
CANADA / JUDGMENT

North King Lodge Ltd. v. Gowlland Towing Ltd.

2005 BCCA 557

COURT

British Columbia Court of Appeal

DECIDED

21 November 2005

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

North King Lodge Ltd. v. Gowlland Towing Ltd.,

2005 BCCA 557

Date: 20051121

Docket: CA031875

Between:

North King Lodge Ltd.

Appellant/

Respondent by Cross Appeal

(Plaintiff)

And

Gowlland Towing Ltd.

Respondent

(Defendant)

And

T. & D. Carter Holdings Ltd.

Respondent/

Appellant by Cross Appeal

(Defendant)

Before:

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Smith

The Honourable Mr. Justice Lowry

J. W. Bromley

Counsel for the Appellant

D. F. McEwen, Q.C.

Counsel for the Respondent, Gowlland Towing Ltd.

J. D. Buchan

Counsel for the Respondent,

T. & D. Carter Holdings Ltd.

Place and Date of Hearing:

Vancouver, British Columbia

September 13 and 14, 2005

Place and Date of Judgment:

Vancouver, British Columbia

November 21, 2005

Written Reasons by:

The Honourable Mr. Justice Lowry

Concurred in by:

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Mr. Justice Lowry:

- [1] SEA LION VI is a large 130 foot towing vessel drawing 16 feet of water that was built 100 years ago. She holds a place in the maritime history of this coast. One night during the winter of 2000 she took the ground on a falling tide where she had been moored for 45 days. She fell on her side, flooded when the tide rose, and was damaged extensively. The owner brought this action for the cost of re-floating and repairing her against those alleged to be

responsible for the sinking: a towing company that altered her mooring two days before she sank and a logging contractor to which the vessel was chartered.

- [2] The action was tried before Mr. Justice Sigurdson. The owner was found to be substantially at fault for the sinking of its vessel, but the charterer was held liable for a portion of the loss. The claim against the towing company was dismissed: (2004), 27 B.C.L.R. (4th) 284, 2004 BCSC 460. This appeal by the owner and this cross appeal by the charterer raise issues in respect of the obligations borne by the towing company and by the charterer for the safety of the vessel.

The Nature of the Appeals

- [3] The owner of the vessel was North King Lodge Ltd. ("North King") in Nanaimo. The charterer was T. & D. Carter Holdings Ltd. ("Carter"), and the towing company was Gowlland Towing Ltd. ("Gowlland"). Carter contracted with Ashlaur Trading Ltd. ("Ashlaur") to undertake logging operations near Port Neville, a considerable distance north of Nanaimo, under a timber licence held by Ashlaur. Carter chartered the vessel to provide accommodation for its logging crew. At the logging site, North King's principal, Richard Wood, anchored the vessel on 300 feet of chain by the bow, the anchor being set in 40 feet of water. The stern was secured to the beach with two lines run ashore. The port side was secured by three lines tied to anchored boom sticks used to form the booming ground where the cut logs were assembled into booms to be towed. Mr. Wood then left the vessel, along with the employees of North King who had assisted him, and was not at the site again until after the sinking.
- [4] When the logging season drew to a close and the operation was being shut down, Ashlaur, who owned the boom sticks, engaged Gowlland to remove them. Gowlland towed the boom sticks away, leaving the vessel secured only bow and stern such that she lay across the flow of the tide without the lateral support of the anchored boom sticks that had held her. On that day, Carter informed North King that it was finished with the vessel and that she could be collected, but North King was not told by anyone that the vessel's moorage had been significantly altered.
- [5] The tides over the next two days were particularly high. On the morning of the second day, Carter's employees at the site observed that the vessel's position had changed substantially. She had swung on her anchor and lay some distance from the beach with her starboard side parallel to the beach. The two stern lines were no longer holding her. One stern line was later found to have been significantly lengthened and the other was missing altogether. Carter informed North King that the vessel's position had changed substantially, but not until later in the day at about 2:00 p.m. The vessel came to grief that night when she swung around on the ebbing tide and her position changed again. She took the ground on a shoal in shallow water to her starboard of where she had been moored.

