IN THE COURT OF APPEAL OF BELIZE, A.D. 2003

CIVIL APPEAL NO. 7 OF 2003

BETWEEN:

REGENT INSURANCE COMPANY LIMITED **Appellant**

AND

ANTONIO VEGA **Respondent**

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BEFORE:

The Hon. Mr. Justice Rowe	**-**	**President**
The Hon. Mr. Justice Mottley	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Denys Barrow, S.C. for the Appellant.
Mr. Dean Barrow, S.C. for the Respondent.

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October 9 and 14, 2003 & March 12, 2004

ROWE P

1. Hurricane “Mitch” blew through Central America in October 1998 and in its unpredictable progress, devastated countries south of Belize, but the territory of Belize did not go unscathed. This appeal arises out of a claim on a marine insurance policy by Antonio Vega against Regent Insurance Company Limited for the loss of his boat “The Odyssey” which was totally destroyed at the time of hurricane “Mitch”. I will hereafter refer to the hurricane as “Mitch”.

2. The respondent operated a business in Caye Caulker which included the provision of fishing trips for tourists. He owned a 42 foot fibre glass boat, the Odyssey, that he used for the purpose. It appears that the Odyssey had been uninsured and Mr. John Valdez, the Account Executive of the appellant knew this. Mr. Valdez made a proposal to Mr. Vega for insurance of his boat, his real property on Caye Caulker and the operation of Mr. Vega's business there. Hurricane Mitch had not yet gestated. The discussions between Mr. Valdez and Mr. Vega as to insurance were put in abeyance.

3. On October 25, 1998 Mr. Vega was out at sea with his boat. He heard about the approach of hurricane Mitch. He returned to Caye Caulker, securely tied up his boat at his marina at Caye Caulker and took a water-taxi to Belize City. Mr. Vega telephoned Mr. Valdez, the agent of the appellant, and told him what he had heard about the approaching hurricane and asked Mr. Valdez if the insurance coverage that they had been discussing was still available. Mr. Valdez invited Mr. Vega to attend at the appellant's office on the next day when, he, having taken instructions, would be able to further discuss this matter with him. On October 26, 1998, Mr. Vega attended the office of the appellant. All parties then had knowledge that hurricane "Mitch" was forecast to affect the territory of Belize.

4. There was massive evacuation from the Cayes. Evacuation was being made by Tropic Air, Maya Airlines and boats from numerous water-taxi operators. All governmental agencies with responsibility for emergency operations in the face of impending national disasters, were activated. Evidence was led that in some of the Cayes there were signs of panic and whoever could escape from the Cayes, was seeking shelter on the mainland.

5. In the face of these dynamic operations in Belize City and on the Cayes, the evidence is that Mr. Vega did not return to Caye Caulker on October 26, 1998 and that he did not remove his boat from the windward side of Caye Caulker, at which it had been moored in the respondent's Marina, to sheltered waters that were alleged to be available on that Caye or on nearby Cayes.

6. The Odyssey was completely destroyed and the respondent claimed the amount of $300,000.00, the insured amount, on the allegations that the Odyssey was wrecked and sunk, and became a total constructive loss by perils of the sea.

7. The respondent gave evidence that on either the 29th or 30th October 1998, when he thought that it was safe to do so, he returned to Caye Caulker and saw that the Odyssey had been sunk off the coast of Caye Chapel.

8. At trial, Blackman J held that in the circumstances which prevailed at the time, the loss of the Odyssey was caused by perils of the sea. He further held that:

> "For the avoidance of doubt, I would wish to make clear that I do not accept the contention of the Defence that the Plaintiff deliberately abandoned his vessel in order to profit from a hurricane or its side effects".

9. It was alleged in the respondent's Statement of Claim that between October 27 and 28, 1998, while the Odyssey was moored in the slip at the respondent's marina at Caye Caulker, the vessel was wrecked and sunk by hurricane Mitch. The particulars of damage were "sea swells in excess of 7 ft. culminating in 40 ft. storm serge; massive wind force consistent

with a category 5 hurricane". In its defence the appellant admitted that while insured under the policy and moored in its slip at the respondent's marina at Caye Caulker, the Odyssey was wrecked, but denied that the wrecking and sinking of the vessel was caused by hurricane Mitch or its accompanying sea swells, storm surge or wind force. The appellant averred that the total constructive loss of the Odyssey was due to the respondent's failure to take reasonable measures for the purpose of averting or minimizing damage to the vessel by hurricane Mitch or its accompanying sea swells, storm surge or wind force.

