

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: AXAHCV2024/0038

BETWEEN:

TEI ANGUILLA VILLA EQUITIES LLC

Applicant

-and-

CARIBBEAN ALLIANCE INSURANCE COMPANY LTD

Respondent

Before: His Lordship The Honourable Justice Ermin Moise

Appearances: Mr. Paul Dennis KC with him Mrs. Cora Richardson-Hodge for the Applicant.
Ms. Tara Carter for the Respondent.

2024: December 2
2025: February 10

JUDGMENT

[1] **Moise, J.:** This is an application for leave to appeal the decision of an umpire in arbitral proceedings. The dispute arises from a claim made by the applicants under a policy of insurance following the passage of Hurricane Irma in 2017. There was no dispute that the applicant's property was significantly damaged as a result of the hurricane. There was also no dispute that the respondent is obligated to make payments towards the damages pursuant to the terms of the policy. The parties, however, could not agree on the interpretation of the standard commercial term - the average condition (underinsurance) clause within the contract and the impact which this clause had on the amount payable under the policy. There was also a dispute regarding consequential losses for an alleged breach of contract.

- [2] In keeping with the terms of the agreement, the parties engaged in arbitration. The award made by the umpire significantly reduced that which was being claimed by the applicant and its claim for consequential damages was also denied with costs awarded in favour of the respondent. It is this award, and the consequential orders, which the applicant now seeks leave to appeal. Having examined the evidence put before this court, and the submissions of counsel for both sides, I have determined that the application should be dismissed with costs. These are the reasons for my decision.

The Facts

- [3] TEI Anguilla Villa Equities LLC (TEI) is the proprietor of the Altamer Resort (the Resort), which is located at West Point, Shoal Bay, Anguilla. TEI is also a limited liability company which is registered in Delaware in the United States. Prior to Hurricane Irma in 2017, the Resort comprised four beachfront private villas, a restaurant building, guard building, leasing office, construction office and other various amenities.
- [4] Caribbean Alliance Insurance Company Limited (CAI) is an insurance company registered in Antigua. TEI entered into an insurance policy agreement with CAI effective 28th August, 2017. This policy was titled "the Material Damage Insurance Policy" (the Policy) and provided coverage to the Resort for the policy period 28th August 2017 to 27th August 2018. In keeping with the terms of the agreement, TEI paid CAI a premium in the sum of US\$55,750.00 for insurance coverage under the Policy up to a sum of US\$8,000,000.00. The policy covered, among other things, loss caused by hurricanes or windstorms.
- [5] On 6th September, 2017, Hurricane Irma caused extensive damage to Anguilla. The Resort was also damaged as a result of the hurricane. TEI then submitted an insurance claim in the sum of US\$8,338,432.99 to CAI for damage to the Resort. As I understand it, CAI has paid US\$1,000,000.00 as part payment towards this claim. However, as I have previously indicated, the parties were at variance in their interpretation of the standard commercial term - the average condition (underinsurance) clause (the Average Clause) and referred the dispute to arbitration for resolution

pursuant to the Policy's arbitration clause. In addition to this dispute, the issue of consequential damages for CAI's alleged breach of contract also emerged.

[6] In keeping with the terms of the agreement, each party was entitled to nominate an arbitrator. TEI referred Mr. Stanley Smith (Mr. Smith) for appointment and CAI referred Mr. Kelvin John (Mr. John). The parties further agreed to the appointment of Mr. Gifford Connor (Mr. Connor) as the umpire in the event of a stalemate between the two appointed arbitrators. The parties complied with the various case management orders, and, in due course, the following findings of fact were made and agreed to by the arbitrators:

- (a) The Resort was damaged, not lost or destroyed;
- (b) The Policy deductible for windstorm was "2% of the sum insured". In this case, as the sum insured was US\$8,000,000, the deductible was US\$160,000.00.
- (c) The cost to repair the Resort was US\$5,776,422.00

[7] After considering the evidence and submissions of the parties, the arbitrators were at variance on the total sum to be awarded. They both delivered competing decisions on 3 June 2024. In accordance with the provisions of the UK **Arbitration Act 1996** ("the Act"), the matter then fell to the Umpire to decide. The following issues were identified as matters for consideration by the umpire:

- (a) The definition of what constitutes the property at Shoal Bay, West;
- (b) The cost of restoration/repairs;
- (c) The insurable amount;
- (d) Averaging Condition (Under Insurance);
- (e) Consequential Damages;
- (f) Prejudgment Interest; and
- (g) Legal Fees

[8] The umpire, for the most part, agreed with Mr. John in his own assessment of the award and made the following orders:

