Canadian Imperial Bank of Commerce v. Le Chêne No. 1 (The), 2003 FC 873, [2004] 1 FCR 120

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T-194-97

2003 FC 873

Canadian Imperial Bank of Commerce (*Plaintiff*)

v.

The Owners and all other Interested Parties in the Ships *Le Chene No. 1*, *L'Orme No. 1*, *Le Saule No. 1* and **the *W. M. Vacy Ash*** (*Defendants*)

Indexed as: Canadian Imperial Bank of Commerce v. Le Chêne No. 1 (The) (F.C.)

Federal Court, Snider J.--Toronto, June 2; Ottawa, July 14, 2003.

Maritime Law -- Liens and Mortgages -- Employee claiming unpaid wages for service on defendant ships -- Amounts allegedly secured by maritime lien against proceeds of sale of ships -- Could not claim annual bonuses but entitled to damages for wrongful dismissal -- Scope of admiralty jurisdiction -- Evolution of interpretation of "wages" -- Maritime lien arising in respect of damages for wrongful dismissal -- Key factor in determining whether maritime lien arises service to ship -- Link between service, defendant ships established -- Lien attached to ship employee would have been working on, but for wrongful dismissal -- Damages for wrongful dismissal to be paid out to employee in priority to claim of CIBC.

This was a motion to set aside a decision of Prothonotary Lafrenière with respect to bonus payments and a maritime lien claimed by the applicant, Donald MacKenzie. The latter is a chief engineer who served for many years on ships owned and operated by Socanav Inc., a large tanker company in Montréal. He began his employment with Socanav on July 1, 1985. Of the 12 years that passed from that date, the applicant spent eight years as a member of the crew of the defendant ships. At the time of his dismissal, he was serving on the ship *Le Chêne No. 1*. Due to its financial difficulties, Socanav entered into a short-term agreement with a numbered company to operate the defendant ships and to pay all costs relating to their maintenance. The agreement expired in early January 1997 and the applicant's employment was terminated shortly thereafter. Within a few weeks, the Quebec Superior Court in Bankruptcy declared Socanav bankrupt, retroactively to the date of filing of its notice of intention to make a proposal to creditors (September 20, 1996). Following the sale of the defendant ships, the proceeds, in the amount of $2,700,000 were paid into Court pending satisfaction of third party claims. The applicant claimed unpaid wages for his service which, according to him, are secured by a maritime lien against the proceeds of sale of the defendant ships. His claim competed with that of the plaintiff in the main action, the Canadian Imperial Bank of Commerce (CIBC), who claimed priority based on its mortgages on the defendant ships. The Prothonotary found that the applicant was not entitled to annual bonuses, that he could claim damages for wrongful dismissal and that the amounts claimed did not give rise to a maritime lien.

Held, the motion should be allowed with respect to the maritime lien for the applicant's claim to damages.

The decision of a prothonotary is to be accorded significant deference. Unless it was based upon a wrong principle or a misapprehension of the facts, the decision of Prothonotary Lafrenière in respect of the applicant's entitlement to bonus payments should not be disturbed. However, the issues related to damages for wrongful dismissal and maritime lien, relying for a large part on the correct interpretation of applicable law, should be reviewed *de novo*. As to the Prothonotary's conclusion on the issue of annual bonuses, the applicant was unable to identify any specific error, other than referring to the same evidence considered by the Prothonotary. Therefore, such decision should not be disturbed. Likewise, the Prothonotary was right in concluding that the applicant was entitled to damages for wrongful dismissal since his employment relationship was terminated as a result of the act of the employer, without cause and without notice.

