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Case No: CL-2022-000527

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2024

Before :

MR JUSTICE FOXTON

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Between :

MS AMLIN MARINE NV **on behalf of MS AMLIN SYNDICATE AML/2001**	**Claimant**
-and-	
(1) KING TRADER LIMITED **(2) BINTAN MINING CORPORATION** **(3) THE KOREA SHIPOWNERS' MUTUAL PROTECTION & INDEMNITY ASSOCIATION**	**Defendants**

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Dominic Kendrick KC and **Benjamin Parker** (instructed by **Holman, Fenwick & Willan LLP**) for **the First and Third Defendants**
John Passmore KC and **Koye Akoni** (instructed by **Campbell Johnston Clark**) for **the Claimant**
The Second Defendant did not appear and was not represented

Hearing dates: 3 and 4 July 2024
Draft judgment to the parties: 8 July 2024

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Approved Judgment (Rev 1)

This judgment was handed down remotely at 10.30am on 16 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Foxton :

1. These proceedings were commenced by the Claimant ("**Amlin**") to secure a determination that a "pay as may be paid" clause in a policy of charterers' liability insurance ("**the Policy**") issued by Amlin to Bintan Mining Corporation ("**BMC**") has the effect that no indemnity is payable under the Policy to the extent that BMC has not discharged the legal liability for which indemnity is sought.

The background facts

2. King Trading Ltd ("**the Owner**") time-chartered the vessel "SOLOMON TRADER" to BMC by a time charterparty dated 29 May 2017. BMC took out the Policy from Amlin on 28 March 2018, with cover incepting for 12 months from 1 April 2018. I shall return to the terms of the Policy below.

3. On 4-5 February 2019, the "SOLOMON TRADER" grounded in the Solomon Islands.

4. On 25 March 2021, BMC went into insolvent liquidation in its seat, the British Virgin Islands.

5. Amlin issued these proceedings on 5 October 2022.

6. On 14 March 2023, an LMAA Arbitration Tribunal sitting in two references in Hong Kong found BMC liable in damages to the Owner and the Third Defendant ("**KP&I**") in respect of the grounding, awarding USD140,434.21 and interest to the Owner, and USD 31,839,18.90, AUD1,327,781.44 and KRW 980,800,249 and interest to KP&I. On 20 January 2024, the LMAA tribunals made costs awards in favour of the Owner and KP&I. The total amount awarded now exceeds USD 47 million. I will refer to the Owner and KP&I as "**the Third Parties**".

7. On 24 April 2024, ICC Judge Mullen wound up BMC under the Insolvency Act 1986.

The Policy

8. The Policy took the form of an insurance certificate (**the Certificate**) and an attached Amlin wording entitled "Charterers' Liability: Marine Liability Policy 1 – 2017) ("**the Booklet**").

9. The Certificate:

    i) described the type of insurance as "Charterers' Liability including Liabilities for damage to Hull Class 1";

    ii) identified the security, the vessels covered and the period of insurance;

    iii) set out the Maximum Amount insured of USD 50 million "any one accident or occurrence combined single limit";

    iv) contained a warranty as to trading areas;

    v) in a section headed "Conditions" stated "as per Marine Liability Policy for Charterers 1-2017 as attached", but also specified various specific conditions: the

fact that war risk cover was given as per "Part 4 of Marine Liability Policy for Charterers 1-2017"; an exclusion of liability for cargo liquefaction and a several liability clause;

vi) set out the payment terms, in a provision which provided that breach of the payment terms might lead to rejection of all claims "whether arising before or after the breach as per Marine Liability Policy for Charterers 1-2017".

10. The Booklet is a single integrated document in five parts. The index identifies the five parts with a page reference to a brief description of each section in each Part. Parts 1 to 4 address different types of cover: Part 1 Charterers' Liability - Class 1; Part 2 Defence Cover for Legal Costs - Class 2; Part 3 Cargo Owners' Legal Liability – Class 3; and Part 4 War Risk Protection Cover. The effect of the Certificate is that only Parts 1 and 4 formed part of the Policy. Part 5 is headed "General Terms and Conditions". The five parts are followed by a set of definitions.

11. The opening of Part 1 provides :

> "The Company shall indemnify the Assured against the Legal Liabilities, costs and expenses under this Class of Insurance which are incurred in respect of the operation of the Vessel, arising from Events occurring during the Period of Insurance as set out in sections 1 to 17 below".

In the definitions section, "Legal Liability" is defined as "Liability arising out of a final unappealable judgment or award from a competent Court, arbitral tribunal or other judicial body".

12. Part 1 (like Part 3) does not expressly refer to other terms of the Booklet, in contrast to Part 2 (which expressly refers to the "General Terms and Conditions", albeit it wrongly suggests that they are to be found in Part 4 rather than Part 5) and Part 4 (which contains general language stating cover is "subject always … to the provisions of this Policy of Insurance"). Nonetheless, no one could have imagined that Part 1 was intended to be legally self-contained and self-sufficient, as it failed to address topics such as claims notification, handling, termination and applicable law which a document of this kind would inevitably contain.

13. Part 5 begins with an important clause, Section 25, which provides:

> "Any contract of insurance effected pursuant to the Marine Liability Policy for Charterers shall incorporate the general terms and conditions and the terms and conditions of Class of Insurance 1, Class of Insurance 2 or Class of Insurance 3 as the case may be. The terms and conditions set out in each Class of Insurance in this policy shall prevail over the general terms and conditions in the event of a conflict between them, but any terms appearing in the Certificate of Insurance shall prevail above all others."

