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CREW MEMBERS OF THE MOTOR VESSEL "CASINO ROYALE" v. OWNERS AND PARTIES INTERESTED IN THE MOTOR VESSEL "CASINO ROYALE"

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Citation # BS 2009 SC 35

Country The Bahamas

Court Supreme Court

Judge Adderley, J.

Subject Admiralty

Date March 24, 2009

Suit No. COM/ADM 30 of 2007

Subsubject Sale of motor vessel – Determination of the priorities of claimants against the proceeds of sale.

Full Text Appearances:

Mr. Arnold Forbes, Mr. Myles LaRoda with him, for the Crew of the Casino Royale.
 Mr. John Wilson, Mrs Nicole Sutherland-King with him, for Catina SA.
 Mr. Oscar Johnson, Mr. Van Gaitor and Ms Karen Brown for Casino Slots LLC, et. al.
 Ms Cheryl T Whyms for PDS Gaming Corp. Ltd.
 Mr. Che-Toussainte E. C. Chase for Tenmark Marine Ltd. et al.
 Mr. Larell Hanchell for George Blackshaw and Mr. Stephen Rabjohns.
 Mr. Dwayne Hanna for Seahawk North America et al Mr. Michael Scott, Ms Courtney Pearce, Ms Kenra Harris Whittaker and Ms Bryunda Carroll with him, for International Shipping Agency et al.
 Ms Dawn Lewis, Ms Wendy Poitier, Ms Carmen Bostwick and Ms Michelle Ryan with her, for the Admiralty Marshal.
 Mr. Emerick Knowles, Mr. Donovan Gibson with him, for Wartsila Canada Inc..

ADDERLEY, J.: This application by Summons filed 26 June 2008 by counsel for the plaintiffs seeks a determination of the priorities of the claimants against the proceeds of sale of the motor vessel Casino Royale ("the Vessel") and that the amount found due to the claimants upon such determination be paid out. It also deals with a Notice of Motion filed 24 November 2008 on behalf of the plaintiff for an order that the Order of Lyons, J. filed 6 December 2007 be enforced and that \$295,544.78 out of the proceeds of sale of the Vessel be paid to the plaintiffs as wages owed, that \$270,300.00 out of the proceeds be paid out to the plaintiffs' attorneys, and that the Admiralty Marshal's costs be paid out.

2. By Order of Lyons, J. filed 6 December 2007 it was ordered that the Vessel be appraised and sold and inter alia:

"3. That the proceeds of the sale do stand as the subject matter in this action and be

paid into an interest bearing account in the joint names of the Admiralty Marshal and the attorneys for the plaintiffs, and that the costs of this motion be costs in the cause
4. That from the proceeds of sale, the Admiralty Marshal's costs and expenses for the appraisal and sale, filing fees as well as fees for the attorneys shall be deducted as part of the costs of the arrest."

3. The Summons was supported by Supplemental Affidavits of Myles K. LaRoda filed 16 July 2008 and 24 November 2008. In those Affidavits he states:

"4. The vessel was arrested by this honourable court on the 22nd day of October A.D. 2007 and on the 6th day of December A.D. 2007 His Lordship Justice John Lyons ordered that the vessel be appraised and sold. According to the Affidavit of Arnold Forbes filed herein on the 6th of March 2008 the vessel was sold and the proceeds of sale were paid into an interest bearing account in the joint names of the Admiralty Marshal and Arnold Forbes & Co."

It also states that as of 30 September 2008 the fund contained \$1,514,526.62.

4. Pursuant to Order 67, rule 22 of the Rules of the Supreme Court the Affidavits outline additional claims exceeding \$8,000,000.00 as follows:

"13. That the claim of INTERNATIONAL SHIPPING AGENCY (hereinafter referred to as "ISA), filed herein on the 14th of November A.D. 2007, claiming the sum of \$271,180.58 for Agency fees should rank as a **maritime** lien pursuant to Chapter 277 (1)(b) of the Act.