- (i) *The Respondent shall pay the Claimant, the sum of **One Million Six Hundred and Twelve Thousand Six Hundred and Eighty-Three Dollars (US\$1,612,683) United States Currency**, by way of award in full and final settlement of the Insurance Claim and the Arbitration Process;*

- (ii) *The claim for Consequential Damages is Denied;*
- (iii) *The Claim for Prejudgment Interest is denied; and*
- (iv) *Legal Costs is awarded to the Respondent to be assessed if not agreed within 30 days from the date of this award."*

[9] Mr. Connor, in his own decision, stated that he was in agreement with Mr. John's findings that the total reinstatement cost of the property insured was US\$16,759,844.00. In light of this, like Mr. John, Mr. Connor concluded that *"the property is grossly underinsured and based on the definition of the Average Condition ..., under the Basis of Settlement as defined in the policy where the property is insured for less than 85% of the Insurable Amount, the amount otherwise payable by the company will be proportionately reduced."* Given that the property was valued at US\$16,759,844.00 and was insured at US\$8,000,00.00, it was determined that an award of US\$5,776,422.00 should therefore have been proportionately reduced to US\$1,612,683.00 after applying the deductible and the part payment which was already made by CAI.

[10] As it relates to TEI's claim for consequential damages, Mr. Connor shared Mr. John's view that this was not sustainable. TEI's argument was that CAI's failure to make good its obligations under the policy resulted in its inability to repair the buildings in good time. This therefore resulted in financial losses due to an inability to collect rent. As it relates to that issue, the umpire found that *"there [was] such a huge variance between the parties that could not result in a meeting of the minds and what is most interesting is that the initial claim by the Claimant of \$8,338,432.99 exceeds the insured amount of \$8,000,000.00. The most appropriate way forward was to follow the process as set out in the policy of taking the matter to Arbitration."* On that basis it was found that CAI was not in actual breach of the contract and that TEI had *"not in any way justified their claim for an award for consequential damages."*

[11] On the issue of costs, the umpire found that CAI was successful in significantly reducing the amount claimed by TEI and, on that basis, was entitled to costs.

[12] TEI was dissatisfied with this decision and sought consent from CAI to lodge an appeal. CAI did not agree and, on that basis, TEI now seeks leave of this court to file an appeal.

[13] Before addressing the law and the submissions of counsel on the issues, I note that Mr. Smith, in his own assessment, was of the view that the specific average condition clause as was contained in the policy was unique (I will assess the details of the clause later on in this judgment). Mr. Smith also stated that he had extensive experience in insurance in the Caribbean and had never come across a clause of this nature which was worded in the manner it was. He expressed the view that the wording of the clause was ambiguous and, given that it was a policy drafted by CAI, this should be interpreted in favour of TEI. He was of the view that the clause should be interpreted to mean that the cost of reinstatement was the actual value of the repairs to the damaged buildings and not the value of the buildings insured at the time of the risk. Given that the cost of repair was lower than the amount insured, there was no underinsurance for the purpose of the averaging clause. On that basis, Mr. Smith was of the view that TEI was entitled to the entire cost of repair which was established by consensus among the arbitrators.

The Law

[14] In accordance with Section 1 of the **Arbitration Act**¹ *The Arbitration Act (14 Geo. 6 c. 27) (UK) as amended from time to time shall be, and the same is hereby declared to be henceforth, in force in Anguilla, and all the provisions of the Act, so far as the same are applicable, shall mutatis mutandis apply to all proceedings relating to arbitration within Anguilla.*” The Act currently in force in the UK is the **Arbitration Act 1996**. Insofar as that Act provides for a right of appeal against the award of an arbitrator, the following is noted in section 69:

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings...

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

¹Chapter A105 of the Revised Laws of Anguilla

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.”

[15] The question therefore is whether the applicant has met the criteria for the grant of leave pursuant to section 69 of the UK Act. This calls upon the court to consider 6 issues. These are:

(a) Whether the applicant is seeking to appeal a question of law arising out of an award made in the arbitral proceedings;

(b) Whether determination of the question will substantially affect the rights of one or more of the parties;

(c) Whether the question is one which the tribunal was asked to determine;

(d) Whether the decision of the tribunal on the question is obviously wrong, or alternatively

(e) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

(f) whether it is just and proper for the court to consider the question(s).

[16] I will therefore consider the manner in which these issues have been addressed in case law over time.

The Question of Law Test

- [17] On the question of whether the applicant is seeking to appeal questions of law, the court was referred to the case of *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis*² where Mustill J noted that:

“Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator’s process of reasoning into three stages. (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.

