
CANADA / JUDGMENT

Seaspan International Ltd. v. The 'Kostis Prois'

[1974] SCR 920

COURT

Supreme Court of Canada

DECIDED

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Seaspan International Ltd. v. The 'Kostis Prois'

Collection

Supreme Court Judgments

Date

1973-02-28

Report

[1974] SCR 920

Judges

Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Laskin, Bora

On appeal from

Canada

Subjects

Transportation

Decision Content

Supreme Court of Canada

Seaspan Int. Ltd. v. The 'Kostis Prois', [1974] S.C.R. 920

Date: 1973-02-28

Seaspan International Ltd. and Seaboard Lumber Sales Co. Ltd. (Plaintiffs) Appellants;
and

The Ship “Kostis Prois” and Aegean Cia, Naviera S.A. (Defendants) Respondents.

1972: December 4, 5; 1973: February 28.

Present: Martland, Judson, Ritchie, Hall and Laskin JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Admiralty—Alleged Bailment—Onus of Proof—Standard of care—Duty of shipowner to supervise barge.

A barge owned by Seaspan International Limited carrying a load of lumber then the property of Seaboard Lumber Sales Limited broke loose from the mooring on the port side of the ship “Kostis Prois” to which it had been made fast at about 10 p.m. on November 23, 1969 and on November 25 collided with a bridge with resultant damage to the barge and the loss overboard of part of its cargo of lumber.

Seaboard Lumber had purchased lumber from a related company which hired a barge and tug from Seaspan International Limited to deliver the wood to Seaboard Lumber “free alongside” the ship which was on charter to Seaboard Shipping. The barge was made fast to the ship by the watchman on the ship providing lines to the tug captain.

The appellants as plaintiffs claimed damages on the proposition that the barge and cargo were held by the ship “Kostis Prois” as bailee, however Sheppard D.J. found that the elements necessary for bailment were not present. In the absence of bailment the liability of the defendants had to depend on proof of negligence, the onus of proof being on the plaintiffs. The trial judge found that there was neither evidence as to whether the breaking of the lines should have been foreseen nor evidence to justify the conclusion that the watch had been negligent. The action was dismissed with costs. The appellants appealed to the Court of Appeal of the Federal Court of Canada and on that appeal failing for want of jurisdiction to this Court. Held (Hall and Laskin JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Ritchie JJ.: The relationship flowing from the respondents having permitted the barge and cargo to lie alongside the ship was that of licensor and licensee—as there was no bailment the burden of proving that the loss was caused or contributed to by the negligence of the respondents rested with the appellants and there was no evidence of such negligence. Other considerations might have applied if there had been evidence of active negligence attributable to the respondents but the respondents were under no duty to have the lines checked and as the failure so to do was a purely passive factor, the appeal could not succeed.

Per Hall and Laskin JJ. dissenting: There was no bailment to the ship either of the lumber or of the barge however the arrangement none the less put the ship under a duty of care in respect of the barge and its cargo. The duty began but did not end with the securing of the barge to the ship and it was for the watch to monitor the lines. There was liability of the ship for the negligence of the watchman in his failure to discover timeously that the barge was loose.

[Coggs v. Bernard 2 Ld. Raym. 909; Harris v. Best, Ryley and Company, (1892), 68 L.T. 76; Gilchrist Watt & Sanderson Property Limited v. York Products Pty. Limited, [1970] 3 ALL E.R. 825; Ashby v. Tolhurst, [1937] 2 K.B. 242; Morris v. C.W. Martin & Sons Ltd., [1966] 1 Q.B. 716 referred to.]

APPEAL from a judgment of the Exchequer Court of Canada dismissing a claim for damages. Appeal dismissed with costs, Hall and Laskin JJ. dissenting.

W.O'M. Forbes, for the plaintiffs, appellants.

D.H. Wood, for the defendants, respondents.

