Federal Court of Appeal  Cour d'appel fédérale

Date: 20151009

Docket: A-506-14

Citation: 2015 FCA 216

CORAM: **NADON J.A.**
TRUDEL J.A.
DE MONTIGNY J.A.

Docket: A-506-14

BETWEEN:

BURIN PENINSULA MARINE SERVICE CENTRE

Appellant

and

MAXWELL FORSEY

Respondent

Heard at Ottawa, Ontario, on September 8, 2015.

Judgment delivered at Ottawa, Ontario, on October 9, 2015.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: TRUDEL J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal of a decision of Madam Justice Heneghan of the Federal Court dated October 20, 2014 (2014 FC 974) wherein she allowed with costs the respondent's action in damages against the appellant. More particularly, the Judge granted general damages to the respondent in the sum of $269,206.38 in respect of an incident which occurred on July 10, 2011 when the respondent's vessel, the fishing vessel "Eastern Gambler" (the Vessel), fell from its cradle while stored at the appellant's premises situated in Fortune, Newfoundland.

[2] On November 18, 2014, the appellant filed a notice of appeal in which it challenged the Judge's decision on numerous grounds. However, in its memorandum of fact and law, the appellant submits that only two questions should be determined in the appeal, namely whether the Judge erred in drawing an adverse inference against the appellant for allegedly disposing intentionally of relevant evidence and whether the Judge erred in concluding that the exclusion clauses found in the contract between the parties did not protect the appellant from its negligence.

[3] For the reasons that follow, I conclude that we ought to dismiss the appeal.

I. Facts

[4] The appellant's business is in the storing and servicing of vessels at its Marine Service Centre in Fortune, Newfoundland.

[5] The respondent is the owner of the Vessel.

[6] In late June, 2011, the appellant agreed to remove the respondent's vessel from the water and to place it on dry land in order to, *inter alia*, effect repairs to the Vessel's hull.

[7] However, prior to lifting the Vessel from the water, the appellant required the respondent to sign a document entitled "Statement of Acceptance of Responsibility" (hereinafter the Statement of Acceptance) which the respondent signed on June 27, 2011. Because the Statement of Acceptance is at the heart of this appeal, I reproduce it in its entirety.

I Max Forsey of Hillveiw (sic) agree to accept responsibility for any and all damage which may result to my boat _____, _____
(Name of Vessel) (C.F.V. Registration No.)
during the lift and/or launch by the Marine Straddle Crane at the Marine Service Centre, provided such damage does not result from the negligence of the Straddle Crane operator in operating the Marine Straddle Crane.

Furthermore, I understand and agree that I assume and accept all risk of loss, damage or injury, by fire or otherwise, to my person and/or my property, or to the person and/or property of any other persons caused by my negligence or acts of my employees, servants or agents. Furthermore I agree to indemnify and save harmless the said Marine Service Centre, its agents, servants or employees against all claims for such loss, damage or injury sustained by me or any other person by any negligence and/or acts of myself or any servants, agents or employees of mine.

I understand and agree that the securing and locking of my boat is my responsibility, and not that of the said Marine Service Centre, or of its agents, servants, employees, or otherwise. Furthermore I agree to indemnify and save harmless the said Marine Service Centre and its officers, agents, employees, servants or otherwise from, any claims on my part with respect to the same.

I further understand and agree that the said Marine Service Centre accepts no responsibility for any damage that may occur to my boat as a result of acts of God; acts of theft; acts of vandalism, the escape of fire or other peril from the neighbouring property or premises of others onto the property of the said Marine Service Centre; or the illegal or negligent actions of any third party or parties (howsoever caused). Furthermore, I agree to indemnify and save harmless the said Marine Service Centre and its officers, agents, employees, servants, or otherwise from any claim on my part with respect to the same.

Furthermore, I agree to assume all liability for any damage that may occur to the property or person of the said Marine Service Centre, or its officers, agents, employees, servants or otherwise, or to any third party resulting from improper or inadequate blocking of my vessel, or any other acts of negligence (howsoever arising) of myself, or any of my agents, servants, or employees; and I do agree to indemnify and save harmless the said Marine Service Centre and its officers, agents, employees, servants or otherwise from the claims of any third parties that may result from any such improper or inadequate blocking, or other negligent act of myself, or of my servants, agents, or employees.

I agree that I have read the "Notice of Warning" sign posted on and around the said Marine Service Centre and fully understand same.

I agree also that if any charge in respect of my boat remains unpaid at the expiry of one month from the date of notification thereof to me by the said Marine Service Centre in writing, the said Marine Service Centre shall be empowered at

its option to remove, sell, or otherwise dispose of the boat; and I further agree that I shall have no claim of any kind whatsoever against the said Marine Service Centre arising from or in connection with such removal, sale or other disposal of the boat.