10. Clause 15.1 of the policy of Insurance provided that:

> "In case of any loss or misfortune it is the duty of the Assured and their servants or agents to take such measures as may be reasonable for the purpose of averting or minimizing a loss which would be recoverable under Clause 15".

It was argued before us by the appellant that the learned trial judge failed to make a finding as to whether or not the respondent had, in breach of Clause 15.1, failed to take such steps as were reasonable for the purposes of averting or minimizing the loss of the Odyssey. We concluded that the judge had dealt with the issue appropriately.

11. The Policy of Insurance that was issued to the respondent incorporated The Institute Yacht Clauses and stated that the "insurance was subject to English law and practice". In my view it was not open to the respondent to maintain that he was not bound by Clause 15.1 of the Contract. It was in every respect his contract and his claim on a marine insurance policy could only be made and maintained on a written policy. I adopt the principles peculiar to marine insurance as set out in **Halsbury's Laws of England**, 4th Edition Vol. 25, para. 6.1, where it is stated that "a contract of marine insurance is inadmissible in evidence unless it is embodied in a

policy, but contracts of non-marine insurance can be made orally and are enforceable, even though no policy has been issued". The receipt that was issued to the respondent did not contain all the conditions of the insurance agreement and the respondent knew that a policy would be issued at a later date. As stated in **MacGillivray on Insurance Law**, 9th edition, para. 4-14, "the protection afforded by an interim receipt is not fully defined in the instrument itself, which is usually expressed to be on the company's usual terms or subject to the company's policies". The receipt that the respondent received from the appellant when he paid the premium for his insurance protection was not provided to us but I am satisfied that it would have no effect upon this claim as the marine policy containing the insured terms was in evidence.

12. The defence was conducted on the basis that the conditions associated with hurricane Mitch damaged, wrecked and sank the Odyssey, but it was argued that the proximate cause of the loss of the vessel was the failure of the respondent to take reasonable measures to avert or minimize the damage. The burden of proof was on the appellant to show that the respondent failed to remove the Odyssey from the slip at the respondent's marina, to a sheltered anchorage, and that this failure was the proximate or dominant cause of the loss of the vessel. See **Ivamy, General Principles of Insurance Law**, p. 440, where the author says:

> "where the insurer sets up an affirmative case that the loss was caused by failure of the assured to take certain steps, the insurer must prove that on a balance of probabilities".

And in **Slattery v. Maine**, [1962] 1 Lloyd's Rep. 60, Salmon J said:

> "In my judgment once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case and the onus is upon the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff. Accordingly, if at the end of the day, the jury come to the conclusion that the loss

is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff will win on that issue".

13. It was a feature of the defence at trial that the respondent was undergoing severe financial pressure due to his indebtedness to Atlantic Bank Limited of over $700,000.00 and lawsuits then pending against him. As Mr. Dean Barrow S.C. said in his submissions, the defence came dangerously close to suggesting that the respondent had deliberately, almost fraudulently, left the Odyssey exposed to hurricane Mitch after he had insured it in order to secure the insurance money and relieve his financial pressure. I found the appellant's position to be strange when submissions were made to us relating to the financial position of the appellant in October 1998. The appellant's agent agreed that it was the respondent who first alerted him on the Sunday that hurricane Mitch appeared to be bearing down on Belize. It was the respondent who asked the appellant's agent if the insurance was still open. Mr. Valdez properly advised the respondent of the policy of the appellant not to offer insurance coverage in the face of an impending peril and after the discussions, the appellant's agent agreed that in the special circumstances of this case, he would seek management's approval for the issue of the policy to the respondent. There was, in my view, the fullest disclosure by the respondent to the appellant's agent and the insurance coverage was secured in an open and transparent manner.

14. The learned trial judge accepted the evidence of the respondent that he made an effort to return to Caye Caulker after he had obtained insurance but he was refused by the only boat captain from whom he sought passage. The appellant has asked us to say that the learned trial judge did not pay sufficient attention to the evidence of the defence that boats and planes continued to ferry people from the Cayes to the mainland throughout the whole of October 26, 1998 and that it was reasonable for the respondent to have returned to Caye Caulker and to have sought

sheltered mooring for the Odyssey. There was no evidence that anyone knew from which side of the Cayes the hurricane would approach. There was no evidence that if the respondent could somehow have got a passage to Caye Caulker and could somehow have single-handedly removed his boat to a sheltered mooring, he could then have received safe passage back to the mainland. The respondent testified that he considered the risks of putting out to sea from Belize City to Caye Caulker on October 26, 1998 in the face of the hurricane threat, and that he believed that to do so he would be risking his life.

