Federal Court  Cour fédérale

Date: 20121001

Docket: T-2112-11

Citation: 2012 FC 1161

Ottawa, Ontario, October 1, 2012

PRESENT: The Honourable Mr. Justice Harrington

ACTION *IN REM*

BETWEEN:

COMFACT CORPORATION

Plaintiff

and

**THE SHIP IDENTIFIED AS "HULL 717"
AND HER OWNERS AND ALL
THOSE INTERESTED IN THE SHIP
IDENTIFIED AS "HULL 717"**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] The enactment of section 139 of the *Marine Liability Act* in 2010 changed Canadian Maritime Law. It created a maritime lien where none existed before. Necessaries men now enjoy, in certain circumstances, a maritime lien where, in the past, at best they only had a statutory right *in rem* and at worst no claim at all against the ship over which they rendered service.

[2] The holder of a maritime lien enjoys many advantages. He outranks other creditors and his right *in rem* is not defeated by the sale of the ship. The plaintiff is an unpaid subcontractor of Davie Yards Inc., which went under the *Companies' Creditors Arrangement Act* while it was in the course of constructing the defendant ship. The issue is whether the plaintiff has a maritime lien. If so, it would rank ahead of Export Development Canada (the Bank), the mortgagee.

THE FACTS

[3] At relevant times, the defendant ship, "Hull 717", was recorded in the Canadian Registry of Ships at the Port of Quebec as a ship being built in Canada for the benefit of a Norwegian corporation, Cecon Shipping 2A/S. Export Development Canada is recorded as the first mortgagee in order to secure an account current.

[4] In 2009, Davie Yard Inc., as builder, entered into a subcontract with Comfact Corporation to provide skilled welding services on "Hull 717".

[5] Pursuant to Quebec Superior Court orders under the *Companies' Creditors Arrangement Act*, Davie's assets were sold to a consortium led by Upper Lakes Group Inc.

[6] Thereafter, Comfact, which admittedly has no *in personam* claim against Cecon, or anyone other than Davie, filed an action *in rem* only against the defendant ship. Her owners have not

appeared, but in accordance with rule 480 of the *Federal Courts Rules*, Export Development Canada, as a person clearly interested in the ship, appeared in order to defeat the plaintiff's claim.

[7] The parties are proceeding on an agreed statement of fact and questions of law.

THE LAW AS IT WAS

[8] Under the law as it was, Comfact's action would be dismissed. Of all the many cases on point, it is only necessary to refer to the decision of the Federal Court of Appeal in *Mount Royal/Walsh Inc. v Jensen Star (The)*, [1990] 1 FC 199, 99 NR 42, [1989] FCJ No 450 (QL). That case involved repair work carried out at the behest of a bareboat charterer. The presumption that the services were rendered on the credit of the ship was not rebutted as the individual who issued the purchase order was an officer of both the bareboat charterer and the shipowner. Had the ship repairer known it was dealing with the bareboat charterer as a principal, rather than as agent, the claim would have been defeated. As Mr. Justice Marceau stated at paragraph 30:

> […]To contend that an action in rem could be sustained even in the absence of any personal liability on the part of the owner would go against the whole idea behind the system which is, again, the protection of the owner. A claim against a ship cannot be viewed apart from the owner; it is essentially a claim against the owner. […] I essentially agree that liability as a result of some personal behaviour and attitude on the part of the owner is required.

[9] Thus, at the time, a necessaries man only enjoyed, at best, a statutory right *in rem*, contingent upon some personal behaviour and attitude on the part of the owner. That right *in rem* does not survive a transfer of ownership. On the other hand, a maritime lien may exist, even without personal liability on the part of the shipowner, and survives a change of ownership.

THE LAW AS IT IS

[10] Section 139 of the *Marine Liability Act*, which came into force before Comfact rendered its services, reads as follows:

139. (1) In this section, "foreign vessel" has the same meaning as in section 2 of the *Canada Shipping Act, 2001*.	**139.** (1) Au présent article, « bâtiment étranger » s'entend au sens de l'article 2 de la *Loi de 2001 sur la marine marchande du Canada*.
(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise	(2) La personne qui exploite une entreprise au Canada a un privilège maritime à l'égard du bâtiment étranger sur lequel elle a l'une ou l'autre des créances suivantes :
(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or	a) celle résultant de la fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage;
(b) out of a contract relating to the repair or equipping of the foreign vessel.	b) celle fondée sur un contrat de réparation ou d'équipement du bâtiment étranger.
(2.1) Subject to section 251 of the *Canada Shipping Act, 2001*, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting	(2.1) Sous réserve de l'article 251 de la *Loi de 2001 sur la marine marchande du Canada* et pour l'application de l'alinéa (2)a), dans le cas de l'acconage et du gabarage, le service doit avoir été fourni à la demande du propriétaire du bâtiment étranger

