

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2007/005

BETWEEN:

FRANKLYN REYNOLDS

Appellant

and

STATE INSURANCE CORPORATION

Respondent

Before:

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC and Mr. D. R. Hamilton for the appellant

Sir Gerald Watt, QC and Ms. Denise Jonas Parillon for the respondent

2009: July 22;
2010: February 8.

Civil Appeal – Indemnity – exclusion of liability for negligence – contra proferentem rule – whether the insured is entitled to be indemnified

The appellant owned a passenger carrying glass bottom boat which was insured with the respondent. The cover note excluded swim, dive, snorkel and crew liability and incorporated by reference the Institute Time Clauses Hull Port Risks including limited navigation 20/7/87 clause 10 of which dealt with indemnity. Susan Norman, a passenger on the appellant's boat, went swimming and snorkeling. In ascending the ladder to re-enter the boat, she sustained serious injuries to her heel when a crew member negligently started the engine. Ms. Norman instituted legal proceedings, obtained judgment against the appellant and damages were assessed. The appellant commenced payment then started indemnity proceedings against the respondent.

The learned judge dismissed the indemnity claim on the grounds that: (i) it was the clear intention of the parties that the boat would not be used for snorkeling, swimming or diving; (ii) liability to third parties for injuries sustained while snorkeling, swimming or diving was excluded in the cover note; (iii) the act of attempting to re-enter the boat was an integral

part of Ms. Norman's conduct of swimming and/or snorkeling both of which were clearly prohibited; (iv) Ms. Norman's swim and/or snorkel activity was one of the proximate causes of her injuries; and (v) the indemnity clause in the Institute Time Clauses Hull Port Risks could not be relied on by the appellant to claim in respect of Ms. Norman's injuries in the face of the express exclusion clause in the cover note.

Held: allowing the appeal, setting aside the decision in the court below and awarding prescribed costs in the appeal and in the court below:

1. The act of swimming or snorkeling in which Ms. Norman was engaged did not cause the injury. The direct and proximate cause of the accident was the negligence of the master/crew member in turning on the engine without ascertaining that it was safe to do so. The learned judge accordingly failed to adequately direct herself on the issue of causation and erred in law in finding that Ms. Norman's swim or snorkel activity was merely one of the proximate causes of her injuries.
2. On construction of the cover note, swimming or snorkeling was not prohibited. Further, the policy schedule and the Marine Hull Proposals do not support a conclusion that it was the clear intention of the parties that the boat should not be used for swimming, diving or snorkeling. In any event, the act of attempting to re-enter the boat, during which act Ms. Norman was injured, was not an integral part of swimming or snorkeling.
3. The court will give effect to an express reference excluding liability for negligence. If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the proferens. If a doubt exists on this point it must be resolved against the proferens, that is, the contra proferentum rule applies.

Canada Steamship Lines Ltd. v The King [1952] AC 192 and **Beaulieu v Reliance Insurance** (1971) 19 DLR 3ed. 399 applied.

4. The words "excluding swim, dive, snorkel and crew liability" contained in the exclusion clause are not clear enough to limit liability in respect of negligence. In the absence of an express reference to negligence in the exclusion clause, the words "excluding swim, dive, snorkel and crew liability" are not wide enough in their ordinary meaning to cover negligence. The learned judge accordingly erred in failing to find that the terms of the policy of insurance did not exclude liability for negligence.
5. The words "excluding swim, dive, snorkel and crew liability" contained in the exclusion clause are ambiguous for it is unclear whether the activities referred to are excluded or prohibited and it is unclear what is meant to be covered by crew liability having regard to the indemnity provision in clause 10.1.4. There is

sufficient ambiguity in the exclusion clause to engage the contra proferentem rule whereby the clause is to be interpreted strictly against the respondent.

