

# Finansbanken ASA v. GTS Katie (The), 2002 FCT 74 (CanLII)

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**Date: 20020122**

**Docket: T-2009-00**

**Neutral citation: 2002 FCT 74**

**ADMIRALTY ACTION IN  
REM AGAINST THE VESSEL *GTS KATIE* AND IN PERSONAM AGAINST  
THIRD OCEAN MARINE NAVIGATION COMPANY L.L.C.**

**BETWEEN:**

**FINANSBANKEN ASA**

**a body politic and corporate of Oslo, Norway**

**Plaintiff**

**and**

**THE VESSEL *GTS KATIE*,**

**THE OWNERS AND ALL OTHERS**

**INTERESTED IN THE VESSEL *GTS KATIE*,**

**THIRD OCEAN MARINE NAVIGATION**

**COMPANY L.L.C., a body politic and**

**corporate of Annapolis, Maryland, U.S.A.**

**REASONS FOR ORDER**

**RICHARD MORNEAU, PROTHONOTARY**

[1] The question here is whether Peter Hornick ("Hornick") held a lien for the alleged payment of crew wages ("crew wage lien") and could thus ask that his claim against the proceeds of sale of the ship *GTS Katie* be paid after the costs of the sheriff or in priority to the claims of the mortgagees, namely the plaintiff Finansbanken ASA ("the Bank") and Lloyd Werft Bremerhaven ("Lloyd").

[2] The essential facts supporting Hornick's claim may be summarized as follows.

[3] It appeared that on or about July 28, 2000 Peter Margan, president of the company owning the ship, Third Ocean Marine Navigation L.L.C. ("Third Ocean"), asked Hornick to let him have the sum of U.S.\$40,000 so that sum could in turn be used to pay the crew its wages, as among other problems Third Ocean was no longer able to pay its crew. In consideration for this payment and with the crew's full knowledge and participation, Hornick would be subrogated into the crew wage lien for an amount 25% greater, namely the sum of U.S.\$50,000.

[4] This agreement of July 28, 2000 between Hornick and Third Ocean could not be translated into payment of the crew until August 15, 2000 in Montréal, when the ship had been docked in that port since August 10, 2000. At all relevant times the ship was registered in St. Vincent and the Grenadines.

**Analysis**

[5] It seems to me that Hornick's claim is faced with two major problems here.

[6] The first and primary problem relating to Hornick's claim has to do with the quality and sufficiency of the evidence presented by Hornick in support of his claim.

[7] It must be noted that Hornick's claim was introduced by hearsay which itself referred to a series of other hearsays. Although it is true that in this summary proceeding hearsay evidence is not prohibited, such a presentation has a significant effect on the weight to be attached to the evidence.

[8] The evidence of Hornick's claim derives first from his counsel's affidavit. By his affidavit the latter referred the Court to what was supposed to be an affidavit of Hornick, which referred the Court to what was supposed to be an affidavit of the then master of the ship.

[9] In actual fact, these "affidavits" of Hornick and the master are nothing of the kind, since in Hornick's case it was simply an unsworn statement which referred not to an affidavit by the master, but simply to a letter from him. A receipt ("Receipt, Assignment and Subrogation Agreement") supposedly signed by the master followed this letter from the master, without the receipt also being properly attached to an affidavit. Amazingly, and in some manner not explained in the evidence, all these documents and the affidavit of Hornick's counsel were signed on January 15, 2001, the deadline for submitting evidence of the claim in the case at bar.

[10] The fact that the Bank proceeded to examine Hornick on his statement cannot completely anodize the situation in the latter's favour. Even if we must accept and recognize that the parties by implication dealt with Hornick's statement as an affidavit for purposes of the examination - since apparently nothing was said at the start of the examination about the presentation of Hornick's evidence - the fact remains that the master's letter and the receipt following it were not in any way properly related to Hornick's statement. Further, the master's letter and the receipt constitute hearsay with respect to that statement, and as mentioned before this was itself introduced by hearsay.

