Neutral Citation Number: [2025] EWCA Civ 1387

Appeal No: CA-2024-002122
Claim No: CL-2022-000527

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (KBD)
Mr Justice Foxton
[2024] EWHC 1813 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2025

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE SINGH
and
LORD JUSTICE MALES

Between:

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

Michael Ashcroft KC and **Benjamin Parker** (instructed by **Holman, Fenwick and Willan LLP**) for **the first and third Defendants/Appellants** (the Owner and the Club respectively)

The second Defendant did not appear and was not represented (the Charterer or the Insured)

John Passmore KC and Caleb Kirton (instructed by **Campbell Johnston Clark**) for **the Claimant/Respondent** (the Insurer)

Hearing date: 21 October 2025

JUDGMENT

This judgment was handed down remotely at 10:00am on Wednesday 5 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

1. This appeal concerns the proper interpretation of a marine insurance policy (the Policy) issued by the claimant insurer, MS Amlin Marine NV (Amlin or the Insurer), on 28 March 2018 to the second Defendant, Bintan Mining Corporation (the Charterer or the Insured), in respect of the Charterer's liability. The cover was for 12 months from 1 April 2018. The Charterer is now in insolvent liquidation.

2. King Trading Ltd (the Owner) time-chartered the *Solomon Trader* to the Charterer by a time charterparty dated 29 May 2017. In February 2019, the *Solomon Trader* grounded in the Solomon Islands. The Owner and the third Defendant, the Korea Shipowners' Mutual Protection & Indemnity Association (the Club), obtained an award on 14 March 2023 against the Charterer in LMAA arbitrations in Hong Kong (the Award).

3. The Award against the Charterer, together with costs and accrued interest, now exceeds US$47 million. The Charterer was wound up in the BVI on 25 March 2021, and in London on 24 April 2024.

4. The Insurer issued these proceedings on 5 October 2022 seeking declarations that (i) a "pay to be paid" or "pay first" clause in the Policy (the "pay first clause") was enforceable by the Insurer against the Charterer in respect of its liability under the Award, and (ii) the pay first clause survived the transfer of rights to the Owner and the Club under the Third Parties (Rights against Insurers) Act 2010 (the 2010 Act).

5. In other words, the Insurer claimed that its pay first clause (which was found at clause 30.13 of the Policy) meant that it did **not** have to indemnify the Charterer against its liability under the Award. The Charterer had not paid and could not pay the Award, because of its insolvency. As a result, the Insurer said that the proper interpretation of the Policy meant that it had no liability to the Owner and the Club, even if the Charterer's liabilities passed to the Insurer under the 2010 Act.

6. The judge, Mr Justice Foxton, made declarations on 30 July 2024 to that effect. Specifically, the judge declared that: (i) the pay first clause was incorporated into the Policy, (ii) the pay first clause was enforceable against the Charterer, (iii) the true interpretation of the Policy meant that no indemnity was payable by the Insurer in respect of any liability that the Charterer had not discharged, and (iv) the pay first clause survived any vesting of the Charterer's rights under the Policy in the Owner and the Club under the 2010 Act.

7. The Owner and the Club appealed on three grounds, which I shall present in reverse order. It is said that the pay first clause should not be given effect because: (a) it is inconsistent with the insuring clause (the inconsistency ground), (b) it falls foul of the so-called "red hand doctrine", because it is an onerous or unusual clause, and was not brought fairly and reasonably to the Charterer's attention (the red hand ground), and (c) it was not incorporated into the Policy (the incorporation ground).

8. The incorporation ground was not vigorously pursued in oral argument, so I shall concentrate on the inconsistency and red hand grounds. In essence, though, I have concluded that none of the grounds can succeed and that the judge was right, broadly for the reasons he gave. I have, however, respectfully disagreed with the judge on one

point, namely as to the proper starting point for our consideration of the inconsistency ground. I shall explain that difference of view at [61]-[62] below.

9. I shall give my reasons under the following headings: (i) the critical terms of the Policy (ii) other terms of the Policy, (iii) the evidential background and the application by the Insurer to adduce further evidence, (iv) the legal background concerning pay first clauses, (v) the inconsistency ground, (vi) the red hand ground, (vii) the incorporation ground, and (viii) conclusions.

10. Under these headings, I will draw, with gratitude, on parts of the judge's judgment.

The critical terms of the Policy

11. The essential argument advanced in support of the appeal, across the three grounds, is that the pay first clause (section 30.13 in part 5) is inconsistent with the certificate of insurance (the Certificate) and the insuring clause (section 1 in part 1), that the pay first clause is buried in the claims section of the General Terms and Conditions in part 5 and should not be given effect, and that the Certificate and the insuring clause take precedence over the pay first clause under the hierarchy clause (section 25 in part 5).

12. With these arguments in mind, I will outline the critical terms of the Policy in this section, with the other relevant terms left to the next section.

13. Part 1 of the Policy booklet (which is incorporated by the Certificate) (the Booklet) provided that:

> The Company [the Insurer] shall indemnify the Assured [the Charterer] against the Legal Liabilities [defined in part 7 of the Booklet as "Liability arising out of a final unappealable judgment or award from a competent Court, arbitral tribunal or other judicial body"], 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.

14. The pay first clause in section 30.13 of part 5 provided as follows:

> 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.

15. The hierarchy clause 25 (under the heading "Application of Terms") in part 5 of the Booklet provided as follows:

> 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.

16. The relevant insurance for our purposes is in section 1 (i.e. Class of Insurance 1). The hierarchy clause is saying that the terms of the specific Charterers' Liability clauses in section 1 of the Booklet should prevail over the General Terms and Conditions (in part 5, which includes the pay first clause) "in the event of a conflict between them". The Certificate did not actually contain any relevant terms beyond its reference to the class of insurance in part 1, so its overall hierarchy is not critical for these purposes.