6. Having regard to the exclusion clause and the indemnity provision of clause 10, the loss arising from Ms. Norman's personal injury for which the indemnity is claimed, falls squarely within the indemnity provision so that the appellant is entitled to be indemnified to the amount of the award of damages adjudged payable by him.

JUDGMENT

- [1] **BAPTISTE, J.A. [AG.]:** This appeal arises out of the dismissal by the learned judge of an indemnity claim brought by Franklyn Reynolds (the appellant) against the State Insurance Corporation (the respondent).

Background

- [2] The appellant owned a passenger carrying glass bottom boat which was insured with the respondent. The cover note excluded swim, dive, snorkel and crew liability and incorporated by reference the Institute Time Clauses Hulls, Port Risks including Limited Navigation 20/7/87 clause 10 of which dealt with indemnity. Susan Norman, a passenger on the appellant's boat went swimming and snorkeling. In attempting to re-enter the boat she was ascending the ladder which was positioned near to the propeller. One of the propellers inflicted serious injuries to her heel as a crew member negligently started the engine. Ms. Norman instituted legal proceedings against the appellant, obtained judgment against him and damages were assessed. The appellant commenced payment then started indemnity proceedings against the respondent.

The Judgment

- [3] In dismissing the indemnity claim the learned judge held that the indemnity clause in the Institute Time Clauses Hulls, Port Risks could not be relied on by the appellant in the face of the express exclusion clause in the cover note. The judge

also held that the principles of estoppel were of no assistance to the appellant. In arriving at her conclusion, the learned judge reasoned that the main condition of the policy excluded liability to third parties for injuries sustained while swimming, snorkeling or diving. The appellant took passengers both swimming and snorkeling knowing full well he was violating the terms of the policy. The learned judge found that the clear intention of the parties to the agreement was that the boat should not be used for snorkeling, swimming or diving and more importantly, should any injuries be sustained by a third party as a consequence of such activities, the appellant would be debarred from obtaining compensation by way of indemnity. The act of attempting to re-enter the boat was an integral part of Ms. Norman's conduct of swimming and or snorkeling both of which were clearly prohibited. Further Ms. Norman's swim and/or snorkel activity was one of the proximate causes of her injuries. Had she not left the boat to go swimming and/or snorkeling she would not have sustained the injuries. The learned judge stated that it was of no significance whether the injuries were occasioned as a result of an accident or were caused due to the negligence of crew members. The cover note specifically excluded coverage for liability to third parties in circumstances where the third party was swimming, diving or snorkeling.

Grounds of Appeal

- [4] Mr. Hamilton QC, learned counsel for the appellant, advanced seven grounds of appeal against the judgment of the learned trial judge. Some of the grounds of appeal overlap. I will consider Grounds 1 and 2(a) together.

Ground 1

- [5] The learned judge erred in law in her finding on the evidence led at the trial that Ms. Norman's swim and/or snorkel activity was one of the proximate causes of her injuries.

Ground 2(a)

- [6] The learned judge failed to adequately direct herself on the issue of causation in that:

“She failed to find that while [Ms.] Norman’s swimming activity may have been the *causa sin qua non*, it was not the *causa causans* of the accident as the direct and proximate cause was the negligence of the master/crew members in turning on the engine without first ascertaining that it was safe so to do.”

- [7] In addressing Ground 1, it is necessary to refer to the evidence led at the trial, in particular, the appellant’s evidence. At paragraph 17 of her judgment the learned judge referred to the appellant’s witness statement. The appellant’s evidence is that on 9th December 1998 he went on a tour with about 14 passengers including Ms. Norman. They anchored at Cades Reef. Ms. Norman went swimming. She was in the water at the stern of the boat. The boat accidentally cut its moorings so it had to be restarted. When the engine started Ms. Norman was climbing up the ladder which was at the rear of the boat and the engine propeller cut her heel. Prior to starting the engine, the appellant and other crew members had failed to notice that Ms. Norman was ascending the ladder. In cross-examination, the appellant stated:

“...while the boat was moving Susan Morgan [sic] tried to board the boat ...The ladder is near to the propeller. She boarded the boat while the boat started. I agree this is what happened. She was at the back of the boat snorkeling. We started the boat and she tried to board the boat.”