The judgment of Martland, Judson and Ritchie JJ. was delivered by

RITCHIE J.—This is an appeal from a judgment of Sheppard J.A., sitting in his capacity as District Judge of the Exchequer Court of Canada in the Admiralty District of British Columbia, dismissing the claim of the appellants for damages allegedly sustained by them when a barge owned by Seaspan International Ltd., (hereinafter referred to as “Seaspan”) carrying a load of lumber which was then the property of Seaboard Lumber Sales Co., Ltd., (hereinafter referred to as “Seaboard Lumber”) broke loose from the port side of the respondent ship where it had been tethered at about 10 p.m. on Sunday, November 23rd, 1969, and having drifted with the rising tide, in the early hours of November 25th collided with the Second Narrows Bridge in Vancouver Harbour, with the result that the barge was damaged and part of the lumber knocked overboard.

The circumstances giving rise to this action were that the appellant Seaboard Lumber, had purchased a quantity of lumber from its related company, Wellwood of Canada Limited (hereinafter referred to as “Wellwood”) which latter company hired the Barge VT 9 and a tug from Vancouver Tugboat Company Limited (now Seaspan International Ltd.) for the purpose of transporting the lumber to the B. Lynn Terminals Limited in North Vancouver where the “Kostis Prois” (hereinafter referred to as the “ship”) was tethered. The lumber was to be delivered in the barge to Seaboard Lumber “free alongside” the ship, and there is no doubt that the property in the cargo passed to that company when the barge was so delivered. On reaching the Lynn Terminals, Captain Lee, an employee of Seaspan who was in charge of the tug, superintended the tying up which the learned trial judge described as follows:

There was a watch on the “KOSTIS PROIS” consisting of the Officer, Mr. Georgios Paraskevakis and a watchman (an A.B.). The watchman offered a light line to the Captain Lee, the Master of the tug La Bette and that was refused: eventually “KOSTIS PROIS” provided, for the purpose of tying up the VT 9 and the cargo, a manilla line one inch in diameter which was fastened aft on the barge, a manilla line about one inch in diameter fastened forward on the barge. The tug captain gave evidence to the effect that he brought the barge alongside at 9:30 and stayed for one half hour supervising the tying up and he proceeded to give the following evidence.

Q. I presume at that time of night it was dark in Vancouver Harbour?

A. I rather think it would be in November.

Q. Yes.

A. And 9:30 at night.

Q. When you left were you satisfied or not with the way in which the scrow appeared to be tied up alongside?

A. No, it was tied up quite good, very good.

Q. Could you see the manner in which the lines were made fast at the ship end?

A. No. There is no way I could have known that other than to watch the man's arms going in the proper direction turning the lines.

The ship, which was registered in Greece and owned by a Panamanian company, was at all material times under time charter to Seaboard Shipping Company Limited (hereinafter referred to as "Seaboard Shipping") under the terms of which the latter company assumed the duty of loading the vessel.

Seaspan, on instructions from Wellwood and with the knowledge of Seaboard Lumber, left the barge tied alongside the respondent ship with its cargo of lumber throughout the night of the 23rd and all the next day and although none of the cargo was unloaded on Monday, no representative of either Seaspan or the charterer, who was responsible for loading it on the ship, appears to have taken any steps to check its condition. The lines attaching the barge to the ship, one of which had a testing strength of 4.9 tons, appear to have held firm during this period notwithstanding the fact that the incoming tide was running at 4.8 knots on the morning of the 24th, but between 5:45 and 6:30 p.m. on that day a Japanese vessel cast off from a neighbouring berth and in clearing for sea came very close to the respondent ship and thereby set up a swell which caused the spring line attaching the ship to the wharf to break and which appears to have broken all three lines attached to the barge. At this time the tide was ebbing and the barge was brought forward so as to lodge against two barges tethered two feet ahead of it and there it rested until some time in the early morning when the rising tide caused the untethered VT 9 to float away in the direction of the Second Narrows Bridge.

The action of the appellants was initially based on the allegation that while the VT9 and her cargo were tethered alongside the ship they were in the care, custody and control of the respondents and that the damage which resulted from the barge breaking loose and drifting with the tide so as to collide with the Bridge was caused

...by the negligence of the Defendants (respondents) their servants and agents, and by their breach of duty as bailees of the said barge and her cargo and of their duty as carriers of the said cargo by water.

