COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 26 of 2022

B E T W E E N

RAV BAHAMAS LIMITED

Appellant

AND

GREAT LAKES REINSURANCE (UK) PLC
(as Subrogee of Modrono's Bimini Place Limited)

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. John Wilson, QC with Ms. D'Andra Johnson, Counsel for the Appellant**

Mrs. Tara Archer-Glasgow with Mr. Audley Hanna, Jr., Counsel for the Respondent

DATES: **16 June 2022; 8 September 2022**

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Civil appeal – Contract – Contractual relationship - Breach of contract - Negligence - Exclusion clause – Implied term – Subrogation – Judicial deference – Sections 40 & 41 of the Consumer Protection Act

The appellant is the owner/operator of the Bimini Bay Marina. The respondent, Great Lakes, is the insurer of a 41-foot vessel known as the Rum N' Coke. The vessel was beneficially owned by Modrono's Bimini Place (MBP). Manuel Modrono, Jr. (Modrono) is an owner and officer of MBP. Modrono and his father (Modrono, Sr.) purchased the vessel but its monthly expenses at various marinas were split among Modrono, Modrono, Sr., Anthony Modrono and James Begera. The relationship between the owner(s) of the vessel and the appellant was governed by a Boat Slip Lease agreement (BSL).

In July 2009 both Modrono and Tony left Bimini to return to Florida; Modrono left that morning and Tony later that afternoon. Tony's evidence is that he secured and locked the vessel prior to his departure.

Sometime around July 2009, while the vessel was docked at the appellant's marina, an employee of the marina received a call from an unknown individual claiming to be one of the owners of the vessel. The unknown individual instructed the employee to ready the vessel for sailing; he gave the employee specific instructions. The employee, having met the vessel unlocked, did as he was instructed and readied the vessel. Two days later the employee met two men, one of whom he assumed was the captain of the vessel; he paid the employee for his services. The vessel has not been found.

The respondent conducted an investigation which concluded that the owners of the vessel were not involved in the theft of the vessel and, therefore, the respondent paid out the insurance claim. The respondent sued the appellant on the basis of subrogation. The respondent claimed damages, interest and costs. The respondent's cause of action was based upon breach of contract and negligence by the appellant. The court below found that the appellant breached its duty of care and therefore the respondent was entitled to the damages claimed. The appellant now appeals that decision to this Court.

Held (Barnett, P. concurring): appeal allowed. Judge's decision that the respondent was entitled to damages is quashed. Costs, here and below, to the appellant, to be taxed if not agreed.

per Isaacs, JA: Paragraph 17 of the BSL provides that "the tenant is responsible for … taking all necessary precautions to ensure that the boat is secure from damage from any all causes including without limitation theft…".

There is no duty on the appellant to prevent the theft of the vessel. Having regard to the boating traffic at the marina and the level of security implemented by the marina it would not be reasonable to place the onus of securing the vessel from theft on the appellant. The Judge's finding of systemic failures to provide adequate security cannot be supported by the evidence.

The judge's finding that the appellant breached its duty of care cannot be sustained in the face of paragraph 17 of the BSL as this paragraph places the responsibility to prevent theft of the vessel on the respondent.

Further, the judge's finding that a reasonable investigation was conducted appears flawed. The investigation did not condescend to inquire of all of the owners / operators of the vessel whether they had removed the vessel or authorized anyone else to do so.

Ashby v. Tolhurst [1937] 2 K.B. 242. considered
Bahamasair Holdings Ltd v Messier Dowty [2018] UKPC 25 applied
Caparo Industries plc v Dickman [1990] 1 All ER 568 considered
Halbauer v Brighton Corporation [1954] 1 WLR 1161 applied
Hollins v. J. Davy Ltd. [1963] 1 Q.B. 844 considered
McGraddie v McGraddie and another [2013] UKSC 58 considered
Pratt v Aigaion Insurance Co SA [2008] EWHC 489 (Admlty) considered
Stephen Carroll v An Post National Lottery Company [1996] 1 IR 443 considered
Sze Hai Tong Bank v Rambler Cycle Co [1959] A.C. 576 mentioned

Taylor v Cooper's Marine Specialist [2011] 1 BHS J. No. 54 considered
Watt v Thomas [1947] 1 All ER 582 considered

per Barnett, P.: The relationship between the appellant and the boat owner was contractual. There was no basis for implying terms pleaded in the Statement of Claim as a part of the contract. Further, there is no basis for imposing tortious obligations in a contractual relationship.

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2015] UKSC 72 applied

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J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. The appellant is unhappy with the decision of Mr. Justice Ian Winder ("the Judge") delivered on 17 January 2022, wherein the Judge said, inter alia:

> **"13. ... that the Defendant breached its duty of care as its actions fell below the reasonable standard expected of it, resulting in the loss of the Vessel...**
>
> **14. I did not find that Clause 3(7) the Boat Slip Lease was effective to exclude the Defendant from being liable with respect to the theft of the Vessel…**
>
> **…**
>
> **16. ... On a strict reading of Clause 3(7) therefore, it could not contemplate the negligence of the nature claimed against the Defendant in this action, which led to the theft of the Vessel. The lapses, resulting in the Defendant's breach of its duty of care, which were identified in the findings of Alphonso were systemic and could not be confined to any negligent act or omission by any porter, attendant, or servant of the Defendant.**
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> **17. In any event it seems that Section 40 and 4[1] of the Consumer Protection Act 2006 would exclude the**

operation of clause 7 of the Lease for the purpose of excluding liability…"

2. The appellant asks that we overturn the Judge's decision, dismissing the action on the following grounds:

> **"1. The learned Judge erred in law and in his assessment of the evidence before him in concluding that the Appellant owed a duty of care to the Respondent to prevent the theft of the Vessel. In so holding the Learned Judge:**
>
> > **i. Misapplied the law and the applicable test for determining the existence of a duty of care to the facts that was before him. The Learned Judge ought to have concluded that in accordance with the Boat Slip Lease and in particular paragraph 17 of the Fourth Schedule thereof, either alone or in conjunction with the prevailing circumstances unique to a boating marina, that the Appellant did not owe a duty to the Respondent to prevent theft of the Vessel. In so imposing a duty the learned Judge essentially enlarged the property rights of the Respondent which had already been delineated through the carefully constructed commercial arrangement between the parties.**
> >
> > **ii. Did not consider at all the effect of paragraph 17 of the Fourth schedule to the Boat Slip Lease dated 7th March, 2008 (the "Lease") entered into between the Vessel owner and the Respondent in determining whether a duty was owed to the Respondent. Had the Learned Judge considered or properly considered paragraph 17 of the Fourth Schedule he would have concluded that it was not fair just or reasonable to impose a duty on the Appellant in the circumstances to prevent the theft of the Vessel where the parties to the Lease expressly agreed that this duty was to be borne solely by Modrono's Bimini Place Limited (the "Owner").**
>
> **2. In the event the learned Judge was correct in holding that the Appellant owed a duty to the Respondent to prevent theft the learned Judged (sic) erred in his assessment of the evidence in determining that the Appellant breached that duty in that:**

i. The evidence was insufficient to establish on a balance of probability that Mr. Modrono locked and secured the Vessel.

ii. The accepted position on the evidence that no one at the Marina was in possession of keys to the Vessel.

iii. The Respondent's evidence was uncorroborated and diametrically opposed to the Appellant's but expressly preferred by the learned Judge without reason.

iv. The absence of any evidence that the vessel had to be broken into or was locked and the uncontested evidence that the 'thieves' advised Oneil that the Vessel was unlocked in instructing him to prepare the vessel for sailing. The only reasonable inference which ought to have been drawn by the learned Judge was that the 'thieves' unlocked the Vessel and obtained the keys to the Vessel directly from or through the negligence of the Owner and/or his co-owners.

The above should have led the Learned Judge to infer that at most the critical act which was directly causative of the theft, the proof of which rested with the Respondent, was not proven and at best the probabilities were equal.

3. The Learned Judge erred as a matter of law in proceeding to consider a claim in tort for negligence advanced by the Respondents in the face of the parties' contractual relationship. Such a claim, especially as it related to theft, was not open to the Respondents as a matter of law given the terms of the parties' contractual arrangement.

4. Alternatively (as must be assumed given that the Learned Judge proceeded to consider the applicability of the exclusion in clause 3(7) of the Boat Slip Lease to the claim for negligence) the Learned Judge erred as a matter of law in implying a term into the Boat Slip Lease that the

Appellant would take any measures to keep the Vessel safe from theft. There was nothing in the Learned Judge's Judgment to indicate that he considered or applied the legal test for the implication of such a term into the Boat Slip Lease.

5. The Learned Judge erred as a matter of construction in concluding that clause 3(7) did not operate to essentially exclude negligence on the part of the Appellant's employee which negligence on the Respondent's case led to the theft of the Vessel.

6. The Learned Judge erred as a matter of law in holding that section 40 of the Consumer Protection Act 2006 ("CPA") operated to vitiate clause 3(7) exclusion. The Learned Judge ought to have found that the CPA had no applicability to the contract arrangement between the parties and that to the extent it did that the exclusion clause was reasonable.

7. The Learned Judge erred in concluding that the loss of the Vessel was due solely to the negligence of the Appellant and that (by omission having not dealt with the point at all) the Respondent was not liable in contributory negligence. The Learned Judge ought to have found that the Respondent was at a minimum contributorily negligent having not proven that the vessel was locked and the Appellant asks this court to so find should the Learned Judge's finding that the Appellant is liable to the Respondent be upheld."

3. The appeal arises out of a claim against the appellant for the theft of a 2007 forty-one-foot Luhrs motor yacht vessel called "Rum N' Coke" ("the vessel") which the respondent/claimant alleged had been stolen due to the negligence of the appellant.