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The question of whether the amounts claimed give rise to a maritime lien should be considered in the context of the Admiralty jurisdiction. The scope of Admiralty jurisdiction in respect of the rights of seamen evolved to include such amounts to ensure the fairest treatment possible for those persons who work on board ships. Historically, only wages directly earned on board the ship in question were protected. However, the interpretation of "wages" broadened to meet the changing nature of employment generally and seamen's rights in particular. Thus, the concept of "wages" includes damages for wrongful dismissal, where such damages would arise on the facts. Canadian law appears to have accepted that a maritime lien arises in respect of damages for wrongful dismissal. When read with subsections 22(1), 43(2) and 43(3) of the *Federal Courts Act*, paragraph 22(2)(*o*) of said Act gives rise to a statutory lien for "any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her

employment". Damages for wrongful dismissal would generally be included as "other remuneration or benefits". A maritime lien can arise out of a claim for damages for wrongful dismissal because those damages are part of wages earned on board a vessel. The key factor in determining whether a maritime lien arises is the service to the ship. The lien is not dependent on who hired the seaman and arises independently of the contract. If in the relevant period the claimant was rendering a service to the ship as a member of the crew, he is entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract. The right to a maritime lien is not contingent on the nature of the seaman's contractual arrangements. The applicant's service was referable to one or more of the defendant ships as a member of the crew. The applicant was retained to render service as a crew member on Socanav's ships and, at the time of his dismissal, he was a member of the crew of one of the defendant ships. These facts established a link between the service of the applicant and the defendant ships. The applicant was entitled to a reasonable notice period when he was dismissed. A maritime lien arose whether the applicant actually worked during the notice period or whether he was given salary in lieu of that notice upon dismissal. In general, the lien would attach to the ship that the applicant would have been working on, but for the wrongful dismissal. In this case, that would be *Le Chêne No. 1* and the lien should attach to that particular vessel. As to the quantum of the damages, the parties have agreed that, should a claim for wrongful dismissal arise on the facts, eight months' wages in lieu of notice would be appropriate. This amount should be paid out to the applicant in priority to the claim of CIBC.

statutes and regulations judicially

considered

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 (as am. by S.C. 1992, c. 27, s. 2).

Federal Courts Act, R.S.C., 1985, c. F-7 (as am. by S.C. 2002, c. 8, s. 14), ss. 22(1) (as am. *idem*, s. 31), (2)(*o*) (as am. *idem*), 43(2) (as am. *idem*, s. 40), (3) (as am. *idem*).

cases judicially considered

applied:

Halcyon Skies, The, [1976] 1 Lloyd's Rep. 461 (Q.B.D.); *Llido v. Lowell Thomas Explorer (The)*, [1980] 1 F.C. 339 (T.D.); *Ever Success, The*, [1999] 1 Lloyd's Rep. 824 (Q.B.).

distinguished:

Tacoma City, The, [1991] 1 Lloyd's Rep. 330 (C.A.).

referred to:

Demetries Karamanlis v. Norsland (The), [1971] F.C. 487 (T.D.); *Canada v. Aqua-Gem Investments Ltd.*, 1993 CanLII 2939 (FCA), [1993] 2 F.C. 425; [1993] 1 C.T.C. 186; (1993), 93 DTC 5080; 149 N.R. 273 (C.A.); *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* 2000 CanLII 14954 (FC), (2000), 16 C.B.R. (4th) 188 (F.C.T.D.).

authors cited

Tetley, William. *Maritime Liens and Claims*, 2nd ed. Montréal: International Shipping Publications, 1998.

MOTION to set aside a decision of the Prothonotary (2003 FCT 292 (CanLII), (2003), 41 C.B.R. (4th) 13; 229 F.T.R. 181) finding that the applicant could not claim annual bonuses, that he was entitled to damages for wrongful dismissal and that the amounts claimed did not give rise to a maritime lien. Motion allowed with respect to the maritime lien for the applicant's claim for damages.

appearances:

Edouard Baudry for plaintiff.

Garri Benjamin Hendell for defendants.

solicitors of record:

Lavery, de Billy, Montréal, for plaintiff.

Borden Ladner Gervais LLP, Toronto, for defendants.

The following are the reasons for order and order rendered in English by

[1]Snider J.: Chief Engineer Donald MacKenzie served for many years on ships owned and operated by Socanav Inc. (Socanav). He claims that he is entitled to unpaid wages for his service and, further, that such amounts are secured by a maritime lien against the proceeds of sale of *Le Chêne No. 1*, *L'Orme No. 1* and *Le Saule No. 1* (the defendant ships). Mr. MacKenzie's claim competes with that of the plaintiff, the Canadian Imperial Bank of Commerce (CIBC) who claims priority based on its mortgages on the defendant ships.

