CA on appeal from Admiralty Court (HHJ Mackie QC) before Sir Anthony Clarke MR; Maurice Kay LJ; Stanley Burnton LJ. 27th November 2008

Sir Anthony Clarke MR:

Introduction

1. This is an appeal against an order made by His Honour Judge Mackie QC ('the judge'), sitting in the Admiralty Court, on 14 March 2008 dismissing the appellant's claim under a contract of marine insurance. The judge refused permission to appeal but it was subsequently granted by Sir Paul Kennedy. The appeal raises a short point of construction of the contract. The key provision in the contract is a warranty given by the appellant as follows:

   "Warranted Owner and/or Owner's experienced skipper on board and in charge at all times and one experienced crew member."

   The judge held that the appellant could not recover in respect of loss sustained by a fire during the currency of the contract on the ground that he had not complied with the warranty.

2. The judge refused permission to appeal but permission was subsequently granted by Sir Paul Kennedy. In granting leave, Sir Paul wrote:

   *"In the context of the industry the words **"at all times"** cannot have been intended to be read literally. Such a reading of the contract is also inconsistent with other terms of the contract (albeit they are standard terms). If there is to be a qualification the Appellant is entitled to say that the burden was on the Respondent to show clearly the extent of the qualification. For those reasons I consider that the appeal has a real prospect of success."*

   It is essentially that case that Mr Nolan advances on behalf of the appellant.

The facts

3. The appellant, Mr John Pratt, owns the motor fishing trawler RESOLUTE, a steel stern trawler, which is 21.35 metres in length and has a gross tonnage of 117 tonnes. He entered into the contract through brokers. The period of cover was for twelve months from 23 June 2006. The insured value of the vessel was given as £120,000. The living accommodation on the vessel comprised a crew cabin with dimensions of six feet by nine feet and a galley (which doubled as a mess room) with dimensions of six feet by six feet. In the galley there was an oven, a deep fat fryer and a fridge. She was thus a small vessel. There were four crew, including the appellant, who has a Class 1 Fishing Vessel certificate of competency. There was accommodation for the crew on board.

4. I can summarise the facts much as the judge did. The vessel was based at Fleetwood but in December 2006 was fishing from North Shields for prawns. On 10 December the appellant and his crew of three took the vessel out to fish for a day and returned to North Shields where the vessel was all fast alongside the quay at 2000 hours. The crew landed the catch and at 2030 the appellant went to file the vessel's fishing log sheet at the Fisheries Office. The crew readied the vessel for fishing the next day before one of them, who lived in North Shields, went home and another visited a pub some 200 yards from the vessel. At about 2200 Mr Pratt left the vessel to meet a friend at a café in Tynemouth and a few minutes later the fourth crew member also went to the pub. At about 2220 Mr Pratt received a telephone call informing him that the vessel was on fire. When he and the crew members returned to the vessel, the Fire Brigade was there putting out the fire, which was extinguished by about 0045 on 11 December. It can thus be seen that the fire occurred shortly after the crew left and in circumstances in which the crew or most of the crew intended to return to the vessel in order to sleep on board and to be ready for fishing the next day.

5. The vessel was inspected by Burgoynes on 15 January 2007. Their report concluded that the fire started in the galley but that, because of the severity of the fire, it was not possible to identify the precise location of the seat of the fire or its cause with any certainty. Although loss by human agency could not be completely ruled out, it did not appear the most likely cause. On the evidence available it was plausible that the fire was caused by operation or malfunction of the deep fat fryer or the fridge. The fryer was used by unplugging the fridge and placing the fryer plug in the socket. The fryer's on/off switch was stuck in the on position, so that temperature was controlled by unplugging it when necessary. As was usual when the crew were to return to the vessel for the night, the generator was left running while they were ashore. Two quotations for repairs were obtained but both were more than the insured value of £120,000.

The contract

6. It is common ground that the contract was subject to "CONDITIONS" as follows:

   "Aigaion's Trawler Wording with the following Endorsements; Endorsement C - Crew Liability for 4 men.

   Machinery Damage included subject to Machinery undergoing a full overhaul by manufacturers representative and certified by a qualified marine surveyor.

   Warranted Machinery Breakdown is covered for the main engine only, but no cover shall apply following damage as a result of, or caused by, failure of any associated ancillary parts, pumps, generators, writing or peripheral equipment of any kind.

   Subject to MCA or appropriate Licences to be held and in force. A copy required for Underwriters files.

   Warranted Owner and/or Owner's experienced Skipper on board and in charge at all times and one experienced crew member.

   Warranted the vessel is to be maintained to MCA or equivalent authority requirements.

