contract should be approached as an iterative exercise and, where there are rival meanings, the court should give weight to the implications of rival constructions by reaching a view as to which was more consistent with business common sense.

19 The learned authors of *MacGillivray on Insurance Law* [11] make it plain that the contextual approach espoused in *Blairmont*, applies to the interpretation of insurance contracts in general. They write:

> Insurance policies are to be construed according to the principles of construction generally applicable to commercial and consumer contracts. The task of a tribunal endeavouring 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 probe the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention. The question resolves itself in a search for the true meaning of language in its contractual setting".

20 With respect to marine insurance policies specifically, the learned editors of *Arnould Law of Marine Insurance and Average ('Arnould's')*, [12] also recognise that the contextual approach to interpretation applies to the construction of these policies. At para 3-33, they write:

> The words must be considered in their context. The "context", for this purpose, has three different meanings. First, there is the overall context in which the contract is made: this constitutes the "factual matrix" recognised by the House of Lords in the *Investors Compensation Scheme v West Bromwich Building Society*, [13] and later authorities... Secondly, there is the contractual context, which takes account of the objectives of the policy. Thirdly, there is the context of the particular phrase in which the disputed word appears. Generally speaking, those contexts taken together are more likely to enable the court to come to a satisfactory conclusion in regard to the construction of a marine insurance policy than are any of the other canons of construction.

21 In my view, in approaching the interpretation of the word 'moored' in the policy of insurance, the three background contexts that must be taken into consideration are clear. The first is that the word is found in a contract of marine insurance which in the words of *Arnould's* is 'a singularly archaic as well as a very technical document'. This is the factual matrix. The second is that the expression is found in an exclusion clause in the policy of insurance. This is the contractual context. The third is that the expression is used in other parts of the insurance document. This is the textual context.

(ii) Meaning of 'Moored' and the Marine Insurance Context

22 Without reference to *Blairmont*, the Appellant has proceeded on the principle that the word 'moored' must be taken in its plain ordinary meaning as this is the primary canon of construction which should govern this case. I do not agree that that is the law after *Blairmont*. In my view, *Blairmont*, signals a move away from literalism to a more contextual approach to interpretation of commercial contracts. The law is more accurately explained by the learned editors of *Arnould's* who observe at para 3-28 that the plain and ordinary meaning rule is not very helpful when construing marine insurance contracts given the technical nature of those documents. The learned editors also made it very clear that the plain and ordinary

meaning rule is no more than *prima facie* meaning for the terms of the policy and may be displaced by the application other rules to construction.

23 In this regard, Lord Ellenborough CJ stated in *Robertson v French*, [14] that words of an insurance contract may acquire a peculiar sense 'by the known usage of trade or the like.' Lord Ellenborough CJ enunciated the principle as follows:

> [I]t is...proper to state on this head that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz, that it is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.

24 Thus, the plain and ordinary meaning rule may be displaced by the rule that where words have gathered a technical meaning or a specialised meaning in the usage of a particular trade or business, the courts may give it a restrictive meaning. As *Chitty on Contracts* points out at para 12-053, this is even more so where there has been judicial interpretation of such words. Indeed, in *Beaufort Developments (NI) Ltd v Gilbert Ash Ltd*, [15] Lord Hoffmann said:

> It is also important to have regard to the course of earlier judicial authority and practice on the construction of similar contracts. The evolution of standard forms is often the result of interaction between the draftsmen and the courts, and the efforts of the draftsman cannot be properly understood without reference to the meaning which the judges have given to the language used by his predecessors.

25 In the context of marine industry and marine insurance, the words 'mooring' and 'moored', have gained a technical meaning in judicial authorities. In *Attorney General v Wright*, [16] Lord Esher MR stated as follows:

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

26 Rigby LJ also explained in *Wright* [17] that mooring:

> ...consists in having a beam or beams of wood inserted in the soil, and some apparatus for connecting that, by a chain, cable or hawser, with the 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.

27 More recently in *Moore v British Waterways Board*, [18] the English Court of Appeal outlining the definition of mooring, noted as follows:

> The most authoritative definition of "mooring" is in the *Oxford Companion to Ships and the Sea* (1988), which makes it clear that the term refers to the buoys, chains, anchors and gear which comprise the mooring and not the space which the moored vessel occupies: see *Dart Harbour and Navigation Authority v Secretary of State for Transport, Local Government and the Regions*
>
> [2003] 2 Lloyd's Rep 607. Moorings are fixed and are marked with buoys, and all that the person navigating has to do is to slip the attachment when he takes his vessel away, and to pick it up again when he returns to the mooring: see *Attorney General v Wright* [1897] 2 QB 318; *Liverpool and North Wales Steamship Co Ltd v Mersey Trading Co Ltd* [1908] 2 Ch 460; *Cozens v Brutus* [1973] AC 854 and *The Alletta* [1965] 2 Lloyd's Rep 479; [1966] 1 Lloyd's Rep 573.

28 It is noteworthy that none of these authorities make any reference to the state where a marine vessel is docked or tied to a dock. This is hardly surprising, as Earl R Hinz points out in *The Complete Book of Anchoring and Mooring*, [19] in marine usage:

> Anchoring, mooring, and docking are distinctly different actions. A boat is "anchored" when it "rides" or "lays" to a single anchor "rode," although it is conceivable to have to anchors in tandem on that rode. A boat is "moored" after it "picks up a mooring buoy" or has set a multiple anchor moor of its own. "Docking" means to "tie up to a dock," which is a landbound structure.

29 But, quite apart from the authorities just reviewed, we have not been shown any judicial authority to the effect that the terms 'moored' and 'in dock' or 'tied up to a dock' have the same meaning in marine insurance law. The trial judge claims to rely on *Liverpool and North Wales Steamship Co Ltd v Mersey Trading Co Ltd*, [20] *The Alletta*, [21] and *Evans v Godber*, [22] as such authorities. However, I must confess that, after careful study, I have not seen anything in these cases to suggest that 'in dock' or 'docked' are included in 'moored' nor did those cases purport to lay down any rules of interpretation which could lead to such a determination.

30 Taking the word 'moored' in its factual matrix, the person or class of persons to whom exclusion clause 15 was addressed was undoubtedly a class of persons with knowledge of marine insurance or with access to persons with such knowledge. Such a person or class of persons would have knowledge that the language of a

marine insurance policy will invariably be technical and that the word 'moored' has been subjected to judicial interpretation. Such a person or persons must be taken to have contracted on the belief that that word would be understood in the sense accepted by the legal authorities. To be sure, such a person would know that there has been no judicial interpretation of the word 'moored' appearing in the Belizean statutes cited by counsel for the appellant. For this reason, I am of the view that the Court of Appeal was correct in adopting the more technical meaning of the word 'moored' as accepted in the judicial authorities.

31 The same conclusion is compelled if the word 'moored' is interpreted in its contractual context, that is, if exclusion clause 15 is taken in the context of the insurance policy as a whole and the purpose of that policy. That purpose is expressly stated in the policy as follows: ' *IN COMMISSION AND LAID UP* The vessel is covered subject to the provisions of this Insurance: 1) While in commission at sea or inland water or in port, docks, marinas, on way, pontoons, or at a place of storage ashore' (emphasis added). It is manifest from this provision that a purpose of the policy was to provide coverage for a vessel while in commission and in dock.

32 In my judgment, the use of the word 'moored' in exclusion clause 15 must be interpreted against the purpose of the policy. In this regard, the law on the correct interpretational stance is clear. Whilst an exclusion clause is not to be approached with a pre-disposition to construe it narrowly, it must be read in the context of the contract of insurance as a whole and construed in a manner consistent with the purpose of that contract: See *Impact Funding Solutions Ltd v Barrington Support Services Ltd.* [23] A similar view of the law was expressed by Beldam LJ in *Morley v United Friendly Insurance plc*, [24] where he stated that: 'An exclusion clause in a policy of insurance has to be construed in a manner consistent with and not repugnant to the purpose of the policy.'