15. In my view the grounds of appeal failed. There was no evidence to show that the respondent was in breach of Clause 15.1 of the Policy. There was nothing on the evidence that was put before the trial judge that the respondent could have done anything to minimize or avert the loss of the Odyssey. I find that the trial judge gave appropriate consideration to the evidence of Mr. Mohammed as to the movements of boats and planes on October 26, 1998 and that his finding that the loss of the Odyssey was caused by perils of the sea cannot be faulted.

16. For these reasons I concurred in the decision that the appeal be dismissed with costs to the respondent to be agreed or taxed.

MOTTLEY JA

17. I have had the advantage of reading the draft judgment of Carey J.A. I agree with it.

CAREY JA

18. This appeal arises from the appellant's refusal to indemnify the respondent after the latter's 42 foot fiberglass motor yacht "Odyssey" was wrecked and sunk in October 1998 as a result of sea swells, storm surge or wind force generated by Hurricane Mitch. The vessel, valued at $300,000, was insured under the appellant's marine policy to the extent of 100% against perils set out in the policy, including perils of the sea. In the resultant suit launched by the respondent against the appellant, Blackman J entered judgment in favour of the insured for the full value of the boat.

THE ISSUE ON THE PLEADINGS

19. In denying liability, the appellant averred that "the Odyssey" was wrecked and sunk and became a total constructive loss because of the plaintiff's failure to take any such measures as may be reasonable for the purpose of averting or minimizing damage to the vessel by Hurricane Mitch or its accompanying sea swells, storm surge or wind force".

20. Additionally, the respondent also alleged that clause 15(1) of the Institute Yacht Clauses which was expressly incorporated in the marine policy had been breached by reason of the respondent's failure to take reasonable measures to avert or minimize damage to the "Odyssey" by the action of the hurricane. In the interest of completeness, I set out the terms of the clause. It was expressed thus:-

> "… In case of loss or misfortune it is the duty of the assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimizing all loss which would be recoverable under this insurance…."

Particulars of the respondent's failure were given as his failure to remove the "Odyssey" from its slip at the respondent's marina dock at Caye Caulker to a sheltered anchorage.

21. It would seem pellucidly clear that the issue which accordingly arose for the determination of the learned judge, was whether the respondent had taken such steps as would have been reasonable for the purpose of averting or minimizing damage to the vessel by the hurricane. It is as well to note that the onus would be on the insurer to prove that the assured had not taken these measures, on the well-known common law principle that he who asserts, must prove.

THE TRIAL

22. Although the pleadings raised essentially a solitary issue, other issues were allowed to be raised. For example, the respondent contended that clause 15 had not been brought to the attention of the assured, and accordingly he was not bound by its terms. For its part, the appellant was permitted to adduce evidence that the respondent was experiencing financial difficulties and had deliberately abandoned his boat in order to profit from his insurance. Although fraud had not been pleaded. Mr. Denys Barrow, S.C. did refer to the evidence adduced in this regard in his skeleton argument but, adroitly did not press the matter.

23. I fear Blackman J allowed himself to be distracted by these irrelevancies instead of focusing his attention on the pleadings which are intended to put before the court the respective protagonist's case. Each case was, I would suggest, quite straightforward. For the respondent (the plaintiff), his position was that his boat, insured with the appellant against perils of the sea, had been destroyed by a peril for which he was insured. For the appellant, its case was that the respondent suffered loss because he

failed to remove the “Odyssey” from its slip at the Marina dock to sheltered anchorage.

24. With all respect to the learned judge, for the reasons set out above I do not think the issue of whether the loss was caused by perils of the sea, remained a live issue. In his reserved judgment, the judge followed where he was led, and considered such matters. He found as a fact that the loss was caused by perils of the sea and it satisfied the test of being a “fortuitous” loss. He found merit in the submission of Mr. Dean Barrow, S.C. for the respondent that the insurer did not bring the implications of the Institute Yacht Clause and rejected Mr. Denys Barrow, S.C. for the appellant, that the respondent deliberately abandoned his boat in order to profit from the insurance.

