Easter Term
[2024] UKPC 11
Privy Council Appeal No 0044 of 2023

JUDGMENT

Great Lakes Reinsurance (UK) plc (as Subrogee of Modrono's Bimini Place Ltd) (Appellant) *v* RAV Bahamas Ltd (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Briggs
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
21 May 2024

Heard on 10 April 2024

Appellant
Tara Archer-Glasgow
Robert Strang
Audley D Hanna Jr
(Instructed by Shearwater Law (Plymouth))

Respondent
John F Wilson KC
James Bradford
Berchel Wilson
(Instructed by Charles Russell Speechlys LLP (London))

LORD BURROWS:

1. Introduction

1. The central question in this appeal is whether the owner and operator of a marina owed a duty of care in the tort of negligence (or in contract) to the lessee of a dock in the marina to prevent the theft of the lessee's motor yacht ("the vessel").

2. The lessee of the dock, and the owner of the vessel, was Modrono's Bimini Place Ltd ("MBP"), a company incorporated in the USA. The owners and officers of MBP were Manuel Modrono and his father. Two other members of the family, one of whom was Anthony Modrono, Manuel Modrono's cousin, also had a financial interest in the vessel. The marina was the Bimini Bay Marina on the island of Bimini in the Commonwealth of The Bahamas. RAV Bahamas Ltd ("RAV"), a company incorporated in The Bahamas, was the owner and operator of the marina.

3. The vessel in question, "Rum N' Coke", a 41-foot Luhrs motor yacht, was insured by MBP against theft with Great Lakes Reinsurance (UK) plc ("Great Lakes"). On or around 19 July 2009, two unknown individuals stole the vessel from the marina. Great Lakes paid out US$579,721.15 to MBP (US dollars and Bahamian dollars are, and were at all relevant times, of equal value), in settlement of an insurance claim brought by MBP for the theft. In these proceedings, Great Lakes has sought to recover that sum (plus the costs of its investigation into the theft) by way of a subrogated claim for negligence against RAV.

4. Great Lakes' subrogated claim succeeded before Winder J (2011/CLE/gen/01561) but his decision was overturned by the Court of Appeal (Sir Michael Barnett P, Isaacs JA, Evans JA) (SCCivApp No 26 of 2022). Great Lakes now appeals to the Board. Great Lakes is therefore the claimant and appellant and RAV is the defendant and respondent.

5. It is not in dispute that there is no relevant difference in this case between the law applicable in The Bahamas and that applicable in England and Wales.

2. The lease

6. By a lease agreement, dated 7 March 2008, RAV (referred to as "the Landlord") granted to MBP (referred to as "the Tenant") the lease of a dock called "Boat Slip Dolphin #16" at the marina. The lease was for a term of 21 years from 26 May 2005, at an annual rent of $8,571.42, paid in advance as a lump sum, plus an annual service

charge and special assessments. The lease was specified to be for the benefit of "the tenant and his immediate family members", and guests for no more than five days a month (see clause 2(8)).

7. By clause 2(4) of the lease, MBP covenanted to observe the restrictions and regulations specified in the Fourth Schedule to the lease. Clause 17 of the Fourth Schedule provided as follows:

> "The Tenant is responsible for proper operation and mooring and taking all necessary precautions to ensure that the Boat is secure from damage from any [and] all causes including without limitation theft fire vandalism and storm."

8. Under clause 3(6), RAV was to provide the services of porters to clean the common areas, to deal with the lighting of those areas, and to remove domestic refuse and rubbish on a daily basis. But by clause 3(7):

> "the Landlord shall not be liable to the Tenant nor shall the Tenant have any claim against the Landlord in respect of …
>
> (b) any act omission or negligence of any porter attendant or other servant of the Landlord in or about the performance or purported performance of any duty relating to the provisions of the said services or any of them."