4. An Agreed Statement of Facts and Issues was filed by the parties to the action in the court below. That Statement said, inter alia:

"**Facts**

1. At all material times the Defendant was a company duly incorporated within the Commonwealth of The Bahamas in accordance with the Companies Act 1992, Chapter 308 of the revised Laws of the Commonwealth of

The Bahamas and was at all material times, the owners and/or operators of the Bimini Bay Marina (the "Marina") situated on the island of Bimini one of the islands of the said Commonwealth.

2. At all material times the Plaintiff was the insurer of a 2006 41 foot Luhrs motor yacht vessel known as the Rum N' Coke (the "Vessel").

3. In about July/August, 2009, the Vessel docked at the Marina.

4. Subsequent to the docking of the Vessel at the Marina, in or about August 2009, Mr. O'Neil Rolle ("Mr. Rolle"), a dock hand/porter employed by the Marina was contacted by an unknown individual claiming to be one of the owners of the Vessel. This unknown individual requested that the Vessel be cleaned and scrubbed at the bottom.

5. On or about 19th August 2009, Mr. Rolle accepted the sum of $400.00 from an unknown individual as payment for cleaning the Vessel."

Background

5. Mr. Manuel Modrono Jr. (Modrono) was an owner and officer of Modrono's Bimini Place LLC ("MBP"), the beneficial owner of the vessel; and he was the named assured on a policy of insurance in respect of the vessel placed through a broker with the respondent. It appears that Mr. Modrono and his father, Manuel, Sr. had purchased the vessel but monthly payments for its expenses at various marinas was split into four, that is, between the Modronos, Manuel, Jr.'s cousin, Anthony "Tony" Modrono and James Begera.

6. Apparently, he and his family had purchased units in the Bimini Bay Resort and Marina ("Bimini Bay"); and had, through the agency of MBP, entered into a Boat Slip Lease ("BSL") with Bimini Bay initially for a forty-foot slip but upgraded to a fifty-foot slip following their purchase of the vessel. The cost of the slip was two hundred thousand dollars. According to Mr. Modrono, each time the boat was taken to Bimini Bay, a dockage agreement was completed; and a copy would be given to the person when they left.

7. The Fourth Schedule of the BSL entered into between MBP and the appellant contained the following clause at paragraph 17 ("paragraph 17"):

> **"17. The tenant is responsible for proper operation and mooring and <u>taking all necessary precautions to ensure that the boat is secure from damage from any all causes including</u>**

without limitation theft fire vandalism and storm." [Emphasis added]

8. About 9 June 2009, the vessel was taken from Florida to Bimini by Tony, Norberto Albalat and two of their friends: Chuck, a friend of Norberto and another man who was Tony's friend. This was the first time that the vessel was coming to The Bahamas for that year hence they had to secure a cruising permit which "basically allows you to have the boat in the Bahamas and to be able to circulate throughout the Bahamas with that Cruising Permit" (per Mr. Modrono in his interview with Mr. Alphonso Lazaro ("Lazaro") of Nautilus Investigations).

9. Mr. Modrono went to Bimini on 4 July 2009 with members of his family. Tony and his family had traveled there the day before. Mr. Modrono stayed in Bimini for some ten days; and the last time he saw the vessel was about 10:00a.m., 12 July 2009, the day he left Bimini to return to Miami, Florida. It was in its slip, Dolphin 16, in the marina.

10. Tony also returned to Florida on 12 July 2009, but he left Bimini around two or three o'clock in the afternoon. He claimed that he secured the vessel prior to his departure by locking it. Significantly, Tony did not know who else may have had a copy of the key to the vessel: See page 540 of the Record of Appeal.

11. Sometime around 18 July 2009, O'Neil Rolle received a telephone call from a 305 area code number and someone representing himself to be Anthony Modrono, the owner of the vessel, advised O'Neil that he would be sending his captain to collect the vessel; and requested O'Neil to go onto the vessel and, inter alia, turn on the air conditioning in the cabins and salon area and turn on the water pump. The caller directed O'Neil as to how he was to perform the tasks, to wit, he told O'Neil to go on board the boat, to look in the top left corner for the breaker box and switch on the breakers for the air conditioning and the water pump. He told O'Neil to let the water pump run overnight and then shut it off; but he was to make sure the air conditioner cools before leaving the vessel. The caller also asked O'Neil to have the waterline of the vessel cleaned. The person said the vessel was moored at "Dolphin 16" and was unlocked. A price for the service O'Neil was to perform was negotiated and he was to be paid when the captain came to take the vessel.

12. O'Neil did as he was requested having met the vessel unlocked; and two days later he met two men, one of whom he assumed was the captain. The captain searched for the cruising permit on the vessel and located it. The man then paid O'Neil $400.00 cash, $180.00 of which was paid to the young man who had cleaned the waterline. O'Neil explained that he did not suspect the speaker on the telephone was not who he said he was because the man knew so many details about the vessel. O'Neil was off from work on the day that the men came and took the vessel, but he had gone to the marina to collect the money owed to him. The vessel has not been found although Lazaro appears to have tracked its route to its possible final destination, Venezuela, via Long Island, Turks and Caicos, Dominican Republic, St. Croix, St. Kitts and Guadeloupe.

13. Curiously, although O'Neil claimed that the number the caller used had a 305 area code, his phone records revealed some eight phone calls during the relevant period from a telephone number with a 954 area code, a United States area code. The telephone number belonged to a corporation called "Air and Sea Group" and may have been connected to an individual named

Fabian Pesantes who Lazaro reported "was a person of interest involved in a previous Osprey claim (200/658/99927)". That may be taken to mean Pesantes was a suspect in the earlier theft of a boat.

14. The respondent carried out an investigation using the services of Lazaro and he conducted interviews with Mr. Modrono, Tony and Messrs. Black (Director of Marina Operations), David (Dock Master) and O'Neil Rolle. He also pursued a number of leads and prepared reports. He concluded that the owners of the vessel were not involved in the theft of the vessel and the respondent paid out the insurance claim. The respondent then sued the appellant pursuant to the concept of subrogation.

15. Interestingly, as a side note, Lazaro did not interview two of the purported operators of the vessel, nor did he himself obtain photographs of the men nor of the two men who were said to have accompanied Tony to Bimini; and show them to O'Neil. Moreover, it does not appear that, although Tony had photographs of the four operators on his computer when he went to meet with O'Neil, he actually showed them to O'Neil.

16. Additionally, six of the individuals said to have been with the vessel in Santa Domingo, following the theft of the vessel, had business addresses in the area where Mr. Modrono lived in Florida.

The Trial

17. The respondent filed a Statement of Claim that contained, inter alia, the following paragraphs:

> **"9. As a consequence of the acts and/or omissions of the Defendant, on or about 19th August, 2009, an unknown individual sailed the boat out of the Marina, stealing the same. The theft of the Vessel was a consequence of the Defendant's failure to provide reasonable security to ensure that the Vessel remained safe while docked at the Marina. The theft of the Vessel was also a consequence of the Defendant's failure to obtain sufficient confirmation as to the identity of the person(s) from whom it received instructions in relation to the Vessel. The Defendant therefore breached an implied term within the Contract to ensure that the Vessel remained safe while docked at the Marina.**
>
> **Particulars of Breach of Contract**
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> **(i) The contract between Modrano and the Defendant was partly written and partly by conduct.**
> **(ii) To the extent that the contract between Modrano and the Defendant was written, it was comprised of the Lease and the Agreement.**

(iii) **To the extent that the contract was by conduct it was based upon the reasonable expectations of the parties having regard the relevant operative circumstances.**

(iv) **It was an implied term of the contract, necessary to give effect to the intentions of the parties, that the Defendant would not in any way enter upon the Vessel or perform any act in relation to the Vessel without the permission of the Vessel's owners.**

(v) **It was an implied term of the contract, necessary to give effect to the intentions of the parties, that the Defendant would make at least reasonable efforts to ensure that the Marina was kept secure.**

(vi) **It was obvious from the circumstances, that Modrano would have expected the Marina would have at least a reasonable degree of security. It was also obvious from circumstances that it was objectively reasonable for such security to be provided.**

(vii) **In breach of the implied terms of the contract, the Defendant without any proper authority entered upon the Vessel and dealt with it in a manner which made its theft inevitable. Further, in breach of the terms of the contract the Defendant failed to provide reasonable security at the Marina.**

10. Further, or in the alterative, the Defendant breached its duty of care in relation to the safety/security of the Vessel while at the Marina.

Particulars of Negligence

i) **As the owner and/or operator of the Marina, the Defendant, at all material times, owed a duty to its customers to ensure that the Marina had at least reasonable security in place to prevent the theft of vessels kept there.**

ii) **The Defendant failed to discharge its duty to provide at least reasonable security at the Marina.**

iii) **As a consequence of the Defendant's failure to provide at least reasonable security at the Marina, there were no mechanisms in place to prevent the theft of the Vessel.**

iv) **As a consequence of the Defendant's breach of duty as aforesaid the Vessel was stolen and the**

Plaintiff suffered loss and damage as particularized below.

11. Further, as the Defendant, by virtue of its employee, entered upon the Vessel without due authority and prepared the Vessel for sailing, the Defendant facilitated the theft of the Vessel and was grossly negligent in the circumstances.

Particulars of Gross Negligence

(i) As the owner and/or operator of the Marina, the Defendant had no authority to enter upon the Vessel of its own volition.
(ii) The Defendant, by entering upon the Vessel without actual authority and preparing the Vessel for sailing, failed to exercise the due care and skill which would have been expected in the circumstances.
(iii) As a consequence of the Defendant's entering upon the Vessel and preparing the same for sailing, the theft of the Vessel was facilitated.
(iv) As a consequence of the Defendant's breach of duty as aforesaid the Vessel was stolen and the Plaintiff suffered loss and damage as particularized below."

