All England Official Transcripts (1997-2008)

Cil and others v The Turiddu (owners) and another ("The Turiddu")

Admiralty - Arrest of ship - Crew - Crew claiming maritime lien in respect of unpaid wages - Allotted part of wages paid to third party - Whether crew entitled to maritime lien in respect of allotted part of wages

(Transcript: Smith Bernal)

COURT OF APPEAL (CIVIL DIVISION)

NOURSE, SCHIEMANN, BROOKE LJJ

29 JUNE 1999

29 JUNE 1999

B Eder QC for the Appellant Intervener

T Brenton QC and T Macey-Dare for the Respondent Plaintiffs

Watson Farley & Williams; Clifford Chance

BROOKE LJ

This is an appeal by the First National Bank of Maryland, as intervener, from the judgment of Rix J dated 23 April 1998 when he made a declaration that the first to thirty-third plaintiffs, who were the members or former members of the crew of the ship "Turiddu", were entitled to a maritime lien over the proceeds of sale of the ship in priority to the intervener's mortgage. Judgment was entered for these plaintiffs in respect of wages due to them from the defendants, who were the owners of the ship, and directions were made in relation to sums which had been paid into court by agreement out of the proceeds of sale of the ship.

The owners of the vessel were the Malta-based Pius Shipping Company ('Pius'). They wished to recruit a Cuban crew. There are two state-owned Cuban agencies, both based in Havana, which come into the picture on a transaction of this kind. The owners will approach the Guincho Crewing Agency ('Guincho') with their request for a crew, and Guincho will in turn approach an employment company called Agemarca, which provides Cuban manpower for foreign business. In turn, Agemarca will have a number of potential crew members in its books, although it has no responsibility for paying them anything except in the context of the arrangements which I will describe.

In the present case Agemarca supplied the crew pursuant to the terms of a Contract of Hire with Guincho. Guincho supplied them to Pius pursuant to the terms of a Crewing Contract, and Pius entered into individual Embarkation Contracts with each member of the crew it recruited. A fourth set of contractual relationships existed between Agemarca and those on their books, but the evidence showed that these arrangements were largely oral.

There is a sample Embarkation Contract with the court's papers. It is in familiar terms, defining the length of service at sea and the monthly remuneration (together with overtime rates) for the crew member, and also including provisions covering such matters as working hours, breaks, holidays and days off; subsistence; repatriation; sickness or accident; rescission; loss of baggage and personal documents; and applicable law (being the labour legislation of the Republic of Cuba).

The length of service at sea was to be nine months (which Pius was entitled to lengthen or shorten by three months for operational reasons). Clause 4 provided that:

> "4.1 [Pius] will pay US$1,900 a month for the crew member's services.
>
> 4.2 The crew member will receive from the Captain on board the vessel US$570 a month.
>
> 4.3 [Pius] will, with the crew member's agreement, pay US$1,330 a month to [Guincho]."

The Embarkation Contract defines as "the Employer" the Employing Company from whose personnel the Crew Member is drawn, and Clause 3.3 provides:

> "The salary in national currency, holidays and Social Security, will be determined by the Employer to which the crew member belongs, and paid to him accordingly."

The allotment of a seaman's wages in the manner described by Clause 4 of the Embarkation Contract is a very familiar concept. Under English law, ss 36 and 37 of the Merchant Shipping Act 1995 make express provision for allotment notes, and give a person to whom any part of a seaman's wages has been allotted:

> ". . . the right to recover that part in his own name and for that purpose [he] shall have the same remedies as the seaman has for the recovery of his wages."

Similarly, s.20 of the Supreme Court Act 1981, on which the modern Admiralty jurisdiction of the High Court is founded, gives it jurisdiction by sub-sections (1)(a) and (2)(o) to hear and determine:

> "any claim by . . . a member of the crew of a ship for wages (including any sum allotted out of wages . . .)."

