COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

APPEALS DIVISION

2017/APP/sts/00001

IN THE MATTER of the Arbitration Act, 2009.

AND IN THE MATTER of an Arbitration Agreement contained in a Policy of Insurance number FADDP-173271 and dated 1st January 2016 between Taino Beach Limited AND Summit Insurance Company Ltd. and Island Heritage Insurance Co. Ltd.

AND IN THE MATTER of an Intended Arbitration between Taino Beach Limited AND Summit Insurance Company Ltd. and Island Heritage Insurance Co. Ltd.

BETWEEN

SUMMIT INSURANCE COMPANY LIMITED

First Appellant

AND

HERITAGE INSURANCE CO. LTD.

Second Appellant

AND

TAINO BEACH LIMITED

Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Ferron Bethell with him Ms. Camille Cleare of Harry B. Sands, Lobosky & Company for the Appellants
Mr. Raynard Rigby with him Mr. Christopher Francis of Baycourt Chambers for the Respondent

Hearing Date: 12 February 2018

Appeal –Ruling of Arbitrator – Whether this Court has jurisdiction to hear appeal on preliminary findings made by Arbitrator - Whether the Arbitrator erred in making factual and legal findings – Approach of appellate court on review of Arbitrator's factual findings – Whether Arbitrator applied the wrong test in law in holding that "informed in writing" meant that insurer must ensure that insured received the policy wording and notice and read the contents – Principles of Statutory Interpretation – Is language in statute clear and unambiguous? – Literal or purposive approach - Section 214 of the Insurance Act 2009

The Respondent, a hotel and time share resort in Freeport, Grand Bahama, has been taking out insurance coverage with the Appellants' agent since 1998. In January 2015, the Respondent renewed an existing insurance policy against Fire and Special Perils with the Appellants. The Policy covered the Respondent's property and contents against damage by hurricane. On 6 October 2016, Hurricane Matthew impacted Grand Bahama as a Category 4 hurricane. The wrath of that hurricane caused extensive damage to the Respondent's property and contents.

The Appellants have admitted liability but disputed the quantum of the damage suffered by the Respondent relying on the Condition of Average Clause in the Policy. They maintained that the Respondent was underinsured and that they are entitled to rely on the Clause. The Respondent disputed that it was underinsured and further stated that it did not have notice of the Condition of Average Clause before the Policy was renewed as mandated by section 214 of the Insurance Act, 2009.

The matter was referred to arbitration. The parties agreed to the Arbitrator determining, as a preliminary issue, whether notice of an Average Condition pertaining to the Policy was given to the Respondent and, therefore, applied to the claim.

The Arbitrator held that the Appellants did not comply with the mandatory requirements of section 214 of the Act in providing notice to the Respondent prior to the renewal of the Policy and therefore, they could not rely on the Policy. At the heart of the appeal was the meaning to be ascribed to the words "to inform in writing." The Respondent also challenged the jurisdiction of this Court to hear the appeal.

HELD: Finding that the Appellants are entitled to rely on the Condition of Average Clause in the Policy as they have satisfied the requirements of section 214 of the Act;

[1] This Court has jurisdiction to hear the appeal. The jurisdiction is to be found in Clause 14 of the Policy which states that the parties shall enjoy an unfettered right of appeal on questions of law and/or findings of fact where the weight of the evidence do not support the conclusion(s) arrived at by the Arbitrator.

[2] There is a well-recognised reluctance by appellate courts to interfere with a judge's findings on primary facts especially when they depend to a significant extent upon the judge's assessment of witnesses that he has seen and heard give evidence. Accordingly, the correct approach is that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that the judge was plainly wrong. However, these principles do not mean that an appellate court is never justified, indeed required, to intervene. They only concern appeals on fact, not issues on law: **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 and **Central Bank of Ecuador and others v Conticorp SA and others** [2015] UKPC 11 applied.

[3] The first ground of appeal which alleges that the Arbitrator misdirected herself and erred in law with respect to the Condition of Average Form lacks merit and is dismissed. The finding of the Arbitrator was correct in light of the evidence which was before her.

[4] The second ground of appeal which challenges the Arbitrator's failure to make a finding on whether the wording of the Condition of Average Clause provided to the Respondent was adequate to satisfy the requirements of section 214 of the Act is without merit and is accordingly dismissed. It was not an issue before the Arbitrator.

[5] The general principle of statutory interpretation is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would lead to some absurdity, repugnancy or injustice: **Abel v Lee** (1871) L.R.6 C.P. 365 at 367, per Willes J. applied.

[6] If the language of the statute is plain and unambiguous and suggests one meaning, the Court must give effect to those words in light of the legislative intent notwithstanding the fact that such result may be harsh: **Stock v Frank Jones (Tipson Ltd.)** [1978] All ER 948 at 954 referred to.

[7] The Arbitrator misdirected herself and applied the wrong test in law in holding that "inform" means that the Appellants must be able to prove that the Respondent not only received the notice of the Condition of Average but read the contents so as to know what they are being notified of. Section 214 simply requires the Appellants to "tell" or "provide the Respondent with something in writing" explaining the Condition of Average. The word "inform" imposes a low threshold on the Appellants.

[8] The Arbitrator perverted her findings when she found at paragraph 23 of the Ruling that she was satisfied that there was no requirement for a separate document and then at paragraph 45, she found that a separate document is required when one looks at the Policy.

JUDGMENT

Charles J:

Introduction

[1] On 29 December 2017, the Arbitrator in this matter, Mrs. Diane Stewart ("the Arbitrator"), ruled that Summit Insurance Company Limited and Heritage Insurance Co. Ltd ("the Appellants") did not comply with the mandatory requirements of section 214 of the Insurance Act, 2009 ("the Act") in providing notice to Taino Beach Limited ("the Respondent") prior to the renewal of the Fire & Special Perils Policy ("the Policy"). She further ruled that the Appellants could

not prove that they provided notice of the Condition of Average Clause to the Respondent and, therefore, they cannot rely on the said clause in the Policy.

