CaseNote — Trade and Transport

November 2009

R Marine Pittwater Pty Ltd v Skinner [2009] NSWDC 273

The firm acted successfully for Allianz, the liability insurer of Darren Skinner, a shipwright, who was sued by the insurers of R Marine Pittwater Pty Limited, formerly Riviera Sydney Pty Limited.

Our client was sued as the bailee of a new vessel which was owned by a finance company and which had been sold by the plaintiff company to a purchaser but prior to taking delivery the purchaser required modifications to be made to the vessel.

Mr Skinner was retained by the plaintiff to carry out those modifications which included the fitting of a teak deck and table to the cockpit area. The Riviera 33FB/108 Flybridge Cruiser was delivered to the defendant and placed on a mooring about 450 metres from the defendant's workplace at a marina at Careel Bay, in the north of Sydney. Some preliminary work was done on the vessel and the hatch covers were removed and taken to the defendant's workshop. Overnight, the vessel was vandalised by persons unknown removing the sea strainer covers to the engine and opening the sea valves, permitting the vessel to take on water and sink at its moorings, where it was found the next day.

The proceedings were defended essentially on the basis that the defendant had taken all reasonable precautions that a bailee could have taken. His Honour Judge Levy in the District Court agreed that that was the case. He did not consider that leaving the vessel unattended and moored was unreasonable. His Honour took into account the cautionary words of Dixon CJ, Fullagar and Taylor JJ in *Howard v Jarvis* (1958) 98 CLR 177 where their Honours said:

> "This is a case of a spectacular calamity. It is one of that not uncommon class in which very grave damage would not or might not have ensued if a precaution, trifling in itself, had been taken or had been more thoroughly taken. In such cases it is especially necessary to be on one's guard less too high a standard of care be applied."

His Honour also took into account what was said by the High Court in *Modbury Triangle Shopping Centre Pty Limited v Anzil* (2000) 205 CLR 254 which, although it was concerned with occupier's liability for personal injury, he regarded as being relevant in the circumstances of this case, that is, the Court be slow to impose liability on a person in respect of the acts of third parties over whom that person has no control, especially in the case of the unlawful acts of wrongdoers.

There is no doubt that the vessel had been locked by the defendant. His Honour emphasised that the defendant was not in the position of an insurer and the only basis upon which the defendant could have a liability was if his actions "negligently invited the attention of vandals as some form of allurement". Levy J did not think that was the case because he considered that the vessel was prudently and appropriately tied up at a mooring by an employee of the plaintiff who had been directed by the defendant as to where to moor the vessel. The selection of the mooring did not amount to negligence. By mooring the vessel at considerable distance from the shore, His Honour also took the view that that had the effect of creating a moat or barrier to access, thus making access very difficult. It needed water craft. In His Honour's view it was not feasible for the defendant to isolate the vessel in a locked area or at a berth close to the workshop because those berths were already in use. His Honour also accepted that it was practical from a workflow perspective for the hatch covers to be removed and left off overnight without undue risk of damage.

His Honour also found the plaintiff had failed to prove its damages. The facts were that after the sinking the vessel was not delivered to the intended purchaser but was reacquired by the related Riviera company, the manufacturer, at a salvage price of $20,000. No evidence was adduced as to the reasonableness of that amount. Such evidence, as was adduced as to the reasonable cost of repairs, was found by His Honour to have no probative value under the principle of *Makita (Australia) Pty Limited v Sprowles* (2001) 52 NSWLR 705. In particular, there was no evidence as to the reasonable salvage value of the engine, although evidence was given by the plaintiff as to work being done as soon as the vessel was salvaged to inhibit the engine.

Stuart Hetherington
Partner
T: 02 8281 4477
E: swh@cbp.com.au