17. It can be seen immediately that the central question is likely to be whether there is or is not, as a matter of proper interpretation, a conflict between the pay first clause and the insuring clause. That question is, as I shall explain, not free from authority.

Other terms of the Policy

The Certificate

18. The Policy, as I have already indicated, was constituted by the Certificate, which was signed by the Insurer, but apparently not by the Charterer. That said, it is not disputed that the Charterer was represented throughout the placement of the Policy by a professional insurance broker (seemingly Fanny Lo of Geoffrey Cheng & Co Ltd of Hong Kong). The Certificate referred, as I have also already mentioned, to the Booklet containing other terms.

19. The Certificate identified the Charterer as the assured and described the type of insurance as "Charterers' Liability including Liabilities for damage to Hull - Class 1". It identified the security, the vessels covered and the period of insurance, set out the maximum sums insured, and included a warranty as to trading areas. Under a "Conditions" heading, the Certificate included these words: "[a]s per Marine Liability Policy for Charterers 1-2017, as attached". The Booklet has a coloured front page entitled "Charterers' Liability" in large letters with the heading "Marine Liability Policy for Charterers - 1-2017" in smaller letters immediately thereunder.

20. The Certificate also included other provisions under the headings "Conditions", "Warranties", "Excluded Cargoes", "Deductible(s)", "Payment Terms" and "Information given to Insurers". The Owner and the Club drew particular attention to the following warning under the heading "Payment Terms": "Breach of payment terms may lead to rejection of all claims whether arising before or after the breach as per Marine Liability Policy for Charterers 1-2017". It was submitted that the provisions in the General Terms and Conditions concerning the consequences of non-payment of premium were, like the pay first clause, onerous. Yet, the non-payment terms were highlighted in the Certificate, whilst the pay first clause was not.

The Booklet

21. As the index to the Booklet showed, there were 7 parts to it. Parts 1 to 4 contain clauses relating to four 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 Certificate made clear that the Policy only provided the cover in parts 1 and 4. Part 5 was, as I have said, headed "General Terms and Conditions". Part 6 was headed "Additional Cover and Extension Clause" and part 7 was headed "Definitions".

22. The Owner and the Club relied on the fact that the insuring clause in part 1 did not refer specifically to the General Terms and Conditions in part 5, whilst the insuring clause in part 2 did refer to them.

23. The General Terms and Conditions in part 5 of the Booklet comprised sections 25 to 49. I have already set out the hierarchy provision in section 25 in full at [15] above.

24. Section 27.1 of part 5 under the heading "Certificate of Insurance" provided that "[o]n acceptance of the application for insurance by the [Insurer], a Certificate of Insurance will be issued by the [Insurer] evidencing the terms and conditions of the contract of insurance between the [Insurer] and the Assured". Section 27.1 also provided what else should be dealt with in the Certificate (seemingly followed in this case). Section 27.3 provided that the Certificate was to be "conclusive evidence as to the terms and conditions of the contract of insurance".

25. Section 28 of part 5 of the Booklet dealt in some detail with "Exclusions and Limitations". Section 29 dealt, also in some detail, with the "Payments to the [Insurer]" providing that, if a premium payment was not made within 7 days of a notice, the insurance would be cancelled forthwith.

26. Section 30 of part 5 of the Booklet was headed, as I have said, "Claims". The Owner and the Club drew attention to the widely varying provisions included in sections 30.1 to 30.16, in amongst which was found what they described as the onerous section 30.13, requiring claims to be paid first by the Charterer before there would be liability on the part of the Insurer.

27. Sections 31-49 provide for a series of detailed provisions concerning areas that are commonly dealt with in such covers ranging from insolvency, termination, deductibles and subrogation to assignment, interest and applicable law and jurisdiction.

<u>The evidential background and the application to adduce new evidence</u>

28. This claim was brought using the CPR Part 8 procedure and no oral evidence was called. The judge apparently saw some witness statements from Messrs A.H. Johnston and A.J. Kemp, but those statements have not been referred to on appeal. Notwithstanding the approach taken at trial, the Owner and the Club have referred in argument to what the Charterer is to be taken to have known or not known about the Certificate and the Booklet, and the Insurer has made an extensive application to admit much evidence of other wordings commonly available in the global marine insurance market including (and not including) pay first clauses. Both seem to me to be inappropriate approaches. Had the parties wanted to adduce evidence about how the insurance contract came into being and what the parties knew about its terms and conditions, no doubt they would have followed a CPR Part 7 procedure and sought to adduce witness evidence on those matters. Likewise, if evidence were needed as to the utilisation or the usual or unusual nature of pay first clauses, no doubt such evidence could have been adduced at trial. Instead, the parties willingly proceeded to trial on the basis that the case would be decided on the papers.

29. We are told by the Insurer that the Owner and the Club only raised their red hand ground just before trial, so that the Insurer did not have time to adduce evidence of the usual nature of pay first clauses. I am not persuaded that the Insurer could not, had it wished,

have applied for an adjournment to enable it to call the evidence it wanted to resist the new argument. It is, in my judgment, now too late to call evidence about the prevalence or otherwise of pay first clauses. It is equally inappropriate to ask the Court of Appeal to infer, for the first time, things about what the Charterer knew or did not know when such evidence could, had the Owner and the Club wanted, have been called at trial.

30. I would dismiss the Insurer's application to adduce new evidence. For the avoidance of doubt, we agreed to consider that evidence on the basis that we would decide in our judgments whether to admit it. In the event, it was only referred to briefly in oral submissions and we were taken to none of its detail.

The legal background to pay first clauses

31. The Third Party (Rights against Insurers) Act 1930 (the 1930 Act) was the precursor to the 2010 Act. It had been found to have one major flaw, in that under the 1930 Act "a third party [could not] issue proceedings against an insurer without first establishing the existence and amount of the insured's liability" (see [7] of the explanatory note to the 2010 Act). The 2010 Act removed "the need for multiple sets of proceedings by allowing the third party to issue proceedings directly against the insurer and [to resolve] all issues (including the insured's liability) within those proceedings".

