IN THE SUPREME COURT OF BELIZE A.D. 2003

ACTION NO. 173 OF 2003.

(LIGHTHOUSE REEF RESORT LIMITED PLAINTIFF
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(AND
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(REGENT INSURANCE COMPANY DEFENDANT
(LIMITED

Mr. Dean Barrow SC, for the plaintiff.
Mr. Andrew Marshalleck and L. Barrow, for the Defendant.

AWICH J.

31.5.2005 JUDGMENT

1. *Notes:* *Insurance claim, defence of non-disclosure of material facts; exception clause as to damage to engine if there has been negligence- "the Institute Yatch Clauses" in marine hull insurance; the Marine Insurance Act, 1906, (UK) applicable to Belize, measure of indemnity payable.*

2. On 20.5.2002, the SSAZ, a vessel owned by the plaintiff, Lighthouse Reef Resort Ltd, sank at Dos Cocos, near Long Caye. It had been insured by the defendant, Regent Insurance Company Ltd, for the value of $420,000.00 against perils of the sea. The plaintiff claimed indemnity payment from the defendant. The defendant refused to pay. It contended that it was entitled to avoid the contract of insurance, the marine hull policy, between them on the

ground that the plaintiff had failed to disclose material facts that, the standard transom of the vessel had been modified, "by removal of the entire transom", at the request of the plaintiff, and that the builder of the vessel had informed the plaintiff that, "removal of the transom substantially increased the risk of immersion of the vessel", that is, of the vessel sinking. Transom was described as "the wall between the exterior and interior of the boat in the back". In respect to the loss of the engines, the defendant contended that the plaintiff's captain, Mr. Earnest Leslie, and the dive-master Mr. Glenford Torres, had been negligent in handling the vessel and therefore the loss of the engines was excepted in the policy, according to the *"Institute Yatch Clauses"* in marine hull insurance, deemed adopted in the policy.

3. ***The Basic Facts and Contentions.***

There was no issue as to the basic facts. The SSAZ was a dive boat. On 20.5.2002, it took a team of divers to sea. While divers were in water, winds of about 20-25 m.p.h suddenly prevailed and caused sea waves of 6 to 8 ft high. The captain and dive-master considered it dangerous and decided to terminate the diving. At the location there was a mooring line for all dive boats to use. The SSAZ was anchored by it. When the SSAZ was untied and tried to get away, the mooring line got caught onto the propellers of its engines. The SSAZ span round and took a lot of water on board and sank.

4. There was also no issue that if there was negligence on the part of the

captain and or the dive-master, liability for loss of the engines would be excepted. The defendant, of course, contended that the captain and the dive-master when faced with the winds, handled the boat with negligence.

5. The defendant did not adduce evidence to prove the negligence, it relied on the testimonies of the captain, and of the dive-master. Both were witnesses for the plaintiff. The particular facts in their testimonies, which facts, Mr. A. Marshalleck, learned counsel for the defendant, pointed out as constituting negligence were these: Mr Leslie and Mr Torres were not licensed captain and dive-master nor were they licensed to pilot vessels. After Mr Torres untied the SSAZ from the mooring line so that the vessel could get away from the winds and waves Leslie moved the boat, the defendant contended, in the direction of the mooring line, and that was negligent. Mr. Leslie denied that; he explained that the winds and waves "pushed the line towards the boat". When the mooring line got caught onto the propellers Mr Torres entered water to untie the line from the propellers. He failed. He surfaced, got a knife and again went down in water and cut the line off. The vessel was freed, but had taken on board too much water. Mr. Marshalleck submitted that it was negligent of Mr Torres not to have taken a knife the first time he entered water, and that his failure to take a knife occasioned delay in freeing the vessel, there was much time for waves to wash on board. He argued that time could have been saved if Mr. Torres straight away took a knife and cut the line off.

6. ***Determination.***

Negligence.

Although the fact that a person is not a licensed captain or pilot is admissible evidence tending to prove lack of the requisite skill and possible improper handling of the vessel, it is not in itself decisive evidence proving negligent piloting and handling, there must be evidence proving that the unlicensed captain or pilot piloted and handled the vessel in a manner below the skill expected of a competent and experienced captain or pilot exercising his skill - compare ***Nettleship v Weston [1971] 3 ALL ER 581,*** a case in which it was held that a learner motor vehicle driver drove negligently and caused injury to her instructor. It was explained in the judgments of the Court of Appeal that to hold that a learner driver owed a different standard of duty (lower standard), "*would lead to varying standards applicable to different drivers and hence to endless confusion and injustice*".