SIGNED SEALED AND DELIVERED by the parties hereto at the said Marine Service Centre herebefore written on the 27th day of June, 2011.

SIGNED, SEALED AND DELIVERED
By (Boat Owner or Captain)
in the presence of:

_____ _____
(Boat Owner or Captain) (Seal)

SIGNED, SEALED AND DELIVERED
on behalf of Marine Service Centre
in the presence of:

_____ Per: _____
(Marine Service Centre) (Seal)
Manager/Equipment Operator

[8] As appears from the Statement of Acceptance, it incorporates by reference the Notice and Warning signs placed in two locations on the appellant's premises. The Notice and Warning provide as follows:

NOTICE AND WARNING

ALL BOATS LEFT HERE MUST BE ACCEPTABLE TO THE MARINE SERVICE CENTER AND BE AT THE RISK OF THE OWNER/OPERATOR OF THE BOAT. ALL BOATS SHALL BE ACCEPTABLE ONLY UPON THE RECEIPT OF THE MARINE SERVICE CENTER OF A SIGNED "STATEMENT OF ACCEPTANCE OF RESPONSIBILITY" BY THE OWNER/OPERATOR.

ALL BOATS LEFT HERE BY THE OWNER/OPERATOR AND UNCLAIMED AFTER 30 DAYS OF RECEIVING NOTICE BY THE MARINE SERVICE CENTER SHALL BE DISPOSED OF WITH THE OWNER/OPERATOR BEING RESPONSIBLE FOR THE COST OF THE SAME.

MARINE SERVICE CENTER
OF FORTUNE

[9] As a result of the respondent signing the Statement of Acceptance, the Vessel was lifted from the water by the appellant's employees. It was then stored and supported on land by a cradle consisting of keel blocks, which are rectangular pieces of wood, placed under the Vessel at perpendicular angles to the keel and two pieces of "cribbing" or "supports" on each side. The supports on each side were joined by cross-braces. Each support is a triangular piece made of wood which is inserted against the side of the Vessel. The supports were adjusted against the hull of the Vessel by means of "wedges" inserted between the support and the Vessel's hull (my description of the cradle arrangement for the Vessel is taken verbatim from paragraph 6 of the Joint Statement of Facts dated December 6, 2013 filed by the parties).

[10] Between June 27, 2011 and July 10, 2011, the Vessel remained stored at the appellant's premises during which time the appellant's employees performed general maintenance and repairs to the Vessel. More particularly, the appellant installed new zincs, removed and inspected the propeller and removed the rudder. Further, the appellant's employees removed the Vessel's tail shaft which was sent to St. John's, Newfoundland for repair and, upon its return to Fortune, they would reinstall it on the Vessel.

[11] In the early morning of July 10, 2011, heavy winds swept through the Burin Peninsula. During that time, Heber Lethbridge, a truck driver who was on the premises, heard a loud noise and shortly thereafter saw the Vessel lying on the ground on its starboard side.

[12] Following the fall of the Vessel, the appellant's employees did their best to minimize the damage caused to it, namely by staunching the oil leaking from the engines and by uprighting it

using a hydraulic lift and re-cradling it, but not before the Vessel had suffered serious structural damage.

[13] The respondent commenced an action on February 7, 2012 in which he alleged that the appellant was a bailee for reward and thus responsible for the safe storage of the Vessel which had been placed in the appellant's care, custody and control and that the appellant had failed to discharge its duty of care.

[14] More particularly, the respondent alleged that the appellant had failed to install sufficient cradle supports to ensure the safety of the Vessel, that it had failed to install additional cradle supports on July 9, 2011 when it ought to have been aware of the weather forecast and that it had failed to supply adequate and proper cradling materials.

[15] In its statement of defence, the appellant alleged that it was the respondent's responsibility to build the cradle to secure the Vessel for the storage period, adding that the respondent had decided to use materials stored at the appellant's premises and that it was its responsibility to ascertain that the materials were sound so as to properly secure the Vessel during the storage period. The appellant further alleged that it was only after the respondent's employees declared themselves satisfied that the cradle had been properly installed that it removed the slings from under the Vessel to let her rest on the cradle.

[16] Consequently, according to the appellant, the fall of the Vessel resulted from the respondent's fault and negligence in failing to properly secure it onto the cradle installed by its employees on June 27, 2011.

