

**HCAJ000269/1998 THE SPARTI
HCAJ000269/1998**

**HCAJ 269/98
IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ADMIRALTY ACTION NO. 269 & 373 OF 1998
Admiralty Action in Rem against the ship "SPARTI" of
the Panamanian Flag**

**HCAJ 269/98
BETWEEN
MACEDONIA THRACE BANK S.A.Plaintiff
AND
THE OWNERS OF THE SHIP 'SPARTI'Defendants**

**HCAJ 373/98
BETWEEN
T.R.F. PONAHEDEDIGE, D.C.J. PATTIYAGE,
M.E.U.Plaintiffs
DHARMASENA, S.M.F. MADDUMAGE, VICTOR
SINNADURAI, S. NANAYAKKARA, P.F.
ICHACHAMPULIGE, R. RATNASINGHAM, S.W.R.
PRASANTHA SILVA, S.D. MALAPAGE, A.K.
DEWAMUNI, R.P.G. MANAMARAKALAGE, S.P.F.
ARUMAPURAGE, A.N.N.K.S. SINGAPULI, M.R.S.
COORAY, M.H.M. RILA, R.A.D. EDWARD, K.W.S.K.
FONSEKA, M.F. HAMZA, I.A.N.S.EATHIGE, S.
PERIYASAMY, PETROS PETROU, SURaweera
ANIL, ANNA MARINE CONCERN (PYT) LTD.
AND
THE OWNERS OF THE SHIP 'SPARTI'Defendants**

**Coram: The Hon. Mr. Justice Waung in Court
Dates of Hearing: 23 September, 20 - 22 December
1999
Supplementary Written Submissions: 16 and 25
February 2000
Date of Handing Down of Judgment: 27 July 2000**

J U D G M E N T

By Judgment dated 10th November 1998 in AJ 269/98, the sum of US\$6,460,392.16 plus interests was awarded against the Defendant ship SPARTI ("the Vessel") to Macedonian Thrace Bank ("Bank"), the mortgagee of the Vessel. By Judgment dated 5th January 1999 in AJ 373/98, the sum of US\$74,829.38 plus interests was awarded against the Vessel to the 24th Plaintiff in that Action, Anna Marine Concern (PVT) Ltd. ("the Assignee") which was the assignee of wages due to 23 members of the crew of the Vessel who are also the 1st to 23rd Plaintiffs in that Action. The Vessel was sold by order of the Court but the proceeds of sale is not sufficient to cover the Bank's Judgment and the Assignee's Judgment. By the respective Motions of the Bank and of the Assignee, each asked the Court for determination of priority in its favour, ranking it higher against the other party. The normal rule in admiralty is that crew wages rank higher than mortgagee claim. The unusual question raised by the parties is whether in this case, by contract of Assignment the Assignee could enjoy the same high priority as the crew against the Bank mortgagee.

FACTS

The Assignee was the Manning Agent of the Vessel and the 1st to 23rd Plaintiffs in AJ 373/98 ('the Crew') were signed on as crew by the Assignee. In October 1997 while on a voyage from Brazil to Korea, by way of Singapore, the Vessel was diverted to Colombo because of the threat of strike by the Crew over outstanding wages. In Colombo the Crew went on strike and there was sit-in with the result that no new crew could be taken on and the Vessel could not leave Colombo. The Owners of the Vessel ("Owners") at the time was in financial difficulties and could not pay the Crew. The Assignee was acting as agent of the Vessel in Colombo. The Owners asked the Assignee to pay the Crew and although the Assignee was under no legal duty to do so, the Assignee agreed to pay the Crew because it felt that its reputation as Manning Agent was at stake and because it took the appropriate assignments from the Crew. Each of the Assignments from the members of the Crew to the Assignee was in the same form and it

reads:-

"In consideration of the payment by you to me of US\$.... In respect of wages and other amounts due for my employment on board M/V Sparti I hereby assign to you all my rights against the Owners of the Vessel or the Vessel itself."

In each case, it was an equitable assignment to the Assignee as no written notice of the Assignment was given by the Crew or the Assignee to the Owners of the Vessel.