33 On the foregoing authorities, then, the word 'moored' in exclusion clause 15 cannot be construed as including 'docked'. To do so would lead to the absurdity that that clause would remove the very indemnity and coverage which the policy is expressly declared to provide, namely, coverage for a vessel while in commission and in dock. In my judgment, in the absence of clear words to that effect, a reasonable businessman would not find that a clause which wipes out the indemnity which it was the purpose of the policy to cover makes commercial sense.

34 Finally, the textual approach to the interpretation of the term 'moored' as used in exclusion clause 15 also leads to the conclusion that 'moored' does not include 'docked' as was argued by the Appellant. The word 'moored' is also used in exclusion clause 22. That clause reads as follows: 'No claim shall be allowed in respect of loss or damage to the vessel or liability to any third party or any salvage services caused by or arising from the vessel being stranded, sunk, swamped, immersed or breaking adrift, while left moored or anchored unattended off an exposed beach or shore.'

35 In my view, the express language of exclusion clause 22 suggests a restrictive interpretation of 'moored' as it excludes any claim for loss caused by the vessel being 'stranded, sunk, swamped…while left moored or anchored unattended off an exposed beach or shore.' This exclusion clause applies to a situation where the vessel is not off a dock or pier. Consequently, the expression 'moored' in this exclusion clause cannot logically include or be synonymous with 'docked'.

36 It is evident, then, that 'moored' in exclusion clause 22 is to be interpreted restrictively. It appears to me that, in the absence of clear words in a contract, similar words in a contract should be read as having a similar meaning everywhere in that contract. The upshot of the foregoing is that the word 'moored' in exclusion clause 15 should be interpreted consistently with the meaning of the word 'moored' in exclusion clause 22 that 'moored' does not mean 'docked' or 'in dock'.

37 To summarise, applying the *Blairmont* [25] principle of contextual interpretation to this appeal, it is difficult to resist the conclusion that the Court of Appeal was correct in adopting the technical meaning of 'moored'. I agree with Minott-Phillips JA's statement at [17] of her judgment where she said:

> 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".

38 For completeness, I would add that the court did not need expert evidence to come to its decision on the meaning of 'moored'. There was substantial judicial authority supporting its decision. In any event, no expert evidence was led before the High Court and subject to the

fresh evidence rule the Court of Appeal was restricted to the evidence led before the High Court.

Whether the Court of Appeal Erred in its Application of the *Contra Proferentem* Rule

39 The fifth ground of appeal raised by the Appellant is that the Court of Appeal 'erred in law in wrongly applying the legal principle of *contra proferentem*'. In this regard, the Appellant correctly contends that the *contra proferentem* rule is only applicable where the words to be interpreted are ambiguous. Indeed, this contention is supported by *Halsbury's Laws of England* (5th edn, 2023) vol 60, para 79 where it is stated: 'Where there is ambiguity in the policy the court will apply the contra proferentem rule. Where a policy is produced by the insurers, it is their business to see that precision and clarity are attained and, if they fail to do so, the ambiguity will be resolved by adopting the construction favourable to the insured.'

40 The problem with the Appellant's argument is that the Court of Appeal did not base its interpretation of the word 'moored' on the application of the *contra proferentem* rule. Minott-Phillips JA, who delivered the judgment of the court, after deciding that the word was to be interpreted in its strict meaning, stated obiter as follows:

> 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 proferentem* 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.

41 This is the only mention of the *contra proferentem* rule in Minott-Phillip JA's judgment. Respectfully, this could scarcely be described as an application of that rule by the Court of Appeal. To be clear, however, if it be contended that the word 'moored' in its modern usage could include 'anchored' or 'docked', then the exclusion clause would be unquestionably ambiguous. In such an event, as comprehensively explained in the judgment of Jamadar J, the *contra proferentem* rule would be operative and afford the policy holder the benefit of the ambiguity.

Conclusion

42 For all the foregoing reasons, this appeal is dismissed. The appellant shall pay costs in this Court and the courts below, to be assessed if not agreed.

Introduction

> *I desire nothing so much as that all questions of mercantile law shall be fully settled and ascertained; and it is of much more consequence that they should be so, than which way the decision is.* [26]

Jamadar J (concurring with Burgess J)

43 I have read the opinion of Burgess J and fully agree with his reasoning and decision that the appeal be dismissed. I only wish to add some comments on the applicability of the *contra proferentem* rule to this matter. A maxim which has been described as 'a principle not only of law but of justice'. [27]

44 At the Court of Appeal, the unanimous decision of the court is contained in the judgment of Minott-Phillips, JA. At [19] it was stated:

> **[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.

45 The Appellant has challenged this reasoning as a ground of appeal, contending that the Court of Appeal erred in law in wrongly applying the legal principle of *contra proferentem*. Burgess J has suggested that in fact the Court of Appeal did not base its interpretation of the word 'moored' on the application of the *contra proferentem* rule and that the reference to the rule was *obiter dictum*. I agree that any application of the *contra proferentem* rule by the Court of Appeal was at best incidental, and not essential to its decision.

46 However, in my opinion there is every good reason why the rule can properly be applied to the factual matrix in this case. I say so on the basis of:

(i) the meaning and relevance of the rule to exclusion clauses in 'take-it-or- leave-it' essentially standard form insurance contracts,

(ii) the principle of good faith,

(iii) seven discrete and intersecting features of this case, and

(iv) Caribbean policy considerations.

47 Having said that, I accept that in the construction of an insurance contract, the first duty of a court is to apply the *Blairmont*, [28] approach to the task of interpretation. [29] That is, to objectively consider the contractual language used, in context and holistically, and if necessary, to resolve rival contentions by applying commercial common sense and determining what is a commercially realistic interpretation (among other things, informed by accepted industry customs and practices, as well as established trade and technical usage – the background factual matrix). [30]

48 If that approach yields an acceptable meaning, that is the meaning to be ascribed. In this case, I agree with the analysis of Burgess J in this regard. Yet, *arguendo*, and accepting that Barrow J has also applied the *Blairmont* approach to yield a different and reasonably arguable meaning, then the *contra proferentem* rule assumes relevance in this matter. It does so even if only as a rule of last resort. [31] This is because, where genuine ambiguity is not resolved with sufficient clarity, and there are legitimately arguable rival contentions, then the rule steps in as a determinative aid to interpretation and application.

Analysis

49 At midnight, on 19 April 2019, in the midst of a storm, the Respondent's marine vessel sank. It was a parasailing boat, the 'Cast Away Flyer'. At the time, it was tied up securely in dock, at Tom's Boatyard in San Pedro, **Ambergris Caye**, Belize. **Ambergris Caye** is popular, especially among tourists, and well known for its

stunning natural beauty, aquamarine waters, and a barrier reef with thriving underwater life. The Respondent assumed its vessel was covered by the insurance policy it had with the Appellant, as coverage included vessels that were 'in dock'. Alas! Their claims were denied - coverage did not apply to vessels that were 'moored', said the Appellants, relying on an exclusion clause.

50 Just about five years later, the Respondent is still waiting to find out whether their vessel was in fact covered. As to the fate of the 'Cast Away Flyer' and the income it may have earned, the families it may have fed, the adventure and joy it may have brought to countless parasailers – we are not quite sure. What we are sure about is that justice must be done.

(i) Contra Preferentem

51 The *contra preferentem* rule is anchored in the fundamental values of fairness and equality.

52 The rule is a principle in contract law that applies to the interpretation of ambiguous or unclear terms in a contract. Translated from Latin, ' *contra proferentem*' loosely means 'against the offeror' or 'against the party who puts forward.' In fact, ' *contra proferentem*' is shorthand for the Latin maxim ' *verba cartarum fortius accipiuntur contra proferentem*' (literally, 'the words of documents are to be taken strongly against the one who puts forward').