3. Facts

9. Many of the agreed facts emerged not only from the evidence at trial but also from an investigation carried out by Lazaro Alfonso of Nautilus Investigations, who was engaged by Great Lakes to investigate the circumstances of the theft. He interviewed several people, including Manuel Modrono and Anthony Modrono, O'Neil Rolle, who was employed as a porter at the marina, and Douglas Black, who was the director of operations at the marina.

10. On 9 June 2009, the vessel was sailed from Miami, Florida to The Bahamas by Anthony Modrono, along with other individuals. On 12 July 2009, Anthony Modrono left The Bahamas for Miami, leaving the vessel docked at Boat Slip Dolphin #16. His evidence at trial, which was accepted by the judge, was that he had left the cabin locked. The Court of Appeal found (see paras 42 and 45 of the judgment of Isaacs JA) that, while keys could be left with the marina, and there was then a system for releasing the

keys (by a sign-out form and visual or phone call verification to check that the release of the keys was allowed), the marina was not asked to, and did not, retain the keys for this vessel. In respect of this vessel, therefore, an owner could board the vessel moored at the marina unchallenged and, without providing any documentation, sail it away.

11. On or around 18 July 2009, while the vessel was docked at the marina, O'Neil Rolle was contacted by an unknown individual. According to O'Neil Rolle, this individual, who claimed to be Anthony Modrono, told him that he would be sending his captain to collect the vessel and instructed him to enter the vessel, whose door he said would be "open", to prepare the vessel for departure, by turning on the air conditioning and the water pump (so that the pump ran overnight), and to arrange for the cleaning of the waterline. According to O'Neil Rolle, he prepared the vessel as the caller had instructed, and hired a third party to clean the waterline. On or around 19 July 2009, he met two unknown individuals on board the vessel. One of them paid him $400 for his services, $180 of which was paid to the young man who had cleaned the waterline, before the two unknown individuals sailed the vessel away. O'Neil Rolle did not seek to obtain any verification of the individuals' identities, nor did he seek to confirm that they had any right to board or access the vessel. According to Douglas Black, this did not violate existing procedures in place at the marina. There was no vessel release form unless an owner chose to leave a key with the marina; and no key for the vessel had been left with the marina.

12. The Court of Appeal drew attention to the interview of Douglas Black by Lazaro Alfonso, in which Douglas Black indicated that the resort and marina had 24-hour security, by three shifts of guards who secured the marina, patrolling by foot and in golf carts. He also revealed that there had been no theft of a vessel in the three and a half years since the marina had been open.

13. The Court of Appeal also drew attention to the interview of Manuel Modrono by Lazaro Alfonso, in which Manuel Modrono explained that no-one was allowed onto the marina's premises unless they had a wristband. The wristband indicated that the person was checked into the resort and was an owner (he presumably meant an owner of an apartment at the marina) or a guest.

14. Lazaro Alfonso also investigated subsequent sightings of the vessel. His report identified people who were known to have sailed it after the theft and the registered user of the telephone number from which O'Neil Rolle was called shortly before the theft. It appeared that the final destination of the vessel was Venezuela.

15. Lazaro Alfonso's report did not conclude that the owners had been involved in the theft of the vessel. Subsequent to his report, on 14 January 2010, Great Lakes paid out the sum of US$579,721.15 in satisfaction of the insurance claim brought by MBP.

4. The judgments of the courts below

(1) Winder J

16. The essential reasoning of Winder J was as follows:

(i) Although the case had been pleaded in both tort and contract, the primary claim was in the tort of negligence.

(ii) Winder J cited the House of Lords negligence case of *Caparo Industries plc v Dickman* [1990] 2 AC 605, with its three-step approach to the duty of care: foreseeability, proximity and whether it was fair, just and reasonable for there to be a duty of care. He then held, without explanation, that there was a duty of care owed by RAV, as the owner and operator of the marina, to ensure that the vessel was kept "reasonably safe, and not susceptible to theft" (para 7).

(iii) RAV was in breach of its duty of care resulting in the loss of the vessel. O'Neil Rolle, who was an employee of RAV, had "contributed to the theft" (para 12). By boarding the vessel and preparing it for sailing, without asking for identification, he had "facilitated the removal of the vessel by the unknown persons who stole it" (para 13).

