MOBIL OIL NZ LTD V THE SHIP "RANGIORA" [RATINGS]

IN THE HIGH COURT OF NEW ZEALAND

AUCKLAND REGISTRY

AD 877

BETWEEN MOBIL OIL NZ LTD

Plaintiff

AND THE SHIP "RANGIORA" & OTHERS

Defendant/Intervenors

AND AD 881

BETWEEN CANTERBURY STEVEDORING SERVICES LTD

Plaintiff

AND THE SHIP "RANGINUI" & OTHERS

Defendant/Intervenors

AND AD 882

BETWEEN PARTENREEDEREI MS TAKITIMU

Plaintiff

AND THE SHIP "TAKITIMU" & OTHERS

Defendants/Intervenors

AND AD 937

BETWEEN LÖWER HOLDING GmbH

Plaintiff

AND THE PROCEEDS OF THE SHIP "RANGIORA"

Defendant

AND AD 938

BETWEEN LÖWER HOLDING GmbH

Plaintiff

AND THE PROCEEDS OF THE SHIP "TAKITIMU"

Defendant

AND AD1/99

BETWEEN LÖWER HOLDING GmbH

Plaintiff

AND THE PROCEEDS OF THE SHIP "RANGINUI"

Defendant

Hearing: 21, 22, 23, 24, 28, 29 June 1999

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M.S. Ryan for Masters & Officers

J. Haigh QC & K.M. Beck for Crew Members

T.J. Broadmore & W.J. McIntosh for Canterbury Stevedoring Services Ltd

Judgment: 9 August 1999

RESERVED JUDGMENT OF FISHER J RE RATINGS

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Introduction

1. These proceedings involve competing claims upon the proceeds of the ships "Rangiora", "Ranginui" and "Takitimu". The question addressed in this judgment is whether redundancy payments contractually due to ratings employed on the vessels are protected by a maritime wages lien over the funds.

Factual background

2. The three vessels Rangiora, Ranginui and Takitimu were registered in Germany. Each was owned by a separate legal entity known to German law as a partenreederei. Through a series of charters and subsidiary charters the vessels were held on demise charter by South Pacific Shipping Limited ("SPS") which used the vessels for the carriage of cargo in the South Pacific. SPS employed its own crews on these and other vessels within its chartered fleet.

3. SPS fell into arrears on its charter payments. Eventually it was placed into voluntary liquidation on 19 February 1998. Termination of its demise-charters was accepted by the SPS liquidator on 20 February 1998. Over the next month all three vessels were arrested by other parties. Caveats against release were lodged on behalf of the ratings of each vessel. The vessels were sold yielding total proceeds of approximately $17 million. It is presently expected that subject to prior claims, all proceeds will go to

mortgagees. There will also be a substantial shortfall in the SPS liquidation. It is therefore critical to the ratings that their claims be protected by a maritime wages lien.

Issues

4. Priority was originally contested for the ratings' claims to holiday pay, wages, wages in lieu of notice, superannuation contributions and redundancy compensation. In the course of the hearing before me all claims other than redundancy were settled by agreement on the terms now recorded in a filed memorandum of 2 July 1999. A draft formal judgment for sealing in that respect may be submitted for consideration.

5. Redundancy compensation remains the outstanding issue. As I understand it, the in personam liability of SPS to pay redundancy in the sums claimed is not contested. The issue is whether the claims give rise to a lien. Central to that dispute are the nature of the underlying contractual relationships between SPS and the ratings, and whether the redundancy entitlements qualify in law as "wages" for the purpose of a maritime wages lien. The evidence provided as to the nature of the contractual relationships is incomplete. It will be convenient to consider whether redundancy can fall within the wages lien in principle before turning to the types of employment contract involved in the present case.

The contractual right to redundancy compensation in this case

6. Although some aspects of the ratings' employment contracts were unclear, it was common ground that each was employed by SPS and that the terms of employment included a document conveniently referred to as the "CEC".

7. Two preliminary points may be disposed of at the outset. Clause 33(a) of the CEC conferred upon both employer and employee a right to terminate the employee's service upon one calendar month's notice in writing or with payment of one month's salary in lieu thereof. Clause 37 conferred the right to compensation for a termination brought about by redundancy. The relationship between the two is not obvious but it was not argued that redundancy rights were in any way diminished by cl 33. In those circumstances I have given that clause no further consideration. Similarly clause 37 excludes redundancy compensation for the completion of a fixed term contract. It was not argued that any fixed terms were involved in the present case.

8. The redundancy compensation rights conferred by cl 37 occupy a little over three pages. In essence that clause confers upon the seafarer the right to compensation if he or she is declared redundant in a "redundancy situation". As to that expression cl 37(b)(ii) provides:

" 'Redundancy situation' means a situation where a worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become superfluous to the needs of the employer, but does not include a situation solely involving the completion of a fixed term contract, temporary relief employment, or the transfer of an employee

from industry based employment to company employment as a consequence of the end of the Ratings Engagement and Stabilisation Schemes."

9. In the present case the ratings became superfluous to the needs of SPS consequent upon its financial collapse. Their employment contracts were then terminated. It is not disputed that there was a "redundancy situation" giving rise to a contractual right to redundancy compensation.

10. The quantum of compensation is calculated in accordance with cl 37(f) which provides:

"(f) Redundancy Compensation Payment

(i) Compensation shall be paid on the basis of three weeks for each year of service, based on the annual salary rate appropriate to the rating. Part years of service are to be calculated on a pro-rata basis.

(ii) There shall be a minimum payment of twelve weeks all inclusive.

(iii) The maximum all inclusive payment shall be 60 weeks, provided that no payment shall be greater than 60% of the weeks remaining up to the employee's normal retirement date.

For the purposes of this clause:-

Service shall have the same meaning as in subclause (c) of the Long Service Leave clause in the case of an employee whose service with the employer commenced on or before 1 May 1992. In the case of an employee who commences service with the employer after 1 May 1992 it shall mean continuous unbroken service with the same employer."