53 This principle has a long history, dating from Roman times [32] and given prominence in medieval jurisprudence. [33] Thus, the associated principles ' *ambiguitas contra stipulatorem est*' and ' *ambiguitas contra venditorem est*', meaning, an ambiguity is construed against the drafter (' *stipulatorem*') or seller (' *venditorem*'). In both

instances, the principles dictate that vague or ambiguous terms or provisions should be interpreted in the manner most favourable to the position of the party other than the one who drafted the document or to the buyer, respectively. [34]

54 The principle can be understood rationally and conceptually, as follows:

(i) a party should not benefit from their default, and it is a fault to formulate a defective clause,

(ii) a party who drafted a contractual term should take responsibility for its formulation and should bear the risk of any ambiguity,

(iii) an ambiguity could have misled the other party and induced them to enter into the contract, and

(iv) these premises are amplified when there is unequal bargaining power and/or asymmetrical knowledge and understanding between the parties. [35] Thus, a working justification for the principle in terms of duty and responsibility is, that the party who has created the ambiguity and could and/or should have expressed themselves more clearly (duty), must bear the consequences of that failure (responsibility).

55 In the 17 th century, in the matter of *Manchester College v Trafford*, [36] the rule was applied in England. Lord Coke popularised the rule with his statement: '[I]t is a maxim in law, that every man's grant shall be taken by construction of law most forcible against himself.' [37]

56 Dr O N Ravi, [38] points out:

> However, later on William Blackstone came out with a combination of the rule ... with what was practiced during his time. He believed that the
>
> concept would effectively deter the parties from acting unfairly and it would ensure that the parties to the contract do not indulge in deceitful practice of couching ambiguous and indeterminate expressions with an intent to exploit later.

57 The values of fairness and equality are of particular relevance where in written contracts there is little or no opportunity for one party to bargain or negotiate contractual terms. The principle places the burden of ambiguity on the party who is most able to mitigate the uncertainty, typically the party who is instrumental in writing up the contract and who is considered the dominant party. The rule has therefore evolved as a means of safeguarding parties who have little say in and/or relatively less influence over contractual terms. It recognises and mitigates bargaining power imbalances in contractual relationships. As judicial policy, it seeks to resolve disputes on principles of fairness and equality and to promote transparency, clarity, and precision in the drafting of contracts. It does so typically in the context of asymmetrical power and knowledge relationships.

58 The general approach is summarised in *Halsbury's Laws of England* (5th edn 2023), vol 60, para 79, which provides:

> Where there is ambiguity in the policy the court will apply the contra proferentem rule. Where a policy is produced by the insurers, it is their business to see that precision and clarity are attained and, if they fail to do so, the ambiguity will be resolved by adopting the construction favourable to the insured. ... This rule, however, only becomes operative where the words are truly ambiguous...

59 Ambiguity must exist for the rule to apply. The *Halsbury*'s explains: '... it is a rule for resolving ambiguity and it cannot be invoked with a view to creating a doubt. Therefore, where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the rule has no application.' [39]

60 In such instances, of ambiguity in exclusion clauses in insurance contracts, the following approach is typical: courts generally interpret and apply the clause using a strict interpretation and in favour of the non-drafting party, typically the insured. This is especially so when insurers draft and present 'take-it-or-leave-it' standard form contracts. In short, given a range of legitimate interpretative choices, courts choose to resolve exclusion clause ambiguities of this nature in favour of the insured and against the party (insurer) seeking to diminish or exclude liability.

61 In *Cornish v Accident Insurance Co*, [40] the approach was put this way:

> [I]n a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

62 In more recent times there has been some movement away from a general default reliance on the rule, certainly where there is equality in bargaining power and in negotiating terms of agreement. Thus, in *Persimmon Homes Ltd v Ove Arup & Partners Ltd*, [41] the Court of Appeal of England and Wales stated: [42] 'The *contra proferentem* rule requires any ambiguity in an exemption clause to be resolved against the party who put the clause forward and relies upon it. In relation to commercial contracts, negotiated between parties of equal bargaining power, that rule now has a very limited role.'

63 Earlier, in *Taberna Europe CDO II plc v Selskabet AF1*, [43] the very court also stated:

> In the past judges have tended to invoke the contra proferentem rule as a useful means of controlling unreasonable exclusion clauses. The modern view, however, is to recognise that commercial parties ... are entitled to make their own bargains and that the task of the court is to interpret fairly the words they have used. The contra proferentem rule may still be useful to resolve cases of genuine ambiguity, but ought not to be taken as the starting point...

64 Nevertheless, in *Oxonica Energy*, [44] the operation of the rule was illustrated as follows:

> The maxim operates most comfortably in standard form contracts, where one side puts forward the document on take-it-or-leave-it terms. If, for example, an insurance policy contains a clause excluding losses caused by "floods", and damage is caused by water escaping from a burst domestic pipe, we would say: "Well, they should have put that more clearly, if they wanted to exclude 'floods' of that sort" (citation omitted).

65 In my opinion, the application of the rule can be especially important in insurance contracts which, in Caribbean contexts and as is well known, are characteristically pre-written by insurers, and which can contain general and technical terms, not always clearly defined, or explained. Its deployment also comes into the spotlight where exclusion clauses in insurance contracts are to be interpreted, such as exclusion clause 15 in this case. [45]

66 In the context of exclusion clauses in insurance contracts, Lord Bingham, in *Dairy Containers Ltd v Tasman Orient Line CV*, [46] was quite unequivocal:

> The general rule should be applied that if a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party: *Homburg Houtimport BV v Agrosin Private Ltd*
>
> [2004] 1 AC 715, 779, para 144, per Lord Hobhouse of Woodborough.

67 In India, the courts have taken a similar approach in cases of insurance contracts where standard form agreements are used. [47] In a 2020 decision, [48] the Supreme Court of India considered the application of the rule and explained that only in the event of vagueness or unclear expressions used in a clause, can the maxim be applied, and if on a reading of the entire insurance contract, the meaning was clear, then even an ambiguous clause in the contract may not make the *contra proferentem* rule applicable.

68 In Australia, the position seems to be as explained in *McMahons Tavern Pty Ltd v Suncorp Metway Insurance Ltd*, [49] a decision of the Full Court, Supreme Court of South Australia. In that case, although two readings of the impugned clause of the contract were possible, that fact of itself did not bring into play the *contra proferentem* rule. [50] It was held that rule was not relevant in that case because the construction of the clause advanced by the appellant was not strongly supported by argumentation and logic. [51] However, the usefulness of the rule was affirmed and described as contingent on: (i) 'the relevant words must be words (or words in an instrument) proffered by one of the parties', and (ii) 'it must be shown that the provision, when fairly read, is … "doubtful or ambiguous and reasonably susceptible of two constructions", or … "ambiguous or obscure, or uncertain in application or misleading".' [52]

69 The court cited with approval the statement of the law by Kerby J in *Johnson v American Home Assurance Co*: [53]

> More recently, it has been accepted that the contra proferentem principle may still be useful where each of the competing constructions is strongly supported by argumentation and where dictionaries and logic alone cannot readily carry the day for either party. Then, it is not unreasonable for an insured to contend that, if the insurer proffers a document which is ambiguous, it and not the insured should bear the consequences of the ambiguity because the insurer is usually in the superior position to add a word or a clause clarifying the promise of insurance which it is offering.