The first to fifteenth plaintiffs in this action are Cuban nationals who were engaged in July or August 1996 by Pius pursuant to Embarkation Contracts made in the terms I have described to serve as officers and crew on board the "Turiddu". They were serving in that capacity when the vessel was arrested at New Holland, near Grimsby, in early May 1997. The sixteenth to thirty-third plaintiffs are Cuban nationals who had served on the vessel on the same or similar terms between October 1994 and January 1997. Schedules 4 and 6 to the Amended Statement of Claim show that Pius started to default on payment of wages to the vessel's officers and crew as early as June 1995, and by the time the vessel was arrested the current crew members claimed to be entitled to arrears of wages in excess of US$150,000 and the former crew members entitled to arrears of US$60,400.

After the vessel's arrest the intervener bank claimed to be entitled to over $1,650,000, the arrest constituting an event of default under a loan agreement made in January 1997 which was secured by a mortgage of all the shares in the vessel. The bank did not dispute that the current crew members, who had to spend ten idle

weeks in Hull while the lawyers were arguing, were entitled to rely on a maritime lien in respect of the 30% of their wages which should have been paid to them on board the vessel pursuant to Clause 4.2 of their contracts, but it maintained that a lien did not extend to the Clause 4.3 payments or to the wages due to the former crew, and that in those circumstances its mortgage took priority. On 15 July the current crew were persuaded to accept the 30% element (which amounted to just over US$58,000) under protest and without prejudice to their claim for the full wages, in return for arrangements to be made for their immediate repatriation, which took place two days later.

On 27 June 1997, Clarke J, when giving judgment in favour of the intervener for over US$1,670,000, ordered the sale of the vessel and required the outstanding wages of the current crew to be agreed and paid, together with the expenses of their repatriation, by the Admiralty Marshal, as costs of the arrest. When the parties were unable to agree the amount of the wages to be attributed to the judge's order, they agreed that following the sale of the vessel (which took place on 24 September 1997) US$225,000 should be paid into court as security for the plaintiffs' claims pending the resolution of the dispute.

The bank based its contentions on the provisions of the Pius-Guincho contract and more particularly the Guincho-Agemarca contract. The first, which was governed by English law, made provision as to what was to happen to the 70% of the crew's wages which were to be paid each month by Pius to Guincho with the relevant crew member's agreement. The relevant provisions of this contract were as follows:

> "*Article No 5: Payment*
>
> 5.01[Pius] undertakes to pay monthly to [Guincho's] Bank account as per Side Letter attached to this Crewing Contract which cover:
>
> (a) 70% of Basic Wages
>
> 5.02 The only other cost not included in the lump sum which shall be for [Pius's] account are:
>
> (l) Agency Fees USD50 per month per crew member, which cover
>
> Scanning, recruitment
>
> Training
>
> . . .
>
> Union Fees
>
> Bank Fees
>
> Communication relative to crewing
>
> Insurance and Social Security in Cuba.
>
> *Article No 6: Cash Advance Method*
>
> 6.01 At [Guincho's] request [Pius] shall deliver to the crew cash advance money up to 30% of monthly wage in USD plus 2.5 days as leave pay plus [US$]120 fixed overtime . . . for no more than 80 hours, in accordance with Side Letter attached to this contract.

6.02 Cash advance money will be paid in USD.

. . .

6.04 Seafarers under this Contract have declared on Enlistment Contract their acceptance to transfer to [Guincho's] Bank Account 70% of his monthly wage (as per Side Letter attached to this contract).

Article No 7: Payment Method

7.01 Due Monthly Payment to [Guincho] should be made within 45 days of correspondent month by telegraphic transfer in the currency agreed.

If said payment is made from abroad, then it should be effected in British Pounds as follows:

Transfer to Banco Financiero Internacional, Havana, Cuba, in favour of:

Account Number: 402.01.2394

Ref: Guincho Crews."

The Side Letter contained a statement of the basic wages for each category of crew member, broken down in three columns as to 100%, 70% to be sent to [Guincho], and 30% respectively. It also included a few other details such as overtime rates.

The bank also placed reliance on art No 11 (General) which begins:

"11.01 It is understood that the crew are the employees of [Guincho] who agrees to place at the disposal of [Pius] for the duration of this Contract in order to ensure satisfactory operation of the vessel. So during the period of embarking contract the seafarer will be subject to owner's and flag's regulations and under owner-master's orders . . .