The position of the various parties in relation to the barge and cargo was that Seaspan was under contract to carry Wellwood's lumber free alongside the ship where title passed to Seaboard lumber, but Seaboard Lumber's only contract was with the charterer, its associated company, Seaboard Shipping. The position is explained in the following terms by the insurance manager of Seaboard Lumber who was the representative produced for examination on discovery:

Q. All right. Now, having theoretically taken delivery of this lumber alongside the 'KOSTIS PROIS', what is the position of Seaboard Lumber Sales Co. Ltd. in regard to placing it on that vessel?

A. We don't perform that function ourselves, we rely on, to place it on the deep sea ship, an associated company, Seaboard Shipping Company, to make those arrangements.

Q. Now, is that arrangement informal, that is to say, you merely advise them that you have got such-and-such an amount of lumber to go to such-and-such a place and leave it to them to determine how it shall be handled?

A. We give them a shipping period date.

Q. Yes.

A. And then we leave it to them.

Q. This may be some time ahead of the arrival of any ship, you may not even know what ship you are dealing with?

A. That is always the case.

Q. Accordingly, you now have lumber alongside the 'KOSTIS PROIS' and so far as you know Seaboard Shipping Co. Ltd. is going to see that it is stowed, is that right?

A. Yes.

The responsibility for the barge, of course, remained with its owner (Seaspan) whose agent had approved the manner in which it was tethered to the ship.

There was thus, in my view, no contract express or implied between either of the appellants and the ship or its owners in relation to the barge or its load of lumber, but it was nevertheless strongly contended by counsel for the appellants before this Court that when the laden barge was tied up alongside the ship the respondents became fixed with responsibility for it as bailees for reward on the ground that the ship was to carry the lumber to its ultimate destination at the behest of the time charterer and that the leaving of this cargo "free alongside" the ship set in motion a chain of events for which the ship owners were to be rewarded under the terms of the charter. It was contended on this basis that in permitting the barge and cargo to tie up to the ship the respondents were acting in their capacity of "carriers of the said cargo by water" and in part discharge of an obligation which they had undertaken for reward.

The relationship of bailor and bailee is created whenever one person accepts the delivery and takes temporary possession of another's goods on the understanding that they are to be returned to the owner or his nominee. In this situation the degree of care required of the bailee who has taken possession varies according to the circumstances under which the goods came into his hands. The various categories of bailment were outlined in 1703 in the case of *Coggs v. Bernard*[1], and although refinements have been engrafted on the reasoning in that case in the intervening years, the basic principles remain unchanged.

It is sometimes said that a bailment involves the existence of a contract expressed or implied, and the appellants' contention that the circumstances here disclose a bailment for reward presupposes a duty of care was assumed by the respondents for valuable consideration as a part of the contract of carriage. As I have indicated, not only was there no consideration passing between either of the appellants and the respondents, but there was no contractual relationship whatsoever between them, and I am accordingly of opinion that the contention of the appellants that the respondents were in the position of bailees for reward and thus seized with the burden of proving that the barge and cargo were damaged without their negligence must fail.

The appellants, however, claim in the alternative that the placing of the barge alongside the respondent ship gave rise to a gratuitous bailment under which the respondents were liable to exercise the same degree of care over the goods as a reasonable man would ordinarily exercise in relation to his own property. In dealing with this claim it appears to me to be enough to say that no such duty of care could arise unless it could be shown that the respondents accepted delivery and took possession of the barge and cargo, and although there is some suggestion that a watchman on board the "Kostis Prois" "accepted delivery" from the representative of Seaspán who was in charge of the tug and barge, it is clear that the responsibility for loading lay with the charterer (Seaboard Shipping) and that the possession of the cargo could only pass to the "Kostis Prois" when it was delivered on board. Like the learned trial judge, I adopt the language of Lord Esher in *Harris v. Best, Ryley and Company*[2], as applicable to the role of the charterer (Seaboard Shipping) in this case and agree that no obligation could rest upon the "Kostis Prois" or its owner in relation to the care and custody of the lumber so long as it remained loaded aboard the barge. It is also clear to me that the respondents at no time accepted delivery or in any sense acquired possession of the VT 9 and I am therefore satisfied that there was no bailment of either the lumber or the barge.