18. The respondent claimed $579,721.00 in relation to the settlement of the claim for the loss of the vessel, $18,545.00 as the cost of the investigation it carried out, interest and costs.

19. As a part of its defence, the appellant alleged that it owed no duty of care to the owners of the vessel or to the respondent; that by express agreement the duty to maintain the safety of the vessel from, e.g., theft, was that of the owners. The appellant specifically adverted to the clauses in the lease, that is, clause 3.7 and paragraph 17, which they alleged, excluded the appellant from any liability for the loss of the vessel.

20. The appellant also alleged that the owners were contributorily negligent at the very least because they did not secure the vessel by locking it since the employee of the marina would not have been able to ready the vessel for sailing had the cabin been locked.

The Judge's Decision

21. At paragraphs 12 and 19 of his decision, the Judge stated:

"[12] I did not accept the Defendant's submissions as to the state of the facts. I have no hesitation in indicating that I preferred the evidence of the Plaintiff's witnesses. Having seen and heard the witnesses who gave evidence in this case I accept the following facts:

(1) O'Neil Rolle, the dock hand/porter employed by the Marina was contacted by an unknown individual claiming to be the owner of the Vessel. This unknown individual requested that the Vessel be cleaned and made ready for sailing. Between 17-19 July 2009, without making any enquiries, and without confirming the identity of the caller, O'Neil Rolle, the Defendant's employee, entered upon the Vessel, without lawful permission, cleaned the Vessel and prepared it for sailing by clearing the water lines. On 19 July O'Neil Rolle personally accepted the sum of $400 from the unknown individuals as payment for cleaning the Vessel and preparing it for sailing. At no time did the Defendant seek to obtain any verification of the individuals' identity or confirm that the individuals had any right to board or access the Vessel.

(2) The Vessel was indeed stolen from the Marina as the Vessel's owner did not authorize anyone to use or remove the Vessel from the Dock at the Defendant's premises.

(3) The evidence did not support a finding that the owner of the Vessel was involved in its removal.

(4) Whilst the Vessel may have been unlocked at the time O'Neil Rolle prepared it for sailing, I accept, on balance, the evidence of Modrono that the Vessel had been secured the time it had been last used by Modrono on July 12, 2009.

(5) The Marina did not have surveillance cameras as alleged by the Defendant in its submissions and pleadings. In his interview, Doug Black, the Director of Marina Operations accepted that, at the time of the incident, there were no cameras anywhere in the Marina. He stated that, just after the theft of the Vessel, cameras were placed in the key money change locations.

(6) Alfonso, an experienced investigator, was hired by the Plaintiff as the insurers for the Vessel to investigate a claim that the Vessel had been stolen. Alfonso conducted a reasonable investigation and determined that the Vessel had been stolen from the Marina and taken to the Dominican Republic and thereafter to parts unknown. Alfonso interviewed widely the

persons connected to the incident and determined, at paragraphs 34-40 of his investigative report, that:

> **34. The Vessel arrived at the Marina in June 2009.**
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> **35. The Vessel was last in the possession of authorized persons on or about 12 July 2009.**
>
> **36. Mr. Rolle was contacted by an unknown person on or about 18th July 2009, and requested to board the Vessel and prepare it for sailing. Mr. Rolle complied with this request and boarded the Vessel and prepared it for sailing.**
>
> **37. The Vessel was sailed from the Marina in or about 19 July 2009, and never returned to the Marina.**
>
> **38. There were no protocols in place at the Marina which would have prevented the theft of the Vessel.**
>
> **39. The security at the Marina was insufficient to prevent the theft of the Vessel.**
>
> **40. The actions of Mr. Rolle contributed to the theft.**

On balance I accept these findings of Alponso (sic).

….

[19.] In my assessment, for negligent claims other than personal injury or death to be excluded it has to be shown that the clause is a reasonable one. The duty to so prove is upon the person asserting its reasonableness, the Defendant in this case. In my assessment, I have not been satisfied on any evidence provided that the contract terms is reasonable. In fact, it would not seem to be a reasonable interpretation of Clause 7 of the lease that the Defendant could exclude itself from liability in negligence of the nature claimed in this action. I accept the Plaintiff's submission on this issue, at paragraph 6.5 of its Trial Submissions where it states:

> **6.5 In the premises, it is submitted that in all the circumstances, reliance by the Defendant on an exclusion clause in this instance would be entirely unreasonable. This is due to the following factors: (1) the entire purpose of the Marina is for the dockage of vessels and it would not be reasonable to exclude any responsibility for the loss of vessels without very clear and unambiguous language; (i) the Theft was facilitated and/or generally assisted by the conduct of the Defendant's employee; and (iii) the Defendant failed to provide any security or appropriate checks and balances which would be expected of a facility such as the Marina to prevent the theft of a valuable vessel.**
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> **This is consistent with finding, that such negligence, namely the breach of the Defendant's duty of taking reasonable measures or care to ensure that the Vessel is kept reasonably safe and not susceptible to theft, was not contemplated by the parties to the Boat Slip Lease."**

22. Significantly, the Judge does not advert to paragraph 17 and, as a consequence, fails to address it in his judgment. Also, the Judge's finding at (3) appears to be at odds with Lazaro's evidence that an investigation into possible fraud is still open:

> **"Q. Right, sorry. So, let me just make this clear, right; you're saying to this court, that the investigation of potential insurance fraud in relation to mr. Modrono is still open to this day?**
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> **A.Yes."** (pages 1287 of the Record of Appeal).

23. One may ask why would a theft claim be paid if there was an ongoing fraud investigation which could possibly conclude that there was complicity of the owners in the alleged theft?

General Observation

24. The appellants ask this Court to interfere with findings made by the Judge. As the respondent correctly submitted in opposition to any such interference, an appellate court would not normally overturn a finding of fact made by a judge in the court below. However, that reticence aside, if it is shown that the judge erred by making findings of fact not supported by the evidence or failed to take proper advantage of having seen and heard the witnesses, then the appellate court is to treat the issues as at large and free to make its own findings of facts.

25. Lord Thankerton in **Watt v Thomas** [1947] 1 All ER 582 spoke to when an appellate court would interfere with a finding of fact by a judge in the lower court. He said at page 587, inter alia:

> **"(i) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion…"**

26. More recently, in **Bahamasair Holdings Ltd v Messier Dowty** [2018] UKPC 25, the Privy Council affirmed the proper approach an appellate court should take when invited to review findings of fact by a trial judge. At paragraphs 32 and 33, Lord Kerr stated:

> **"32. As was observed in DB v Chief Constable of the Police Service of Northern Ireland [2017] UKSC 7, para 78 the United Kingdom Supreme Court on a number of occasions recently has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. And, as was said in that case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477.**
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> **33. In para 1 of his judgment Lord Reed referred to what he described as "what may be the most frequently cited of all judicial dicta in the Scottish courts" - the speech of Lord Thankerton in Watt v Thomas [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's comprehensive and authoritative discussion ranged over the speech of Lord Shaw of Dunfermline in Clarke v Edinburgh & District Tramways Co Ltd (1919) SC (HL) 35, 36-37, where he said that an appellate court should intervene only if it is satisfied that the judge was "plainly wrong"; the judgment of Lord Greene MR in Yuill v Yuill [1945] P 15, 19, and the speech of Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:**
>
> > **'It can, of course, only be on the rarest of occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.'"**

27. Lord Kerr also mentioned paragraphs 3 and 4 of Lord Reed's judgment in **McGraddie v McGraddie and another** [2013] UKSC 58 where Lord Reed said as follows:

> **"[3] The reasons justifying that approach are not limited to the fact, emphasised in Clarke and Thomas, that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in Anderson v City of Bessemer 470 US 564 (1985), 574-575:**
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> > **'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the 'main event' … rather than a 'tryout on the road.'' … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'"**

28. Lord Kerr continued at paragraph 37 of **Bahamasair Holdings**:

> **"37. The Board considers that the Court of Appeal in the present case should have operated on these principles in reviewing the Chief Justice's findings made at first instance. It further finds that it failed to do so. Rather, because it disagreed with some of those findings, it considered that it was legitimate to set them aside and to examine the evidence de novo. Given that there was material before the Chief Justice on which he could make the factual findings which he did and that the inferences which he drew from them could properly be drawn, and that none of his conclusions was "plainly wrong", the Court of Appeal should not have conducted its own analysis."**

29. With their Lordships' rebuke in **Bahamasair Holdings** ringing in my ears, I cautiously approach the appellant's invitation to impugn the Judge's findings of fact.

The Appeal

Ground 1 - The learned Judge erred in law and in his assessment of the evidence before him in concluding that the Appellant owed a duty of care to the Respondent to prevent the theft of the Vessel…

Ground 3 - The Learned Judge erred as a matter of law in proceeding to consider a claim in tort for negligence advanced by the Respondents in the face of the parties' contractual relationship. Such a claim, especially as it related to theft, was not open to the Respondents as a matter of law given the terms of the parties' contractual arrangement.