11.02 It is understood that [Pius] must be committed prior to sign-off the seafarer, to settled all wages and others earnings corresponding to the seafarer, according to (5.01)."

The bank also placed reliance on some of the provisions of the Agemarca-Guincho contract (in which Agemarca is described as "the Employer"):

"1. [Agemarca] offers a labour force qualified in the maritime area, for the execution of various tasks aboard vessels . . . owned or operated by foreign entities . . . resident in Cuba or abroad.

2. The crews or crew members that [Agemarca] undertakes and is liable to deliver for the provision of the services described in the foregoing clause, shall have the following requisites:

(a) To be bound to [Agemarca] for a period or indefinite contract."

The third clause, which provides for the arrangements between Agemarca and Guincho when the latter makes a request for qualified technical personnel, ends in these terms:

"The crewman shall be informed of his selection and approval by the Owner through [Guincho] and his entitlement to

> receive his salary shall commence once he arrives on board."

The contract continues, so far as is material:

> "5. [Guincho] undertakes to credit to [Agemarca] such monthly salary (MLC) as is earned and as [Guincho] receives from the Owners for the service of the crewman contracted to foreign-entities, wherever so approved, as set out as follows:
>
> (a) 70% of the salary for each crew member will be received by [Agemarca],
>
> (b) 30% of the salary shall be received by the crew member on board the vessel . . .
>
> . . .
>
> 8. [Agemarca] shall supply the labour force requested by [Guincho] on the basis of the tariff contracted by the latter with the Owners, which shall be duly advised to [Agemarca]. [Guincho] will supply [Agemarca] with the technical characteristics of the Vessel on which the crew member shall be enrolled, thus rendering [Agemarca] liable to establish the payment of salaries in national currency."

There followed arrangements by which Guincho was to be responsible for the cost of transporting the crew members to "the final destination" and for insuring the crew, and Agemarca was to be responsible for repatriation expenses for the crewman in three events - compassionate repatriation, indiscipline or gross professional incapacity, or upon the crew member's written request.

The arrangements as between Agemarca and the potential crew members were described to the judge by Mr Antonio Egued Garcia, Guincho's commercial manager. He said that Agemarca had 4,000 qualified officers and crew on its books, or "payroll". The crewing contracts made by Guincho with foreign shipowners inevitably provided that the crew's wages were payable in a hard currency such as dollars. When the "allotted" part of a crewman's wages was passed from the shipowner via Guincho to Agemarca, Agemarca would deduct the crewman's personal tax and other statutory contributions, which it would remit to the appropriate Cuban government agencies. It would then exchange the balance into Cuban pesos at the local official rate of exchange, which is $1 = 1 peso: the judge was told that there was also an international rate of exchange, which was more like $1 = 23 pesos.

The judge said that he would be prepared to infer, although the express evidence was not before him, that it is unlawful for a Cuban national in Cuba to hold foreign currency, that the only lawful currency in which he can be paid is Cuban pesos, and that he is not permitted to exchange any foreign currency he has earned abroad into local Cuban currency except at the local official rate of exchange.

After deduction of income tax and national insurance contributions and exchange into Cuban currency Agemarca will pay the balance of the wages either to the crew member's dependants as directed or to the crew member himself in Cuba, but only after it has received the hard currency from the shipowner via Guincho. If the shipowner fails to remit the outstanding balance of the agreed wages, as happens from time to time, Agemarca is under considerable pressure to continue to pay dependants on a voluntary basis, in order to avoid real hardship to them, but Mr Egued was unaware of any judgment of the Cuban courts to the effect that Agemarca is legally bound to pay the dependants in such circumstance. The only written contracts made between the crew members and employment companies such as Agemarca are the signing-on slips, by which the crew member may direct Agemarca to pay his Cuban remitted wages to his dependant.

There was evidence before the judge in the present case, in an affidavit sworn by the plaintiffs' solicitor in February 1998, that over the past year or more Agemarca had advanced monies to the families of those crewmen who had directed it to do so in their signing-on slips, even though it had not received the relevant part of the wages from Guincho, because of Pius's default. The plaintiff's solicitor was unable to say precisely how much had been advanced and to whom, but he did assert that Agemarca had made these payments voluntarily, in order to prevent those families from suffering serious financial hardship.