(iv) As a matter of interpretation, clause 3(7) of the lease did not exclude the negligence alleged. That clause was concerned with negligence in relation to the services set out in clause 3(6). In any event, the provisions of the Consumer Protection Act 2006 meant that RAV would have to show that, to be valid, the exclusion was reasonable and RAV had failed to show this.

(2) The Court of Appeal

17. The Court of Appeal allowed the appeal and overturned Winder J's decision. Isaacs JA and Sir Michael Barnett P each gave a judgment, and Evans JA agreed with both. The Court of Appeal's essential reasoning was as follows:

(i) Contrary to the reasoning of Winder J, there was no duty of care in tort owed by RAV to prevent the theft of the vessel.

(ii) Clause 17 of the Fourth Schedule of the lease, which was not mentioned by Winder J, was significant in clarifying that it was the vessel's owner who had

responsibility for preventing the theft of the vessel. In the words of Sir Michael Barnett P, at para 113:

> "By that clause the parties agreed that the duty of care to prevent a theft of the boat was imposed on the boat owner and not the marina. This is not surprising given that the marina did not have the keys to the vessel and had no control over the vessel whilst at the marina."

He added at para 120:

> "The leasing of the boat slip is not like a bailment as the marina never had control of the vessel."

(iii) That RAV's duty of care did not extend to preventing theft was consistent with the judgment of the Court of Appeal (of England and Wales) in *Halbauer v Brighton Corp* [1954] 1 WLR 1161 ("*Halbauer*"). In that case, a caravan had been stolen from a camping ground maintained by the defendant corporation; and the Court of Appeal explained that, while the defendant had a duty of care in its own sphere of operations (eg if their employee negligently crashed into the caravan), that duty of care did not extend to preventing theft of the caravan.

(iv) There was no term, express or implied, in the lease imposing a contractual duty of care on RAV to prevent theft of the boat. Such a term could not be implied because it would be inconsistent with clause 17 of the Fourth Schedule of the lease.

5. Was there a relevant duty of care, and breach of duty, in the tort of negligence?

(1) Introduction

18. On this appeal, counsel for Great Lakes submitted that the Court of Appeal was incorrect to have set aside Winder J's decision that RAV owed a relevant duty of care to Great Lakes and was in breach of that duty. The primary focus was on the tort of negligence although the Board also needs to consider, and will do so briefly at the end of this judgment, the alternative claim for breach of a contractual duty of care.

(2) Failure to prevent theft of the vessel: assumption of responsibility?

19. Winder J gave no reasons to explain how he arrived at the conclusion, at para 7, that RAV had a duty of care "to ensure that the vessel is kept reasonably safe and not susceptible to theft". It is not clear that the three-stage test in *Caparo Industries plc v Dickman* [1990] 2 AC 605, cited by Winder J, is of any assistance in this type of case and certainly it cannot be relied on without further careful analysis. This is because, and this cannot be overstated, this case primarily concerns liability for an omission. In other words, the Board is primarily considering an alleged failure by RAV to confer a benefit on MBP by preventing a third party causing harm to MBP. The Board is not primarily dealing with acts by RAV which have harmed MBP (ie which have made MBP worse off).

20. One of the objections to the *Anns v Merton London Borough Council* [1978] AC 728 approach to establishing a duty of care in the tort of negligence was that it had a tendency to blur the distinction between failing to confer a benefit/omissions and harming/acts. Since the demise of that approach, it has become well-established that, for a duty of care to arise grounding liability for a failure to confer a benefit, restrictive principles going beyond foreseeability and proximity must be applied. Leading cases include *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 (although that was not itself a failure to confer a benefit case), *N v Poole Borough Council* [2019] UKSC 25, [2020] AC 780, and *HXA v Surrey County Council* [2023] UKSC 52, [2024] 1 WLR 335.