11. A table was produced showing the period which each rating had worked for SPS. The periods ranged from 5.8 years to 2 months. In addition for this purpose a number were able to claim portability of qualification periods with other employers prior to 1 May 1992. Some therefore had redundancy compensation claims under cl 37(f)(i) of more than $60,000. Others were employed for periods of less than four years and therefore advanced claims of $10,000 to $20,000 under the minimum provisions of cl 37(f)(ii). In all cases the periods employed on the actual arrested vessels were less than four years. Quantum was not in issue. The question is whether these contractual debts qualified for lien status.

Can redundancy compensation qualify for a wages lien in principle?

12. An early jurisdictional distinction between "ordinary" mariners' contracts containing basic or customary terms, and "special" contracts adding special or additional terms, has since been removed by legislation. With removal of that distinction the maritime wages lien expanded to embrace any form of emolument properly described as "wages": *The "Tacoma City"*[1991] 1 Lloyd's Rep 330 (CA) at pp 335 and 336 and *The Halcyon Skies* [1976] 1 All ER 856 at 864-862. Everything therefore comes down to the meaning of the expression "wages" for present purposes.

13. As to the scope of "wages", one of the early explanations for the lien was the notion that seamen "... should have a remedy against the ship which he has served because it is reasonable that in whatever

thing a person invests his services or his labour that very thing ought to pay him, wherefore everyone who shall buy such a ship must beware..." from *The Customs of the Sea,* cited in *Rosco's Admiralty Practice* 3rd edition 1903, in turn cited in *The Tacoma City,* supra, at 335. But whatever early influence that idea may have had, it could not be reconciled with subsequent authority. The contract is the measure of quantum, not a quantum meroit [sic] evaluation of the services actually provided to the ship (the *"Ever Success"* [1999] 1 Lloyd's Rep 824 at 831; the *"Tacoma City",* supra, at 334). And it could not be reconciled with the subsequent extension of the lien to emoluments which do not represent a return for services actually performed.

14. The last point is helpfully captured in the passage from Davies and Dickey in the publication "Shipping Law", 2nd edition, LBC Information Services, Sydney 1995 at p 112:

"In the context of maritime law, the term 'wages' has a broad meaning and includes not only wages in the strict sense but also emoluments. An emolument here is any allowance, bonus or other financial benefit that accrues to the advantage of a member of a ship as contractual recompense for services that have either been rendered, or in normal circumstances would be rendered, for the benefit of the ship. An emolument need not be paid or made, directly to the crew member provided that it none-the-less accrues to the crew member's advantage by virtue of his or her contract of service."

15. What is significant about the Davies and Dickey definition for present purposes is its inclusion of contractual recompense for services that "in the normal circumstances would be" rendered for the benefit of the ship but which, for one reason or another, were not in fact rendered. Thus the lien has been extended to sums due in lieu of notice, paid leave, sick leave and damages for wrongful dismissal: *The Arosa Star* [1959] Lloyd's Rep 396; *The Halcyon Skies,* supra*; The Tacoma City,* supra, at p 335; *Wallace v Proceeds of the Ship "Otago"* [1981] 2 NZLR 740 at p 745; *The Great Eastern* (1867) LR 1 A & E 384; *The Blessing* (1878) 3 PD 35 contra *The British Trade* [1924] P 104 not followed in *Halcyon Skies,* supra. With the exception of *The British Trade*, these were all cases approving extension of the lien to claims in respect of services which in the normal course would have been rendered, but which in the event were not, albeit for good and proper reason on the seafarer's part. Even the *British Trade*, not followed in the *Halcyon Skies,* would not have precluded redundancy compensation, given that the point of the decision was to distinguish between claims in debt and claims to damages. Redundancy claims of the present type are, of course, claims to enforce contractual debts, not claims to damages for breach. And even as to damages, the inclusion of damages for wrongful dismissal was recently extended by Young J to include damages for failure to pay wages in *ArturUdovenko & Ors v AO Karelrybflot* (HC Christchurch, AD 90/98, 24 May 1999).

16. There are now more convincing rationales for the modern wages lien. One is the need to protect individual employees against an imbalance of power when negotiating employment packages with major commercial entities. The latter have better opportunity to protect themselves through proprietorship or security. There is nothing new about this as a relevant consideration. Earlier judicial attitudes emphasised the relative ignorance of seafarers compared with the acumen of owners and other creditors. As Lord Stowell said in *The Juliana*(1822) 2 Dods. 503 at 509 (cited in D.R. Thomas: *Maritime Liens,*supra, at p 168): "The common mariner is easy and careless, illiterate and unthinking" (p 509) and "This Court ... will, as far as it can, protect these illiterate and inexperienced persons against their own ignorance and imprudence" (p 522). While such descriptions do less than justice to the modem seafarer, the lien is still explainable in part by the power imbalance compared with ship owners and major commercial creditors.

17. It is true, as Mr Gresson pointed out, that since 1822 seafarers have made progress through collective bargaining at national and international levels and through their role as preferential creditors in company liquidations and receiverships (Companies Act 1993 s 312 and 7th schedule; Receiverships Act s 32). However, collective bargaining usually addresses the terms of employment rather than security for payment. Protection as preferential creditors is also limited, being subordinate to fixed charges and limited to services rendered to the company during the four months preceding liquidation or receivership plus holiday pay, a maximum of $6,000 and employers whose liquidation happens to occur in New Zealand. The desirability of protecting seafarers' emoluments through wages liens is as strong now as it ever was.

18. To that consideration one can add the public and private interest in attracting seafarers to crew on vessels. As Mr Gresson put it:

"A voyage is possible only if a ship is manned, bunkered, provisioned and financed. Several contribute to the venture. At the top of the queue are the people whose labour made the venture possible, the venture capitalists who take security over the vessel, the traders who provide fuel and provisions and others. Each gains security commensurate with the nature of the contribution, whether taking the form of a lien, a mortgage, a retention of title provision, some other commercial mechanism or a statutory right in rem. The form of security is commensurate with what each has contributed to the venture'.