In re-examination the appellant said:

“We were trying to move the boat, she was snorkeling. The lady was at the back of the boat. We started the engine and she was trying to climb the ladder and she got cut.”

- [8] Mr. Hamilton QC submitted that the act of swimming which Ms. Norman was engaged in did not cause the injury. The direct and proximate cause of the injury was the turning on of the boat engines when Ms. Norman was ascending the ladder. Mr. Watt QC, learned counsel for the respondent, saw no reason for the

court to disturb the finding of the learned judge. It was however accepted in the respondent's skeleton argument that the negligent turning on of the engine by the crew of the boat while Ms. Norman was swimming and snorkeling was also one of the proximate causes of her injury.

[9] Two causes were being postulated with respect to Ms. Norman's injury; one was the swimming, the other was the negligent turning on of the engines. It must be noted that the learned judge did not make a finding that Ms. Norman's swim or snorkel activity was the proximate cause of her injury. The judge found that it was one of the proximate causes. Having regard to the evidence led the learned judge erred in law in finding that Ms. Norman's swim or snorkel activity was one of the proximate causes of her injury.

[10] Implicit in the learned judge's finding that Ms. Norman's swim or snorkel activity was one of the proximate causes of her injury is a finding that there was another proximate cause of her injury. Although the learned judge made no express finding as to that other cause, it is pellucid that it had to be the negligent turning on of the boat's engine. This had to be the dominant cause of the injury. It appears then that the learned judge did not adequately direct herself on the issue of causation. The thrust of the judge's analysis related to the exclusion provided by the cover note in respect of swim or snorkel activity. As a result, the learned judge failed to find (as it was open to her to find) that the direct and proximate cause of the accident was the negligence of the master/crew member in turning on the engine without ascertaining that it was safe to do so.

Ground 2(b)

[11] The learned judge erred in her finding that the act of attempting to re-enter the boat was an integral part of Ms. Norman's conduct of swimming and or snorkeling both of which was prohibited.

- [12] I am of the view that a critical question to be considered is whether the insurance contract prohibited swimming or snorkeling. As far as is relevant, the cover note provided:

“CONDITION/WARRANTY

- (1) Institute Time Clauses Hulls, Port Risks including Limited Navigation 20/7/87.

...

- (3) Excluding swim, dive, snorkel and Crew Liability.”

- [13] It is seen that the cover note specifically excluded swim, dive, snorkel and crew liability. Swimming or snorkeling, however, was not prohibited. In any event the act of attempting to re-enter the boat could not have been an integral part of swimming or snorkeling because when Ms. Norman was injured she was ascending the ladder. This ground of appeal accordingly succeeds.

Ground 3

- [14] The learned judge erred in law in failing to find that the terms of the policy of insurance did not exclude liability for negligence; alternatively erred in holding that it matters not whether the injuries were occasioned by accident or due to the negligence of crew members.

- [15] In **Canada Steamship Lines Ltd. v The King**¹ the Privy Council enunciated the following principles regarding the duty of the court in approaching the consideration of a clause excluding liability for negligence:

- (1) If the clause contains language which expressly exempts the person in whose favour it is made (the proferens) from the consequence of the negligence of his own servants, effect must be given to that provision.

¹ [1952] AC 192

- (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the proferens. If a doubt exists on this point it must be resolved against the proferens, that is, the contra proferentum rule applies.
- (3) If the words used are wide enough in their ordinary meaning to cover negligence on the part of the proferens the court must then consider whether the head of damage may be based on some ground other than that of negligence. The existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

[16] Mr. Hamilton QC submitted that the words “excluding swim, snorkel, dive and crew liability” do not include liability for negligence caused by the owner. Mr. Watt QC contended that the clear and plain meaning and implication of the exclusion clause is that liability for negligent and or willful actions by the appellant towards swimmers, divers or snorkelers is excluded from the insurance contract.