[11] I am therefore not prepared - and this would be sufficient as a ruling - to regard the master's letter or the receipt as serving to establish that the parties established that U.S. law governed the assignment or subrogation of the crew lien. Nevertheless, the crew's consent is essential evidence since a statement by Hornick or Third Ocean does not suffice to properly establish that the two real parties to the transaction clearly agreed that U.S. law was applicable.

[12] If there is no good evidence expressly establishing agreement by the relevant parties that U.S. law should apply, what law should one apply to the situation in fact?

[13] Although the agreement of late July 2000 was framed in U.S. dollars between two Americans, the fact remains that the payment to the crew - the truly relevant stage - took place in Canada when the ship was in Canadian territory, on August 15, 2000. In my opinion, these relating factors mean that Canadian law

should be applied here. It should be noted that neither the place where the ship is registered nor the crew's nationality appears to link the situation to U.S. law.

[14] Additionally, since the situation as presented by Hornick does not purport to be just a loan by him to Third Ocean, for which Third Ocean arbitrarily and unilaterally assigned the crew lien so as to obtain protection otherwise not available for the loan, Hornick's place of residence does not seem to me to be relevant.

[15] If Canadian law applies, it is established under that law, apart from the special provisions contained in ss. 196 and 203 of the *Shipping Act*, [R.S.C. 1985, c. S-9](#), as amended, that the crew wage lien cannot be assigned or subrogated unless the Court has first given its consent (see *Scott Steel Ltd. v. Ship Alarisa et al.* [1996 CanLII 4035 \(FC\)](#), (1996), 111 F.T.R. 81). No such consent was obtained here. Nonetheless, despite the problems encountered by the ship and its owner, it was not established that Hornick or Third Ocean was unable to apply to the Court between July 28 and August 15, 2000 to obtain the latter's authorization.

[16] Moreover, there is no basis here for taking the particular approach used by Rouleau J. in *Metaxas et al. v. Ship Galaxias et al.* (1998), 24 F.T.R. 243, since there is no necessity in the circumstances to protect a voluntary organization which paid the costs of repatriating a crew from sheer altruism. So far as altruism is concerned, it will be noted that here Hornick sought a premium of 25% of the amount paid to Third Ocean.

[17] It may thus be concluded that Hornick did not validly establish an assignment or subrogation in the crew's wages which can be set up against other interested creditors.

[18] Additionally, even if further consideration should be given to Hornick's statement, or to the master's letter or the receipt, in Canadian or even U.S. law, none of those documents had been created at the time of the transaction between Hornick and Third Ocean. Further, none of them satisfactorily establishes that the master was acting with the crew's authorization or even that the crew actually received the sums of money.

[19] On this particular point, in his affidavit even Margan did not indicate that he had paid over this money to the master or the crew.

[20] As regards the receipt specifically, the Court cannot additionally consider that this document constitutes a receipt as far as Hornick is concerned, created in the ordinary course of business. The receipt was not created at the time

of the alleged payment on August 15, 2000, but actually on the last day for submitting evidence of the claim, namely January 15, 2001. Strangely, this document bears the ship's seal although the master had ceased to act in that capacity since September 9, 2000.

[21] The Court therefore cannot concur in the conclusions of Donald C. Greenman, the U.S. law expert submitted by Hornick, on the sufficiency of the evidence in support of a valid assignment of subrogation.

[22] Consequently, for all the foregoing reasons Hornick cannot have his claim against the proceeds of sale of the ship *GTS Katie* paid after the sheriff's costs or in priority to the claims of the mortgage creditors, the Bank and Lloyd.