In the further alternative, the appellants contended that there was a sub-bailment of the cargo by Seaboard Shipping to the appellants made on behalf of Seaboard Lumber and in this regard reliance was placed on the case of *Gilchrist Watt & Sanderson Property Limited v. York Products Pty. Limited*[3]. In that case, the ship owners had carried two cases of clocks belonging to the plaintiffs in their vessel from Hamburg to Sidney where the defendant carried on the business of stevedores and ships' agents and as such unloaded the clocks at a wharf controlled by them. One case of clocks was missing when the plaintiffs sought to take delivery and the plaintiffs brought action alleging that the goods were delivered to the defendants to be safely kept and taken care of and that they were liable as bailees although there was no contract or attornment between the

parties. The ratio decidendi of this case appears to me to be well summarized in the penultimate paragraph of the opinion delivered by Lord Pearson on behalf of the Privy Council where he said:

Both on principle, and on old as well as recent authority it is clear that, although there was no contract or attornment between the plaintiffs and the defendants, the defendants by voluntarily taking possession of the plaintiffs' goods, in the circumstances assumed an obligation to take due care of them and are liable to the plaintiffs for their failure to do so (as found by the trial judge). The obligation is at any rate the same as that of a bailee, whether or not it can with strict accuracy be described as being the obligation of a bailee. In a case such as this, the obligation is created by the delivery and assumption of possession under a sub-bailment. In the English courts the word 'bailment' has acquired a meaning wide enough to include this case.

It will be seen that the obligation to which Lord Pearson referred was created "by the delivery and assumption of possession under a sub-bailment.", and as these essential elements were absent in the present case, no such obligation could be said to arise here.

In my view the relationship between the respondents and the appellants flowing from the respondents having permitted the barge and cargo to lie alongside the ship was that of licensor and licensee and in that respect the respondents' position is analogous to that of a land owner who permits another to leave his automobile parked on his property without any assumption of responsibility therefor. As was said by Sir Wilfrid Greene in *Ashby v. Tolhurst*[4], at p. 249:

...that relationship in itself would carry no obligation on the part of the licensor towards the licensee in relation to the chattel left there, no obligation to provide anybody to look after it, ...

See also *Morris v. C.W. Martin & Sons Ltd.*[5], per Lord Denning at p. 725.

In any event, as there was no bailment, the burden of proving that the loss was caused or contributed to by the negligence of the respondents rested upon the appellants, and there was, in my view, no evidence of such negligence. I cannot accept the suggestion that the barge was negligently tethered to the ship by any employee of the respondents or that the lines were not strong enough to withstand normal strain; the lines and their attachment had been approved by Seaspan's agent and the barge broke loose because these lines snapped under pressure from the unusual swell created by the departing Japanese ship. The alleged negligence which appellants' counsel claimed to be attributable to the respondents was that the night watchman failed to note that the lines had broken, and as I have indicated, this did not, in my opinion, constitute negligence in the present case. Other considerations might have applied if there had been evidence of any active negligence attributable to the respondents which caused or contributed to the loss, but, for the reasons which I have indicated, the respondents were under no duty to have the lines checked, and as the failure to do so was a purely passive factor, the appellants cannot succeed.

For all these reasons I would dismiss this appeal with costs.

The judgment of Hall and Laskin JJ. was delivered by

LASKIN J. (dissenting)—I have had the advantage of reading the reasons prepared by my brother Ritchie, and my own will be the briefer because he has clearly set out most of the relevant facts. Some others are set out in what follows. I agree with Ritchie J. that there was no bailment to the ship *Kostis Prois* either of the lumber or of the barge in which it was carried and which was brought alongside the ship by a tub belonging, as did the barge, to Seaspan.