14. Section 27 provides for the issuance of a certificate of insurance which is to "evidence the terms and conditions of the contract of insurance", and is to be "conclusive evidence as to the terms and conditions of the contract of insurance".

15. Section 28, headed "Exclusions and Limitations", sets out a series of circumstances which have the effect that the insured is not entitled to recover under the Policy, including "the Assured has failed promptly to provide the Company … with any information or documentation relating to any claim or dispute under this Policy".

16. Section 30 is headed "Claims", and is so described in the index at the front of the Booklet. This contains:

    i) an obligation on the part of the insured to take steps to avert or minimise any expense or liability, breach of which entitles Amlin to reject any claim (Section 30.1);

    ii) a clause providing that Amlin may reject any request for payment which is known to be fraudulent or false or where the insured has colluded with a third party with a view to making a fraudulent claim (Section 30.2);

    iii) a clause providing that if the insured becomes insolvent during the course of any claim to which Amlin has given support, Amlin is entitled to withdraw that support (Section 30.3);

    iv) a notification obligation which is a condition precedent to liability (Section 30.4);

    v) various clauses intended to assist Amlin in investigating and defending claims (Sections 30.5 to 30.9);

    vi) provisions addressing the giving of bail or security (Sections 30.10 to 30.12);

    vii) the provision in issue (section 30.13):

> "It is a condition precedent to the Assured's right of recovery under this policy with regard to any claim by the Assured in respect of any loss, expense or liability, that the Assured shall first have discharged any loss, expense or liability."

17. Section 31 identifies circumstances in which Amlin is entitled to terminate the insurance cover with prospective effect. They include the insolvent winding-up of a corporate insured (Section 31.1.3). Section 32 provided that in the event of termination other than for the non-payment of premium, Amlin would "remain liable for all claims under this policy arising from any incident which occurred before the cesser but shall be under no liability in respect of any claim arising out of any occurrence or Event after the cesser".

18. Finally, for present purposes, Section 44 provided that the insured's claim would be extinguished if it failed to notify Amlin of a casualty, Event or claim within one year of knowledge or failed to submit a claim "for reimbursement of any liabilities, costs or expenses within one year after discharging the same".

The Third Parties (Rights against Insurers) Act 2010

19. It is common ground that the Third Parties are both "relevant persons" under the Third Parties (Rights against Insurers) Act 2010 ("**the 2010 Act**"): s.6(1)(f). Pursuant to s.1 of the 2010 Act, BMC's rights under the Policy in respect of the insured liability have been "transferred to and vest in" the Third Parties, who are entitled to bring a direct claim

against Amlin to enforce those rights. BMI's liability to the Third Parties has been "established" for the purposes of the 2010 Act by virtue of the LMAA arbitration: s.1(4)(c).

20. Section 9 of the 2010 Act deals with the situation where the "transferred rights are subject to a condition (whether under the contract of insurance from which the transferred rights are derived or otherwise) that the insured has to fulfil". Section 9(5) provides that the transferred rights "are not subject to a condition requiring the prior discharge by the insured of the insured's liability". Section 9(6) qualifies this for contracts of marine insurance: for such policies, the statutory overriding of any condition requiring prior discharge "applies only to the extent that the liability of the insured is a liability in respect of death or personal injury".

21. Section 9(7) provides that the term "contract of marine insurance" has the meaning given by s.1 of the Marine Insurance Act 1906, namely "a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure". It is common ground that the Policy is a contract of marine insurance.

22. It is helpful at this point briefly to explain the background to ss.9(5) to 9(7) of the 2010 Act. Shipowners' mutual Protection and Indemnity Clubs ("**P&I Clubs**") have for very many years included provisions in their rules which limit a member's right to indemnity for liability risks to circumstances in which the member has first discharged the relevant liability ("**pay first clauses**"). The effect of a term of this kind, in circumstances in which a claim was brought by a third party under the provisions of the Third Parties (Rights against Insurers) Act 1930 ("**the 1930 Act**") the predecessor to the 2010 Act, was litigated in cases which culminated in the decision of the House of Lords in conjoined appeals in *Firma C-Trade SA v Newcastle Protection and Indemnity Association* and *Socony Mobil Oil Inc v West of England Shipowners Mutual Insurance Association (London) Ltd (No 2)* [1991] 2 AC 1 (***The Fanti and the Padre Island***). The P&I Club rules in issue in that case provided:

    i) "the member shall be protected and indemnified against all and any of the following claims and expenses which he shall have become liable to pay and shall in fact have paid" *(The Fanti*); and

    ii) the club would "protect and indemnify members in respect of losses and claims which they as owners of the entered vessels have become liable to pay and shall have in fact paid" (*The Padre).*

23. The House of Lords held that:

    i) Both provisions made payment by the members to the third parties of the liability or expense a condition precedent to the clubs' obligation to pay, and that no principle of equity permitted those provisions to be disregarded or overridden: pp.23A, 27F-H, 28C-E, 30C-D, 31F-32A, 39G.

    ii) The provisions did not fall of s.1(3) of the 1930 Act which invalidated clauses in a contract of insurance which purported to avoid the contract or alter the rights of the parties on the occurrence of an event which triggered the 1930 Act's operation: pp.23A, 29A-B, 30C-D and39G.

iii) As a result, the third parties acquired no greater rights under the contracts of insurance in the Clubs' rules than the members had had, and the "pay first" provisions defeated their claims.