32. The unsatisfactory effect of the 1930 Act had been authoritatively determined in *Post Office v. Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 (*Post Office*) and *Bradley v. Eagle Star Insurance Co Ltd* [1989] AC 957. Denning LJ explained the problem at pages 373-4 in *Post Office*. The policy in that case had provided that "the company will indemnify the assured against all sums which the insured shall become legally liable to pay as compensation …". Until the insured's liability to the injured person had been ascertained and determined to exist by judgment or award, no right to indemnity arose. As Devlin J had said in *West Wake Price & Co v. Ching* [1957] 1 WLR 45 at 49: "the assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss".

33. It will be observed that the insuring clause in part 1 of the Policy has a similar effect to the clause at issue in *Post Office*, though it was in slightly clearer terms.

34. The judge explained the relevant background to the 2010 Act in relation to pay first clauses at [19]-[32] of his judgment. I can summarise those paragraphs briefly here.

35. The Charterer's rights under the Policy have been transferred to and vested in the Owner and the Club under section 1 of the 2010 Act. That section allows the Owner and the Club to bring a direct action against the Insurer to enforce those rights, which have been "established" for the purposes of the 2010 Act by the Award.

36. Section 9 of the 2010 Act directly addressed transferred rights that are subject to conditions "that the insured has to fulfil" including pay first clauses. Section 9(5) outlawed pay first clauses by providing that the transferred rights "are not subject to a condition requiring the prior discharge by the insured of the insured's liability". But section 9(6) added an important qualification. It provided that, in the case of a contract of marine insurance (such as here), section 9(5) "applies only to the extent that the liability of the insured is a liability in respect of death or personal injury". The 2010

Act, therefore, directly addressed the mischief created by pay first clauses and relied upon by the Owner and the Club, but excluded non-personal injury marine insurance policies from the ambit of the statutory override. It is accepted that the Policy is indeed a "contract of marine insurance" within sections 9(6) and (7) of the 2010 Act.

37. The mischief created by pay first clauses was, therefore, well understood when the 2010 Act was passed. They were used widely by shipowners' mutual Protection and Indemnity Clubs (P&I Clubs) and other insurers. The House of Lords had decided 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*) that pay first clauses were effective. The pay first provisions in those cases were admittedly contained within the insuring clauses. In the *Padre Island*, the clause provided that the P&I 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 House of Lords held that payment by the member was a condition precedent to the clubs' obligation to pay, and that the third parties acquired no greater rights under the contracts of insurance in the Clubs' rules than the members had had, so that the "pay first" provisions defeated their claims. Lord Goff recorded at page 36E that the P&I Clubs had submitted that the pay first clauses were essential because "members should be able to assume the financial probity of other members because all of them are insurers as well as insured".

38. There were some well-documented expositions of how pay first clauses worked injustice. Mr Justice Mance (as he then was) wrote an article entitled *Insolvency at Sea* ([1995] LMCLQ 34) questioning the P&I Clubs' justification of pay first clauses in *The Fanti*. The Law Commission consulted on reforms to the 1930 Act and pay first clauses in 2001 (CP152 at [5.58]). It noted in footnote 71 that there was concern over pay first clauses "being used more widely [than just by P&I Clubs] 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". The Law Commission's report (No. 272) repeated the concern at [5.28].

39. The Law Commission ultimately recorded the conflicting views of consultees at [5.31] to [5.32] of its report, concluding at [5.37] that they were "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 …". As I have explained, this was what the 2010 Act eventually provided.

40. It was not suggested here or below that section 9(5) of the 2010 Act, which carves contracts of marine insurance, like the Policy, out of the override for other pay first clauses in section 9(4), was not applicable to this case. Instead, the Owner and the Club raised the three arguments I have mentioned already.

41. In relation to the arguments before him as to the ways in which the pay first clause in this case should be read out of the Policy, the judge cited Lord Diplock at page 851 in *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827, where he said that:

> … 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 today 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 businessmen 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.

I agree with the judge that this passage has some relevance to this case.

The inconsistency ground

42. The argument as to inconsistency can be summarised as follows. The Certificate referring to "Charterers' Liability including Liabilities for damage to Hull -Class 1", and the insuring clause in part 1, providing, as it does, for the Insurer to indemnify the Charterer against its legal liabilities under the Award, are fundamentally inconsistent with the pay first clause 30.13. The separate obligation to indemnify in part 1 fell due when the Award established the Charterer's liability, yet the pay first clause provides, inconsistently, that the Charterer has no right to recovery under the Policy until it pays the Award. The two clauses cannot sensibly be read together. Moreover, the two clauses are in different documents. The insuring clause is in the Certificate, which refers to part 1. The pay first clause is only in the General Terms and Conditions in part 5, which, applying the hierarchy clause, should not be given effect because it conflicts with the insuring clause.

43. At [35]-[47] of his judgment, the judge dealt with the cases cited to him on inconsistency. I shall summarise the effect of the four cases that seem to me to be most relevant: *Glynn v. Margetson* [1893] AC 351 (*Glynn*), *Pagnan SpA v. Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep 342 (*Pagnan*), *Alexander v. West Bromwich Mortgage Co* [2016] EWCA Civ 496 (*Alexander*), and *Septo Trading Inc v. Tintrade Ltd (The Nounou)* [2021] EWCA Civ 718 (*The Nounou*) (together "the four cases"). Again, I am drawing on the judge's treatment.

Glynn

44. In *Glynn*, the bill of lading provided specifically for the carriage of a perishable cargo of oranges from Malaga to Liverpool, whilst the printed terms of the bill of lading gave the shipowner wide powers to deviate. The Court of Appeal unanimously read down the printed deviation clause to allow only calls at a particular port or ports in the course of the stipulated voyage. Lord Herschell LC said at pages 354-5 that it was "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". He said that "it would be to defeat what is the

manifest object and intention of such a contract" to hold that the contract permitted unlimited deviation. Instead, the court was 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".