on the owner's behalf.	ou de la personne agissant en son nom.
(3) A maritime lien against a foreign vessel may be enforced by an action in rem against a foreign vessel unless	(3) Le privilège maritime peut être exercé en matière réelle à l'égard du bâtiment étranger qui n'est pas :
(a) the vessel is a warship, coast guard ship or police vessel; or	a) un navire de guerre, un garde-côte ou un bateau de police;
(b) at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.	b) un navire accomplissant exclusivement une mission non commerciale au moment où a été formulée la demande ou a été intentée l'action le concernant.
(4) Subsection 43(3) of the *Federal Courts Act* does not apply to a claim secured by a maritime lien under this section.	(4) Le paragraphe 43(3) de la *Loi sur les Cours fédérales* ne s'applique pas aux créances garanties par un privilège maritime au titre du présent article.

ISSUES

[11] The first issue is not an issue at all. In order to take advantage of section 139, the claimant must be one who carries on business in Canada. It is not necessary to consider the outside limits of that requirement. Comfact is a Canadian corporation, which not only carries on business in Canada, but also rendered in Canada the services for which it remains unpaid.

[12] The second issue is whether a ship under construction by a Canadian shipyard, at a request of and on behalf of a foreign corporation, is a "foreign ship" within the meaning of section 139 of the Act.

[13] The third issue is whether the plaintiff's welding services, rendered at Davie's request in connection with the construction of "Hull 717", were of the nature of services supplied for the operation and maintenance of that ship.

[14] The fourth issue is whether the welding services, rendered at Davie's request, were of the nature of services relating to the ship's repair or equipping.

[15] The final issue, the culmination of the other questions, is whether Comfact enjoys a maritime lien in accordance with section 139 of the Act. Comfact submits, to use the words of the *Jensen Star*, that "some personal behaviour and attitude on the part of the owner" is no longer required. Export Development Canada submits that the law, as it was, remains the same, save that if the other conditions of section 139 are met, the necessaries man now enjoys a maritime lien, rather than a mere statutory right *in rem*.

ANALYSIS

A. Nationality of the ship "Hull 717"

[16] As to the nationality of "Hull 717", plaintiff makes two submissions; one simple and the other complex. Although the ship is being built in Canada, she is recorded in the Canadian Ship Registry as being owned by a Norwegian company. Therefore, she is a foreign ship.

[17] The more complex argument is based on the *Canada Shipping Act, 2001*. In section 2 thereof, a "foreign vessel" "means a vessel that is not a Canadian vessel or a pleasure craft." "Hull 717" certainly is not a pleasure craft. It is not Canadian. Therefore, it must be foreign. Part II of that Act is entitled *Registration, Listing and Recording*. A pleasure craft need not be registered. Section 46 requires a vessel other than a pleasure craft to be registered under the Act if not registered, listed, or otherwise recorded in a foreign state, provided it is wholly owned by qualified persons. There is no evidence before me to show that the Norwegian owner is qualified. A foreign registered ship subject to a bareboat charter to a qualified person may be "listed" in the Canadian Registry. However, there is no such charter in this case.

[18] What is applicable is section 49, which provides:

49. A vessel that is about to be built or that is under construction in Canada may be temporarily recorded in the Register as a vessel being built in Canada.	**49.** Un bâtiment sur le point d'être construit ou en construction au Canada peut être inscrit provisoirement sur le Registre à titre de bâtiment en construction au Canada.

[19] The Bank disputes this is an all or nothing proposition. A pleasure craft may be constructed in Canada and owned by qualified persons, who choose not to register her. Surely, it does not follow that the pleasure craft is foreign. Furthermore, suppose "Hull 717" was being constructed for a Canadian company. She cannot be registered until completed. Does this make her a foreign vessel?

B. Supply of Services, Repairs or Equipment

[20] Sections 139(2)(a) and (b) of *Marine Liability Act* may be considered together. Comfact rendered services, which were not in the nature of stevedoring or lighterage. It submits that the services were either for "Hull 717"'s operation, maintenance, repair, or equipping. The Bank's position is that the services were not rendered with respect thereto, but rather were rendered with respect to the construction of the ship. Shipbuilders and their subcontractors do not benefit from section 139. Furthermore, the former law was not changed as dramatically as the plaintiff suggests. There must still be a personal nexus between the necessaries men and the shipowner. If so, instead of having a mere statutory right *in rem*, the necessaries men now benefit from a maritime lien. There was no nexus under the former law, and so there is no claim whatsoever against the ship; see the *Jensen Star*, above.