25. It is not perhaps surprising that no where in his reasons for judgment, does the learned judge really consider or deal with the matter of substance raised on the pleadings. There is indeed a reference to the case of *A.P. Stephen v. Scottish Boat Owners Mutual Insurance Association (“The Talisman”) [1989] 1 Lloyds Rep. 535* which was concerned with a similar issue, viz. whether the plaintiff had used all reasonable endeavours to save his vessel. He noted the decision of the House of Lords. However, the judge regrettably, did not vouchsafe his thinking on the case nor demonstrate how it applied to the matter with which he was grappling. We can only conjecture and surmise how the case assisted him. The judge found as a fact that the loss was caused by perils of the sea. He also accepted that the insurer had not brought to the attention of the respondent the implications of the Institute Yacht Clause and he rejected the contention of the defence that the respondent deliberately abandoned his vessel for profit.

THE APPEAL

26. The appellant lodged three grounds of appeal, none of which raised questions of law.

GROUND 1

> "The learned trial judge erred in failing to make a finding as to whether or not the Plaintiff had in breach of condition 15(1) of the Institute Yacht Clauses failed to take such steps as were reasonable for the purpose of averting or minimizing the loss of the "Odyssey".

Mr. Denys Barrow, S.C. acknowledged in the course of his submissions before us that by reason of the pleadings, there was a burden on the appellant to prove the affirmative case, it had put forward, *scilicet*, that the loss was caused by the failure of the respondent to remove the Odyssey from its slip at the dock to a sheltered anchorage. Both parties pleaded the contract of insurance and relied on its terms. Neither party pleaded or raised any challenge to its efficacy. It is perfectly true that the respondent was allowed to lead evidence as to whether or not the terms of policy were specifically brought to the attention of the insured. Such evidence was, in my opinion, irrelevant to any issue raised on the pleadings and was therefore inadmissible.

27. The judge was required in light of the circumstances of the case, to examine the steps taken by the respondent and his reasons for adopting them. This was purely a question of fact.

28. It is a matter of no little regret that the treatment accorded to this issue was less than it demanded. The decision at which the judge ultimately arrived can, in my judgment be supported although he omitted to make

express findings of fact. The circumstances in which the vessel came to be left at the respondent's slip at his marina dock at Caye Caulker are not in dispute. Nor is it in dispute that the vessel was insured on the day Hurricane Mitch was forecast to affect Belize. It is also a fact that the respondent duly paid the appropriate premium but did not receive the policy until after the hurricane; nothing turns on this factor of time. There can be no question that the 26 October was a day of crisis and panic: Hurricane Mitch was imminent.

29. It is helpful to fill in some background detail. Prior to mooring his boat at the dock, the respondent had been fishing some 30 miles from Belize City when he learnt of the approaching hurricane. He tied up his boat at the dock and left for Belize City. On the following morning he attended the offices of the insurance company where he paid the premium. This exercise occupied the whole morning: he did not complete his business with the insurer until closing time about noon. Evacuation of the coastal area and the island was in progress. He did not return to Caye Caulker where he had moored until some three days later because of the rough seas. On his way to Caye Caulker, he had observed his boat sunk at Caye Chapel and on his arrival at his destination, it was to find that the marina where the boat had been moored, had disappeared.

30. With the wisdom of hindsight, counsel for the insurers, cross-examined the respondent as to what he should and ought to have done in order to avert or minimize damage to his boat. It was suggested to him that since boats were going between Caye Caulker and Belize City evacuating people, he could have resorted to one of these boats. He was criticized because he said that he had entreated one boat owner who had declined to take him. In view of the answers he gave to counsel with regard to what he had seen done by boat owners in securing boats for a hurricane, it is altogether unclear what he would have been expected to do. His

evidence was that he had done the best he could have done in the light of the prevailing circumstances. His experience had shown him that hurricanes were largely unpredictable. Hurricane Mitch was a large and dangerous hurricane of force five (5) strength. Unless there was a means of predicting the direction from which the wind would come at any given time, it was idle to speak of leeward and windward. Hurricanes consist of rotating winds. It would be a pointless exercise to place one's life at risk if the sea conditions did not allow it.

