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STOREBRAND BANK ASA (Formerly FINANSBANKEN) v. THE OWNERS AND PARTIES INTERESTED IN THE MOTOR VESSEL "FOREST CARRIER" (of the Port of Panama)

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Citation # BS 2005 SC 9

Country The Bahamas

Court Supreme Court

Judge Thompson, J.

Subject Maritime law

Date February 10, 2005

Suit No. COM/ADM/00003 of 2003

Subsubject Sale of ship - Priority of payment to several claimants - Plaintiff obtaining judgment in sum of \$2 million against owners of ship - Sale of ship realising only \$320,000 - Admiralty marshal retaining \$75,000 in respect of claims made on behalf of crew - Whether \$75,000 to be released to plaintiff as mortgagee - Whether defendant entitled to priority as having maritime lien in respect of service provided as agent - Merchant Shipping Act, ss. 277, 278, 281 - Provision as to Constitution of Maritime lien - Finding that defendant had no maritime lien - Judgment for plaintiff to be paid sum of \$75,000.

Full Text Appearances:

Charles Mackay, Esq. for the plaintiff

Ms. Constance McDonald for the Interested Party Tanja Enterprises Company Limited. (end of page 1)

THOMPSON, J.: Prior to the commencement of this action, Tanja Enterprises Company Limited had instituted another action in the Supreme Court seeking monies allegedly owed to the company in respect of goods and services rendered by the company to the ship.

2. However, apart from issuing the Writ and assisting the ship in Freeport, no further action was taken on behalf of Tanja.

3. When the plaintiff in this action brought an order for payment out following the sale of the ship the sum of \$75,000 was retained by the Admiralty Marshal in respect of claims made by Tanja and another.

4. By a Notice of Motion filed on July 28, 2004 Tanja is seeking "an order of

determination of priority of payments to the several claimants against the funds in Court and for payment out of the amounts found due to various claimants".

5. And, the plaintiffs by Summons filed August 5, 2004 is seeking an Order that the sum of \$75,000, which was reserved out of the proceeds of sale of the MV Forest Carrier" with respect to the claim by Tanja Enterprises Company Limited be paid out to the plaintiff as its mortgage under the provisions of section 278 of the Merchant Shipping Act, ranks ahead of the claim of the said Tanja Enterprises Company Limited as that claim is not a **maritime** lien within the meaning of section 277 of the Merchant Shipping Act and that Tanja pay the costs of and occasioned by the application."

6. Both the Summons and the Notice of Motion were heard at the same time.

7. Tanja's position was that it provided to the MV Forest Carrier the following services:

(a) Pay Customs and Immigration bills

(b) Pay Harbour bills for any associated services (end of page 2)

(c) Pay for husbandry items such as crew, medical treatment, transport, hotel, mail or courier service costs, arrange provisions and deliver the same to the MN Forest Carrier".

8. It was also submitted on behalf of the company that the plaintiff confirmed the appointment of Tanja as agent in respect of the provision of the above services on account. Tanja submits that it has a **maritime** lien for the customs duties, Immigration and Port charges and that the plaintiff is estopped from denying Tanja's claim because at all material times it represented to Tanja that it would pay its monies.

9. Tanja further contends that it is entitled to the charges and expenses of the Admiralty Marshal in arresting the MN Forrest Carrier and the legal costs involved in the arrest as a prior charge on the fund, and that these costs rank prior to the costs of the Admiralty Marshal in effecting the second arrest.

10. Submitting also that Tanja is a secured creditor as a result of the prior Admiralty action in rem filed in the Freeport Registry, Tanja contends that the warrant of arrest made Tanja a possessory lien holder giving it priority over all other claims before the Court.

11. The plaintiff in this action won judgment in the sum of \$2m but as the sale of the ship released only \$320,000 it is unable to obtain full payment. The order of July 8, 2004 set out the priorities of payment and retained the sum of US\$75,000 by the Admiralty Marshal in respect of claims made on behalf of the crew by Sea Marine Agency Limited and seafarers and **Maritime** Workers Union of Western Russia and the claim by Tanja.

12. By its application under its Summons as set out herein the plaintiff is now seeking that the sum of \$75,000 be released to it as mortgagee under Order 67 and rules 22 and 24.

13. The plaintiff submits that s.278 of the Merchant Shipping Act provides that subject to section 280 the **maritime** laws set out in section 277 shall take priority over mortgages registered under the Act, or any preferential rights arising under the Bankruptcy Act and "no other claim shall take priority over such mortgage or rights." (end of page 3)

14. It is further submitted on behalf of the plaintiff that having regard to the specific provisions of s.278 and the **maritime liens** as set out in section 277 Tanja has not shown on the evidence that it is a **maritime** lien holder in respect of any of the claims which are set out in its affidavit in support sworn by Frederick Hall and most of the claims made therein are not **maritime liens**.

15. In this connection it is argued that section 277 makes no provision for **maritime liens** in respect of services provided by an agent, and if the payment of customs, immigration fees and Labour bills could be interpreted as port dues under Section 277, the **maritime** lien holder would have to be the one to make the claims and not the agent, see *The Petone* (1917) P. 198.

16. Counsel further argued that the other items specified in Mr. Hall's affidavit did not fall within the provisions of section 277 to constitute a **maritime** lien and also there was no evidence of payment of any of the amounts. The further argument was raised that the affidavit does not explain what payments were made by Tanja and how those payments constitute a **maritime** lien under section 277 of the Merchant Shipping Act, and further that Tanja cannot claim the right of subrogation as there is no law to support such a claim and also there is no evidence of assignment by the Customs and Immigration Departments show that the right to collect these monies were assigned to Tanja.

17. In respect of the amount claimed with respect to the Admiralty Marshal's expenses and legal fees for Tanja's attorney it is argued that the Admiralty Marshal is bound to call upon the undertaking given by Tanya's attorney at the time of the arrest and that undertaking is personal to the attorney and not to Tanja. See s.281 of the Merchant Shipping Act which provides that it is not until a sum is awarded by a Court in respect of costs or expenses that these items would have priority to all other claims. In this connection Tanja did not obtain judgment in its actions and no order in terms of section 281 of the Merchant Shipping Act was ever made. (end of page 4)

18. Both counsel provided the Court with authorities which the Court found extremely helpful in its deliberation. However, the Court is of the opinion that these authorities need not be set out for the purposes of this ruling.

19. Counsel for Tanja also urged the Court to consider equitable principles in dealing with the claim made by Tanja, however, as stated by counsel for the plaintiff, equity is unable to interfere with statute law.

20. In all the circumstances I am satisfied that Tanja does not have a **maritime** lien within the meaning given thereto by the relevant sections of the Merchant Shipping Act. Consequently the claim made by Tanja is dismissed with costs to the plaintiff.

21. It is hereby ordered that the plaintiff be paid the sum of US\$75,000 now being held by the Admiralty Marshal pursuant to the order of the Court of July 8, 2004.

Jeanne I. Thompson

Justice (end of page 5)

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