Warranted any piece of Equipment valued in excess of GBP 500 to be specifically declared failing which Underwriters maximum liability will not exceed GBP 500 per item.

Subject to sight of current MCA survey and Ultrasonic thickness Test that has been carried otherwise full Out of Water survey to be carried out prior to attachment and all recommendations to be complied with within the time frame set by surveyor. All survey costs to be for Owners account."

7. The reference to "*Aigaion's Trawler Wording*" is a reference to the respondent's standard *"Trawler Wording"*, which comprises 19 pages of fairly closely typed clauses. Like the specific conditions quoted above, they form part of the contract, which must be construed as a whole. They are, however, plainly subject to the specific conditions, because the first line of the conditions expressly provides "Aigaion's Trawler Wording with the following Endorsements" and, in my opinion, the "Following Endorsements" includes the disputed warranty, so that the warranty may alter the meaning and effect of the wording, as Stanley Burnton LJ explains.

The issue

8. The judge described the issue between the parties broadly in this way at [8] of his judgment. In essence the respondent says that the clause means what it says and that it is not liable because, in circumstances where neither the appellant nor anyone else was on board at the time of the fire, there was "*no Owner and/or Owner's experienced skipper on board and in charge at all times*". By contrast, the appellant submits that this construction ignores the fact that the clause is obviously directed to periods when the vessel was navigating or working and, if applied literally, would lead to absurd results. It is important to note that the sole question is whether there was failure to comply with the warranty relied upon by the respondent. It is common ground that the warranty is a limited warranty in the sense that, if the fire occurred at a time when the appellant was not complying with it, the vessel would not be covered during that period. It is also common ground that, if the respondent cannot rely upon the warranty, the appellant's claim will succeed. That is because fire is an insured peril and there is no suggestion that any fault of the appellant or his crew which caused the fire would give the respondent a defence.

The legal principles

9. It is to my mind possible to over-elaborate the relevant principles. Indeed there was a tendency to do so during the argument in this appeal. They are the principles relevant to the construction of contracts in general and of warranties in insurance contracts in particular. As I see it, any clause in a contract must be construed having regard to its context within the contract, which must in turn be set in its surrounding circumstances or factual matrix. The general principles are to be found in a number of comparatively recent cases, notably ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 897, where they were summarised by Lord Hoffmann at pages 912H to 913E as follows:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See ***Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd*** *[1997] AC 749).*

(5) The 'rule' that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in ***Antaios Compania Neviera SA v. Salen Rederierna AB*** *[1985] 1 AC 191, 201:*

'… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"

10. I should add that in ***BCCI v Ali*** [2001] UKHL 8, [2002] 1 AC 251, at [39] Lord Hoffmann said that, in referring to *"absolutely anything"* in his proposition (2) he meant anything which a reasonable man would have regarded as relevant. He added that there is no conceptual limit to what can be regard as relevant and then said:

*"But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: **'we do not easily accept that people make linguistic mistakes, particularly in formal documents'**. I was certainly not encouraging a trawl through **'background'** which could not have made a reasonable person think that the parties must have departed from conventional usage."*

11. Lord Steyn put the general position thus in ***Sirius Insurance Co v FAI Insurance*** [2004] UKHL 54, [2004] 1 WLR 3251 at [19]:

"There has been a shift from literal methods of interpretation towards a more commercial approach."

He then referred to the well-known passage from Lord Diplock's speech in the ***Antaios*** case quoted by Lord Hoffmann as part of his proposition (5) and to a statement of his own from the ***Mannai Investment*** case, which was also referred to by Lord Hoffmann, and concluded that "[t]*he tendency should therefore be against literalism*".

12. As Lord Hoffmann expressly noted in ***BCCI v Ali***, none of this is to say that the language is not important. As Lord Mustill put it in ***Charter Reinsurance v Fagan*** [1997] AC 313 at page 384C-D:

"Subject to [the use of a specialist vocabulary] the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used."

I should also refer to this further proposition, which was relied upon by the judge at [26], which is stated by Lord Mustill at page 388C, after referring to Lord Reid's well-known statement in ***Wickman Machine Tool Sales Ltd v Schuler AG*** [1974] AC 235, 251 that the more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make their meaning clear:

"This practical rule of thumb … must however have its limits. There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for the court."