[2]At the time the motion was originally brought before Prothonotary Lafrenière by Mr. MacKenzie, the amount in dispute was $73,286.84, less employment benefits he received, plus interest and costs. That amount consists of two types of payments: an amount for unpaid bonuses and eight months of wages as damages for wrongful dismissal. Prothonotary Lafrenière's decision, dated March 10, 2003 and reported as *Canadian Imperial Bank of Commerce v. Le Chêne No. 1 (The)*, 2003 FCT 292 (CanLII), (2003), 41 C.B.R. (4th) 13 (F.C.T.D.), can be summarized as follows:

1. The claim by Mr. MacKenzie to $12,500 in bonuses was not supported by the evidence and was disallowed.

2. Mr. MacKenzie's claim to damages arising from the failure of his employer to provide adequate notice of termination was allowed.

3. Mr. MacKenzie was not entitled to a maritime lien in respect of his claim to damages for wrongful dismissal.

[3] MacKenzie, in this motion, asks this Court to reverse the decision with respect to the conclusions of Prothonotary on the bonus payments and the maritime lien.

[4]CIBC did not dispute that Mr. MacKenzie is entitled to vacation pay of $9,878.40 and to reimbursement of personal expenses totalling $320. Further, it agrees that these amounts are secured by maritime liens and take priority over its mortgages. Second, based on the decision of Pratte J. (as he then was) in *Demetries Karamanlis v. Norsland* (*The*), [1971] F.C. 487 (T.D.), CIBC acknowledges that this Court has jurisdiction to award damages for wrongful dismissal. It concedes as well, for the purpose of this motion, that a reasonable notice period would have been eight months. CIBC disagrees, however, that Mr. MacKenzie was wrongfully dismissed, or that he is entitled to recover annual bonuses. Moreover, CIBC maintains that even if the claims are established to be valid, they are not secured by a maritime lien, and consequently, do not rank ahead of CIBC's security.

Issues

[5]The issues before Prothonotary Lafrenière and before me are:

1. Is Mr. MacKenzie entitled to unpaid bonuses on the basis of an implied term of his employment by Socanav?

2. Given that Socanav was declared bankrupt, is Mr. MacKenzie entitled to damages for wrongful dismissal as a result of his eight years of service on the defendant ships?

3. If Mr. MacKenzie is entitled to either or both of the foregoing, do these amounts give rise to a maritime lien when his employment contract employed him to serve "on one of Société Sofati/Socanav ships" rather than on a specifically named ship?

Background

[6]The defendant ships were owned by Socanav, a large tanker company in Montréal. Mr. MacKenzie began his employment with Socanav on July 1, 1985. The one-page letter agreement, dated June 4, 1985 between Société Sofati/Socanav and Mr. MacKenzie stated that "as of July 1, 1985 we hereby offer you a position as Chief Engineer on one of Société Sofati/Socanav's ships." This contract also set out Mr. MacKenzie's daily wages (payable 365 days per year), his work rotation and his fringe benefits. Of the 12 years that passed from July 1, 1985, Mr. MacKenzie spent 2894 days or eight years as a member of the crew of *Le Chêne No. 1*, *L'Orme No. 1* and *Le Saule No. 1*. At the time he was dismissed, he was serving on the ship *Le Chêne No. 1*.

[7]On September 20, 1996, Socanav filed a notice of intention to make a proposal to creditors pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [as am. by S.C. 1992, c. 27, s. 2]. The Quebec Superior Court in Bankruptcy (the Bankruptcy Court) granted Socanav's petition to appoint an interim receiver, with the power to sell certain of its assets and to complete the sale to another company. The sale fell through, however, after one of Socanav's other vessels was seized by unpaid suppliers at a port in France on October 21, 1996.

[8]Due to its continued financial difficulties, Socanav entered into a short-term agreement with a numbered company on November 21, 1996 to operate the defendant ships and to pay all costs relating to their maintenance. The agreement expired in early January 1997 and Mr. MacKenzie's employment was terminated shortly thereafter. Within a few weeks, the Bankruptcy Court declared Socanav bankrupt, retroactively to the date of filing of its notice.