[17] The appellant further alleged that, in any event, it was not responsible for the loss suffered by the respondent by reason of the exclusion clauses found in the Statement of Acceptance and more particularly by that part of the Statement of Acceptance which reads:

> I understand and agree that the securing and locking of my boat is my responsibility, and not that of the said Marine Service Centre, or of its agents, servants, employees, or otherwise. Furthermore I agree to indemnify and save harmless the said Marine Service Centre and its officers, agents, employees, servants or otherwise from, any claims on my part with respect to the same.
>
> (emphasis added)

[18] The appellant also invoked the Notice and Warning posted on its premises to the effect that it was not responsible for vessels entrusted to it for storage.

[19] The case proceeded before the Judge on January 27, 28 and 29, 2014. On October 20, 2014 the Judge delivered her judgment concluding that the loss had been caused by negligence on the part of the appellant's employees. The Judge further concluded that the appellant's employee Robert Ayres, its manager, had intentionally disposed of relevant evidence in order to thwart the respondent's investigation into the loss. The Judge also found that the exclusion clauses relied on by the appellant did not protect it against its negligence.

[20] I will now examine the Judge's decision in greater detail as her findings of fact and her legal conclusions are, it goes without saying, of great importance to the determination of this appeal.

II. The Federal Court Decision

[21] The first factual determination which the Judge had to make concerned the question of who had chosen the cribbing and who had built the cradle. After reviewing the evidence and noting that there was a conflict in that evidence, the Judge held that both the wood used to build the cradle and the plywood used to construct the cross bracing were owned by the appellant. She was further satisfied that the wedges used were also the property of the appellant and that the cribbing, the wedges and the cross bracing materials were at all times under the physical and managerial control of the appellant. She also held that it was the appellant's employees that had chosen the materials used to build the cradle.

[22] With respect to the building of the cradle, she reviewed the evidence and again noted that there was a conflict in the evidence. She held that the cradle had been constructed by the appellant's employees and that the respondent's employees had not been directly involved in the construction thereof.

[23] The next factual issue which the Judge had to determine concerned the fitness of the cribbing materials used to construct the cradle. In that regard, the Judge noted that that issue was also relevant to the issue of the disposal of the materials. Again, she reviewed the evidence on point noting that the appellant had changed its policy regarding the use of cribbing in that prior

to June 2011 it was charging for the use of the cribbing whereas by June, 2011 it was no longer charging for it but offering it to its clients for use at no charge.

[24] At paragraph 54 of her reasons, the Judge made the point that although the appellant was no longer charging for the use of the cribbing materials, that did not relieve it from its duty to provide adequate materials. Since, in the Judge's view, the appellant was responsible for the security of the Vessel while on its premises, it was an irrelevant consideration that it had not charged for the use of the materials since it was its duty to ensure that the materials were adequate for the job at hand.

[25] The Judge also found that the damaged cribbing materials were not available when the respondent's surveyor attended the appellant's premises on July 12, 2011 for inspection. In her view, the damaged cribbing materials had been removed prior to the surveyor's attendance and was removed with the intent that it not be available for inspection.

[26] She further found that the cribbing materials used by the appellant to build the cradle had been stored outside and had been exposed to wind, rain, snow and sun.

[27] On the basis of these factual findings, the Judge then turned to the legal issues and made a number of legal determinations.

[28] First, after setting out the parties respective submissions regarding the nature of the contract and the legal consequences which arose as a result of the events of July 10, 2011, the Judge turned to the issue of bailment.

[29] In her view, there was a bailment between the parties with respect to the placing of the Vessel in the appellant's possession at its premises for the purpose of repairs and this notwithstanding the existence of a contract with regard to the lifting and storage of the Vessel. The fact that the respondent's employees had done work on the Vessel, including the painting thereof, did not have the effect of reverting possession of the Vessel to the respondent while on the appellant's premises.

[30] Because of the existence of a bailment, the Judge then turned to the burden of proof. More particularly, she indicated that the burden of proof had shifted to the appellant and that it was its obligation to show that the loss had not occurred by reason of its negligence. She then posed the question: "Has the [appellant] met its burden to show that it was not negligent?" (Paragraph 105 of her reasons).

[31] She began her analysis on this issue by stating that the issue of negligence related both to the fitness of the materials and the manner in which the cradle had been built, adding that as she had found that the cribbing materials had been disposed of prior to inspection by the respondent's surveyor, the fitness of the materials could not be assessed.

[32] This led the Judge to discuss whether a reasonable inference could be drawn against the appellant because of the destruction of the damaged cribbing materials in circumstances where litigation ought to have been contemplated by the appellant.

[33] In her view, the damaged cribbing materials which the appellant had disposed of prior to inspection was evidence that related directly to the issue of negligence, adding that she was satisfied that the appellant knew or ought to have known that the disposal of the materials would have an impact on the respondent's claim.