19. To that I would add the helpful submission of Mr Davies that seamen's wages are protected by lien "largely because of the importance of protecting commerce by ensuring that seamen are available to sail ships."

20. That theme is developed in greater detail by M.E. Perkins in his article "The Ranking and Priority of In Rem Claims in New Zealand (1986) 16 VUWLR 105 at 111 and that of Connor in his article "Maritime

Lien Priorities: Cross Currents of Theory" (1956) 54 Mich.L.R. 777. As Connor points out (p 791), the maritime lien for wages ranks as one of the highest classes of maritime lien because commerce would not take place without men to man ships and that men will not sign on without a trustworthy security for wages. Viewed in that light, it will be seen that crews are persuaded to man ships by the offer of a package of emoluments and financial protections rendered secure by the lien over the ship. Consistent with this view, sick pay, long service leave, wages in lieu of notice, damages for wrongful dismissal and damages for non-payment of wages are included not because they are a return for value actually added by the seafarer but because they had persuaded the seafarer to agree to work on the ship in the first place. Essentially, then, the rationale supports inclusion of any form of payment which had been promised in return for the seafarer's agreement to work on the ship, as well as damages for breaching that promise.

21. In principle, therefore, one would expect redundancy compensation to fall within the lien. It is a form of payment promised in return for agreement to work on the ship. The payment is contingent upon the occurrence of a stipulated event, namely a termination due to the position becoming superfluous to the needs of the employer. Its quantum can also be affected by the length of prior service. But it is no less a part of the employment package which had enticed the seafarer on to the vessel. In principle it does not seem to differ from wages in lieu of notice, sick pay, long service leave or damages for wrongful dismissal. Nor has it ever been suggested that eligibility for a wages lien is affected by the quantum of the claim.

22. Arguments to the contrary must then be considered. Mr Gresson submitted that recent New Zealand legislation narrowing the scope of the term "wages" in the Admiralty Act impliedly produced a narrowing in the wages lien. In support he made the points that s 4(1)(o) of the Admiralty Act 1973 had originally conferred admiralty jurisdiction to recover money recoverable as wages under the Shipping and Seamen Act 1952; that s 4(1)(o) had since been amended to substitute the Maritime Transport Act 1994 for the now repealed Shipping and Seamen Act 1952; that the sums recoverable under the Maritime Transport Act 1994 are more narrow than those recoverable under the earlier Act; that an expansion in admiralty jurisdiction relating to wages had earlier been interpreted as a reason for a corresponding expansion in the maritime lien; and that by the same reasoning a reduction in the scope of the admiralty jurisdiction should be taken to have diminished the scope of the lien.

23. I am unable to accept that argument. Section 4(1)(o) of the Admiralty Act does not limit the wages jurisdiction to sums recoverable under the Maritime Transport Act. That limb of s 4(1)(o) is additional to the first limb "any claim by a master or member of the crew of a ship for wages". There has been no reduction in the scope of the first limb, and therefore no basis for any implied reduction in the scope of the lien. It should be noted, too, that the substitution of the Maritime Transport Act 1994 for the

Shipping and Seamen Act 1952 has not resulted in any reduction in the scope of the wages one would expect to be recoverable by seafarers. All that has happened is a deregulation of coastal shipping and a shift in emphasis from legislative control of employment conditions under the Shipping and Seamen Act to collective and private bargaining under the Employment Contracts Act. There is no reason for thinking that the change from legislative to negotiated terms has changed the content.

24. A second argument against the inclusion of redundancy compensation was that it does not represent a return for services actually provided to the ship. The argument is based upon some very general judicial statements expressed in terms of actual service: that of Lord Watson in *The "Castlegate"* [1893] AC 38 at 52 (HL) "In the case of lien for wages of master and crew the legislature has recognised the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship."; that of Lord Field in the same case at p 55 "Service done is of the very essence of maritime lien" and similar remarks in *The "Tacoma City",* supra, at 345 and *The "Ever Success",* supra, at pp 829 and 830. In my view it is impossible to reconcile broad statements of that nature with the inclusion of wages in lieu of notice, sick pay, damages for wrongful dismissal etc referred to earlier. They do not represent a recompense for services actually provided. Their inclusion is also consistent with the rationale discussed earlier.

25. Thirdly, it was pointed out that the inclusion of redundancy compensation would be contrary to a view expressed by Ralph Gibson LJ (using the expression "severance pay") in *The "Tacoma City".* supra at p 345. He considered that neither pensions nor redundancy payments could be included for the reason that:

"All the additions to wages, payable under special contracts 'which the mariner can be fairly said to have earned by his services' (per Worley C.J. in *The Arosa Star* at p.403) which have been accepted as giving rise to liens, have been claims which can be regarded as items in the quantification of the value of the current service in the ship by the seafarer. Pension, as contrasted with contributions towards a pension fund, is not part of the agreed value of the current service but, in substance, is the reward for past service.

Modem conceptions of welfare, to which Worley C.J. referred, have led to the acceptance by shipping companies of the obligations to pay bonuses, to pay wages during sick leave, to give notice of termination of service, etc. but all, I think, represent the value of the current service in the ship by the seafarer."

26. Those remarks were obiter but in any event there seem to be real difficulties in the distinction which Ralph Gibson LJ was attempting to draw between " past" and "current" service. Basic wage claims themselves always relate to past service. Sick leave, wages in lieu of notice, and damages for wrongful

dismissal, might well be described as substitutes for "current" or "future" service. But temporal distinctions of that sort have never been regarded as significant. Perhaps the distinction Ralph Gibson LJ had in mind lay between the current voyage and earlier voyages, between the current ship and earlier ships, between the current employer and earlier employers or between short-term ship or voyage agreements and long-term company service agreements. These are important topics in their own right and I will need to return to them shortly. But in principle, redundancy compensation could as readily stem from a current voyage or current ship crew agreement as any other kind of agreement.