[9]The defendant ships, *Le Chêne No. 1*, *L'Orme No. 1* and *Le Saule No. 1*, were arrested by their mortgagee, CIBC, and ordered to be sold by this Court on March 10, 1997. On April 7, 1997, following the sale of the vessels, the proceeds, in the amount of $2,700,000 were paid into Court pending satisfaction or disposition of third party claims. All of the claims by other third parties have since been resolved, and a number of payments have been made. Mr. MacKenzie is the sole remaining claimant against the balance of the funds standing to the credit of this action in the amount of $120,000, plus accrued interest. The monies have been held back from CIBC pending a determination of the quantum of Mr. MacKenzie's claim and its priority in relation to that of CIBC. In light of the substantial shortfall in the Socanav liquidation, it is critical to Mr. MacKenzie that his claim be protected by a maritime wages lien.

Analysis

[10]For the reasons that follow, I am of the view that the analysis and conclusions of Prothonotary Lafrenière were correct with respect to Mr. MacKenzie's entitlement to bonus payments and damages for failure to give notice of termination. However, I conclude that Mr. MacKenzie is entitled to a maritime lien for his claim to damages.

What is the appropriate standard of review?

[11]CIBC submits that since the Prothonotary's rulings dealt with issues of law, those ruling are to be reviewed *de novo* by this Court. Mr. MacKenzie does not expressly disagree, although he argues that the Prothonotary's decision with respect to the bonus payments was based on a misapprehension of the facts.

[12]The decision of a prothonotary of this Court is to be accorded significant deference. The conclusion of Prothonotary Lafrenière in respect of Mr. MacKenzie's entitlement to bonus payments was reached on the basis of the evidence before him. Unless it was based upon a wrong principle or upon a misapprehension of the facts, his decision should not be disturbed (*Canada v. Aqua-Gem Investments Ltd.*, 1993 CanLII 2939 (FCA), [1993] 2 F.C. 425 (C.A.)). However, the issues related to damages for wrongful dismissal and maritime lien, relying for a large part on the correct interpretation of applicable law, should be reviewed *de novo*.

Is Mr. MacKenzie entitled to annual bonuses?

[13]According to the affidavit evidence of Mr. MacKenzie, bonuses of up to $5,000 were paid annually to employees from 1986 to 1991. Mr. MacKenzie therefore claims $12,500, representing the average annual bonuses that he claims should have been paid to him over the last five years of the company's operations. The Prothonotary concluded, at paragraph 9, that this claim was not supported by the evidence as follows:

. . . the evidence falls short of establishing a firm commitment on the part of the employer to reinstate annual bonuses. The fact that the employees did not grieve the employer's failure to pay bonuses over the years suggests that they recognized that such payments were entirely discretionary. Since it has not been established that MacKenzie was entitled to bonuses under his contract of employment, or otherwise, (see *Llido v. The "Lowell Thomas Explorer"*, [1980] 1 F.C. 339), I conclude that this portion of his claim should not be allowed.

[14]Before me, Mr. MacKenzie argues that this decision was based on a misapprehension of the facts. However, other than referring to the same evidence clearly considered by the Prothonotary, he was unable to identify any specific error. Rather, Mr. MacKenzie would have me weigh the evidence differently. I decline to do so. Accordingly, I am not prepared to overturn Prothonotary Lafrenière's conclusion on this issue.

Is Mr. MacKenzie entitled to damages for wrongful dismissal?

[15]Having considered the submissions of parties, I am persuaded that Mr. MacKenzie is entitled to damages for wrongful dismissal. Having heard the submissions of parties, I find that I concur with and adopt the following reasoning and conclusion of Prothonotary Lafrenière, at paragraphs 10 and 11:

MacKenzie claims that it was an implied term of his employment that reasonable notice or pay in lieu would be given in the event of dismissal. There is no dispute that Socanav's assignment in bankruptcy resulted in the termination of MacKenzie's employment. MacKenzie's claim for damages arises from the failure by his employer to provide adequate notice of termination. CIBC contends that Socanav cannot be faulted for failing to give notice of termination to its employees, since public disclosure of its financial difficulties would only have precipitated its demise. It submits that Socanav acted reasonably in its attempts to stave off bankruptcy and to continue its business, and that MacKenzie was therefore not dismissed voluntarily, but rather, that his employment was terminated by operation of law. I disagree.