24. At p.36, Lord Goff recorded the P&I Clubs' submission that:

> "In a mutual association such as a P & I Club, it is essential that members should be able to assume the financial probity of other members because all of them are insurers as well as insured. To that end, it is customary to require each member to discharge his own liability before he can be indemnified against it by the Club. Each member is, after all, running his own business; it is up to him to make sure that a claim is well-founded, and the best way of ensuring that is to require him first to pay the claim before seeking indemnity from the club."

25. Lord Mance, writing extra-judicially, expressed rather more hostility to "pay first" clauses. In "Insolvency At Sea" [1995] LMCLQ 34, an article based on his Donald O'May Lecture in Maritime Law delivered at the Institute of Maritime Law of the University of Southampton on 16 November 1994, he identified what was said to be the "paradoxical result" of the decision –that if the insured had not paid,, the rights transferred by the 1930 Act were valueless, but that "if the insured were able to find some means of paying, any rights transferred would be equally valueless, because unnecessary!" (p.45). Lord Mance questioned the justification which the P&I Clubs had offered for the "pay first" provisions in *The Fanti and The Padre Island*, because P&I Clubs frequently undertook direct liability to third parties in the form of guarantees, and he doubted whether a "pay first" clause "is, in its full width, actually essential to the day-to-day operation of mutual Clubs". He also identified some potential "work arounds" which might permit a third party who had established liability against an insolvent insured to recover under the 1930 Act nonetheless (p.47).

26. The 1930 Act was considered by the Law Commission and the Scottish Law Commission in 2001. Their consultation paper (CP152, [5.58]) sought views on "pay first" clauses, which they noted "are usually only found in the rules of Protection and Indemnity Clubs" where they were included so that "Club members could rely on the financial soundness of other members". However it was noted in footnote 71 that "concern has been voiced that pay to be paid clauses are being used more widely by mutual insurance companies …. The standard collision clause (clause 8 in the Institute Time Clauses, Hulls) does provide that the insured shall have paid sums due to a third party before being entitled to an indemnity". Consultees were asked for their views on whether there should be restrictions on an insurer's ability to rely upon a "pay first" clause against a third party bringing a claim under any replacement of the 1930 Act.

27. In the final report (Law Com No 272, Scot Law Com No 184), it was once again suggested that such clauses "are usually only found in the rules of Protection and Indemnity Clubs, although concern has been voiced that they might be used more widely by other mutual insurers" ([5.28]). At [5.31] to [5.32], it was noted that conflicting views had been expressed during the consultation process, with the minority who opposed reform suggesting that such clauses were "vital to the functioning" of P&I Clubs, and that the Law Commissions "should avoid reforming areas of law currently under discussion in international negotiations on marine liability insurance". Those minority views prevailed, the Law Commissions stating at [5.37]:

> "We are … reluctant to recommend that a new Act should intervene in the field of marine liability insurance, given current domestic and international negotiations. We wish to avoid proposing provisions which might conflict with international measures. Accordingly, the draft Bill only nullifies the effect of pay-first clauses in the context of marine insurance if the claim is for death or personal injury …..".

That approach was reflected in the draft Bill. Section 4(3) provided that transferred rights would not be subject to any "pay first" provision in the contract of insurance, and s.4(4) providing "in the case of a contract of marine insurance, subsection (3) applies only to the extent that the liability of the insured in respect of death or personal injury".

28. It took some 8 years for implementing legislation to be passed. The essentials of the Law Commissions' proposals remained in the Bill which emerged from the House of Lords Special Bill Committee, chaired by Lord Lloyd of Berwick ("Third Parties (Rights against Insurers) Bill [HL]" (HL Paper 58)), although the drafting had been modified from the Law Commissions' drafts. Once again, such discussion as there was of the issue in the evidence given to the Special Committee proceeded on the basis that "pay first" clauses were essentially a creature of mutual insurance, and, to the extent that they were justified in that context, it was because members were both insureds and insurers, exposed to a liability to supplemental calls to the extent that contributions were not sufficient to cover paid claims.

29. It is clear, however, that a deliberate decision was taken not to confine the limited saving for "pay first" clauses under the 2010 Act to cases of mutual marine insurance, and to extend it to all contracts of marine insurance, save in respect of death and personal injury. One consequence of this formulation was that "pay first" clauses continued to apply to claims brought pursuant to the 2010 Act under policies of collision insurance written on the terms of the ITC Hull clauses. Another is that they continue to apply to fixed premium marine insurance such as the Policy or the fixed premium policies (including charterers' liability cover) which many P&I Clubs also write (Steven J Hazelwood and David Semark, *P&I Clubs Law and Practice* 4th (2010), [6.2], [6.22]-[6.23], [7.4] and [25.1]).

30. Mr Kendrick KC does not suggest that s.9(5) of the 2010 Act is not engaged in this case but submits:

> "For present purposes it is important to note that the 2010 Act is (unsurprisingly) silent as to the question of whether any contract of insurance in fact contains, on its true construction, an effective "pay to be paid" clause. That is a pure question of contractual interpretation, and not a matter on which the statute has any bearing."

31. That is true – but only up to a point. The terms in which Parliament, enacting the report of the Law Commission and Scottish Law Commissions, has chosen to address the operation of "pay first" clauses in insurance contracts is not without significance when considering submissions that the court should strive for a means of limiting their effect. In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 851, Lord Diplock noted:

> "My Lords, the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what

> to-day would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977. In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations".