70 Internationally, Dr O N Ravi explains that 'international rules also contain specific provisions for " *contra proferentem*" as part of their rules', [54] citing:

(i) Principles for European Contract Law (PECL), Article 5.103, [55] and

(ii) UNIDROIT [sic] Principles of International Commercial Contracts (PICL), Article 4.6. [56] Dr Ravi makes the point that: 'While PECL seems to take out of the purview of the *contra proferentem* rule all individually negotiated contracts, the PICL appears to include all contracts for application of the principle of contra proferentem, though both seek to enforce the terms against the author or supplier of the same.' [57]

71 In this matter there is no indication that the policy was not produced by the insurers, or that the insured (Respondent) had any real and meaningful say in negotiating its terms. It is therefore reasonable to presume that it was prepared by the Appellant and presented as a 'take-it-or-leave-it' standard form agreement, as can be the general industry practice in the Caribbean. A court can take judicial notice of this. In any event, there is no evidence to the contrary.

72 There are also good reasons to conclude that exclusion clause 15 is ambiguous in relation to the meaning of 'moored', [58] as will be explained. Indeed, the meaning of

'moored' is central to the interpretation and application of the exclusion clause in this case. Thus, in this case it is entirely proper to apply the *contrapreferentem* rule in order to resolve the interpretation and application of exclusion clause 15.

(ii) Uberrima Fides - Utmost Good Faith

73 In both law and language, the principles of *uberrima fides* and *bona fides* are distinguished. The former means literally 'most abundant faith' and is usually rendered 'utmost/perfect good faith'. The latter, simply as 'good faith', meaning real or genuine and without intention to deceive. The difference is qualitative, and it is the former that is applicable to marine insurance law. Interestingly, whereas a lot of attention is placed on the insured's duty of utmost good faith, this is in fact a mutual obligation that also binds an insurer. [59]

74 In Canada, the Supreme Court, in *Bhasin v Hrynew*, [60] has clarified Canadian common law in relation to the good faith principle in contracts. [61] First, the court explained that good faith contractual performance is a general organising principle of the common law of contract. Second, there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. According to the court, this good faith organising principle is a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations. It is a standard that helps to understand and develop the law in a coherent and principled way.

75 This Court, in *Sandy Lane Hotel Co Ltd v Cato*, [62] recognised the need to develop the Caribbean common law by including the good faith principle as an underlying concept implied into certain contracts. As the Court explained: 'The genius of the common law, however, is that when judges perceive gaps in the common law, they

are empowered incrementally to fill them.' [63] In *Sandy Lane*, the Court proceeded to introduce the principle of good faith into every contract of employment by implying 'a term of "mutual trust and confidence."' [64] The Court opined, that in Caribbean contract law: 'Under the modern law of employment, contractual terms are subject to an overriding obligation of trust and respect.' [65]

76 Indeed, and as this Court observed in *Sandy Lane*, [66] in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*, [67] the principle that has in fact been implied into employment contracts in the UK is 'the implied obligation of good faith'. [68] In Caribbean terms, 'a mango by any other name would taste just as sweet', and so whether called 'mutual trust and confidence' or 'good faith', the substantive principle is the same.

77

Historically, s 17 of the UK Marine Insurance Act 1906 codified the common law duty of utmost good faith in insurance law. [69] Section 17 stated: 'A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.' It appears that the 1906 UK Act has been treated as also declaring the common law of Belize. [70]

78 The historically prescribed remedy for a breach of the duty was avoidance of the policy, rendering it *void ab initio*, as if it never existed. Such was the importance of good faith dealings in insurance agreements. [71] Notice also that the common law placed this duty on all parties.

79 Earlier, in 1766, in *Carter v Boehm*, [72] Lord Mansfield had explained the essence of this good faith duty of disclosure in the context of insurance contracts, as follows: 'Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.'

80 In *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd*, [73] this Court would point out that the good faith principle in insurance law: 'It is one that adds greater balance and fairness to the proposer-underwriter, insured-insurer contractual relationship.' [74] This principle of good faith is applied to all types of insurance. [75] It assumes special significance when dealing with standard form, 'take- it-or-leave-it', insurance contracts in which insurers place reliance on exclusion clauses which use industry specific technical terms - such as 'moored' in clause 15 in this case.

81 There is every good reason to imply and/or confirm a similar requirement into insurance contracts and to do so in relation to both the making and performance of the agreement. The principle of good faith is thus a general organising principle in insurance contracts that informs the interpretation and application of the law.

82 This general principle of good faith demands that all parties to an agreement act with integrity and deal fairly with each other. It creates duties and responsibilities in the making and performance of a contract. It is relevant at stages leading up to an agreement and prior to actual performance. That is, it can demand that parties deal honestly and fairly throughout the

process of arriving at an agreement, and that the agreement itself is the fruit of this process. In concrete terms and relevant to this case, good faith as fairness requires appropriate clarity and precision (disclosure) of the meaning of terms used in contracts, especially where those terms

are technical and contained in exclusion clauses of standard form insurance contracts.

83 Thus, the *contrapreferentem* principle will not usually apply where both parties are considered to be on equal footing and have in fact had an opportunity to and have negotiated terms in good faith. If these conditions exist, then any ambiguity in a contract should be interpreted according to the intentions of the parties and the terms of the contract, leaving little room for the application of the *contra proferentem* rule.

84 However, in the case of a standard form, 'take-it-or-leave-it' insurance contract, especially where there is an imbalance in bargaining power, the position can be that ambiguities in exclusion clauses may be resolved against the party who drafted it (insurer). This is because, one function of good faith is to avoid opportunistic behaviours that would take advantage of situations uncontemplated by the 'weaker' party (the insured) and contrary to a reading of the agreement properly construed that favours that party. Such ambiguity, which could and/or should have been avoided, can result in the application of the *contra proferentem* rule with its consequent implications.

85 Thus, in the same way that an insured is bound, under penalty of policy avoidance, by the good faith duty; [76] correspondingly, and as an offshoot of the good faith principle, the *contra proferentem* rule may be applied against the insurer. This may occur if their contracts set out exclusion clauses that give rise to ambiguities in meaning in relation to coverage exclusion, especially if those ambiguities could and/or should have been avoided.

(iii) Seven Features Indicating Ambiguity

86 There are seven features of this case that, in my opinion, intersect and in their combination render exception clause 15 ambiguous, for the purposes of applying the *contra proferentem* rule. First, marine insurance law is a specialised area of insurance law and has been so for a very long time. The Marine Insurance Act 1906 (UK) is entitled: 'An Act to codify the Law in relation to Marine Insurance', and its substantive content amply illustrates this, even on a

casual reading, [77] Second, marine insurance is an area of law in which specific terms are used that self- evidently have specific commercial and trade usage meanings. That is, marine insurance contracts include and deal with prima facie technical and industryspecific terms. The policy in question and the very issues before this Court around the meaning of 'moored' are poignantly illustrative.

87 Third, in the instant contract there are no definitions of the terms 'moored' or 'docked', when defining them could have been reasonably undertaken and would have provided clarity and certainty to all parties. Fourth, no expert evidence called to explain industry usage or customary interpretations (meaning) of the terms 'moored' or 'docked', whether as understood in the Caribbean or generally. This Court has been left to research and discover, based on rivalling contentions, the meaning(s) of 'moored' in clause 15. Resort to dictionaries (legal and otherwise), maritime handbooks, and some measure of lived seafaring experience - which we Caribbean people have in abundance (living on the seas as we do), have been the ports at which the Court has had to call upon.

88 Fifth, this search for meaning has revealed a multiplicity of nuanced and even inconsistent possibilities as to what 'moored' may mean in maritime affairs and in the context of clause 15. For example, the *Oxford Companion to Ships and the*

Sea, [78] offers at least three alternative meanings, classified as 'strict meaning', 'loose usage', and 'also used', as follows:

> Moor, to. In its strict meaning the condition of a ship when it lies in a harbour or 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. The word is also loosely used to describe other ways of anchoring a ship, e.g. when a ship has a stern anchor laid out as well as a bow anchor, it is said to be moored head and stern. It is also used to describe a vessel which is secured head and stern to a "quay; or alongside another vessel, with "berthing hawsers; or which lies with the bow or stern secured to a quay with anchor laid out from the bow or stern, in which case a "passerelle is often used to gain access to the quay.