[2] The Appellants, not happy with the Arbitrator's Ruling, have appealed to this Court seeking the following Declarations and/or Orders namely:

1) An Order setting aside the Ruling, insofar as the Arbitrator determined that the Appellants did not meet their obligations as required by the mandatory provision of section 214 of the Act;

2) A Declaration that having informed the Respondent in writing of the Condition of Average Clause, the Appellants are not obligated by the provisions of section 214 to "prove" that the Respondent had "read" the same prior to renewing the Policy;

3) A Declaration that the Appellants are entitled to rely on the Condition of Average Clause in the Policy, having informed the Respondent in writing of the Condition of Average prior to the renewal of the Policy; and

4) An Order directing the Arbitrator, pursuant to section 48 of the 2009 Act, to appoint an assessor to determine the true and correct value of the Respondent's insured properties for the purpose of applying the Condition of Average Clause.

Some salient facts

[3] The Respondent has been taking out insurance coverage with Insurance Management Bahamas Limited ("IMBL"), as agent for the Appellants, since 1998. Their relationship was a long standing one; for nearly thirty years.

[4] The Respondent renewed an existing insurance policy No. FADDP-173271 against fire and special perils in January 2015 through IMBL over its property, a hotel and time share resort comprising multiple buildings in Freeport, Grand

Bahama. The Policy covered the Respondent's property and contents against damage by hurricane.

[5] On 6 October 2016, Hurricane Matthew impacted Grand Bahama as a Category 4 hurricane. The wrath of that hurricane caused extensive damage to the Respondent's property and contents.

[6] The Appellants have admitted liability but disputed the quantum of damage suffered by the Respondent relying on the Condition of Average Clause in the Policy.

[7] The Condition of Average which forms part of the Policy provides (in part) as follows:

> **"Please note that your Policy is subject to a Condition of Average. This means that if the Sum Insured is less than it should be, known as underinsurance, you will not receive reimbursement for the full amount of any loss to which this Policy responds….**
>
> **The basis for calculating your Sum insured is set out in your Policy wording, but we recommend that a professional valuation or appraisal be carried out at regular intervals. If you have any questions about the way the Condition of Average may affect you please contact your Insurance Company, Agent or Broker.**
>
> **This notice is given to you in fulfillment of the requirement (sic) set out in Section 214 of the Insurance Act, 2005, to provide you with information on the nature and effect of the Condition of Average as stated in your Policy."**[Emphasis added]

[8] The Policy provides the following in relation to the Condition of Average:

> **"This Policy is intended to help you check your cover and to reassure you that we will give you the protection you need for the year ahead. First of all, to help you understand your Insurance Policy we want to make sure you aware of the following:**
>
> - **….**
> - **….**
> - **When arranging this Insurance you were given a CONDITION OF AVERAGE NOTICE that explains why, in certain circumstances, you may not recover the full amount of the claim under this Policy. This condition applies if the sums insured do not represent the full value of the property insured. If you remain uncertain as to the**

> **implications of this condition please do not hesitate to contact Insurance Management (Bahamas) Limited and they will be pleased to answer any questions you may have. For your ease of reference a further copy of this Notice follows this page.”**[Emphasis added].

[9] The Appellants maintains that the Respondent was underinsured and that they are entitled to rely on the Condition of Average Clause. The Respondent disputes that it was underinsured and further states that it did not have notice of the Condition of Average Clause before the Policy was renewed as mandated by section 214 of the Act.

[10] In accordance with the arbitration agreement contained in the Policy, the matter was referred to arbitration.

[11] By Order dated 27 September 2017, the parties agreed to the Arbitrator determining, as a preliminary issue, whether notice of an Average Condition pertaining to the Policy was given to the Respondent and, therefore, applied to the claim.

[12] The critical issue before the Arbitrator was whether the Appellants had complied with the requirements of section 214 of the Act. Two witnesses testified before her namely Mr. Anton Bowleg for the Appellants and Mr. Peter Collins for the Respondent. Having heard the evidence and applied the law, the Arbitrator found that the Appellants did not satisfy the mandatory requirements of section 214 of the Act in that the Respondent was not “**informed in writing**” of the Condition of Average **prior** to the renewal of the Policy. At paragraph 27 of the Ruling, she found that “inform” meant that the Appellants must be able to prove that the Respondent not only received the policy wording and notice but read the contents so as to know exactly what they are being notified of.

[13] Section 214, which came into effect in 2009, provides as follows:

> **“(1) Where a contract of insurance contains provision with respect to pro rata condition of average, the condition shall be void and unenforceable unless, before the contract is entered into, the insurer**

> **informs the insured in writing, in a form satisfactory to the Commission, of the nature and effect of the condition.**
>
> **(2) This section shall not apply in respect of a contract of insurance entered into before the coming into operation of this Act, but shall apply to any renewal of any such contract."** [Emphasis added]

Jurisdiction to hear appeal

[14] Learned Counsel for the Respondent, Mr. Rigby challenged the jurisdiction of this Court to hear an appeal of the Arbitrator on a preliminary point. He submitted that clause 14 of the Policy is silent on the party's unfettered right of an appeal on any preliminary issues made by the Arbitrator. He argued that the use of the word "award" in clause 14 was intended to address an appeal arising from the final decision of the Arbitrator with respect to the quantification of damages arising from a limited dispute which could give rise to arbitral proceedings. Learned Counsel submitted that there being no award by the Tribunal, the Appellants do not have a right of appeal. In other words, if I understood learned Counsel well, the Ruling of the Arbitrator on a preliminary point is not only final but it cannot be impeached even if wrong.

[15] Learned Counsel next submitted that there is also no provision in the Arbitration Act, 2009 ("the Arbitration Act") which will grant to a party to arbitral proceedings an unfettered right of appeal on preliminary issues determined by the Arbitrator.

[16] Clause 14 of the Policy, under the rubric "Arbitration" provides in part:

> **"The decision to participate in arbitral proceedings also by necessary implication means that the parties shall enjoy an unfettered right of appeal on questions of law and/or findings of fact where the weight of the evidence do not support the conclusion(s) arrived at (sic) the Tribunal. There shall be no requirement for the parties to obtain the other's agreement or consent to proceed to an appeal to the Supreme Court arising from the award. This term in the Policy shall be deemed to supersede and to amend any term or provision in the Arbitration Act, 2009 (or any amendments or replacing statute) and thereby amounts to a fundamental term in the party's agreement to proceed to arbitration."** [Emphasis added]

[17] Learned Counsel for the Appellants, Mr. Bethell submitted that section 69 of the Arbitration Act, under the rubric, "The Award on different issues et seq", is also helpful. It states:

> "**(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.**
>
> **(2) The tribunal may, in particular, make an award relating –**
>
> **(a) to an issue affecting the whole claim; or**
>
> **(b) to a part of the claims or counterclaim submitted to it for decision;**
>
> **(3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award."**

[18] In my opinion, clause 14 is clear and unambiguous: the parties shall enjoy an unfettered right of appeal on questions of law and/or findings of fact where the weight of the evidence do not support the conclusion(s) arrived at by the Tribunal (Arbitrator).