- [6] The judge found that Gowlland's conduct in removing the boom sticks caused the sinking, but he dismissed the claim against the towing company because the duty it owed to North King was no greater than the duty owed to a trespasser. He held that North King secured the vessel to the boom sticks without permission such that there was a trespass to Ashlaur's chattels. Gowlland was a bailee of the boom sticks and therefore entitled to exercise Ashlaur's remedies to the trespass. The judge took the view that the duty Gowlland owed to North King was not to damage the vessel intentionally and not to act recklessly or without what in law is characterized as common humanity toward North King. He found that Gowlland had not met the standard of reasonable care, first because it removed the boom sticks when arrangements could have been made to leave those to which the vessel was tied in place for a time, and because it did so without determining that North King knew that the vessel's mooring was being significantly disturbed. However, the judge concluded that Gowlland had met the lower standard required in respect of the duty the logging company owed to a trespasser in the circumstances and was not liable for the loss.
- [7] On this appeal, North King contends that the judge erred in two respects. It is first said that he was wrong to hold that there was any trespass to Ashlaur's chattels because North King's permission to secure the vessel to the boom sticks was, in the circumstances, to be implied. It is then said that, even if there was a trespass, the judge erred in holding that Gowlland met the requisite standard of care in discharging its duty to act with common humanity toward North King.
- [8] The judge found that Carter's conduct in not informing North King promptly that the vessel had shifted during the morning of the day of the sinking contributed to the loss because, when North King was informed, there was insufficient time for Mr. Wood to travel to the site by air that day to take charge of the situation. The judge held that Carter was a bailee of the vessel and that the contract of bailment contained an implied term requiring Carter to take reasonable steps to inform North King of any possible danger to the vessel of which Carter was aware, thereby imposing an obligation that Carter did not otherwise have. The judge found that Carter had breached this implied obligation and held the logging company liable for a portion of the loss. He assessed the fault for the loss as 80% against North King for its failure to take certain steps it could have taken to prevent the sinking and 20% against Carter.
- [9] On this appeal, Carter contends that it was not a bailee of the vessel because it did not take possession of the vessel and that there was no implied obligation that it could have breached. It is, at least now, common ground that responsibility for navigating the vessel, including in particular her mooring, remained with North King throughout. Carter would say that the extent of its obligations to North King went no further than those of a licensee entitled to the use of the accommodation spaces and ancillary parts of the vessel to which it had access. Carter also contends, as it did unsuccessfully at trial, that to the extent that this is a subrogated action brought by the vessel's insurers, the terms of North King's hull insurance preclude its underwriters from prosecuting the claim against the charterer of the

vessel.

[10] Finally, North King contends that the judge erred in apportioning fault as he did. It maintains that fault should have been equally divided between Gowlland, Carter, and itself.

[11] I address North King's appeal and then turn to Carter's cross appeal.

North King's Appeal

[12] It is first necessary to consider whether the judge erred in concluding that the securing of the vessel to the boom sticks constituted a trespass to chattels. Then, if there was no error in finding a trespass, it is necessary to consider whether Gowlland met the required standard of care given the duty it bore to North King.

a) Trespass to chattels

[13] The initial moorage of the vessel had been such that the loggers had to use a boat to reach the vessel. Carter wished to have the vessel moored close to shore so that a ramp could be used to get aboard. The vessel was moved and moored by Mr. Wood with the assistance of a deckhand. Mr. Wood decided to secure the port side of the vessel to the boom sticks. He did not seek anyone's permission to do so.

[14] It must be accepted that if North King secured the vessel to the boom sticks without Ashlaur's permission, then North King committed a trespass. A trespass occurs when there is any direct, intentional interference with a person's possession of a chattel without that person's consent: Clerk and Lindsell on Torts, 18th ed. (London: Sweet & Maxwell, 2000) at 787. Attaching an object to a person's chattel that impairs the movement of the chattel without permission to do so is a trespass. On his review of the evidence, the judge found that no permission, express or implied, had been given. North King contends that Ashlaur's permission was implied such that North King was either an invitee or a licensee and that therefore no trespass was committed. It relies mainly on the testimony of Douglas Saunders, Ashlaur's principal, emphasizing that, at least in a broad sense, Ashlaur benefited financially from the vessel being used to facilitate accommodation for the loggers engaged to harvest the timber for Ashlaur to sell.

[15] Mr. Saunders acknowledged that those in the industry on this coast work together to create efficiencies without an expectation of additional compensation. He said that he thought it was common for vessels to tie alongside boom sticks without obtaining permission; although what he said did not necessarily relate to large unmanned vessels being tied to boom sticks for long periods of time. He did not know the vessel was tied to Ashlaur's boom sticks but said that, had he learned that to have been the case, he would not have asked that it be removed, provided there was no interference with Ashlaur's operations.

