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The " Leoborg " (No. 2)

## ADMIRALTY DIVISION

Wednesday, May 6, 1964

THE " LEOBORG " (No. 2)

Before Mr. Justice HEREON

**Admiralty practice — Priorities — Voluntary payment off of privileged creditor Equitable right of payer to same privilege — Unpaid wages while serving in sister ship—Costs of opposed motion.**

Motion by plaintiff first mortgagees of motor tanker for determination of priorities and payment out from fund in Court arising from appraisal and sale of *Leoborg* at instigation of A.K. Ltd. (necessaries men) — Claim by first mortgagees that they were next in priority to wages claimed; that mortgage principal and interest should be paid to them from fund; and that A.K. Ltd. should pay costs of present motion because their intervention in previous proceedings by first mortgagees had resulted in first mortgagees' motion being dismissed to allow further investigation which showed that A.K. Ltd.'s allegation was without foundation—Priority of chief engineer of *Leoborg* in respect of claim for wages unpaid while serving on *Haysborg* (sister ship of *Leoborg*)—Wages and repatriation expenses of crew of *Leoborg* paid by A.K. Ltd.—Whether A.K. Ltd. entitled, on equitable grounds, to take priority over first and second mortgagees—Claim by A.K. Ltd. to costs of arrest and administration of fund.

*Held*, by HEWSON, J., (1) that all costs thrown away by first mortgagees as result of A.K. Ltd.'s unfounded allegation should be paid by A.K. Ltd.; (2) that point as to priority of chief engineer in respect of wages earned on *Haysborg* was not, in the circumstances, fully argued; and that, therefore, it would be left open; (3) that A.K. Ltd. had failed to give all relevant facts and circumstances as to payment of crew's wages; that, accordingly, Court would not apply equity to one party to detriment of other parties; and that, therefore, in all their claims, A.K. Ltd.'s status was that of necessaries men; and (4) that A.K. Ltd. were entitled to costs of arrest and administration of fund — Order of priorities, Admiralty Marshal's expenses having been paid:

- (1) Costs of arrest and administration of fund to A.K. Ltd.;
- (2) Wages claims, interest and taxed costs, excluding chief engineer's *Haysborg* wages claim;
- (3) First mortgagees;
- (4) Second mortgagees;
- (5) Necessaries men and chief engineer's *Haysborg* wages claim.

The following case was referred to : *Petone*, [1917] P. 198.

This was a motion by the plaintiffs, A/S Hakedal, a Norwegian corporation, for an order (a) that their claims were entitled to priority over the claims of all other persons having claims against the fund in Court in respect of the proceeds of sale of the motor tanker *Leoborg* save for the costs of arresting the vessel and wages claims; and (b) that the sum of £81,384 8s., being the sum for which judgment was given for the plaintiffs in respect of principal and interest due under a mortgage of the *Leoborg* ([1963] 2 Lloyd's Rep. 268), be paid out of Court to the plaintiffs' solicitors.

A similar motion by the plaintiffs for payment out was dismissed by Mr. Justice Hewson on Nov. 25, 1963 ([1963] 2 Lloyd's Rep. 441).

Mr. J. D. H. Rochford (instructed by Messrs. **Ince & Co.**) appeared for A/S Hakedal, plaintiff first mortgagees; Mr. J. F. Willmer (instructed by Messrs. Coward, Chance & Co., agents for Messrs. Jacksons, Monk & Rowe, of Middlesbrough) appeared for a former master of the *Leoborg*, who had obtained judgment, and the master and crew at the time of arrest; Mr. J. S. Hobhouse (instructed by Messrs. William A. Crump & Son) appeared for the second mortgagees; Mr. G. K. Beattie (instructed by Messrs. Clyde & Co.) appeared for August Kopcke & Co., Ltd., who obtained judgment on Feb. 19, 1962, in respect of a claim for necessaries and disbursements totalling £5794.

Mr. ROCHFORD, for the plaintiff first mortgagees, said that all known claimants against the fund were either agreed that priorities should be determined, or else were present in Court to raise objections.

COUNSEL submitted that the claims should be given the following priorities :

- (1) Costs incurred by August Kopcke & Co., Ltd., in arresting the vessel and up to the order for appraisal and sale.
- (2) Wages claims and crew's repatriation expenses and disbursements, including the first mortgagees' costs of an application in respect of advances to the crew.

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(3) Principal and interest due under the first mortgage, for which the plaintiffs had obtained judgment with costs.

(4) Principal and interest due under the second mortgage and costs.

(5) Necessaries.