[19] Accordingly, this Court is clothed with the jurisdiction to hear this appeal and I so find.

The Grounds of Appeal

[20] Before this Court, the Appellants advanced five grounds of appeal namely:

1. The Arbitrator misdirected herself and erred in fact, in holding that "*no prescribed form was provided other than an exhibit of a declaration signed by Taino [the Respondent] for its 2017-2018 coverage, but no evidence was led that this is a prescribed form by the Commission*."

2. The Arbitrator observed that the Act *"did not state that the notice must be in a specific form except that it must be in a form satisfactory to the Insurance Commission."* Further, the Arbitrator asserted that: *"The issue is even if the Respondent did receive it, whether or not the service of the*

policy wording in this manner was sufficient for the purposes of complying with section 214."

3. The Arbitrator misdirected herself and applied the wrong test, in holding that for the Appellants to "inform" the Respondent, pursuant to section 214 '*they must be able to prove that the Respondent received the policy wording and notice and read the contents so as to know exactly what they were being notified of."*

4. The Arbitrator made a finding of fact, when she asserted at paragraph 41 of the Ruling that "*I believe that Mr. Collins would have said this to Mr. Bowleg and in order to do so would have had to have sight of the premiums quoted and accordingly I believe Mr. Bowleg delivered the package and that Mr. Collins would have seen the initial quotes."* Accordingly, having found as a fact that the Respondent received the package containing the Notice of the Condition of Average in a form similar to that posted on the Insurance Commission's website prior to the renewal being effected, it is totally perverse and against the weight of the evidence for the Arbitrator to have held that the Appellants did not meet their obligations under section 214 of the Act.

5. Further, the Arbitrator misdirected herself in placing reliance on and giving weight in her "Findings" to a matter which she had earlier held was of no material significance; thereby, further perverting her Findings.

The role of an appeal court

[21] The principles governing appellate intervention with regards to the review of findings of fact and inferences of fact made by a judge at first instance are well established. There is a well-recognised reluctance of appellate courts to interfere with a judge's conclusions on primary facts made by a judge at first instance unless he/she is plainly wrong.

[22] The Privy Council comprehensively dealt with this issue in **Beacon Insurance Company Limited (Respondent) v Maharaj Bookstore Limited (Appellant)** [2014] UKPC 21. In delivering the judgment of the Board, Lord Hodge stated at para. 12:

> **"In *Thomas v Thomas* [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487-488:**
>
> > **"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; II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."**
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> **In that case, Viscount Simon and Lord Du Parcq (at pp 486 and 493 respectively) both cited with approval a dictum of Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19:**
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> > **"It can, of course, only be on the rarest 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."** [Emphasis added]
>
> **It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in *Thomas v Thomas* at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the**

evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169."

[23] At paragraph 17, Lord Hodge continued:

> **"Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. *In re B (a Child)* Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:**
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> > **"[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."**
>
> **See also Lord Fraser of Tullybelton, at p 263G-H; *Saunders v Adderley* [1999] 1 WLR 884 (PC), Sir John Balcombe at p 889E; and *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 (CA), Clarke LJ at paras 12-17. Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. <u>Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum</u>."** [Emphasis added]

[24] More recently, in **Central Bank of Ecuador and others v Conticorp SA and others** [2015] UKPC 11, Lord Mance echoed similar sentiments at para. 5:

> **"…any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any**

> **appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ: see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577, paras 15-17, per Clarke LJ, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325, para 46.** [Emphasis added]

[25] While cautioning appellate intervention with respect to findings of fact and inferences to be drawn from them, Lord Mance continued at paragraph 8 of the judgment:

> **"…these principles do not mean that an appellate court is never justified, indeed required, to intervene. They only concern appeals on fact, not issues of law. But they also assume that the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities…. In this connection, a valuable coda to the above statements of principle is found in a passage from the judgment of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1, 56-57. Robert Goff LJ noted that Lord Thankerton had said in *Thomas v Thomas* that:**
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> > **"It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, according to the individual case in question."**
>
> **Robert Goff LJ then added this important practical note:**
>
> > **"Furthermore it is implicit in the statement of Lord MacMillan in *Powell v Streatham Manor Nursing Home* at p 256 that the probabilities and possibilities of the case may be such as to impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as**

> **there was in the present case, reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth."**

[26] These very principles were also considered by our Court of Appeal in **The Airport Authority v Western Air Limited** [2014] 2 BHS J. No. 36.

[27] The principles governing appellate intervention are well established and may have particular relevance to this appeal since the Appellants complained that the Arbitrator misdirected herself in coming to some factual determination based on the evidence which was adduced.

Ground One - The Arbitrator's misdirection on Condition of Average Form

[28] The first ground of appeal alleges that the Arbitrator misdirected herself, and erred in fact, in holding that "*no prescribed form was provided other than an exhibit of a declaration signed by the Respondent for its 2017-2018 coverage, but no evidence was led that this is a prescribed form by the Commission*."

[29] Learned Counsel for the Appellants, Mr. Bethell argued that this is plainly wrong as during the course of the hearing, and, in particular, in the witness statement of Mr. Bowleg, he averred that the Condition of Average information is provided on the Bahamasinsurance.org/consumer-resources/insurance-info link for the Bahamas Insurance Association and on the link for the Insurance Commission of the Bahamas icb.gov.bs under consumer information. He next submitted that at paragraph 13 of their written submissions, the Appellants asserted that the form of their Condition of Average Clause was "wholly similar" to the form of Notice of Average provided on the Bahamasinsurance.org/consumer-resources/insurance-info link for the Bahamas Insurance Association and on the link for the Insurance Commission of The Bahamas icb.gov.bs.