GENERAL RULE OF PRIORITY IN ADMIRALTY

The foundering of any sea adventure normally would result in a number of claims being made in rem against a ship. When the court sells the ship, the proceeds of sale is often insufficient to satisfy all in rem claimants. Question of priority then becomes important. Unfortunately, maritime countries of the world do not apply in their courts a uniform rule of priority. The Courts of the United States of America give the highest possible priority to wages claim. The law on priority in England and in Hong Kong is somewhat different from that applicable in the United States. As described in Tetley on Maritime Liens and Claims, 2nd edition at pages 884 onwards and in McGuffie on Admiralty Practice (1964) at pages 742 onwards, the general order of priority for maritime claims usually seen in the Admiralty Courts of the United Kingdom and of Hong Kong is as follows:-

- 1. Costs of arrest;**
- 2. Possessory lien of repairer;**
- 3. Salvage (maritime lien);**
- 4. Collision (maritime lien);**
- 5. Wages (maritime lien);**
- 6. Mortgage;**
- 7. Statutory rights in rem such as necessaries claims, agent claims, cargo claims, charterer's claims, towage claims, etc.**

ISSUES

The Bank and the Assignee agree that the general rule of priority is that maritime lien of wages ranks higher than mortgage. There is also agreement that if

sanction is obtained from the Admiralty court before payment is made to the crew then the person who pays off the crew will enjoy the same high priority of the crew, if not higher priority by way of the Bailiff's expenses. The difficulty here is that the Assignee made payment without the sanction of the Admiralty Court (which of course was not possible because in October 1997 when payment and Assignment took place the Vessel was in Colombo and the arrest in Hong Kong was in August 1998). The legal difference between the parties in this case is the following:-

1. Whether the maritime lien of wages is capable of being assigned;

2. If maritime lien of wages is capable of being assigned whether the assignment here is invalid being prohibited by Section 93(1) of the Merchant Shipping (Seafarers) Ordinance.

ASSIGNABILITY OF MARITIME LIEN

For a long time, it was generally thought that maritime lien was not capable of being assigned. The leading textbook writers all took that view:-

(1) Roscoe on Admiralty Practice, 5th edition pages 28-9;

(2) Price on Law of Maritime Liens, Chapter 8, pages 72-82;

(3) Thomas on Maritime Liens, Chapter 10, pages 278-9;

(4) Tetley on Maritime Liens and Claims, 2nd edition, pages 1221 onwards.

In the new book by Toh Kian Sing on Admiralty Law and Practice at pages 244-6, where there is emphasis on Singapore decisions, doubt is expressed as to the correctness of non assignability of maritime lien. In Jackson on Enforcement of Maritime Claims, 2nd edition, pages 408-410, it was also argued that there are good ground in favour of assignability of maritime liens.

There is a lot of old learning on this subject which supports the basic submission (which I accept) of Mr. Sussex for the Bank that maritime lien as understood by the British and Hong Kong Courts is regarded as a

personal privilege which enured to the sole benefit of the maritime lienholder. This personal right of maritime lien is not capable of being transferred and therefore notwithstanding the wide wording of Section 9 of the Law Amendment and Reform Consolidation Ordinance providing for the legal assignment to transfer "legal right to debt or chose in action and legal remedies" maritime lien cannot be voluntarily transferred. It is for this reason that we do not see any decision where well known maritime liens such as salvage or collision claims had ever been the subject of assignment to third party volunteers. Bottomry bonds have always been an exception to this general principle because of the transferable nature of this particular maritime right.-

Mr. Smith for the Assignee argues that there is in law a right to assign maritime lien and he relies on various old decisions which suggest the existence of this right.

First in time is the case of *The William F. Stafford* (1860) Lushington 69. This is a case on priorities where the competing interests were the bottomry bond and necessaries in the form of *Da Costa* paying the crew by directions of the master on behalf of the ship. The contest before Dr. Lushington was whether what *Da Costa* paid was necessaries (not maritime lien) which would of course rank behind bottomry bond or in the nature of wages which being maritime lien would rank ahead of the bottomry bond. In one sentence Dr. Lushington gave priority to *Da Costa* by saying:- "I am of opinion that *Da Costa's* claim is in the nature of wages, and must therefore be the first paid." The point of assignment of maritime lien was not argued but the point was decided on the basis strictly of priority in the sense that because the necessaries of *Da Costa* was in the nature of wages therefore it enjoyed a higher priority than bottomry bond.