[21] The parties have made very interesting submissions as to the impact of section 139(2.1). Comfact submits that since that subsection requires a personal nexus with the shipowner as regards stevedoring and lighterage, it must follow that no such personal nexus is required under sections 139(2)(a) and (b). It suggests that section 139(2.1) covers a "free-in free-out" situation. There may well be contracts of affreightment wherein the cargo interests, rather than the carrier, are responsible

for, and are to pay for, stevedoring. The subsection simply makes it clear that there must be some carrier involvement in the hiring of stevedores or lighterers.

[22] The Bank, on the other hand, points out that the enactment of section 251 of the *Canada Shipping Act, 2001*, modified the effect of the *Jensen Star*. Section 251 provides that a bareboat charterer, as such, may now bind a ship with respect to stevedoring and lighterage services, and the ship may be arrested while under that charter. Section 139(2.1) simply preserves the narrow exception that a bareboat charterer may, in certain circumstances, bind the ship, even though the other contracting party knows full well that it is not acting on behalf of the owner, but rather on its own account.

[23] Section 22(2)(n) of the *Federal Courts Act* confirms this Court's jurisdiction in respect to claims arising out of a contract relating to the construction, repair or equipping of a ship. "Construction" is missing from section 139. Comfact contends that this absence is merely parsimonious language. The Bank's position is that the absence of the word "construction" is fatal to Comfact's claim; Parliament obviously intended to exclude shipbuilders, and their subcontractors, from the ambit of section 139.

[24] Comfact suggests that section 139's purpose was to align claims against ships together with those against aircraft. To use the words of Mr. Justice Binnie in *Canada 3000 Inc, Re: Inter-Canadian (1991) Inc*, 2006 SCC 24 [2006] 1 SCR 865, [2006] SCJ No 24 (QL), who gets the "haircut" when the operator becomes insolvent; the shipowner or the supplier of services? It should be the shipowner as he is in a better position to protect himself. However, the Bank says that the

mischief addressed was that American necessaries men enjoyed a maritime lien to which effect was given in Canada, while Canadian necessaries men got nothing, unless the personal liability of the shipowner was engaged, and the ship had not been sold. See, for instance, *Todd Shipyards Corp v Altema Compania Maritima SA*, [1974] SCR 1248 (QL), *Marlex Petroleum Inc v The "Har Rai"*, [1984] 2 FC 345, [1984] FCJ No 158 (QL), affirmed without additional reasons by the Supreme Court at [1987] 1 SCR 57, [1987] SCJ No 3 (QL), *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)*, 2001 SCC 90, [2001] 3 SCR 907, [2001] SCJ No 89 (QL), and *World Fuel Services Corp v Nordems (The)*, 2010 FC 332, 366 FTR 118, [2010] FCJ No 391 (QL), affirmed by the Federal Court of Appeal, 2011 FCA 73, [2011] FCJ No 293 (QL).

[25] The Bank adds that shipbuilders have a possessory lien and other means at their disposal, such as the withholding of a construction certificate, to protect their position. Indeed, they could even maintain title during construction (*F.C. Yachts Ltd v Splash Holdings Ltd*, 2007 FC 1257, 289 DLR (4th) 167, [2007] FCJ No 1636 (QL)). Furthermore, in the United States, a shipbuilding contract is not even a maritime matter. *Canada 3000* may be distinguishable. The services rendered were services which were required to be rendered by statute, a statute which made owners and operators jointly and severely liable. In this case, Comfact rendered services voluntarily pursuant to a contract, and the requirement in such cases as the *Jensen Star* that there be some "personal behaviour and attitude on the part of the shipowner" serves to protect the shipowner.

DECISION

[26] I would like nothing more than to offer my opinion on all these points. I feel like the lawyer who, in contemplating the application of the *Hague Rules*, was described by Lord Devlon in *Pyrene Company Ltd v Scindia Steam Navigation Company Ltd*, [1954] 1 Lloyd's Rep 321, as follows at page 329:

> Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.

[27] However, I have come to the conclusion that section 139 of the *Marine Liability Act* does not apply to those who have rendered services in respect to the construction of a ship. Therefore, in declaring that the plaintiff does not enjoy a maritime lien, it is not necessary for me to consider whether "Hull 717" is a foreign vessel, and whether there must be personal liability on the part of the shipowner before this new maritime lien can be created.