The judge accepted the whole of Mr Egued's evidence, which included his evidence that all that Clause 2 of the Guincho-Agemarca contract signified was that the relevant personnel could not be free-lance: they had to "belong to" the employment company, to be on its payroll.

Agemarca does not deduct any commission from the payment it receives from Guincho. Nor does it make any profit from supplying crews to foreign ships. It engages on its activity solely in order to earn much-needed hard currency. Mr Egued explained to the judge that this Cuban scheme had been inspired by the study of similar state-sponsored schemes which had been running successfully for several years in the Philippines, Honduras and, earlier, Greece.

The issue at the centre of this case is whether the plaintiff crew members are entitled to the benefit of a maritime lien in relation to the allotted part of their wages. The entitlement of a seaman to a lien over the vessel on which he has served in respect of his unpaid wages goes back over 400 years in our admiralty law. DR Thomas, in his authoritative text-book on *Maritime Liens* (Vol 14 in the British Shipping Law series, 1980) asserts at p.175 that the first trace of its existence arose in *Johnson v The Black Eagle* (1597: see Marsden, Select Pleas in the Admiralty, Vol II, 1xxiv), where a decree for wages, necessaries, debts and bottomry was pronounced against a ship. "Thereafter", Thomas writes:

> "the lien emerged as an unequivocal privilege enuring to the benefit of the seamen, and by the beginning of the nineteenth century its existence was assumed without dispute."

In *The Sidney Cove* (1815) 2 Dods 11 Sir William Scott said at p.13:

> ". . . that the claim of a mariner for wages stood on very different grounds from those of a bondholder, and the hypothecation of the ship could not divest his interests, nor even a sale of it, except as was made under the authority of a competent court. That a seaman's claim for his wages was sacred as long as a single plank of the ship remained."

The same judge, now Lord Stowell, explained the reason why the Court of Admiralty was so predisposed to protect the mariner in his judgment in *The Juliana* (1822) 2 Dods 503 at p.509:

> "The common mariner is easy and careless, illiterate and unthinking; he had no such resources, in his own intelligence and experience in habits of business, as can enable him to take accurate measures of postponed payments, with proper estimates of profit and loss . . .
>
> The owner contracts with a certainty of receiving his freight at all hazards . . . But the mariner goes to sea upon the single security of the freight. His labours and perils have nothing else to trust to. Freight is the mother, and the only mother of wage; if that goes, everything goes. He has no stepfather, if I may say so, in the character of insurer, to supply the loss."

Lord Stowell returned to the same theme three years later, in *The Minerva* (1825) 1 Hagg 347, a case involving a crew which had taken a cargo of convicts to New South Wales and had then been subjected by the ship's captain to an extended voyage round the world looking for cargo (spared only a landing in New Zealand "where not a man ventures to land, for fear of being made a meal's meat of by the cannibal

inhabitants, as they are represented to be"). At p.355 Lord Stowell described mariners as:

> "a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves."

At p.357 he mentioned:

> "the known principle of maritime law, which considers freight as the mother of all wages; and that, wherever the owner earns his freight, he thereby gives the mariner an undeniable title to his wages."

Throughout the nineteenth century the same concept recurs again and again. Thus:

> "(1) The man by his contract has a lien on the vessel: he may proceed *in rem* . . . The court has every disposition to help this class of man. (*The Lady Durham* (1835) 3 Hagg 196, per Sir John Nicholl at p.202).
>
> (2) Where a man purchases a ship he takes it with all the liabilities that attach to it in law . . . If the ship be sold, she is always subject to any demand for seamen's wages for any period of time during which the law allows a suit to be brought" (*The Nymph* (1856) Swab 86, per Dr Lushington at p.87).