89 It appears thus, that a vessel is typically considered 'moored' when it is secured in a fixed position in the water, typically by anchors or mooring lines to a buoy, or another fixed structure. The vessel is not necessarily alongside and secured to a structure like a dock or wharf but is held in place by its anchoring equipment.

90

In contrast, a vessel is generally considered 'docked' when it is secured in a fixed position alongside a dock or wharf, or another type of docking facility. The vessel is, characteristically, physically connected to a fixed structure on the shoreline. In maritime usage in the Caribbean, and in Trinidad and Tobago in particular, a 'dock' (noun) is explained as follows: 'A dock is a structure built along, or at an angle from, a navigable waterway so that vessels may lie alongside to receive or discharge cargo. Sometimes, the whole wharf is informally called a dock.' [79] And 'docked' (verb) as meaning: 'To bring in a vessel to tie up at a wharf berth.' [80] In Belize, the Belize Port Authority Act [81] speaks of … any wharfs and docks constructed along

the foreshore …, with obvious resonances to the understandings in Trinidad and Tobago.

91 The etymology of the word 'dock' indicates the following: From early modern English 'area of mud in which a ship can rest at low tide, dock', borrowed from Dutch dok ('dock') or middle low German docke ('dock, ship's dock'), both from Middle Dutch *docke* ('port, harbour, roadstead'), of uncertain origin. [82] One may reasonably conclude that in the maritime industry a dock is usually considered to be a fixed structure attached to the shoreline to which a vessel may be secured, including for purposes of loading and unloading. [83] In this sense, 'docking' and 'mooring' of maritime vessels are, on the face of it and without more explanations, very different activities, and occurrences.

92 How therefore is determinative interpretative choice to be made as to the meaning of 'moored' as used in exclusion clause 15? What is right and what is wrong? What did the insurers intend? What did the insured expect?

93 Sixth, little wonder that this case has tossed up, as it were on tumbling seas, differences in judicial interpretations as to meaning. The trial judge and two judges of this Court agree on one interpretation, and the three judges of the Court of Appeal and three from this court agree on other meanings. To my mind, given that these different interpretations are reasonably arguable, this is also proof of reasonable contextual ambiguity.

94 Seventh, the wide-ranging exclusion that results if clause 15 is given the Appellant's interpretation, renders the purported coverage for vessels in commission and 'in dock' virtually otiose. If every vessel that is tied up 'in dock' is also moored, then no vessel tied up in dock or in port, or in a marina is covered

- wither the coverage held out in section 1 of the Policy! [84] Such an interpretation reaches rationally and analytically into the realms of uncertainty, and surely invokes the application of the *contra proferentem* rule as an aid to resolving the contentions as to meaning. It is sufficient to repeat the observations made in *McMahons Tavern Pty Ltd v Suncorp Metway Insurance Ltd*, [85], to wit: 'it must be shown that the provision, when fairly read, is … "doubtful or ambiguous and reasonably susceptible of two constructions", or … "ambiguous or obscure, or uncertain in application or misleading".' [86]

(iv) Policy Considerations

95 In reality, the *contra proferentem* rule is not technically one of interpretation, as it does not assist in determining the meaning of words or language used *per se*. It is more akin to judicial policy deployed in support of interpretation. Thus, the view that it is a rule of last resort. In a practical sense this is true, the rule is applied when the usual methods of interpretation are unable to resolve the material ambiguity. In plain terms, it is a default rule that fills a gap in interpretation which unfavourable consequences for the dominant contracting party, in this case the Appellant.

96 The rule has been described as 'an information-forcing rule'. [87] That is, the rule as judicial policy promotes commitment and efforts to continuously review and revise standard form contracts to ensure optimal clarity and precision to standards of reasonableness. This especially where industry specific and technical standardised

> **We insure your vessel**, machinery and equipment as described on the declaration page.
>
> PERIL 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 inland water or **in port, docks, marinas**, on way, pontoons, or at a place of storage ashore …

terms are used. Such a policy fulfils the principle of good faith and satisfies the value of fairness.

97 From a maritime insurance perspective, the specific terms used in a policy and the circumstances surrounding the vessel's status can potentially impact coverage, as in this case. Here coverage purported to include vessels in commission and in dock. [88] Both of which

conditions were met by the Respondent. Indeed, it is agreed that the Respondent's vessel was docked as a matter of fact and law. However, the policy also created an exemption for vessels that were 'moored' (unless the loss resulted from collision with another vessel). [89] Hence the dispute: can a vessel that is indisputably 'docked' also be 'moored' for the purposes of exclusion clause 15?

98 It is crucial for vessel owners and insurers to clearly define and be able to understand these terms within the context of their insurance agreements, to ensure that the parties are *ad idem* and that the coverage provided aligns with the vessel's intended and actual uses. Uncertainty is anathema. Clarity and precision in the use and meaning of terms, especially in relation to exclusion clauses, is incumbent and part of the duty of good faith. Clarity and precision should be expected when it could be done.

99 Where insurance contracts are agreed but there is unequal bargaining power and terms are dictated by the insurer, then the duty and obligation of clarity and precision falls upon the insurer. Failure based on ambiguity, which could and/or should have been avoided, can result in the application of the *contra proferentem* rule with its consequent implications. Such a judicial policy is anchored in the values of fairness and equality, and in the obligation of good faith set to a standard of reasonableness.

100 In Caribbean states, whatever else may the trends in other jurisdictions, the use of the *contra proferentem* rule in instances such as this one, remains relevant. This is so for all the reasons outlined above, and as well in order to protect the interests of ordinary persons, whose economic and bargaining power remain disadvantaged relative to national, regional, and trans-national insurance service providers. In Caribbean spaces, this disadvantage also extends to the relative interpretation and comprehension capacities of parties.

Conclusion

101 Applying the *contra proferentem* rule in this case entails choosing a meaning of 'moored' that is fairest to the Respondent (insured). The choice is context driven, where on one hand coverage has been assured for vessels in commission and in dock ('docked' as typically understood in maritime affairs), and on the other hand excluded for vessels that are 'moored'. That meaning, as explained by Burgess J, is the more restrictive and technical meaning of the

term ‘moored’ as used in maritime affairs. Thus, the ‘mooring’ exception in this case, does not apply to a vessel that is secured in a fixed position alongside a dock or wharf, or another type of docking facility.

102 In the broadest policy sense and in the context of standard form contracts, the *contra proferentem* rule encourages insurers to draft clear and precise contracts and exclusion clauses. This increases the chances that all range of insured persons will understand the benefits and burdens of their agreement. What is required, as part of the good faith duty, is substantive clarity. A reasonable reader ought to be able to understand and be clear as to their rights and responsibilities, especially with exclusion clauses.

103 This opinion also demonstrates how two significant civil law principles (*uberrima fides* and *contra proferentem*) have been engrafted and become embedded in the common law. As core values both have operated in ways to advance fairness and equality, especially in circumstances of asymmetrical power and knowledge. It is unsurprising that we can turn to Canada and Saint Lucia for jurisprudential insight, as both are mixed law jurisdictions. In Caribbean spheres we need to become more cognisant of our civil law influences, and to remind ourselves that Saint Lucia and Guyana (both of which have acceded to the Appellate Jurisdiction of the Caribbean Court of Justice) have deep civil law origins and continuing legal influences; and, as well, that within the wider Caribbean Community (‘CARICOM’) family of nations the same is also true. Comparative legal analysis can help indigenise Caribbean jurisprudence for the better.