COUNSEL said that the earlier motion for payment out of £75,000 had been opposed by Mr. Willmer and the second mortgagees as being too large, compared with the size of the fund. Mr. Beattie had objected to any payment out on account until priorities had been determined.

Mr. BEATTIE, for August Kopcke & Co., Ltd., said that he had withdrawn his allegation that the first mortgagees knew that the owners were insolvent when certain necessities were incurred, and the mortgagees were running the vessel.

Mr. WILLMER, for the first interveners, said that he raised no objection to priorities being determined, except for one plaintiff, the chief engineer, Herman Eertman, who died in 1963, allegedly domiciled in Eire. Until letters of administration were granted in England, the widow was not on the record.

Mr. HoExousE, for the second mortgagees, said that his clients, as second mortgagees, had obtained judgment for more than £40,000. Only part of that claim would be satisfied.

COUNSEL asked that an order should be made listing the priorities put forward by Mr. Rochford, with the exclusion from the wages' priority of the claim by the chief engineer, Eertman, for £314 10s. 10d. The claim represented wages earned while serving in the *Leoborg's* sister ship the *Haysborg*.

COUNSEL submitted that there was no maritime lien on the *Leoborg* in respect of wages incurred on the *Haysborg*.

Mr. WILLMER *said* that as that particular client was not on the record he was not entitled to say anything.

COUNSEL said that he would have asked for an adjournment to argue this new question of principle, but since the widow had no legal aid or union backing, he would not risk the further costs that such a hearing would involve.

Mr. BEATTIE submitted that his clients should receive priority above the first mortgagees, in respect of wages paid to the crew and repatriation expenses.

COUNSEL asked his Lordship to consider whether it was right that a party who had paid off a privileged claim should be deferred to a party who had not helped.

Mr. Justice HEWSON said that the priorities were obviously as Mr. Rochford had submitted.

Mr. ROCHFORD submitted that if payment out of £81,384 8s. was allowed, there would still be sufficient in the fund to pay claims prior to his and costs.

Mr. WILLMER submitted that £81,384 8s. was too much, and that £75,000 would be safer.

#### JUDGMENT

**Mr. Justice HEWSON:** The plaintiffs, who are the first mortgagees of the *Leoborg*, obtained, on Oct. 9, 1963,\* a declaration as to the validity of their mortgage and judgment on their claim in the sum of £81,384 8s. in respect of principal and interest. In this motion they ask for an order that, firstly, they are entitled to priority over the claims of all other persons having claims against the fund in Court in respect of the proceeds of sale of the *Leoborg*, save for wages claimed and a claim made under action 1962 Folio 77 in respect of seamen's pensions. I pause there to say that this latter claim is not being proceeded with and, therefore, so far as these plaintiffs are concerned, the only effective priorities are in respect of wages claimed. Secondly, they ask that the sum of £81,384 8s. be paid out; and, thirdly, that their costs of and incidental to this present motion be paid by the plaintiffs in action 1962 Folio 19. I shall make more detailed reference to those plaintiffs in the course of this judgment.

There are over a dozen writs altogether in respect of claims against this ship or the proceeds of sale. All these writs were issued between January and October, 1962.

When these present plaintiffs came before the Court on Oct. 9, 1963, for their declaration and judgment, to which I have already made reference, I gave warning in Court to all parties having claims against the fund to bring them in and prosecute them without delay.

On Nov. 25, 1963, this Court was moved by the present plaintiffs for payment out on account of the sum of £75,000 in respect of their claim.† Because of the intervention

• [1963] 2 Lloyd's Rep. 268. † [1963] 2 Lloyd's Rep. 441.

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by the plaintiff in action Folio 19, a firm of the name of August Kopcke & Co., Ltd., ships' chandlers, of Rotterdam (who alleged that these plaintiffs, the first mortgagees, knew that the owners of the *Leoborg* were insolvent at the time when certain expenses on account of necessities were incurred, and that these mortgagees were in fact operating the vessel at the time), the motion was dismissed in order that such allegations could be investigated and the necessary discovery given. This intervention resulted in delay and expense to the present plaintiffs, who, by an affidavit sworn on Feb. 25, 1964, satisfied me that this allegation was, and is, unfounded.

Dealing with these plaintiffs' third claim in this motion first, that is, in respect of costs of and incidental to this present motion, it is ordered that all costs thrown away by these plaintiffs as the result of that allegation shall be paid by the plaintiffs in action Folio 19, namely, August Kopcke & Co., Ltd. The costs of any party in respect of this motion should be the costs in their respective actions.

