

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2011/CLE/gen/01561**

BETWEEN

**GREAT LAKES REINSURANCE (UK) PLC
(as Subrogee of MODRONO'S BIMINI PLACE LIMITED)**

Plaintiff

AND

RAV BAHAMAS LTD.

Defendant

Before Hon. Mr. Justice Ian R. Winder

**Appearances: Tara Archer-Glasgow with Audley Hanna Jr. for the Plaintiff
John Wilson with Lamarque Campbell for the Defendant**

**7 November 2018, 8 October 2019 and 21 October 2019
Closing Submissions: 25 November 2020; 13 January 2021**

JUDGMENT

WINDER J

This is a claim by the Plaintiff alleging negligence and/or breach of contract. They seek damages for losses suffered as a result of an alleged theft of a 2006 41 foot Luhrs Motor Yacht named Rum N' Coke ("the Vessel"). The Plaintiff claims that the vessel was stolen from Dolphin slip #16 at the Bimini Bay Marina and Resort, which is owned and operated by the Defendant, on or about 23 July, 2009.

[1.] This claim was commenced by Writ of Summons. The Statement of Claim provided in part as follows:

- ...
5. On or about 19th July, 2009, Modrono entered into a dockage agreement with the Defendant (the "Agreement") for the docking of the Vessel at the Marina.
 6. It was an implied term of the Lease and the Agreement that the Defendant would use reasonable efforts to ensure that the Vessel would remain safe while docked at the Marina. The Defendant was also charged with a duty of care in relation to the safety of the Vessel while at the Marina.
 7. In or about August, 2009, an employee of the Marina, Mr. O'Neil Rolle, 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. Without making any enquiries, and without confirming the identity of the caller, the Defendant's employee, entered upon the Vessel, without lawful permission, cleaned the Vessel and prepared it for sailing.
 8. Thereafter, on or about 19th August, 2009, the Defendant's employee personally accepted the sum of \$400.00 from an unknown individual as payment for cleaning the Vessel and preparing the same for sailing. At no time did the Defendant seek to obtain any verification of the individual's identity or confirm that the individual had any right to board or access the Vessel.
 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

- (i) The contract between Modrono and the Defendant was partly written and partly by conduct.
- (ii) To the extent that the contract between Modrono 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 to 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 Modrono 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 alternative, 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.
12. As a consequence of the theft of the Vessel, the Plaintiff, as insurer, settled the claim of Modrono. Additionally, prior to the

settlement of the claim the Plaintiff was required to conduct a lengthy and expensive investigation in relation to the theft of the Vessel.

Particulars of Special Damages

- (i) Settlement of Insurance Claim - \$579,721.15;
and
- (ii) Payments to Nautilus Investigations for investigations relating to the theft of the Vessel - \$18,545.00

13. In the circumstances, the Plaintiff has suffered loss and damage.

AND THE PLAINTIFF CLAIMS:-

1. The said sum of \$579,721.00 relating to the settlement of the claim;
2. Investigative costs in the said sum of \$18,545.00;
3. Interest pursuant to the Civil Procedure (Award of Interest) Act from the date of judgment until payment;
4. Costs; and
5. Further or other relief as the Court may deem just.

[2.] The Defence, filed on 1 June 2015, provided in part as follows:

...

5. The Defendant denies the averments contained in paragraphs 7 and 8 of the Statement of Claim. The Defendant avers that the vessel was unlocked and that the boat owner from time to time allowed various persons unknown to the Plaintiff to have access to and possession of the vessel. The Defendant specifically denies that it acted in breach of contract as alleged or at all or that it owed a duty to the owner or the Plaintiff to inquire into the access to or use of the vessel.
6. The Defendant denies paragraph 9 and denies that it was in breach of contract as alleged or at all.
7. The Defendant avers that by express agreement and/or by conduct the boat owner and the Plaintiff have expressly waived all rights to bring the action as pleaded herein. Under the terms of the Lease the duty to keep any vessels maintained at the marina safe was expressly the responsibility of the boat owner: clauses 7 & 17 of the Lease provide:

Clause 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:

... (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.”

Clause 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.”

The Defendant will rely on the above clauses and the said Lease for its full terms and effect.