30. Whether a party owes another party a duty of care must be derived from the circumstances of each case. In **Caparo Industries plc v Dickman** [1990] 1 All ER 568 Lord Bridge of Harwich stated at pages 573-574, inter alia:

> **"But since Anns case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] AC 210 , 239f–241c; Yuen Kun-Yeu v. Attorney-General of Hong Kong [1988] A.C. 175, 190e–194f; Rowling v. Takaro Properties Ltd. [1988] AC 473 , 501d–g; Hill v. Chief Constable of West Yorkshire [1989] AC 53 , 60b–d. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other…"**

and continued at page 581:

> **"…It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless:**
>
> > **'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the**

> **actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.'**
>
> **(See Sutherland Shire Council v Heyman (1985) 60 ALR 1 at 48 per Brennan J.)"**

31. In the court below, the respondent's Statement of Claim said, inter alia, that they claimed against the appellant: **"damages for negligence; and/or breach of contract made pursuant to a lease agreement dated 17th March, 2008".** This claim will have to be reconciled with paragraph 17 of the BSL which specifically placed on MBP the onus of ensuring the vessel was secured from, inter alia, theft:

> **"17. <u>The tenant is responsible for</u> proper operation and mooring and <u>taking all necessary precautions</u> to ensure that the boat is secure from damage from any all causes including without limitation theft fire vandalism and storm." [Emphasis added]**

32. Moreover, the paragraph would have to be reconciled with the finding of the Judge in relation to Clause 3.7 of the BSL that:

> **"[19.] ... namely the breach of the Defendant's duty of taking reasonable measures or care to ensure that the Vessel is kept reasonably safe and not susceptible to theft, was not contemplated by the parties to the Boat Slip Lease."**

33. This appeal appears to raise issues, in my view, similar to those cases relating to exemption clauses found in what may be characterised as "ticket cases", even though some of the cases relate to exclusion clauses found in contracts.

34. In the Irish High Court case, **Stephen Carroll v An Post National Lottery Company** [1996] 1 IR 443, Costello, P. stated at pages 461-4:

> **"…The party receiving a document which forms part of a contract between him and the party tendering it may know that it contains conditions which he does not take the trouble to read. But if the condition relied on by the party tendering the document is particularly onerous or unusual that party must show that it has been fairly and reasonably brought to the other party's attention. If he cannot do so, then he cannot rely on it. This proposition is illustrated by the following cases:**
>
> **Spurling v Bradshaw [1956] 3 All ER 121 was a case in which the defendant sent to the plaintiff, who carried on a business as a warehouseman, eight barrels of orange**

juice which due to his negligence were badly damaged. The plaintiff sued for his charges and in answer to the defendant's counterclaim for damages pleaded a clause in a "landing account" which he had delivered to the plaintiff which exempted him from liability for any loss howsoever, whensoever, and wheresoever even if occasioned by his servants or agents. In the course of his judgment, Denning LJ expressed the opinion that he should consider the plaintiff had given sufficient notice of this condition to the defendant and only if he had would the claim be enforceable. In holding that this had been done he observed that the more unreasonable the clause, the greater the notice which must be given of it adding: -

> **'some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient' (p 125).**

Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163 was a case in which the proprietors of a car park sought to avoid liability for severe personal injuries which the plaintiff sustained, by relying on an exemption clause in a set of printed conditions which were displayed on the premises. The ticket issued to the plaintiff had the following words printed on them:-

> **'This ticket is issued subject to the conditions of issue displayed on the premises.'**

The Court of Appeal held that the car park proprietors could not rely on them. Counsel for the defendant had in fact admitted that the defendant had not done what was reasonably necessary to give the plaintiff notice of the exempting condition, and Denning MR (at p 690) stated:-

> **'I do not pause to enquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the court could not hold any man bound by it unless it is drawn to his attention in the most explicit way.'**

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433 was not concerned with

an exemption clause but with a claim for payment of a sum of money arising, it was submitted, under a condition in a delivery note.

The defendant was an advertising agency. It required photographs of the 1950s for presentation to a client. The plaintiff ran a library of photographic transparencies and at the defendant's request dispatched a number of photographs for the defendant's consideration. The bag in which they were sent contained a delivery note which stated that the photographs were to be returned by the 19th March. The note contained 9 printed conditions one of which (Condition 2) provided that if the transparencies were not returned within 14 days from the date of delivery 'A holding fee of £5.00 plus VAT per day will be charged for each transparency which is retained by you longer than the said period of 14 days'. The transparencies were not returned until the 2nd April and the plaintiff sent an invoice for £3,783.50 being the holding charge calculated at £5 per day per transparency. The defendant refused to pay. The trial judge held that they were liable, but this decision was reversed, the Court of Appeal holding that when a condition in a contract is particularly onerous or unusual and would not be generally known to the other party the party seeking to enforce that condition had to show that it had been fairly and reasonably brought to the other party's attention.

This case explicitly recognised the principle that, whilst in the earlier ticket cases the court looked at the conditions as a whole and considered whether the printed conditions as a whole had been sufficiently brought to the customers' attention so as to make the set of conditions part of the parties' contract, the court would also consider if there was a particularly onerous or unusual condition in the contract. If so, then the party seeking to enforce it must show that it was fairly brought to the notice of the other party (see page 437).

The basis for the refusal of the courts to permit a party to rely on certain contractual terms is a two-fold one. Firstly, by the application of the law of contract; secondly, by the application of the concept of fair dealing in the particular circumstances (see Bingham Interfoto Picture Library Ltd v Stiletto Visual Programmes

Ltd [1989] QB 433 at p 439). If a party does not do what is reasonably necessary to draw attention to the fact that the document (including a ticket) being tendered contains conditions of a contractual nature and the other party does not know this fact, then he/she has not given consent to the conditions (see Mellish, LJ in Parker v South Eastern Railway Company (1877) 2 CPD 416 at page 423). If the document being tendered contains conditions of an unusual or particularly onerous nature the party tendering it must take reasonable steps to draw attention to such conditions in order to establish that the other party has agreed to it. The refusal to enforce the conditions is also justified if it can be shown that in all the circumstances of the case it would not be fair or reasonable to hold the other party bound by it. As Bingham LJ stated at page 445:-

> **'The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned.'"**

35. The head note in **Hollins v. J. Davy Ltd.** [1963] 1 Q.B. 844 reveals, inter alia, the following:

> **"The plaintiff garaged a car with the defendants under a contract by the terms of which he relieved the defendants of "all liability for loss ... however caused," and the defendants did "not accept responsibility for loss or misdelivery of ... any vehicle ... arising from any cause including negligence." The garage attendant negligently allowed a thief to drive the car away because of an honest belief induced by the thief that he represented the plaintiff. The car was lost and the plaintiff claimed damages for the loss against the defendants. It was common ground that the defendants were liable unless exempted by the terms of the contract:-**
>
> **Held, (1) that on the true construction of the contract, loss by theft fell within the words "loss ... however caused" and also loss ... arising from any cause including**

> **negligence," so that, prima facie, the defendants were exempted from liability.**
>
> **(2) That the innocent but mistaken and negligent act of the garage attendant in allowing the thief to drive the car away was not such a deliberate disregard of the obligations of the contract as amounted to a fundamental breach precluding the defendants from relying upon the exemption from liability. Where a person did an act honestly intending to do his best to carry out the intent of the contract and that act was one which, if his beliefs were true, would be proper under the contract, he could not, merely because he had been deceived into that action, be said to be deliberately breaking the contract."**

36. Sachs, J. concluded that the actions of the garage attendant although negligent, were honestly done. It was not a case where the breach by the attendant evinced **"a deliberate disregard of his bounden obligations"**: per Lord Denning in **Sze Hai Tong Bank v Rambler Cycle Co** [1959] A.C. 576 at 588.

37. Mr. Modrono testified that he read the lease and that he was aware of paragraph 17 of the BSL. The evidence shows through his interview with Lazaro that Mr. Modrono was not a business neophyte since he had operated three businesses for many years. Thus, it may be presumed that he understood and appreciated the import of paragraph 17 of the BSL. But his understanding the paragraph does not rise to a complete protection of the appellant against all loss caused through their or their employees' negligence.

38. The interview Lazaro conducted with Mr. Douglas Black on 19 August 2009, during the course of his investigation reveals the following exchange:

> **"LA: Is there any policy set for the Bimini Bay Marina as to how these vessels are to be released to operators at any given time or there are no, no policies written in regards to owners coming onto their boats and taking their boats?**
>
> **DB: Owners, no policy. An owner can come and take his boat whenever he wishes.**
>
> **LA: And in your mind was there any policy violation with regard to the way that O'Neil handled the situation?**
>
> **DB: <u>No policy violation because there is no policy in place that says if you have a conversation with (sic) like apparently occurred. The only way he would have been in violation is if they had come in here and asked for a key or combination and he had failed to fill out the</u>**

> **proper from (sic) and make the proper identification, but that was not the case.**
>
> **LA: So there's no documentation to be prepared for any individual to come here and take a boat. Is that correct?**
>
> **DB: That's correct." [Emphasis added]** (See page 651 of Volume 2 of the Record of Appeal)

39. Lazaro asked Mr. Black about what actions the marina took to avoid the thefts of rods and reels from boats in the marina that Mr. Black had said occurred a number of times. Mr. Black responded that there was little they could do. He did indicate that the resort and the marina had twenty-four hour security, three shifts; and the guards secure the marina by both foot and golf carts. His statement revealed at page 637 of the appeal record, that there had been no theft of a vessel in the three and a half years that the marina had been open.

40. Mr. Black also explained why the theft was not detected until a complaint had been made by Mr. Modrono when he said the following at page 644:

> **"DB: Yeah. At first I don't think any of us took it seriously that it was stolen. So none of this registered hard in our mind that 'oh yeah we don't have a stolen boat because this sort of happens at time when you have multiple owners or somebody's taken a boat and somebody doesn't realize it'. So there was no big red flag 'we got a problem here' at first." And then particularly when O"Neil revealed, 'no we got a call that, he got a call that there was a person saying he was the owner and he was going to have this captain come get it cleaned up. Get it fixed. Go inside the boat'. The boat was not locked according to O'Neil, and since this boat has electronic ignition, once you get inside this boat, turn on the electricity all you do is push buttons on it and the motors will start up for you. So the thought was at first "this boat is not stolen'. This is just one of the owners, or the captain and somebody miscommunicating. So it was sort of coming for all of us to come to realize that the boat might have really been stolen. It took a little bit of time to evolve that 'maybe it really is stolen'. So I don't, we don't really know exactly, well I don't know exactly what I was thinking or doing or what I did when I came to that realization."**

41. At page 645 of the Record of Appeal the following exchange appears:

"LA: Let me ask you a question backing up a little bit. In order for a boat owner to come into the marina, board the vessel and sail away, they need not contact anyone? They can just basically do that on their own will without being questioned by anyone?

