

SUPREME COURT OF QUEENSLAND

CITATION: *Morphett v Rivergate Marina & Shipyard Pty Ltd* [2018] QCA 15

PARTIES: **ALEXANDRA MORPHETT**
(applicant)
v
RIVERGATE MARINA & SHIPYARD PTY LTD
ACN 116 163 912
(respondent)

FILE NO/S: Appeal No 6425 of 2017
DC No 1516 of 2014

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane – [2017] QDC 141

DELIVERED ON: Date of Orders: 20 October 2017
Date of Publication of Reasons: 23 February 2018

DELIVERED AT: Brisbane

HEARING DATE: 20 October 2017

JUDGES: Sofronoff P, Morrison JA and Jackson J

ORDERS: **Date of Orders: 20 October 2017**

- 1. Application dismissed.**
- 2. Applicant to pay the respondent's costs of the application.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where duties of bailee of a boat modified by contract – where applicant was ordered by the District Court to pay expenses of salvaging applicant's boat while bailed to respondent – where applicant applied for leave to appeal to this Court – whether leave to appeal should be granted

Crouch v Jeeves (1938) Pty Ltd (1946) 46 SR (NSW) 242; [1946] NSWStRp 18, cited

COUNSEL: P Somers for the applicant
N H Ferrett with M Forrest for the respondent

SOLICITORS: Bennett & Philp for the applicant
Archibald & Brown for the respondent

- [1] **SOFRONOFF P:** I agree with the reasons of Jackson J.
- [2] **MORRISON JA:** I agree with the reasons of Jackson J. Those reasons reflect my own for agreeing with the orders made.
- [3] **JACKSON J:** This application was heard on 20 October 2017, and orders were made on that day. These are the reasons for those orders.
- [4] The application was for leave to appeal from a civil judgment of the District Court.¹ After a five day trial, the District Court reserved judgment. The judgment given on the claim was that the applicant pay to the respondent the amount of \$85,231.01 including \$25,468.11 by way of interest and on the applicant's counterclaim against the respondent that the counterclaim be dismissed. As well, the District Court dismissed the respondent's claim against the second defendant. The learned Judge gave detailed reasons for judgment in 38 pages.
- [5] The respondent operates a marina and shipyard on the Brisbane River. In late 2010, a wooden hulled motor cabin cruiser, the "C Princess" ("the boat") came into the shipyard and work was done on it by various subcontractors for the respondent to perform work that was done by the respondent for the applicant under a written agreement. Not all of the work was paid for.
- [6] From September 2011, the respondent refused to release the boat from the marina until the unpaid amounts were paid. That did not occur. Invoice no 16306 in the sum of \$23,256.45 remained unpaid. The respondent obtained judgment for that sum as part of the judgment.² The applicant does not apply for leave to appeal against that part.
- [7] The applicant applies for leave to appeal against that part of the judgment on the claim awarding the respondent "salvage costs" in the sum of \$36,506.45 and interest of \$6,224.74. The principal sum was found to be payable by way of salvage costs.³ The salvage costs related to floating and retrieving the boat after it sank. The boat was taken out of the water by the salvage company and placed on the hard stand.
- [8] The boat sank on 18 January 2014. Soon after 8.00 am on that morning the respondent's dock master noticed a slight list of the boat. Fifteen minutes later it had a serious list. About 15 to 20 minutes later, the starboard flybridge wings were resting on the marina. The boat sank at its moorings before the respondent's shipyard manager arrived.⁴
- [9] The hull had a number of penetrations that were not far above the water line. Because of them, the boat did not need to list very much before water began to flow in through the penetrations. The immediate cause of the sinking was that water flowing through these penetrations added to the rate at which water entered from an original leak and accelerated its rate of listing and sinking.⁵

¹ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141.

² *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [41], [46] and [96].

³ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [96].

⁴ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [35].

⁵ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [37].

- [10] The ultimate cause of the sinking was found to be that the boat was not properly maintained. The position of the hull penetrations, the condition of the hull and glands, and deficiencies in the bilge pump arrangements all contributed.⁶
- [11] The contract between the applicant and the respondent provided that the applicant would indemnify the respondent against all expenses arising from the acts, omissions or negligence of the applicant that resulted in any economic loss to the respondent.
- [12] The basis of the respondent's claim was that it had incurred the salvage costs because of the applicant's failure to maintain the boat properly which amounted to economic loss suffered by the respondent within the terms of the indemnity.⁷ The learned Judge held that:
- “Once the boat had sunk in the marina, it was reasonable for the [respondent] to arrange for salvage of the boat, because it was not obliged to accept a derelict boat cluttering up its marina until such time as it rotted away. This cost was economic loss, in respect of which the [applicant] had agreed by clause 15 to indemnify the plaintiff.”
- [13] At the trial, the applicant defended that claim by relying upon an alleged breach by the respondent, as an unpaid workman claiming a lien, of a duty at common law to exercise reasonable care to protect the boat from harm.
- [14] The learned Judge held that the respondent was not under a duty to maintain the boat in order to keep it in a sound or seaworthy condition.⁸ The applicant did not challenge that finding.
- [15] The learned Judge held further that the respondent took care of the boat by keeping it connected to shore power so that the electric bilge pumps would continue to operate and from time to time checking those pumps in order to ensure that they were in operating condition. It held that amounted to reasonable care in the circumstances.⁹
- [16] The learned Judge held further as follows:
- “Apart from that, however, the duties of bailee are subject to the terms of the contract. There is nothing in the contract which caused it to come to an end as a result of the exercise of the lien by the plaintiff; indeed the passage referred to earlier expressly contemplates the exercise of such a lien. If I am wrong about the position at common law, and a bailee exercising a lien does have a duty to carry out routine maintenance, I consider that clause 10.1 was an effective modification of the obligation so that any obligation to undertake routine maintenance of the boat while in the plaintiff's possession, including during the exercise of a lien, fell on the first defendant. That obligation was not performed.”¹⁰

⁶ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [39].