Pagnan

45. In *Pagnan*, the contract was for the export of Tapioca from Thailand. A special term provided that the "seller [was] to provide for export certificate". The contract also incorporated the GAFTA 119 form, clause 19 of which provided, in essence, that, if the export was prohibited by government, the contract should be cancelled. A hierarchy clause provided that the special terms should "prevail in so far as they may be inconsistent with the printed clauses" of the GAFTA form.

46. The Court of Appeal (Dillon, Woolf and Bingham LJJ) held that the clauses were not inconsistent and that both could be given effect. The special term imposed an absolute obligation on the exporter to obtain the export certificate save insofar as another clause relieved it from liability. In the circumstances of that case, clause 19 relieved the exporter from liability if they could not provide a certificate because of an impediment falling within the carefully defined ambit of clause 19.

47. Bingham LJ's judgment includes two passages that are instructive in this case. At pages 349-350, he said that it would be quite wrong to approach the interpretation of the contract "with any predisposition to find inconsistency between the special condition and clause 19". "By including the inconsistency clause, the parties have acknowledged that there may be. One should, therefore, approach the documents in a cool and objective spirit to see whether there is inconsistency or not".

48. Bingham LJ explained that it was "a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. It does not make the latter provisions inconsistent or repugnant". Having considered a number of other authorities, Bingham LJ said that "[i]t 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". That point was echoed by Dillon LJ at page 353 as follows:

> 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.

Alexander

49. In *Alexander*, the Court of Appeal (Sir Brian Leveson P, Sharp and Hamblen LJJ) applied both *Glynn* and *Pagnan*, but decided that, in the circumstances of that case,

there **was** an inconsistency between two of the special terms of a tracker mortgage, which provided for a fixed rate of interest until June 2010 and thereafter a variable rate of 1.99% above base rate, and terms in the mortgage booklet that had been incorporated into the contract by reference. The contract included a hierarchy clause giving primacy to the special terms over the booklet in the event of any inconsistency.

50. Hamblen LJ held that two terms in the booklet could not be read fairly and sensibly together with, and were inconsistent with, the main purpose or object of the contract, namely to provide the mortgage product described. Clause 5 of the booklet provided that the variable rate of interest could be varied by the lender at any time for any of 8 listed reasons or by the lender giving advance notice in writing. Clause 14 of the booklet provided that the borrower would be obliged to repay the loan in full if any of a number of listed events occurred, including the lender giving one month's notice.

51. Hamblen LJ explained the process at [41] noting that *Pagnan* had made clear that inconsistency extended to cases where clauses could not "fairly or sensibly" be read together, in addition to cases where there was "a clear and literal contradiction". He said that the question should be approached "having due regard to considerations of reasonableness and business common sense".

52. Hamblen LJ said at [46] that the principle in *Glynn* depended on being able to identify "the main purpose" or the "main object and intent" of the contract, which itself depended on the interpretation of the contract as a whole considered in its proper context.

53. At [58]-[62], Hamblen LJ held there were three grounds on which it could be said that clause 5 was inconsistent with the mortgage product description. That description was fundamentally transformed and negated, not merely modified or qualified. Hamblen LJ accepted 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". Hamblen LJ also held at [83] that clause 14 was negation of the obligation to provide the loan for 25 years, not modification or qualification.

The Nounou

54. The Court of Appeal (Moylan, Males and Phillips LJJ) once again endorsed the principles in these cases in *The Nounou*. The special terms in a "Recap" provided that the quality and quantity of the fuel oil being sold should be ascertained at the loadport by a mutually acceptable first-class independent inspector "[s]uch result to be binding on parties save for fraud or manifest error". The Recap also contained a hierarchy clause applying the BP 2007 General Terms and Conditions for fob sales: "[w]here not in conflict with the above". Clause 1 of the BP 2007 conditions provided, in contrast, that certificates of quantity and quality were binding on the parties for invoicing purposes (requiring payment of the invoiced amounts with a right of subsequent adjustment), but not otherwise. Males LJ held that the clauses could not be fairly and sensibly read together. Clause 1 deprived the Recap clause of all practical effect.

55. Males LJ summarised the state of the law at [28]. I entirely endorse his summary, which was as follows:

> 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.

Discussion of the Inconsistency Ground

56. The judge dealt with the inconsistency ground at [47]-[59]. The arguments were put rather differently before the judge, but on the inconsistency ground itself, the judge held at [47] that *Glynn*, *Pagnan*, *Alexander* and *The Nounou* "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". He said that that was "a context which [was] particularly favourable to "privileging" the bespoke term over the boilerplate", because (i) the boilerplate was not drafted with the particular bargain in mind, and (ii) boilerplate terms were likely to be less intensively reviewed during negotiation. At [48]-[49], the judge held that the court required a stronger case to read down or read out a clause appearing in the same document as the allegedly inconsistent clause, because of these two features. The court was reluctant to read out one of two clauses in a contract (see Lewison on *The Interpretation of Contracts* 7th edition at [9.101] ff and Leggatt J in *Scottish Power UK Plc v. BP Exploration Operating Co Ltd* [2015] EWHC 2658 (Comm) at [80]).

57. On the specific inconsistency arguments before him, the judge held first at [52] that the Owner and the Club could not bring themselves within the more favourable context for establishing and resolving an inconsistency, because the Certificate incorporated the entirety of the Booklet and "[n]o sensible reader … 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". In other words, the insuring clause referred to in the Certificate and the pay first clause were to be regarded as being of equal status, since they appeared in the same document.