7. The captain explained that they did not get licence because at the time the authority concerned did not demand or require captain's and pilot's licence, but that the authority had since 2 years before the date of trial, become vigilant about licence. Mr Leslie now has a licence. The fact that the duo did not have licences for years may have been a matter for criminal law sanction, it certainly was not useful in proving the manner they handled the SSAZ on 20.5.2002, at Dos Cocos. They had many years of actual experience, 16 years and 7 years respectively. The accounts they gave of how they acted during the emergency did not disclose any negligence. I recount the story. Faced with the emergency, Mr. Torres decided instantly and jumped into water to untie the line. Then in a matter of seconds he concluded he could not untie it, he needed a knife to cut the line off. He quickly surfaced and called for a knife. The captain tossed it to him. Mr.

Torres re-entered the water and successfully cut the line off. He said the entire effort took him 20 to 25 seconds. That cannot in any way suggest undue delay and negligence. There were no facts in the testimonies of the witnesses suggesting that Torres took more than 20 to 25 seconds or that 20 to 25 seconds was unduly long moment in the emergency. In any case the defendant did not adduce any evidence proving that Mr. Leslie or Mr Torres handled the SSAZ in the emergency in a manner lacking of the competence of a licensed competent captain or pilot. The contention of negligence fails. It will not be available to provide to the defendant entitlement to exclude loss of the engines of the SSAZ, if the defendant is found liable to pay indemnity under the policy.

8. *Non disclosure; the utterance of the boatbuilder.*

The defence of non disclosure of material facts presented several points for consideration. I start by noting that there were no issues that a low transom and or the utterance by Mr Bradley, if proved, would be material facts which would normally be disclosed. Mr. Barrow SC, learned counsel for the plaintiff, conducted the plaintiff's case on the footing that a low transom was a material fact, although he put the utterance by Mr. Bradley in issue. The implication in law was that the parties accepted that a low transom and the utterance by Mr Bradley were facts that could influence the decision of the insurer as to whether he would undertake the risk of loss of the SSAZ at sea or as to the premium it would charge for insuring the vessel against the risk. The case law is well set out in, ***Seaton v Burnard [1900] AC 135,*** the ***Anglo African Merchants Ltd v Bayley [1969] 2 ALL ER 421*** and in, ***Mutual Life Insurance Co. of New York v Ontario Metal Products Ltd. [1925] AC 344.***

Mr Barrow directed a larger part of his effort to the question of non disclosure of those material facts.

9. The plaintiff obviously accepted that the SSAZ had a low transom. The evidence, in my view, proved that much as well, and not that there was no transom at all, as the defendant suggested in crossexamination despite its averment in the memorandum of defence. The view that there was a low transom was also supported by the testimony of Mr. Dennis Bradley, the builder of the SSAZ, called as witness for the defendant. He said, “the order placed requested that the transom of the boat be left completely open... [The] reason was easy access for divers to get in and out of water”. The question to be decided was therefore reduced to whether there was a duty on the plaintiff to disclose the fact that the SSAZ had a low transom, and the utterance by Mr. Bradley that he “informed” Bret Wolfenbarger, the manager of the plaintiff, “that the removal of the transom substantially increased the risk of immersion of the vessel...” Note that I have already decided that the transom was there, but low, so it was not completely removed.

10. I do not believe that Mr. Bradley informed Mr. Wolfenbarger about the risk of removal of transom or of a low transom. He may have forgotten or he lied. He considered that the risk he associated with the transom as requested was so great, one would think he would have told his wife who operated

from his yard as an agent of the defendant. An example of Mr. Bradley forgetting details is the fact that he did not remember to state that the order was placed by a Mr. Dennis Payne in 1999 or 2000, and not by Mr. Wolfenbarger. Mr. Payne was the manager, not Mr. Wolfenbarger who later took over the transaction after Mr. Payne had died. The rest of the descriptions of the order that Mr. Bradley remembered were that the vessel was to be, "a basic 43 feet wayward dive boat with end of cabin open... the inner deck be one continuous level, meaning that the inner deck of the boat would be one flat surface not step up and down". Given the lack of details in Mr. Bradley's testimony compared to the details in the testimony of Mr. Wolfenbarger, and given the unreliability of the testimony of Mr. Bradley, I regarded the more detailed testimony of Mr. Wolfenbarger as the more accurate one where the two testimonies differed. It is my finding of fact that Mr. Bradley did not inform Mr. Wolfenbarger about risk associated with low transom, the question does not arise therefore that Mr. Wolfenbarger, on behalf of the plaintiff, failed to disclose to the defendant the information said to have been offered by Mr. Bradley. Mr. Wolfenbarger did not receive the information.

11. *Non disclosure; low transom.*

I have made a finding of fact that the transom of the SSAZ was low and that it was a material fact, so can the defence that the plaintiff failed to disclose that the transom was low succeed and operate to entitle the defendant to avoid the policy to the extent of the defendant's liability to pay indemnity sum in respect to the SSAZ?

