CCH
a Wolters Kluwer business

TransAction

February 2007
Number 141

LIABILITY FOR ON DECK CARGO

By Gerard Chouest. Mr. Chouest is a partner at Bersenas Jacobsen Chouest Thomson Blackburn LLP, and specializes in regulatory, commercial and general litigation. He can be contacted at chouest@lexcanada.com or 416-982-3804. This article first appeared in the January 2007 Transportation Notes newsletter, which can be found on the firm Web site at www.lexcanada.com. The article is reproduced with permission.

Under the *Hague-Visby Rules* (which are incorporated into Canadian law as Schedule 3 of the *Marine Liability Act*) an ocean carrier is not permitted to exclude its liability for damage to "goods" where the damage is caused by the fault of the carrier. However, the word "goods" is defined to exclude cargo carried on deck. A decision of the Court of Appeal for British Columbia released in December 2006 considers two issues of interest: How might the description of cargo in a bill of lading affect the availability of an exclusion defense? If such a defense fails because of inadequate description, should the ultimate responsibility rest with the carrier or with its shipping agent?

The participants in the relevant transactions were the vessel owner and charterer (for simplicity we will refer to these collectively as "Gearbulk"), the shipping agent (Seaboard International), the shipper (Timberwest) and two consignees in Europe. The essential contractual documents were a Contract of Affreightment ("COA") between Gearbulk and Seaboard, a master bill of lading issued by Gearbulk and two bills of lading issued by Seaboard to its customers.

Gearbulk carried a cargo of lumber from British Columbia to Antwerp. The greater part of the shipment was stowed on deck and was damaged as a result of the negligence of persons for whom Gearbulk was responsible. Accordingly the question was whether Gearbulk should have the benefit of a clause excluding its liability.

Inside

The Seaboard bills contained the notations: "Stowage: 86% OD 14% UD" and "ALL CARGO CARRIED ON DECK AT CARGO OWNER'S SOLE RISK AS STATED ON THE REVERSE IN CLAUSE 6 OF THE CONDITIONS". It was common ground that the contracts allowed the lumber to be carried on deck, at the carrier's option.

The shipper prevailed in an earlier action against Gearbulk. The trial judge (upheld by the Court of Appeal) found that the description of the cargo carried on deck was not adequate. He reasoned that the reference in the Seaboard bills of lading to a volume of lumber stowed on deck was a rough estimate which was inadequate for a number of reasons. He was impressed by the fact that the shipment contained a range of packages, the values of which varied considerably. He concluded that even a precise volume calculation "would not, without more, have helped the consignees determine their respective risks in relation to the carriage of the cargo". This conclusion, which will turn out to be crucial for the disposition of the litigation, appears to assume that the consignees (or more realistically their insurers) would care. This is not likely the case.

Having been found liable for damages of $550,000, Gearbulk made a claim for indemnity as against Seaboard. It advanced a number of grounds for the claim, including one under the terms of the COA. In particular, it argued that it was entitled to an indemnity because Seaboard issued two bills of lading and that this constituted a variance from the Gearbulk bill. Clause 16 of the COA imposed on Seaboard an obligation to indemnify in the event of losses resulting from such a variance. Although the Seaboard bills undoubtedly differed from the Gearbulk bill, that difference was not the cause of the liability imposed by the Court. Given the Court's analysis of what is required by way of description of the cargo, the Gearbulk bill would not have afforded any greater protection.

Gearbulk also argued for indemnity on the basis of the common law which recognizes that an indemnity may be appropriate where an agent fails to achieve a result within the reasonable contemplation of principal and agent. Again this failed. Although the Court did not say so, one might argue, on behalf of the agent, that to hold it liable on this basis would be to require it to foresee the construction the court would place on the bills of lading. The foreseeability of that construction might be clear to one learned in the law (although certainly not to this author) but would hardly be expected in the world of commerce.