58. Secondly, the judge held at [53]-[54] that there was no inherent inconsistency between the insuring clause and the pay first clause. Pay first clauses traditionally made enforcement of the obligation to pay the indemnity conditional on prior discharge of that liability by the insured (see Lord Mustill at page 387 in *Charter Re v. Fagan* [1997] AC 313). *The Fanti and Padre Island* and section 9 of the 2010 Act made clear that pay first clauses could co-exist with the main purpose of liability insurance in the context of marine insurance and P&I Clubs. The clauses could be read together under Hamblen LJ's "single clause" test (see [53] above). *Apostolos Konstantine Ventouris v. Trevor Rex Mountain (The Italia Express (No 2)*) [1992] 2 Lloyd's Rep 281 (per Hirst J) did

not support the inconsistency argument. The judge was not minded to follow Rein J in 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], who held that a pay first clause as part of the insuring clause was "inherently inimical to the concept of insurance", for the reasons he had given.

59. Thirdly, the judge held at [55] that the fact that the insuring clause gave rise to a liability to indemnify when the Award was pronounced did not give rise to inconsistency with the pay first clause, because, in essence, the pay first clause was dealing with a "right to recovery", rather than a "right to indemnity". *Coburn v. Colledge* [1897] 1 QB 702 at page 705 and *Rolls-Royce Holdings Plc v. Goodrich Corporation* [2023] EWHC 1637 (Comm) at [236] demonstrated that there was no sensible inconsistency between a clause providing for a particular obligation to accrue at one point in time, and another clause giving a defence to enforcement until some further requirement is met. There were anyway several provisions in part 5 of the Policy that had the effect of preventing a right to indemnity accruing or rendering it unenforceable after it had arisen or even after it had become enforceable (sections 28.1.2, 30.1, 30.2, 44(a) and 44(b)).

60. Finally, at [56]-[57], the judge rejected the alleged conflict between the pay first clause and the Insurer's right to terminate the Policy for the Insured's insolvency in sections 31 and 32 alongside the preservation of the Insured's rights to indemnity for incidents occurring prior to termination. This argument was not renewed before us.

61. In my judgment, this case is, contrary to what the judge decided, to all intents and purposes, in the same category as *Glynn*, *Pagnan*, *Alexander* and *the Nounou*. The hierarchy clause 25 (see [15] above) provided that part 1 "shall prevail over the general terms and conditions [in part 5] in the event of a conflict between them, but any terms appearing in the Certificate of Insurance shall prevail above all others". Whether the insuring clause is regarded as being in the Certificate or part 1, it prevails, in the event of inconsistency, over the general terms and conditions in part 5, including the pay first clause. The judge seems to have lost sight of the hierarchy clause, when he said at [52] and [47] that this was not a case where the "more favourable context for establishing and resolving an inconsistency" applied, because this was not a case where "parties who had agreed a set of main or bespoke terms … [had] incorporated a set of pre-printed terms drafted for general use".

62. Whilst I accept that the Booklet included **both** the insuring clause in part 1 and the pay first clause in part 5, the essential nature of the part 1 insurance was made clear in the specifically agreed Certificate by the reference to the type of insurance as "Charterers' Liability including Liabilities for damage to Hull - Class 1". That is not the same as the facts in the four cases, but it means that the principles they adumbrated should be applied here. I would not apply the more stringent test referred to by the judge at [48]-[49] (see [56] above).

63. Even applying the test of inconsistency adumbrated in the four cases and summarised by Males LJ at [28] of *The Nounou*, I would still hold that there is, in this case, no inconsistency or conflict (the word used in section 25) between the Certificate and the insuring clause on the one hand and the pay first clause on the other hand. There are the following main reasons:-

i) The pay first clause does not negate the insuring clause. It qualifies and supplements it, admittedly in a very significant way. But, as Bingham LJ explained in *Pagnan*, even though the hierarchy clause acknowledges that there may be inconsistency, one should not approach the exercise of interpretation with any predisposition to find inconsistency. Moreover, it does not make the qualifying provision inconsistent or repugnant, just because a wide and absolute provision is subject to limitation, modification or qualification.

ii) In this case, the indemnity, as the judge said, fell due when the Award was made, but that indemnity could not be enforced until the insured had paid the claim. That is a qualification, not a negation of the indemnity.

iii) I have also considered, from the point of view of business common sense, the two questions of whether the effect of the pay first clause is: (i) to emasculate the insuring clause or to deprive the insuring clause of all practical effect, or (ii) inconsistent with the main purpose or object of the insurance. It does not seem to me that either question can be answered positively. As I have explained at [31]-[41] above, the legal background to pay first clauses demonstrates that they are a qualification to the insuring clause, not a complete negation of it. They are commonly used in the insurance and reinsurance industry (Lord Mustill recorded the submission that they were "long-established contractual provisions" in *Charter Re v. Fagan*). Parliament decided not to outlaw their use in contracts of marine insurance save to the limited extent I have outlined above (death and personal injury cases). The insuring clause has its full effect whenever the insured discharges a judgment or award. The mischief of the pay first clause described by Lord Mance and others only kicks in when insolvency of the insured supervenes. As it seems to me, it would be illogical and excessive to hold that the pay first clause emasculated the insuring clause, deprived it of all practical effect, or that the pay first clause was inconsistent with the main purpose or object of the insurance. In Bingham LJ's words in *Pagnan*: "[i]t 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". That is not the case here.

iv) It follows from what I have said that, in the sense that Hamblen LJ used those words at [41] in *Alexander*, the pay first clause can be fairly and sensibly read together with the insuring clause. This can be verified by applying the 'single clause' test suggested by Hamblen LJ.

64. Accordingly, applying the principles established in the four cases and summarised at [28] in Males LJ's judgment in *The Nounou,* I would dismiss the inconsistency ground of appeal.