[30] In my analysis of the witness statement and evidence of Mr. Bowleg, there is no direct reference to the prescribed form by the Commission. In his witness statement, Mr. Bowleg averred that the Insurance Commission has issued

directives from time to time as to how the Condition of Average Clause should be specifically explained to the insured so as to ensure compliance with section 214 of the Act.

[31] In her analysis of the evidence, the Arbitrator dealt with the sub-issue of **whether there is a requirement for the notice to be in a specific form** and stated that "no prescribed form has been provided other than an exhibit of a declaration signed by Taino for its 2017-2018 coverage, but no evidence was led that this is the prescribed form by the Commission."

[32] I agree with Mr. Rigby that the Arbitrator was accurate in light of the evidence to make this finding. Submissions without evidence do not rise to the level of evidence. This ground of appeal lacks merit and is dismissed.

Ground Two - Adequacy of wording of Condition of Average Clause

[33] The Appellants contended that while the Arbitrator observed that the Act did not state that the notice must be in a specific form except that it must be in a form satisfactory to the Insurance Commission, she failed to make any finding on whether the wording of the Condition of Average Clause provided to the Respondent was adequate to satisfy the requirements of section 214 of the Act but concerned herself solely with the question of "whether simply delivering the package is sufficient" to comply with the Act.

[34] At paragraph 24 of the Ruling, the Arbitrator posed the question as to whether the policy wording explains the Condition of Average Clause and she found:

> **"The explanation in the policy document is that the condition applies if the sums insured do not represent the full value of the property insured and refers to the Notice included in the document which sets out a fuller explanation of the concept. This constitutes some explanation and accordingly the Insurers[Appellants] could rely on this if the policy wording and the attached Notice were in fact given to Taino [Respondent] prior to the renewal."**

[35] Therefore, as the Respondent submitted, the clear words set out above confirm that the Tribunal addressed the "terms" of the words employed in the Notice and

therefore was satisfied that it described "**the nature and effect of the condition**" as required by section 214.

[36] That being said, I find that the Arbitrator was not required to make any finding on whether or not the wording of the Condition of Average Clause was adequate as the pivotal issue before her focused on whether the Respondent was informed in writing of the Condition of Average Clause prior to the renewal of the Policy. I agree with learned Counsel Mr. Rigby that there was no real dispute on the adequacy of the language employed in the Appellants' Policy or the Declaration of Condition of Average.

[37] The Arbitrator cannot be faulted for not making a finding on an issue which was not before her.

Ground Three and Four- Duty on Appellants to show that they "informed" the Respondent "in writing" "prior" to Policy being effected

Submissions by Counsel

[38] These two grounds are inter-related and are dealt with conjointly. Undoubtedly, at the heart of this appeal is Ground Three. Under this ground, the Appellants submitted that the Arbitrator misdirected herself and applied the wrong test in holding, at paragraph 27, that for the Appellants to "inform" the Respondent, pursuant to section 214, "*they must be able to prove that Taino* ***received*** *the policy wording and notice and* ***read the contents so as to know exactly what they were being notified of****."* [Emphasis added].

[39] Succinctly put, learned Counsel Mr. Bethell contended that there is no obligation whatsoever, either under common law or statute, for the Appellants to prove that the Respondent had "read the contents" of the Notice. According to him, the Appellants were only obligated to inform the Respondent, in a clear and sufficient manner, as to the provision and operation of the Condition of Average prior to the renewal of the Policy being effected.

[40] Mr. Bethell next submitted that the proper question for the Arbitrator to have asked was: Did the wording of the Notice sufficiently inform the Respondent of the operation of the Condition of Average and was the Respondent informed in writing thereof prior to the renewal?

[41] Mr. Bethell argued that the Arbitrator misdirected herself, in that, she failed to appreciate the varying distinctions between “inform”, “notify” and “knowledge”. According to him, “inform” is the most neutral and generic word to use when you give information or facts to someone. To inform someone is simply to tell something to that person. The "tell" can be in speech or in writing. “Notify” is to inform (above) but in an essentially official or formal manner (which basically means in writing in most cases). In other words, *to give notice of* something. It is chiefly British English, though American English uses it only a little less. He relied on the case of **Cresta Holdings Ltd v Karlin** [1959] 1 W.L.R. 1055. Hodson L.J. stated:

> **“I do not myself regard the word “notice” as a synonym for the word “knowledge”. Notice is a word which involves that knowledge may be imparted by notice, but “notice” and “knowledge” are not the same thing, although loosely one sometimes talks as if to act with notice and to act with knowledge were indeed the same.”**

[42] According to Mr. Bethell, section 214(1) simply requires the Appellants to “inform” the Respondent in writing of the nature and effect of the Condition of Average, that is, to simply provide them with something in writing explaining the Condition of Average. The use of the word “inform” imposes a low threshold on the Appellants. For the Arbitrator to state that the Appellants must “prove” that Mr. Collins “read” the notice imposes a duty on a standard of “knowledge”.

[43] Learned Counsel next submitted that the Appellants provided a package containing the notice of Condition of Average, which the Arbitrator found as a fact that Mr. Collins received and had sight of its contents. The fact that Mr. Collins elected not to read (or claimed not to have read) all the documents contained

therein does not provide a factual predicate for the Arbitrator to conclude that the Appellants have failed to "meet" their obligations under section 214(1) of the Act.

[44] Mr. Bethell fought hard to persuade the Court that the notice provided was clear and sufficient as to the nature of the Condition of Average had Mr. Collin deigned to read it. His allegation that he did not read the contents of the package cannot avail him of a defence to the Appellants' entitlement to implement the Condition of Average Clause.

[45] The Appellants also submitted that the testimony of Mr. Bowleg was never challenged as regards his assertion that the Condition of Average is noted on all proposal forms which must be signed. In the circumstances, Mr. Bethell submitted that the Respondent "*is not entitled to, and is not at liberty to pursue a claim for relief under the subject Policy.*"

[46] Learned Counsel Mr. Rigby argued, quite correctly, that section 214 imposes a legal duty and obligation on an insurer to bring to an insured's attention in writing the effects of a Condition of Average before the contract of insurance is concluded. The obligation of an insurer under section 214 is to inform **"the insured in writing … of the nature and effect of the condition."** The context of the section created a mandatory obligation on an insurer requiring it to show (or establish by evidence) that information was given in writing to an insured.