32. Those sentiments are equally apposite here.

Mr Kendrick KC's argument in summary

33. In its oral formulation, Mr Kendrick KC's argument involved the following elements:

    i) This is a liability policy in which the (sole) insured contingency is the ascertainment of a legal liability by a final judgment, not the ascertainment of a legal liability by a final judgment **and** the discharge of that liability by payment by the insured. That one contingency identifies the main purpose of the Policy.

    ii) The "pay first" clause is repugnant to or inconsistent with that main purpose, and also inconsistent with the clauses creating the obligation to indemnify, and falls to be read down "ruthlessly" as a result.

    iii) The Policy gives no "fair warning" of the "second contingency" which the "pay first" clause creates, such that the clause operates as a "wolf in sheep's clothing".

    iv) Where a clause which appears in a document or part of document which occupies a lower place in the contractual hierarchy would negate or deny effect to a clause which enjoys a higher contractual status, particularly where that "higher" clause forms part of the main purpose of the contract, the subsidiary clause will not be incorporated into the contract, alternatively will be read down to ensure that it does not have this effect.

34. On this basis, Mr Kendrick KC submits that either the "pay first" clause does not form part of the Policy, or that as a matter of construction it should be interpreted as not applying where a third party seeks to enforce the Policy, or the insured is unable to discharge the liability or is insolvent, or that a term should be implied into the clause to this effect.

Cases of inconsistency or repugnancy between a provision in terms which have been specifically negotiated and a provision in an incorporated set of pre-existing terms

35. I accept that there is a long line of authority, which for the purposes of the argument in this case was traced back to *Glynn v Margetson* [1893] AC 351, that where a contract comprises terms specifically drawn up for the contract in issue (sometimes referred to as "typed" or bespoke terms), and the incorporation of a set of terms prepared independently of the transaction in issue, with a view to their use in a number of contracts (sometimes

referred to as "printed" or "boilerplate" terms), the court will not give effect to an incorporated term, or will limit its effect, if and to the extent that it would defeat or contradict the main purpose of the contract as apparent from the typed terms (or negate one of the typed terms).

36. In *Glynn v Margetson*, the typed terms of a bill of lading provided for the carriage of a perishable cargo from Malaga to Liverpool, with a limited liberty to call at immediate ports, but incorporated printed terms which contained a broad power of deviation. Lord Herschell LC noted at pp.355-56:

> "These words are printed words in a document evidently intended to be used in relation to a variety of contracts of affreightment. The name of the particular port of shipment, as well as the goods to be shipped, is left in blank, and the words in question are treated as a liberty which is to attach to the particular voyage which is agreed upon between the parties. But the main object and intent of the charterparty is the voyage so agreed upon; and although it would not be legitimate to discard the printed words (indeed here the shipowner requires the shipper to undertake to be bound by them as well as by the written words), yet it is well recognised that in construing an instrument of this sort, in considering what is its main intent and object, and what the interpretation of words connected with that main intent and object ought to be, it is legitimate to bear in mind that a portion of the contract is on a printed form applicable to many voyages, and is not specially agreed upon in relation to the particular voyage.
>
> My Lords, the main object and intent, as I have said, of this charterparty is the carriage of oranges from Malaga to Liverpool. That is the matter with which the shipper is concerned; and it seems to me that it would be to defeat what is the manifest object and intention of such a contract to hold that it was entered into with a power to the shipowner to proceed anywhere that he pleased, to trade in any manner that he pleased, and to arrive at the port at which the oranges were to be delivered when he pleased.
>
> Then is there any rule of law which compels the construction contended for? I think there is not. Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent. Therefore, it seems to me that the construction contended for would be an unreasonable one, and there is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage."

See also Lord Halsbury LC at p.357.

37. *Glynn v Margetson* was a case in which the conflict between the printed and incorporated term was not a direct conflict of the "black v white" kind (cf. Akenhead J's observation in *RWE Npower Renewables Ltd v JN Bentley* [2013] EWHC 978 (TCC), [24]), but implicitly conflicted with the obligation of safe carriage and timely delivery of a perishable cargo to the contractual destination which was the contract's main purpose. It was also a case in which the incorporated term could be given some effect, by limiting

its operation to calls at ports along the contractual route specified on the face of the bill of lading.

38. I was referred to a number of cases considering an alleged conflict between provisions in the main body of a contract and an incorporated set of pre-existing printed terms.

39. In *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep 342, the special terms of a contract for the sale of tapioca provided "seller to provide for export certificate". The contract incorporated the GAFTA 19 form, which contained a provision addressing the consequences of a prohibition of export. A hierarchy clause made it clear that the special terms "shall prevail in so far as they may be inconsistent with the printed clauses of such contract form". The buyer argued that these terms were in conflict. At p.349, Bingham LJ stated that the court should approach the interpretation of the contract without any predisposition as to the absence, or presence, of a conflict noting that the presence of the hierarchy clause acknowledged at least the possibility of a conflict. On the facts of that case, he held that there was no conflict, noting at p.350 that:

> "It is a commonplace of documentary construction that an apparently wide and absolution provision is subject to limitation, modification or qualification by other provisions. It does not make the latter provisions inconsistent or repugnant".

40. At p.350, he also noted that "it is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it , such that effect cannot fairly be given to both clauses."