Returning now to the history of the case. For reasons given in my judgment on Nov. 25, 1963, I found it impossible to order payment out before priorities were determined and I suggested that in the exceptional circumstances that had arisen in this case any claimant who so desired should institute a motion for such determination. I suggested that this should be done in a period of not less than two months from that date to enable any party to consider what steps he wished to take. The solicitors for these plaintiffs, acting upon this advice, filed this present motion on Feb. 26, 1964, giving proper notice to the solicitors representing all claimants. This present motion only asks for certain priorities to be determined. All parties were warned by the plaintiffs that in this motion the Court would be asked to deal with all priorities. In the absence of any further intervention I propose so to do.

Further, it is now several months since the warning was given in October, 1963, and ample time has elapsed for any party alive to his interests, and having a claim against the ship or the fund and wishing to pursue that claim, to do so.

Before deciding on priorities in the order in which Mr. Rochford, for the first mortgagees has submitted, reference must be made to certain exceptional circumstances in this case.

The chief engineer of the *Leoborg*, Herman Eertman, who is now dead, claimed against the fund for unpaid wages in respect of his service on board the *Leoborg*, and also in the sum of £314 10s. 10d., being unpaid wages while serving on board the vessel *Haysborg*. This latter part of the claim could not, before the Administration of Justice Act, 1956, have been made against the *Leoborg*, but under the sister-ship clause, Sect. 3 (4) of that Act, such a claim may now be made, provided that the requirements of that section are complied with.

Mr. Hobhouse, who appears for the second mortgagees, in the course of an attractive argument, has submitted, among other things, that, though the chief engineer may have a right *in rem* against the *Leoborg* in respect of wages earned on board the *Haysborg*, he has not a maritime lien against the *Leoborg* in respect of them. He submitted that those unpaid wages do not carry the priority of a maritime lien and that they should rank after claims of mortgagees. He has further submitted that the Courts are against the creation of further maritime liens and that the Act of 1956 has not extended them to sister ships. He has further submitted that mortgagees have a lien on the *Leoborg* in respect of their mortgages, and has intimated that there would be no injustice to the chief engineer, or his administrator or administratrix, who still have a maritime lien on the *Haysborg* for wages earned in that ship.

Most unfortunately, Mr. Willmer, who appears for the master and crew, including the chief engineer, is in a very difficult position because of some difficulty in the appointment of an administrator or administratrix of the estate, and, in any event, he understands that the chief engineer's widow does not wish this point to be argued as she is not legally aided and, in the circumstances, is most unwilling to risk the hazards of litigation on a full-scale hearing. I have the greatest sympathy for the widow and Mr. Willmer in those circumstances.

Mr. Hobhouse's submission raised matters which should only be resolved after full argument. The point raises matters which might have very far-reaching consequences. With these things in mind, I find it impossible for me in this motion to decide the point, which must expressly be left open for some future occasion in some other case. Mr. Willmer, in the circumstances, quite properly, is not

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abandoning his claim and priority in respect of the wages earned on board the *Haysborg*, but he is not pressing the point on priority in respect of it, nor is he asking for the motion to be adjourned.

A further matter to be considered is in relation to the claim of August Kopcke & Co., Ltd., which is for about £5794, in respect of necessities and disbursements to the crew. Of that sum, I am told £2265 is for disbursements, and that is in respect of advances on account of wages of the crew made in Rotterdam in 1961, and a further £643 on account of their repatriation expenses. The total disbursements amount, therefore, to about £2908. In respect of these disbursements Counsel for August Kopcke & Co., Ltd., argued that they should have priority over the claims of the mortgagees, not because his clients were subrogated to the claims of the crew, or because by so advancing money to the crew they became possessed of a maritime lien in respect of those advances. He submitted that this Court on equitable grounds should give to his clients a priority superior to that of the mortgagees.

This Court does exercise, and has exercised, a wide equitable jurisdiction and there have been cases in the past where the Court has exercised it in cases of this kind. Cases on this question were considered by Mr. Justice Hill in *The Petone*, [1917] P. 198. Mr. Justice Hill, after reviewing the cases, is reported as follows (*ibid.*, at p. 208):

These, I believe, are the cases. For the view of the more modern text-writers I may refer to [—and he refers to certain authorities—]. They treat maritime liens, other than liens for bottomry, as not transferable.

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 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.

The decision in *The Petone, sup.*, has never been challenged and I propose to accept it.

In spite of this, Mr. Beattie, for August Kopcke & Co., Ltd., has submitted that even if the Court has not been asked to consider the matter before the payment was made and to investigate the circumstances, nevertheless these claimants, having done so as volunteers should be given a priority superior to the mortgagees.