Barrow J (dissenting and with whom Saunders P concurs):

104 This appeal is from the trial of a preliminary issue in a claim by Kahtal Resorts International Ltd (Kahtal) against Insurance Corp of Belize Ltd (‘ICB’) for payment of the sum insured under a policy of marine insurance. The insurer denies the claim as being an excepted peril.

<u>The Claim</u>

105

The vessel ‘Cast Away Flyer’ was insured by ICB. At midnight on 19 April 2019, when the vessel was docked afloat at Tom's Boatyard in San Pedro, **Ambergris Caye**, by being tied to a pier bow and stern, there was a thunderstorm, and the vessel took on water and sank.

106 Kahtal sought to recover under the policy, but ICB asserted that the loss was not covered and relied on an exclusion clause in the policy at section 1, exclusion 15 which disallows claims for ‘loss or damage while the vessel is moored unless such loss and damage results from collision with another vessel’.

107 Before the High Court, the parties agreed to deal with the interpretation of the exclusion clause as a preliminary point to determine whether the exclusion clause operated to exclude cover. This question turns on the meaning of ‘moored’. The learned trial judge found that when a vessel is docked it is moored and therefore the exclusion clause applied, and she dismissed the claim. Kahtal appealed to the Court of Appeal and that court upheld the appeal, holding that on the strict meaning of the word ‘moor’ the vessel was not moored but docked. ICB now appeals to this Court.

The Policy

108 The provisions of the policy to be interpreted are at section 1, exclusion 15. These state:

> 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 or damage results from collision with another vessel.
> >
> > ...

The Decisions

109 In a comprehensive and well-reasoned decision, Young J gave judgment in the High Court upholding ICB's denial of the claim. She found that a vessel which was tied bow and stern to a jetty in a marina or dock was moored.

110 In the Court of Appeal, in a succinct and clear judgment with which the other members of the court concurred Minot-Phillips JA reversed the first instance decision and decided in favour of Kahtal. She held that a vessel which was moored was one that was tied at the bow to a mooring and that could swing freely to the tide.

The Meaning of Moored

111 The strongest argument for ICB on its appeal to this Court is encapsulated in its ground of appeal which asserts that the Court of Appeal erred in failing to appreciate that whatever definition may be given to the word ‘moor’, including swinging to the tide or not, the exclusion clause applied. A close examination of this argument reveals that its thrust is that the meaning of the word is not so much in issue as what risk was it used and intended to exclude. As ICB

urged, the exclusion clause must be considered to see when the insurer is at risk. The following passage from the High Court decision at [39], was cited in ICB's written submissions to bring home the point about risk:

> 39. The Court also finds ... [Mr Eamon Courtenay SC's] words ... [in] 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.

Understanding the Exclusion

112 Much effort was given at both levels, by counsel and the bench, in examining the meaning and usage of the word 'moored'. These efforts may now be extended to looking at the practice in the marine insurance industry regarding insuring moored vessels. Such a review would be valuable for appreciating the context of a policy such as the one presently in issue, since ICB would not have invented the current policy, which may be presumed to be stereotypical, given that maritime insurance is an international industry and reinsurance of local insurers by international reinsurers is the norm. The copy of the policy produced to the court indicates a standard form, pre-printed, off-the-shelf contract that seems to contain no modification that tailors it to the requirements of this insured or the usage of this vessel. It would be helpful to consider whether there is a general industry practice regarding insurance cover for a moored vessel.

113 A most helpful insight is provided in an article 'Keeping It Shipshape With Maritime Insurance' published in Australia by Vaarzon-Morel Maritime Solicitors. [90] In Australia, marine insurance policy contracts are governed by the UK's Marine Insurance Act 1906 ('MIA'). Under the MIA contracts of marine insurance are limited to marine losses which are incidental to the 'marine adventure'. As defined in MIA, marine adventure occurs when any ship, goods or movables are exposed to maritime perils, that is perils consequent on or incidental to the navigation of the sea. Marine perils include perils of the sea and a host of others.

114

In laymen's terms, maritime insurance contracts can cover a variety of incidences, goods and damage depending on the policy. Given the varied uses of crafts there really is no one-size-fits-all policy when it comes to marine insurance. Therefore, the article observes, it is important to consider what policy will best serve the owner's needs in the event of the unexpected, such as loss and the effect of rough weather. This observation is shown to be of seminal importance as borne out by the facts of this case.

115 The article considers the matter of moored vessels and gives immediate focus to the scenario where a cyclone or powerful storm rolls in and literally rips boats from their moorings and drives them into one another or forces them onto the land. In circumstances such as this the question arises who bears the cost of paying for any damage, the boat owner, the insurer or the provider of the mooring.

116 Significantly for our purposes, the article identifies as 'one major area of risk minimisation amongst maritime insurance providers … the refusal of some boating insurance providers to cover damage to or caused by moored vessels; some major insurance providers will only cover damage to a boat caused *when it is actually in use*' (emphasis added). It is also significant that the article matter-of-factly observes 'that mooring failure is a frequent cause of loss [so] it is important to consider the amount of potential loss which could be caused to and by your vessel while it is moored.' This harks back to the seminal observation that it is important that a person purchasing a policy should consider what cover will meet their need.'

A Stationary Vessel

117 A fundamental starting point on the interpretation of the present exclusion clause is that it is directed at vessels which are stationary and not in motion. The review provided by the article indicates in clear terms that as a general matter, insurers across the industry are attuned to the peril of a stationary vessel as opposed to one underway. It is a peril that insurers reflexively avoid; they will limit cover to a vessel actually in use. That knowledge accords with the submissions of ICB as to the avoidance of risk and helps to give it context. While not definitive, the formulation in the policy that the vessel is covered 'While in commission at sea or … in … docks …' is indicative because the everyday meaning of 'in commission' 91 is 'in use or in service'. [91]

118 This fully supports ICB's submission that what the policy intended was to exclude from cover a stationary vessel and it does not matter that what it calls a moored vessel, on another's definition, may be called a docked vessel to distinguish the way it is tied up. The Court of Appeal erred in giving exclusivity to a strict definition that was favorable to the insured. They failed to realise that it was not a matter of choosing between meanings but what the word, capable of both uses, was intended to cover. The meaning for which the insurers opted was fully available. It was a matter of what the policy intended in its use of the word. And there was nothing to preclude the word from intending to refer to and excluding cover for a stationary vessel. It is, again, important to remember that this was a standard form policy offered by the insurer that was intended to cover the perils they were accustomed to cover as acceptable risks and to exclude from cover those perils they regarded as unacceptable risk.

The Everyday Meaning

119 In the High Court, Young J relied on the case of *Evans v Godber*, [92] which is strong persuasion for the proposition that the word mooring is used loosely among even maritime people and, more, that it is used in its ordinary English language sense. The case concerned the prosecution of a defendant for mooring his boat overnight in a body of water in which a regulation stated persons should not moor vessels. The defendant contended, among other things, that the yacht was 'anchored,'

whereas the bye-laws only prohibited 'mooring'. The defendant appealed his conviction.