The next decision is again that of Dr. Lushington in *The Wasp* (1867) LR 1 A & E 367. The Plaintiff in that action being shipbuilders sued the ship in rem but that was not a claim based on maritime lien because there was no maritime lien for shipbuilders or repairers only a statutory right in rem. There was a strike-out application by the defendant on the basis

that the plaintiff had no claim against the defendant vessel because its cause of action as well its other properties had passed to its trustee in bankruptcy under the composition deed. The reply of the plaintiff to this is that it had assigned its cause of action to a bank and that therefore what was assigned under the composition deed did not include the cause of action based on the shipbuilding claim. The plaintiff therefore had a right to sue for the shipbuilding claim because it was in fact suing as trustee of the Bank. It is to be noted that the Bank was not suing as assignee of the shipbuilding claim but it was the shipbuilder plaintiff itself who was suing. Whatever was said by Dr. Lushington was therefore hardly any proposition for the assignability of maritime lien.

The decision of *The St. Lawrence* (1880) 5 P.D.250 also afforded no authority for assignability of maritime lien. It was a case of priority and by concession if not agreement of the party, the money paid by the necessaries for wages was given higher priority by Sir Robert Phillimore than the bottomry bond.

The Tagus (1903) P. 44 is an important decision of Phillimore, J. where the contest on priority is between the master and the mortgagee. The master while acting as supercargo and before he became master advanced as disbursement to the crew their wages and it was argued that following *The William F. Stafford* the master was entitled to stand in the shoes of the seamen who could have arrested the vessel. In an important passage at page 54, Phillimore, J. said:-

"I follow and concur in the decision in *The Albion* 1 Asp. M.L.C. 481 so that if the whole disbursements are, as apparently they are, payment of wages of the crew, who might have seized the ship, then I think that the doctrine, that the man who has paid off the privileged claimant stands in the shoes of the privilege claimant should be applied, and he has a lien for any disbursements made, although he was not master, in payment of the wages of the crew "

This decision therefore supports the proposition of high priority given to someone who paid off privileged claimant with high priority because he stands in the shoes of the privileged claimant. The

case does not lay down any proposition that a maritime lien can be assigned or transferred.

The next decision of Clark v Bowring (1908) SC 1168 however does touch on this proposition. An American necessities paid off the wages of the crew and asked for higher priority than the mortgagee. The court held on the facts that the American necessities did not rely on the credit of the ship but on the credit of the owners. In an obiter judgment, the Lord President said at page 1174 that there is no question that that seamen's wages lien can be assigned. This is of course said in the context of Scottish law which is closer to civil law of Europe. No authority however was cited in support of that proposition. Lord Kinnear said at page 1177:-

"when anyone in a foreign port is asked by the master of a ship to advance money for the payment of the wages of the crew, and agrees to do so, he is to be put into the shoes of the seamen whose wages he had paid so as to have the same rights and remedies against the ship as they would have had, because he is presumed to make advances upon the credit of the ship, which is the only fund of credit, that, ex hypothesi, he know anything about. "

That was repeating what were said in earlier cases referred to above.

The Petone [1917] P. 198 is an important judgment of Hill, J. the Admiralty Judge. The application there was to set aside the Writ in rem on the ground that the plaintiff who had paid off the crew wages did not have any maritime lien transferred to the plaintiff by such payment. This was the first time a British Admiralty Court was asked directly to decide whether maritime lien could be acquired by subrogation as argued by the plaintiff and unlike the priority cases, it was a decision which went directly to the question of jurisdiction in rem of a claim based on the acquisition or transfer of maritime lien (albeit not by assignment). There was an extensive review of the authorities including The William F. Stafford, The Wasp, The St. Lawrence, The Tagus and a number of other decisions (Clark v Bowring however was not cited). The Admiralty Judge was of the view that the fact of the leave of the Admiralty Court was

necessary was quite inconsistent with any doctrine that he who pays off wages stands in the shoes of and has the maritime lien of the seafarer. At page 208, Hill, J. said:-

"In my view the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and has his lien, whether it be regarded as a general doctrine or as applied to wages only.