[17] In my judgment the words “excluding swim, dive, snorkel and crew liability” contained in the exclusion clause, do not indicate that the parties intended to exclude negligence. The words are not clear enough to limit liability in respect of negligence. The respondent had failed to insert an express reference to negligence in the exclusion clause to protect itself from the consequences of negligence. In the absence of an express reference to negligence in the exclusion clause, the words excluding swim, dive, snorkel and crew liability” are not wide enough in their ordinary meaning to cover negligence. I conclude therefore that the learned judge erred in failing to find that the terms of the policy of insurance did not exclude liability for negligence. In the circumstances I find it unnecessary to consider the alternative limb of ground 3.

Contra Proferentem

[18] I now consider whether the contra proferentem rule applies. That rule falls for consideration because Mr. Hamilton QC submitted that the terms of the exclusion are not clear; it is not straightforward as to what they mean, how wide they are to be construed and what activity is not covered. The contra proferentem rule provides that an ambiguous term in a contract will be construed against the interests of the party who imposed it.² The first issue for the court's determination is whether there is an ambiguity in the exclusion clause. In the absence of an ambiguity, the contra proferentem rule will not apply.

[19] The words used in the exclusion clause are: "excluding swim, dive, snorkel and crew liability." Does the exclusion clause exclude or prohibit swimming, diving or snorkeling? What is meant to be covered by crew liability having regard to the indemnity provision in clause 10.1.4? The appellant contended that swimming, diving or snorkeling were not prohibited. The respondent argued that they were prohibited and that liability under the insurance contract ceased once the passengers went swimming, snorkeling or diving. I am of the view that there is enough ambiguity in the exclusion clause to engage the contra proferentem rule. The exclusion clause has to be interpreted strictly against the respondent.

Ground 4

[20] The learned judge erred in law and in fact in failing to find that the Institute Time Clauses Hulls, Port Risks including Limited Navigation 20/7/87 provided by clause 10 an indemnity in respect of personal injury caused by the negligence of the master, officers or crew and further, that the terms of the cover note dated 1st July 1998 did not and could not exclude liability for negligence.

² Beaulieu v Reliance Insurance [1971] 19 DLR 3 ed. 399 at 402 (Ontario High Court) upheld on appeal to the Ontario Court of Appeal

[21] Clause 10.1 of the Institute Time Clauses Hulls, Port Risks including Limited Navigation provides:

“The Underwriters agree to indemnify the Assured for any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable, as owner of the vessel, for any claim, demand, damages and/or expenses, where such liability is in consequence of the following matters or things and arises from an accident or occurrence during the period of this insurance:

...

10.1.4 loss of life, personal injury, illness or payments made for life salvage.”

[22] The principal issue arising is whether on a proper construction of the insurance contract the appellant is entitled to an indemnity. It is to be borne in mind that what was before the learned judge was not a claim for breach of contract. It was a claim to an indemnity for a liability incurred. It is common ground that the appellant became legally liable as owner of the boat to pay damages to Ms. Norman as a result of the personal injuries she sustained. In fact judgment was entered against him. To my mind the dominant cause of the injury was the negligent turning on of the boat's engine while Ms. Norman was ascending the boat's ladder, after having gone swimming. This was surely an occurrence or accident during the period of the insurance. I am not in agreement with the respondent's submission that once Ms. Norman went swimming or snorkeling liability under the policy ceased. A proper construction of the policy does not lead to that conclusion. It is instructive to note that no mention is made of negligence in the indemnity clause. It is settled law that if liability for negligence is to be excluded it must be stated clearly and unambiguously. Paying regard to the exclusion clause and the indemnity provision of clause 10, the loss for which the indemnity is claimed fell squarely within the indemnity provision. The appellant would therefore be entitled to an indemnity.