- [18] In dividing the arbitrator’s process into 3, Mustill J interprets the relevant provisions of the contract in much the same way the provisions of the statute or the common law is to be interpreted. This is the same approach taken in the case of *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema*³, where Lord Diplock noted that *“in English jurisprudence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law.”* Lord Diplock went on to state that *“it is far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being “a question of law” for the purposes of judicial review of awards of arbitrators or decisions of administrative tribunals from which an appeal to a court of justice is restricted by statute to an appeal upon a question of law.”*

²[1983] 2 All ER 658

³[1982] AC 724

[19] It is therefore settled jurisprudence that where there is a dispute about the interpretation of the terms of a contract and what the parties intended it to mean, that would satisfy the test of whether the issue for consideration on the appeal is a matter of law. Mustill J went on to note the following:

“The second stage of the process is the proper subject matter of an appeal ... In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another: and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct – for the Court is then driven to assume that he did not properly understand the principles which he had stated.”

[20] Bearing in mind that an interpretation of the terms of a contract is a matter of law, the court may grant leave to appeal if what is under consideration is the arbitrator’s application of the terms of the contract to the facts. If the application of the provisions of the contract can only provide one inevitable answer and the arbitrator arrives at another, then the matter under consideration in an appeal will clearly be one of law, as the court can assume that the arbitrator did not properly understand the provisions of the contract and how they were to be interpreted.

[21] For these same reasons, it can be said that where the question is one of mixed fact and law, such as whether there was a breach of contract, the question is to be considered one of law and not of fact. This was decided in the case of **The Nema** where Lord Roskill noted that ***“when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion.”*** A similar approach was taken in the case of **Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (“The Sylvia”)**⁴ at paragraph 55 of that judgment. What this establishes is that at times the decision of the arbitrator can appear initially to be a matter purely of fact. However, when one examines the legal principles under

⁴ [2010] EWHC 542 (Comm)

consideration in light of those facts, the court may grant leave if no reasonable person could have arrived at the decision. That would be a matter of law.

The Effect on the Rights of the Parties

[22] This aspect of the test does not require much discussion, and I do not wish to spend time on it. I have considered the submissions and, in my view, it is clearly the case that the question would affect the rights of TEI to reimbursement of a substantial amount of money under the policy as a result of the damage caused by the hurricane. CAI in turn, is affected by its obligation to pay whatever award is due as settled in this dispute.

Was the question one which the Tribunal was asked to determine?

[23] On the issue of whether the question is one which the tribunal was asked to determine, reference was made to the case of **Sharp Corp Ltd v Viterro BV (previously known as Glencore Agriculture BV)**⁵, where Lord Hamblen approved the following statement of Lewison J in **Safeway Stores v Legal and General Assurance Society Ltd**⁶:

“...the tribunal must be asked to determine the question, but I do not think that the question needs to have been raised with the precision of a construction summons. All that is needed, in my judgment, is that the point was fairly and squarely before the arbitrator, whether or not it was actually articulated as a question of law.”

[24] The question for consideration will therefore be whether the points raised on appeal were fairly and squarely before the Umpire for his determination. Again, this is a matter I am prepared to accept as being established at this stage in this judgment. There is no argument to be made here other than that the salient issues up for consideration in this application were matters which the umpire was called upon to determine.

⁵[2024] UKSC 14

⁶[2004] EWHC 415

The Obviously Wrong Test?

- [25] As it relates to the question of whether the umpire was obviously wrong in his decision, the applicant makes reference firstly to **The Nema** where Lord Diplock stated that:

"Where, as in the instant case, a question of law involved is the construction of a "one-off" clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance."

- [26] Reference was also made to the case of **HMV UK v Propinvest Friar Limited Partnership**⁷ where Arden LJ noted that *"the alleged error must be transparent. It must also, at the least, be clear. The word "obvious" is a word of emphasis which means that the courts must not whittle away the restriction on rights of appeal in subsection (c)(i) by being over generous in their determination of the clarity of the wrong."*

- [27] In examining the statement by Lord Diplock in **The Nema**, a number of issues emerge. Firstly, there is no public interest element here. What exists is a private contract between one or two parties. On the basis of their own bargain, they have agreed to have their disputes settled by arbitration. Where there is therefore a one-off contract and perhaps a one-off event, the court cannot embark on the process of substituting its own view of the interpretation of the contract for that of the arbitrator. Unless the decision is obviously wrong, the parties are bound by the decision of the arbitrator as it is an integral part of the bargain which they have willfully entered into.

⁷ [2012] 1 Lloyd's Rep

[28] Secondly, as stated in the **HMV UK** case, emphasis must be placed on the word obvious. There must be a transparent and clear error of law in order to move the court to intervene in granting leave to appeal. This ground of appeal is not one which calls upon the court to first examine whether there is a prospect that the arbitrator may be wrong, or that the court would have arrived at a different decision. The error of law, if it exists, must be obvious in the literal sense of the word.

The General Public Importance and Serious Doubt Test.