[47] Learned Counsel Mr. Rigby next submitted that the Arbitrator was correct in concluding that the Respondent was not informed in writing of the Average Condition because it was clear in Mr. Bowleg's testimony that he personally hand-delivered the package with new policy terms to the Respondent but did not ensure that the insured's attention was directed to the nature and effect of the Condition of Average. His evidence also confirmed that the Respondent was not given the Appellants' Declaration of Average Notice (which is a separate document from the Policy).

[48] According to Mr. Rigby, the evidence of Mr. Bowleg fell below the evidential threshold to show that the Respondent was informed of the Condition of Average. He submitted that the only evidence is the letter dated 26 November, 2014 which makes no reference to the Condition of Average contained in the Policy, the Declaration of Average Notice and similarly makes no reference to the Policy (Fire & Special Perils Policy). He submitted that it is reasonable to expect the letter to contain some language directing the Respondent's attention to these matters in the package.

[49] Learned Counsel Mr. Rigby submitted that on the unchallenged facts before the Arbitrator, the Appellants' evidence was that Mr. Bowleg personally delivered the package at the Respondent's office. He next submitted that no evidence was led by the Appellants (by way of Mr. Bowleg) that he explained or informed the Respondent of the nature and effect of the Condition of Average. Mr. Bowleg's evidence was clear that he did not draw to the Respondent's attention the Condition of Average in the Policy and did not provide to the Respondent the Condition of Average Declaration (the separate document). Mr. Bowleg also stated under cross-examination that he did not do anything to ensure that Mr. Collins read or understood the terms of the Policy. He however provided him with his mobile number and asked him to ring him if he had any questions.

[50] Additionally, Mr. Rigby asserted that, contrary to the Appellants' view, Mr. Bowleg's evidence in relation to the "proposal form" was clear that it was the initial proposal when the Policy was taken out some 20 years before the claim (given rise to the arbitral proceedings). Mr. Bowleg's evidence was also clear that the Condition of Average was not included on the renewal terms or the quote. According to Mr. Rigby, it is also clear that the Appellants could not rely on the initial proposal form completed by the Respondent some twenty years ago when the Policy was first taken out. He asserted that section 214(2) makes it clear that the section applies to "**any renewal of any such contract [entered into before the coming into effect of the Act]**". The Act came into effect on 2 July 2009 and its provisions, specifically section 214, apply to the subject of the instant

matter, the renewal for the period 2015/2016. That being the case, the Appellants could not rely on a proposal form, which predated the Act and which was not before the Arbitrator.

[51] The Respondent submitted that a discussion about the Condition of Average at the meeting on 24 November 2014 would not satisfy the requirements of section 214 because it would not amount to being "in writing". Mr. Rigby submitted that Mr. Bowleg's evidence is contrary to the assertion of the Appellants at paragraph 7 of their submissions. He insisted that Mr. Bowleg's evidence was clear that no discussion was had on the Condition of Average at the said meeting: see page 49 of the Transcript of Proceedings.

[52] Learned Counsel Mr. Rigby submitted that when the legislature used the words "**inform in writing of the nature and effect of the condition**" in section 214, it was mandating an insurer to take all positive steps to bring to the (actual) attention of the prospective insured the terms and implications of the Condition of Average. In other words, the insurer must, by its actions, bring to the insured's attention the clause and its effects.

[53] The Respondent refuted the suggestion that the use of the word "inform" in section 214 "*imposes a low threshold on the Appellants*". To arrive at such a conclusion would militate against the gravity of the "penalty" set out in section 214 for failure to comply with its provision and its mandatory effect.

[54] Learned Counsel Mr. Rigby forcefully argued that the word "**inform**" means to "***communicate, apprise, detail, explain, familiarize, disclose***". According to him, given the fact that the section was designed to protect the consumer/insured from the effects of the Condition of Average, it would be absurd to think that its natural meaning was to limit the obligation on an insurer (like the Appellants) to provide and explain the necessary details to the insured in writing.

[55] The Respondent further submitted that the Appellants' document (and evidence) confirms that it had a duty pursuant to section 214 to **explain** the Condition of Average. The Condition of Average Declaration contains the following words:

> **"Declaration**
>
> **I/we declare that the above Condition of Average has been explained to me by a representative of Insurance Management … I/We have been given a copy of this notice for future reference."**

[56] The Respondent also submitted that section 214 does not contain the word "notice" as is being suggested by the Appellants. Parliament used the word "inform" and therefore the Appellants' reliance on **Cresta Holdings Ltd. v Karlin and Others** [1959] 1 W.L.R. 1055 is of no material assistance to the interpretation of section 214.

[57] In his comprehensive submissions, learned Counsel Mr. Rigby submitted that the words "***informs the insured in writing***" is a requirement for the insured to be given sufficient information to fully understand the workings of the Condition of Average. He asserted that the words should be given their ordinary (day-to-day) meaning and as such, it is plain that what was intended by section 214 was for the insured to be provided with sufficient information on the condition of average clause to understand its working in relation to a claim under the Policy.

[58] Learned Counsel Mr. Rigby trenchantly submitted that the Appellants have fallen woefully short in not discharging the obligation placed on them in section 214 and therefore, the Arbitrator was correct in finding that they did not comply with the mandatory obligation as set out in that section. He submitted that more was required than the insurer notifying the prospective insured. The section in its full context was intended to ensure that the insured understood the "***nature and effect of the condition***". This could only be achieved by the Appellants providing the details to the Respondent of the Average Condition and its application on a claim.

[59] Mr. Rigby also submitted that the Arbitrator was correct in finding that the mere delivery of a package with the new policy and proposed renewal terms could not satisfy the mandatory requirements of section 214, primarily because it did not draw to the insured's attention the nature and effect of the Condition of Average.

[60] Finally, says Mr. Rigby, there was no misdirection by the Arbitrator as to the duty imposed on an insurer and there was no application of the wrong test in the interpretation of section 214. The Arbitrator applied the correct test and her Ruling is unimpeachable.

Court's Analysis and Disposition of Grounds Three and Four

[61] It is common ground that the Arbitrator correctly decided, at paragraph 27, that the onus is on the Appellants "*if they wish to rely on the Condition of Average Clause to prove that they **informed** the Respondent **in writing** of the nature and effect of the condition **prior** to the renewal of the contract*." [Emphasis added].