In *The Castlegate* [1893] AC 38, a case decided after the introduction of the statutory definition of the jurisdiction of the Admiralty Court in 1861, Lord Watson said at p.52:

> "In the case of lien for wages of master and crew the Legislature has recognised the rule that it attaches independently of any personal obligation of the owner, the sole condition required being that such wages shall have earned on board the ship."

Lord Field added at p.55 that "service done" is of the very essence of maritime lien.

In *The Ripon City* [1897] P 226, in a judgment approved by this court in *United Africa Co Ltd v Owners of MV Tolten ("The Tolten")* [1946] P 135, [1946] 2 All ER 372, Gorell-Barnes J reviewed all the relevant authorities and said at pp 241-2:

> "The definition of a maritime lien, as recognised by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process . . .
>
> It is a right acquired by one over a thing belonging to another - a *jus in re aliena*. It is, so to speak, a substraction from the absolute property of the owner in the thing."

The main issue to be decided in the present case is whether a crew member somehow or other loses his lien for unpaid wages to the extent that he directs the shipowner to pay an allotted share of his wages through two agencies to some identified person or persons at addresses in his home country (where the ultimate recipient may be the crew member himself). It is difficult as a matter of principle to understand on the facts of the present case why this should be so, since the payments never lose their characterisation as wages, and the two agencies do not deduct any commission for themselves as they send the money on its way. As I have observed, Guincho is paid its commission as a separate monthly payment, and Agemarca covers its costs during the process (required by Cuban law) of converting the wages from US dollars to Cuban pesos at the local official rate of exchange. The only deductions that are made from the allotted part of the wages before they reach their final destination are deductions for tax, social security and so on which are no doubt

required by Cuban revenue and labour legislation.

The judge held that on the proper interpretation of this contractual scheme the ultimate recipient of the allotted wages was to be paid as the crew member's nominee. In doing so he applied the distinction identified by Lord Reid in his speech in *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, at p.71 of the former report:

> "For clarity I think it best to begin by considering a simple case where, in consideration of a sale by A to B, B agrees to pay the price of £1,000 to a third party X. Then the first question appears to me to be whether the parties intended that X should receive the money simply as A's nominee, so that he would hold the money for behoof of A and be accountable to him for it, or whether the parties intended that X should receive the money for his own behoof and be entitled to keep it. That appears to me to be a question of construction of the agreement read in light of all the circumstances which were known to the parties."

The judge expressed his reasons in these terms:

> "There was no reason to suppose that the 70% balance of the wages was to be paid to Guincho for its own account (or Agemarca's), rather than for the account of the crew. The shipowner was prepared to pay 100% of the wages stipulated in each contract, and they were agreed and payable as wages. The 70% payable to Guincho was so payable 'with the crew member's agreement'. It was payable, like the other 30%, 'for the crew member's services' (clause 4.1 of the Embarkation Contract). It was not the price of anything other than those services. That was confirmed by article 5.01 of the Crewing Contract which said that Pius was to pay to Guincho's bank account each month '70% of Basic WAGES'. Guincho was separately rewarded for its agency services by the payment of its commission of $50 per crew member per month (article 5.02(L), which enumerated the agency services this payment compensated, including recruitment and training and much else)."

The judge went on to say that when clause 3.3 of the Embarkation Contract spoke of the "salary in national currency" (which was to be determined and paid by Agemarca), it was referring to an accounting process in the crew's own currency with which Pius was not concerned. Whether Agemarca dealt fairly or unfairly with the crew, the clear impression which the Embarkation Contract would have left on Pius was that the crew's "salary in national currency" would have been paid out of that portion of the agreed wages which it was directed to remit to Guincho's bank account.

The judge also found that this was what in fact happened. On Mr Egued's evidence, the content of the unwritten contract of agency or employment between Agemarca and each individual crew member would have had to have been consistent with his testimony that Agemarca owed each crew member nothing save to account to him out of proceeds received from his wages abroad in accordance with his tax and other such responsibilities (or statutory rights in the nature of holidays or social security) and in Cuban currency.

In the circumstances the judge held that as a matter of law the crew could claim the unpaid 70% balance of their stipulated wages in debt, and that they were therefore entitled to rely on a maritime lien in respect of these unpaid wages which ranked in priority to the bank's mortgage.