27. Fourthly Mr Gresson pointed out that redundancy compensation could involve very substantial sums. These could be primarily attributable to periods of service before joining the arrested vessel. Thus in the present case John Wright has a claim for $65,808 attributable to a period of 17 or 18 years at sea, only five and a half years of which were with SPS, and only eight months of which were served on the Rangiora. Why should the creditors of the Rangiora now bear that fortuitous burden?

28. I think that two distinct concepts are raised by that argument. One is the potential magnitude of redundancy compensation claims. Quantum per se has never been a reason for limiting the scope of the lien. Potential creditors might well be able to estimate their wage lien exposure, with or without disclosure and reporting requirements. Viewed across a range of likely seafarers, it might also be possible to estimate the risk presented by maritime wage liens and procure adequate security margins, insurance or other protection. No legislative steps have been taken to limit the sums recoverable in a manner akin to the regime for preferential creditors in company liquidations. The question would seem to be one of principle as to the type of emolument involved, not a limit, which would necessarily have to be an arbitrary one, as to the sums which can be claimed.

29. A different question altogether, however, is the relationship between redundancy compensation on the one hand and the particular ship or voyage in respect of which the lien is claimed on the other. In *The "Tacoma City"* ' for example, the fundamental reason for excluding redundancy compensation from the lien was the fact that the right to payment stemmed not from a ship or voyage contract with the relevant ship-owner but a company service agreement with a distinct management company. There was no reason for imposing upon the creditors of the arrested ship the burden of compensation derived from a contract which had no relevant connection with the voyage, the ship or its owners.

30. In principle I can see no difficulty in the proposition that redundancy compensation is eligible for inclusion in a maritime wages lien. In my view the real challenge for the ratings is to show the necessary connection between their contractual right to redundancy compensation on the one hand and the arrested ship on the other. That in turn requires one to identify with some precision the particular employment contract which gave rise to their right to the compensation. On that subject, it has to be said, there has been a paucity of evidence.

Possible forms of crew employment contract

31. Given the limited evidence about the employment contracts in the present case it may be helpful if I try to set out the legal background in some detail. The authorities reveal a number of developments in the contracts of seafarers over the years. The "ordinary" mariners' contracts referred to earlier seem to have been traditionally referred to as "articles" and to represent the forerunner of the modem single voyage or single ship "crew agreement" (for an example where the expression "articles" is equated with such agreements see *The "Tacoma City"* supra, at p 336). Redundancy compensation would certainly have required a "special" rather than "ordinary" mariners' contract but nothing now turns on the difference. Nor was there anything to prevent the inclusion of redundancy compensation as a term of a single voyage, or single ship, mariner's contract.

32. Another development was the intervention of the legislature to protect seafarers by requiring the inclusion of specified terms and conditions in their employment contracts. Sections 113 to 122 of the Merchant Shipping Act 1894 (UK), ss 41 to 48 of the Shipping and Seamen Act 1908 (NZ) and ss 32 to 38 of the Shipping and Seamen Act 1952 (NZ) were examples in England and New Zealand respectively. They required the master of a ship (presumably as agent for the owner) to enter into an agreement with every seaman whom he carried to sea as one of his crew. Thus s 34 of the Shipping and Seamen Act 1952 (NZ) required the agreement to be in writing, to be signed by the master and seaman, and to include such details as "the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement, and the places or parts of the world, if any, to which the voyage or engagement is not to extend", the "number and description of the crew", and "the capacity in which each member of the crew is to serve".

33. The document required by shipping legislation also appears to have been regarded in the trade as the ship's "articles" although that expression is not used in New Zealand legislation until the Maritime Transport Act 1994. Section 22 of that Act requires the "employer of a seafarer on any New Zealand ship, other than a pleasure craft, going on an overseas voyage" to "enter into articles of agreement in a form approved by the Director as meeting the requirements of the relevant convention and [other terms specified]". Significantly, all such agreements appear to have contemplated employment specific to either a particular voyage, or to a particular ship for a defined period. The prescription of certain mandatory terms does not seem inconsistent with the optional inclusion of others such as redundancy compensation. But in the present case there is a limit to the conclusions which can usefully be drawn on this aspect without the relevant legislation for Antigua and Barbuda where these ships were registered.

34. A third development was the growth of national and international collective bargaining. A common pattern appears to have been the negotiation of standard terms of employment at a national level by a national trade union supplemented at an international level by another agreement with the International

Transport Workers Federation of London. In the present case, for example, a collective employment contract (the "CEC") was negotiated between SPS and the New Zealand Seafarers' Union and an "ITF contract" between SPS and the ITF. It was the CEC which made provision for redundancy compensation. By the time of the events in question neither of those documents purported to record an employment contract as such. Rather, they recorded standard sets of terms available for adoption as part of individual employment contracts as and when the latter were entered into. In principle the individual employment contract could be specific to a particular voyage or ship or represent a more long term arrangement with a given employer. Consequently one cannot say, from these collectively negotiated documents, whether the redundancy compensation was specific to a given ship or incidental to a more general employment contract.

35. Another development of real importance for the present case was the practice of entering into long term employment agreements, conveniently referred to as "company service agreements", to use the language of Ralph Gibson LJ in *Tacoma City.* As Ralph Gibson LJ explained (p 336), the purpose of company service agreements was:

"... to provide a better alternative to the existing system under which the majority of seafarers entered into new contracts every time they signed new articles, and thus had no continuity of service and, in particular, were deprived of the benefits which long service might be expected to bring. Under the new system, a seafarer who made a company service contract was employed on terms which remained unaltered for the duration of the contract even though he might serve on a number of different ships owned by different companies within his company group."