13. The general propositions to which I have referred are subject to these further considerations in the context of continuing warranties in insurance contracts. In ***Hussain v Brown*** [1996] 1 Lloyd's Rep 627 this court was considering the kind of warranty the breach of which produces an automatic cancellation of the cover. That is a more draconian kind of warranty than the one in the present case because it is common ground here that a breach does not automatically cancel the cover for good but only means that the underwriters are not on risk for as long as the insured is not complying with the warranty. The parties agree that this is what is sometimes called a delimiting warranty. It is not necessary for me to express a view of my own on the point. However, assuming that to be the case, the principle stated in ***Hussain v Brown*** nevertheless seems to me to be of some relevance. Saville LJ, with whom Rose and Leggatt LJJ agreed, after referring to the draconian nature of the warranty, said at page 630 that in his view, if underwriters want such protection, it is up to them to stipulate for it in clear terms.

14. In this regard Mr Nolan relies upon two particular principles identified in the 10th edition of *McGillivray on Insurance Law* as follows at paragraphs 10-50 and 10-53:

"10-50 The first relevant rule of construction is that the apparently literal meaning of the words in a warranty must be restricted if they produce a result inconsistent with a reasonable and businesslike interpretation of such a warranty. A warranty in a contract must, like a clause in any other commercial contract, receive a reasonable interpretation and must, if necessary, be read with such limitations and qualifications as will render it reasonable. The words used ought to be given the interpretation which, having regard to the context and circumstances, would be placed upon them by ordinary men of normal intelligence conversant with the subject matter of the insurance."

"10-53 The second principle of construction which assists the assured who contends that he had complied with the warranty is that any ambiguity in the terms of a policy must be construed against the insurer …"

I accept that those are indeed, in broad terms, principles which are relevant to warranties of the kind with which we are concerned in this appeal. The second principle is of course simply a particular application of the *contra proferentem* principle.

Application to the facts

15. In addition to the basic facts set out above, it is relevant to take account of a number of further facts which would have been known to both parties, no doubt amongst others. There are EU regulations which limit the number of days which a vessel like the RESOLUTE is permitted to fish. In the relevant year the limit was 227 days. Vessels are often tied up for days between trips. During that time the skipper and crew would not ordinarily be expected to live on board. Even when the vessel was manned, the skipper would be expected to go ashore from time to time, both in connection with the operation of the vessel, as for example to a fish auction, and in connection with recreational activities such as going to a pub or a restaurant for a drink or a meal. Some vessels are laid up from time to time in a shed ashore.

16. The judge accepted the submission made by Mr David Bailey QC on behalf of the respondent that the clause should be construed as meaning what it says. It expressly warrants that the owner and/or owner's experienced skipper will be on board at all times. He was not on board at the time of the fire. It follows that the respondent is not liable It is not in any way an unreasonable clause because it was reasonable for underwriters to want to ensure that the vessel was protected from damage while tied up, as for example from damage by fire. Mr Bailey relies before us, as he did before the judge upon two decisions in which judges have construed warranties in

similar terms providing for crew to be on board at all times as meaning precisely that. They are the decisions of Aikens J in ***Brownsville Holdings Ltd v Adamjee Insurance Co Ltd ('The Milasan')*** [2000] 2 Lloyd's Rep 458 and the decision of Gross J in ***GE Frankona Reinsurance Ltd v CMM Trust No 1400 ('The Newfoundland Explorer')*** [2006] EWHC 429 (Admlty), [2006] 1 Lloyd's Rep IR 704.

17. In ***The Milasan*** a 90 foot motor yacht sank in calm weather in the course of a voyage from Piraeus to Sardinia with a crew of three: a skipper, an engineer and a deckhand. The relevant insurance policy contained a warranty in these terms:

"Warranted professional skippers and crew in charge at all times".

Aikens J held that the insured were in breach of warranty because they did not employ a professional skipper. He held at [24] that a practical construction must be given to the warranty, that there must a be a professional skipper and crew in charge of the vessel, in the sense that they looked after the vessel the whole time, and that there was a breach of the warranty because at the relevant time the insured had not employed a "*professional skipper*" to look after or "*be in charge of the vessel*". I do not quarrel in any way with that reasoning. However, I do not think that it assists here. It relates to a different clause in a policy which insures a very different type of vessel in different circumstances.

18. In ***The Newfoundland Explorer*** a yacht was damaged by fire while laid up. The relevant insurance policy contained a warranty which read "*Warranted vessel fully crewed at all times*". The fire was caused by the overheating of the generator. On the day of the fire, the skipper had been on board from 0700 until 1430, when he left to go home some 15 miles away. Thereafter none of the crew members was on board until the skipper returned at about 1830. He returned because he had been alerted to the fire. Gross J held that the vessel was not *"crewed",* let alone fully crewed, at the time of the fire and that there was a breach of the warranty. At [14] he took the ordinary and natural meaning of the language of the warranty as his starting point. At [16] he said that, as a matter of natural and ordinary language, for the vessel to be "*fully crewed at all times*" while laid up alongside a berth, there must be at least one crew member on board her 24 hours a day. However he added that questions of context and practicality required careful reflection and some qualification.