The bank has appealed against this part of the judgment on the basis that the judge ought to have found that on the true construction of the Embarkation Contract, and having regard to the Crewing Contract and all the circumstances, the allotted part of the crew's wages was payable to Guincho for its own account and that the crew were therefore not entitled to a judgment in debt for these sums.

Mr Eder QC argued that the crew's rights in this case were barred by the old common law rule that a party to a contract cannot recover by way of a judgment in debt a sum which it has been agreed will be paid to a third party. He referred us, for an exposition of the well-known rule that in such a case a promisee cannot, except in exceptional circumstances, sue for the agreed sum, to a passage in Chitty on Contracts (27 Edition), Vol

1, para 18-030, and to the cases there cited.

Mr Eder sought to distinguish the present case on its facts from the simple illustration given by Lord Reid in *Beswick*. He said that the effect of both the Embarkation Contracts and the Crewing Contract was that the crew were employed by Guincho or Agemarca, and that if any further sums were due to the crew they would be payable by way of a separate salary in Cuban currency without reference to the 70%.

In this context he seized on the description of Agemarca as "the Employer" in the Embarkation Contracts, and on the terms of clause 3.3 of those contracts whereby payment of salary in national currency to each crew member was to be "determined by the Employer". He also referred us to clause 11.01 of the Crewing Contract which provided that the crew would be *employed* by Guincho and said that there was no suggestion in that contract that Guincho would be obliged to account as agents to the crew for the 70% payable to it.

He went on to submit that even on the basis of the facts as found by the judge, it was plain that neither Guincho nor Agemarca was a nominee in the sense used in Lord Reid's dictum, and that the crew were not entitled to demand payment of the 70% from either of them. On those facts Agemarca was (at most) not obliged under its own contracts with the crew to pay the crew anything unless it (ie Agemarca) had received payment of the 70%. Even if such a receipt triggered Agemarca's own obligations to the crew to pay them an amount in Cuban currency, Mr Eder said that this did not render Agemarca the crew's "nominee" for the receipt of the 70% in the sense used by Lord Reid. He added that since the terms of the contracts between Agemarca and the crew were unknown to the owners, they could have no bearing on the construction of the Embarkation Contracts, which was at the heart of the issue before the judge.

He also sought to persuade us that we ought to attach significance to the fact that the 70% was eventually to be paid to the crew in Cuban pesos, whilst in the present proceedings the crew was currently maintaining a lien on a sum calculated in US dollars.

In my judgment the judge was correct for the reasons he gave. The payments in question never lost their characterisation as wages, and as such the crew were entitled to sue Pius for them or to maintain a maritime lien in respect of them over the vessel on which they served if they were not paid. In my judgment it would be deplorable, given the history of the maritime lien, if a third party bank was to be able to maintain a priority to the crew in relation to unpaid wages simply because the crew had given instructions that an allotted part of their wages, which they did not need on board ship, should be sent home.

As Mr Eder accepted, the critical contract is the contract made between the owners and each individual crew member, and clause 4 of that contract is in my judgment dispositive of the issues we have to decide. It shows that Pius is undertaking to pay US$1,900 a month for the crew member's services and that how that monthly remuneration is distributed depends on the crew member's agreement. Guincho is simply a conduit pipe through which the 70% part of the wages is to be paid to the crew member in Cuba, and Agemarca, which is also to act as part of the conduit pipe, is to "determine" (ie calculate) the equivalent sum in his national currency, after adjustments are made for holidays and social security, so that it can be paid "to him" (ie the crew member) accordingly. As we have seen, this sum may be paid to a nominee for the crew member (such as his wife), but Pius is not concerned with this part of the arrangements and will not know what directions the crew member may or may not have given.

Like the judge, I would not place any reliance on the fact that the expressions "employer" or "employed" are used to characterise the crew's relationships with Agemarca and Guincho in these contracts translated from their Cuban originals. For the purposes of identifying the character of these sums, Pius was the employer which was paying them to the crew (or at the crew's direction) as remuneration for their services. The crew was not employed by Guincho which was to receive its agency fee each month as an item quite separate

from the crew's wages.