21. To establish liability for a failure to confer a benefit, which is the exception rather than the rule in the common law, one of the recognised exceptional principles must be established. Those principles were neatly encapsulated, in general terms, by Stelios Tofaris and Sandy Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128, in a summary which was cited and approved in *Robinson v Chief Constable of West Yorkshire Police* and then in *N v Poole* and *HXA v Surrey County Council*:

> "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

22. In respect of those principles, Great Lakes accepted before the Board that, if it were to succeed on the facts of this case, it would need to show that there was a relevant assumption of responsibility by RAV. That is, it would need to show that RAV had assumed responsibility to MBP to take reasonable care to prevent theft of the vessel.

Great Lakes submitted that RAV had relevantly assumed responsibility by leading MBP reasonably to expect security against the risk of theft of vessels by promising to provide, and providing, security guards, cameras and a wristband system.

23. The Board rejects that submission. RAV did not assume responsibility to use reasonable care to guard against theft of MBP's vessel. In particular, in respect of MBP's vessel, RAV was not asked by MBP, or by any of those with a financial interest in the vessel, to take in and retain a key for the vessel. A vessel release form, and identification checks, were, therefore, not in play. It followed that, as the Court of Appeal made clear (see para 10 above), in respect of this vessel, an owner (or a guest of the owner) could board the vessel moored at the marina unchallenged and, without providing any documentation, sail it away.

24. As regards the existing and expected security system, with wristbands, cameras and security guards, whatever the precise responsibility to use reasonable care that RAV may thereby have been assuming it did not extend to an assumption of responsibility to use reasonable care to prevent theft of boats. Even if it did, and such a duty of care was established by provision of the security system, there was no proved breach of such a duty of care and no proved causal connection between any breach of such a duty of care and the theft of this vessel.

25. Even if there were otherwise some doubt about the assumption of responsibility (which, in the Board's view, there is not), clause 17 of the Fourth Schedule to the lease (see para 7 above) assists the correct analysis of the legal position. This clarified that, as between the tenant of the dock and the owner of the marina, responsibility for guarding against theft of a vessel lay with the tenant. While counsel for Great Lakes submitted that that clause was consistent with the landlord having the same duty, the Board rejects that submission because there was no such express duty imposed on the landlord elsewhere in the lease. Therefore, read in the context of the lease as a whole, clause 17 was inconsistent with RAV having assumed responsibility to use reasonable care to prevent theft of MBP's vessel.

26. More generally, it would be very surprising if, without clear words to this effect, owners of leased properties were assuming responsibility to use reasonable care to protect their tenants against theft from the properties. Take, for example, the lease of a garage to park a car. Without a clear agreement to the contrary, the owner of the garage has not assumed responsibility to use reasonable care to guard against theft of the car from the garage and therefore, in general, owes no such duty of care to the tenant.

27. The Board agrees with the Court of Appeal that the English case of *Halbauer* (see para 17(iii), above) is on point. The position at the camping ground during the

summer months (starting in March) was somewhat analogous to that at the marina in the instant case. In Denning LJ's words at pp 1165-1166:

> "The corporation did not … take possession of his caravan so as to become bailees of it. The camper remained in possession of it himself, and it was for him to take care for its safety… [The corporation's] responsibilities did not extend to locking up the caravans or chaining up the wheels so as to prevent their theft. That was the duty of the camper himself. The camp was open day and night throughout the summer, with campers and their friends coming in and out, with and without vehicles, without let or hindrance. In these circumstances the corporation could not be expected to be responsible for loss or damage to property not caused by them; and they were not in law responsible for it."

Cast in the language of an assumption of responsibility, Denning LJ was making clear that the corporation had not assumed responsibility to use reasonable care to guard against theft of the caravan. The same analysis applies in this case.

28. Counsel for Great Lakes also drew to our attention the decision of the House of Lords in *Smith v Littlewoods Organisation Ltd* [1987] AC 241. In that case, the owners (the defenders) of an empty cinema had done nothing to secure its safety. A fire was deliberately started by youths and the cinema burnt down. The fire also caused serious damage to adjacent property. The owners of the adjacent property (the pursuers) sued the defenders for damages in negligence. It was held that the defenders owed no relevant duty of care to the pursuers.