Gearbulk Pool v. Seaboard Shipping, B.C.C.A., Docket CA033620

TRANS *ACTION*

Published bi-monthly as the newsletter complement to the CANADIAN TRANSPORTATION LAW REPORTER by CCH Canadian Limited. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

For CCH Canadian Limited

STEPHANIE MAH, B.A. (Hons.), LL.B., Senior Editor
(416) 224-2224, ext. 6442
e-mail: Stephanie.Mah@wolterskluwer.com

BINDIA PERSAUD, B.A., Information Specialist
(416) 224-2224, ext. 6202
e-mail: Bindia.Persaud@wolterskluwer.com

CHERYL FINCH, B.A., LL.B., Director of Editorial
Legal and Business Markets
(416) 228-6128
e-mail: Cheryl.Finch@wolterskluwer.com

FARIDA KARIM, B.A., Marketing Manager
(416) 228-6138
e-mail: Farida.Karim@wolterskluwer.com

SEAMAN'S WAGE CLAIMS, AND MARITIME LIENS – PART I: INTRODUCTION TO THE PRINCIPLES

By Darren Williams. Mr. Williams is a partner at Williams & Company, which specializes in Marine & Admiralty law. This article first appeared in Mariner's Life and is also posted on the firm Web site at www.marinelaw.ca. This article is reproduced with permission. © Williams and Company

The remedies available to seamen when their wages go unpaid are unlike those remedies available to any worker in any other industry – they are truly extraordinary. It is wise for every mariner to have a basic understanding of what a maritime lien for wages is, and how it can help them enforce their rights to fair compensation. Conversely, it is important for vessel owners to understand these principles of maritime law so that they can prevent unnecessary or inappropriate claims against their vessel, claims that can result in the arrest, sale and general interference with the business activity of the vessel. Assisting in this understanding is the purpose of this series of the Legal Desk focusing on seaman's wage claims.

For those working aboard a vessel, a "maritime lien" arises when they go unpaid and the lien attaches to the vessel for the amount of their unpaid wages. This maritime lien gives the seaman the right to arrest, sue, and even sell the vessel if their claim is not satisfied. The remedy is a powerful one, but must not be used recklessly or maliciously. The starting point to understanding a "maritime lien for seaman's wages" is to understand what a *lien* is.

What is a Lien?

The issue of "what is a lien" fills volumes of mind-numbing text, but generally speaking, a lien is a person's legal right that arises in respect of property as result of a rule of law. Simply put, its essential purpose is to ensure that the person who holds the lien has their claim satisfied – usually this means getting paid. In this sense, a lien is a type of security for payment of a debt.

Liens typically arise from two sources: statutes, and common law. "Statute law" is the law written and enacted by the elected law makers, being either the provincial legislature or the federal Parliament. "Common law" on the other hand is law that has developed from courts of law deciding cases, and further courts following or varying those decisions – courts will try to achieve consistent results when asked similar questions, that is, they will develop "common" law. Liens created by statute are called "statutory liens" and liens created by common law are, not surprisingly, called "common law liens".

Examples of statutory liens are mechanic's liens under the *Repairers Lien Act* (a B.C. statute), and warehousers liens under the *Warehouse Lien Act* (another B.C. statute). Each of these liens gives the repairer or warehouser certain rights against property they have repaired or stored that allows them to collect money owed to them for their services in the event they are not paid when expected. These liens provide the lienholder (the repairer or the warehouser) with the ability to retain and sell the property to satisfy their claim for monies.[1]

An example of a common law lien is a possessory lien. A possessory lien arises when a person provides some value to property and keeps possession of it pending payment. A possessory lien exists only so long as they do not voluntarily give up possession of the item. The possessory lien does not give the party the right to sell the item, only to retain it pending satisfaction of their claim (though this right of sale is given under a statutory lien). While repairers and warehousers have possessory liens so long as they retain possession, their statutory liens allow them to lose possession of the item yet retain a lien provided they meet certain conditions (such as registering their lien in a government registry). This legislation also provides the right to sell the property, a right the repairer did not have under their possessory lien. The repairers and warehousers lien legislation was created so that repairers could release the property, and hence encourage commerce, while protecting their claims.

Maritime Liens – An Extraordinary Lien

Maritime liens are common law liens, that is, they have arisen out of hundreds of years of court decisions recognizing persons' rights in property. Centuries of shipping and navigation law have given rise to a select few types of claims being recognized as "maritime liens". These special liens include liens for salvage (see Legal Desk article May 2004), liens for bottomry (costs incurred in supporting the vessel away from home port, usually paid by the master when the owner's wallet is not available), and a seaman's claim for wages.