14. That the following persons have been granted leave to intervene in this action;

- i. PDS GAMING CORPORATION by Affidavit filed herein on the 7th of March 2008, claiming the sum of \$2,475,646.36 for the conversion of gaming equipment.
- ii. OCEAN INSURANCE MANAGEMENT INC, by Order filed on the 4th day of December 2008. The claim is for the sum of \$42,521.06 for unpaid insurance premiums in respect of the Vessel.
- iii. LNYC, LLC by Order filed herein on the 27th day of June 2008. The claim is for the sum of \$192,650 for crew wages and \$272,418.52 in expenses.

15. That the following persons have either entered caveats in this action or given leave to intervene;

- I. LENNOX PATTON, filed herein on the 12th day of December 2007 claiming the sum of \$17,709.50 for legal services provided.
- II. MACHINE & ENERGY LIMITED, filed herein on the 6th day of March 2008 claiming the sum of \$12,000.00 for the rental of a power generator.
- III. MILLENIUM MARINE REPAIRS, filed herein on the 14th day of December 2007 claiming the sum of \$120,727.92 for repairs and maintenance and to provide materials to the Vessel.
- IV. TENMARK MARINE GROUP, filed herein on the 14th day of December 2007 claiming the sum of \$2,199,087.16 for management and Agency services provided to the Vessel.
- V. GLOBAL MARINE ENTERPRISES INC, filed herein on the 29th day of October 2007, claiming the sum of \$94,288.33 for damages and services rendered to the vessel.
- VI. NEPTUNE RACE & SPORT BOOK, filed herein on the 29th day of November 2007 claiming the sum of \$48,884.74 for Gaming equipment and installation services provided to the Vessel.
- VII. GARY PARKER (TRADING AS PARKER MARINE), filed herein on the 29th day of November 2007 claiming the sum of \$73,000.00 for providing provisions and services and other lay-up charges arising from berthing charges of the Vessel.
- VIII. SEAHAWK NORTH AMERICA LLC, filed herein on the 6th day of December 2007 claiming \$611,613.76 for management services provided to the vessel.
- IX. CASINO SLOTS LLC, filed herein on the 6th day of December 2007 claiming the sum of \$869,000.00 for providing gaming slot machines to the Vessel.
- X. CARIBBEAN ELEVATOR CO. LTD., filed herein on the 28th day of January 2008

- claiming the sum of \$7,006.00 for charges made on behalf of the Vessel.
- XI. INTERNATIONAL SHIPPING AGENCY, filed herein on the 14th day of November 2007 claiming the sum of \$271,280.58 for Agency services rendered.
- XII. GARVEYS TOOLS & EQUIPMENT RENTALS, filed herein on the 14th day of November 2007 claiming the sum of \$8,344.60 for equipment rental
- XIII. GEORGE E. BLACKSHEAR, filed on the 25th day of February 2008 claiming the sum of \$10,096.20 for provided provisions and services and other lay up charges arising from the berthing of the Vessel.
- XIV. STEPHEN RABJOHNS, filed on the 26th day of February 2008 claiming the sum of \$21,636.00 for provided provisions and other lay-up charges arising from the berthing of the Vessel.
- XV. GLENN GOLDEN d/b/a G2 DATABASE MARKETING, filed herein on the 10th day of March 2008 claiming the sum of \$83,087.86 for provided provisions and services and other lay-up charges arising from the berthing of the Vessel.
- XVI. NIGEL F. WHITE, filed herein on the 10th day of March 2008 claiming the sum of \$150,000.00 for provided provisions and services arising from the berthing of the Vessel.
- XVII. WARTSILA CANADA, INC., filed herein on the 20th day of March 2008 claiming the sum of \$260,000.00 for goods and materials supplies to the Vessel for its operation and maintenance and for repairs and equipment supplied to the vessel."

5. Leave to intervene was also granted on 18 January 2009 to Marinetech Overseas as agent for certain crew members claiming US\$134,562.40 for seamen wages.
6. The Affidavit filed 24 November 2008 states in part as follows:

- "a. Pre Arrest wages total = \$177,451.61
 b. Interest at a rate of 6% = \$10,647.10
 c. Post Arrest wages total = \$107,446.08
 d. Total amount owed to the Crew = \$295,544.78

12. That the total amount owed to the Plaintiffs' Attorneys as it pertains to the cost of the Plaintiffs arresting and sale of the Vessel is the sum of \$207,300.00 and attached was a statement of account"