There is no doubt on the evidence that the ship, under charter to a company associated with Seaboard, was aware that it would be taking on cargo, but it is also clear that the particular cargo, the lumber, was to be loaded on board the ship by the charterer after the seller to Seaboard had it brought alongside. Since it was dark at that time, and stevedores to transfer the lumber from barge to ship were not available, the captain of the tug saw to the fastening of the lumber-carrying barge to the ship. There was an officer on board the ship and a seaman on watch provided the lines to tie the barge alongside, namely, a manilla line of one inch diameter and a wire cable about half an inch in diameter fastened aft and a manilla line of one inch diameter fastened forward. The tug captain felt that the barge was secure with these lines although he could not see the manner in which they were made fast at the ship end.

In my view, what the ship provided was temporary mooring of the barge which, although not resulting in bailment, put it under an obligation of reasonable care and supervision to see that the barge remained fast. This was not a case where a ship, obliged or undertaking itself to load on cargo, had the carrying barge await its convenience before taking on the cargo and made the barge fast to it in the meantime. There was no delivery of cargo to the ship but only alongside it, and all interested parties understood this. The arrangement, falling short of bailment, nonetheless put the ship under a duty of care in respect of the barge and its cargo until they were taken in charge by the charterer or its agents to offload the cargo from the barge and on to the ship. The evidence shows, moreover, that the ship assumed this duty in respect of barges tied alongside it.

The duty began but did not end with the securing of the barge to the ship, as the trial judge appeared to hold. It was for the watch on the ship to monitor the lines, and on the evidence the barge remained fast from about 10 p.m. on November 23, 1969, when the lines were tied, until about 6.30 p.m. on November 24, 1969 when they broke by reason of a swell created by another ship which left a neighbouring berth. The swell also broke two of the three strands of the spring line which held the *Kostis Prois* to its berth. There were two other scows tied to the *Kostis Prois* at the time, and it appears that because of the ebb of the tide the barge was held against them but moved out early next morning when the tide rose. It floated in the direction of a bridge, striking a pier with resulting damage to the barge and with some of the lumber going overboard. A tug of another company found the barge damaged and adrift at about 5 a.m. on November 25, 1969.

The chief officer of the *Kostis Prois* gave evidence that he saw the barge still fast in its position at about 6 p.m. on November 24, 1969, before he went off duty. The change of tide occurred at 12.25 a.m. on November 25, 1969, and the barge, being loose, would begin to drift off as the tide rose.

High tide was at 4.05 a.m. The seaman on the night watch, 6 p.m. to 6 a.m., whose duties included making frequent rounds of the ship (it could be every 10 or 20 minutes, according to the captain's testimony) and also keeping an eye on the barges tied alongside, did not see the barge break away but at about 5.30 a.m. noticed that it was missing. It appears that he blew a whistle to attract a passing tug but to no avail, and then did nothing else.

I am of the opinion that there is liability of the ship for the negligence of the watchman in his failure to discover that the barge was loose from about 6.30 p.m. on November 24, 1969, especially when the ship's spring line to the wharf had also been partly broken by the swell created by the neighbouring ship. Although it would be difficult to say that the collision with the pier could have been avoided if the breach of duty is fixed at the time the watchman saw the barge adrift and blew the ship's whistle, his duty of continuing surveillance and the fact that almost four hours elapsed between the time the tide changed and it reached its high point persuade me that there was a breach of duty in failing to discover the drift of the barge much earlier. The damage that occurred would probably have been averted had the watchman kept proper watch.

Accordingly, I would allow the appeal with costs, set aside the judgment of Judge Sheppard and direct that the appellants should have judgment for their damages with costs.

Appeal dismissed with costs, HALL and LASKIN JJ. dissenting.

Solicitors for the plaintiffs, appellants: Owen, Bird & McDonald, Vancouver.

Solicitors for the defendants, respondents: Macrae, Montgomery, Hill & Cunningham, Vancouver.

[1] 2 Ld. Raym. 909.

[2] (1892), 68 L.T. 76.

[3] [1970] All E.R. 825.

[4] [1937] 2 K.B. 242.

[5] [1966] 1 Q.B. 716.

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