The red hand ground

65. The Owner and the Club advanced the red hand ground in their skeleton argument on the basis that there was a principle of interpretation that, where terms were incorporated by reference, a particularly onerous term was not to be given effect, unless the other party's attention had been specifically drawn to that term. When pressed in oral argument, Mr Michael Ashcroft KC, leading counsel for the Owner and the Club, said that it was established law that, where a clause was particularly onerous, especially

stringent, unreasonable or draconian (as to which there was scope for argument), there was then a sliding scale as to the degree of notice that was required to be given before that term was to be held to have effect as being incorporated into the contract. The parties called these two formulations the "red hand doctrine", but, as I shall explain, I prefer to call it the "onerous clause doctrine".

66. The authority for the red hand or onerous clause doctrine is said to derive from *J Spurling Ltd v. Bradshaw* [1956] 1 WLR 461 (*Spurling*), *Thornton v. Shoe Lane Parking Ltd* [1972] 2 QB 163 (*Thornton*), *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433 (*Interfoto*), *Goodlife Foods Ltd v. Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] BLR 491 (*Goodlife*), *Bates v. Post Office Ltd (No 3: Common Issues)* [2019] EWHC 606 (QB) (*Bates*), and *Blu-Sky Solutions Ltd v. Be Caring Ltd* [2021] EWHC 2619 (Comm) (*Blu-Sky*) (together the "six cases").

67. The Owner and the Club submitted that the pay first clause was harsh, extremely unfair, onerous and commercially unreasonable. On the sliding scale of unfairness, the pay first clause was said to be at the top end.

68. This was seemingly not how the argument was advanced before the judge. He recorded at [58] that the Owner and the Club had argued before him that the suggestion that the pay first clause was hidden away in the thickets of the Policy supported their other arguments about incorporation and inconsistency. The judge rejected that argument on the ground that there was clear reference in the Certificate to the general provisions in the Booklet, any reader of part 1 would have appreciated that more general conditions regarding claims and disputes were likely to appear elsewhere, and that general terms and conditions were commonplace in insurance policies. On that basis, the judge held that the pay first clause was not a fox in the henhouse or a wolf in the flock. He said that "[i]n 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".

69. It has not been suggested that the red hand or onerous clause doctrine is inapplicable to commercial contracts entered into by commercial parties. Indeed, some of the six cases were decided in commercial situations. Essential elements of the doctrine include (i) that the party burdened by it was **not** actually aware of the clause in question, and (ii) that the party relying upon it had not done all that was fairly and reasonably sufficient to bring the clause to the attention of the other party (see *Chitty on Contracts* 35th edition 2023 at [16-010 to 16-012]). The red hand or onerous clause doctrine is all about notice and it is not likely, in my judgment, to have any application to purely commercial transactions in financial markets such as insurance, where the party relying on the doctrine is represented by professional agents, whose duties will presumably include explaining the meaning and effect of the contracts it concludes for its principal, the insured.

70. I turn now to deal with what the six cases relied upon by the Owner and the Club actually decided.

Spurling

71. In *Spurling*, the Court of Appeal (Denning, Morris and Parker LJJ) dismissed an appeal by a bailor of barrels of orange juice from Judge Block, who had held that adequate

notice of an exclusion clause contained in printed conditions had been given to that bailor. The bailee had successfully relied on the exclusion as a defence to a claim for damage to the barrels. Denning LJ said this *obiter* at page 466:

> The clause therefore avails to exempt the warehousemen, provided always that it was part of the contract. This brings me to the question whether this clause was part of the contract.
>
> Mr. Sofer urged us to hold that the warehousemen did not do what was reasonably sufficient to give notice of the conditions within *Parker v. South Eastern Railway Co* [(1877) 2 CPD 416] [*Parker*]. I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. **Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient**. The clause in this case, however, in my judgment, does not call for such exceptional treatment, especially when it is construed, as it should be, subject to the proviso that it only applies when the warehouseman is carrying out his contract, and not when he is deviating from it or breaking it in a radical respect. So construed, the judge was, I think, entitled to find that sufficient notice was given. [Emphasis added].

Thornton

72. In *Thornton*, the Court of Appeal (Lord Denning MR, Megaw LJ and Sir Gordon Wilmer) held that an exemption clause was **not** incorporated into a car park's contract, when it was referred to on the printed ticket as being "displayed on the premises" and was written up on a post opposite the ticket machine itself. Lord Denning held at page 170 that (i) the defendant had not proved that the claimant knew of the clause, and (ii) it had been properly admitted by the car park's counsel that it had not done what was reasonably sufficient to bring it to his attention. Lord Denning continued by saying that:

> I do not pause to inquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in [*Spurling*]. In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it – or something equally startling.

73. Again, this was an *obiter dictum*, since the point about the non-incorporation of the exemption clause had been admitted.

Interfoto

74. In *Interfoto*, the Court of Appeal (Dillon and Bingham LJJ) applied a version of the red hand or onerous clause doctrine. They held that an onerous clause requiring a huge and disproportionate payment to be made for delay in returning transparency photographs to a picture library had not been sufficiently drawn to the borrower's attention, when contained in small print on a delivery note included with the bag of 47 photographs delivered. Bingham LJ's judgment repays reading in its entirety, as it contains an insightful summary of the decision in *Parker*. Unfortunately, however, Dillon and

Bingham LJJ did not agree on the jurisprudential basis for the principle they were applying.

75. In short, Dillon LJ held at page 439A-B that: "if one condition in a set of printed conditions was particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party". Dillon LJ held that the onerous condition never, as a result, became part of the contract between the parties.

76. Conversely, Bingham LJ held at page 445 that the borrower was to be relieved of liability under the onerous condition because the lender had not done "what was necessary to draw this unreasonable and extortionate clause fairly to [borrower's] attention". Bingham LJ explained that:

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

77. Bingham LJ also remarked, significantly for our case, at page 445E that "[t]o the extent that the conditions so displayed were common form or usual terms regularly encountered in this business, I do not think the defendants could successfully contend that they were not incorporated into the contract".