[29] As I have examined above, there is no public importance element in the test of whether the decision of the umpire was obviously wrong. However, where the interpretation of the contract involves a matter of public importance, the test is generally less strict. The question then becomes whether the decision of the umpire is open to serious doubt. In the case of **The Nema**, Lord Diplock seeks to explain the rationale for this element of the test. He states as follows:

“Business on the Baltic, the insurance market and the commodity markets would be impracticable without the use of standard terms to deal with what are to be the legal rights and obligations of the parties upon the happening of a whole variety of events which experience has shown are liable to occur, even though it be only rarely, in the course of the performance of contracts of those kinds.”

[30] In some commercial markets, business arrangements have evolved to incorporate standard terms. These terms often involve a wide variety of foreseeable events which will give rise to specific obligations under the contract. In such circumstances, it is in the public interest to ensure that there is clarity in the law and in the manner in which such terms are to be interpreted. The potential events which impact these standard obligations need not be frequent. The standard obligations placed in a commercial contract in a specific market setting will sometimes be sufficient to make it a matter of public importance. Lord Diplock went on to state that, in such circumstances, the law had evolved to render unenforceable any contractual provision which sought to prohibit access to the courts in order to settle such disputes of law and to provide clarity to it. Certainty in the law in areas of public importance is vital to commerce in general. Lord Diplock therefore went on to state as follows:

“... when contracts are entered into which incorporate standard terms it is in the interests alike of justice and of the conduct of commercial transactions that those standard terms should be construed and treated by arbitrators as giving rise to similar legal rights and obligations in all arbitrations in which the events which have given rise to the dispute do not differ from one another in some relevant respect. It is only if parties to commercial contracts can rely upon a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion. Such uniform construction of standard terms had been progressively established up to 1979, largely through decisions of the courts upon special cases stated by arbitrators. In the result English commercial law has achieved a degree of comprehensiveness and certainty that has made it acceptable for adoption as the appropriate proper law to be applied to commercial contracts wherever made by parties of whatever nationality. So, in relation to disputes involving standard terms in commercial contracts an authoritative ruling of the court as to their construction which is binding also upon all arbitrators under the sanction of an appeal from an award of an arbitrator that has resulted from his departing from that ruling performs a useful function that is lacking in that performed by the court in substituting for the opinion of an experienced commercial arbitrator its own opinion as to the application of a "oneoff" clause to the particular facts of a particular case. It was this useful function that it was the plain intention of the Act of 1979 to preserve by section 4, for at least an experimental period during which it would be subject to scrutiny by the Commercial Court Users' Committee to see whether the new provisions of sections 1 and 2 relating to leave to appeal from arbitrators' awards and the determinations of preliminary points of law would operate in practice to prevent the continuance of abuses that had become notorious of recent years under the previous system of case stated.”

[31] Notwithstanding Lord Diplock's statement here, it is my view that it would be for the applicant to show that the term is indeed a standard term. Even if the court were to find that the term under consideration is standard, the applicant must also prove that the decision of the umpire is open to serious doubt. Again, the specific words of the section must be taken in account. The court is not concerned here

with its own doubt about the umpire's award. The doubt must be serious. Once that has been established to the satisfaction of the judge, he must then go on to consider whether it is just and proper in all the circumstances to consider the issue on appeal.

Is it just and proper in all the circumstances for the court to determine the question?

- [32] On this ground, counsel for TEI referred to the case of **HOK Sport Ltd (formerly Lobb Partnership Ltd) v Aintree Racecourse Co Ltd**⁸. In that case, Judge Anthony Thornton QC appears to have shifted the burden to the respondent to show that it would suffer injustice. This appears to be the case if the ground of the award being obviously wrong was satisfied. He states as follows:

“The final threshold requirement that an applicant must surmount in order to obtain leave to appeal is that it is just and proper in all the circumstances for the court to determine the question even though the parties have agreed to resolve the dispute by arbitration... the Act gives no guidance as to the circumstances in which this requirement should preclude leave being granted where otherwise, leave would be granted...”

However, in circumstances where the arbitrator is obviously wrong and his erroneous decision might substantially affect one of the parties, the 1996 Act envisages that the affected party will be allowed leave to appeal. It follows that, in such circumstances, the responding party must show that it would suffer substantial injustice if leave to appeal is granted.”

- [33] For my part, I must say that I have some doubt as to whether there is a need to shift the burden to the respondents in the manner advocated by Anthony Thornton QC. What the section appears to state is that if the decision of the arbitrator was obviously wrong or, alternatively, the question is of general public importance and the decision is placed in serious doubt, the court should consider all the circumstances in order to determine whether it is just and proper to intervene. No doubt, the applicant would have also had to show beforehand that his rights would be substantially affected.