At common law, the ability of a terminated employee to seek damages for wrongful dismissal from a bankrupt employer is directly related to the manner in which the employer was assigned in bankruptcy. If the assignment occurred on the petition of a creditor, the employee's right to damages may not exist. However, where the assignment is made voluntarily, in the sense that it was the employer's choice to trigger the bankruptcy, the employer effectively terminates the employment: *Re Kemp Products Ltd*. (1978), 27 C.B.R. (N.S.) 1; *Re Penningtons' Stores Ltd.* 1996 CanLII 8266 (ON SC), (1996), 21 C.C.E.L. (2d) 318; and *In Re Bryant, Isard and Co*. (1922), 3 C.B.R. 352. Based on the evidence before me, I conclude that MacKenzie's employment relationship was terminated as a result of the act of the employer. Since termination was without cause and without notice, MacKenzie is entitled to damages for wrongful dismissal.

Do the amounts claimed give rise to a maritime lien?

[16]As noted earlier, Prothonotary Lafrenière concluded at paragraph 18 that:

. . . although MacKenzie worked 8 out his 12 years with Socanav crewing on the Defendant ships, I am unable to conclude that his claim for severance pay or damages [is] referable to the services he provided on the Defendant ships. . . . I conclude that the claimed wages in lieu of notice or damages for wrongful dismissal give no lien upon the Defendant ships, save and except for the vacation pay and personal expenses that were conceded by CIBC.

[17] With respect, I am unable to agree with this conclusion. As this is an issue to be reviewed *de novo*, there is no need to examine his analysis for specific errors. Rather, I have approached this analysis afresh and reached a different conclusion.

(i) Scope of Admiralty jurisdiction

[18]Since the 1880s, claims for damages for wrongful dismissal have been recognized as claims over which Admiralty courts have had jurisdiction because they were seen as part of "wages". The scope of Admiralty jurisdiction in respect of the rights of seamen evolved to include such amounts to ensure the fairest treatment possible for those persons who work on board ships. Historically, only wages directly earned on board the ship in question were protected. However, the interpretation of "wages" broadened to meet the changing nature of employment generally and seamen's rights in particular. This process was described by Brandon J. in *Halcyon Skies, The*, [1976] 1 Lloyd's Rep. 461 (Q.B.D.), at page 464 where he stated:

Although . . . the Admiralty jurisdiction over claims for wages was limited to wages earned on board the ship, this concept was very broadly interpreted. In particular, the jurisdiction was regularly exercised, both before and after 1861, not only in respect of claims in debt for unpaid wages in the strict sense, but also in respect of claims in damages for wrongful dismissal, including claims for wages lost and for the cost of repatriation (viaticum). [Emphasis added.]

[19]Thus, the concept of "wages" includes damages for wrongful dismissal, where such damages would arise on the facts.

(ii) Maritime lien

[20]In *The Halcyon Skies*, Brandon J. also considered the extent of maritime liens as related to wages and, in particular, the types of payments to crew members that would give rise to such a lien. Although the issue before the Court in *The Halcyon Skies, supra*, was whether a maritime lien attached to pension contributions owed by the ship's owners, the following reasoning of Brandon J. at page 470, is equally applicable to damages for wrongful dismissal.

As I said earlier, the requirement that wages, in order to be recoverable in Admiralty, should have been earned on board the ship existed, in theory at least, under the law as administered by the High Court of Admiralty before 1861. In practice, however, such limitation was never interpreted strictly and did not prevent that Court, as was recognized in *The British Trade* at pp. 108 to 110, from exercising jurisdiction, under the head of wages, over claims for wrongful dismissal arising out of ordinary mariner's contracts, or from according to seamen the same maritime lien in respect of such claims as they had in respect of claims for wages in the strict sense. In these circumstances it seems to me reasonable to infer that when the legislature, by s. 10 of the 1861 Act, enlarged the existing jurisdiction over claims for wages due under ordinary mariners' contracts so as to cover similar claims due under special contracts, it intended, despite the use of the hallowed phrase "earned . . . . on board the ship" that the enlarged jurisdiction should, so far as concerns the kinds of claims covered, be co-extensive with the existing jurisdiction.