31. The appellant did not call any expert on the meteorological phenomena called hurricanes and their characteristics, nor any seaman with the necessary expertise. It was content to rely on such evidence as could be realized by his cross-examination. It was argued by Mr. Denys Barrow, S.C. on behalf of the appellant that there was "direct conflict of evidence" on the steps taken by the respondent to avert or minimize damage to his boat. But, I have not been astute to discover this conflict. As I observed earlier in this judgment, the respondent gave evidence as to what he did and suggestions were put in his cross-examine as to what the respondent ought to have done. These suggestions were not accepted by the witness. There could be no "direct conflict". Neither Mr. Valdez, an Account Executive of the appellant company nor Mr. James Janmohammad, a hotelier and the operations officer for the San Pedro Emergency Committee, both of whom were called as witnesses for the appellant were deemed experts. Their "opinion" evidence is, I would think, of little weight.

32. The test as the judge correctly indicated by his reference *to A. P. Stephen v. Scottish Boat Owner's Mutual Insurance Association (The Talisman") (supra)* is what and ordinarily competent skipper would have done. The ultimate decision of the judge makes it fairly plain that he was satisfied that the respondent satisfied that test. His decision did not depend on the

credibility of Mr. Vega but on an evaluation of all the evidence which this court is capable of undertaking. Lord Keith of Kinkel articulated the approach of a court to the question whether the adoption of a particular course was in all the circumstances reasonable, stated as follows at p. 539:

> "…The question whether the taking of a particular course of action would have constituted a reasonable endeavour to save the vessel is essentially one for the judgment of the court, to be arrived at upon an evaluation of all the evidence, which where appropriate may include expert evidence. The test is an objective one, directed to ascertaining what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances…"

33. The evidence of the respondent was that he tied up his boat at the marina. At the time he did so, he said that in his judgment, he could think of no better place, one place was as good as another in light of the size of the storm and its imminence. At that time also, his boat was uninsured but that did not convert what he did to something of little significance. Any boat owner would take steps to secure his boat no matter it was uninsured. It is not to be supposed that the reasonable steps to be undertaken by the respondent includes putting his life at risk. It could not be predicted that even if the respondent had secured a return passage to Caye Caulker that he would have had time to take other measures to secure his boat without help and return safely to Belize City before the hurricane struck. His crew member had left the boat when it docked at Caye Caulker and made his way to Belize, according to the evidence.

34. This Court, seeing that the outcome of the suit did not depend on the credibility of the respondent, is perfectly competent and entitled, despite the omission in the judge's reasons which Mr. Deny Barrow S.C. correctly

identified, to evaluate the evidence and determine whether the objective test is satisfied. I am satisfied that the respondent acted as reasonably in the prevailing circumstances as could be expected. In my opinion, the judgment of Blackman J is as I have endeavoured to demonstrate, correct. It is to be emphasized that the appeal is not against the reasons for judgment but against the judgment itself. Scant though the reasons were, enough was stated which was capable of showing what the judge must have had in mind. The evaluating of the circumstances, must relate to the circumstances operating at the time, and must be entirely uninformed by hindsight. There was no expert evidence called in this case which in some cases is very helpful. The onus which was placed on the appellant was not discharged. The suggestions for security put to the respondent as to what he ought to have done, have not been shown as more efficacious than his stated efforts and, more to the point, they were not accepted. They never achieved any better status than mere suggestions.

35. Finally, I mentioned an argument put forward by the appellants that the respondent had heedlessly or recklessly abandoned his boat on the footing that he could make some claim on his insurers for its loss. There was no evidence on which this argument could rest. But on any rational basis, it is misconceived. When the respondent left his boat moored, it was uninsured. He had for comfort a mere promise by Mr. Valdez the agent, that he would speak with his superior on the matter. Its outcome could not have been predicted with any degree of confidence or certainty. It is not farfetched to suppose that the respondent would at all events, have taken steps to secure an asset. I do not see how a clause (cl. 15) in the policy would have placed any greater duty of care on the boat owner, the respondent. Indeed this point was made in *National Oilwell (U.K.) Ltd. v. Davy Offshore Ltd. [1993] 2 Lloyd's Rep. 582 at p. 619*.

36. The other two grounds were subsumed under ground 1 and have been considered thereunder.

37. In the result, despite the illuminating arguments skillfully deployed by Mr. Denys Barrow, S.C. on behalf of the appellant, I am not persuaded that the judgment of Blackman J ought to be disturbed. For the reasons stated, I agreed that the appeal should be dismissed with costs.