Each of these maritime liens provide the lienholder with unusual rights. Firstly, the maritime lien travels with the vessel wherever it goes, including to other provinces and countries, but also into the hands of another owner (even though they haven't been told about it – buyer beware). Importantly, the maritime lien also provides that the lien-holder's claim is placed in a high priority position in relation to other creditors of the vessel. For example, a maritime lien for wages will rank ahead of a mortgage registered against the vessel, even though the mortgage was registered many years prior. This ranking, or ability to be paid in priority to other claims, is a critically important advantage when there is a limited amount of money to be had. For example, when a vessel owner who owes you $5,000 in wages goes bankrupt, and his $500,000 vessel has a $600,000 mortgage on it, the only way to ensure you will see money for your wages is to ensure you rank ahead of the mortgage-holder. Maritime liens, including seaman's liens for wages, provide this important advantage.

Seaman's Wage (Maritime) Liens

The maritime lien is extremely useful to seamen because it allows the seaman's claim for unpaid wages to attach to the vessel, like a barnacle, and follow the vessel wherever it goes, even into the hands of a new buyer. The seaman can have a maritime lien for wages, and a right against the vessel on which they worked, regardless of whether they had a contract with the owner of the vessel, whether the owner is bankrupt or not, and even when they can't find the owner.

A seaman's wage claim can only arise if the person making the claim actually worked on the vessel. The seaman need not have actually navigated the vessel in order to have a seaman's wage lien, but it is helpful if they worked on the vessel while it was navigating. For example, a musician or hairstylist on a cruise ship can have a seaman's wage lien because they worked on the vessel during a cruise, but a worker that labours on the vessel while in port, such as a shipyard welder, likely does not have a seaman's wage claim.

When shipowners are faced with a seaman's wage claim they must consider carefully the work done by that person to ensure they are "seaman" and therefore whether they are actually entitled to the extraordinary remedies of a maritime lien for wages. In many cases they will not be, and this is often of benefit to the owner and their creditors.

Giving Effect to the Seaman's Wage Lien

The seaman gives effect to their wage lien by suing the vessel for the wages in a court that has jurisdiction, or authority, in Admiralty law. In British Columbia, courts with authority in Admiralty law include the Supreme Court of B.C. and the Federal Court of Canada. These courts have something called "*in rem*" jurisdiction, or legal authority to consider claims against property (as distinct from claims against a person or a legal entity like a company, which are the typical defendants in law suits). In an *in rem* claim, you sue the "*res*", being the property, which in the case of a seaman's wage claim is usually the vessel. In some cases however, where the vessel is not available, but parts of the vessel are available such as an engine or other machinery, it may be possible to sue that item.

While suing a vessel may sound odd, the court treats the vessel as if it were a person. The crewmember may ask the court to grant a warrant to arrest the vessel to ensure that it does not go anywhere pending the wage claim being heard by the court. The owner or other party interested in the vessel (such as a bank holding a mortgage on the vessel) may appear in court on the vessel's behalf and defend against the wage claim. This would be of interest to that party because the ultimate remedy of an in rem claim, if the claim is not satisfied, is the sale of the vessel to satisfy the claim. In other words, if a shipowner is not paying attention, a crewman owed $1,000 in wages could sell their $100,000 vessel. While this is a drastic result, shipowners should not ignore claims by seaman for wages, for the seaman wield a very large club, being a maritime lien for seaman's wages.

In next month's Legal Desk we will discuss the general employment law principles of severance, and damages for wrongful dismissal, and how these claims made by a seaman, or defended by an owner, can effect a vessel.

Darren Williams, a former commercial fisherman, is a lawyer with the marine law firm of Williams & Company and can be reached for question or comment at 250-478-9928 or at dwilliams@MarineLaw.ca.

Notes:

[1] While these types of provincial statutory liens likely do not apply to vessels (because the provincial legislation conflicts with the Federal government's exclusive jurisdiction over navigation and shipping), developing case law indicates this provincial legislation may apply to vessels that ordinarily operate within the boundaries of the Province. In B.C.'s case this includes operations carried out in Johnston Strait, Georgia Strait and parts of Juan de Fuca Strait. Of course, this affects many coastal tugs, fishboats and other vessels. This is an important matter for a future Legal Desk article.