Goodlife

78. In *Goodlife*, the Court of Appeal (Gross, Moylan and Coulson LJJ) held that an exclusion clause in a commercial contract for the installation of a factory fire prevention system was not onerous or unusual and had been fairly and reasonably brought to the purchaser's attention. Accordingly, the exclusion clause was incorporated into the contract and the purchaser was not to be relieved of its effect under the Unfair Contract Terms Act 1977. Coulson LJ stated the "well-established principle of common-law" at [29] as follows: "… even if A knows that there are standard conditions provided as part of B's tender, a condition which is "particularly onerous or unusual" will not be incorporated into the contract, unless it has been fairly and reasonably brought to A's attention". Coulson LJ then helpfully reviewed the law, some of which I have already covered, at [30]-[38]. He emphasised at [35] that not every exclusion or limitation clause is onerous or unusual. At [34], Coulson LJ approved Judge Waksman's *dictum* in *Allen Fabrications Ltd v. ASD Ltd* [2012] EWHC 2213 (TCC) (*Allen*) to the effect that: "Much will depend on the context. It might be said that if in very common use it is less likely properly to be regarded as onerous especially between two commercial parties since that is the business in which they knowingly operate". Gross LJ, in a powerful concurring judgment, emphasised that, between parties of equal bargaining power, party autonomy was an important pillar of English common and commercial law. Parties are free to contract on terms they choose, to allocate risks as they see fit, and the court will enforce their bargains. Gross LJ concluded by saying that "[o]verall, this was a commercial contract between parties of broadly equal bargaining power. …

fully cognisant of the requirement of reasonableness, I think the court should be slow to intervene in such a case, all the more so on an appeal".

Bates

79. In *Bates*, Fraser J summarised some of the six cases at [978] concluding that: "the more onerous and unusual a clause, the greater notice must be given to the other party". He noted at [979] that the "principle [is] available to contracting parties who are not consumers, but context and the respective bargaining positions of the parties are relevant. … I also consider that it is a high hurdle that must be passed for a term to be held to be onerous and unusual".

Blu-Sky

80. In *Blu-Sky*, Judge Stephen Davies applied the principles I have described from *Goodlife*, *Interfoto* and *Bates* which he summarised (along with other cases) at [93]-[99]. He dealt in some detail with the question of the hierarchy of printed conditions at [98]ff, before deciding at [108]-[111] that clause 4.6 of a mobile phone provider's standard terms (which provided for a cancellation charge totalling £180,000 in the circumstances of that case) was onerous and had not been fairly and reasonably brought to the attention of the social care provider, which was the other contracting party.

81. The details of *Blu-Sky* may not matter, but I should say that I cannot agree with the general statement that Judge Davies made at [102] to the effect that "the fact that such clauses are not unusual does not of itself mean that they are not onerous". This is not entirely consistent with at least three prior judicial statements: Bingham LJ at page 445E in *Interfoto* at page 445E, Coulson LJ at [34] in *Goodlife*, who himself approved Judge Waksman in *Allen* (see [77]-[78] above).

82. I accept, of course, that the usual nature of a clause does not **automatically** mean that it is not onerous (which is perhaps all that Judge Davies was saying), but it does mean that such a clause is less likely properly to be regarded as onerous especially between two commercial parties.

Discussion of the red hand ground

83. The six authorities do indeed establish the existence of a red hand or onerous clause doctrine. I think the name "red hand doctrine" adopted by the parties is unfortunate and should not be perpetuated. It derives from *Spurling* and *Thornton*, which were two cases in which Lord Denning adumbrated a principle that never really found its way into the common law – at least in the way he expressed it. The principle is better described as the onerous clause doctrine.

84. The onerous clause doctrine can be applied to both consumer and commercial contracts, though it is to be noted that *Interfoto* and *Blu-Sky* are actually the only recent examples we were shown of it having been applied by the court in commercial situations. The other authorities emphasise the high threshold needed to establish that a clause is onerous or unusual, and the fact that the doctrine is unlikely to have any application in commercial contracts where the parties are of broadly equal bargaining power, and where the challenged clauses in question are common form or usual terms regularly encountered in the business.

85. It is, perhaps, worth restating what the onerous clause doctrine actually amounts to, since Dillon and Bingham LJJ disagreed as to its precise terms. In my judgment, the cases establish, despite Bingham LJ's persuasive conclusion that the effect of the doctrine is to relieve the party from liability under the onerous condition, that where the doctrine applies, the onerous clause in question is not to be regarded as incorporated into the contract, or, perhaps more accurately, as having effect.

86. The onerous clause doctrine provides, therefore, that where a particularly onerous or unusual term of a contract (an onerous clause) is contained in one party's standard terms, and where the other contracting party does not actually know of that term, it will not bind the other contracting party unless the party seeking to rely upon it shows that the clause in question (whether individually or as part of the standard terms) was fairly and reasonably brought to the other contracting party's attention.

87. It is right to point out that some of the authorities have suggested that a sliding scale applies so that the more onerous a clause, the more notice is required to be given to make it effective (see, for example, Gross LJ at [101] in *Goodlife*). For my part, I would not formalise that as part of the onerous clause doctrine. It is sufficient to say that both the question of how onerous or unusual the clause needs to be and the question of what amounts to fair and reasonable notice are questions of fact and degree that the court needs to decide taking into account all the circumstances of the case in question. It is always unwise to lay down strict conditions for the application of simple principles, since one cannot predict the facts and circumstances of future cases.

88. I would emphasise once again the high threshold that is required to show that a clause is onerous or unusual in the first place, particularly in a commercial context.

89. So far as this case is concerned, I am entirely satisfied that the judge was right to conclude that the pay first clause was not onerous or unusual.

90. First, the pay first clause is not unusual as the legal background summarised at [31]-[41] above demonstrates. Pay first clauses are commonly deployed by both P&I Clubs and in marine insurance generally. Precisely how commonly pay first clauses are deployed does not matter. The new evidence that the Insurer sought to adduce (and which I would, as I said at [28]-[30] above, not admit) would have taken the matter no further. The pay first clause in this case does not meet the high threshold needed to be classified as unusual to engage the onerous clause doctrine.