12. First, I remind myself that the duty to disclose material fact in a contract of insurance is one feature of the principle of utmost good faith - *uberrimae fide,* owed by both the insurer and the assured. Failure by one party to live up to the duty entitles the other party to claim avoidance of the contract- see ***Greenhill v Federal Insurance [1927] 1 KB 65 and, Brownlie v Campbell (1880) 5 App. Cas 925.***

13. Secondly, I have to remember that in this case, it was said that the fact that the transom was low was known by the plaintiff and so it ought to have disclosed it to Mr. Valdez, an agent of the defendant, who Mr. Wolfenbarger called and requested to insure the SSAZ. The plaintiff had already a policy with the defendant, covering his several vessels; insuring the SSAZ was to be by simply adding the SSAZ onto the existing policy.

14. The relevant evidence about the duty to disclose material facts proved two facts against the defendant's case. The first was that the low transom on the SSAZ was, a feature, if not standard, was common to dive boats. That was in the testimony of Mr. Wolfenbarger who said they did not ask for a low transom, but for a standard 43 feet wayward dive boat with certain unique features. He enumerated the unique features. Note that he was no longer employed by the plaintiff when he testified. The testimony of Mr. John Black, the "owner" of the plaintiff, was to the same effect. He actually challenged the defendant to prove that dive boats did not have low transoms. The challenge was in the statement that he had seen boats anchored at the Radisson Hotel marina and at the Princess Hotel marina with identical low transoms. The defendant did not take up the challenge. I am inclined to

accept that low transom, as was on the SSAZ, was standard or at least common to dive boats. That would therefore be within the knowledge of Mr. Valdez, an experienced agent who had insured many dive boats before. The law then excused the plaintiff from the duty to disclose that fact which was within the knowledge of the insurer, the defendant, or which the defendant may be deemed to have knowledge of see - ***Bates v Hewitt (1867) L.R. 2 Q.B. 595*** and ***Joel v Law Union [1908] 2 K.B. 863***.

15. The second fact proved by the evidence was that Mr. Wolfenbarger called Mr. Valdez and asked that the SSAZ be insured. In their subsequent discussion Mr. Valdez asked which of the boats at the builder's yard was the SSAZ, and after the description given by Mr. Wolfenbarger, Mr. Valdez said he had seen the boat. I believe that evidence. I doubt that an experienced agent such as Mr. Valdez would conclude a policy worth $420,000.00 without ever inspecting the item to be insured. The SSAZ was within Belize City where Valdez worked. My finding is that he was invited to inspect the SSAZ and he inspected it. The law applicable is that: *"the assured need not disclose any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge and matters which an insurer in the ordinary course of business, as such, ought to know"* see ***S: 18 (3) (b) of the Marine Insurance Act, 1906, (UK),*** applicable in Belize. Actual knowledge was not necessary, the means to know was the inspection of the SSAZ, carried out by Mr. Valdez, on behalf of the defendant. My conclusion about the defence of non disclosure of the low transom is that the plaintiff did not fail in its duty to disclose to the defendant the fact that the transom on the SSAZ was low.

16. ***The Award and Order.***

The defences of non-disclosure and of negligence have failed. On the other hand, the plaintiff, the assured, has proved a good marine hull insurance policy with the defendant, the insurer of the plaintiff's interest in the SSAZ, and has proved that the SSAZ sank in peril of the sea. The plaintiff is entitled to indemnity, not to "damages", as stated in the statement of claim. The losses particularised might only assist in the determination of the quantum of the indemnity, that is, the sum payable as indemnity. It is not clear from the evidence whether the policy was "a valued policy" or was the more common policy limited to a stated amount, "the sum insured". If it was "a valued policy", then the plaintiff is entitled to recover the agreed value less the salvage value of the SSAZ that the plaintiff might wish to take over, with the agreement of the defendant. If the policy was the latter open policy limited to "the sum insured", then the quantum of the indemnity is the actual loss to the value of the SSAZ as at the time it sank, but not more than the sum insured, and less salvage value if by agreement the assured will retain the SSAZ. If the loss was regarded as total loss, then the indemnity value is the actual value of the SSAZ as at the time it sank. Sometimes even in total loss circumstances there may be value attached to the scrap left. If so, then the value of the scrap is deducted, if the plaintiff retains it with agreement of the defendant. Sometimes, and not always, the indemnity value works to the same figure as the sum for damages.

17. The claim for trading income lost as the result of the accident was abandoned Mr. Barrow for the reason that it was not proved. It has no place

in a claim based on insurance contract anyway - see ***Glasgow Assurance Corporation v Symondson (1911) 104 L.T. 254*** and ***Roselodge v Castle [1966] 2 Lloyds Rep. 113.***

18. Judgement is entered for the plaintiff against the defendant for payment of indemnity, that is, to the extent that the SSAZ only, was insured, less the salvage value of the SSAZ recovered from the sea, if it is agreed by parties that the plaintiff will retain what is left of the SSAZ. The sum is payable with interest at 6 percent per annum, from the date of this judgment until full payment.

19. Costs to be agreed or taxed, are awarded to the plaintiff.

20. Pronounced this Tuesday the 31st day of May 2005.

At the Supreme Court

Belize City

Sam Lungole Awich

Judge

Supreme Court.