Ground 5

- [23] The learned judge misdirected herself in holding that the clear intention of the parties to the agreement was that the boat should not be used for snorkeling, swimming or diving and failed to properly distinguish injuries caused during those activities and injuries occurring as a result of the unforeseen act of negligence by either the master or crew.
- [24] In support of that ground Mr. Hamilton QC submitted that there was nothing in the evidence which lent itself to that intention of the parties that the boat should not be used for snorkeling, swimming or diving. Mr. Watt QC argued that the purpose for which the appellant's boat was insured was stated in clear and plain terms on the policy schedule as being for "sightseeing day charter" and was also stated in both the 1992 and 1997 Marine Hull Proposals as being for "day charters." Mr. Watt QC concluded that the learned judge's finding that the clear intention of the parties was that the boat should not be used for snorkeling, diving or swimming was quite sound. I have examined the policy schedule and the Marine Hull Proposals and nothing in these documents support a conclusion that it was the clear intention of the parties that the boat should not be used for swimming, diving or snorkeling. The expressions "day charters" or "sightseeing day charter" do not necessarily exclude swimming, diving or snorkeling.
- [25] The learned judge had concluded that swimming or snorkeling was prohibited by the terms of the insurance contract. That however, was not a correct reading of the contract. Personal injuries occurring as a result of the negligence of the master or crew member in the circumstances ordained by Clause 10.1 fell within the scope of the indemnity provided. If Ms. Norman was injured while snorkeling or swimming through no fault of the owner or crew member, the appellant would not be legally liable for that injury and no issue of indemnity could arise. Consequently, different results would flow from the injuries sustained in different circumstances. There is merit in the ground that the learned judge did not properly

distinguish injuries caused during swimming or snorkeling and injuries occurring as a result of the unforeseen act of negligence of either the master or crew member.

Ground 6

[26] The learned judge erred in further failing to find that the Third Party Liability provision of the cover note merely limited the recoverable damages in the event of one accident and had to be read with Clause 10 of the Institute Time Clauses Hulls, Port Risks including Limited Navigation 20/7/87 which provided for indemnification of the insured on the assured becoming legally liable on any claim, damages and or expenses.

[27] The Third Party Liability provision provided for \$500,000.00 – any one accident or occurrence. The meaning of that clause is quite clear. I agree with Mr. Watt's submission that it only refers to the limit of liability to the third parties under the insurance contract. I find no error on the part of the learned judge in construing that provision.

Ground 7

[28] The learned judge erred in law in failing to find that on the evidence adduced by the appellant, that the respondent had over a period of five years so conducted itself in relation to the claim of Ms. Norman that it ought to be estopped from exercising any right to deny liability in respect of that claim.

Estoppel

[29] In view of the appellant's success on the indemnity claim the alternative ground of estoppel is only of academic interest. I however find no basis to disturb the finding of the learned judge with respect to estoppel and I discern no error of law on her part in concluding that the principles of estoppel were of no assistance to the appellant.

Conclusion

- [30] In conclusion, the terms of the cover note did not exclude liability for negligence. The cause of the injury to Ms. Norman was the accidental but negligent act of the insured in turning on the engine of the boat when it was not safe to do so, occasioning injury to Ms. Norman as she ascended the ladder. The appellant was entitled to be indemnified by the respondent under section 10.1 of the Institute Time Clauses Hulls, Port Risks including Limited Navigation 20/7/87. The award of damages adjudged payable by him was a liability covered by section 10.1. The judgment of the learned trial judge is accordingly set aside. The appeal is allowed. The parties are to make written submissions on the issue of costs within four weeks of today's date.
- [31] The appellant is awarded prescribed costs in the court below based on the amount of the indemnity claim and two thirds of that amount on appeal.

Davidson Kelvin Baptiste
Justice of Appeal [Ag.]

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]