29. In one of the two leading speeches, Lord Goff incisively analysed the issues involved for the tort of negligence where harm has been deliberately caused to a claimant by a third party. Early on in his analysis, at p 271, he posed and answered the following question:

> "Why does the law not recognise a general duty of care to prevent others from suffering loss or damage caused by the deliberate wrongdoing of third parties? The fundamental reason is that the common law does not impose liability for what are called pure omissions."

30. Lord Goff then went on to identify exceptions to that principle. Of particular relevance to the instant case was Lord Goff's recognition that an assumption of

responsibility might trigger a duty of care to prevent harm by third parties. He said at p 272:

> "That there are special circumstances in which a defender may be held responsible in law for injuries suffered by the pursuer through a third party's deliberate wrongdoing is not in doubt. For example, a duty of care may arise from a relationship between the parties, which gives rise to an imposition or assumption of responsibility upon or by the defender, as in *Stansbie v Troman* [1948] 2 KB 48, where such responsibility was held to arise from a contract. In that case a decorator, left alone on the premises by the householder's wife, was held liable when he went out leaving the door on the latch, and a thief entered the house and stole property. Such responsibility might well be held to exist in other cases where there is no contract, as for example where a person left alone in a house has entered as a licensee of the occupier."

31. More relevant to the facts of the case before him, Lord Goff said, at pp 272-273, that there might be a duty of care owed:

> "where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer."

But, on the facts, that "creation of a source of danger" principle did not apply because the owners of the cinema did not know about the previous acts of vandalism and the cinema was not obviously a fire risk.

32. In the context of theft, it can be seen that *Stansbie v Troman*, as explained by Lord Goff, is plainly distinguishable from the instant case. The decorator had assumed responsibility to the owner to lock the premises when leaving. But, in the instant case, RAV had certainly not assumed responsibility for locking up the vessel and, as has been explained, had not assumed any responsibility in relation to the vessel's keys.

33. Counsel for both Great Lakes and RAV relied on the decision of the Privy Council in The Bahamas case of *The Airport Authority v Western Air Ltd* [2020] UKPC 29. An aircraft, belonging to the claimant, was stolen from an airport owned and operated by the defendant, which was a statutory airport authority. It was unclear how the thief or thieves had gained access to the area where the plane was without passing

manned entry points. But there were defects in the security fencing around the airport and it was possible that the thief or thieves had gained access in that way.

34. At first instance, the judge had found, and the Board decided that he was entitled to find, that the defendant alone was responsible for the safety of the claimant's aircraft and that the claimant was not allowed to provide its own security. On that basis, the judge had held that the defendant owed the claimant a duty of care to prevent the theft of the aircraft. The judge's decision had been upheld by the Court of Appeal and the defendant's appeal to the Board was dismissed.

35. Lord Kerr, giving the advice of the Board (comprising himself, Lord Wilson, Lord Carnwath, Lord Briggs and Lady Arden), accepted that, although the case concerned a duty of care to prevent harm caused by third parties, and that such a duty of care arose only in certain limited categories of case, two of those limited categories applied. The first was that the defendant had created the risk of danger that a third party might cause harm to the claimant because of the defects in the system of security at the airport. By this Lord Kerr presumably had in mind the defects in the security fencing. This appears to correspond to the "creation of the source of danger" principle recognised by Lord Goff in *Smith v Littlewoods.* Secondly, Lord Kerr considered that the defendant had assumed responsibility to protect the claimant's aircraft from theft. In his Lordship's precise words at para 44:

> "There is no difficulty, therefore, in bringing the circumstances within [two of the] categories of case outlined … [above] whereby a defendant can be held liable to a claimant for harm caused by a third party. The [defendant] had created the risk of danger that the third party might cause harm to the claimant by reason of the defects in the system of security at the airport; and it had assumed a relevant responsibility towards the [claimant] by dint of its being the sole agency which had the means to provide adequate protection for the aircraft."