8. Paragraph 10 of the Statement of Claim is denied. It is denied that the Defendant was negligent as alleged or at all. Further, the Defendant owed no duty of care to the Plaintiff to keep his vessel safe from theft. At all material times, the Defendant ensured that the marina was secured with security guards and surveillance cameras. These security measures employed by the Defendant are not only deemed adequate and sufficient for docking facilities but were also observed and approved by the boat owner, Modrono, prior to signing the Lease.
9. Paragraph 11 of the Statement of Claim is denied. The Defendant denies that it was grossly negligent as alleged or at all.
10. Further or in the alternative, the theft of the Plaintiff’s vessel was wholly caused by, or in the alternative, contributed to, by the negligence of Modrono.

Particulars of Contributory Negligence

- (i) Modrono left the Vessel unlocked at the marina, which allowed access for anyone to enter the Vessel, start it and drive out with it.
 - (ii) Modrono allowed others, not including the Defendant, to have possession of the keys to the Vessel.
11. The Defendant denies paragraphs 12 and 13 of the Statement of Claim or that the Plaintiff suffered any losses as alleged or at all.

[3.] The Agreed Statement of Facts provided as follows:

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.

- [4.] At trial the Plaintiff called Manuel Modrono (Modrono), Lazaro Alfonso (Alfonso) and Beric Anthony Usher as witnesses in their case. The Defendant called David Rolle as a witness in its case.

Issues

- [5.] The relevant issues for determination have been agreed between the parties to be the following:
- (i) Whether the Defendant owed the Vessel's owner a duty of care to prevent theft.
 - (ii) In the event that the Defendant was under a duty of care to prevent theft of the Plaintiff's vessel whether the Defendant sufficiently discharged this duty?
 - (iii) Whether clause 7 of the Lease is effective to exclude the Defendant from being liable with respect to the theft of the Vessel?
 - (iv) If clause 7 of the Lease is otherwise effective to exclude liability, whether section 41(a) of the Consumer Protection Act 2006 excludes the operation of clause 7 of the Lease for the purpose of excluding liability?

- (v) Whether the Plaintiff settled a claim in relation to the theft of the Vessel and, if so, whether the Defendant should reimburse the Plaintiff for such sums.

Analysis and Disposition:

- [6.] Notwithstanding the pleadings the primary claim argued by both parties was that of negligence. According to *Alderson B* in *Blyth v Birmingham Waterworks Co. (1856) 11Exch 781 at 784, 784*:

'negligence is the omission to do something which a reasonable man guided upon those circumstances which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

I accept the Defendant's submission as to establishing a duty of care and its reliance of the dicta in the case of *Caparo Industries plc v Dickerman* 1990 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 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* [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 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 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.

[8.] The Plaintiff's case is summarized in paragraph 5.1 of its closing submissions:

5.1 As shall be discussed more fully below the Defendant was under a legal duty to take reasonable measures to prevent theft or harm befalling vessels docked at the Marina. It is submitted that the evidence adduced at the trial clearly established that the Defendant failed to provide any reasonable standard of security in relation to the Vessel. Beyond this, an employee of the Defendant actively participated in assisting parties who turned out to be thieves, with gaining access to the Vessel and actively prepared the Vessel for sailing by these thieves. Therefore, in addition to its omissions in relation to taking necessary steps to prevent theft, the Defendant's negligence extended to positive steps which it took to actually enable the theft. As shall be outlined below, the only witness tendered on behalf of the Defendant essentially admitted that no active steps were taken to prevent theft from the Marina and confirmed the Plaintiff's position that the Vessel was locked at all material times.

[9.] The Defendant's case is summarized in paragraph 6 of its written submissions as follows:

6. RAV categorically denies that the theft, if it occurred, was caused or contributed to by any breach of contract, negligence or gross negligence on its part. To the contrary the evidence clearly established that it was not possible to prove to disprove that the alleged theft was facilitated by the actions of or the negligence of one of the several persons with ownership interest in the Vessel who had unrestricted access to the use of the vessel. It could not be established on a balance of probability that one or

the other of these individuals did not arrange for the vessel to be removed from the Marina. If the Vessel was stolen it was caused solely by, or in the alternative, contributed to, by the negligence of the owners of the Vessel.

[10.] Further at paragraph 19 of its skeleton arguments it was contended by the Defendant that:

19. Further, even though there was no expressed contractual duty for the Defendant to keep the Vessel safe from theft, the Defendant contends it was not in the circumstances negligent since it made all reasonable efforts to ensure that the Marina was patrolled by security guards and equipped with surveillance cameras. These security measures employed by the Defendant are not only deemed adequate and sufficient for docking facilities but were also observed and approved by the owners/operators of the Vessel prior to signing the Lease. In this regard we submit that the Defendant did not act negligently in its overall operation of the Marina.