DB: They can. Pretty much any marina, unless you have a gated community which we do not, you can waltz in either by land or by sea and step on a boat and drive it away.

LA: Ok. And that's the procedure here?

DB: Well, no procedure, you can just; you just do it. There's no way to stop anybody, physically from doing it. Now some people do here and the previous places I've managed leave their keys or combination to the boat with the marina office. <u>Now, here like other places I've been we have a sign out form where you have to come in and physically sign a form. We do a, either a visual verification or we make a phone call to someone to verify that we're allowed to give the keys to this boat. But in this case, we don't retain the keys to this boat, so..."</u> [Emphasis added]

42. The thought is left uncompleted, but the meaning is clear. A sign out form is needed or verification by visual or phone call is necessary where the marina retains the keys to a boat and a person, not the owner, has come to request the keys. However, in the present case, as the marina did not retain the keys to the vessel, those procedures were not called for. Mr. Black's opinion is to be contrasted with the appellant's Security Department's Incident Report dated 12 August 2009. The Judge rehearsed a part of the Report at paragraph 13 of his judgment:

"[13.] … (2) Mr. O'Neil Rolle (Dock master) indicated receiving a call from Mr. Anthony Modrono (yacht owner) to have the water-line of the yacht cleaned and turn on the A/C and fresh water pump for a price, (four hundred dollars) $400.00. Mr. Rolle met an individual whom he assumed was a captain; who paid him the sum of $400.00 the amount agreed by himself and Mr. Modrono. Mr. Rolle did not ask for identification, did not seek assistance from a senior person, did not ask Mr. Modrono for fax verification of individual/s arriving to take possession of the yacht, did not have the person/s taking possession of the yacht complete a vessel release form.

> **(3) A vessel release form is in place for the authenticity of individual (sic) to take possession of property at the owner's request a procedure as to what steps is necessary for this process to proceed forward should be implemented…"**

43. I note that the Report does not differentiate in the procedure mentioned by Mr. Black as to when a sign out form is necessary and/or verification is done, that is, if the marina retained a key to the boat. It is unclear if the maker of the report knew the keys to the vessel were not in possession of the marina or that access to the vessel was done via an unlocked entrance.

44. Mr. Black's opinion derives some support from the words of Mr. Modrono during his interview with Mr. Alphonso (page 87 of the Record of Appeal):

> **"LA: Did Anthony ever go to Bimini to use the subject vessel without you being there?**
>
> **MM: I don't believe so. I don't think so.**
>
> **LA: If he did, would he have to provide some type of documentation or something?**
>
> **MM: No, he's an owner there."**

45. It is apparent, therefore, that an owner can board a boat moored at the marina unchallenged; and without providing any documentation, sail away with it. It is also apparent that the procedure spoken to in the Report did not apply in all cases.

46. The situation at the marina seems similar to that described by Lord Denning in **Halbauer v Brighton Corporation** [1954] 1 WLR 1161. The head note reveals that:

> **"The plaintiff, who was the owner of a caravan, kept it during the summer in a municipal camping ground maintained by the defendant corporation. … Regulation 8 of the camping regulations provided:**
>
> > **'Liability. The corporation will accept no liability for injury to any person using the camping ground or for damage to, or loss of the property of any such person.'**
>
> **The plaintiff, who had used the camp facilities during the summer of 1951, had her caravan removed to the tarmac for the winter, and for her own convenience she allowed it to remain there until after the next summer season had begun. On March 11 the caravan was stolen during the night. The plaintiff brought an action against the**

corporation claiming the value of the caravan and its contents, which she alleged had been lost by reason of the defendants' negligence as bailees."

47. Denning, LJ stated at page 1165-1166:

> **"…They did not take possession of his caravan so as to become bailees of it. The camper remained in possession of it himself, and it was for him to take care for its safety. The corporation, as the camp authority, were, no doubt, under a duty to use reasonable care in their own sphere of operations. If their servants negligently ran into the caravan, they would be liable for the resulting damage. If they negligently allowed the camp to become filthy and insanitary, they would be liable for the resulting disease. <u>But their responsibilities did not extend to locking up the caravans or chaining up the wheels so as to prevent their theft. That was the duty of the camper himself. The camp was open day and night throughout the summer, with campers and their friends coming in and out, with and without vehicles, without let or hindrance. In these circumstances the corporation could not be expected to be responsible for loss or damage to property not caused by them; and they were not in law responsible for it.</u> In my opinion, condition 8 does no more than express the legal position as I have stated it. It is a warning to campers that they must take care of their own property. As such it is unobjectionable. It would not protect the corporation from their own negligence, for example, in running into the caravan." [Emphasis added]**

48. In **Ashby v. Tolhurst** [1937] 2 K.B. 242, the English Court of Appeal considered a provision on a car park ticket which apparently absolved the car park owners of any liability in negligence. The head note reveals the following:

> **"The owner of a motor-car left it on a private parking ground, and on payment of 1s. received from the attendant a ticket headed "Seaway Car Park, Car Park Ticket" and containing a receipt for 1s., followed by the provision: "The proprietors do not take any responsibility for the safe custody of any cars or articles therein nor for any damage to the cars or articles however caused. ... all cars being left in all respects entirely at their owners' risk." Later when the owner returned for his car the attendant told him he had just given it to the owner's friend. The man who had so obtained the car had neither the ticket nor the key to the car, which was locked; but he was able to get his hand through the windscreen and free the car. The car was never**

> **recovered, and the owner brought these proceedings against the proprietors of the car park for damages. The negligence of the attendant was admitted, but liability denied:-**
>
> **Held (1.) that the relation between the proprietors and the owner of the car was that of licensors and licensee, and therefore that the proprietors were under no liability whatever in regard to the car; (2.) that what had been done by the attendant did not amount to a misdelivery of the car; (3.) that even if the relationship between the parties was such as to constitute a contract of bailment and the act of the attendant amounted to a misdelivery of the car, the conditions on the ticket relieved the proprietors of all liability; (4.) that no term could be implied in the contract (if any) between the parties that the car should not be parted with without production of the ticket."**

49. The defendants admitted negligence on the part of their employee but argued that the provision excluding responsibility for the safe custody of the vehicle protected them from the claim. The English Court of Appeal agreed with their submission.

50. It is not lost on me that the exclusion clauses in the "ticket cases" exempted the defendants with great particularity from any responsibility for any loss experienced by the plaintiff, howsoever that loss may have occurred. In the present appeal, the clause and paragraph on which the appellant relies are not, in my view, so all encompassing.

51. Yes, it is true that Clause 3.7 of the BSL provides some measure of protection against a claim in negligence, but I agree with the conclusion of the Judge that the situations it covers are limited in nature, to wit, to those services mentioned in Clause 3.6 of the BSL. In any event, as the respondent submits, where there is an ambiguous contractual term, it should be construed against the drafter of the contract, a rule known as the contra proferentem rule.

52. In relation to paragraph 17 of the BSL, responsibility for taking precautions against theft is placed on the tenant but the clause does not specifically limit the liability of the appellant in negligence by the use of very clear words to that effect, if the security measures taken by the tenant prove to be ineffective against theft due to the marina's negligence. I repeat the clause:

> **"17. <u>The tenant is responsible for</u> proper operation and mooring and <u>taking all necessary precautions</u> to ensure that the boat is secure from damage from any all causes including without limitation theft fire vandalism and storm."**

53. Thus, if the tenant locks the door to his boat and an employee of the marina allows someone to "jimmy" or "pick" the lock to gain access to the boat and steal it, or an employee does any of those things, the marina is not protected by the clause because the tenant has fulfilled his obligation insofar as he is able to do so. The appellant cannot cloak itself in paragraph 17 immunity for the employee's **"deliberate disregard for his bounden obligations"** without

clearly expressed words to that effect. Had the appellant wished to achieve the level of protection for which it contends, absolute immunity, it must, as the Judge so found, have used very clear words to do so, for example, the lessor is not liable, nor accepts any liability for loss howsoever caused, inclusive of misdelivery of the boat and arising from any cause including negligence.

54. Inasmuch as the Judge accepted the submission of the respondent that the theft of the vessel was "**was facilitated and/or generally assisted by the conduct of the Defendant's employee**" he concluded that such an event was not within the contemplation of the parties to the BSL so as to exclude liability for such negligence.

55. I observe what was said by Judge Mackie, QC in **Pratt v Aigaion Insurance Co SA** [2008] EWHC 489 (Admlty) while seeking to find the proper construction of a clause in a policy of marine insurance, **"on board ... at all times"**. He observed at paragraph 26, inter alia:

> **"[26] The qualification to the literal wording should be only that required by commercial common-sense not a means to arrive at what in retrospect the Claimant and perhaps others see as a more advantageous bargain. That would be illegitimate for the reasons given by Lord Mustill in Charter Re v Fagan [1997] AC 313, [1996] 3 All ER 46, [1996] 2 WLR 726:**
>
> > **'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.**
>
> **We all make unwise bargains from time to time but the fact that we incur burdens that later seem folly does not relieve us from our legal obligation…"**

56. In my view, the responsibility to prevent the theft of the vessel laid on the respondent. The BSL absolved the appellant of that responsibility. Although Mr. David Rolle opined that the owners had done all they could do to secure the vessel by locking it, it seems to me that in the same way that a householder would install another level of security, e.g., cameras or an alarm system in his home over and above locks on doors and windows or a car owner placing "The Club" on the steering wheel over and above locking his car doors, a boat owner could do the same. Given the movement of persons in and around the marina, it would not be reasonable, under normal circumstances, to place the responsibility of securing the vessel against theft, on the appellant.