I accept Mr Brenton's submission that whether or not the crew members were actually entitled to demand payment from Guincho or Agemarca to themselves, in US $, of the 70% paid by Pius, it is clear from the terms of the Embarkation Contracts that they were intended to receive that 70% or its product (ie its Cuban equivalent less deductions) and that it was intended to be "their money".

Mr Eder had difficulty in explaining to us the reliance he placed on the idea that Agemarca was in some sense the crew member's employer when the judge had accepted Mr Egued's evidence that Agemarca owed no duty to pay anything to the crew member until such time as the 70% part of his wages arrived from Guincho. Until then, he was simply a name on their books.

Mr Eder, however, had a fall-back argument to the effect that even if the judge was right to hold that the crew were entitled to claim a maritime lien in respect of their unpaid wages, they could not rely on that lien insofar as Agemarca had made payments in Cuba in lieu of the unpaid wages.

The judge held that on the evidence before him Agemarca had not been obliged to make those payments to the crew or their dependants, and that they were therefore voluntary payments which did not affect the position as between the parties. Mr Eder argued, however, that there was no evidence before the judge to suggest that those sums were repayable by the crew to Agemarca or that those crew members who had already been paid would receive any further sums in the event of judgment being given in their favour. On the contrary, he suggested that it was highly improbable that Agemarca would (or will) pay them twice.

In those circumstances, he submitted that although the payments may have been voluntary (in the sense that Agemarca was not bound to make them when it did), either (a) any maritime lien attaching to them would accrue for the benefit of Agemarca (rather than the crew members), if Agemarca retained the payments, or (b) the crew members in question would be paid twice, if Agemarca pass on the benefit of any maritime lien. In either event, he said, no maritime lien attaches because the purpose of the maritime lien for wages is not to protect third parties with whom such crew members are enrolled or to protect crew members who have already been paid.

Mr Eder referred us to two cases which established the proposition that if the seaman's claim to wages is satisfied by another person acting independently of and without the authority of the owner of the vessel his lien is extinguished, and the third party enjoys no right, as if by subrogation, to assume the benefit of the lien: *Anonymous* (1696) Fort 230 and *The James W Elwell* [1921] P 351. The report of the first of these cases reads, simply:

> "Moved, for a prohibition, on a suit in the Admiralty by a master of a ship against the part-owners for seamen's wages, he having paid off the seamen and would now stand in their places; and per Cur', it was granted, for when the master has paid the seamen and they are discharged, there is an end of that privilege and indulgence to seamen, which is personal, and can't be transferr'd."

In the latter case Hill J said of a firm of ship brokers at p.363:

> "Their advances included a sum of £200 advanced for payment of wages. They made that advance in the erroneous belief that they would stand in the shoes of the crew. The payment of course cleared away a maritime lien."

In my judgment the evidence about the payments made by Agemarca in Cuba is altogether too uncertain to warrant a finding that they discharged, to the relevant extent, the relevant crew member's lien. They sound

like voluntary payments made out of a sense of benevolence, to be compared with the type of voluntary payments to an injured employee discussed by Denning J in *Dennis v London Passenger Transport Board* [1948] 1 All ER 779. It may be that the crew have a moral obligation, if not a legal obligation under an implied contract, to reimburse Agemarca (compare *Seldon v Davidson* [1968] 2 All ER 755, [1968] 1 WLR 1083) once they have recovered their unpaid wages through the enforcement of their lien, but that is a different matter. It does not seem to me to be profitable to extend this judgment by considering the different types of voluntary or statutory payment discussed in para 1236 in *McGregor on Damages* (16 Edition, 1997) to which Mr Brenton referred us, because they have raised all sorts of difficult problems under English law which are a long way away from the comparatively simple situation with which the court is concerned in the present case.

For these reasons I would dismiss this appeal. In the circumstances it is not necessary to hear counsel on the issues which arise on the Respondents' Notice, for which we adjourned hearing argument until after we had given judgment on the issues raised by the bank on its appeal.

SCHIEMANN LJ

I agree.

NOURSE LJ

I also agree.

Appeal dismissed.