[34] As a result, the Judge was satisfied that she could draw an adverse inference against the appellant that the evidence was intentionally destroyed to thwart the course of litigation. At paragraph 118 of her reasons, the Judge made the following statement:

> My conclusion in this regard raises a rebuttable presumption that the evidence was unfavourable to the [appellant], that is, that the cribbing materials used to construct the cradle were unsound and unfit. The burden is on the [appellant] to rebut this presumption by showing that it did not intend to destroy evidence relevant to existing or contemplated litigation.

[35] The Judge then went on to state that the appellant had not, in the circumstances, rebutted the presumption that it had intentionally disposed of the materials.

[36] She then held that the appellant had been negligent in the selection and use of inadequate cribbing materials for the construction of the cradle and that it had not met its burden of showing that the loss had occurred without its negligence.

[37] Lastly, she found that there was strong evidence to the effect that the cribbing materials had been stored outside and thus had been exposed to wind, rain, snow and sun. This suggested to the Judge that the cribbing materials were no longer being properly maintained by the appellant.

[38] The Judge then turned to the exclusion clauses which the appellant invoked to argue that it could not be held responsible for the respondent's loss even if it was held to be negligent in regard thereto. More particularly, at paragraph 127 of her reasons, she set out the issue that she had to address in the following terms:

> Having concluded that the [appellant] was negligent in the construction of the cradle, the final issue that remains to be determined is whether the [appellant] can rely on the Statement [the Statement of Acceptance] and the two Notices [the Notice and Warning signs], which are incorporated into the Statement by reference, to exclude its liability for its negligence.

[39] She first began her inquiry into this question by stating that neither the Statement of Acceptance nor the Notice and Warning signs expressly, or by necessary implication, excluded the appellant's negligence. She then pointed out that there was some ambiguity in regard to the word "securing" found in paragraph 3 of the Statement of Acceptance and asked herself whether the word "securing" meant that the respondent was responsible for lifting lines and securing buoys, as argued by the respondent, or whether the word "securing" indicated that the respondent was responsible for his vessel while on the cradle on the appellant's premises, as submitted by the appellant.

[40] Because she was of the view that the contract was ambiguous, she applied the *contra proferentem* rule of construction against the appellant, the drafter of the document. This led her

to dismiss the appellant's submission that the words "securing and locking" found in paragraph 3 of the Statement of Acceptance could only mean that the respondent was responsible for the safety of its vessel while on the cradle. Her rationale for this conclusion appears at paragraph 134 of her reasons where she says:

> Mr. Ayres was consistent in his testimony that he was ultimately responsible for the operations of the Marine Centre, and I have already concluded that [appellant] was in control of the construction of the cradle. Given the control exercised by the [appellant] throughout the process of lifting and securing the Vessel, it could not have been the intention of the parties that the word "securing" bear the meaning proposed by the [appellant], that is, that the [respondent] was responsible for securing the vessel during the period of the repairs.

[41] She then held that she could also not accept the appellant's submission that even though the exclusion clauses did not expressly cover the appellant's negligence, that negligence was excluded by necessary implication when the Statement of Acceptance was read in its entirety. At paragraph 136 of her reasons, she dealt with that argument as follows:

> In my opinion, having regard to the principles of contract construction relative to exclusion clauses, the Statement and the Notices do not exclude liability for negligence, and the [appellant] cannot rely on them to exclude its liability for negligence in connection with construction of the cradle.

[42] As a result, she found that the appellant was liable for the respondent's loss.

III. Issues

[43] The parties are in agreement that two issues must be decided in this appeal. The first concerns the adverse inference drawn by the Judge in respect of the cribbing materials disposed of by the appellant's employees and the second concerns the Judge's determination that the

exclusion clauses in the Statement of Acceptance did not exclude the appellant's negligence for the loss of July 10, 2011.

IV. Analysis

[44] At the hearing before us, counsel for the appellant, correctly in my view, made a number of concessions. He did not dispute the Judge's finding that there existed a bailment with regard to the respondent's vessel nor did he dispute, in most regards, the findings of fact made by the Judge. He did not agree with these findings but made it clear that, on the evidence, he was in no position to argue that the Judge had made palpable and overriding errors which explains why, with regard to the first issue which I will now address, he essentially couched his arguments on the basis of procedural unfairness.

[45] With regard to the first issue, the appellant makes a number of submissions. First, it says that there was no evidence to support the Judge's finding that Mr. Ayres had intentionally disposed of relevant evidence. It then says, after referring to paragraph 74, 117 and 120 of the Judge's reasons, that it was never given the opportunity of rebutting the presumption that it had disposed of relevant evidence. In its view, there was nothing in the pleadings that could allow the Judge to draw the inference which she drew nor had the respondent asked for her to draw such an inference.