Richard Morneau

Prothonotary

Montréal, Quebec

January 22, 2002

Certified true translation

Suzanne M. Gauthier, C. Tr., LL.L

**Federal Court of Canada**

**Trial Division**

**Date: 20020122**

**Docket: T-2009-00**

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**Between:**

**FINANSBANKEN ASA**

**a body politic and corporate of Oslo, Norway**

**Plaintiff**

and

THE VESSEL *GTS KATIE*,

THE OWNERS AND ALL OTHERS

INTERESTED IN THE VESSEL *GTS KATIE*,

THIRD OCEAN MARINE NAVIGATION

COMPANY L.L.C., a body politic and

corporate of Annapolis, Maryland, U.S.A.

Defendants

**REASONS FOR ORDER**

**FEDERAL COURT OF CANADA**

**TRIAL DIVISION**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**FILE:**

T-2009-00

**STYLE OF CAUSE:**

ADMIRALTY ACTION *IN REM* AGAINST THE VESSEL *GTS KATIE* AND *IN PERSONA* AGAINST THIRD OCEAN MARINE NAVIGATION COMPANY L.L.C.

Between:

FINANSBANKEN ASA

a body politic and corporate of Oslo, Norway

Plaintiff

and

THE VESSEL *GTS KATIE*,

THE OWNERS AND ALL OTHERS INTERESTED  
IN THE VESSEL *GTS KATIE*, THIRD OCEAN MARINE NAVIGATION  
COMPANY L.L.C., a body politic and corporate of Annapolis, Maryland, U.S.A.

Defendants

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** December 19, 2001

**REASONS FOR ORDER BY: RICHARD MORNEAU, PROTHONOTARY**

**DATED:** January 22, 2002

**APPEARANCES:**

Mireille Tabib for the plaintiff

Trevor H. Bishop for Lloyd Werft  
Bremerhaven GMBH

Guy Vaillancourt for Clipper Inc. and EPG-  
MZ L.L.C./Peter Hornick

**SOLICITORS OF RECORD:**

Stikeman, Elliott for the plaintiff

Montréal, Quebec

Brisset Bishop for Lloyd Werft Bremerhaven  
GMBH

Montréal, Quebec

Guy Vaillancourt for Clipper Inc. and EPG-  
MZ L.L.C. and/or

Québec, Quebec Peter Hornick

Borden Ladner Gervais for Her Majesty the Queen in  
writ of Canada

Montréal, Quebec  
Authority

and the Montréal Port

Flynn, Rivard  
Supplies Inc.

for Calogeras & Master

Montréal, Quebec

Gowling Lafleur Henderson  
Inc. and SDV

for Andromeda Navigation

Montréal, Quebec

Logistics (Canada Inc.)

De Man, Pilote  
Inc. and The

for Hempel Coatings (USA)

Montréal, Quebec  
Company

State Ukrainian Crewing

Radnoff Pearl Slover Swedko Dwoskin  
S.A.

for Macoil International

Ottawa, Ontario

**Date: 20020122**

**Docket: T-2009-00**

Montréal, Quebec, January 22, 2002

**Before: RICHARD MORNEAU, PROTHONOTARY**

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**THIRD OCEAN MARINE NAVIGATION**  
**COMPANY L.L.C., a body politic and**  
**corporate of Annapolis, Maryland, U.S.A.**

**Defendants**

**ORDER**

Peter Hornick and/or EPG-MZ L.L.C. are not entitled to have their claim against the proceeds of sale of the ship *GTS Katie* paid immediately after the sheriff's costs or with priority over the claims of the mortgage creditors, namely the Bank and Lloyd. The claim by Peter Hornick and/or EPG-MZ L.L.C. must accordingly be dismissed, with costs.

On this last point, after hearing counsel for the parties, it appears to the Court that costs should be awarded to the Bank in accordance with column IV of the Tariff and to Lloyd in accordance with column III, as the latter's participation was more limited than that of the Bank.

Richard Morneau

Prothonotary

Certified true translation

Suzanne M. Gauthier, L.L.L. Trad. a.