Lord Kerr also made clear that the theft could not have occurred without negligence by the defendants and, in any event, the doctrine of res ipsa loquitur applied.

36. The instant case is distinguishable from the *Western Air* case. There was no proved defect in the security at the marina and no proved causal link between any such defect and the theft of the vessel; and, which was more central to the submissions made in the instant case, there was no assumption of responsibility equivalent to that undertaken by the airport authority. In direct contrast to the facts of that case, RAV, the owners of the marina, had not assumed responsibility to take reasonable care to guard

against the theft of the vessel. Rather, the responsibility fell on MBP, the owner of the vessel, as was clarified by clause 17 of the Fourth Schedule to the lease.

37. The Board's conclusion is that, viewed in terms of liability for failure to confer a benefit on MBP by preventing theft of the vessel, there was no duty of care owed by RAV.

(3) The acts of O'Neil Rolle

38. As an alternative submission, counsel for Great Lakes argued at first instance and before the Board (although it would appear that this was not raised in, and was not addressed by, the Court of Appeal) that, even if there was no relevant duty of care owed in respect of the failure to confer a benefit by preventing the theft, RAV was vicariously liable for the acts of O'Neil Rolle, who had assisted or facilitated the theft. In other words, O'Neil Rolle and, as his employer, RAV, were in breach of a straightforward tortious duty of care not to harm MBP or make MBP worse off. It is not in dispute that such a duty of care was owed but in the Board's view there was no breach of that duty.

39. Winder J said that O'Neil Rolle had contributed to or facilitated the theft. But, with respect, it is hard to understand what he meant by that. All that O'Neil Rolle had done was to prepare the vessel for sailing, by turning on the air conditioning and the water pump, and to arrange for the waterline to be cleaned. That did not facilitate the theft in any significant sense. In particular, there was no proof that he had unlocked the vessel. Moreover, O'Neil Rolle could not be faulted for preparing the vessel for sailing and arranging cleaning without asking for identification from the thieves because, as has been explained, there was no identification system in place. Counsel for Great Lakes submitted that O'Neil Rolle had provided cover for the theft. But, again, it is unclear what is meant by that submission. To prepare the vessel for sailing and to arrange for it to be cleaned did not conceal the theft.

40. It is clear, therefore, that, focusing on a straightforward duty of care by acts, there was no breach of such a duty by O'Neil Rolle. RAV was therefore not vicariously liable for a tort committed by its employee acting in the course of his employment. The Board considers that Winder J's apparent acceptance of this alternative submission (at para 13 of his judgment) was incorrect as a matter of law.

41. Even if there had been such a breach of duty, Great Lakes would have needed to prove that that breach of duty was a cause of the theft. However, applying the standard test for factual causation, there was no finding by Winder J that the claimant had proved that "but for" O'Neil Rolle's acts, the vessel would not have been stolen.

6. Was there a contractual duty of care to prevent the theft?

42. Although the submissions of counsel for Great Lakes were primarily focused on the tort of negligence, a contractual duty of care to keep the vessel safe from theft while docked in the marina was pleaded in the alternative. However, just as there was no assumption of responsibility for the purposes of the tort of negligence, we agree with the Court of Appeal that there was no contractual duty of care to prevent theft of the vessel. There was no express duty of care on RAV to prevent theft of a vessel in the lease agreement and there is no basis for implying such a term. That would have been the correct analysis even without clause 17 of the Fourth Schedule to the lease. But that clause helps to clarify the position as has been explained in para 25 above. There could be no implied term because it would be inconsistent with the express risk allocation in clause 17 of the Fourth Schedule.

7. Conclusion

43. The Court of Appeal was correct, as a matter of law, in overturning the decision of Winder J. There was no duty of care owed by RAV to MBP to prevent the theft of MBP's vessel, whether in tort or contract. There was also no breach of the duty of care owed by O'Neil Rolle, and vicariously by RAV, not to harm MBP. The Board will therefore humbly advise His Majesty that the appeal should be dismissed.