[28] In the *Nordems*, above, which dealt with the supply of bunkers prior to the enactment of section 139, I made the following blatant *obiter* remark at paragraph 15:

> Canadian domestic law was amended last year to give necessaries men carrying on business in Canada a maritime lien against a foreign ship. The services must have been provided at the request of the owner or a person acting on his behalf. There is no indication that the case law pertaining to the rebuttable presumption of authority has been overridden. (*An Act to Amend the* Marine Liability Act *and the* Federal Courts Act *and to make consequential amendments to other Acts,* S.C. 2009, c. 21, s. 139))

Whether the remarks of Mr. Justice Marceau in the *Jensen Star* still stand in the light of the language of section 139 is to be decided another day when a necessaries man, such as a bunker supplier, or tug operator, renders services knowing full well he is dealing with a charterer as principal, rather than the shipowner.

[29] In my opinion, the answer to this case lies in the insertion of the word "construction" in section 22(2)(n) of the *Federal Courts Act* and its exclusion in section 139(2)(b) of the *Marine Liability Act*.

[30] The enactment of the *Federal Courts Act* in 1971 abolished the then existing *Admiralty Act*, first enacted as the *Admiralty Act, 1934*, 24-25 George V, ch 31. In turn, that Act incorporated, *mutandis mutandis*, section 22 of the United Kingdom's *Supreme Court of Judicature (Consolidation) Act 1925*. It confirmed that the High Court had jurisdiction to determine: "(vii) any claim for necessaries supplied to a foreign ship…(x) any claim for building, equipping or repairing a ship…"

[31] Apart from the fact that the mischief which gave rise to so much complaint related to the unfortunate position Canadian necessaries men found themselves in as compared to American necessaries men who arrested a ship in Canada, the principle of "presumption of coherence" is applicable (Ruth Sullivan, *Sullivan on the Construction of Statutes*, Ottawa: LexisNexis Canada, 2008, page 325).

[32] In *MacKeigan v Hickman*, [1989] 2 SCR 796, [1989] SCJ No 99 (QL), Madam Justice McLachlin, as she then was, summarized the principle when she wrote at paragraph 77:

> I start from the fundamental principle of construction that provisions of a statute dealing with the same subject should be read together, where possible, so as to avoid conflict […] In this way, the true intention of the Legislature is more likely to be ascertained.

This principle was further explained in *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015, [1997] SCJ No 41 (QL), where the Supreme Court stated at paragraph 61:

> There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among statutes should prevail over discordant ones.

[33] As to the suggestion by Comfact that Parliament was merely parsimonious in omitting the word "construction", which should be read into section 139, there is a presumption that the legislator included in the statute the elements which he meant to include. Therefore, "when a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned." (*Sullivan*, above, page 244) In the context of the Exchequer Court's admiralty jurisdiction, the Court had jurisdiction with respect to any claim for building, equipping or repairing a ship. In 1971, the language was changed in the *Federal Courts Act* to "construction, repair or equipping of a ship". Furthermore, the wording of section 22(2)(m) of the *Federal Courts Act* is identical to that of section 139(2)(a) of the *Marine Liability Act*. I cannot accept that the failure to mention "building" or "construction" in section 139(2)(b) of the *Marine Liability Act* was a slip. Parliament could not have intended to grant a maritime lien to those engaged in the construction of a ship, such as the plaintiff in this case.

COSTS

[34] The Bank is entitled to its costs. Both parties sought costs, but asked that they be permitted to make submissions with respect thereto in the event they cannot reach an agreement. They may do so within 30 days hereof, in accordance with rule 403 of the *Federal Courts Rules*.

JUDGMENT

THIS COURT ADJUDGES AND DECLARES that:

1. The plaintiff's action is dismissed, with costs.

2. The plaintiff does not have a maritime lien over the ship "Hull 717".

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2112-11
STYLE OF CAUSE:	COMFACT CORPORATION v THE SHIP IDENTIFIED AS "HULL 717" AND HER OWNERS AND ALL THOSE INTERESTED IN THE SHIP IDENTIFIED AS "HULL 717"
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 18, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HARRINGTON J.
DATED:	OCTOBER 1, 2012

APPEARANCES:

David G. Colford	FOR THE PLAINTIFF
John O'Connor	FOR THE DEFENDANT EXPORT DEVELOPMENT CANADA

SOLICITORS OF RECORD:

Brisset Bishop Barristers & Solicitors Montreal, Quebec	FOR THE PLAINTIFF
Langlois Kronström Desjardins Barristers & Solicitors Québec City, Quebec	FOR THE DEFENDANT EXPORT DEVELOPMENT CANADA