⁸ [2002] EWHC 3094

Having determined that, the court may very well have already established that it was just and proper to intervene given the obvious error of the arbitrator and the impact on the applicant. However, that is not the same as saying that the burden has been shifted. The court should, in my view, simply consider the facts and circumstances in the round.

- [34] In a case where the matter is of public importance and there is serious doubt about the arbitrator's award, the issue of whether it is just and proper to grant leave may call for different considerations. Here, the court is not deciding that the arbitrator was obviously wrong. In addition to that, the court must never lose sight of the fact that the parties have agreed to have their dispute resolved by arbitration. In my view, the fact that we are dealing with a standard term in a commercial market, in and of itself, may not be enough to warrant intervention. As I have said before, the court should also consider whether there is in fact any uncertainty in the market. It may be that there is no confusion at all as to what such standard term means and an intervention by the court may only serve the purpose of upending rather than clarifying a standard condition in a commercial contract. It must be just and proper to intervene.

The Applicant's Submissions

- [35] It is submitted on behalf of TEI that what is before the court is a question of the interpretation of the average condition (underinsurance) clause within the contract. It is submitted that Mr. John was wrong in his interpretation of this clause and that Mr. Connor, in following this rationale, also fell into error. Counsel submits further that a proper understanding of the terms of this provision within the contract would lead to only one inevitable result and it is not the one arrived at by the umpire. In order to put this submission into context, it is important to closely examine the various provisions within the agreement referred to by TEI.
- [36] The average condition clause in the policy states that ***“[u]nder the Basis of Settlement below, if at the time of DAMAGE the Sum Insured by the relevant Item on Property Insured or interest is less than 85% of the Insurable Amount, the amount otherwise payable by the Company will be proportionately reduced.”*** The policy goes on to state in clause 5 that:

“For the purpose of the Average Condition (Underinsurance) the Insurable Amount will be the total of the cost of reinstatement at the time of the DAMAGE of the Property Insured by the Item and the additional cost B as above.”

[37] The source of the dispute between the parties is the definition of the term “cost of reinstatement” as used in this provision of the policy. TEI submits that it is this cost which influences the determination of the insurable amount and, in turn, the question of whether there is underinsurance for the purpose of the claims made to CAI. TEI submits that under the policy, the term “cost of reinstatement” has two distinct meanings. For that proposition, reference is made to Clause A of the Basis of Settlement. The clause defines this term in this way:

- in the case of Buildings, the cost of rebuilding

- *in the case of Machinery and other Contents the cost of its replacement by similar property.”*

“(i) where the property is lost or destroyed

(ii) where the property is damaged the cost of repairing or restoring the damaged portions in either case to a condition substantially the same as but not better or more extensive than its condition when new.”

[38] The submission being made by TEI is simply that a finding of fact had already been made that the property insured was not lost or destroyed, but that it was damaged. As such, the claim was not one which called for consideration of the value of the property at the time of risk, but rather the cost of repairing or restoring the damage. In applying the value of the property to determine the cost of reinstatement, it is submitted, Mr. John and the Umpire fell into error. What should have been considered was the sum of US\$5,776,422.00 which was the cost of repair upon which the arbitrators had found consensus. If that had been used, then there would be no question of whether an apportionment ought to have been made in accordance with the average condition clause. It is therefore submitted that this is purely a question of law for which leave to appeal can appropriately be granted.

[39] It is submitted that there is no doubt that the average clause was up for consideration. There is also no doubting that the issue of consequential damages, interest and costs were clearly before the tribunal for consideration. On this specific ground, the court can find little reason to suggest that the criteria would not have been met. I determined earlier that this element of the criteria is clearly established.

The “Obviously Wrong” test

[40] TEI relies on the same submissions already put forward on the ground of whether the appeal is on a point of law in order to argue that the decision was obviously wrong. It was stated that the Umpire’s decision on the meaning of the term “cost of reinstatement” was obviously wrong for two reasons. The first reason is that the Umpire applied the wrong definition to the term “cost of reinstatement”. The second reason is that the Umpire departed from the clear meaning of the words “cost of reinstatement”. It was submitted that had Mr. Connor properly interpreted the provisions of the policy, there would have only been one conclusion. The fact that the property insured was not lost or destroyed, but rather damaged, meant that the umpire was obviously wrong in his decision to rely on the value of the property instead of the cost of repair. Perhaps this is an appropriate stage to assess in some detail the rationale for the Umpire’s decision.