I say nothing about contractual assignments of debts or claims supported by maritime liens. It is not necessary to consider how far such an assignment carries with it in all cases the maritime lien; it does so in the case of bottomry; whether it does so in any other cases it is not necessary to express an opinion. In the present case there is no question of assignment. The plaintiffs paid the wages and/or the disbursements. The master and crew have been paid and their debts satisfied. They assigned nothing to the plaintiffs. The plaintiffs do not claim as their assignees but in their own right as having paid the men off. Counsel for the plaintiffs contends that the doctrine is an application of the principle of subrogation. But I know of no principle of English law which says that one who, being under no compulsion and under no necessity to protect his own property, but as a volunteer, makes a payment to a privileged creditor, is entitled to the rights and remedies of the person whom he pays. That is the position of the plaintiffs. They chose as volunteers to pay off debts which constituted a marine lien upon the ship. They did not, in my opinion, thereby acquire any maritime lien. They have therefore no right in rem based upon a maritime lien. They have no right in rem independent of a maritime lien."

Mr. Smith does not in express terms say that The *Petrone* is wrong. What he says is that The *Petrone* has left open the point about whether maritime lien can be assigned by contract. In a sense Mr. Smith is of course correct that Hill, J. left the point of assignability of maritime lien open but it seems to me that in the light of what was said and decided in The *Petrone*, there is little room left for the contention that maritime lien could be acquired or transferred by

contractual assignment. Having regard to the reasons given by Hill, J. as to why no maritime lien could be acquired or transferred by subrogation, the same reasons would equally be applicable against acquisition or transfer of maritime lien by contractual assignment. In fact I would have thought that there would be stronger objection against contractual assignment because in such a case it would not even require full payment to be made by the assignee to the assignor. With subrogation there is at least the merit of the person having paid off the wages and then in equity standing into the shoes of the crew. With contractual assignment, there would not even be the necessity for such payment. With equitable assignment, the matter is even worse as the owners of ships would have no notice of such equitable assignment and could face competing or conflicting equitable assignments of the same maritime lien. In equity, there ought to be even less reason for the Court to recognise such an equitable right. In my judgment, either The Petrone is right and carries with it the corresponding implication that maritime lien is not capable of being transferred voluntarily in any form whether by way of subrogation or by way of contractual assignment. Or alternatively The Petrone is wrong. The decision of The Petrone had stood unchallenged as being correct for the last 80 years. The Court must scrutinise with care any attempt to cast doubt on its correctness, specially when the challenge is made indirectly or inferentially.

Having looked at the authorities which is against the Assignee, it will be convenient to have regard to other considerations on this matter of assignability of maritime lien.

The Merchant Shipping (Seafarers) Ordinance Cap. 478 ("Ordinance") can be said to reinforce my aforesaid view that maritime lien (in the form of wages) is not capable of being assigned. Section 89 of that Ordinance provides for a seafarer of a Hong Kong ship to allot to any person part of wages by means of an allotment note. Section 90(1) provides that the allottee under the allotment note can recover in his own name the wages allotted and shall have the same remedies as the seafarer has for the recovery of his wages. By this provision, an allottee such as the wife of crew can sue in her own name in any

proceeding including an action in rem. The introduction of this right by section 90(1) of the Ordinance suggests that there was no previous right in the allottee or assignee wife to claim in her own name for wages of the husband transferred to her.

Public policy is said by Mr. Smith as providing a good ground why this Court should at least acknowledge the principle of assignability of the maritime lien of wages. Reference was made to American cases such as *The Bethlehem* (1923) 286 F.400 and *The President Arthur* (1928) 25 F. (2d) 999 where the public policy sentiment expressed is that so long as there is no fraud or overreaching in the assignment, it is better for a seaman to be able to assign his wages claim and get his money than for him to wait for his money when it can be paid out of the proceeds of sale of a ship. I can of course understand the strength of that view but American maritime jurisprudence has developed along a somewhat different line such as giving the very highest priority to wages (which could be related to its recognition of the assignability of wages) and it is not in my view for a Court of First Instance in a case such as this, where there is doubt even as to the equity of the Assignee (is this in reality a Greek agent closely related to the Greek Owners seeking to take advantage of the Bank), to declare a new principle against the weight and history of decisions not only in Britain but also in other Commonwealth countries.