The Law

7. Under Order 67, rule 22(1) of the Rules of the Supreme Court in an Action in rem where the court has ordered a ship to be sold any party who has obtained a judgment against the ship may apply to the court by motion for an order determining the order of priority of the claims against the proceeds of sale of the ship. The plaintiffs obtained Judgment in default herein for \$200,000.00 on the 21 November 2007 which was filed on 26 March 2008. They applied by Summons filed 26 June 2008 for the court to determine priorities. No issue was raised as to the regularity of the proceedings.
8. In determining the order of priorities the court is bound by statute. Section 281 of the Merchant Shipping Act, 1976 chapter 268 Statute Laws of The Bahamas ("the MSA") provides for the costs of the Admiralty Marshal to rank first before any other claims. It provides as follows:

"281. Anything to the contrary notwithstanding in this Act or in any other law, any sum awarded by a court as costs arising out of any proceedings in respect of the arrest of a ship or the subsequent sale thereof, including such charges or expenses incurred in effecting the arrest or sale shall have priority over all claims in payment out of the proceeds of the sale or of any moneys paid into court for the release of the ship from that arrest and, subject to such payment, the court shall determine the order of priority of the claims in accordance with the foregoing provisions of this Part."

9. Section 277 of the MSA sets out which claims are secured by **maritime liens** as follows:

"277. (1) The following claims shall be secured by **maritime liens** on a ship:-

- (a) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship;
 (b) port, canal, and other waterway dues and pilotage dues and any outstanding fees

payable under this Act in respect of the ship;
(c) claims against the owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
(d) claims against the owner, based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water, in direct connection with the operation of the ship;
(e) claims for salvage, wreck removal and contribution in general average.

(2) The word "owner" mentioned in this section shall be deemed to include the demise or other charterer, manager or operator of the ship."

10. Section 279 sets out how the priority of claims are ranked and therefore paid:

"279 (1) The **maritime liens** set out in section 277:-

(a) shall rank in the order listed therein save that **liens** securing claims for salvage, wreck removal and contribution in general average shall take priority over all other **maritime liens** which have attached to the ship prior to the time when the operations giving rise to the said **liens** were performed;
(b) shall as respect those set out in each of paragraphs (a), (b), (c) and (d) of subsection (1) of the said section rank *pari passu* as between themselves;
(c) shall as respect those set out in paragraph (e) of subsection (1) of the said section rank in the inverse order of the time when the claims secured thereby accrued."

11. From the Affidavits filed in support of the claims issues have arisen under three heads:

(1) whether the services performed by the crew members or seamen were performed as employees of the Vessel or as employees of independent contractors;
(2) whether persons who have paid the wages to the master or crew are subrogated to their rights to a **maritime lien**;
(3) whether any distinction ought be drawn between a right in personam or a right in rem in determining whether a claim is secured by a **maritime lien**; and
(4) the nature of the claim envisaged in section 277(1)(d). I will discuss these issues in turn.

12. In *The Petone* [1917] P.198 on a motion by its owners to set aside a writ in rem issued against the steamship *Petone* on the ground that the plaintiffs who had paid the wages had no **maritime lien** and no right to arrest the ship it was held after a comprehensive review of the authorities that persons who advanced money to pay the master's disbursements and seamen's wages voluntarily and without getting the protection of an order of the court when doing so, do not get the benefit of the **maritime lien** which the master and seamen had. Hill, J. left the door open for a situation where there was an assignment of the debt or claim supported by **maritime liens**. However, section 100 of the MSA mandates that a seaman cannot by agreement forfeit his **maritime lien** or be deprived of his remedy to recover his wages so it is doubtful that the wages lien is one which is assignable. The *Petone* was applied by Thompson, J. in *Storebrand Bank ASA (formerly Finansbanken) v. The Owners and Parties Interested in the Motor Vessel "Forest Carrier"* 2004/Com/ADM/00003 dated 10 February 2005 (unreported).