Ground 2 - In the event the learned Judge was correct in holding that the Appellant owed a duty to the Respondent to prevent theft the learned Judge erred in his assessment of the evidence in determining that the Appellant breached that duty…

57. For this ground the appellant relied heavily on paragraph 17 of the BSL; and on the measures it had in place to secure the marina and the greater development. In view of my finding on ground 1 that there was no duty on the appellant to prevent the theft of the vessel, I need not venture into this ground, I do so to illustrate the measures taken by the appellant to secure the marina.

58. The appellant submitted that the Judge ought to have arrived at a conclusion similar to that reached in **Taylor v Cooper's Marine Specialist** [2011] 1 BHS J. No. 54, to wit, the appellant had taken all reasonable precautions to secure the marina.

59. In **Taylor**, the plaintiff left his boat on the premises of the defendant for repairs. An unknown 3rd party set fire to the vessel thereby occasioning extensive damage. The plaintiff sued the defendant for $35,000, the estimated loss due to the damage. The defendant resisted the claim of negligence and expounded on the measures taken to secure the premises, namely, the compound was surrounded on three sides by a six foot chain link fence topped with barbed wire and with an iron gate; and the compound was locked. The defendant had also attempted to produce a standard repair form that contained an exclusion clause, to wit, excluding liability for property left on the premises in cases of, inter alia, fire. The trial judge, Adderley, J., rejected the claim that the exclusion clause was in use at the time of the fire.

60. In his judgment, Adderley, J. observed that the plaintiff had not pleaded a duty of care nor had he outlined the negligent act or omission on the part of the respondent; and no negligent act or omission had been proven. At paragraph 19, he said:

> **"19 Nevertheless if it had been pleaded I would have readily held that the defendant had a duty of care to the plaintiff. But even if I had so held the plaintiff has not offered any evidence to show how the defendant was negligent. Res ipsa loguitur was not raised, and even if it had been there is positive evidence of how the accident happened; it was due to the apparently malicious act of a 3rd person aimed at the plaintiff's boat alone and not due to negligence of the defendant. There was no security guard on the premises. The handyman which the plaintiff observed on the premises from time to time was not a security guard, as suggested by the plaintiff, and was not on the premises when the incident happened. Nevertheless, in my judgment the security taken by way of an enclosed locked compound with barbed wire fencing was reasonable in the circumstances. The defendant was not insured and there was no evidence of whether or not the plaintiff was insured. The defendant, however, gave evidence that there were no problems of**

> **this nature before the incident or since. The defendant was not required to take every possible precaution against every conceivable occurrence."**

61. Adderley, J. found that the plaintiff had failed to demonstrate that the defendant was negligent or in breach of contract. Hence, the defendant was not liable for the plaintiff's loss.

62. The appellant points out that they provided significantly more security than the defendant in **Taylor** inasmuch as the Marina was patrolled by security guards and equipped with surveillance cameras and access to the Marina was restricted by security checkpoints. This aspect of the appellant's claims, i.e., the surveillance cameras and the security checkpoints is not entirely accurate. While there were cameras in the Marina's office there were none installed around the slips; and persons were able to access the property freely despite the checkpoints. Nevertheless, they argue that Mr. Modrono saw the security measures the respondent was taking, for example, cameras in the office and lights being installed and improving the Marina. He found this adequate for him to enter the lease.

63. At pages 1368 to 1369 Mr. Modrono spoke to the security he observed at the resort:

> **"A. Well, definitely, like I mentioned at the beginning, with the more personal – as soon as you're coming in into the marina, you need to check in with the dockmaster, switch over to the VHF16, check in, someone meets you at the marina at your slip, they sign you in. They fill out the paperwork like I showed you at the beginning what I have, and they'll sign in the owners and all that.**
>
> **At the same time, no one is allowed on premises unless they have a wristband; and by having a wristband means that you are checked into the resort and you are an owner or a guest, so they do not allow anyone else that does not have a wristband to be on property.**
>
> **There is definitely always the dockmasters or the assistants, deckhands or whatever you call them walking around, the property is lit, there are security guards that will escort you out where you can't come into certain areas of the property. Well, you can't come into the property without bands and there are supposed to be cameras on the office and continuous checking, doing the rounds of the marina."**

64. Mr. David Rolle explained about the operation of the marina and why it was difficult to police the comings and goings of boats. At pages 1396-7, he testified, inter alia, about boats leaving the marina:

"Q. When the vessel left the marina was there a procedure to log the vessel out?

A. Whenever a vessel leave (sic) I don't know if I can go into, if I can explain a lil' more?

Q. Feel free.

A. We have what we call home owners, like Mr. Modrono, then we have transients, people who come and rent slip (sic) from us, Mr. Modrono was a home owner So what happens is if when a vessel leave sometimes, they would leave a day early, they would say we are here for two days, sometime for some unforeseen accidents they had to go, then somebody would e-mail us and say we left, some come and say we want to check out.

Now, we have a check out process, now some home owners leaves (sic), sometimes even transients just leave. As we go and do the vessel check we would notice no line or lines or electrical cord, sometime they leave them there, we would check them as in went fishing or went joy riding, but if we see no lines, no electrical cord, then we would check them out; and if there is a bill we would send them, we would e-mail their bill, someone would e-mail back a letter and say they didn't get their bill, but in the instance Mr. Modrono (sic) case because he was a home owner he might not have had a water bill or electrical bill. Like I say some boaters up and leave, they don't give us the courtesy of I'm leaving now, etc., etc. and some home owners don't give us the courtesy when they come they would just come get in their slip, go to customs, immigration etc., and maybe the next morning see them in and put a notice on the board and tell them get checked in stuff like that, so they can pay for the water and electricity, if that answers you."

65. In keeping with Mr. David Rolle's evidence about the amount of boat traffic in the marina daily, and the occasional lack of courtesy by boaters leaving the marina, in my view, the appellants were in the same situation as the defendants described by Denning, LJ in **Halbauer** when he said at page 1166, inter alia:

"…But their responsibilities did not extend to locking up the caravans or chaining up the wheels so as to prevent their theft. That was the duty of the camper himself. The camp was open day and night throughout the summer, with campers and their friends coming in and out, with

> **and without vehicles, without let or hindrance. In these circumstances the corporation could not be expected to be responsible for loss or damage to property not caused by them; and they were not in law responsible for it…"**

66. In my view, having regard to the evidence of Mr. Modrono as to the level of security he observed at the marina and the evidence of David Rolle about the volume of boating traffic at the marina, it would not have been reasonable to place the onus of securing the vessel from theft on the appellant and it was a reasonable term of the BSL for the owners to bear the responsibility of securing the vessel from theft.

Ground 4 - …The Learned Judge erred as a matter of law in implying a term into the Boat Slip Lease that the Appellant would take any measures to keep the Vessel safe from theft…

67. The appellant's written submissions combined grounds 4 and 5 but I choose to treat them separately because the allegation by the appellant that the Judge erred when he implied into the BSL that the appellant would take measures to keep the vessel safe when the terms of the BSL stated otherwise is dissimilar to a claim that the Judge erred in dis-applying an exclusion clause in Clause 3.7 of the BSL to the facts of this case.

68. The appellant submitted that it was necessary for the Judge to determine whether any purported implied term existed; and cited the learned authors of Halsbury's Law of England (4th edn.) 9 (356) as follows:

> **"356. Determining whether a term is to be implied. If there is any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced, the document should be looked at and all the surrounding circumstances considered; and, if the document is silent and there is no bad faith on the part of the alleged promisor, the court "ought to be extremely careful" how it implies a term..."**

69. The appellant alleged that the Judge failed to consider all of the express provisions of the BSL and in doing so focused on Clause 3.7 of the BSL without having regard to paragraph 17 of the BSL. They submit that had he considered the BSL as a whole, he ought to have found that liability for negligence in the theft of the vessel was expressly and unambiguously excluded.

70. Further, the appellant submits that **"the unique circumstances of the Marina would render it impossible for the Appellant to prevent theft"**. The appellant refers to the Witness Statement of David Rolle where he said at paragraph 8:

> **"8. While Bimini Bay provides security personnel generally for the Bimini Bay Resort and in their patrols these security guards do in fact patrol the Marina, the mere patrolling of a marina can never be effective to prevent the theft of a vessel if someone is intent on**

> **stealing a vessel from the Marina. Boat owners and their guests are constantly walking up and down the docks at the Marina and entering and exiting vessels. Marina staff of a busy Marina could never be personally familiar with each boat owner, some of whom only visit occasionally, whose vessel is docked at the Marina. The only way to secure a vessel from theft at a marina is to ensure that the vessel has a very secured (sic) locking system and that it is kept locked at all times. This was obviously not the case with the Vessel as the persons who took the Vessel either stole or obtained the keys from Mr. Modrono or someone who in the ordinary course of their relationship with Mr. Modrono had access to the keys for the Vessel. <u>The only other possible scenario was that the Vessel was left unlocked by Mr. Modrono</u> as the Marina did not have any keys for the Vessel in its possession." [Emphasis added]**

71. It must be noted that under cross-examination, Mr. Rolle stated categorically that the vessel was locked. Thus, the highlighted portion of his Witness Statement is not a viable scenario.

72. The respondent's response to the appellant's claim that paragraph 17 of the BSL is an absolute bar to the respondent making any claim against it for the theft of the vessel is that such a claim is fundamentally flawed because the owners discharged their contractual obligation to take all necessary precautions to ensure the vessel was not stolen.