120 The following extracts from 1324 - 1325 provide a full discussion by Lord Widgery CJ:

> The result of looking at the dictionaries, so far as one should be properly guided by them, is that the word “moor” is not necessarily exclusive of the word “anchor,” and there are at least some circumstances in which it is proper to describe a vessel as moored even though she is secured by one or more anchors.
>
> Going to the authorities on this point, I do not propose to make a reference to some of the older ones, because there is enough modern learning, I think, to take a proper view of this case. I take first the decision of Hewson J. in *The Alletta and The England* [1965] 2 Lloyd's Rep. 479. It was a very complicated case involving such questions as whether the captain's wife was a passenger and many other matters which do not concern us ‘today, but Hewson J. deals with our problem, at p. 489:
>
> > “A mooring connotes to me the securing of a ship to some fixture, some permanent fixture, ashore or in the river and does not in any event include riding to a single anchor....”
>
> Mr Steel, not unnaturally, has drawn our attention to that with some enthusiasm, because if that is right then the defendant's yacht on this occasion riding to a single anchor would not have been at a mooring in Hewson J's view. But when he comes to deal with “mooring” as a noun rather than a verb, he recognises that this is not an exclusive meaning, at p. 490:
>
> > “Researches into the meaning of the word ‘moor’ or ‘mooring’ in seamanship text books, both old and new, including *Falconer's Marine Dictionary* (1815) (which is generally accepted as being the most reliable of the many editions of that work which were published in the last century), have shown that the word is, and has been used for the last 150 years, in a very general way to embrace the use of the ship's own anchors and cables — even, exceptionally, anchor and cable —...”
>
> So from the authority of a judge learned in these matters one has recognition of the fact that in recent years there has been a certain laxity in the meaning attributed to the words “mooring” and “anchoring” in this context.

121 Lord Widgery drew upon further authority to support the conclusion that ‘mooring’ was not to be interpreted in a restricted or strict sense. He said:

> Support for that view is to be obtained from a judgment of Neville J. in *Liverpool and North Wales Steamship Co. Ltd. v. Mersey Trading Co. Ltd.* [1908] 2 Ch. 460. Neville J. in the course of a short judgment said, at p. 474:
>
> “The question is what is meant by the word ‘mooring.’ Does it, as used here, include the case of a vessel merely coming alongside to embark or disembark passengers? 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 ...”
>
> In the face of that authority and such guidance as one gets from the dictionaries, it seems to me that this is not a case in which it is possible to say that the word “mooring” has one clear and fixed meaning and no other. It evidently has certain shades of meaning according to those who use it and the circumstances in which it is used, and where that situation is once reached it becomes clear from a recent authority of the House of Lords that the matter is really to be treated as a matter of fact for the justices and not a matter of law for this court. I refer to *Cozens v. Brutus* [1973] A.C. 854, and more especially to the speech of Lord Reid, at p. 861. That was a case which involved the meaning or the word “insulting” as applied to insulting behaviour. Lord Reid said:
>
> > “It is not clear to me what precisely is the point of law which we have to decide. The question in the case stated for the opinion of the court is ‘Whether, on the above statement of facts, we came to a correct determination and decision in point of law.’ This seems to assume that the meaning of the word ‘insulting’ in section 5 is a matter of law. And the Divisional Court appear to have proceeded on that footing. In my judgment that is not right. *The meaning of an ordinary word of the English language is not a question of law*. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word ‘insulting’ being used in any unusual sense....” (emphasis added)

122 Lord Widgery continued:

> I think that comment could be repeated exactly in reference to the word "mooring" in the present case. It seems to me that it is a perfectly ordinary English word and that the proper attitude towards it is to say that the meaning given to it is primarily a matter of fact for the justices. If the justices had held that the dropping of an anchor for some period of minutes, even perhaps for an hour or two, I know not, had amounted to a mooring, then questions might have arisen whether that was not too strict a meaning which the word could not possibly attract; but in the present circumstances, where the yacht remained at anchor, although sometimes grounded, throughout 24 hours, it is impossible in my judgment to say that the justices reached a conclusion which they were not entitled to reach, and I think we should be wrong to disturb their finding. …

123 So, while there is no discussion of moored as embracing docked, the case is clear on the point that moored is a word of general use even among seafarers and, equally, there is no principle of law which drives a court to search for a specialised or technical meaning. As derived from the highest English authority, the meaning of moored is not a question of law but a question of fact. That being so in determining its meaning in a penal statute, it could hardly be any less so in a contract of insurance.

The Distinction with Docked

124 Considerable effort has been given in the courts below and in this Court to the contrast to be drawn between a vessel which is 'docked' and one which is 'moored' but, with respect, I find this misleading. There is no contrasting to be done because the policy does not use docked.

125 It is an easy mistake to make because of the cover in the policy of a vessel 'While in commission at sea or on inland waters or in port, docks, marinas, on ways …' The error is to convert this to say that a purpose of the policy was to provide coverage for a vessel while in commission and docked.

126 This is erroneous because a vessel which is 'in port, docks, marinas …' is not a vessel which is docked. There is a world of difference between a vessel *in docks*and a vessel which *is docked*. As defined in the Oxford Languages dictionary *docks* (the plural noun) means 'an artificially enclosed area of water in a port for the loading, unloading, and repair of ships.' [93] The dictionary identifies as similar, the words 'harbour' and 'marina', which are the same words as appeared in the policy cover. It is therefore the fact that a vessel is covered while it is any of these enclosed bodies or areas of water. That cover would apply to a vessel while in commission and moving on or in those bodies of water. Such a vessel is not docked, in the same way it is not 'ported' or 'marinaed'. To repeat, it provides no assistance to contrast docked and moored vessels because it is *not* the case that there is cover of the former to distinguish it from exclusion of cover for the latter. The effort spent in discussing that there is cover for a

vessel while docked proceeds upon a misconception. The policy does not cover a vessel while it is docked; there is nothing in the policy that says it does. That point would seem beyond dispute.

127 Therefore, to conclude, a moored vessel is a stationary vessel and, by whatever other name it is called, such a vessel is excluded from cover. When the insurers sold this standard form policy, they were selling a policy that covered acceptable risks as predetermined by them (and their reinsurers) and an insured person should not succeed in urging that the amplitude of the exclusion should be restricted.

Orders of the Court

128 The following are the orders of the Court:

1. The appeal is dismissed; and

2. The appellant shall pay costs to the respondent in this Court as agreed between the parties in the sum of BZD $24,000.00.

/s/ A Saunders

Mr Justice A Saunders (President)

/s/ M Rajnauth-Lee

Mme Justice M Rajnauth-Lee

/s/ D Barrow

Mr Justice D Barrow

/s/ A Burgess

Mr Justice A Burgess

/s/ P Jamadar

Mr Justice P Jamadar

[1] [2013] 1 WLR 2477.

[2] *McGraddie* (n 1).

[3] H Beale (ed), *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) vol 1 para 12-047.

[4] [2002] 2 SCR 235 at [26] – [36].

[5] *McGraddie* (n 1).

[6] *Rainy Sky SA v Kookmin Bank* [2012] 1 All ER 1137 at [14].

[7] [1998] 1 WLR 896 at 913.

[8] [2021] CCJ 7 (AJ) GY, [2021] 5 LRC 433 at [71] – [72]; applied in ***Caye*** *International Bank Ltd v Rosemore International Corp* [2023] CCJ 4 (AJ) BZ.

[9] [2017] AC 1173.

[10] *Blairmont* (n 8) at [71] – [72] (footnote omitted).

[11] John Birds, Ben Lynch and Simon Milnes, *MacGillivray on Insurance Law: Relating to All Risks Other Than Marine* (13th edn, Sweet and Maxwell 2015) para 11-001.

[12] Jonathan Gilman and others, *Arnould Law of Marine Insurance and Average* (20th edn, Sweet and Maxwell 2021).

[13] *Investors Compensation Scheme Ltd* (n 7).

[14] [1803-13] All ER Rep 350 at 353.

[15] [1999] 1 AC 266 at 274.

[16] [1897] 2 QB 318 at 320.

[17] ibid at 324.

[18] [2013] Ch 488 at 491.

[19] Earl R Hinz, *The Complete Book of Anchoring and Mooring* (rev 2nd edn, Cornell Maritime Press 2009).

[20] [1908] 2 Ch 460.

[21] [1965] 2 Lloyd's Rep 479.

[22] [1974] 1 WLR 1317.

[23] [2017] AC 73.