36. The importance of distinguishing between specific voyage agreements and company service agreements has been emphasised on a number of occasions. One type of case where it matters is a claim by a seafarer where he has already given a release at the end of an individual voyage. In *Maclea v Essex Line Limited* (1933) 45 Ll L Rep. 254 the seafarer had come to an oral agreement to work continuously for a shipowner. Over the next three years he crewed on nine voyages spread between two ships. Between voyages he worked as caretaker on his ship or remained "standing by" until "articles opened" again for the next trip. After signing "off articles" for the last of the nine trips he was dismissed and brought a claim for wages in lieu of notice. The employer pointed out that under the Merchant Shipping Act 1906 (UK), signing off articles without lodging any caveat constituted a release to the employer in respect of further claims. It was held that that [sic] the discharge related only to the voyage in question, not to employment under the equivalent of a company service agreement. Although there had been no express agreement as to the terms of the latter, the standard terms settled by the National Maritime Board were taken to have been adopted by usage. They entitled the plaintiff to 14 days' wages

in lieu of leave for each complete year of service. The voyage-specific agreement was not inconsistent with the co-existence of the company service agreement. Acton J held (p 256):

"When the articles are signed and when, at the conclusion of the voyage, a settlement is signed by a member of the crew - in this case it is the second mate who receives his pay and who is discharged - pro tanto I think it is reasonably clear that all he is then signing is a settlement in full of everything that arises in respect of and by reason of that particular voyage and that thereafter he could not - it may well be - be heard to say that he had some other claim to bring forward which was a claim to which he was entitled by reason of any services rendered, or it may be any incidence occurring, during that particular voyage; so with all the other settlements which were signed by this officer with each separate voyage so concluded. But it seems to me that there is nothing in that which is in any way inconsistent with there being an agreement between the officer and the ship owner by whom he is engaged. That, if he serves for a certain period of time, or it may be for a certain number of voyages, he shall be entitled to a certain amount of leave or to some payment in lieu of leave under such conditions and terms as may be agreed upon between the parties. It is clear that there is nothing under s 114 of the Merchant Shipping Act of 1894 which would make any such agreement illegal; and indeed we know that such an agreement is an agreement which is contemplated by and often applied to relations of this kind between the crew and the ship owner by the rules and regulations of the National Maritime Board. Therefore, one has the position that it may very well be that an officer such as the second mate signs a settlement which is a full discharge without any reservation whatever of every claim that he can have against the ship owner in respect of a particular voyage; but he may still have behind that a right in certain contingencies, if he serves continuously for a certain period of time, or if he sails a certain number of voyages - in the case of an agreement to that effect - against the ship owner either for leave or for payment in lieu of leave."

37. In New Zealand the same argument was upheld by Chilwell J in *Wallace v Proceeds of the Ship "Otago"* supra, at 746-749. There too a distinction was drawn between the seafarer's voyage-specific agreement and his employment under a co-existent long term agreement. A statutory release from the former pursuant to s 75(2) of the Shipping and Seamen Act 1952 was held not to preclude wages claimed in respect of non-articled periods of continuous employment and other claims not related to the last voyage.

38. Turning then to redundancy compensation, it seems important to classify the particular employment agreement from which the redundancy compensation claim flows. More than one classification is possible, but for present purposes I do not think that any distinction need be drawn between "single voyage" and "single ship" agreements. The expression "articles" seems to have been used indiscriminately, in some cases indicating one and in others indicating the other. But for present

purposes it seems sufficient to refer to them all as "single ship agreements" since agreements to crew on a particular voyage will necessarily be included in agreements to crew on a particular ship. They are to be contrasted with others (conveniently referred to as "company service agreements") where the employment is continuous notwithstanding the particular voyages or ships which may from time to time be involved. Ascertaining the precise relationship between those two types of agreement in a particular case may not be simple, given that the two can evidently co-exist between the same parties.

Relationship between type of employment agreement and wages lien

39. For reasons outlined earlier I consider that in principle wages liens can extend to redundancy compensation. It has been said at times that the "wages" in question must be earned on the arrested ship: *Castlegate,* supra, at p 52. Clarke J made the point more recently in *The "Ever Success"* supra, at p 83 2 when he said:

"In my judgment the authorities show that a master or a seaman is entitled to wages and thus to a coextensive maritime lien if he renders the service appropriate to his rank. That is as, say, master, chief engineer or seaman. He must be part of the crew of the ship but need not necessarily render the service on board the ship or live on board the ship, but the service must be in a real sense referable to the ship and the service must be rendered during a period when the particular claimant can fairly be said to be part of the crew of the ship."

40. If this is intended to suggest that the wages must have been "earned" in the sense that they are a return for services already provided, I would respectfully differ for the reasons covered earlier. In principle one of the promised emoluments could be compensation for redundancy in relation to the voyage or the operations of the ship. However the need for the wages to be "referable to the ship" seems undeniable. It is, after all, a lien over the ship only because the wages in question relate to the ship. To extend the lien to an emolument stemming from a company service agreement, where the field of activity has no necessary connection with any particular ship, would be contrary to all authority and to the rationale for the lien. It is one thing to say that those who finance and underwrite a voyage should bear the cost of attracting a crew to man the ship in question. It is another to say that they should bear the cost of attracting employees to work for an employer in a variety of circumstances of which crewing any particular ship is merely one of the possibilities.

41. It appears to follow that if the true source of the redundancy compensation is not a contract specific to the arrested ship (which necessarily includes a single voyage agreement) but a company service agreement, the required link between redundancy and the arrested ship is lacking. In those circumstances the termination of employment has come about not because the seafarer became surplus to the requirements of the arrested ship in particular but surplus to the requirements of the overarching

employment relationship pursuant to the company service agreement. That was the situation in *The "Tacoma City",* supra. In that case the fourth plaintiff qualified for redundancy compensation (there referred to as "severance pay") under his company service agreement with the management company SWRS but not under his agreement with the ship-owner RSN. Although his agreement with the latter made provision for redundancy compensation after two years' employment, he had not been employed long enough to qualify under that agreement. Another obstacle in that case was that two distinct employers were involved. But as I understand the case, the plaintiff would have enjoyed no more success had he had a common employer. The redundancy which gave rise to compensation stemmed from the company service agreement, not the agreement specific to the arrested ship.