[16] When it was put to him, Mr. Saunders accepted that Douglas Carter, the principal of the logging company, who had asked that the vessel be moved and who knew she was tied to the boom sticks, did not require Ashlaur's permission, again provided there was no interference

with Ashlaur's operations. Mr. Saunders was not, however, asked why he held what can only have been his belief about what was in effect Mr. Carter's authority to give Ashlaur's permission to North King. Mr. Carter said only that he did not need permission because he had never sought permission from Ashlaur with respect to the logging operations his company conducted for Ashlaur over the course of many years. Finally, Mr. Saunders said that, had he been asked, the particular boom sticks to which the vessel was tied could have been left where they were for a time without any problem.

- [17] North King appears to base its argument largely on the premise that, because vessels routinely tie up to boom sticks on this coast without obtaining permission to do so, no trespass can be said to be committed when that occurs. It contends that permission is implied. But that is not so. While the evidence adduced to support the premise is not particularly compelling, the practice may be common and in most instances it may not be objectionable, but that does not mean that it is predicated on any implied permission. Those who tie to boom sticks without permission commit a trespass to chattels when they do so.
- [18] In any event, as the judge noted, Mr. Saunders's evidence was given after the fact. Even if he would have been prepared to give his permission, or believes that Carter did not require Ashlaur's authority to give Ashlaur's permission, it does not follow that Ashlaur's permission was implied. We have not been referred to any evidence indicating that either Mr. Saunders or anyone else actually did anything from which it could be said that Ashlaur's permission to tie the vessel to Ashlaur's boom sticks was implied. Further, when it came time to have the boom sticks towed away, the presence of the vessel was an interference. Had Mr. Saunders been asked, there may have been no problem, but he was of course not asked.
- [19] In my view, the judge did not make any error in finding that the vessel was tied to Ashlaur's boom sticks without permission. There is no factual basis on which North King can be said to have been an invitee or a licensee. When Mr. Wood and his deckhand tied the vessel to the boom sticks, a trespass was committed and it continued as long as the vessel's lines remained tied to the boom sticks.
- b) The Standard of Care
- [20] The judge derived the duty he considered to be owed to a trespasser, and hence the standard of care to which Gowlland was to be held, from the authorities where a trespass to land has resulted in personal injury.
- [21] North King contends that the judge properly identified the duty owed by Gowlland (not to intentionally or recklessly cause damage to the vessel and to exercise common humanity in respect of the vessel), but erred in concluding that the requisite standard of care had been met. North King appears to accept, as it must, the judge's factual finding that Gowlland did not cause the sinking intentionally or, more particularly, through a reckless disregard for the safety of the vessel when the boom sticks were towed away.

- [22] However, North King says that the duty of common humanity required Gowlland to take what the judge found would have been reasonable steps to avoid the sinking: leaving the boom sticks to which the vessel was secured in place for a time or insuring that North King knew that the mooring was being altered significantly. North King contends that there were other reasonable steps that the evidence of various mariners who testified shows should have been taken, the most significant of which was to secure the position of the vessel with a line ashore from the portside. It appears to me that North King contends for the standard of reasonable care that would be owed to an invitee or licensee. Gowlland maintains that, if it bore a duty of common humanity to North King, the duty did not, in the circumstances, serve to raise the standard of care for which North King contends.
- [23] The decision of the House of Lords in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358, [1929] All E.R. 1 (H.L.) [Addie] established the duty owed by the occupier of land as being only that the occupier not cause injury to a trespasser intentionally or recklessly. The case involved injury to a child. The duty as stated there was accepted as the common law duty owed by an occupier to a trespasser by the Supreme Court of Canada in *Canadian Pacific Railway v. Anderson*, [1936] S.C.R. 200, [1936] 3 D.L.R. 145, where, in a personal injury case, Addie was treated as a restatement of the duty recognized by the Privy Council in *Grand Trunk Ry. Co. v. Barnett*, [1911] A.C. 361.
- [24] The House of Lords altered the duty owed by an occupier to a trespassing person in *British Railways Board v. Herrington*, [1972] A.C. 877, [1972] 1 All E.R. 749 [Herrington cited to A.C.] by introducing the duty of common humanity. Like Addie, the case was concerned with injury to a child. Five speeches were given. Lord Pearson saw the shortcomings of the duty as stated in Addie as three-fold: occupiers are liable only in respect of commissions not omissions; no duty to act arises until the trespasser is on the land; and the occupier is liable only for deliberate or reckless acts. He considered the duty as stated in Addie to be outdated. He said at pp. 929-30:

With the increase of the population and the larger proportion living in cities and towns and the extensive substitution of blocks of flats for rows of houses with gardens or back yards and quiet streets, there is less playing space for children and so a greater temptation to trespass. There is less supervision of children, so that they are more likely to trespass. . . There is considerably more need than there used to be for occupiers to take reasonable steps with a view to deterring persons, especially children, from trespassing in places that are dangerous for them.

* * *

In my opinion the *Addie v. Dumbreck* formulation of the duty of occupier to trespasser is plainly inadequate for modern conditions, and its rigid and restrictive character has impeded the proper development of the common law in this field.

- [25] Thus, in Lord Pearson's view, which appears harmonious with the views held by the other members of the Committee who heard the appeal, the rule in *Addie* and the rigid adherence to it required change in order to accommodate changes in society, particularly with respect

to the protection of children. He did, however, recognize the need to circumscribe the duty of an occupier (pp. 924-26), as did the other law Lords. Lord Wilberforce noted that, "it must be remembered that we are concerned with trespassers, and a compromise must be reached between the demands of humanity and the necessity to avoid placing undue burdens on occupiers" (p. 920).

- [26] In *Pannett v. P. McGuinness & Co. Ltd.*, [1972] 3 All E.R. 137, [1972] 3 W.L.R. 386 [Pannett cited to All. E.R.], the English Court of Appeal interpreted and applied the five speeches made in *Herrington*. Pannett was also a case where a child was injured while trespassing. Lord Denning provided a summary of the proper approach to be extracted from *Herrington*. With respect to defining the duty, he stated at pp. 140-141 that:

... the duty owing to a trespasser is not found by any general principle applicable to all trespassers alike. ... The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did. (1) You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it. (2) You must take into account also the character of the intrusion by the trespasser. A wandering child or a straying adult stands in a different position from a poacher or a burglar. You may expect a child when you may not expect a burglar. (3) You must also have regard to the nature of the place where the trespass occurs. An electrified railway line or a warehouse being demolished may require more precautions to be taken than a private house. (4) You must also take into account the knowledge which the defendant has, or ought to have, of the likelihood of trespassers being present. The more likely they are, the more precautions may have to be taken.

- [27] Thus, obligations of an occupier to prevent injury to a trespasser under a duty of common humanity vary according to the circumstances.

- [28] The decision of the Supreme Court of Canada in *Veinot v. Kerr-Addison Mines Ltd.* (1974), [1975] 2 S.C.R. 311, 51 D.L.R. (3d) 533 [Veinot cited to S.C.R.], which involved personal injury suffered in a snowmobile accident, has been considered by this Court to have recognized the duty of common humanity. (See *Phillips v. Canadian National Railways* (1975), 61 D.L.R. (3d) 253, [1975] 4 W.W.R. 135 (B.C.C.A.), and, sitting as the Court of Appeal for the Yukon Territory, *Anderson v. Whitepass Transportation Ltd.*, [1994] Y.J. No. 9 (Q.L.) [Anderson].) The above-quoted passage from Lord Denning's judgment in *Pannett* was quoted by Dickson J., at p. 317, as a statement of the factors to be taken into account when considering intrusions upon land.

- [29] In *Anderson*, the duty owed by an occupier to a person who sustained personal injury while trespassing upon the occupier's land was stated succinctly as follows at para. 23:

The basic duty occupiers owe to trespassers is not to harm them either intentionally or recklessly, regardless of the knowledge or foreseeability of their presence. An additional duty, a duty of common or ordinary humanity, arises when the presence of trespassers on the property is foreseeable. Once it arises, this duty is limited to taking reasonable steps to enable trespassers to avoid danger. What is reasonable depends on the nature and degree of the danger and on the knowledge, skill and resources of the occupier.