In Canada, it is established that maritime lien such as wages is not capable of assignment. (see *The Samuel Marshall* [1924] Ex. C.R. 53, *The Aragon* [1943] Ex. C.R. 41, *The Alarisa* [1996] 2 F.C. 883). The same legal position holds true also in New Zealand (see *The Offi Gloria* [1993] 3 NZLR 576). In Singapore, there was no direct decision in favour of assignability. In *Soon Aik Marine & Engineering Pte Ltd. v Hoesheng* [1989] 1 MLJ 178, the challenge was by the mortgagee against the in rem jurisdiction of the CPF Board claim for arrears of CPF contributions for the crew. It was said by Chan Sek Keong, JC at page 182 that:-

"The legal assignment of choses generally has been permitted by statute since the Judicature Act 1873. Unless there is binding authority against such assignment, there would seem to be no public policy

consideration against the assignment of wages of the master and the crew, and with it the maritime lien..... It is unnecessary for me to decide whether seamen's wages or masters' wages are assignable."

The learned Judge did not seem to have been referred to The Petrone or the series of commonwealth decisions against assignment. As the point was not decided in favour of assignability, the Singapore decision does not assist the Assignee.

I therefore conclude on the first and crucial issue that the Assignee has not acquired the maritime lien of wages from the Crew because maritime lien is not capable of being transferred by the Assignment (whether legal or equitable) and it follows therefore that the Assignee ranks behind the Bank which is entitled to payment out of all the fund now in Court.

STATUTORY PROHIBITION

In the event that I might be wrong on the issue of assignability of maritime lien, the question then arises as to whether in this case the Assignment of the maritime lien falls foul of Section 93(1) of the Ordinance which provides as follows:-

"a seafarer's lien, his remedies for the recovery of his wages ... and any right he may have or obtain in the nature of salvage shall not be capable of being renounced by any agreement."

This provision was derived from an earlier statutory provision in Section 182 of the Merchant Shipping Act which provides as follows:-

"Every stipulation by which any seaman consent to abandon his right to wages in the case of the loss of the ship or to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative."

The submission of Mr. Sussex for the Bank is that the Assignment by the Crew to the Assignee was a renouncement of the maritime lien by the Crew and that therefore following the decision of The Rosario, the Assignment was invalid and no maritime lien could be assigned to the Assignee who therefore

could obtain no priority over the Bank. This issue is therefore on the facts of this case, the construction of Section 93(1) in the light of *The Rosario*.

First, as a matter of construction of Section 93(1) what is provided by the statute is the lack of ability to renounce the wages lien and remedies for recovery of wages by any agreement. I do not understand an assignment of the wages to the Assignee could be characterised as renouncement of the lien or the remedy for recovery of wages. The lien and the remedy were the rights whereby the Crew could receive wages from the Defendant Vessel. The obligation of the Defendant Vessel was to pay the wages. The obligation of the Defendant to pay wages was not in any way abandoned by the Crew by their making the Assignment. They merely passed the right to receive the wages to the Assignee. Rather than the Assignment being the Crew's renouncement of the right to wages it was the Crew's affirmation of the right to wages except the receipt of the wages was transferred from the Crew to the Assignee. As a matter of construction, Section 93(1) presents no bar to the transfer of the Crew's wages lien by the Assignment to the Assignee.