13. Mr. Hanna cited the case of *Republic of India & ors v. India Steamship Co. Ltd* [1997] U.K.H.L. 40 as authority to counter the argument advanced that if the relationship between the plaintiffs and the defendants is one of agency or one of independent contractor and client, being contractual relationships, they are in personam and cannot be secured by **maritime liens** which arise out of actions in rem. The *Republic of India Case* in reviewing the authorities does show that since the passage of the Judicature Acts (1873-1875) the law has gradually discarded the fiction that an action in personam was against the owner of a vessel and the action in rem was against the vessel itself. As observed as far back as *The Dictator* [1892] P.304 it is now accepted that once he has entered an appearance or notice to defend in the action in rem the owner becomes personally subject to the jurisdiction of the Admiralty Court and a defendant in both actions.

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14. On this basis the House of Lords in The Republic of India Case (Lord Browne Wilkinson, Lord Steyn, Lord Hoffman, Lord Cooke of Thorndon, and Lord Hope of Craighead) dismissed the plaintiffs appeal from the Court of Appeal's decision to strike out an action brought in the English Admiralty Court by the Indian Government. The action was for damages for the loss of 51 artillery shells and 10 charges which were jettisoned from the Indian Grace because of a fire. Judgment in personam had already been obtained in India against the owner of the ship on the same matter. It was dismissed under the principal of Henderson v. Henderson and section 34 of the Civil Jurisdiction and Judgments Act 1982, which reads:

"No proceedings may be brought by a person in England and Wales...on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies...in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales..."

15. However Lord Steyn pointed out that the claims endorsed on the writ issued by the Indian Government did not involve **maritime liens**. They involved the enlarged Admiralty jurisdiction of the High Court under section 20(2) of the Supreme Court Act, 1981.

16. Lord Steyn referred to the observation by Staughton, L.J. in the Court of Appeal at 22, col 1 where he referred to the rule as it relates to **maritime liens** which he labeled as an anomaly in the context of section 34:

"it is well established since the time of Dr. Lushington that a plaintiff who has an unsatisfied judgment in personam can proceed by an action in rem.... Similarly, a plaintiff who has proceeded in rem, recovered judgment against the vessel, and is left with it only partially satisfied, may start a second action in personam."

Mr. Hanna sought to show, as did counsel for the Indian Government in The Republic of India Case, that the anomaly had disappeared also. On that question Lord Steyn had this to say:

"...This point was not remitted by the House to be decided by Clarke, J. [the primary judge]. He did not do so. It was not put before the Court of Appeal. In these circumstances, I propose to express no view on it."

The Republic of India Case is therefore no authority that the rule referred to by Staughton, L.J. no longer obtains.

17. On the issue of crews' wages, whether a person performs as an employee or as an independent contractor depends on the circumstances. On the authorities, factors such as the control of the employee by the employer are considered before making a determination. Some claims ostensibly made by claimants as agents for crew on examination may be no more than independent contractors claiming on behalf of their employees who were not part of the ship's complement. In Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance 2 Q.B. 47 Lord Wright suggested that in complex cases a four fold test could be appropriate: (1) control (2) ownership of tools, (3) chance of profit and (4) risk of loss.

18. Finally, the nature of the claim envisaged in section 277(1)(d) was the subject of consideration by Longley J, as he then was, in First National Bank of Summer v. The Owners of the M.V. "Viking Explorer" (ex "Joan Salton") the Supreme Court Admiralty Side No. 721 of 2000 (unreported). He made this observation on section 281(1)(d) of the Merchant Shipping Act then Chapter 246 Statute Laws of The Bahamas [now 277 (1)(d) of the MSA]:

"...It would appear that in the ordinary case the section contemplates a situation where no contractual nexus exists between the owner of the res and the person seeking to set up the **maritime lien** on the basis of tort."

I adopt that reasoning. The tort for consideration in this case is the strict liability tort of conversion. (See Douglas Valley Finance Co. Ltd. v. Hughes (Hirers) Ltd. [1969] 1 Q.B.). The claim is that the owner of the Vessel committed the tort of conversion in taking on board 555 gaming machines of PDS Gaming Corporation ("PDS") in The Bahamas knowing that the equipment had been fraudulently transferred to it without

*Seafarer's lien
s. 81 requires a crew agreement*

*a seaman's lien is
incapable of being
renounced by any
agreement. (See. s.100)*

the consent of PDS.