42. The question in the present case is therefore whether the ratings become redundant in terms of a single ship agreement or a company service agreement.

Sources of evidence as to ratings' employment contracts

43. The ratings' three statements of claim plead:

"5. At all material times the Interveners were employed by the company to crew the defendant ship.

6. The terms of such employment were contained in individual employment contracts based on a collective employment contract dated 1 May 1995 - 30 April 1996 and in an ITF special agreement dated 20 November 1997."

44. It seems clear, however, that other communications and documents were involved. A rating on the Ranginui, Mr Gardner, deposes that the arrangement between SPS and the ratings on that vessel was as follows:

"2. The crew on board the Ranginui were initially employed under the terms of a collective employment contract. This contract expired on 30 April 1996. We were then employed on the basis of individual employment contracts which contained the same terms as the collective employment contract. A copy of the collective employment contract applying to the ratings is annexed hereto and marked 'A'.

3. In addition, there was an ITF special agreement dated 20 November 1997, the terms of which also applied to our employment on board the vessel. Annexed hereto and marked 'B' is a copy of that document.

4. The Interveners were engaged on articles. A copy of the articles in respect of the vessel the Ranginui is annexed hereto and marked 'C'.

5. In providing service to the vessel, the Interveners ... carried out their portside duties in accordance with their employment contracts, (Annexure 'A').

6. The Interveners worked shifts on board the vessel, referred to in the shipping industry as 'swings'. This mean that the Interveners spent approximately 28 days on board the vessel and 28 days 'off

articles' in his homeport. The Interveners would accrue a day's leave for each day worked upon the vessel. This entitlement is contained in 'Annexure A'. While 'off articles' an Intervener would often still be attached to a particular vessel, and simply waiting for the next 'swing' when he would be back on board the vessel."

45. Identical affidavits were filed by ratings in respect of the Rangiora and the Takitimu.

46. The collective employment contract produced as exhibit "A" to Mr Gardner's affidavit (the "CEC") is a 37 page document bearing initials but no signatures. It is in the form one would expect for a collective employment contract in terms of ss 20 to 22 of the Employment Contracts Act 1991. Pursuant to those provisions an employer may enter into a collective employment contract with groups of employees who become parties to the contract by either signing it at the outset or subsequently agreeing to take up employment on the same terms. Pursuant to s 19(4), where a collective employment contract expires, each employee who continues with the employer is in the absence of agreement to the contrary thereafter bound by an individual employment contract on the same terms.

47. In the present case the term of the CEC expired on 30 April 1996. Accordingly at the material time each employee who continued in the employ of SPS was, in the absence of any agreement to the contrary, bound by an individual contract in the same terms. It will be convenient to refer to the document as the "CEC" although, strictly speaking, at the material time it had become merely a documented set of terms available to SPS and individual ratings to incorporate into their individual employment contracts.

48. The CEC indicates that the parties to the original collective employment contract had been the New Zealand Seafarers Union, SPS ("the employer") and "Ratings employed by the employer on ships that may be owned, operated, chartered or managed by the employer...". The contract is said to have been made pursuant to the Employment Contracts Act in recognition that:

"(a) The employee is employed as a seafarer (Chief Integrated Rating, Chief Steward, Chief Cook, Integrated Rating, Boatswain, Able Seaman, Ordinary Seaman, Deck Boy, Motorman, Assistant Cook, Second Steward, Assistant Stewart [sic], Catering Attendant, Crew Attendant).

(b) The employee's work shall include any work required in connection with the efficient operation of the vessel is of the employer, and for which the employee is trained and qualified.

(c) **New Employees**

(i) Any new employee engaged in a position specified above after the commencement date of this contract shall become a party to this contract and such agreement shall be in writing between the employer and the new employee.

(ii) The employer parties hereto recognise the employment service for seafarers operated by the New Zealand Seafarers Union as a source of labour."

49. There then follow highly detailed terms of employment adequately indicated by the headings "Shipboard Management Team, Hours & Duties, Performance of Work, Avoidance of Physical Exhaustion, Remuneration, Payment of Wages, Allowances and Increments, Uniform, Protective Clothing & Laundry Allowances, Leave & Time-Off, General Conditions, Homeport Provisions, Expenses, Meal Hours, Meals & accommodation not Available on Board, Cargo Work, Provisions for Carriage of Special Cargoes, Sailing shorthanded, Minor Illness & Injury - Flexibility of Operations, Sickness and Accident, Training & Study Leave, Parental Leave, Retirement Leave, Superannuation, Sailing board, Safety & other Drills, Articles of Agreement, Transfer of Labour, Ships Stranded or Wrecked, Indemnity, Code Of conduct, Termination of Employment, Disputes Procedures, Personal Grievances, Stop-Work Meetings, Redundancy, Medical Loss Licence, Employees Long Service Leave and Term of Contract".

50. The second document produced by Gardner, dated 20 November 1997, records an agreement between the International Transport Workers Federation of London and SPS in respect of the ship "Ranginui" ("the ITF agreement"). The document recites the wish of the parties to "regulate the conditions of employment of all seafarers ... serving from time to time on board the ship". In the agreement SPS undertook to employ each seafarer in accordance with the collective employment agreement between SPS and the NZ Seafarer's Union (which was evidently intended to be an appendix to the ITF agreement) and, somewhat inexplicably, to "incorporate the terms and conditions of the ITF standard agreement into the individual contract of employment of each seafarer ... and into the ship's articles" (Article 1(a) and (b)). Although the obligation under Article 1(a) of the ITF agreement was to employ each seafarer in accordance with the CEC, the terms and conditions to be incorporated into the individual contract of employment of each seafarer and into the ship's articles is, at least literally, to be not the CEC but the "IFT [sic] standard agreement". The ITF agreement has been signed on behalf of SPS, ITF and the NZ Seafarer's Union. That appears to explain why the CEC document produced bears initials only, it presumably being merely an appendix to the ITF agreement.