41. Dillon LJ (at p.353) noted:

> "What is meant by an inconsistency? Obviously there is inconsistency where two clauses cannot sensibly be read together, but can it really be said that there is inconsistency wherever one clause in a document qualifies another? A force majeure clause, or a strike and lockout clause, almost invariably does qualify the apparently absolute obligations undertaken by the parties under other clauses in the contract; so equally with an extension of time clause, for instance in a building contact. So equally, with a lease, the re-entry clause qualifies the apparently unconditional demise for a term of years absolute, but no-one would say that they were inconsistent".

42. In *Alexander v West Bromwich Mortgage Co* [2016] EWCA Civ 496, the conflict was said to arise between the "bespoke" terms in the special conditions of an offer letter for a loan, and the pre-existing standard terms in the lender's mortgage booklet. The bespoke offer letter stated that the interest rate was fixed at 6.29% until 30 June, and thereafter an identified variable rate would apply. The booklet contained a clause entitling the lender to vary the rate appearing in the offer letter by advance notice of the new rate in writing. A hierarchy clause provided that the terms in the offer letter would prevail over those in the booklet in the event of "any inconsistency" (such that lower place in the contractual hierarchy of the clauses in the booklet was apparent not simply from the fact that they were a set of pre-printed terms prepared for general use, but by the contractual hierarchy clause as well):

i) At [41], Hamblen LJ held that inconsistency for this purpose was not limited to "a clear and literal contradiction", and the issue was to be approached "having due regard to considerations of reasonableness and business common sense".

ii) At [46], he noted that the principle applied in *Glynn v Margetson* "obviously depends upon being able to identify 'the main purpose' … or the 'main object and intent' … of the contract, which depends on the construction of the contract as a whole considered in its proper context."

iii) There was an inconsistency which was "not a matter of qualification or modification" but "a matter of transformation and indeed negation" both with the specific term ([60]), and with the main object and purpose as the clause in the booklet fundamentally changed the financial product on offer ([61]).

iv) He suggested that "one way of testing whether clauses can be 'fairly' or 'sensibly' read together is by seeking to put them together in a single clause" ([62]).

43. In *Septo Trading Inc v Tinetrade Ltd (The NouNou)* [2021] EWCA Civ 718, the contract comprised a "bespoke" recap which provided for "Determination of Quality and Quantity" to be ascertained through an independent survey which was to be "binding on parties save for fraud or manifest error". It also provided:

> "Where not in conflict with the above, BP 2007 General Terms and Conditions for fob sales to apply".

44. Those terms and conditions provided that any survey would be binding in the absence of fraud or manifest error for invoicing purposes (requiring payment of the invoiced amounts with a right of subsequent adjustment), but not otherwise. Once again, the subordinate place of the BP clauses in the contractual hierarchy was signalled both by the fact that they were a set of pre-printed terms prepared for general use and by the contractual hierarchy clause.

45. At [28], Males LJ stated:

> "Thus there is a distinction between a printed term which qualifies or supplements a specially agreed term and one which transforms or negates it. In order to decide on which side of this line any particular term falls, the question is whether the two clauses can be read together fairly and sensibly so as to give effect to both. This question must be approached practically, having regard to business common sense, and is not a literal or mechanical exercise. It will be relevant to consider whether the printed term effectively deprives the special term of any effect (some of the cases describe this as the special term being 'emasculated', but in my view it more helpful to say that it is deprived of effect). If so, the two clauses are likely to be inconsistent. It will also be relevant to consider whether the specially agreed term is part of the main purpose of the contract or, which is much the same thing, whether it forms a central feature of the contractual scheme. If so, a printed term which detracts from that scheme is likely to be inconsistent with it. Ultimately, the object is to ascertain the intention of the parties as it appears from the language in its commercial setting."

46. At [45] and [49], he continued:

> "Finally, it is necessary to stand back and consider the intention of the parties as practical business people operating in the real world. While it is perfectly reasonable for parties to choose a contractual scheme in which the quality certificate is not binding but is merely evidence, it is appropriate to ask whether that is a commercially reasonable interpretation of what they have done in this case. In my view it is not. As Lord Justice Phillips said in the course of argument, if the parties' intention was to provide that the quality certificate would not be binding in any real sense, they went about it in a very strange way, first by saying in the Recap that it would be binding and then by providing something different in standard conditions which could be argued to qualify and not to nullify what was said in the Recap.
>
> …
>
> … [I]f Section 1.3 applies as Mr Bright contends, it operates as something of a trap for the seller. A seller who would reasonably think that he was agreeing the procedure to be followed by the independent inspector which would result in the issue of a binding certificate of quality would in fact be contracting out of the regime agreed in the Recap term and replacing it with a new and different term as to quality which has the status of a condition of the contract."

47. Each of these cases concerned parties who had agreed a set of main or bespoke terms setting out the individualised terms of their bargain, and incorporated a set of pre-printed terms drafted for general use. That is a context which is particularly favourable to "privileging" the bespoke term over the boilerplate: first, because the boilerplate terms will not have been drafted with the particular nature of the instant bargain specifically in mind; and second, because the intensity of review of those terms during the period of contractual negotiation is likely to be less than for the bespoke terms.