[41] Mr. Connor was of the view that the words in the policy were clear and contrary to the submissions put forward by TEI. Mr. Connor noted, for example, that the main question is “*what is the property insured*” (which is defined in the schedule) and the **key** wording “**the total of the cost of reinstatement**” in its definition. He expressed the view that TEI was confusing the matter by arguing that the cost of reinstatement has two meanings in the policy under Basis of Settlement A and is therefore ambiguous. In his view, placing emphasis on the damage done to the property and not the “property insured” itself was the challenge in this argument. He therefore concluded that:

“The Insurable Amount will be the total cost of reinstatement at the time of the DAMAGE (in Capitals) of the Property Insured by the Item and the additional Cost B as above”. Here the operative words are ‘*total cost of reinstatement at the time of the DAMAGE of the Property Insured*’. The property insured is as set out in the schedule.”

- [42] In Mr. Connor's view, it is the words "property insured" upon which emphasis must be placed. The insurable amount will be the total cost of reinstatement of the property which has been insured. That is defined in the schedule of the policy. Therefore, if the property was underinsured, then the averaging clause will apply. He went on to find that *"the use of the phrase cost of reinstatement under the Basis of Settlement Section A (i) and (ii) clearly refers to the amount the company will pay or amount payable in the event the property is lost or destroyed (DAMAGE) or where the property is **damaged**, the cost of repairing or restoring the damaged portions."* In his view, that is a separate issue altogether from the underinsurance of the property itself.
- [43] In returning to the submissions of TEI, it is argued, further, that Mr. John mischaracterized the very evidence he used to determine that the cost of reinstatement was US\$16,759,844.00. In adopting a similar approach, Mr. Connor also fell into the same error. He placed much reliance on the evidence of Mr. Douglas Lake Gillander (Mr. Gillander) who is a quantity surveyor who gave evidence in the matter. It is submitted that from Mr. John's own assessment he *"inexplicably recharacterizes the evidence of Mr. Douglas Lake Gillander ('Mr. Gillander') from the 'value of the property at the date of risk' to 'the total of the cost to reinstate, rebuild, THE PROPERTY INSURED'. Mr. John's characterization was fundamentally unsustainable as Mr. Gillander's evidence distinctly related to the cost of repairing the property and its value (undefined) at the time of the damage."* The argument here is that there is nothing in the policy which requires that the value of the property at the time of damage be used as a basis for determining the cost of reinstatement. By agreeing with Mr. John in adopting this approach, the umpire was clearly wrong and therefore used the wrong figures for the cost of reinstatement.
- [44] The second issue is whether the umpire was wrong in his determination that there had not been a breach of contract for which consequential damages ought to have been awarded. It was submitted that a breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract. Reference was made to **Jarvis v Moy, Davis, Smith, Vandervell & Co**⁹ for that submission. The substance of the argument therefore is that CAI breached its obligation under the Policy by failing to pay the amount due as set out in the insurance claim or by failing to make a satisfactory offer to compensate for its loss. TEI further submitted that CAI has

⁹[1936] 1 KB 399

failed to pay the sum of US\$353,283.00 which was due since October 2018 and was not in dispute. This has caused losses to TEI as it was unable to repair the resort in a timely manner. It was also submitted that the Umpire erroneously took into account and gave significant weight to the variance between the parties, which was a factor irrelevant to his decision on the point in issue and erroneously took into account and gave significant weight to TEI's revision of its insurance claim from US\$8.3 million to US\$5.8 million, which was irrelevant to his decision on the point in issue.

- [45] TEI goes further in its submissions to argue that the umpire was clearly wrong in his findings on the issue of consequential loss. It is argued that Mr. Connor was wrong to find that there was no consequential loss because there was no breach of the policy, and that rental income was not recoverable under the policy. It was submitted that Mr. Connor failed properly to consider the relevant legal principles relating to consequential losses. Those principles, it is submitted, are as expressed in the case of ***Hadley v Baxendale***¹⁰ where Alderson B stated the following:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally; that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it”

- [46] The submission is made that whilst loss of rental income is not recoverable under the policy, the consequential losses claimed are on account of the breach of contract and not an indemnity in the event of damage which is covered by the policy.

- [47] On the question of costs, it is noted that neither arbitrator awarded costs to the respondent. Mr. John, whose decision Mr. Connor largely followed, indicated that the respondent had, without prejudice to its rights, been willing to accept that each party should bear their own costs. He adopted that position in his judgment. Mr. Connor, on the other hand, noted that “[his] ruling therefore, which is contrary to

¹⁰ (1854) 9 Ex Ch 341

Arbitrator John's ruling is that **legal cost is awarded to the Respondent to be assessed if not agreed within 30 days from the date of this award.**" TEI submits that no reason was given for departing from Mr. John's conclusion in the umpire's decision.

[48] It is submitted that TEI will suffer injustice if the question is not determined by the court. TEI stands to accept an award much less than what is required to make good the damage caused to the resort. The difference in that amount stands at US\$4,616,422.00. On the other hand, it is submitted that CAI stands to suffer no prejudice if the question is determined.