[46] Thus, the appellant submits that it was an error of law on the part of the Judge to conclude that Mr. Ayres had removed the cribbing materials in order to prevent the respondent's surveyor from examining it, adding that the Judge's inference constituted "a fundamental

violation of procedural fairness resulting in a serious and unjustified stain on the reputation and goodwill of the appellant and its employees" (paragraph 41 of the appellant's memorandum of fact and law).

[47] The appellant further says that the issue concerning Mr. Ayres' intention was raised *proprio motu* by the Judge and that the parties were unaware that she had done so until they read her reasons. Thus, procedural fairness was breached in the circumstances as the appellant was not given an opportunity to respond to the Judge's theory of the case.

[48] The appellant concludes on this issue by inviting us to "expunge from the judgment any reference to Mr. Ayres' intentional removal of evidence or apply any remedy that it deems suitable" (paragraph 47 of the appellant's memorandum of fact and law).

[49] Consequently, as the issue is one pertaining to procedural fairness, the appellant submits that the applicable standard of review is that of correctness.

[50] The respondent totally disagrees with the view put forward by the appellant and submits that there was no violation of the appellant's procedural rights. In support of that view, the respondent says that the appellant's submission is contrary to the facts, in that:

1. At the trial conference of October 30, 2012, the parties agreed that there was an issue as to whether the respondent was entitled to an inference that the damaged cribbing destroyed by the appellant was unsuitable for the intended purpose.
2. The joint book of authorities contains three cases on the issue of spoliation, all of which were raised in oral argument before the Judge.

3. The issue of spoliation and the question of whether intent was necessary to trigger the doctrine of spoliation were argued by counsel for the respondent at the trial.

4. Counsel for the appellant also argued the issue of spoliation at the trial and asked the Judge to find that Mr. Ayres had not intended to destroy relevant evidence.

5. Paragraph 11 of the statement of claim clearly raised the question of the appellant having disposed of the cradling materials without giving notice to the respondent.

[51] Thus, the respondent submits that it is clear beyond doubt that the appellant's procedural rights were not violated. He further says that the thrust of the appellant's complaint is directed at the Judge's findings of fact and thus, on that basis and on the basis that the applicable standard for findings of fact is that of palpable and overriding error, the Judge made no error of law that would allow this Court to intervene.

[52] I agree with the respondent that there was no procedural unfairness when one considers the pleadings and the evidence put forward by the parties. I further agree with the respondent that the true question is whether the Judge made a palpable and overriding error in finding that the cradling materials had been intentionally removed prior to the arrival of the surveyor so as to prevent him from examining it, that the materials had been destroyed intentionally to thwart the course of litigation and finally, that the appellant had not offered any proof to disprove the inference made by the Judge.

[53] In my view, it is sufficient for the purposes of this appeal to say that there is no basis to conclude that the Judge made a palpable and overriding error in concluding that the appellant had not rebutted the inference of negligence which she had drawn. Thus, I am satisfied that there is no basis on which we could intervene with regard to that question.

[54] As to the question of intent with regard to the disposal of the cribbing materials, I believe that a few additional remarks are necessary. First, because of the Judge's finding that the appellant was a bailee of the respondent's vessel, the finding of intention to remove and dispose of the cribbing materials was not, in my respectful view, necessary to dispose of the case. In other words, since the burden of proving that the Vessel had been damaged without its negligence had shifted to the appellant, it was necessary for the appellant to produce the damaged materials in order to demonstrate its soundness for the job at hand. Thus, the appellant, in order to succeed on the issue of negligence, had to satisfy the Judge that the materials supplied were in good condition. As it could not produce the materials, it was not in a position to meet its burden of proof.

[55] Thus, by failing to produce the damaged materials the appellant was unable to disprove the presumption of negligence against it. Consequently, the destruction of the damaged materials was, in the circumstances of the case, highly prejudicial to the appellant's case. Whether or not it removed and destroyed the materials intentionally had no effect on the burden which it had to meet in order to disprove the Judge's inference.

[56] Because of the conclusion at which I arrive in regard to the second issue and as the question of intent was not, in my respectful opinion, relevant to the determination of the first issue, I do not believe that it is necessary for us to decide whether the Judge made a palpable and overriding error in reaching her conclusion as to Mr. Ayres' intention. However, I would say that having carefully reviewed the evidence, I would have been very reluctant to conclude that Mr.

Ayres and the appellant's other employees had intentionally removed and destroyed the evidence.

[57] I now turn to the second issue which the appellant has framed as follows at paragraph 20 of its memorandum of fact and law:

> Did the Trial Judge commit an error of law in concluding that the exclusion Provisions were inapplicable and did not extend to the Appellant's negligence?