Cases involving apparent inconsistency or repugnancy within a set of contractual terms which have the same status within the contractual hierarchy

48. I accept that the principle applied in these cases is not limited to conflicts between a document setting out individualised terms and an incorporated set of pre-prepared terms. Mr Kendrick KC referred to three well-known insurance cases which applied similar reasoning to two clauses appearing within a contract constituted by a single document (in each case without, as it would seem, any relevant hierarchy clause):

    i) In *Fraser v BN Furman* [1967] 2 Lloyd's Rep 1, a clause in a liability insurance policy providing "the insured shall take reasonable precautions to prevent accidents and disease" was read down, so as only to apply to cases where the insured personally foresaw the relevant danger and knew that inadequate steps had been taken to avert it. Diplock LJ reached that conclusion by applying "the rule one does not construe a condition as repugnant to the commercial purpose of the contract", which was to cover the insured for legal liability, including that resulting from its own negligence (p.12).

    ii) A similar construction of a similar clause in a property insurance was adopted in *Sofi v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 559. The "reasonable care" clause there appeared in wording which would also have applied to the

liability section of the policy, although the Court's conclusion was not dependent on that fact.

iii) In *Impact Funding Solutions Ltd v Barrington Support Services* [2016] UKSC 57, Lord Hodge noted at [7] of exclusions from cover in an insurance contract that "an exclusion clause must be read in the context of the contract of insurance as a whole …. [and] in a manner which is consistent with and not repugnant to the purpose of the insurance contract", referring to *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] EWCA Civ 845 as an example of this approach.

49. Nonetheless, it seems to me that the court is likely to require a stronger case to "read down" a clause which appears in the same document as the clause with which it is said to be inconsistent, let alone to read it out altogether, because the features identified in [47] above are absent. In *Fraser* and *Sofi*, the clause was read down (but still given a meaningful content, and not ignored altogether) because of a conflict with something as fundamental in an insurance policy as one of the insured perils. It is well-established that the courts are particularly reluctant to find that two contractual clauses of co-ordinate documentary status cannot be read together, such that one must be read out of the bargain altogether (see Sir Kim Lewison, *The Interpretation of Contracts* 7th [9.101] and following). That reluctance will be all the more acute in cases in which the clauses which are said to conflict appear in a document which appears to be professionally drafted, and reflects the product of a single drafting exercising seeking to arrive at a comprehensive statement of the contractual bargain (cf. Leggatt J in *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2015] EWHC 2658 (Comm), [80]).

The relevant considerations summarised

50. This is one of many legal contexts in which the court does not apply a set of binary rules, one or more of which must be satisfied, but where the right answer will reflect the interplay of a number of factors:

i) Where the alleged inconsistency is between a clause specifically agreed for the contract in issue, and a provision in an incorporated set of pre-existing printed terms, it will be open to the court to find that the second clause is not incorporated at all, or, if it is, the court will be more ready to read it down.

ii) Where the alleged inconsistency is between two clauses which appear in a single document (whether a bespoke document or a set of pre-existing terms), the argument that one of the clauses was not incorporated will be very difficult indeed, and the court will be more likely to conclude that the clauses were intended to co-exist and construe them accordingly.

iii) In determining whether and to what extent two clauses can co-exist, it is relevant to consider whether giving effect to the supposedly repugnant clause will still leave the more substantive clause with a real and sensible content, and, if the subsidiary clause is to be read down, whether it will be left with a meaningful and sensible content. Those factors can be seen in Bingham LJ's observation in *Pagnan* at p.351 that it is helpful to ask of a combined reading "is this an apportionment of risk which the parties could reasonably have been supposed to have intended?"

iv) There will be greater readiness to read down, or if necessary, read out a subsidiary clause which is inconsistent with a provision which forms part of the main purpose of the contract, or which is inapposite to the main contract into which it is to be incorporated.

The inconsistency/repugnancy case advanced here

51. Mr Kendrick KC advanced this part of his case at a number of levels, alleging that:

i) the "pay first" clause is repugnant to the terms of the Certificate;

ii) the "pay first" clause is repugnant to the main purpose of the Policy as stated in the Certificate (which describes the type of insurance as "Charterers' Liability including Liabilities for damage to Hull – Class 1") and in the insuring clause in the opening paragraph of Part 1; and

iii) the "pay first" clause is inconsistent with other provisions in Part 5 of the Contract.

52. I would accept that the Certificate here can be treated as analogous to the individualised contractual documents considered in the *Glynn v Margetson* line of cases. However, I do not accept that it is possible to establish any inconsistency between Section 30.13 and the terms of the Certificate. The Certificate incorporates and attaches the entirety of the Booklet. It is clear that the terms of the Policy were set out in "Marine Liability Policy for Charterers – 1-2017 as attached". No sensible reader of the Certificate could have imagined that all the terms (or even all of the significant) terms of the Policy were to be found on the face of the Certificate. It follows that this is not a case in which the Owners and K&PI can bring themselves within the more favourable context for establishing and resolving an inconsistency outlined at [47].

53. I therefore turn to Mr Kendrick KC's second formulation. Once again, I am not persuaded by it. In particular, I do not accept that there is an inherent inconsistency between an insurer's promise to provide liability cover and a clause making enforcement of the obligation to pay the indemnity conditional on prior discharge of that liability by the insured:

i) That is exactly what "pay first" clauses in P&I Club rules or the ITC Hull collision clauses do, the latter on a fixed term basis (and the former sometimes so). In *Charter Re v Fagan* [1997] AC 313, 387, Lord Mustill referred to "long-established contractual provisions creating just such a condition precedent as is argued for here: for example, in the running down clause and in protection and indemnity club cover against third party liabilities…"

ii) That "pay first" clauses can co-exist with the main purpose of liability insurance provided for in P & Club cover is also clear from *The Fanti and Padre Island*, and, for all types of marine insurance, is expressly acknowledged in s.9 of the 2010 Act.

iii) Indeed, Mr Kendrick KC appeared to accept that if the indemnity clause had obliged Amlin to indemnify BMC against those Legal Liabilities, costs and expenses BMC "had discharged", the "pay first" requirement would be effective. That involves an informative application of Hamblen LJ's "single clause" test (see [42(iv)] above).

iv) By contrast, where the provisions appeared in separate clauses, Mr Kendrick KC struggled to identify a case where the "pay first" provision would not, on his case, negate the obligation of indemnity. This approach places too much weight on the drafting form adopted in a contract, rather than the position as a matter of substance.