[21]Canadian law also appears to have accepted that a lien arises in respect of damages for wrongful dismissal. In *Llido v. Lowell Thomas Explorer (The)*, [1980] 1 F.C. 339 (T.D.), Marceau J. dealt with a marine engineer's claim for a month's salary allegedly promised near the end of his employment. In deciding that this particular amount was not secured by a maritime lien, Marceau J. stated at pages 352-353:

A maritime lien attaches to a vessel for salaries or wages *earned on board* [underlining in original] by the master and the crew member. If the additional pay that is the subject matter

of the claim here had been a condition of employment of Captain Holland, I think it would have been part of his wages earned on board. If it had been compensation for wrongful dismissal, a case could have been made to have it included in the wages earned on board. [Emphasis added.]

[22]This analysis is consistent with the *Federal Courts Act*, R.S.C., 1985, c. F-7 [as am. by S.C. 2002, c. 8, s. 14]. When read with subsections 22(1) [as am. *idem*, s. 31], 43(2) [as am. *idem*, s. 40] and 43(3) [as am. *idem*], paragraph 22(2)(*o*) [as am. *idem*, s. 31] gives rise to a statutory lien for "any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment". In my view, damages for wrongful dismissal would generally be included as "other remuneration or benefits".

[23] As a result, I am satisfied that a maritime lien can arise out of a claim for damages for wrongful dismissal because those damages are part of wages earned on board a vessel. The question then becomes whether a maritime lien arises on the facts of this case.

(iii) Application to Mr. MacKenzie

[24]Mr. MacKenzie was employed as a Chief Engineer on one of Société Sofati/Soconav's ships. CIBC submits that the fact that his contract did not assign him to any particular ship is the determinative factor. Had Mr. MacKenzie served on one ship only, CIBC agrees that he would have been entitled to a maritime lien for his damages. However, under his contract, Mr. MacKenzie served on a number of vessels. His record of sea service shows significant movement among several ships. Thus, CIBC argues that there "is no link between any particular defendant vessel and any entitlement that Donald [MacKenzie] might have under the Company Service Agreement that could support a maritime lien."

[25]The respondent relies on *Tacoma City, The*, [1991] 1 Lloyd's Rep. 330 (C.A.) as authority for its position that the claim for wrongful dismissal, in this case, does not give rise to a maritime lien. In *The Tacoma City, supra*, the England and Wales Court of Appeal (Civil Division) addressed whether a lien attached to severance payments, as opposed to damages for wrongful dismissal, that arose out of a complex contractual arrangement between a company and affected seamen. As on the facts of this case, there was no particular vessel identified in the contract. In analyzing the nature of the severance payments owed to the seamen, all three judges took great pains to carefully analyze the nature of the severance payments under the contractual arrangements and to distinguish such payments from "wages". Illustrative of the reasoning of the Court are the comments of Lord Justice Dillon who described the severance payments at pages 347 and 348 as follows:

The severance pay is payable when the seaman becomes surplus to the requirements of the shipping company or group, ... the severance pay is to be calculated by reference to the whole of his service with the company or group in question . . . . Indeed it is not paid as remuneration for his services at all; it is paid as compensation for the loss of the expectation he would otherwise have had that because of his long service he would have been offered further employment by the company or group after the end of what was in the event his final voyage in his last ship for the company or group.

Such a payment is therefore not, in my judgment, "wages" even in the extended sense in which that word is used in the context of a maritime lien.

[26]The fundamental finding of the Court in *The Tacoma City, supra*, was, in my belief, not that argued before me by CIBC; rather, the Court dealt with the nature of a contractual entitlement to severance payments and concluded that such payments were not, on those facts, "wages". The case should not, in my view, be extended to a conclusion that wages earned under an umbrella contract cannot enjoy the benefit of a maritime lien. The conclusions in *The Tacoma City, supra*, should be limited to its unusual facts.