73. The respondent seeks to meet the appellant's assertion that the Judge did not consider paragraph 17 of the BSL by suggesting that all that that paragraph does is to require the owners to take necessary precautions to ensure a boat is secure from, inter alia, theft. The respondent contends that the Judge **"expressly addressed his mind, judicially, to whether the contractual requirements imposed upon the Respondent by Clause 17 had been complied with and found that they had been".**

74. The difficulty I have with the respondent's contention is that the Judge does not mention paragraph 17 of the BSL anywhere in his judgment. If I was to accept the respondent's argument, I would be indulging in impermissible speculation. That I cannot do.

75. In the premises, I agree with the appellant that the Judge did not advert his attention to paragraph 17; and that his failure to do so renders his reliance on an implied term unsound.

Ground 5 - The Learned Judge erred as a matter of construction in concluding that Clause 3(7) did not operate to essentially exclude negligence on the part of the Appellant's employee which negligence on the Respondent's case led to the theft of the Vessel

76. The appellant submitted that the Judge erred when he found that they owed a duty of care to the respondent by relying on **Caparo Industries plc v Dickman** because that duty did not exist due to the provisions of the BSL, namely Clause 3.7 and paragraph 17.

77. At paragraphs 6 and 7 the Judge sets out the basis for his finding that the appellant owed the respondent a duty of care. He said:

> **"6. … I accept the Defendant's submission as to establishing a duty of care and its reliance of (sic) the dicta in the case of Caparo Industries plc v Dickerman 1990 (sic) 1 All ER 568, 581:**
>
> > **It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless:**
> >
> > > **'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.'**
>
> **(See Sutherland Shire Council v Heyman (1985) 60 ALR 1 at 48 per Brennan J.)**
>
> **Further, at page 573, Lord Bridge states:**
>
> > **But since Anns's case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith, have emphasized the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1984] 3 All ER 529 at 533-534, [1985] AC 210 at 239-241, Yuen Kun-yeu v A-G of Hong Kong [1987] 2 All ER 705 at 709-712, [1988] AC 175 at 190-194, Rowling v Takaro Properties Ltd [1988]1 All ER 163 at 172, [1988] AC 473 at 501 and Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238 at 241, [1989] AC 53 at 60. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be**

one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[7] I accept that the Defendant, as the owner and the operator of the Marina, providing dockage and other related services to slip owners, owed a duty of care to such slip owners. The duty however is not the absolute duty to prevent the theft of the Vessel but rather the duty of taking reasonable measures or care to ensure that the Vessel is kept reasonably safe, and not susceptible to theft."

78. In relation to Clause 3.7 of the BSL and the Judge's view of that Clause, to wit, that it related to the acts or omissions of the appellant's employees in the provision of services related to the business of running a marina, e.g., to clean common area bathrooms and passages and remove trash from designated areas, I can find no reason to differ from his conclusion that the negligence contemplated in Clause 3.7 did not cover the negligence of the nature claimed by the respondent and which led to the theft of the vessel.

79. This ground has no merit.

Ground 6 – Misapplication of the Consumer Protection Act

80. The applicant submitted that the Judge fell into error when he concluded that sections 40 and 41 of the Consumer Protection Act 2006 ("the CPA") excluded the operation of Clause 3.7 of the BSL. Those sections provide as follows:

"40. (1) A person shall not by reference to —

(a) any term of a contract;

(b) a notice given to persons generally; or

(c) particular persons,

exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person shall not so exclude or restrict his liability for negligence except in so far as the term or notice satisfied the requirement of reasonableness as provided for in section 17.

(3) Where a term of a contract or notice purports to exclude or restrict liability for negligence, the fact that,

that person agrees with it or is aware of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

41. No party to a contract shall —

(a) when he is in breach of contract, exclude or restrict his liability in respect of the breach; or

(b) claim to be entitled to render —

(i) a contractual performance substantially different from that which was reasonably expected of him; or

(ii) no performance in respect of the whole or any part of his contractual obligation, except in so far as the contract term satisfies the requirement of reasonableness."

81. At paragraph 19 of his judgment the Judge said:

"[19.] In my assessment, for negligent claims other than personal injury or death to be excluded it has to be shown that the clause is a reasonable one. The duty to so prove is upon the person asserting its reasonableness, the Defendant in this case. In my assessment, I have not been satisfied on any evidence provided that the contract terms is (sic) reasonable. In fact, it would not seem to be a reasonable interpretation of Clause 7 of the lease that the Defendant could exclude itself from liability in negligence of the nature claimed in this action. I accept the Plaintiff's submission on this issue, at paragraph 6.5 of its Trial Submissions where it states:

6.5 In the premises, it is submitted that in all the circumstances, reliance by the Defendant on an exclusion clause in this instance would be entirely unreasonable. This is due to the following factors: (1) the entire purpose of the Marina is for the dockage of vessels and it would not be. reasonable to exclude any responsibility for the loss of vessels without very clear and unambiguous language; (ii) the Theft was facilitated and/or generally assisted by the conduct of the Defendant's employee; and (iii) the Defendant failed to provide any security or appropriate checks and balances which would be

> **expected of a facility such as the Marina to prevent the theft of a valuable vessel.**
>
> **This is consistent with finding, that such negligence, namely the breach of the Defendant's duty of taking reasonable measures or care to ensure that the Vessel is kept reasonably safe and not susceptible to theft, was not contemplated by the parties to the Boat Slip Lease."**

82. The thrust of the appellant's submission under this ground was that the CPA is inapplicable to **"ordinary commercial affairs for provision of services or terms under the [BSL]"** and pertains to the sale of goods. Thus, section 40(2) of the CPA is **"not applicable to the exclusion of liability of the Appellant as afforded by Clause [3](7) and Fourth Schedule 17 (sic) of the Lease"**.

83. Section 46 of the CPA states, inter alia,

> **"46. (1) The requirement for reasonableness in relation to a contract term, is that the term is a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.**
>
> **…**
>
> **(4) Regard shall be had in particular (but without prejudice to subsection (2) in the case of a contract term) to —**
>
> > **(a) the resources which the person could expect to be available to him for the purpose of meeting the liability if it arises; and**
> >
> > **(b) how far it was open to that person to cover himself by insurance.**
>
> **(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does."**

84. The respondent submits that this ground would only be relevant if we were to find that Clause 3.7 of the BSL is of general application and goes beyond the services mentioned in Clause 3.6 of the BSL; and if we were to find that the Judge incorrectly concluded that the defaults of the appellant in providing adequate security were systemic and went beyond the acts of its agents. I agree. Inasmuch as we have not found that Clause 3.7 of the BSL goes beyond the services

mentioned in Clause 3.6 of the BSL, I find it unnecessary to enter into a consideration of that aspect of this ground.

85. However, in relation to the Judge's finding of systemic failures to provide adequate security, I am satisfied that this finding cannot be supported by the evidence.

Ground 7 - The Learned Judge erred in concluding that the loss of the Vessel was due solely to the negligence of the Appellant and that (by omission having not dealt with the point at all) the Respondent was not liable in contributory negligence…

86. The appellant complained that the Judge did not consider the appellant's claim of contributory negligence on the part of the respondent in arriving at his conclusion that the loss of the vessel was due solely to the negligence of the appellant. They base their claim on the fact that as there was no evidence that the vessel was broken into, the thieves must have had a key to the vessel; a key that they could only have obtained from one of the four owners or operators.

87. It appears that this ground has an element of res ipsa loquitur, to wit, the event speaks for itself. The principle generally enables a plaintiff to prove negligence by circumstantial evidence surrounding an event. In this case, however, the appellant was, in effect, asking the Judge to find that the cabin to the vessel being found unlocked by O'Neil, meant that the respondent had failed to secure the vessel against theft.

88. The respondent submitted that the appellant failed to prove their claim of contributory negligence on the part of the owners of the vessel based on the particularization of its claim, to wit, the owner left the vessel unlocked which allowed access to anyone to enter and sail off with the vessel; and the owners allowed others to have possession to the keys of the vessel.

89. The Judge was satisfied that on the last occasion that the owners were in Bimini, they left having secured the vessel by locking it. At page 1392 of the Record of Appeal, David Rolle testified to the following effect:

> **"Q. But you said obviously keys from Mr. Modrono, how do you know that?**
>
> **A. Because the boat was locked.**
>
> **Q. The boat was locked?**
>
> **A. Yes.**
>
> **Q. Are you sure?**
>
> **A. Yes."**

90. At page 1395 of the Record of Appeal Mr. Rolle was questioned about a part of his Witness Statement where he posited that the vessel may have been unlocked:

"Q. Well, I'm slightly confused then because earlier you said the vessel was locked, you said it definitively, so if the vessel was locked the last sentence cannot be a possibility, you agree with me? Those two things cannot agree in the same universe at the same time?

A. That is correct.

Q. So your final sentence then in this statement is incorrect? I'm not trying to trick you, your answer is it's incorrect?

A. I understand, but, that's a scenario in my true believe (sic). If I remember that vessel at a time or the other was locked, I am sure of that.

Q. That's great, I appreciate that. Only thing I'm asking you the final sentence here this is not correct?

A. The boat was there for a while, at the time when I notice the vessel was locked I don't know what happen after that, so that statement. is, in my honest opinion, is (sic) correct."

91. At page 1400 of the Record of Appeal, the following appears after Mr. Rolle responds to a question about securing expensive boats:

"… responsibility to keep your vessel lock as you keep your house lock (sic) and vehicle lock (sic), that's the responsibility of the boater.

Q. I understand that, but going to your evidence earlier you said the boat was locked, so they did do that?

A. They lock that boat.

Q. So they did all they could do?

A. Yes."

92. Inasmuch as the evidence of David Rolle, the appellant's witness, confirms that the vessel was locked and in his opinion the owners had done all they could do, it is apparent that the Judge was entitled to conclude that the owners had secured the vessel by locking it when they were last in Bimini.