[62] In the same breath, the Arbitrator continued:

> **"To inform Taino they must be able to prove that Taino received the Policy wording and notice and read the contents so as to know exactly what they are being notified of. This is a mandatory provision."**[Emphasis added]

[63] The Appellants take no issue with the Arbitrator's finding that section 214 is mandatory. What they complained about is that the Arbitrator misdirected herself and applied the wrong test in holding that for the Appellants to "*inform*" the Respondent, according to section 214, it meant that the Appellants must be able to prove that the Respondent "*received the policy wording and notice and read the contents so as to know exactly what they were being notified of.*"

[64] Perhaps, a recapitulation of the salient facts which have been distilled from the evidence of Mr. Bowleg and Mr. Collins may assist before I return to the Arbitrator's holding on what the words "*inform in writing*" mean. The salient facts derived from Mr. Bowleg's evidence are that his employer, IMBL, the Appellants' agent in Grand Bahama, had a long history spanning for about twenty-four years

of dealing with the Respondent. Since joining IMBL in or about 2012, he assumed responsibility for the Respondent's account. He has always communicated with Mr. Collins who has been very diligent in negotiating and discussing the insurance over the Respondent's property.

[65] On 24 November 2014, he and Mr. James Carey, the Manager of IMBL, met with Mr. Collins and Mr. Basden to discuss the insurance renewal of the Respondent's property which was due in January 2015. Mr. Carey led the meeting and he explained the Condition of Average Clause to Mr. Collins. Mr. Carey asked if Messrs. Collins and Basden wished, in light of the average penalty, to adjust the sums insured at (sic) the property. They both declined. During cross-examination, Mr. Bowleg was asked the following (at page 49-50):

> A. I don't recall the length of the meeting.
> Q. Okay.
> But you recall what was discussed in the meeting.
> A. Yes, sir.
> Q. And why did the issue of the average arise in this meeting?
> A. The condition of average didn't arise. Mr. Carey asked if they wanted to reconsider the sums insured for the buildings.
> It was never mentioned in this meeting that they were underinsured. Just simply asking if they --if their opinion was that the values were adequate.
> --------
> --------
>
> Q: You said ---on the fourth line, "Mr. Carey led the meeting and he explained the condition of average clause to Mr. Collins.
> A: Right.
> Q: Is that correct?
> A: Yes, Sir.
> Q: ---in line with what you said previously?
> A: Mr. – when the – in the conversation in relation to the value of the building was explained to them that was to prevent the condition of average.
> At what point did they ask what the –
> Q: When is "they"? Sorry
> A: Sean Basden nor Peter Collins
> Q: Uh-huh
> A: At no point did they ask what was the condition or average of underinsurance. The conversation was that we wanted to avoid this

from happening. And both of them agreed that the buildings were adequately insured.

Q: Was there a discussion on the effect of condition of average?

A: No, just that the condition of average existed and that we needed to make sure that the value of the buildings were (sic) adequate to avoid it.

[66] Though this bit of evidence appears contradictory, I agree with the Appellants that the evidence seems to support the contention that the Condition of Average was discussed at the meeting to ascertain whether the Respondent wished to adjust the insured value of the building in light of the average penalty. However, there was no discussion as to the effect of the Condition of Average Clause.

[67] On 27 November 2014, that is, three days after that meeting, Mr. Bowleg personally hand-delivered a package to Mr. Collins' office containing the following:

- Policy wordings (active and proposed policies);
- Proposed Renewal Terms.

[68] He also wrote a letter. In that letter he stated "*I trust you find this acceptable and await you (sic) comments/instructions*." According to Mr. Bowleg, the enclosures also included the new Fire & Perils Policy 2014 booklet.

[69] Further, on 28 November 2014, Mr. Bowleg sent an email seeking confirmation from Mr. Collins that he received the package. Mr. Collins replied "no." Mr. Bowleg responded stating that he had "*dropped it off yesterday afternoon at the office around 2 p.m. to a young lady (who) assured me she will forward it to you both."*

[70] Mr. Bowleg stated that he never received a response from Mr. Collins. According to Mr. Bowleg, subsequent telephone conversations ensued between him and Mr. Collins where Mr. Collins requested IMBL "to sharpen (its) pencils with respect to the proposed premiums that were enclosed in the package. He understood "sharpen our pencils" to mean "come down on the premiums." Mr. Bowleg's unchallenged evidence was that the first time Mr. Collins had been

provided with any quotes was in the package. Therefore, for him to request that IMBL reduce their premiums evidenced the fact that Mr. Collins had opened the package and had read the contents.

[71] Mr. Bowleg's testified that "the Condition of Average is noted on the proposal form, which every insured has to sign." Additionally, the package contained a notice with respect to the Condition of Average which states "*For your ease of reference a further copy of this Notice follows this page."* On the following page, a detailed explanation as to how the Condition of Average is calculated is set out, and the last paragraph expressly states:

> "**This notice is given to you in fulfillment of the requirement set out in Section 214 of the Insurance Act, 2005** (sic)**, to provide you with information and effect of the Condition of Average as stated in your Policy**."

[72] Mr. Rigby extensively cross-examined Mr. Bowleg as to whether he had enquired whether Mr. Collins had read the Condition of Average in the Policy. Mr. Bowleg emphatically answered in the negative: page 76, lines 14-18 of Transcript of Proceedings. Later on, Mr. Bowleg was asked whether he was aware that under the Act, the insurer has to give notice of the Condition of Average to the insured to which Mr. Bowleg answered affirmatively. In other words, say the Appellants, Mr. Bowleg was quite familiar with the requirements of the Act, hence, he did not *"ask Mr. Collins specifically if he read the Condition of Average*" as that is not a requirement under the Act.

[73] Mr. Collins for the Respondent testified. He is no ordinary man. Besides being the Comptroller of the Respondent's property, he is also a Chartered Accountant and a Member of the Institute of Chartered Accountants in England & Wales since 1983. He subsequently became a Member in the Bahamas Institute of Chartered Accountants. Stripped to its bare essentials, Mr. Collins' testimony is that, to the best of his knowledge and belief, he was never presented with a declaration or statement setting out the terms of the Condition of Average except for the current coverage period of 1 February 2017 to 31 January 2018 (which

has no applicability to the present claim). He also testified that the Respondent did not have notice of the Average Condition before it took out the renewal of the Policy in 2015. He testified that, in hindsight, over the years, it was the customary practice for the Respondent to simply renew the Policy and not to be asked to sign a Condition of Average notice, principally because, in his view, IMBL made sure the property was annually assessed.