91. Secondly, whilst the pay first clause does, of course, have a serious and significant effect in the event of the insolvency of the Insured, it does not, in my judgment reach the high threshold that is required to make it an onerous clause to engage the onerous clause doctrine. I would summarise my reasons as follows:

    i) As Gross and Coulson LJJ explained in *Goodlife*, it is not every burdensome clause that is properly regarded as an onerous one. A clause in common use is "less likely properly to be regarded as onerous especially between two commercial parties since that is the business in which they knowingly operate" (see Judge Waksman in *Allan*). As Bingham LJ said in *Interfoto* at page 445E, "common form or usual terms regularly encountered in this business" were not covered by the doctrine.

ii) The argument that the pay first clause was hidden away in clause 30.13 cannot avail the Owner and the Club when the Insured was represented by a professional marine insurance broker. That broker ought to have drawn the Insured's attention to it. Indeed, I would venture to suggest that the onerous clause doctrine could never be applicable in any normal case in which a party has its own professional broker or adviser acting for it in the transaction. That said, I certainly accept that the location of the pay first clause was not helpful to a clear understanding of the cover provided by the Policy.

iii) Even if there had been no insurance broker acting for the Charterer, I agree with the judge that there was clear reference in the Certificate to the general provisions in the Booklet, so that any reader of the Certificate and the insuring clause in part 1 would have appreciated that general conditions appeared in part 5 of the Booklet. I agree also that: "[i]n a contract of marine insurance … the presence of a "pay first" provision cannot fairly be described as a bolt from the blue".

iv) In my judgment, Gross LJ's *dictum* in *Goodlife* is applicable in this case. This was a commercial contract between parties of broadly equal bargaining power, in which the court should be slow to intervene.

92. I would dismiss the red hand ground of appeal.

The incorporation ground

93. I can deal with this ground very briefly in the light of what I have already said. The Owner and the Club argued in their skeleton that the general terms and conditions in part 5 of the Booklet formed no part of the Policy. They relied, amongst other things, on the fact that part 1 of the Booklet did not refer expressly to part 5 of the Booklet, whilst part 2 of the Booklet did refer to it.

94. In my judgment, it is entirely unsustainable to suggest that part 5 of the Booklet was not, as a matter of fair interpretation, incorporated into the Policy. It is ironic that, for its main arguments, the Owner and the Club relied strongly on the hierarchy clause in section 25 (which appeared in part 5), yet they say, under this heading, that part 5 was not incorporated at all.

95. The Certificate referred under the heading "Conditions" to "as per Marine Liability Policy for Charterers 1-2017 as attached". The Booklet is entitled on its front page with the same words "Marine Liability Policy for Charterers - 1-2017", making it clear that the Booklet was part of the Policy. The Certificate also identified the part of the Booklet that provided the Charterer's liability cover, which was "Charterers' Liability including Liabilities for damage to Hull - Class 1". The Booklet referred to that coverage in part 1. Without part 5 of the Booklet, the Policy would have been devoid of the normal terms and conditions of marine insurance, many of which have been specifically relied upon by the Owner and the Club both in this court and before the judge.

96. It was obvious on a fair reading of the Certificate alongside the Booklet that parts 1 and 5 of the Booklet were applicable to the Policy. I would dismiss this ground of appeal.

Conclusions

97. For the reasons I have given, despite differing from the judge on the small point explained at [61]-[62] above in relation to the inconsistency ground, I would dismiss the appeal on all grounds broadly for the reasons the judge gave.

98. I have tried, however, to explain a little more than the judge did about the red hand ground which was seemingly not fully argued before him. In my view, the onerous clause doctrine (as I would prefer to call it) provides (as I have said at [86] above) that:

> Where a particularly onerous or unusual term of a contract (an onerous clause) is contained in one party's standard terms, and where the other contracting party does not actually know of that term, it will not bind the other contracting party unless the party seeking to rely upon it shows that the clause in question (whether individually or as part of the standard terms) was fairly and reasonably brought to the other contracting party's attention.

This onerous clause doctrine is subject to the qualifications I have mentioned at [84]-[88] above.

LORD JUSTICE SINGH:

99. I agree.

LORD JUSTICE MALES:

100. I also agree. I add three comments.

101. First, the rationale for the red hand doctrine or, as we must now call it, the onerous clause doctrine, is that the party seeking to escape from the effect of the clause was not aware of it and should not reasonably have been aware of it because it was not fairly and reasonably brought to his attention. It is therefore concerned with the kind of contract which a reasonable party would not be expected to read carefully from beginning to end. It is difficult to see how this doctrine could ever apply to a contract of marine insurance in which the insured was represented, as will usually be the case, by specialist brokers who can be expected to familiarise themselves with the terms available in the market. If the proposed policy contains a clause which can genuinely be regarded as unusual or unreasonable, it would be the brokers' duty to draw that clause to the insured's attention.

102. Second, as Mr Ashcroft pointed out, pay first clauses in marine liability policies have often been referred to in disparaging terms by judges and commentators. Nevertheless, they remain prevalent. It can therefore safely be assumed that the market understands their effect but is content to contract on such terms. There is of course nothing to prevent an insured from seeking a quotation for a policy which does not include such a term, but that might affect the premium which it was required to pay.

103. Finally, whether pay first clauses in marine liability policies should be rendered ineffective as against third parties must be a matter for Parliament. I note that the reason why they were excluded (save to the extent that they insure against liability for death and personal injury) from section 9(5) of the 2010 Act was that the Law Commission wished to avoid proposing provisions which might conflict with potential international

measures which were said to be the subject of then current international negotiations. If such negotiations have not resulted in international agreement, it is always open to Parliament to think again.