19. He considered context and practicality at [17] to [19] and expressed his provisional conclusion under those heads at [20] as follows:

"The warranty obliged the defendant to keep at least one crew member on board the vessel 24 hours a day, subject to (i) emergencies rendering his departure necessary or (ii) necessary temporary departures for the purpose of performing his crewing duties or other related activities."

He then considered a number of other matters, including the question whether the warranty should be construed *contra proferentem* and, if so, whether it would affect his provisional conclusion. He held at [24] that there was no ambiguity or doubt such as to bring the maxim into play and, in any event, assuming the maxim to apply, his conclusion was the same.

20. That case too is different from this. In particular the warranty is significantly different. The reasoning of Gross J is I think of assistance in that it shows the importance of context. Thus he held that, depending upon the circumstances, a vessel could be "*fully crewed*" by one crew member. However, the clause is so different that I do not think that the decision there is of any real help in pointing the way to the correct conclusion on the facts of the instant case.

21. In the present case the judge held at [24] that the natural and literal meaning of the words is that the owner or owner's experienced skipper must be on board at all times and that there is no ambiguity except, perhaps, as to whether the "*one experienced crew member*" must also be on board and in charge at all times, which he said was a consideration irrelevant to this dispute. As to context, he focused at [25] on the parties' awareness that the insured vessel was a trawler with a small crew, spartan living accommodation and the ability to fish at sea for only a limited number of days a year. However, he held that those considerations did not shift the natural meaning of "*wording as explicit as this",* save to the extent that they bear on the extent of the qualification to the literal meaning of "*on board … at all times*" which he correctly said that both sides accept is required.

22. The judge identified Mr Nolan's argument as being that the clause should be read to include "*but only while the vessel is underway or working*" and Mr Bailey's argument as being that the limitations should only be those recognised by Gross J in ***The Newfoundland Explorer***, namely limitations restricted to emergencies requiring departure from the vessel or for the purpose of carrying out other crewing duties. He also noted Mr Bailey's alternative argument that if working was accepted as a limitation, the vessel was working because at the time of the fire the generator was in operation. The judge held at [26] that the qualification to the literal wording should only be that required by commercial common-sense and not a means to arrive at what might be thought to be a more advantageous bargain. In that regard he quoted the extract from Lord Mustill's speech in the *Charter Reinsurance* case at page 388C which I have quoted above. The judge limited the qualification to the circumstances suggested by Gross J and held that, although the owner and crew were reasonably ashore when the fire broke out, their absence was due neither to emergency nor a requirement of crewing duties. He further held that the clause was not ambiguous and, although he thought that the clause was in a sense inconsistent with some of the standard terms of the contract, that was of little weight. For these reasons he held that the claim failed.

23. I have reached a different conclusion from that of the judge. I entirely accept that the court must not invent a new bargain for the parties. However, for the reasons I have given I do not think that any real assistance is to be gained from either Aikens J's case or Gross J's case. The language of the clause in this case is different from the language in either of those cases. In circumstances in which the policy wording is significantly different, I do not think that the principle that the court should be consistent in its approach to policy wording (referred to by the judge at [22]) is of any assistance. The critical aspect of the language of this clause is to my mind "*Warranted Owner and/or Owner's skipper on board and in charge*". It was no doubt contemplated that the owner would be capable of acting as skipper, as was indeed the case. Moreover, I note in passing that the proposal form makes it clear that Mr Lee Pratt, the appellant's son, is an experienced skipper. However that may be, the warranty requires that the owner or his skipper be on board and in charge. The natural inference from that is that an experienced skipper was to be on board and that the reason for that is that underwriters wanted protection from risks which a skipper would be needed to guard against. That suggests to me that the primary purpose of the warranty was to protect the vessel against navigational hazards.

24. That is I think underlined by the reference to "*and one experienced crew member*" because, as I see it, the warranty was for the owner or skipper to be on board and in charge and for a second person to be on board at the same time but not of course in charge. That second person was to be an experienced crew member. Thus the underlying purpose of the warranty, read as a whole, was to protect the vessel in circumstances in which at least two members of the crew, ie the skipper and one other, could be expected to be on board. The judge disregarded the last part of the warranty on the basis that its meaning was irrelevant to this dispute. For my part, I would not accept that that is so. For the reasons I have given, the existence and meaning of the last part of the warranty help to construe the warranty as a whole.