The question then is whether the decision of *The Rosario* alters in any way my construction of the section. In *The Rosario* (1876) 3 Asp. Mar. Law Cas 334 (a slightly different report at 2 P.D. 41), the plaintiffs were 16 crewmembers of the ship *Navarino* which had rendered salvage services to the *Rosario*. The plaintiffs crew assigned their salvage rights to the Owners of the *Navarino* in consideration for the immediate payment of a sum by these Owners to the crew which turned out subsequently to represent only a small fraction of the amount which should have been awarded to them by an Admiralty Court. After the Owners of *Navarino* received a substantial sum of salvage from the *Rosario*, the plaintiffs crew sued the Owners of *Navarino* for the crew's share of the salvage and the Owners of *Navarino* pleaded the assignment by the crew as a defence to the claim of the crew. The crew sought in reply to rely on the statute (Section 182 of MSA 1854) as preserving their right to salvage notwithstanding any consent on their part to abandon the claim to salvage under the agreement with the Owners of *Navarino*. It is in the

context of the Owners of Narvarino's argument that the crew had assigned the salvage claim right and not abandoned it that the judgment of Sir Robert Phillimore becomes relevant.

First it is to be noted that The Rosario is of limited value because it was a pleading decision on an application to put in a reply by the plaintiffs crew to contend that they could still sue for salvage against the Owners of Navarino notwithstanding the assignment.

Secondly, the citation of The Pride of Canada by Sir Robert Phillimore showed that historically the rationale behind this statutory provision or its predecessor was to protect seamen from inequitable agreement whereby crew gave up for little or nothing their salvage right. It is not meant to be a statute to be applicable whereby instead of seamen being cheated inequitably they were enforcing fully their rights by being paid in full and transferring the right of enforcement to someone else.

Thirdly, the conclusion reached by Sir Robert Phillimore in the last paragraph of the judgment where he said:-

"it must have intended, looking to the general purpose of the Act, to protect seamen in the assignment of their rights The section of the statute is in aid of the general law, and not as a substitute for it."

seems to me unwarranted and too wide. The surmise of "it must be intended" followed by the width of what was intended seem to me to render that part of the judgment of doubtful value. And this is even more so having regard to, by comparison with the old English statute, the very different nature of the Ordinance embodied in Chapter 478 of which section 93(1) is merely a small part.

Finally, I have serious doubt that it was intended by the Ordinance that a seafarer is not permitted to have his rights transferred to someone else who would fully enforce his lien rights. We have seen how by Section 90(1) an allottee of the seafarer could have transferred to it all the rights of the seafarer. If

Section 93(1) is an absolute prohibition against assignment or transfer as contended by the Bank, then I do not see how that can sit comfortably with Section 90(1) of the Ordinance.

In my view, the true spirit and intention of Section 93(1) is not to prohibit absolutely all assignment of the right of wages lien. The vice aimed at is the loss or giving up of wages by the device of some inequitable agreement and not the gain of wages by an instrument which transfers the enforcement of the wages lien to some other person who pays off the seafarer in full. On this issue I therefore hold against the Bank.

CONCLUSION

The final result is therefore that I find that the Bank is entitled to higher priority against the Assignee because on the first issue I hold that no maritime lien is transferred to the Assignee as maritime lien being personal in nature is incapable of being transferred in law. It follows therefore that the Bank is now entitled to be paid the fund in Court having a higher priority than the Assignee.

It is in a way regrettable that I have to come to this decision because it could be said, looking at it from the Assignee's point of view, that the Bank is better off now than would have been the case if the Assignee did not pay off the Crew. The Vessel would then most probably be arrested by the Crew in Colombo and the Crew would be entitled to the higher priority for wages and the total amount of money which the Bank would be able to collect from the proceeds of sale would be less in Colombo than in Hong Kong. Further it might also be noted that if the Assignee had paid off the crew in Colombo with the sanction of the Colombo Court (assuming the law in Colombo on non-assignability of maritime lien and on necessity of obtaining leave of the Court to pay off crew is the same as in Hong Kong) then the Assignee would be able to recover the amount paid as they would have a higher priority than the Bank under the protection of the leave of the Colombo Court.

The legal position however is clear and in the circumstances, the dispute of priority results in a

determination in favour of the Bank and against the Assignee. There will be an order for payment out of the fund in Court to the Bank. The Bank is entitled to its costs of the hearing.

(William Waung)

Judge of the Court of First Instance, High Court

Representation:

Mr. Clifford Smith instructed by Messrs. Crump & Co. for the Plaintiffs in AJ 373/98 (the Crew)

Mr. Charles Sussex, S.C. instructed by Messrs Holman Fenwick & Willan for the Plaintiff in AJ 269/98 (Mortgagee Bank)

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