[74] Mr. Collins was extensively cross-examined by Ms. Cleare who appeared at the hearing before the Arbitrator. His cross-examination is to be found at pages 5 to 28 of the Transcript of Proceedings; specifically pages 11,12 and 20.

[75] Against this backdrop of evidence, at paragraphs 18 and 19 of the Ruling, the Arbitrator stated:

> **"18. Taino through Mr. Collins denies receiving a copy of this policy wording as the document was left with the receptionist and Mr. Collins says he does not recall receiving it.**
>
> **19. The issue is even if Taino did receive it, whether or not the service of the policy wording in this manner was sufficient for the purposes of complying with Section 214. Mr. Collins's evidence on this point was equivocal as he never denied that Mr. Bowleg delivered the documents but only denied ever seeing them."**

[76] Having posed this question and analyzed the evidence presented by Mr. Bowleg and Mr. Collins, the Arbitrator then made the following finding of fact at paragraph 41 of the Ruling:

> **"…He (Mr. Bowleg) in his evidence stated that Mr. Collins "confirmed" receiving the package because he had asked him to sharpen his pencils which meant that he wanted the Insurers to reduce the premiums quoted which had been enclosed in the package. I believe that Mr. Collins would have said this to Mr. Bowleg and in order to do so would have had to have sight of the premiums quoted and accordingly I believe Mr. Bowleg delivered the package and that Mr. Collins would have seen the initial quotes. This does not mean however that *he would have read the policy or seen the Condition of Average Notice in the policy* which he would have had to have done in order to be notified.** [Emphasis added].

[77] The Arbitrator accepted Mr. Bowleg's evidence that he delivered the package and that Mr. Collins saw the quotes. Then she continued: *"this does not mean however that he would have read the policy or seen the Condition of Average Notice which would have had to be done in order to be notified*." As she stated in paragraph 27, to **"inform"** means that the Appellants **must be able to prove** that the Respondent **not only received the policy wording and notice** but also **read the contents so as to know exactly what they were being notified of.**"

[78] Both parties agree that the word 'inform" must be given its ordinary natural meaning. Learned Counsel Mr. Bethell ascribed the dictionary meaning to the word; "to inform" to mean "to tell."

[79] Learned Counsel Mr. Rigby submitted that "inform" means "communicate", "apprise", "detail", "explain", "familiarize", "disclose." He relied on the cases of **Wharton v Attorney General and Police Service Commission** H.C.A. No. 495 of 2005 and **Jno. Lewis v The Commissioner of Police et al (No. 1)** Civil Appeal No. 11 of 2003. Both cases are unhelpful as the phrase "inform in writing" was used but no meaning was ascribed to these ordinary English words.

[80] It seems to me that the primary issue for determination is one of statutory interpretation. It is therefore necessary to remind ourselves of the principles which a court should apply in order to decide on the meaning and effect of the statute. In **Charles Savarin v John Williams** [1995] 51 WIR 75 at 78-79, Sir Vincent Floissac C.J. expressed the principles thus:

> **"…I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention."**

[81] The dominant purpose in construing a statute is to ascertain the intention of the Legislature as expressed in the statute, considering it as a whole and in its context. **The intention is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand**, [Emphasis added] however strongly it may be suspected that the result does not represent the real intention of Parliament: see **Halsbury's Laws of England, 4th edition Volume 44**, paragraph 856. It is only where the words of the statute are not clear and ambiguous that it is necessary to enlist aids for interpretation.

[82] In **Pinner v Everett** [1969] 3 All ER 257 at 258, Lord Reid stated this principle in the following terms:

> "**In determining the meaning of any word or phrase in a statute the first question is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other permissible meaning of the word or phrase."**

[83] In **Abel v Lee** (1871) L.R.6 C.P. 365 at 371**,** Willes J stated that:

> **"No doubt the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some absurdity, repugnancy, or injustice…. But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable."**

[84] It is clear from the above authorities that if the language of the statute is plain and unambiguous and suggests only one meaning, the court should give effect to those words in light of the legislative intent notwithstanding the fact that such result may be harsh. The court is allowed to apply the rules of construction where an anomaly exists. But, the court has to be wary in doing so as not to modify the language of the statute. On this, Lord Simon of Glaisdale in **Stock v Frank Jones (Tipton Ltd.)** [1978] All ER 948 at 954 articulated:

> **"…a court would only be justified in departing from the plain words of the statute were it satisfied that:(1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly."**

[85] Another general principle of statutory interpretation is that every clause within a statute or act must be construed in the context of and with reference to the other clauses or sections of that statute. One section or sections should not be interpreted without reference to the other sections. In **Case of Lincoln College** (1595) 3 Co. Rep. 58b, at page 59b, it was held that in interpreting an act of Parliament one must "make construction on all the parts together and not of one part only by itself."

[86] Having expounded on the principles of statutory interpretation, in my opinion, a good starting point is Collins English Dictionary (6th Ed) 2003 since both parties agree that the word "inform" must be given its every-day ordinary meaning. The dictionary defines "inform" as "give information, tell, impart some essential or formative characteristic to."

[87] The Insurance Act was passed in 2009 to revise the law regulating the carrying on of insurance business in The Bahamas in order to strengthen the protection given to policy holders under the existing Act; to increase the capital and solvency requirements of insurance companies; to expand the existing regulatory framework; to provide for the establishment of a supervisory authority; to include the regulating of all insurance intermediaries; and to give effect to matters related thereto. In other words, the Act was passed to protect both insurers and insured; not solely insured as Mr. Rigby submitted.

[88] The marginal notes to section 214 read: "Disclosure of pro rata condition of average" and the Act mandates that the insurer informs the insured in writing before the renewal of the Policy.

[89] Section 214(1) requires the Appellants to “inform” the Respondent in writing of the nature and effect of the Condition of Average, that is, to simply provide the Respondent with something in writing explaining the condition.

[90] I agree with Mr. Bethell that the use of the word “inform” imposes a low threshold on the Appellants. For the Arbitrator to state that the Appellants must “prove” that Mr. Collins “read” the notice imposes a duty on a standard of knowledge.