- [30] The duty of common humanity has evolved out of personal injury consequent upon trespass to land. The discussion in the authorities has been well removed from a consideration of damage to the chattel of a person consequent upon steps taken as a result of that person's trespass to the chattel of another. Counsel have cited no cases where the duty of common humanity has been considered in the context of damage to chattels. There appear to be only two reported decisions in Canadian jurisprudence and none in the English reports: *Northern Native Fishing Corp. v. Canada* (1987), 13 F.T.R. 153 (T.D.) and *Lockhart v. Calgary (City)*, [1975] A.J. No. 165 (Q.L.) (Alta. Dist. Ct.). It is only in the second that the duty of common humanity owed to a trespasser was held to have been breached and then only in respect of a trespass to land.
- [31] It is of no little significance that the whole reason for the expansion of the traditional duty articulated in *Addie* to include the duty of common humanity was, to paraphrase Lord Pearson in *Herrington*, to respond to changing social conditions and needs associated with urbanization and modernization. Those considerations were seen to require that occupiers take greater care to prevent intrusions by trespassing persons, particularly children, into dangerous places. The resultant duty of common humanity was an attempt to balance what Dickson J. described as, "the traditional nineteenth century concern for the sanctity of landed property" (Veinot, p. 314), and what Professor Lewis Klar says are the "twentieth century loss distribution goals of tort law" (Tort Law, 3d ed. (Scarborough: Thomson Carswell, 2003) at 534). The same considerations are by no means as compelling when viewed in the context of trespass to chattels.
- [32] It appears to me that, where as here there has been no risk of injury to any person, it would have to be an exceptional case for the duty of common humanity to raise the standard of care beyond a standard that is commensurate with the duty not to cause damage intentionally or by reckless conduct. That is what will be reasonable in most cases involving damage to chattels. The duty of common humanity certainly cannot, as *North King* appears to suggest, have raised the standard of care that *Gowlland* was required to meet to that of exercising reasonable care for the safety of the trespassing vessel. At least in respect of damage to chattels, as opposed to personal injury, there remains a clear distinction between the duty of care owed to a trespasser and that owed to an invitee or licensee, as well as between the respective standards of care to be met.

- [33] If, as I conclude, North King committed a trespass and Gowlland did not fail to meet the required standard of care, no error was made by the judge in his disposition of the action against the towing company, and North King's appeal is to be dismissed.

Carter's Cross Appeal

- [34] The judge held Carter liable for the sinking of the vessel solely by virtue of what he found to be the breach of an implied term in what he determined to be a contract of bailment: Carter was required to take reasonable steps to inform North King of any possible danger to the vessel of which Carter became aware. The employees of the logging company on site were aware that the vessel's position was altered substantially early on the morning of the day of the sinking and so informed Mr. Carter, who was then elsewhere. The logging company was held to have breached the implied term by not informing North King of the situation until about 2:00 p.m. when Mr. Carter informed Mr. Wood by speaking to his wife. The judge held that, by this time, Mr. Wood did not "have the realistic opportunity to fly to Port Neville that day, even though there were other steps [he] might have taken". The judge appears to have reached this conclusion only on the basis that float planes cannot be operated after dark. The judge found that had Mr. Wood been informed earlier, he would have travelled to the site and the sinking of the vessel that night would probably not have occurred.
- [35] The judge also found that, when Mr. Wood was informed that the vessel's position had shifted, he would as a mariner have appreciated, much more so than Mr. Carter or the loggers, that she was at risk. Mr. Wood would have known that the boom sticks to which she had been secured were gone, the stern lines were no longer holding her, and he could not be confident that the depth of water close to shore, where she ultimately grounded, was safe. In other words, he had no reason to believe that the means by which he had secured the vessel, in what the judge said was a precarious position, were not critical to her safety.
- [36] On my review of Mr. Wood's evidence, it is less than clear that the reason he did not attempt to fly to the site was because it was too late in the day. He said that when he learned of the situation, he was "not unduly concerned". He said he understood that float planes cannot land at night, but he did not say that he had made inquiries or that it was too late to fly to Port Neville. His stated reason for not going was only that "he did not feel the need to". His lack of concern was borne out by the fact that he made no effort to give instructions to those at the site to have the vessel resecured as she could have been or to engage tug assistance that was available reasonably close by. His explanation was that the weather was good and Mr. Carter had said the vessel was all right. The judge found that Mr. Wood took no assurance from Mr. Carter and that he knew immediate action was required.
- [37] That said, however, on the way the cross appeal has been argued, the only question to be decided is whether the judge was right in holding that the term he found Carter had breached was to be implied. That requires consideration of the agreement between North King and Carter, the nature of the charter to which it gives rise, and the implied term.