54. Mr Kendrick KC relied upon two cases which he said supported the contrary view:

i) The first is *Apostolos Konstantine Ventouris v Trevor Rex Mountain (The Italia Express (No 2)*) [1992] 2 Lloyd's Rep 281. In that case, a fixed premium policy of war risk insurance provided Protection and Indemnity Cover for claims "as would be paid under the entry of the insured vessel [in its P&I Club] … but for the existence of" a War Risk Exclusion. That case raised a straightforward issue of the extent to which the words "as would be paid" effected an incorporation of the Club's rules (it being common ground that they were not all incorporated). Hirst J's conclusion that the "pay first" term was not incorporated reflected the conventional difficulty of incorporating a term from one contract which is not germane to the host contract. At p.298 he stated:

> "It is clear that the purpose of this rule is to meet the special needs of a mutual insurance scheme in a member's association or club. Such a rule is, on the other hand, entirely inappropriate in the non-club environment of a commercial insurance contract such as the present".

ii) Mr Kendrick KC gets more direct support from a decision of the Supreme Court of New South Wales in *Lambert Leasing Inc v QBE Insurance Ltd (No. 2)* [2016] Lloyd's Rep IR 163, [15]-[16] in which Rein J held that a "pay first" provision which formed part of the insuring clause was "inherently inimical to the concept of insurance". However, I am unable to follow that conclusion, which cannot in any event be readily reconciled with the position set out at [53] above. At [19], Rein J suggested that the "pay first" provision in that policy of direct insurance was intended to address a problem identified by Scrutton LJ in *Versicherungs and Transport A/G Daugava v Henderson* (1934) 49 Ll L Rep 252. This appears to be a reference to the position where there is a reinsurance of a ship on a "total loss" basis, but the reinsured manages to settle its liability as a partial loss. If so, that analogy would not seem to translate to a direct policy of liability insurance of the kind Rein J was considering.

iii) The decision in *Lambert Leasing* is also inconsistent with the decision of the Court of Appeal of the Federal Court of Canada in *Conahan v The Cooperators* [2003] 3 FC 421 concerning a "pay first" provision in collision liability cover in a policy of fixed premium marine insurance. The Court gave effect to the clear terms of the clause: [25]-[26].

55. Mr Kendrick KC advanced a refined version of this argument, suggesting that the effect of the definition of "Legal Liability" was that Amlin's obligation to indemnify BMC accrued on the occurrence of the ascertainment of its liability by an unappealable judgment, but Section 30.13 purported to impose a further condition (discharging the liability) after the obligation to indemnify had already arisen. As to this:

i) The nature of BMC's rights in the period between the ascertainment of its liability, and discharge of the liability by payment of the third party, is potentially a complex

question, and was not really explored in argument. In *The Fanti and The Padre Island*, it is possible to find references to the "pay first" provisions operating as condition precedents to the obligation of indemnity (p.26) or to payment (p.27). As a matter of first impression, I would favour the view which forms the premise of Mr Kendrick KC's argument that an obligation to indemnify arises on the ascertainment of liability by a final unappealable judgment, but that Amlin can set up a defence to any attempt to secure payment the fact that the liability has not been discharged by the insured. That approach appears consistent with the use of the words "right of recovery" rather than "right of indemnity" in Section 30.13. It would also avoid a position in which BMC could indefinitely postpone the running of any statutory limitation period by not paying the third party, in circumstances in which the contractual time bar in Section 44(b) only runs from the date of discharge of the liability. This is not an unfamiliar approach: see *Coburn v Colledge* [1897] 1 QB 702, 705 and *Rolls-Royce Holdings Plc v Goodrich Corporation* [2023] EWHC 1637 (Comm), [236]. However, as these cases show, there is no sensible inconsistency between a provision stating that a particular obligation will accrue at one point in time, and another provision which gives a defence to enforcement until some further requirement is met.

ii) Looking at Part 5 of the Policy, there are a variety of provisions which can have the effect of preventing a right to indemnity accruing or render it unenforceable after it has arisen or even after it has become enforceable: Sections 28.1.2, 30.1, 30.2, 44(a) and 44(b). They are all provisions which can sensibly co-exist with a provision which has the effect that the obligation to indemnify accrues when liability is established by a final unappealable judgment.

56. The final formulation of Mr Kendrick KC's argument is that there is a conflict within Part 5 between Sections 31 and 32 on the one hand, which allow Amlin to terminate the Policy on BMC's insolvency but preserve BMC's rights to indemnity in respect of incidents occurring prior to termination, and Section 30.13 on the other, which would require an insolvent insured to discharge its liability as a condition precedent to its right to enforce payment of the indemnity.