[58] With regard to this issue, the appellant argues that the Judge erred in law by failing to consider and apply the correct legal test. More particularly, it says that the Judge ought to have given effect to the clear wording of the exclusion provisions found in the Statement of Acceptance and in the Notice and Warning signs posted on its premises. In the appellant's submission, these exclusion provisions and the Notices were sufficient to exclude its liability for all boats stored and secured on its premises.

[59] With regard to the issue of negligence, the appellant says that the Judge failed to consider a number of Supreme Court of Canada decisions, i.e. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4, [2010] 1 S.C.R. 69 and *ITO International Terminal Operators Ltd. v. Miita Electronics Inc.*, [1986] 1 S.C.R. 752, where the Court sets out the proper analytical grid for determining the applicability and the scope of exclusion clauses and whether the clauses extend to negligence.

[60] The appellant says that had the Judge applied the proper test she would have found in its favour.

[61] The appellant then goes on to examine the specifics of the exclusion clauses found in the Statement of Acceptance. More particularly, it says that applying the test set out by the Privy Council in *Canada Steamship Lines v. the King*, [1952] A.C. 192 leads to the inevitable conclusion that its negligence was excluded.

[62] The appellant's arguments must fail. I have not been persuaded that the Judge made any reviewable error in concluding that the exclusion clauses did not protect the appellant from its negligence.

[63] Before proceeding, it is important to remind ourselves of the contract entered into by the parties. The Judge found, at paragraph 100 of her reasons, that the Vessel had been taken by the respondent to the appellant's premises for the purpose of repairs and maintenance. In other words, that was the job which the appellant had undertaken to perform. It goes without saying that before commencing this work, it was necessary for the Vessel to be taken from the water and placed somewhere on the appellant's premises.

[64] I now turn to the Statement of Acceptance on which great reliance has been placed by the appellant. This document is the only written evidence that we have in regard to the contract entered into by the parties. As I indicated earlier, the appellant insisted that the respondent sign the document before taking the Vessel out of the water.

[65] The first paragraph of the Statement of Acceptance deals with the lifting of the Vessel from the water by the appellant. It says that the respondent accepts responsibility for damage that

may be caused to his boat during that operation unless caused by "the negligence of the Straddle Crane operator in operating the Marine Straddle Crane". In my view, there is no difficulty in understanding that paragraph. It is clearly of no relevance in regard to the loss which occurred on July 10, 2011.

[66] The second paragraph of the Statement of Acceptance deals with the occurrence of fire and other such perils which might cause damage to the respondent's property or to that of others. In such an event, the respondent agrees that he will be responsible if such perils result from his negligence or that of his employees, servants and agents and he furthermore agrees to indemnify and save harmless the appellant, its agents, servants and employees. This clause is also irrelevant in respect of the loss of July 10, 2011.

[67] I will presently skip the third paragraph and will return to it shortly.

[68] The fourth paragraph makes it clear that the appellant will not be responsible for any damage that may be caused to the respondent's boat by reason of acts of God, acts of thefts, acts of vandalism, fire or other peril from the neighbouring property or premises of others onto the property of the appellant or in regard to the illegal or negligent actions of third parties, howsoever caused. Should such events occur, the respondent agrees to indemnify and save harmless the appellant, its officers, agents, employees, servants "or otherwise from any claim on my part [the respondent] with respect to the same". It also goes without saying that this paragraph of the Statement of Acceptance is, in the particular circumstances of this case, of no relevance to the issue before us.

[69] The fifth paragraph is one wherein the respondent agreed that he would be liable with regard to damage caused to the property of the appellant or to the property of any third party resulting from the improper or inadequate blocking of his vessel or from any act of negligence, howsoever arising, on his part, or on the part of his agents, servants, and employees. In this scenario, the respondent agreed to indemnify and save harmless the appellant, its officers, agents, employees and servants with regard to claims which could be made by third parties. As no one has argued or suggested that the damage is the result of improper or inadequate blocking, this clause is irrelevant for the present purposes.

[70] As to the sixth paragraph of the Statement of Acceptance, it states that the respondent agrees that he has read the "Notice of Warning" signs posted on the appellant's premises and that he understands their meaning.

[71] The last paragraph of the Statement of Acceptance deals with charges which may be owed by the respondent with regard to the storage of his boat on the appellant's premises and the consequences which may arise should he fail to pay these charges. It is also of no relevance for present purposes.

[72] I now return to the third paragraph of the Statement of Acceptance which is at the heart of the appellant's arguments on the second issue. For ease of reference, I again reproduce the third paragraph of the Statement of Acceptance.