FEDERAL DEVELOPMENTS

International Bridges and Tunnels Act Receives Royal Assent

On February 1, 2007, the *International Bridges and Tunnels Act* (formerly Bill C-3) received Royal Assent. With the passing of the Act, the federal government will now have the ability to ensure effective oversight of the 24 international railway bridges and tunnels, and any new international bridges or tunnels built in the future.

Although jurisdiction for international bridges and tunnels was given to the federal government under the *Constitution Act*, 1867, no clear authority regulated matters such as approvals for the construction of new, or the alteration of existing, bridges and tunnels. Changes in ownership, maintanance, operations, safety, and security will all be covered under the new Act.

Highlights of the new Act included in the press release include:

- The Minister, through the governor-in-council, may make regulations concerning the safety, security, operation, and use of international bridges and tunnels.

- Ministerial authority to issue an emergency directive in response to a potential threat to the safety or security of any international bridge or tunnel.

- No further need to enact a special act of Parliament for the construction of any new international bridges or tunnels.

- The requirement of ministerial approval for transactions that result in changes in ownership or the operation of any international bridge or tunnel.

Some provisions of the Act will come into force at a date to be announced.

Transfer of the Port of Moosonee to the Town of Moosonee

On January 18, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities, announced the transfer of ownership of the Port of Moosonee to the Town of Moosonee.

The Port of Moosonee is one of Transport Canada's regional/local ports. The Town of Moosonee is the central transportation hub for the coastal communities of Northern Ontario. The Port provides access during the shipping season to the hospital and schools located in the community of Moose Factory.

Under the transfer agreement, the Town of Moosonee acquired the site from Transport Canada, and is subject to operating conditions including the facility's continued operation as a public port for a two-year period. The transfer agreement includes a financial contribution of $88,000 from Transport Canada to be used exclusively for operational and maintenance costs at the Port over the next two years.

According to Minister Cannon and Moosonee Mayor Wayne Taipale, the transfer of the Port to local ownership will allow the Port to be more responsive to the needs of local users, while also contributing to the local economy.

Government Welcomes European Commission Interest in Air Agreement Negotiations

On January 9, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities announced that the European Commission, which is the driving force in the European Union's institutional system, has decided to present a negotiating mandate to its Council of Ministers for approval.

Canada currently has individual agreements with 17 of the 27 European Union Member States. Under a Canada–European Union agreement, Canada's air transport relations with European Union Member States would be governed by a single regime.

Officials from the Government of Canada and the European Commission are scheduled to meet at the end of February to hold preliminary discussions.

A comprehensive air transportation agreement between the European Union and Canada would be in accordance with the Government's Blue Sky policy, which seeks to negotiate open agreements that are in Canada's best interest.

Minister Cannon Announces Changes to CATSA

On January 26, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities, announced the appointment of Margaret Purdy as interim chair of the board of directors of the Canadian Air Transport Security Authority (CATSA). Ms. Purdy is replacing Maurice Baril as chair of CATSA. The Minister also commented on the Auditor General's Special Examination Report on CATSA.

CATSA is a Crown corporation that is responsible for the effective and efficient screening of persons who access aircraft or restricted areas in 89 airports across Canada. Minister Cannon noted that the Auditor General found two significant conclusions with respect to CATSA's management oversight and accountabilities. The first conclusion centres on roles and responsibilities and the need for CATSA to focus on security screening operations. The Auditor General also observed that CATSA did not, at the time of the audit, have the required management tools and systems in place to demonstrate its security screening performance.

Minister Cannon has proposed two new measures to enhance airport security: the Restricted Area Identity Card, which uses biometric technology, and the Passenger Protect Program, which is aimed at preventing persons who may pose an immediate threat to aviation security from boarding aircraft and is targeted for implementation for both domestic and international flights.

Over the past year, Canada's Government has committed $133 million to assist CATSA in replacing aging

screening equipment, complete the accelerated installation of hold-baggage screening equipment at Canadian airports, explore new security technologies, and add new screeners and equipment to deal with increased passenger traffic. Budget 2006 also allocated $26 million to implement an Air Cargo Pilot Program, now underway.