It appears to me that before applying the equitable jurisdiction of this Court to this situation those seeking such an application should put all the relevant facts and circumstances in which they made such advances fully before the Court. This they have not done, although they have had more than sufficient time to do it. There is, admittedly, insufficient evidence as to how these payments came to be made. There are some grounds for supposing that these moneys were advanced in the ordinary course of business to the then masters of the *Leoborg*, who, presumably, were acting as agents for her owners, for the benefit of the crew. I am satisfied that these moneys were paid, but I am ignorant as to why and in what circumstances they were paid. I am not prepared in this case to apply equity to one party to the detriment of other parties in ignorance of the circumstances in which these moneys were advanced. They have no knowledge and, therefore, no full opportunity to make any objections. I find, therefore, that the status of August Kopcke & Co., Ltd., in relation to the whole of this company's claims is that of a necessities **man**.

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**The " Kingston Diamond "**

There is one further circumstance to which I must make some reference, and that is as to the costs of the arrest of this vessel, to which August Kopcke & Co., Ltd., are entitled. It was at that company's instigation that this vessel was arrested and brought before this Court, and they are entitled to those costs. They further ask not only for those costs incurred by them up to the date of the order for appraisal and sale, but also for the proper costs incurred by them in the administration of the fund in Court. These, I gather, were comprised of the exchange of certain letters between them and the Admiralty Registry in relation to the investment of that fund, and also to the movement of the ship while she was under arrest. These additional costs expended for the benefit of all are, in my view, rightly claimed by the arrestor, August Kopcke & Co., Ltd.

I come now to priorities. In my view, the order of priorities in this case is as follows (the Admiralty Marshal's expenses having already been accounted for): Firstly, the costs of the arrest and of the administration of the fund to August Kopcke & Co., Ltd.; secondly, the wages claims, interest and taxed costs, excepting so much of Eertman's claim as related solely to service on the *Haysborg*. Thirdly, the first mortgagees : (a) Such moneys as are due to the first mortgagees under par. 2 of the decree of Oct. 9, 1963; (b) mortgage, interest and taxed costs; and (c) costs under par. 3 of the decree of Oct. 9, 1963. Fourthly, we come to the second mortgagees : Mortgage, interest and taxed costs. Fifthly, necessaries men, including such part of Eertman's claim relating to service on the *Haysborg*. That is the order of priorities.

As to payment out, I order payment out of Court of the sum of £75,000 to the first mortgagees' solicitors upon their undertaking to pay that sum to the plaintiffs. All other sums to be paid out to the respective claimants' solicitors on the usual undertakings in the order of determined priorities as and when the amount of the claims, taxed costs and interest have been determined, including the balance of the first mortgagees' claims, taxed costs and interest, with liberty to any party to apply by motion to the Court or by summons to the Admiralty Registrar for payment out on account.

**ADMIRALTY DIVISION**

Monday, May 4, 1964

**THE " KINGSTON DIAMOND "**  
(LIMITATION)

Before Mr. Justice HEWSON

**Admiralty practice—Limitation of liability—Withdrawal of defence in limitation action —Procedure for applying for judgment—Liability of defendants for costs—R.S.C., Order 19, r. 7.**

Collision between plaintiffs' trawler *Kingston Diamond* and first defendants' pier—Limitation of liability proceedings commenced by plaintiffs and contested by first defendants—Plaintiffs' statement of claim and first defendants' defence delivered — Withdrawal of defence Motion by plaintiffs for declaration limiting their liability—Motion allowed—Whether plaintiffs were procedurally correct under R.S.C., Order 19, r. 7, in applying for judgment by way of motion instead of fresh summons; and whether first defendants acted unreasonably in resisting limitation action so that they should pay costs of that action.

                     *Held*, by HEWSON, J. (1) that, although cumbersome, the procedure by way of motion was not wrong, but there was no reason why application in limitation actions similar to this should not be made by issue of fresh summons before Admiralty Registrar; and (2) that defendants had not acted unreasonably; and that, accordingly, plaintiffs should pay costs.

These questions arose on a motion in limitation of liability proceedings by the plaintiffs, Kingston Steam Trawling Company, Ltd., owners of the trawler *Kingston Diamond*, for a declaration that they were not liable to pay damages beyond the sum of £11,281 8s. 11d. in respect of a collision between the *Kingston Diamond* and Victoria Pier, Kingston upon Hull, on Mar. 24, 1962.

The first defendants, the Corporation of Kingston upon Hull had delivered a formal defence which later had been withdrawn.

Mr. Justice Hewson granted a declaration as prayed and the questions then before the Court were (a) whether, in the circumstances, the plaintiffs had, been procedurally correct under Order 19, r. 7, in applying for judgment by way of motion