

*Wage Claimants Proceed Against Asset Outside of Bankruptcy, Trumping Previously Registered Mortgage*

The interplay between bankruptcy and maritime law continues to surprise bankruptcy lawyers to the pleasure of their counterparts in admiralty. In *Nanaimo Harbour Link Corporation v. Abakhan & Associates (Trustees) Inc.* (2007 B.C.S.C. 109) the B.C. Supreme Court was asked to determine whether a maritime lien claim for seamen's wages could be brought against a bankrupt's vessel despite the statutory stay of proceedings under s.69.3 of the *BIA*.

The insolvent Nanaimo Harbour Link Corporation owned as its only significant asset a catamaran fast-ferry that provided passenger service between Nanaimo and Vancouver. When the insolvent filed a notice of intention to file a proposal to creditors in February of 2006 the first-position mortgagee took possession of the vessel as a secured creditor outside of the insolvency proceeding and attempted to sell the ferry. The insolvent's trustee, Abakhan, recognized the mortgage as valid security far in excess of the value of the vessel and waived their claim to the vessel. Meanwhile, 23 crew members and a ship repairer brought *in rem* claims against the vessel and arrested the vessel while in the possession of the mortgagee. The crew and repairer declined to release the vessel so that the mortgagee could sell the vessel under its self-help remedy, and the mortgagee declined to recognize the crew and repairer's alleged maritime lien claim in priority to the previously registered mortgage.

The crew and the unpaid repairer each brought an application in the insolvency proceeding for a declaration under s.69.4 of the *BIA* that their actions were not stayed by s.69.3.

The crew members, who claimed for unpaid wages and damages for wrongful dismissal due to insolvency (under the rule in *Chene v. CIBC* (2002 F.C. 873)) asserted their claim was a maritime lien which by law ranked ahead of the prior registered mortgage, and was also a "secured" claim for the purposes of s.69.3 of the *BIA* (and therefore was not stayed by the bankruptcy proceeding). The mortgagee asserted, *inter alia*, that the *BIA* was a complete code, that maritime law had no application in determining priorities in bankruptcy proceedings, and the seamen were "wage" earners within the meaning of s.136(1)(d) of the *BIA* and were therefore not secured.

In deciding *Nanaimo Harbour Link*, Justice Nicole Garson framed the issue as being whether “liens, when proven as maritime liens, are secured claims having priority to the ship’s mortgage or if the claims are to be determined under the *BIA* as unsecured claims to debt, thereby ranking behind the ship’s mortgage”.

In deciding the issue the court looked at the unique nature of a maritime lien. The court quoted Justice William Binnie in *Holt Cargo Systems Inc. v. ABC Containerline* (2001 3 SCR 907) as saying: “broadly speaking, a maritime lien arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which “goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages” (*The Tolten*, [1946] P. 135 (C.A.), per Scott L.J., at p. 150). It may be described, in that sense, as a “secret lien”. The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship”.

Justice Garson addressed the interaction of bankruptcy and maritime law as it was discussed in *Holt Cargo*. In addressing the mortgagee’s argument that seamen were wage earners and s.136(1)(d) of the *BIA* provided a subordinate position in the distribution of proceeds for wage earners, the court quoted Justice Binnie in *Holt* in noting “a ‘maritime lien is a secured claim’ with the meaning of s.136 of the *BIA*...[and]... Binnie J. noted that “the policy of the [*BIA*] in the case of bankruptcy is not to interfere with secured creditors except in so far as may be necessary to protect the estate as to any surplus on the assets covered by the security”.

The court concluded that the seamen were secured creditors within the meaning of s.136(1), and they were therefore entitled to an order under s.69.4 that the statutory stay under 69.3 was not applicable. In effect, this allowed the lien claimants to proceed to prove their claims in admiralty court and, the vessel being arrested, apply to sell the vessel and distribute the proceeds of sale to themselves in priority to the prior registered mortgagee. While the decision in *Nanaimo Harbour Link* was made in December of 2006, an appeal was abandoned in May of 2007.

Darren Williams is a lawyer with Merchant Law Group LLP in Victoria B.C. and focuses his practice on maritime law and personal injury. Mr. Williams represented 21 of the 23 crewmembers of the ferry in the *Nanaimo Harbour Link* case.