a) The Agreement

- [38] The agreement was made orally between Mr. Wood and Mr. Carter. The vessel was in Nanaimo. She was to be chartered to Carter for a two-month period at \$8,000 per month (payment in advance monthly) plus the cost of fuel. The vessel was to be used by Carter for the accommodation of its logging crew at the site. North King was to deliver the vessel to the site and moor her there to be used for the loggers' accommodation during the charter.
- [39] It appears to me that the charter may be said to have commenced in Nanaimo when the vessel sailed for the site because Carter was billed (and had apparently agreed to pay) for the cost of the fuel for running the main engine to the site, as well as the fuel used daily on site for the generators that supplied electrical power for the accommodation. If not, the charter commenced when the vessel was moored at the site and made available to Carter. It makes no difference in the end.
- [40] Carter informed North King that it was finished with the vessel the day the boom sticks were removed, which was two days before the sinking. North King was presumably then at liberty to employ the vessel elsewhere such that the charter may have ended two days before the sinking. But that is not entirely clear because Carter had been billed and presumably paid for a further week. This point was not addressed in argument, so I proceed on the assumption the charter was ongoing when the vessel sank.
- [41] It was a term of the agreement that a watchman was to be employed by North King and the cost split equally between North King and Carter. The judge found that one purpose of there being a watchman was to insure that the vessel remained adequately and safely moored throughout the charter. Also, the judge found that the requirement was indicative of the responsibility borne by North King for the safe moorage of the vessel during the charter. A watchman was employed initially. He was replaced by a second watchman, but the second watchman was dismissed by Carter midway through the period of the charter. Carter was dissatisfied with the additional services the second watchman provided as a cook in the logging camp. North King elected not to replace him. The judge rejected North King's contention that there was then an alteration in the terms of the charter and his determination in that regard is not challenged.

b) The Nature of the Charter

- [42] The judge began his determination that the agreement contained an implied term by considering the nature of the agreement. There have long been two kinds of charters that are commonly recognized. The first is a "demise charter", the second is a "time charter". Generally, when a vessel is chartered by demise, the charterer takes possession and control of the vessel, assuming responsibility for her employment as well as all aspects of her management, including her navigation. A demise charterer is usually responsible for crewing and insuring the vessel.

- [43] When a vessel is time-chartered, the charterer assumes responsibility for her employment, but the owner continues to operate the vessel with its crew. The owner remains responsible for the vessel's navigation, albeit subject to the directions of the charterer as to the vessel's employment. When a vessel is time-chartered the owner is usually responsible for insurance.
- [44] The distinction between the two types of charters is discussed by Christopher Hill in *Maritime Law*, 5th ed. (London: LLP, 1998) at 177-180 and by the editors of *Scrutton on Charterparties*, 20th ed. (London: Sweet & Maxwell, 1996) at 59-60, the latter of which the judge quoted. The essential question is whether the owner has given to the charterer the whole possession of the vessel, permitting the charterer to do what it wishes with regard to the management and crewing of the vessel entirely independent of and without reference to the owner. Where there has been no demise, the charterer is generally answerable to the owner for the consequences of the employment of the vessel as distinct from her navigation: *The "Erechthion"*, [1987] 2 Lloyd's L.R. 180 at 185 (Q.B.).
- [45] At trial, North King contended that the charter was a charter by demise or a bailment. The judge took the view that the charter of the vessel did not fit the traditional forms of charter because it was not chartered for a voyage and did not have a master and crew. He considered the real question to be whether the agreement was a contract of bailment. Relying on *Allison Concrete Ltd. v. Canadian Pacific Ltd.* (1973), 40 D.L.R. (3d) 237 (B.C.S.C.), the judge concluded that it was a contract of bailment because Carter had taken possession of the vessel. The judge thought it significant that, apart from the watchman, it was Carter, and not North King, that had control of who could be on the vessel or what could occur on the vessel.
- [46] *Allison* is a case about damage to a crane. Although the owner's employees operated the crane as they saw fit, their work was directed by the hirer who otherwise had complete possession of the crane. The crane was held to be in the hirer's possession such that a bailment was found to have been established. If the case was rightly decided, it was not concerned with a maritime charter and the considerations that govern demise and time charters recognized in Canadian maritime law, which, as the judge said, governs this case.
- [47] In any event, I do not consider the judge was right in concluding that the charter gave rise to a bailment. In my view, his conclusion confuses what was a licence Carter had to occupy the vessel for the purpose of providing accommodation for its loggers with having possession of the vessel. North King never gave up possession. Carter was not permitted to do as it wished in respect of the management and crewing of the vessel. It was North King's crew that delivered the vessel to the site, moored the vessel, and then repositioned her at a second mooring during the charter. Indeed, it is, as I said at the outset, common ground that North King was responsible for the safe moorage of the vessel throughout. The logging company was not entitled to interfere with the moorage. Further, North King assumed full responsibility for insuring the vessel. Insurance was not discussed between Mr. Wood and Mr. Carter.