25. As I see it, the principal time when at least two members of the crew including the skipper would be required was when the vessel was being navigated, including when she was manoeuvring. I can see that it would probably be held to apply when the vessel was, say, landing her catch, when again there might well be a need to have the skipper and a crew member on board. The question is how far the expression "*at all times*" should be qualified. As the judge recognised and, as Mr Bailey correctly concedes, the expression cannot be given its ordinary and natural (or literal) meaning. In this case the clause seems to me to be ambiguous because it does not make clear or give any indication as to what the extent of the qualification should be.

26. In these circumstances, in accordance with the principles summarised above, the clause should be construed c*ontra proferentem*, that is against the insurer. At the time the crew left, the vessel was safely tied up alongside, as must happen very often. Sometimes, no doubt, the generator was left running and sometimes it was not. If the insurer wanted the owner or skipper and an experienced crew member on board whenever the vessel was left with the generator still running it should clearly have so provided. So too, if the insurer wanted them on board whenever the vessel was left, it should clearly have so stipulated. It did not. I would hold that the insurer has not established that there was here a breach of the warranty and would allow the appeal.

27. I would add three further points. If, contrary to my view, there was here no ambiguity, I would hold that the purpose of the warranty was to protect the vessel in circumstances when a skipper and experienced crew member could be expected to be needed if something should go wrong. That was not the case when the crew left the vessel to go ashore. In such circumstances, the parties could not have contemplated that a skipper might be required or that more than one crew member might be required, say to put out a fire. It being common ground that "*at all times*" must be qualified, that would be the natural qualification to adopt, having regard to the language used by the parties in the context described by Lord Hoffmann.

28. The second point is that nothing I have said is intended to conflict with the reasoning of Aikens J or Gross J. In the first case the basis of the decision was that there was no professional skipper on board. In the second case the basis of the decision was that the vessel had to be fully crewed at all times and that she could have been "fully crewed" by one crew member. Neither of those considerations applies here. Whether the qualifications discussed by Gross J would apply here if the circumstances were such that a skipper and experienced crew member might be needed if something should go wrong, I rather doubt but it is not necessary to reach a conclusion on that question in order to determine this appeal.

29. The third point arises out of the "*Trawler Wording*". There was some discussion in the course of the argument about the meaning of some of the standard terms which formed part of that wording. The only one which seems to me to be of any real assistance is clause 26, which is referred to by Stanley Burnton LJ. I agree with him that it is of assistance in construing the warranty for the reasons he gives.

CONCLUSION

30. For the reasons I have given I would allow the appeal and hold that the appellant is entitled to recover under the contract of insurance.

Maurice Kay LJ:

31. I agree that the appeal should be allowed for the reasons given by the Master of the Rolls and Stanley Burnton LJ.

Lord Justice Stanley Burnton:

32. I agree with the judgment and reasoning of the Master of the Rolls but wish to refer specifically to the *"Trawler Wording"*, which in my judgment is relevant to the construction of the disputed warranty. The insurance policy falls

to be construed as a whole, and the standard trawler wording of the insurers was expressly incorporated in the contract by the very first of the typed conditions. The standard terms show that the vessel was to be subject to cover in circumstances when no one could have sensibly have thought that any crew should or could be on board. Thus condition 26.1 provided:

"The Vessel is covered while anchored, moored or navigating within the geographic limits set out in the Schedule, including while aground at customary berth and, provided in the following cases the contractor carries adequate liability insurance, and no waiver of the Insurer's subrogated rights of recovery applies, at place of storage ashore, including lifting out and launching, while being moved in shipyard or marina, while being dismantled, fitted out, refitted, overhauled or undergoing major repairs. Gear and equipment are covered whether on board the Vessel or not, while in transit to and from place of storage ashore, always subject to the terms and conditions of this insurance."

It cannot have been thought that the vessel would be crewed while she was aground or at place of storage ashore, while being dismantled etc.

33. It follows that the warranty requiring "*Owner and/or Owner's experienced skipper on board and in charge at all times and one experienced crew member"* cannot be read literally. Some qualification of the words "*at all times"* must have been intended. Condition 26.5 provides the clue:

"It is warranted that unless the Vessel is manned by at least two persons who are medically fit in all respects to man such a vessel, one of whom shall be competent to be in command, she shall not be navigated."

34. This warranty is virtually otiose if the typed warranty is to be read literally. A more sensible reading is that the typed warranty places a gloss on condition 26.5, requiring the Owner or his experienced Skipper and one experienced crew member to be on board when the vessel is navigated or in other circumstances where their presence would be appropriate.

Michael Nolan (instructed by Hill Dickinson LLP) for the Claimant/Appellant
David Bailey QC (instructed by Marine Law) for the Defendant/Respondent