> I understand and agree that the securing and locking of my boat is my responsibility, and not that of the said Marine Service Centre, or of its agents, servants, employees, or otherwise. Furthermore I agree to indemnify and save

> harmless the said Marine Service Centre and its officers, agents, employees, servants or otherwise from, any claims on my part with respect to the same.
>
> (emphasis added)

[73] Before the Judge and before us in this appeal, there was a debate between the parties as to the meaning of the words "securing and locking" found in the third paragraph. The respondent says that these words pertain to the securing of lines, buoys and equipment and the closing of hatches, windows and doors of their vessel prior to the lift and while the Vessel was on the appellant's premises.

[74] On the other hand, the appellant says that the words "securing and locking" are clearly directed at the placing of the respondent's vessel on the cradle. In support of that view, the appellant referred us to the decision of Mr. Justice Barry in *Howell v. Newfoundland (Attorney General)*, 65 Nfld & P.E.I.R. 139, 5 A.C.W.S. (3d) 412 where the learned Judge, in dealing with a Statement of Acceptance in which words similar to those found in the third paragraph of the Statement of Acceptance were used, held at paragraph 35 of his reasons, that the word "securing" meant "providing an adequate support system for it [the boat] and for its security, i.e., maintaining such support while the boat is stored at the [appellant's] [The Marine Terminal] yard".

[75] The Judge dealt with this particular issue at paragraphs 131 to 134 of her reasons. Applying the *contra proferentem* rule of construction, she could not agree with the appellant's understanding of the words "securing and locking". In her view, because it was clear on the facts before her that the appellant was responsible for the erection of the cradle, the construction of the

words "securing and locking" proposed by the appellant did not make any sense in that the appellant exercised total control over the Vessel from the time that it lifted the Vessel out of the water and secured it on a cradle on its premises. In the Judge's opinion, as stated at paragraph 134 of her reasons, "it could not have been the intention of the parties that the word "securing" bear the meaning proposed by the [appellant], that is, that the [respondent] was responsible for securing the vessel during the period of repairs".

[76] In my view, there is no basis to interfere with the Judge's determination of the word "securing" found in paragraph 3 of the Statement of Acceptance. The Judge carefully reviewed the evidence so as to determine the parties' intention which led her to conclude that the word "securing" could not mean what the appellant said it meant. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court revisited the principles pertaining to contractual interpretation and the standard pursuant to which contractual interpretation was to be reviewed. At paragraphs 47 and 48, the Court, under the pen of Rothstein J., reaffirmed that the main concern of contractual interpretation was the determination of the parties' intent and the scope of their understanding and in order to do so, the Judge was bound to consider the contract at issue as a whole giving the words found therein their ordinary and grammatical meaning consistent with the relevant surrounding circumstances existing at the time the contract was concluded. Rothstein J. qualified that statement by saying that the meaning of the words found in a contract was to be arrived at by considering a number of contractual factors such as the purpose of the contract entered into and the nature of the relationship resulting from the contract.

[77] The Supreme Court then stated that contractual interpretation did "not fit well with the definition of a pure question of law identified in Housen and Southam" (paragraph 49 of *Sattva*). In its view, as the purpose of contractual interpretation was the determination of the objective intention of the parties which it characterized as a fact specific goal, by the use of known legal principles of interpretation, the question then appeared to be not a question of pure law, but one of a hybrid nature, i.e. of mixed fact and law which *Housen* defined as "applying a legal standard to a set of facts" (paragraph 49 of *Sattva*).

[78] After stating that a number of courts in this country had questioned whether the *Housen* definition of a question of mixed fact and law could be applied to questions of contractual interpretation as that question was primarily a legal question, Rothstein J. made the following remarks at paragraphs 50 and 51.

> [50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.
>
> [51] The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation….

[79] Consequently, the Judge's determination of the meaning of the word "securing" is one that can only be interfered with if she made a palpable and overriding error. On my understanding of the contractual relationship entered into by the parties, I see no basis on which I could conclude that the Judge made a palpable and overriding error.

[80] I wish to emphasize that the contract at issue is not a contract of storage. Although storage is part and parcel of the agreement, the prime intent of the parties in removing the Vessel from the water and placing it on the appellant's premises was to allow the appellant to effect repairs and general maintenance to the respondent's vessel. The Judge's interpretation of the contract and more particularly of the word "securing" must be understood in that context. Consequently, the appellant's argument that the respondent agreed to be responsible for the securing of its boat on a cradle while at rest on the appellant's premises must fail.

[81] In any event, even if I had been prepared to find that the Judge had erred in determining the meaning of the word "securing", I would still have concluded that the appellant's appeal could not succeed. My rationale for this is as follows.