Determination of Priorities

19. I have considered the submissions and all the affidavit evidence submitted in respect of the various claims; I agree with the submissions of Ms. Whyms and Mr. Chase that where an agent acts for the owners of the vessel the manager acting under contract cannot be in a better position than the owner. Since the owner acquires no **maritime** lien for its own crews' wages, in such case the agent cannot either and must seek his contractual redress in the usual way. Likewise in other cases unless there is evidence of the assignment of the debt supported by a **maritime** lien the agent must seek his contractual redress without the benefit of a **maritime** lien.

20. Despite the finding in the final judgment in the Admiralty CASE No. 8:06-CV-2060-RAL-TBM in the Middle District of Florida that there was fraud in the transfer of the gaming equipment to the Vessel it is unclear on the evidence before me that 21 Oceans Corporation Limited, a Belizean company, (owners of the Vessel) had notice of the fact that the gaming equipment belonged to PDS and that the equipment was not to be removed from the MN Ocean Jewel until PDS had been fully paid. Mr. Nigel White who was part owner of Oceans 21 LLC, the company that managed and operated the Vessel, had signed the Agreement for Sale and Purchase of the gaming equipment as President of 21 Miami Oceans International Ltd. but stated that at the time the documentation was signed on April 21 2006 the equipment had already been transferred since March to the Vessel in Freeport, The Bahamas. He also stated in the transcript that PDS must have known the gaming equipment had already been transferred to the Vessel because the agreements contained exhibits which showed the number of machines on each ship including the serial numbers. There is no evidence before me that PDS raised an objection to that at the signing. Furthermore, the transcripts seem to show that even up to the summer of 2007 Mr. White did not know that he could sign as president of 21 Oceans Corporation Limited until apparently informed by John Padgett, their marine attorney. In these circumstances there is no evidence on which the court can impute notice of fraud at the time of delivery of the gaming equipment when on the evidence it was not in the mind of its president at the time. In other words there is not sufficient evidence on which I can decide on a balance of probabilities that at the time of acquiring the gaming equipment in March 2006, prior to signing the agreements, that 21 Oceans Corporation Limited was not a bone fide purchaser without notice of the fraud. While I am satisfied that the transaction is capable of being a tort that would come within section 277(1)(d) of the MSA as explained in the Viking Explorer (supra), I am unable based on the current evidence to find conversion on the part of the owners of the Vessel.

21. Applying these conclusions and the foregoing principles to the facts of each claim the priorities are set forth below.

22. Pursuant to section 281 of the Act the Admiralty Marshal's costs ranks first. According to the affidavit of Benjamin Ferguson, the Deputy Admiralty Marshal, filed 11 June 2008 those costs and expenses total \$948,754.65. However this must be taxed pursuant to Order 67 rule 23(4) if not agreed by all interested parties who also have a right to be heard on the taxation. The Admiralty Marshal filed a notice of taxation on 5 June 2008. The taxed amount is to be paid out to the Admiralty Marshal.

23. In accordance with the Lyons Order the plaintiffs' attorneys costs are to be paid also. Such costs are normally granted up to and including the arrest (The Rema (1921) 8 Ll.L Rep 369)) but exceptionally they are hereby granted up to the date of complying with the Lyons Order, namely the date the account was opened and the deposit made in the joint names of the Admiralty Marshal and Arnold Forbes & Co. These fees are to be taxed if not agreed by the parties interested in the fund.

24. The claims secured by maritime liens are ranked below in the order in which they are to be paid out:

- (1) The Admiralty Marshals costs and expenses: claimed \$948,754.65 (under section 281).
- (2) Plaintiffs' attorneys fees: claimed \$207,300.00 (under section 281 and Lyons, J.'s Order)
- (3) The plaintiffs' pre-arrest wages with interest thereon at 6% per annum from the date the wages became payable: claimed \$188,098.71 (under section 277(1)(a))

25. By agreement of all parties no payment out would be made pending the appeal by Casino Slots LLC from the court's ruling made herein on the 12 September, 2008 which upheld the validity of the sale of the Vessel (together with its appurtenances) by the Admiralty Marshal to Catina SA.

26. However, taxed amounts certified for payment to the Admiralty Marshal and the attorneys for the plaintiffs may be paid out since the Admiralty Marshal has received the usually written undertaking from counsel for the plaintiff giving an indemnity in respect of those costs.

27. No further persons may intervene or file caveats.

K. Neville Adderley
Justice

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