PROVINCIAL DEVELOPMENTS

Manitoba

Graduated Driver Licensing Yields Dramatic Drop in Injuries and Collisions

According to the latest statistical review, three years of graduated driver licensing (GDL) in Manitoba have resulted in 1,217 fewer injuries and 3,724 fewer collisions involving young novice drivers.

The findings follow a 2005 examination of $15^{1/2}$ to 19-year-old novice drivers that shows the GDL program is meeting all of its intended policy goals and creating a safer learning environment for young Manitobans.

The latest annual review shows the number of bodily injury claims, physical damage claims, collisions and convictions involving younger drivers have all dropped by 43 per cent or more since GDL came into effect.

The review examined claims information, police-reported crashes and convictions of novice drivers $15^{1/2}$ to 19 years old and then merged this data with driver records for this age group. These statistics were compared for young drivers in the three years prior to GDL (2000 to 2002) and the three years after GDL was implemented (2003 to 2005).

The full impact of all three years of GDL shows:

- On average, the number of injuries per 10,000 novice drivers dropped to 267 from 518.
- On average, the total number of collisions per 10,000 novice drivers dropped to 1,006 from 1,783.

Manitoba's graduated driver licensing program is divided into the following stages:

- Learner Stage – After successfully passing a written test, novice drivers must remain in this stage for at least nine months. When driving, they must have zero blood alcohol content, be accompanied by a supervising driver who has been licensed for at least three years and have no more passengers than there are seatbelts in the vehicle.
- Intermediate Stage – Drivers must remain in this stage for at least 15 months. They must have zero blood alcohol content, either one passenger or a supervising driver in the front passenger seat and no more passengers than there are seatbelts.
- Full Stage – Drivers must have zero blood alcohol content for the first 36 months of this stage.

The graduated driver licensing program reduces the risk of injuries and collisions by allowing new drivers to gain experience before being exposed to high-risk driving situations.

New Brunswick

Ferry Project Selection Process Moves Ahead

On January 15, Transportation Minister Denis Landry announced that the three companies that responded to a request for qualifications (RFQ) to build new ferries for Grand Manan and White Head Islands are proceeding to the next phase in the selection process.

The three companies, Coastal Transport Ltd., NFL Holdings Ltd., and Kent Lines Ltd., underwent a thorough evaluation of their technical and financial abilities to design and build the new ferries, operate the service, and maintain the vessels and associated terminals for 15 to 20 years. All met the requirements set out in the RFQ. A request for proposals (RFP) will be issued to all three firms in the near future.

The successful proponent will take responsibility for the Grand Manan and White Head ferry services in spring 2009. Completion of the new Grand Manan ferry is planned for late 2009. The new White Head ferry is scheduled for delivery in 2011.

The new Grand Manan ferry will hold at least 101 cars. It will replace the MV Manan ferry, which is reaching the end of its service life. The new ferry for White Head Island will hold 12 cars, a four-car increase over the MV Lady White Head ferry.

According to Transportation Minister Denis Landry, the new ferries will strengthen the economies of Grand Manan and White Head Islands, and will support New Brunswick's efforts to become a self-sufficient province.

Newfoundland and Labrador

Increased Ferry Rates Will Hurt Newfoundland and Labrador Tourism Industry

According to Minister of Tourism, Culture and Recreation Tom Hedderson, a recent rate increase and a coming fuel surcharge for Marine Atlantic's ferry service will discourage tourist visits to Newfoundland and Labrador.

Effective January 1, 2007, Marine Atlantic Inc (MAI) imposed an increase for commercial and passenger vehicles of about 1.1 per cent. The company also plans to impose a fuel surcharge on passenger vehicles this coming April, similar to that already placed on commercial vehicles.

"Our research clearly shows that cost and accessibility greatly influence people's decision to visit a destination and whether they will make repeat visits", said Minister Hedderson. "With the high cost of fuel and its projected impact on travel, it is more important than ever that ferry costs are not seen to be prohibitive and that the service meets the expectations of travellers."