[49] Counsel for TEI also submits that the interpretation and application of a standard term such as the Average Clause is a matter of significant national and/or local importance. It is further argued that due to the serious financial implications which such clauses have for the insurance market in the context of the increased threat of hurricanes in Anguilla and the wider Caribbean region, it is important for the court to provide legal certainty in the interpretation and application of such clauses. This is clearly in the public interest. As such, even if the court were to find that the umpire was not obviously wrong, leave ought to be granted because, at the least, the findings are open to serious doubt, and it is just and proper to grant leave so as to provide clarity to this issue.

The Respondent's Submissions

[50] Counsel for CAI submits, firstly, that TEI is seeking to appeal findings of fact and not law. It is submitted, in response, that the court should be cautious about the exercise of its discretion when considering such issues. Counsel cited the case of **Fidelity Management SA v Myriad International Holdings BV**¹¹ where the following was noted:

[3] I would add to this citation, dicta of Lord Hoffmann in *Piglowska v Piglowski* [1999] 3 All ER 632 at 643, [1999] 1 WLR 1360 at 1372, citing his own judgment in a different case:

¹¹ [2005] EWHC 1193 (Comm)

'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'

[4] The need for caution when a commercial court judge is dealing with an arbitral award is that much greater, because the parties have chosen an autonomous process under which they agree to be bound by the facts as found by the arbitrators and from whose findings of fact there is no appeal. I approach the award on the basis of an assumption that the arbitrators understood their function and knew how to perform it. In this case the assumption is readily made since the panel comprised most eminent lawyers: Lord Browne-Wilkinson, Professor Dr Albert Van den Berg (a leading Dutch lawyer and experienced international arbitrator) and chaired by Kenneth Rokison QC. And, further, that it would be wrong for this court to undertake a narrow textual analysis of the award so as to conclude that there has been a serious irregularity of the sort required under s 68 of the Act.

[51] Counsel also submits that the umpire was not obviously wrong in his application of the facts to the law. As noted in the submissions, the main issue before the arbitrators was whether the average clause operated to reduce TEI's claim and, if so, to what extent. This issue took a number of weeks of examination and submissions. It is argued that the arbitrators and umpire meticulously examined the factual matrix, including expert evidence on the evaluation of the property insured, the terms of the insurance policy, and correctly applied the average clause in light of the insured value and the actual value of the property in keeping with the express terms of the policy. It is submitted therefore that what is being appealed here, if leave were to be granted, was the finding of fact regarding the value of the property and the calculation in keeping with the average clause. This, it is submitted, is not an issue of law.

[52] Counsel for CAI also referred to the case of *Pioneer Shipping Ltd. and Others v. B.T.P. Tioxide Ltd* where the House of Lords decided that leave to appeal an arbitral award should be reserved for cases which raise questions of law of significant importance or those where there is substantial doubt about the correctness of the decision being appealed. None of these are satisfied in the circumstances of this case.

The Court's Findings

[53] Having examined the evidence and considered the submissions of counsel in the matter, I am of the view that the issues raised by TEI in this application are generally matters of law which may very well be the subject of an appeal. The interpretation of the average condition clause and its application to the facts of the case are matters of law in keeping with the case law assessed earlier in this judgment. I am satisfied that the question of whether there was a breach of contract and whether consequential damages ought to have been granted is also a matter of law. So too is the question of whether costs ought to have been granted in favour of CAI. These are all matters which either involve the interpretation of the contract as was noted in *The Nema* and/ or the application of case law and general principles of law.

[54] I have also decided that TEI's rights are in fact affected by the decision and that the Umpire was called upon to consider the questions which are the subject of this application. The question for consideration, therefore, is whether the umpire was obviously wrong in his decision or alternatively, whether the question is one of public importance and there is serious doubt about the correctness of the decision.

Was the Umpire Obviously Wrong?

[55] I have found that the Umpire's interpretation of the average condition clause was not obviously wrong. TEI's interpretation of the clause seeks to place emphasis on two definitions of the "cost of reinstatement" as outlined in Clause A. This separates the basis of settlement in the event of loss, destruction or damage into two. A circumstance may arise where the property insured is lost or

destroyed. In such a case, the basis of settlement would be the total cost of replacing the insured property. Where, however, the property is damaged, CAI would be obligated to indemnify this loss by paying the cost of repair to the damaged portions of the property insured, subject to the deductible. The umpire, as well as Mr. John, held the view that that was a separate issue from the underinsurance of the property. Mr. Connor interpreted the contract by placing emphasis on the words “property insured” in order to interpret the true meaning of the clause. For convenience’s sake, I repeat here the exact wording of the clause, as well as that of clause 5:

“[u]nder the Basis of Settlement below, if at the time of DAMAGE the Sum Insured by the relevant Item on Property Insured or interest is less than 85% of the Insurable Amount, the amount otherwise payable by the Company will be proportionately reduced.”