- [48] The logging company never took possession of the vessel. It was permitted to use or to employ her for a limited purpose. However, North King remained responsible for the overall management of the vessel and, in particular, her navigation, which included her moorage. In addition to the watchman North King was to appoint, it was North King that supplied the crew for the vessel's navigation and moorage when required. It may be that there was no voyage in the sense of the vessel sailing between ports once she was moored at the site, although she did sail from Nanaimo. She was, however, employed at the site for the limited purpose for which she had been chartered. I do not consider the fact that the charter may have been confined to the vessel being moored throughout renders it any less a time charter. That was the employment the charterer chose.
- [49] There was no charter by demise such as there would have been if Carter had been given complete possession of the vessel; the charter was a time charter. No contract of bailment arose.
- [50] It remains to consider whether the agreement between North King and Carter nonetheless contained the implied term that the judge held had been breached.

c) The Implied Term

- [51] In implying a term obligating Carter to take reasonable steps to inform North King of any possible danger to the vessel, the judge relied on five factors recognized in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1990), 45 B.C.L.R. (2d) 1 at 64 (C.A.), *aff'd* [1992] 3 S.C.R. 299 [London Drugs]. The considerations, which may overlap, are: 1) the term must be reasonable and equitable; 2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; 3) it must be so obvious that "it goes without saying"; 4) it must be capable of clear expression; and 5) it must not contradict any express term of the contract.
- [52] Given that the judge was of the view that the agreement between North King and Carter was a bailment, it is not clear to me why he found it necessary to refer to these factors. He did not explain how he considered the requirements they prescribe for implying the term were met. He said only that, applying the London Drugs test, he found that the term was to be implied. If Carter was a bailee of the vessel it would have had the implied obligation to exercise reasonable care for the safety of the vessel as if it was its own: *Punch v. Savoy's Jewellers Ltd.* (1986), 26 D.L.R. (4th) 546 at 552 (Ont. C.A.). That, it seems to me, would have included an obligation to inform North King promptly of any possible danger that the logging company could not reasonably have been expected to remedy itself, quite apart from what the London Drugs test might dictate.
- [53] In any event, I have concluded that there was no bailment and I do not consider the term could be implied in the agreement between North King and Carter by applying the London Drugs test.

- [54] The term itself is somewhat curious in that it would require the logging company to inform North King only of a possible danger to the vessel of which the loggers became aware, but would not require that any particular vigilance be exercised to ensure that a danger to the vessel would become apparent. But more importantly, it appears to me that the implication of the term in this charter completely overlooks the parties' agreement that North King was to appoint a watchman who, as I have said, the judge found was there to ensure that the vessel remained adequately and safely moored throughout. The watchman requirement appears to me to be completely inconsistent with the logging company, having no marine experience, assuming any responsibility with respect to the safe moorage of the vessel and, in particular, an obligation to inform North King of any possible danger associated with the moorage of which it became aware.
- [55] The term is not one that I consider in the circumstances to be reasonable, nor could it be said that the agreement would not have been effective without it. When the contract was made, North King did not require information about the vessel's moorage from Carter; it was expected that North King would receive such information, if necessary, from the watchman it was to appoint. To my mind, the term is clearly not one that is so obvious that it went without saying.
- [56] If, as is my view, the term is not one that could be implied in the circumstances, it follows that North King's case against the logging company fails and Carter is entitled to succeed on the first ground of appeal it raises.
- [57] Having reached this conclusion, it is not necessary to address Carter's second ground of appeal relating to the terms of North King's hull insurance.

Disposition

- [58] I would then dismiss North King's appeal and allow Carter's cross appeal. I would set aside the judgment against Carter and dismiss the action.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Prowse"

I agree:

"The Honourable Mr. Justice Smith"

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