[24] [1993] 1 WLR 996 at 1003.

[25] *Blairmont* (n 1).

[26] Lord Mansfield, in *Buller v Harrison* (1777) 2 Cowp 565, 98 ER 1243.

[27] *Association of British Travel Agents Ltd v British Airways plc* [2000] 2 All ER (Comm) 204 (Sedley J).

[28] *Blairmont* (n 1).

[29] ibid.

[30] See also *Investors Compensation Scheme Ltd* (n 7) (Lord Hoffmann): 'Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'

[31] *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyds Rep 339 at [27] (Lord Mance). Compare, *Lexi Holdings plc v Stainforth* [2006] EWCA Civ 988 at [17] – [18]: '[17] To each of those contentions the other can fairly say that it is not what the agreement says. In such circumstances the court has to do the best it can on the basis of the intended purpose of the arrangement as understood by both parties, the practical consequences of the alternative contentions, and such other tools as the law makes available in such cases. [18] One of those tools is the so-called " *contra proferentem*" rule.'

[32] *Oxonica Energy Ltd v Neuftec Ltd* [2008] EWHC 2127 at [90] – [91]. At [90]: 'In the classical period of Roman law the principle seems to have been applied … to situations where in practice one side alone had the opportunity to formulate the wording.'

[33] See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 640.

[34] See Peter Cserne, 'Policy Considerations in Contract Interpretation: the Contra Proferentem Rule from a Comparative Law and Economics askaberspective' (Hungarian Association for Law and Economics, No 5, Working Papers 2007) 7.

[35] ibid 11-12.

[36] *Manchester College v Trafford* (1678) 2 Show 31, 89 ER 774.

[37] Co Litt 36a.

[38] O N Ravi, 'The Contractual Interpretation Rule - Contra Proferentem: It's Relevance in Modern Law' (2020) 2 CMR Univ J Contemp Legal Aff 112, 117.

[39] *Halsbury's Laws of England* (5th edn, 2023) vol 60, para 79 (footnotes omitted).

[40] *Cornish v Accident Insurance Co* (1889) 23 QBD 453 at 456. See also, more recently, *Dairy Containers Ltd v Tasman Orient Line CV* [2005] 1 WLR 215 at [12] (Lord Bingham): 'The general rule should be applied that if a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party.'

[41] 172 Con LR 1.

[42] ibid at [52]. See also, *Taberna Europe CDO II plc v Selskabet AF1* [2017] QB 633, where the exclusion clause was considered sufficiently clear.

[43] [2017] QB 633 at 647.

[44] *Oxonica* (n 36) at [91].

[45] See Lesley A Walcott, *Commonwealth Caribbean Insurance Law* (Routledge-Cavendish 2019) 197. See also, Cserne, 'Policy considerations in contract interpretation' (n 38) 16: 'Insurance law is probably the legal area where the *contra proferentem* rule has been most frequently invoked.'

[46] [2005] 1 WLR 215 at [12].

[47] *General Assurance Society Ltd v Chandmull Jain* (1966) 3 SCR 500 and *United Insurance Co Ltd v Pushpalaya Printers* (2004) 3 SCR 631.

[48] *Sushilaben Indravadan Gandhi v New India Assurance Co* (2021) 7 SCC 151.

[49] [2004] SASC 237.

[50] ibid at [7].

[51] ibid at [8].

[52] ibid at [4].

[53] (1998) 192 CLR 266 at 275.

[54] *Ravi* (n 42) 125 – 126 (footnote omitted). See also, Ayse Nihan Karadayi Yalim, 'Specific Rules of Interpretation' in *Interpretation and Gap Filling in International Commercial Contracts* (Intersentia 2019) ch 3, 79.

[55] *Ravi* (n 42) art 5.103: Contra Proferentem Rule, in the section headed 'Chapter 5: INTERPRETATION', states: " *where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred*".

[56] ibid art 4.6, in the section headed 'Chapter 4 – INTERPRETATION', states: (Contra proferentem rule) " *if contract terms supplied by one party are unclear, an interpretation against that party is preferred.*"

[57] ibid 126.

[58] Exclusion clause 15 states: 'no claim shall be allowed in respect of loss and/or damage while the vessel is moored unless such loss/damage results from collision with another vessel.'

[59] See *Naraya Lamart, 'Certainty v Equity: A Case for Reform of the Duty of Utmost Good Faith?'* (2018) 32 A&NZ Mar LJ 59. See also, s 17, Marine Insurance Act 1906 (UK).

[60] [2014] 3 SCR 494.

[61] ibid.

[62] [2022] CCJ 8 (AJ) BB at [67] - [68].

[63] ibid at [67].

[64] ibid at [68] (footnote omitted).

[65] ibid at [68] (footnote omitted).

[66] ibid at [68].

[67] [1991] 1 WLR 589.

[68] ibid at 597 (Sir Nicolas Browne-Wilkinson VC): 'In every contract of employment there is an implied term: … I will call this implied term "the implied obligation of good faith".'

[69] Howard Bennett, 'The Marine Insurance Act 1906: Reflections of a Centenary' (2006) 18 SAcLJ 669.

[70] *Lighthouse Reef Resort Ltd v Regent Insurance Co* BZ 2005 SC 25 (CARILAW), (31 May 2005) (Awich J).

[71] *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) BB.

[72] (1766) 3 Burr 1905; 97 ER 1162 at [1910].

[73] *Apsara Restaurants (Barbados) Ltd* (n 75).

[74] *Apsara Restaurants (Barbados) Ltd* (n 75) at [433].

[75] *Apsara Restaurants (Barbados) Ltd* (n 75).

[76] ibid.

[77] The 1906 Act was a codifying statute. It was the work of the legal draftsman Sir Mackenzie Chambers and was singularly intended to state the law as it was at that point in time. However, while it codified the law relating to marine insurance, the general principles apply equally to all types of insurance contracts, and the Act has operated in practice as a codification of general insurance contract law. See Bennett (n 73) 670 - 672.

[78] I C B Dear and Peter Kemp, *Oxford Companion to Ships and the Sea* (2nd edn, Oxford University Press 2006) 371 - 372. Considered, by many, to be the definitive reference of the seafaring history of the world.

[79] Port Authority of Trinidad and Tobago, 'Glossary of Maritime Terms' > accessed 4 February 2024.

[80] ibid.

[81] Belize Port Authority Act, CAP 233, s 21(1).

[82] 'Online Etymology Dictionary' (11 December 2020) < https://www.etymonline.com/word/dock> accessed 4 February 2024.

[83] According to Bryan Garner (ed), *Black's Law Dictionary* (8th edn, Thomson West 2004) 'dock' is defined as: 'A structure that encloses water, often between two piers, in which ships are received for loading, unloading safekeeping, or repair.'

[84] Section 1 Coverage: Your Property, Property Insured

[85] *McMahons* (n 53).

[86] ibid at [4].

[87] See Cserne, 'Policy Considerations in Contract Interpretation' (n 38) 17.

[88] Section 1 Coverage: '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 inland water or in port, docks, marinas, on way, pontoons, or at a place of storage ashore…'

[89] Exclusion clause 15: 'No claim shall be allowed in respect of: 15. Loss and or damage while vessel is moored unless such loss damage results from collision with another vessel.'

[90] Ocean Magazine, 'Keeping it Shipshape with Maritime Insurance' (Vaarzon-Morel Maritime Lawyers, 19 May 2017) < https://vaarzonmorelsolicitors.com.au/keepmg-shipshape-maritime-msurance/> accessed 7 January 2024.

[91] Joyce M Hawkins and Robert Allen (eds), *The Oxford Encyclopedic English Dictionary* (Oxford University Press 1991).

[92] *Evans* (n 26).

[93] Hawkins *The Oxford Encyclopedic English Dictionary* (n 95).