51. The third document produced by Mr Gardner was described by him as "articles" but the document itself bears merely the heading "List of crew and signatures of seamen who are parties to the crew agreement". What the contemplated "crew agreement" was is not explained. The document lists the names, dates of birth and what appear to be home countries and/or towns of each crew member along with references to crew position and details under columns for "If discharged the reason for discharge", "Date of commencement of employment on board", "Date and place of leaving the ship", "Signature of seaman on engagement and "Signature of seaman on discharge" as well as "certificates of competency

and or service held". On its face, the document does not in itself record any agreement. It has more in common with a register of crew particulars and a log of specific events affecting them. At least on its own it does not appear to contain any contractual obligations. Nor is it executed by or on behalf of SPS. It might well form part of an incomplete set of articles prepared pursuant to the undisclosed legislation of Antigua and Barbuda.

52. The CEC and ITF agreements produced by other deponents for the other two vessels are essentially the same as the Ranginui ones. The so-called "articles" document for the Takitimu, however, has an introductory page headed "Crew agreement and list of crew". The introductory page gives particulars of the ship and its owners along with two entries. One has an entry under "Date and place of commencement of agreement and list of crew" as follows: "Date 06 May 1997, place: Lyttleton, Signature of master A.K. Mobbs". Independent evidence showed that Captain Mobbs was in fact one of the two masters for that vessel. The other entry under "Date and place of termination of agreement and list of crew" read "Date: _____, place: Auckland, Signature of master A.K. Mobbs". There was also an endorsement, apparently in the handwriting of Captain Mobbs, reading: "These articles closed on 6 March 1998 at owner's order at Auckland New Zealand as the employing operator South Pacific Shipping is in liquidation. Articles lent to masters legal advisor until outstanding claims settled in NZ High Court." Taken in combination with the attached list of crew with their signatures, this appears to amount to "articles" and to form the nucleus of a voyage specific or ship specific crew agreement. If a similar cover page was attached to the "List of crew and signatures of seamen who are parties to the crew agreement" produced in the case of the Ranginui and the Takitimu it was not produced or referred to.

53. For the Ranginui another document not expressly referred to by Mr Gardner, but apparently attached to the "list of crew and signatures of seamen who are parties to the crew agreement" document, is a single sheet of paper headed "ITF clause to be inserted into amended ship's articles of the Ranginui". This records the following:

"It is agreed that the wages and employment conditions of the seafarers serving on board the above vessel shall be governed by the terms of the current ITF Approved National Agreement known as the South Pacific Shipping Limited Collective Employment Contract between South Pacific Shipping Limited (the employer) and the New Zealand Merchant Service Guild Industrial Union of Workers Inc (the Guild) and the New Zealand Association of Marine, Aviation and Power Engineers Inc (the Association) (see appendix 1) and that agreement known as the South Pacific Shipping Limited Collective Employment Contract between South Pacific Shipping Limited (the employer) and the New Zealand Seafarers Union (the Union) (see appendix 2) with effect from 29th October 1996. The Owners also agree that, despite whatever may be printed or written in these Articles now or hereafter, signature on these Articles by any seafarers at the time of discharge from the ship shall not amount to a release of the owners and/or the

vessel from any claim for wages or any other claim of the seafarers which is outstanding at discharge but shall amount only to an acknowledgement of discharge, and receipt of wages at discharge shall not be treated as full and final settlement of all outstanding wages."

54. That page bears a single signature which I do not recognise from any of the preceding documents. It seems reasonable to infer that it was with the "list of crew and signatures of seamen who are parties to the crew agreement" document and was intended to form part of a crew agreement relating specifically to the Ranginui. By means of this document the ITF agreement and the CEC were obviously intended to be incorporated into the "crew agreement". One also infers from the wording of this document that the "crew agreement" was regarded as synonymous with "these articles". There is no equivalent "ITF clause", however, in the case of either the Takitimu or the Rangiora.

55. Finally, there is evidence from Captain Mobbs, one of the two alternating masters employed by SPS on the Rangiora. Some oblique indication of the perceived status of the "ship's articles" comes from his evidence that following the termination of the charter and the formal taking of possession of the Rangiora on behalf of the owners on 6 March 1998 "on the instructions of owners, I formally closed the ship's articles, and subsequently the deck and engineer officers then on board departed from the ship ... Following the closure of articles, including my writing off all ratings then on board, the ratings formerly employed by SPS had no continuing status on the ship. Given that a suitably qualified standby crew had come on board, there was no need from a shipkeeping, ship safety, or port safety point of view for any of the ratings to remain on the ship after the articles were closed." There is a written document, presumably promulgated by Captain Mobbs to other members of the crew, which among other things states "On instructions of the owners the articles of the ship have been closed on 6 March 1998. The ship Rangiora has been handed from my command to persons approved by the owners and New Zealand management of the vessel. The Master and ship's complement are therefore discharged. Wages of Master and all other members of the crew of the vessel Rangiora are in dispute up to and including this day."

56. So far as I have been able to ascertain, those together comprise the present sources of evidence as to the contractual relationships between the ratings and SPS. The next question is what they signify as to the nature of the employment agreements involved.

Inferences as to nature of the ratings' employment contracts

57. In their three statements of claim the ratings seek redundancy compensation calculated in terms of their total periods of employment with SPS, in some cases supplemented by qualifying periods before joining SPS. In all but two cases the periods used to calculate the redundancy compensation substantially exceed the time spent by the rating on the particular ship on which he was employed at the

time of arrest. Compensation was calculated, in other words, in terms of an over-arching company service agreement with SPS rather than a single ship agreement specific to the Rangiora, the Ranginui or the Takitimu. Consistent with that approach, it was contended in written submissions for the ratings that "There was essentially one agreement which governed the relationship between SPS and all the interveners on board the ships, irrespective of which vessel they were serving at the time [in contrast with *Tacoma,* supra, in which] the wage claimants were bound by contractual obligations to SWRS, as well as crew agreements with the individual ship owners ...".