[91] I also agree with Mr. Bethell that if Mr. Collins elected not to read (or alleged not to have read) all the documents contained in the package, that does not provide a factual basis for the Arbitrator to conclude that the Appellants have failed to “meet” their obligations under section 214(1) of the Act.

[92] I do not believe that the ordinary every-day use of the word “inform” prior to the renewal of the Policy could by any stretch of the imagination mean that an insurer has to ensure that an insured “read the contents” so as to know exactly what they are being notified of.” That, to my mind, would add absurdity to the intention of the Legislature. Neither the Arbitrator nor Mr. Rigby could provide any authority and/or treatise including dictionaries to support the meaning which they both ascribed to an ordinary English word.

[93] In addition, it could not have been the intention of Parliament that for renewals of insurances, the insurer has to call every insured to ask if they read and understood what the Condition of Average Clause means. As I understand the law of insurance, there is also a corresponding duty on an insured to read what is sent by an insurance company. It cannot be a one-way street.

[94] I am of the considered opinion that the Arbitrator fell into error when she gave a purposive meaning instead of the literal meaning to the word “inform.” The language in the Act is plain and unambiguous and suggests only one meaning – to tell in writing not orally - which the Court is duty-bound to give effect to notwithstanding that the result may be harsh.

[95] In the premises, I find that the Arbitrator misdirected herself and applied the wrong test in law in holding that for the Appellants to inform the Respondent, pursuant to section 214 of the Act, they must be able to prove that the Respondent received the policy wording and notice and read the contents so as to know exactly what they were being notified of.

[96] Additionally, at paragraph 41, having found as a fact that she believed Mr. Collins would have said to Mr. Bowleg "to sharpen his pencils" and in order to have uttered those words, he would have had to have sight of the initial quotes, and she believed that the Respondent received the package (which contains the Notice of Condition of Average), she then said that it does not mean that Mr. Collins would have read the policy or seen the Condition of Average Notice. I agree with the Appellants that the finding is against the weight of the evidence.

Ground Five

[97] The Appellants complained that the Arbitrator misdirected herself in placing reliance on and giving weight in her "Findings" to a matter which she had earlier disposed of as being of no material significance, thereby perverting her Findings.

[98] Learned Counsel Mr. Rigby fought hard to uphold the Ruling of the Arbitrator and referred to the Policy which states:

> **"This Policy is intended to help you check your cover and to reassure you that we will give you the protection you need for the year ahead. First of all, to help you understand your Insurance Policy we want to make sure you aware of the following:**
>
> - **….**
> - **….**
> - **When arranging this Insurance you were given a CONDITION OF AVERAGE NOTICE that explains why, in certain circumstances, you may not recover the full amount of the claim under this Policy. This condition applies if the sums insured do not represent the full value of the property insured. If you remain uncertain as to the implications of this condition please do not hesitate to contact Insurance Management (Bahamas) Limited and they will be pleased to answer any questions you may have. For your ease of reference a further copy of this Notice follows this page."**[Emphasis added].

[99] Learned Counsel Mr. Rigby submitted that the terms of the Policy are clear that notice of the Condition of Average should have been given to the Respondent PRIOR to its receipt of the Policy. That is, the parties contracted that the terms of the Policy were not to amount to notice of the Condition of Average; primarily because the Policy mandates for the Declaration to be given **[w]hen arranging this Insurance**. According to Mr. Rigby, that means that the Notice would be given during the negotiation stage/discussions before the formation of the contract and was intended to be a separate document.

[100] He submitted that the Arbitrator was correct to find that the Act and the Policy by their clear terms expressly required the Appellants to produce to the Respondent the Declaration on pro rata condition of average **in writing** and **prior** to taking out the policy. The terms of the Fire & Special Perils Policy are clear that the Condition of Average Declaration is a separate document, distinct from the Policy.

[101] Mr. Rigby asserted that the Arbitrator's findings and conclusion on the "separate document" [the Condition of Average Declaration] did not form the basis of her decision because the evidence was clear that no separate document was provided to the Respondent.

[102] At paragraph 23 of the Ruling, the Arbitrator found that "*In the absence of a prescribed form I am satisfied that there was no requirement for a separate document to be used….*"

[103] Later on, at paragraph 45 of the Ruling, she found as follows:

> "**"When one looks at the insurance policy which the insurers are relying on, it says that this notice must be in a separate document and they admit that they did not send a separate document."**

[104] Having found that a separate document was not required, the Arbitrator did a complete *volte face* in paragraph 45. As rightly pointed out by the Appellants, the

Ruling contains inconsistent findings and any reliance on the issue of a separate document must inevitably pervert her findings.

Conclusion

[105] In view of the findings of fact made by the Arbitrator, this Court holds that her findings in Grounds Three to Five are against the weight of evidence. Additionally, as a matter of law, the Arbitrator should have found that the Appellants satisfied the requirements of section 214(1) of the Act. That being the case, this Court finds that the Appellants are entitled to rely on the Condition of Average in determining the Respondent's claim under the subject Policy.

[106] For all of these reasons, I find that the Respondent "is not entitled to, and is not at liberty to pursue a claim for relief under the subject Policy": **Rio Brown v N.E.M. Insurance Company (JA) Ltd** [2012] JMSC Civil 27, paras 46-50 supports such finding.

[107] All things considered, I will grant the Orders and Declarations sought by the Appellants namely:

1) An Order setting aside the Ruling, insofar as the Arbitrator determined that the Appellants did not meet their obligations as required by the mandatory provision of section 214 of the Act;

2) A Declaration that having informed the Respondent in writing of the Condition of Average Clause, the Appellants were not obligated by the provisions of section 214 to "prove" that the Respondent had "read" the same prior to renewing the Policy;

3) A Declaration that the Appellants are entitled to rely on the Condition of Average Clause in the Policy, having informed the Respondent in writing of the Condition of Average prior to the renewal of the Policy; and

4) An Order directing the Arbitrator, pursuant to section 48 of the 2009 Act, to appoint an assessor to determine the true and correct value of the Respondent's insured properties for the purpose of applying the Condition of Average Clause.

[108] Last but not least, I am grateful to both Mr. Bethell and Mr. Rigby for their immeasurable assistance to this Court.

Dated this 23rd day of March, A.D. 2018.

Indra H. Charles
Justice