Transportation and Works Minister John Hickey has urged his federal counterpart Lawrence Cannon, Minister of Transportation, Infrastructure and Communities to reconsider the new rate increase and extend the rate freeze until a comprehensive strategy for the future of Marine Atlantic has been released.

BRIEFLY NOTED

Attornment

• • • **Federal Court of Appeal** • • • In early 2000, the appellant, a resident of the State of Hawaii, entered into an agreeement with the respondent, a New Brunswick corporation, pursuant to which the respondent was to build a 50-foot ocean fishing vessel for the appellant's use in Hawaii. A dispute arose as to the seaworthiness of the vessel, and in 2002 the appellant commenced a suit against the respondent in the District Court for breach of contract. In 2003, by way of motion, the respondent challenged the District Court's jurisdiction, but the motion was dismissed. On January 26, 2005, judgment was entered in favour of the appellant. On September 17, 2004, the appellant filed an action in the Federal Court seeking to enforce the District Court's judgment. During a motion for summary judgment, the respondent argued that the Federal Court had no jurisdiction to give executory force to the District Court's judgment, which the Court rejected. The respondent also argued that the District Court had no jurisdiction to render the judgment in favour of the appellant, which the Court accepted; although the respondent had attorned to the District Court's jurisdiction, the Court held that this did not satisfy the "real and substantial connection" test established in *Beals v. Suldahna*, [2003] 3 S.C.R. 46. The only issue that the Federal Court of Appeal addressed was whether there was a genuine issue for trial. Finding that the judge at the Federal Court erred in holding that attornment only "bolstered" the respondent's connection to the foreign jurisdiction, the FCA held that the attornment was sufficient to ground the District Court's jurisdiction and there was no issue for trial. The appeal was allowed with costs.

Morgan v. Guimond Boats Limited, 2006 FCA 410, Docket No. A-138-06

In Rem Action Upheld

• • • **Federal Court** • • • The defendants in the action had entered into an agreement with the plaintiff pursuant to which the plaintiff would construct a 49-foot yacht. At some point, the parties discussed the possiblity of using the yacht as a showboat to encourage the sales of sister yachts, but no formal agreement was ever reached. Costs began to escalate, and a "final billing" was sent to the defendants for the sum of $247,773.77 – an amount alledgedly representing foregone costs and extras done at the request of the defendants. The defendants refused to pay, taking the position that the extras were never approved. The plaintiff had the yacht arrested and commenced a claim for the unpaid fees. In response, the defendants filed a statement of defence and counterclaim and sought a declaration that the yacht be released immediately.

The Court found that based on the evidence at hand, the plaintiff had done the extra work without the actual request or approval of the defendants. Further, without an actual agreement in place regarding the sale of sister yachts, the plaintiff was not entitled to costs on a *quantum meruit* basis. However, since some costs were legitimately incurred (totalling $13,273.71), the arrest was valid. Accordingly, the Court ordered that the plaintiff was entitled to recover the sum of legitimately incurred expenses, expenses incurred in relation to the arrest of the yacht, and interest.

Intertech Marine Limited v. Menéndez, 2006 FC 1445, Docket no. T-1140-02

In Rem Action Struck

• • • **Federal Court** • • • The plaintiff had initiated two actions in connection with a breach of a charterparty

agreement; each action involved an *in rem* claim against the Vessel. The first action was against I.S. Atlantic Corporation Inc., which never at any material time owned the Vessel. The second named I.S. Pacific Corporation Inc., which became owner of the Vessel on the date the second action commenced. The Court rejected the *in rem* portions of both claims because merely naming a vessel in a charterparty does not make it the "subject of the action" pursuant to subsection 43(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. The Court also rejected the *in rem* portion of the claims on the basis that an action *in rem* cannot be brought unless the owner of the vessel at the time the action is brought is the same party that owned the vessel when the cause of action arose (s. 43(3) of the Act). The Vessel was released from arrest without bail. *In personam* portions of both actions were stayed in favour of an arbitration.

Maritima De Ecologia, S.A. de C.V. v. Maersk Defender (Ship), December 20, 2006, Docket T-2185-06 and T-2142-06

CCH™ a Wolters Kluwer business

CCH Canadian Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 • 1 800 268 4522 tel
416 224 2243 • 1 800 461 4131 fax
www.cch.ca