57. This argument may be Mr Kendrick KC's best point, but it arises in the more hostile environment for a repugnancy argument of an alleged conflict between two provisions of co-ordinate standing, and I have not been persuaded by it:

i) It is an argument which would be available in many policies of marine insurance in which a "pay first" provision appears. I note that Steven J Hazelwood and David Semark, *P&I Clubs Law and Practice* 4th (2010) at [23.1] to [23.3] and [23.29] record that Club Rules generally provide for the termination of membership on a member's compulsory winding-up, the appointment of a receiver or manager or if possession is taken under a debenture, but nonetheless preserve liability for all claims arising by reason of an event occurring prior to termination.

ii) The fact that the insured is insolvent does not mean that it is unable to discharge any part of its liability, and, as Lord Mance noted in his "Insolvency at Sea" lecture, there may be means of ensuring discharge of a liability notwithstanding an insured's insolvency.

iii) On analysis, this argument relies on an express recognition within the Policy of what would be implicit in any contract of insurance anyway – the fact that an insured becoming insolvent will not deprive it of its rights under the Policy (whatever they may be) unless and to the extent that the policy so provides. I do not regard that as a sufficiently compelling factor to deprive Section 30.13 of its clear effect in the very scenario when Amlin would most want to rely upon it. It would also be very surprising if a provision principally intended to advantage Amlin by creating a right it would not otherwise have had – the option to cancel the Policy prospectively in the event of BMC's insolvency – had the effect of restricting the operation of the "pay first" provision.

58. Finally, to the extent that Mr Kendrick KC seeks to derive support for these arguments from a suggestion that Section 30.13 was somehow hidden away in the thickets of the Policy, I am unable to accept that contention. It was clear from the Certificate and the index that the Booklet included general provisions which would regulate the assertion of rights under the Policy and the scope of those rights, and any reader of Part 1 would have appreciated that more general provisions addressing claims, disputes etc were likely to appear elsewhere. "General Conditions" sections of this kind are a commonplace in insurance contracts. It is in Part 5 of the Booklet that the hierarchy clause on which Mr Kendrick KC places heavy reliance is to be found. Section 30.13 appears in a Section which imposes a number of obligations on an insured when seeking the benefit of an indemnity under the Policy, and I am not persuaded that a "pay first" provision in this context is in the nature of a fox in the henhouse (or a wolf in the flock). In a contract of marine insurance providing, in effect, P&I-type cover, the presence of a "pay first" provision cannot fairly be described as a bolt from the blue.

59. For these reasons, I am not persuaded that Section 30.13 is to be read out of the Policy on the grounds of repugnancy or inconsistency with the terms of the Certificate or Part 1, the main purpose of the Policy, or other provisions of Part 5, or "ruthlessly" read down. I accept that as a clause which has the effect of imposing a restriction on the right to enforce the indemnity arising under the Policy, Section 30.13 engages a requirement for clear language under the principle in *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 as extended in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827. 850. However, that principle does not have the transformative force which the Third Parties require to defeat Amlin's Section 30.13 defence.

The arguments on construction and implication

60. I turn finally to Mr Kendrick KC's arguments on construction and implication.

61. The construction arguments are that, properly construed, Section 30.13 is applicable only in those cases where the insured has the means to pay a claim before receipt of insurance monies, or that it does not apply at all in the event of insolvency, or in the event that it is a third party, rather than the insured itself, bringing a claim against Amlin.

62. There is no legitimate process of contractual construction, even with the benefit of the *Gilbert Ash* rule, which can subject the clear language of Section 30.13 to any of these limitations. The language of Section 30.13 is wholly unambiguous, and essentially the same in its meaning as language found in P&I Club rules which are not interpreted with these implicit restrictions. The fact that Section 30.13, on its conventional construction, does not fall foul of s.9 of the 2010 Act militates strongly against a construction which

seeks to distinguish claims by the insured and by a third party under the 2010 Act. There are further difficulties with the "means to pay" construction which I address in the context of the implied term argument below.

63. Nor can I accept that necessity or business efficacy (cf. *Marks & Spencer Plc v BNP Paribas Securities Service Trust Co (Jersey) Ltd* [2016] AC 742, [17], [21] and [77]) require the implication of words limiting the operation of Section 30.13 to cases where the insured has the ability to pay. That would equally be true of "pay first" clauses in P&I Club cover where there is plainly no such requirement. The concept of the insured being "able" to pay is inherently unclear. For example, is it enough that an insured was able to pay at some point even if it ceased to be so, and would Section 30.13 apply if the insured could borrow the necessary funds to discharge the liability, but only on onerous terms? It would seem to require an extensive forensic analysis of the insured's finances to determine if it was entitled to payment.

Postscript

64. The state of English law on this issue in the light of the 2010 Act is not particularly satisfactory. As Phillips J noted in *Cox v Bankside* [1995] 2 Lloyd's Rep 437, 453, a liability policy which exposes the insured to the possibility of being rendered insolvent as a result of being unable to claim on the insurance "would provide an unsatisfactory cover." The perverse underwriting incentives to which such a provision can give rise were identified in *Re Law Guarantee Trust and Accident Society Ltd; Liverpool Mortgage Insurance Co.'s Case* [1914] 2 Ch 617, 634, 638-640 and 646-650. In this case, they are particularly acute, given the high level of cover purchased (USD 50 million), and the small scale of BMC's commercial operations. The maritime venture still involves major risks which can give rise to very substantial liabilities. Prudent operators seek to insure against those liabilities, and a range of third parties who suffer loss and damage as a result of accidents at sea will look to insurances of this kind to be made whole. "Pay first" clauses reduce the efficacy of that protection when it is most needed. Mr Kendrick KC described clauses of this kind in marine insurance policies as a "bad thing". But if so, having been left outside the perimeter of statutory control, it is beyond the redemptive power of the common law rules on incorporation, interpretation and implication to deal with them.