Clause 5

“For the purpose of the Average Condition (Underinsurance) the Insurable Amount will be the total of the cost of reinstatement at the time of the DAMAGE of the Property Insured by the Item and the additional cost B as above.”

[56] It was Mr. Connor’s view that the insurable amount was the cost of reinstatement of the “property insured” as outlined in the schedule. That was not the same as the actual cost of repairing the damages in the particular case of the hurricane in 2017, but the total cost of the reinstatement of the property itself. That was arrived at by assessing the value of the property in general. It is not for the court to substitute its own interpretation of the section. However, it does seem to me to be good reasoning if what one is considering in general is the effect of underinsuring the property.

[57] I have also considered TEI’s complaints regarding the treatment of Mr. Gillander’s evidence in arriving at the value of the property insured at the time of damage. I can see no basis to interfere with the reasoning of Mr. John and Mr. Connor here. This is a question of fact, and it was found that the value of the property insured at the time of damage exceeded to sum insured under the policy. It is a matter of fact and, furthermore, there is nothing obviously wrong about that conclusion.

[58] On the issue of consequential damages, I share a similar view. The Umpire was of the view that there was no breach of contract and therefore no basis for consequential damages. The decision was based on the fact that there was a genuine dispute between the parties about the applicability of the averaging clause. TEI at the time was in fact claiming losses above the amount actually insured. Contrary to the submissions of counsel for TEI, I do not find this to be an irrelevant factor for the Umpire to have considered. The impact which this divergence had on the figures to be paid was significant. By referring the matter to arbitration, the parties were exercising their rights under the contract. When one considers that CAI never argued that there was no obligation to pay, but took objection to the amount which was payable, the process of seeking a resolution by arbitration was reasonable and there was therefore no breach of the contract. The fact that there was a balance of US\$353,283.00 which was undisputed did not seem to trouble the Umpire's reasoning. CAI had in fact made an interim payment of \$1,000,000.00 whilst the dispute was being resolved. I, therefore, do not find the Umpire's reasoning to be obviously wrong, especially when one considers the significant reduction which was made to the amount claimed by TEI in the arbitral proceedings.

[59] On the question of the award of costs, I note that it was agreed that the issue of legal fees was a matter before the Umpire for his consideration. I take it that legal fees was in fact the award of costs. Whilst I agree that Mr. John did not award costs, I can see no reason to find that Mr. Connor was prohibited from taking a different view on the issue. His rationale was that CAI was in fact successful in the arbitration. TEI started off by claiming in excess of US\$8,300,000.00. This was substantially reduced. CAI was therefore successful in what was in fact the main dispute between the parties. The award of costs was not, in my view, obviously wrong.

Is the matter of public importance and is the decision of the Umpire subject to serious doubt?

[60] I say from the onset that I harbour no serious doubt about the correctness of the umpire's interpretation of the average condition clause. On that basis alone I would deny the application, given that I have also found that Mr. Connor was not obviously wrong. However, something must also be said about whether it is of public importance for the court to engage in its own interpretation of the clause.

[61] In my view, whilst average condition clauses are standard in insurance contracts, I am not satisfied that the circumstances of this case meet the threshold of public importance. There is nothing here to

suggest that there is any ambiguity or confusion in the market regarding the interpretation of averaging clauses. The clause appears to me to address a circumstance of the underinsurance of the property insured for which there is no evidence of confusion by those involved in and affected by that industry. At most, it would appear that there may be some novelty in the way this particular contract was worded. That is not sufficient to make it a matter of public importance. I express no concern, based on what has been presented to me, that there is a need to intervene in order to bring general clarity to the law in this area. However, even if I were to have been wrong about this issue, as I have already stated, I am not of the view that the Umpire's decision is open to serious doubt. Having arrived at these conclusions, there is no need to engage on whether it is just and proper to entertain the question on appeal.

[62] On the question of whether consequential damages ought to have been awarded, I am also of the view that there is no serious doubt about the Umpire's decision. For the same reasons outlined in my assessment of the question of whether the decision was obviously wrong, even at this lower threshold, I find that the decision is not subject to any serious doubt. I share a similar view on the question of costs.

Disposition

[63] In the circumstances, the application is dismissed with costs to the respondent. The parties are to attempt to agree on reasonable costs and in the event that a consensus is not arrived at, TEI is at liberty to apply to the court for an assessment of those costs in keeping with the provisions of the CPR.

Ermin Moise
High Court Judge



By the Court

Registrar