[82] For the purpose of the following paragraphs, I therefore approach the third paragraph of the Statement of Acceptance on the premise that the word "securing" means that the respondent agreed, when signing the Statement of Acceptance, that it was his responsibility, and not that of the appellant to secure his vessel on the cradle while on the appellant's premises. In other words, I assume for the purpose of the following discussion that the respondent recognized that it was his part of the bargain to do what was necessary to make sure that his vessel was properly secured, i.e. to build a cradle that could support his vessel while on the appellant's premises.

[83] Consequently, on this understanding, once the Vessel was lifted from the water and placed on blocks, the appellant had no obligation to take further steps. The ball was now in the respondent's court. The appellant's argument is, in effect, that because the respondent agreed

that it was his responsibility to secure his vessel, it necessarily follows that its negligence in regard to the securing of the Vessel must be excluded as a ground of liability. In other words, even though the appellant and its employees took charge of securing the Vessel, it cannot be liable for its negligence.

[84] In my respectful view, the clause at issue is not an exclusion clause and cannot be used by the appellant to exclude its negligence in the circumstances of the case. The clause is a contractual provision whereby the respondent agreed to take care of the securing of his vessel while on the appellant's premises.

[85] In addressing the clause and its effects, it is of importance to remember what the Judge found:

(i) She found that the wood and plywood used to build the cradle and the cross bracing was owned by the appellant and that it was at all times under its control and supervision.

(ii) She also found that the appellant's employees had chosen the materials used in building the cradle.

(iii) She further found that the cradle had been built by the appellant's employees and that the respondent's employees were not directly involved in that operation.

[86] Because she also found that the damaged materials used to build the cradle were not available for inspection, having been disposed of prior to examination, she held that she was entitled to draw an inference against the appellant.

[87] On the Judge's findings, there cannot be much doubt that the appellant and its employees took over from the respondent the obligation to secure the Vessel while on its premises. Why

that occurred is not for us to speculate. I would simply note that at the trial witnesses for the appellant and the respondent offered contradictory evidence as to who was in charge of the securing of the Vessel. To put it at its simplest, the appellant's evidence was that its employees had only helped the respondent to secure the Vessel while the evidence tendered by the respondent's witnesses was that the operation had been entirely handled by the appellant and its employees. As I have made clear, because the Judge found the respondent's evidence more credible she held that the securing operation had been conducted entirely by the appellant and its employees.

[88] Consequently, I can only conclude that notwithstanding the contractual provision found at paragraph 3 of the Statement of Acceptance, the appellant and its employees took over the operation of securing the Vessel while it was on its premises. Further, there is no evidence that in so acting, the appellant purported to act on behalf of the respondent. I therefore conclude that the appellant, having decided to assume the obligation of securing the Vessel while on its premises, was bound to secure it properly.

[89] I therefore see no basis, on the assumption that the word "securing" means what the appellant says it means, on which the appellant could escape its liability for the loss caused to the respondent's vessel.

[90] As I have attempted to explain, other than the third paragraph of the Statement of Acceptance, none of the other paragraphs of the Statement of Acceptance are relevant to the loss which occurred on July 10, 2011. This leaves only the Notice and Warning signs placed on the

appellant's premises in regard to which the Judge found that they did not exclude the appellant's negligence.

[91] With respect to the contrary opinion, the Notice and Warning signs do not help the appellant. They clearly pertain to situations where boats have been left on the appellant's premises for the purpose of storage. I again reiterate that the purpose for which the Vessel was placed on the appellant's premises was not storage, but repairs and general maintenance. The Notice and Warning signs use the language "all boats left here" which language suggests that they are not relevant here considering the nature of the contract entered into by the parties. In other words, the case before us is not a situation where the respondent's vessel was "left here". The vessel was entrusted to the appellant for the purpose of repairs and general maintenance. In my respectful view, this is a scenario which does not fall within the purview of the Notice and Warning signs.

[92] Consequently, I have not been persuaded, notwithstanding Mr. Bilodeau's forceful arguments to the contrary, that there is any ground upon which we could interfere with the Judge's decision.

V. Conclusion

[93] For these reasons I would dismiss the appeal with costs.

"M Nadon"

J.A.

“I agree.
Johanne Trudel J.A.”

“I agree.
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-506-14

(APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE MADAM JUSTICE HENEGHAN DATED OCTOBER 20, 2014, DOCKET NO. T-298-12)

DOCKET:	A-506-14
STYLE OF CAUSE:	BURIN PENINSULA MARINE SERVICE CENTRE v. MAXWELL FORSEY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 8, 2015
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	TRUDEL, DE MONTIGNY JJ.A.
DATED:	OCTOBER 9, 2015

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