58. On the legal tests I have posed by now, it could not be suggested that redundancy compensation advanced on that basis would be specific to the arrested ship, and therefore susceptible to a lien. During the hearing, however, the ratings changed the basis upon which they advanced their case. As I understood it their new position was that they were at all times party to a company service agreement but in addition they became subject to a separate agreement, which they referred to as "articles", each time they were assigned to a particular ship. The only agreement under which they now claimed redundancy compensation was the articles. The sums claimed would be calculated in accordance with the periods spent "on articles" with the particular ship involved at the time of arrest. As none of the ratings had been employed on his arrested vessel for as long as four years, each would now confine his claim to the minimum payment of twelve weeks' salary pursuant to cl 37(f)(ii).

59. Despite the paucity of evidence on the subject, all the present indications are that a dual contract approach is correct. The CEC document seems to contemplate that at times seafarers would be "on articles", or attached to identified ships. Thus cl 7 provides that "employees shall be paid at the rate of annual salary specified in the table ... according to the classification of the ship in which they are serving ..."; cl 11(a) that "time off shall accrue at the rate of one day for each complete day-worked in the vessel..."; and cl 11(g) that there would be certain time off "whilst on articles". Equally it seems to be contemplated that at times they would be "off articles". Examples of alternating status are cl 8(a) as to manner of payment of wages "whilst on articles, rostered leave or standing by", cl 11(h) as to time off when "off articles" although, seemingly, still attached to a vessel "where an employee is attached to a vessel off articles in his home part ..."; cl 14(a)(ii) "where employees are required to join or leave a vessel in their home port", cl 14(c) "employees who are required to live ashore whilst waiting to join a new vessel ... "; and cl 22 as to salary while studying ashore on an approved course. Clause 28 could also make sense only if it formed part of an employment contract of greater scope than "articles". It provides:

"ARTICLES OF AGREEMENT

(a) Where a vessel is to proceed on an overseas voyage from New Zealand and the articles of agreement have less than a month to run and it is probable that the round voyage cannot be completed in that time, then new articles shall be entered into prior to commencing the voyage.
(b) The following clause shall be entered into the Articles of Agreement for each vessel coming into the scope of this contract. 'It is also agreed that the current contract and or agreements between the employer and employee organisations in respect of remuneration and conditions of employment for seafarers shall form part of these Articles of Agreement and are deemed to be incorporated herein.' "

60. On the evidence presently available, therefore, the most likely interpretation appears to be that each rating was employed by SPS under a long term company service agreement and that that agreement was supplemented from time to time by single ship agreements. The single ship agreement appears to have been wholly or partly recorded in a document which the parties referred to as "articles". Whether the single ship agreement was confined to a particular voyage seems immaterial for present purposes. Both the company service agreements and the single ship agreement appear to have incorporated extracts from the standard form CEC and ITF documents.

In respect of which contract were the ratings made redundant?

61. A rating could succeed only if he could show that his right to redundancy compensation flowed from his single ship agreement. That would pose no difficulty in terms of period worked, since each rating could qualify for the minimum period of 12 weeks compensation provided for in cl 37. The challenge is, however, to show that the redundancy related to the arrested ship and the agreement related thereto. As has already been noted, not every aspect of the CEC document could have applied to a specific voyage or specific ship. What was the position over redundancy?

62. Under cl 37(b)(ii) redundancy arises where the "worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, surplus to the needs of the employer". It will be noted that the test is surplus to the needs of the "employer", not surplus to the needs of the "voyage" or the "ship". If a rating had been employed solely for the purpose of crewing on a designated voyage or ship it might be possible to argue that the superfluity related to that voyage or ship. But the argument would be difficult to sustain if continuity of the rating's employment were protected by an underlying company service agreement.

63. The matter seems to be one of causation. Suppose a ship sank, or the charter prematurely terminated, in the course of a voyage. In the absence of any company service agreement that might well make the rating redundant with a consequent right to compensation protected by a lien. But if there were an applicable company service agreement, the rating's employment with SPS would presumably continue pursuant to that agreement regardless of the fate of the individual ship. There is no suggestion

that in the latter circumstances the rating would be entitled to redundancy compensation. It would be the failure or retrenchment of SPS itself which would make the rating redundant with a consequent right to redundancy compensation. This suggests that the underlying cause of the redundancy of the ratings in the present case was not the fate of the voyage or the ship but the overall operations of SPS, and the place of each rating within those operations. The contractual right to redundancy appears to have stemmed from the company service agreement, not the "articles".

Conclusions

64. The onus is on the ratings to establish their right to priority. On the evidence so far available, they appear to have been employed under a dual contract system. They appear to have become surplus to the operations of SPS as a whole, not surplus to the operations of the Rangiora, Ranginui or Takitimu. The contractual right to redundancy compensation appears to flow from a company service agreement, not a single ship agreement. It appears to fall outside the scope of a wages lien over the arrested vessels.

65. However I am reluctant to enter judgment against the ratings on redundancy compensation priority without allowing them a limited opportunity to present further evidence. It is just conceivable that upon further inquiry into the facts it will be found that for all or some of the ratings the assumptions provisionally made as to the nature of their contracts and redundancy are found to be incorrect. No evidence has so far been presented as to dealings between individual ratings and SPS; between union or legal representatives and SPS; further documents which might bear directly or indirectly upon those relationships; particular discussions between the parties as to the way in which the standard CEC and ITF documents related to the contracts of individual ratings; or the possible bearing of Antigua and Barbuda legislation upon the agreements. Nor was there any background evidence as to history, usage or custom with respect to articles, individual seafarers' contracts, collective contracts at national and international levels, and the way in which those matters might bear upon the distinction between single voyage or single ship agreements on the one hand and company service agreements on the other.

Result

66. Leave is reserved to the ratings to apply within 7 days for a further hearing relating to the creation and terms of their employment contracts and any consequences this may have for redundancy and a wages lien. In the absence of such an application within 7 days, judgment may be entered to the effect that the ratings have no lien priority in respect of their redundancy compensation claims. Costs are reserved.