⁷ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [77].

⁸ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [83]-[89].

⁹ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [91]-[93].

¹⁰ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [94].

- [17] The clause 10.1 referred to in that passage provided under the heading “owner’s obligations” that “the owner must... ensure that the vessel is kept in a clean, sound, seaworthy and watertight condition, and free of any vermin, pests and insects”.¹¹

Grounds for leave to appeal

- [18] Summarising, the applicant contended that leave to appeal should be granted because the learned Judge did not expressly consider the facts that:
1. the respondent had identified that the vessel was at risk of sinking if maintenance was not performed;
 2. the respondent knew maintenance work was not being performed; and
 3. the respondent had the ability to lift the vessel from the water to place it on the hard stand.
- [19] The applicant’s contention was that the learned Judge’s failure to expressly consider whether those facts amounted to a failure to exercise reasonable care amounted to an error in the form of failure to give adequate reasons.
- [20] The applicant’s contention did not come to grips with the basis of the District Court’s judgment as summarised above. The effect of the applicant’s contention, if leave to appeal had been granted, would be that because the applicant failed to perform its contractual promise to continue to maintain the boat, the respondent became subject to a further or additional obligation to lift the boat out of the water so as to discharge its obligation to exercise reasonable care as bailee. The applicant went so far as to submit that the terms of the contract do not alter the content of the respondent’s obligation as bailee to take all reasonable care of the boat in the circumstances. But the learned Judge held that it was the applicant’s obligation to maintain the boat and that any obligation of the respondent as bailee was subject to the terms of the contract that made maintenance the applicant’s obligation.
- [21] In my view, the applicant’s contention that the terms of the contract did not alter the content of the respondent’s obligation as bailee to take all reasonable care of the boat in the circumstances was unsustainable as a proposition of law. No authority was referred to or identified in support of it. A convenient starting point is that the duties of a bailee under a contract for work and labour are those summarised by Sir Frederick Jordan in *Crouch v Jeeves (1938) Pty Ltd*:¹²

“... to do the stipulated work on the bailed chattels, to do it within a reasonable time, to do it properly, and to take reasonable care of the chattels whilst in its custody”

- [22] Second, as Professor Palmer summarises it in *Palmer on Bailment*:¹³

“[b]ailments by way of work and labour are essentially contractual phenomena. To a great extent, the duties of the parties will depend upon the general law of contract rather than the specialised rules of bailment.”

¹¹ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [77].

¹² (1946) 46 SR (NSW) 242, 244-245.

¹³ N Palmer, *Palmer on Bailment*, 3rd ed, 2009, 851 [15-002].

- [23] Professor Palmer also recognises that the bailment relationship can be subject to “contractual modification imposed by the parties”.¹⁴
- [24] Third, *Halsbury’s Laws of Australia*, in dealing with the obligations of a bailee to keep the bailed chattel safe acknowledges that “[p]arties to a bailment may alter these duties by agreement.”¹⁵
- [25] The detailed fact finding and analysis in the reasons of the learned Judge indicate a careful consideration of the case. The learned Judge did not overlook that the respondent was aware that the boat might sink if the defendants continued to neglect it. The learned Judge made an express finding that the respondent expressed that concern on 16 September 2013.¹⁶ Also, the learned Judge was aware that the boat had been taken out of the water previously for work to be done on it, so that it might have been taken out of the water to prevent it from sinking.¹⁷
- [26] Although the learned Judge did not expressly consider whether those facts, apart from the express terms of the contract between the parties, might have amounted to a failure to exercise reasonable care as bailee, there was no reason why he was bound to do so. That is because, as set out previously, his Honour found that the duties of a bailee are subject to the terms of the contract and the duty to exercise reasonable care was modified in this case by the express terms of the contract, in clause 10.1, so that the obligation to maintain and keep the boat seaworthy was the applicant’s obligation, not the respondent’s obligation, including during the period of exercise of the lien for non-payment.¹⁸
- [27] In my view, in reasoning that way, the learned Judge was clearly correct. Accordingly, the application for leave to appeal did not have sufficient prospects of success to warrant a grant of leave to appeal.¹⁹

¹⁴ N Palmer, *Palmer on Bailment*, 3rd ed, 2009, 851 [15-002].

¹⁵ *Halsburys Laws of Australia*, Bailment, [40-405].

¹⁶ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [34].

¹⁷ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [22].

¹⁸ *Rivergate Marina & Shipyard Pty Ltd v Morphett* [2017] QDC 141, [94].

¹⁹ *Pickering v McArthur* [2005] QCA 294, [3]; *McDonald v Queensland Police Service* [2017] QCA 255, [23]-[28].