[11.] According to the Defendant, the Court should find or infer that:

- (1) Alfonso's investigation relied predominantly on the uncorroborated, untested statements made during his interviews and from information otherwise obtained from Mr. Modrono.
- (2) Alfonso was unable to conclude as a result of his investigation that the vessel had been stolen. As no one at the Marina had a key for the Vessel, that the person who sailed away in the vessel was clearly familiar with it and there remains an open investigation for insurance fraud. The theft claimed remains the subject of investigation.
- (3) Five persons were authorized to access and operate the Vessel and of those five, only two were investigated.
- (4) Alfonso's goal in conducting the interviews was to identify material fact concerning theft not insurance fraud.
- (5) Alfonso is not an expert on marina security or protocol.
- (6) Modrono, Anthony Modrono and the other three persons identified as having the authority to access and operate the Vessel could have, all together or without the knowledge of certain others, reasonably been involved in a scheme to defraud the insurers by staging a theft of the Vessel.

(7) Alfonso approached the investigations from the preconceived opinion that the Vessel had been stolen and those authorized to access and operate the Vessel had no involvement.

(8) As a result of this preconceived opinion, Alfonso relied on photographs and statements from Mr. Modrono as though they were true without taking the reasonable extra steps to test the validity by searching a public database for his own photos for example.

[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.
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.

- [13.] I am satisfied therefore 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. The results of the investigation provide compelling evidence. In fact the Bimini Bay Security Department Incident Report, dated 12 August 2009 is also

compelling. The Report provides perhaps the most contemporaneous account by the Defendant of what transpired. The report reads, in part:

(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 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.

(emphasis added)

On the Defendant's own account therefore, it would appear that there is a recognition of the failures of O'Neil Rolle, an employee and agent of the Defendant. These failures facilitated the removal of the Vessel by the unknown persons who stole it from the Defendant's Marina.

[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. Clause 3(7) provides:

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)...

(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.

(Emphasis added)

The applicability of exclusion clauses are matter of the construction of the contract and are be construed strictly (See *Photo Production Ltd. v Securicor Transport Ltd. 1980 1 All ER 556*). Additionally, the contra proferentum rule applies to construe the contract against the Defendant as the maker of the contract.

- [15.] I find therefore, at best, Clause 3(7) seems to relate to omissions or acts or in relation to the marina services already referred to in the lease. . Clause 3(6) which immediately proceeds Clause 3(7) provides:

So far as is practicable and subject always as provided in Clause 7 hereof to use its best endeavors to maintain the services of a porter or porters for the performance of the following duties:

- (a) To cleanse the common areas restrooms and passages and attend to the lighting and extinguishing the lights therein;
- (b) To remove each day (excepting Sundays) from the designated areas all domestic refuse and rubbish.

PROVIDED that the tenant shall not employ the said porter or porters to perform any special services for the Tenant.

(Emphasis added)

- [16.] It seems therefore that the said services referred to in Clause 3(7) would be limited to the services of the nature of referred to in Clause 3(6) and should be strictly construed in that way. 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.

- [17.] In any event it seems that Section 40 and 4 of the Consumer Protection Act 2006 would exclude the operation of clause 7 of the Lease for the purpose of excluding liability. Section 40-41 and 46 of the Consumer Protection Act provides:

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.

(Emphasis added)

[18.] Section 17 of the Consumer Protection Act does not speak to reasonableness but Section 46 does. Section 46 provides:

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.

(2) The requirement of reasonableness in this Act in relation to a notice (not being a notice having contractual effect), is that the notice should be fair and reasonable to allow reliance on it, having regard to all the circumstances when the liability arose or (but for the notice) would have arisen.

(3) Subsection (4) applies in any case where, by reference to a contract term or notice, a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness.

(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.

(Emphasis added)

[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; (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.

Conclusion

[20.] The Plaintiff settled the claim for the loss of the Vessel and became the subrogee of the Claim of the owner. In the circumstances, I am satisfied that the Plaintiff is therefore entitled to the damages claimed in the Statement of Claim and I give

judgment accordingly. The Plaintiff shall have its reasonable costs to be taxed if not agreed.

Dated this 17th day of January 2022



Ian R. Winder

Justice