93. However, given the evidence of O'Neil that the vessel was unlocked when he went on board, and the evidence of Mr. Modrono at page 1377 of the Record of Appeal when speaking about the lock on the vessel:

> **"Q. ...Could you get in the boat without a key without breaking down the door?**
>
> **A. No."**

it may be reasonably inferred that a key or some lock picking device may have been used to open the vessel. Nevertheless, there was no evidence, just mere speculation on the part of the appellant, any of the owners provided access to the vessel by giving, or negligently causing a key to the vessel to come into the hands of the thieves.

94. I can find no merit in this ground.

Discussion

95. The finding of the Judge that Lazaro conducted a reasonable investigation appears flawed inasmuch as Lazaro admitted that he did not interview three of the purported owners, nor did he ascertain from them if they all had keys to the vessel; he did not show photographs of the persons who were operators of the vessel to O'Neil nor did he obtain photographs of the two friends who accompanied Tony and the other owner to Bimini or of the four individuals for whom he ascertained identities through credit card information in the Dominican Republic, to show to O'Neil.

96. Curiously, all of the individuals said to have been with the vessel in the Dominican Republic, following the alleged theft, had business addresses in North Miami, Florida:

> **"Q. Where were these business addresses relative to where Mr. Modrono lives?**
>
> **A. I believe they are in the north Miami, Ft. Lauderdale, Miami area.**
>
> **Q. And that's where Mr. Modrono and his entire family lives?**
>
> **A. I don't know where his entire family lives.**
>
> **Q. Okay, but that's where Mr. Modrono lives?**
>
> **A. Yes."** (page 1289 of the record of appeal)

97. The Judge does not seem to have had regard to the evidence of Mr. Modrono as to the level of security he observed at the marina and which satisfied him, an experienced yachter, sufficiently to berth his vessel with the appellant; and the evidence of David Rolle, a dock master, as to the

volume of boating traffic in and out of the marina; and the difficulty in monitoring that traffic given the nature of the marina.

98. Moreover, it appears that the Judge based his decision on the flawed investigation of Lazaro, for example, Lazaro said that it was his understanding that Tony had shown photographs of the owners to O'Neil. That did not happen:

> **"Q. …My question is directed to the conclusions you have drawn in your investigative report that the vessel was stolen. And my question to you is relatively straight forward and simple.**
>
> **You are an individual with extensive FBI experience and my only question to you is this, having only interviewed two of the five individuals with access to this vessel, is it reasonable to conclude that as well as this vessel potentially being stolen, one of those other three individuals could have either driven off in the boat themselves or authorized someone else to use the vessel?**
>
> **A. The answer is, during the course of the investigation, I learned that Mr. Modrono had provided photograph of all of the individuals that had access to the boat to Mr. O'Neil to identify if any of those individuals were the ones that had been on the boat and taken the boat."** (page 1328 of the Record of Appeal)

99. At pages 548-9 of the Record of Appeal Tony, in his interview with Lazaro, said, inter alia:

> **"AM: Well after that I told him that, he asked me if I can email him pictures … of the four guys who are usually on this boat and I told him look, you are going to meet me and my, me and my cousin on Monday. We'll be there as soon as we can. That's the first flight that I got, um was on Monday on Links Air and um, unfortunately Bert couldn't go with us. It was just me and my cousin. But I did take my laptop and I took pictures. We, when we when we got to Bimini, we didn't, we didn't see him. We saw him later on in the day. But um, but I had taken my laptop with me to show him pictures of Bert and James.**
>
> **LA: And he did see the pictures and what happened?**
>
> **AM: He did not see the pictures because I did not have my laptop with me when uh, when we actually met. …"**

100. Additionally, Lazaro did not speak with the other operators/owners of the vessel to determine if they had removed the vessel or authorized anyone else to do so. This was not a point taken by the appellant specifically, but perhaps ought to have been an issue between the parties bearing in mind that only two of the four owners and five operators were interviewed by Lazaro.

101. Nevertheless, despite the shortcomings of the investigation and my misgivings about the various findings of the Judge, I am acutely aware of Lord Kerr's remarks in **Bahamasair Holdings**:

> **"37. … Rather, because it disagreed with some of those findings, it considered that it was legitimate to set them aside and to examine the evidence de novo. Given that there was material before the Chief Justice on which he could make the factual findings which he did and that the inferences which he drew from them could properly be drawn, and that none of his conclusions was "plainly wrong", the Court of Appeal should not have conducted its own analysis."**

Conclusion

102. Had the appellant raised the issue whether there had been an actual theft, I would have been satisfied that the Judge was plainly wrong when he concluded that the vessel was stolen when the respondent has not conclusively arrived at that point, that is to say, the fraud investigation continues; so the issue of whether there was a theft cannot be said to have been proven on a balance of probabilities. Moreover, two of the owners were not questioned about the removal of the vessel. However, this was not the pleaded case of the appellant in the court below, although it appears that in their submissions it was questioned whether a theft had occurred.

103. The conclusion of the Judge at paragraph 7 of his judgment:

> **"[7.] I accept that the Defendant, as the owner and the operator of the Marina, providing dockage and other related services to slip owners, owed a duty of care to such slip owners. The duty however is not the absolute duty to prevent the theft of the Vessel but rather the duty of taking reasonable measures or care to ensure that the Vessel is kept reasonably safe, and not susceptible to theft."**

cannot be sustained in the face of paragraph 17 of the BSL as it places the responsibility to prevent theft of the vessel on the respondent:

> **"7. <u>The tenant is responsible for</u> proper operation and mooring and <u>taking all necessary precautions</u> to ensure that the boat is secure from damage from any all causes**

> **including without limitation theft fire vandalism and storm." [Emphasis added]**

104. I find the Judge's acceptance of the following fact puzzling since only two of four owners spoke to no authorisation having been given for the removal of the vessel:

> **"[12.] …(2) The Vessel was indeed stolen from the Marina as the Vessel's owner did not authorize anyone to use or remove the Vessel from the Dock at the Defendant's premises."**

105. I am satisfied that this appeal must be allowed. Therefore, the Judge's decision that the respondent was entitled to the damages claimed in the Statement of Claim is quashed.

106. The costs of the appeal and in the court below are the appellant's; such costs to be taxed if not otherwise agreed.

The Honourable Mr. Justice Isaacs, JA:

Concurring judgment delivered by the Honourable Sir Michael Barnett, P:

107. I have read the judgment of my brother Isaacs, JA and I agree with him that this appeal should be allowed and the judgment of the trial judge set aside.

108. In paragraph 5 of his judgment the trial judge identified the primary issue as **"whether the [Marina] owed the vessel owner a duty of care to prevent theft."**

109. The relationship between the marina and the boat owner was one of contract. It was governed by the terms of the written Boat Slip Lease.

110. In my judgment, there was no basis for implying the terms pleaded in the Statement of Claim as part of the contract. Certainly, no basis for implying terms that were not consistent with the written terms of the lease. As per **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another** [2015] UKSC 72:

> **"28 … it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not**

> **sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath JSC's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication."**

111. Nor, in my judgment, is there a basis for imposing obligations in tort for what is a contractual relationship and again no basis for implying a duty of care imposing a tortious obligation where the contract imposes a contrary obligation.

112. Clause 17 of the Fourth Schedule of the Boat Slip Lease provides:

> **"17. The tenant is responsible for proper operation and mooring and taking all necessary precautions to ensure that the boat is secure from damage from any all causes including without limitation theft fire vandalism and storm."**

113. By that clause the parties agreed that the duty of care to prevent a theft of the boat was imposed on the boat owner and not the marina. This is not surprising given that the marina did not have the keys to the vessel and had no control over the vessel whilst at the marina. The marina's obligations were those imposed upon it by the terms imposed by the written lease.

114. There is nothing in the written Boat Slip Lease which imposes an obligation on the part of the marina to provide security for the boats in the marina.

115. More particularly, there is nothing in the written lease agreement which imposed an obligation **"to provide reasonable security to ensure that the vessel remained safe while docked at the marina"** as pleaded in the Statement of Claim.

116. Indeed, such a provision would be inconsistent with the specific provision in clause 17 of the Fourth Schedule, cited above, to imply such a term would be a breach of the cardinal rule referred to above.

117. As Isaacs, JA noted in his judgment, the trial judge did not address his mind to the provision of clause 17 of the Fourth Schedule.

118. Due to that omission, I am satisfied that the trial judge erred when he found that the marina was in breach of a duty to take reasonable care to prevent the theft of the vessel.

119. The trial judge referred to clause 3(7) of the written Boat Slip Lease. That clause provided:

"3. … (7) Notwithstanding anything herein contained the Landlord shall not be liable to the Tenant nor shall the Tenant have any claim against the Landlord in respect of:

(a) any interruption in any services herein mentioned by reason of necessary repair or maintenance of any installations or apparatus or damage thereto or destruction thereto or destruction thereof by fire water act of God or other cause beyond the Landlord's control by or by reason of mechanical or other defect or breakdown or other inclement conditions or unavoidable shortage of fuel electricity materials water or labour or

(b) any act omission or negligence of any porter attendant or other servant of the Landlord in or about the performance or purported performance of any duty relating to the provisions of the said services or any of them."

120. I agree that whilst that clause may exclude any liability of the marina for the negligence of any porter or attendant or other servant in the performance of their duties relating to the services of the marina under the lease; it does not exclude the marina for the negligence of the marina's own duties under the lease. But, with respect, it is not relevant where the lease does not impose any such duty on the marina. The leasing of the boat slip is not like a bailment as the marina never had control of the vessel.

121. For these reasons I agree with the judgment of Isaacs, JA that the appeal should be allowed and with his order as to costs.

The Honourable Sir Michael Barnett, P

122. I have read the draft judgment prepared by Isaacs, JA as well as the concurring judgment of the President. I agree that the appeal should be allowed for the reasons provided in the aforesaid judgments and I have nothing useful to add.

The Honourable Mr. Justice Evans, JA