[27]However, an interesting secondary aspect of *The Tacoma City, supra*, was a claim by three of the seamen for wages in lieu of notice. The Court was not required to address whether a maritime lien attached to this claim since, on the facts, there was no entitlement to damages for wrongful dismissal. It is significant that the bank mortgagee did not dispute that a maritime lien could attach to damages for wrongful dismissal in this case provided the facts supported the claims to wages in lieu of notice.

[28]In the case before me, in contrast to that before the Court in *The Tacoma City, supra*, I am dealing, not with severance pay, but with a claim for an amount that would represent the wages that Mr. MacKenzie would have earned for his service as a member of the crew had his employment continued. This is directly assessed and quantified as wages referable to the ship on which he served and, as such, is the very type of payment for which a maritime lien should arise to protect Mr. MacKenzie and other seamen in his position.

[29]The key factor in determining whether a maritime lien arises is the service to the ship (W. Tetley, *Maritime Liens and Claims*, 2nd ed. (Montréal: International shipping Publications, 1998); The *Tacoma City, supra*). The lien is not dependent on who hired the seaman (*Maritime Liens and Claims, supra*) and arises independently of the contract (*The Tacoma City, supra*; *Ever Success The*, [1999] 1 Lloyd's Rep. 824 (Q.B.). The proper approach is to ask "whether in the relevant period the claimant was rendering a service to the ship as a member of the crew. If he was, he is entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract" (*The Ever Success, supra*, at page 824).

. . . whether in the relevant period the claimant was rendering a service to the ship as a member of the crew: if he was, he was entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract. . . .

[30]Was Mr. MacKenzie's service referable to one or more of the defendant ships as a member of the crew? In my view, it was. Contrary to the submissions of CIBC, the right to a maritime lien is not contingent on the nature of the seaman's contractual arrangements. The fact that the specific ships were not named in the contract is not, in my view, sufficient to deprive Mr. MacKenzie of the protection of a maritime lien in respect of amounts owed to him. Under the simple and clear terms of the letter agreement, Mr. MacKenzie was hired by Socanav to work as a Chief Engineer on one of Socanav's ships. In other words, he was retained to render service as a crew member on Socanav's ships. At the time of his dismissal, he was a member of the crew of one of the defendant ships, *Le Chêne No. 1*. In my view, these facts establish a link between the service of Mr. MacKenzie and the defendant ships. Mr. MacKenzie was entitled to a reasonable notice period when he was dismissed. If he had received this notice, he would have worked an additional period of time and earned wages for his work. A maritime lien arises whether Mr. MacKenzie actually worked during the notice period or whether he was given salary in lieu of that notice upon dismissal.

(iv) Attachment and Quantum

[31]In general, the maritime lien would attach to the ship that received the benefit upon which the claim is based (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* 2000 CanLII 14954 (FC), (2001), 16 C.B.R. (4th) 188 (F.C.T.D.)). Accordingly, the lien would attach to the ship that Mr. MacKenzie would have been working on, but for the wrongful dismissal. In this case, that would be *Le Chêne No.1*, the ship on which he was serving at the time of his dismissal. Although under his contract, he could have been reassigned to other ships, there was no evidence before me that he would not have continued as Chief Engineer aboard *Le Chêne No. 1*. Accordingly, I would attach the lien to that particular vessel.

[32]The quantum of the damages for wrongful dismissal would be calculated with reference to the contract between Mr. MacKenzie and Socanav. In this case, the parties have agreed that, should a claim for wrongful dismissal arise on the facts, eight months' wages in lieu of notice would be appropriate. I conclude that this amount should be paid out to Mr. MacKenzie in priority to the claim of CIBC.

ORDER

This court orders that:

1. The amount of $50,588 representing eight months' pay in lieu of notice for his dismissal, plus accrued interest, together with vacation pay of $9,878.40 and personal expenses of $320, plus accrued interest, shall be paid out to Donald MacKenzie in priority to the claim of CIBC.

2. Parties shall have 15 days from the date of this order to serve and file written submissions with respect to the costs of this motion and the motion below and 5 days thereafter to serve and file written submissions in reply.