INSOLVENCY AND ADMIRALTY
PROBLEMS FOR PRACTITIONERS AND JUDGES
-
AND SOME SOLUTIONS

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INTRODUCTION

This paper is not intended as a general overview of creditors' and debtors' rights under Canadian Maritime Law. This can be found in articles and texts such as my presentation at the 1993 CMLA Seminar with Judges of the Federal Court of Canada and Members of the Admiralty Bar[1], the paper presented by Christopher Giaschi at this seminar, and the second edition of Professor Tetley's *Maritime Liens and Claims*[2]. In this presentation, I intend to concentrate on:

a) caselaw developments on topics other than creditors' priorities, since 1997;

b) issues in the intertidal zone between admiralty and general insolvency law; and

c) developments in resolving international insolvencies.

THE COMMERCIAL CONTEXT

In the last three decades, the commercial shipping industry has profoundly restructured itself, with a decoupling of traditionally integrated ownership, operation and marketing functions. The maritime venture is frequently fragmented, with different enterprises or contractors responsible for ownership, commercial management, such as marketing cargo carrying space, and operational management such as crewing and repairs[3].

This has resulted in a proliferation of chartering operators and non vessel-owning common carriers and slot chartering arrangements in which cargo capacity is marketed separately from the operation of the ship. E-commerce services for bidding on unallocated or otherwise empty backhaul cargo space are being set up[4].

These commercial developments have placed even more importance on cashflow, rather than asset value, as a vital element of the financial health and creditworthiness of ship operators.

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1 "Priorities Among Creditors in Admiralty Law"

2 International Shipping Publications, 1998

3 John Spruyt, *Ship Management* 2nd. ed. London, 1994

4 "New Portal for Surplus Cargo Space" *The Shipping Times* Singapore April 4, 2000

Conversely, with daily operating costs for even a smaller bulk carrier, including ship mortgage or bareboat charter leasing amortization of $ 15,000 or more, any interruption in cashflow can abruptly debilitate a shipping operation.

As suppliers, agents and crew become paid in arrears or unpaid, an insolvent shipping operator can quickly find its fleet immobilized by arrest in several jurisdictions. Coping with maritime insolvencies raises particular challenges.

THE DISTRIBUTION OF POWERS AND RECEPTION OF LAW

In its 1991 policy submissions to the Deputy Attorney General of Canada, the Canadian Maritime Law Association identified a need to clarify Federal Court jurisdiction over creditors' rights and the administration of insolvent shipowners' estates. The CMLA recommended at that time that the *Federal Court Act* be amended to confer explicit jurisdiction so that the Federal Court may determine the entitlement and priority of all claimants against the proceeds of sale of arrested property.

This issue is being pursued by the CMLA Constitutional Questions Subcommittee. It has become even more pressing as a result of the Supreme Court of Canada's decision in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

Regardless of the eventual judicial, statutory or constitutional disposition of the interrelationship of admiralty, bankruptcy and property and civil rights, individuals and corporations involved in maritime ventures will always be affected, if not in rem before the Federal Court or Bankruptcy courts, then in personam by general insolvency law and legislation.

In *Robinson v. Countrywide Factors Ltd.* (1977), 14 N.R. 91[5], the Supreme Court of Canada has held that the *Bankruptcy Act* does not occupy the entire field. Creditors and debtors' rights are affected also by provincial law, including statutes such as, for example in Ontario, the *Assignments and Preferences Act,* the *Creditors' Relief Act,* the *Fraudulent Conveyances Act* and the *Mercantile Law Amendment Act.*

This may assist parties before provincial superior courts, but where is the source of a law of Canada which is necessary to nourish the statutory grant of Federal Court jurisdiction?

There are at least two judge-made possibilities. The first is the reception of English law into Canada. The second is the mandate given by the Supreme Court in *Ordon v. Grail* that courts of first instance, of their own motion, may create non-statutory Canadian Maritime Law.

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[5] 23 C.B.R. (N.S.) 97, [1977] 2 W.W.R. 111, 72 D.L.R. (3d) 500.

It is abundantly clear that Canadian maritime law includes the English common law of admiralty, developed from historical sources including the civil law, which was received into Canada in 1934. But does Canadian maritime law as received, also include pre-1934 English statutes concerning creditors' and debtors' rights, as they may affect maritime obligations?

The Australian High Court, in cases such as *China Ocean Shipping Corporation v. State of South Australia* (1979), 54 A.L.J.R. 43, 27 A.L.R. 1, has held that Imperial statutes respecting navigation and shipping continue to apply in that country after the *Statute of Westminster*[6] until amended or repealed.

I have not been able to locate any explicit Canadian appellate authority on this point. The Federal Court (Trial Division) has commented on the applicability of pre-1934 English statutes.

In *Ultramar Canada Inc. v. Mutual Marine Office Inc. et al* (1994), 82 F.T.R. 1, the court held, , in determining an marine insurance issue which had arisen before the proclamation of the federal *Marine Insurance Act*[7], that the English *Marine Insurance Act, 1906* had been received as part of Canadian Maritime Law.

Recently, in *Holt Cargo Systems v. Van Dooselare et al (The 'BRUSSEL')* T-738-96 while determining priorities of creditors in rem, the Hon. Mr. Justice MacKay heard arguments based on the English 1857 *Mercantile Law Amendment Act.* Counsel for the container terminal operator Halterm Ltd. contended Halterm should have the benefit of the high priority statutory lien of Halifax Port Corporation as that operator collected dues on behalf of the Corporation and relied on a decision construing the English *Mercantile Law Amendment Act.* The Court held on February 11, 2000: "While I do not foreclose the possibility that a maritime right *in rem* or other lien may be assignable, in my opinion no assignment occurred here."

In this example, when a Federal Court Judge is called upon to enforce an assignment of an maritime obligation, he or she will have to determine whether the body of law to be applied is only the restricted scope of rights of dealings in assignments given by common law or equity, or the broader rights granted by nineteenth century English amending statutes, or to modernize non-statutory admiralty law.

If pre-1934 English statutes affecting maritime obligations are held not to have been received into Canadian maritime law, how are judges expected to apply the common law of admiralty as unmodified by statute? One possibility is the mandate given by the Supreme Court in *Ordon Estate v. Grail:*

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6 Alex J. Castles *An Australian Legal History* Ch. 15" British Statutes in Australia after 1828"

7 S.C. 1993, c. 22.

> The third step, if existing sources of Canadian maritime law do not contain a counterpart to the [provincial] provision sought to be relied upon, also takes place prior to engaging in constitutional analysis. A court must determine whether or not it is appropriate for Canadian non-statutory maritime law to be altered in accordance with the principles of judicial reform developed by this Court in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, and *R. v. Salituro*, [1991] 3 S.C.R. 654, as well as in *Bow Valley Husky, supra.* and in the present case. The court should engage in this step of the analysis regardless of whether the possibility of judicial reform of existing maritime law is raised by the parties (at S.C.R. 493).

This is a challenging task for a judge of first instance with a busy docket!

Where the statutes of the common law provinces and the Quebec Civil Code have similar provisions, it may be a relatively straightforward task to update non-statutory Canadian Maritime Law to reflect this provincial consensus. Thus, in *Ordon Estate v. Grail* the Supreme Court of Canada recognized a non-statutory maritime law right of survival of actions after death , which all of the provinces' legislation had accomplished.

However, the same degree of consensus does not exist in provincial commercial law. Take as an example the spouse of a recreational yacht buyer who co-signs a lending agreement. The buyer becomes insolvent and the lender proposes to arrest the yacht and sue the guarantor spouse in the Federal Court. What will the judge choose as a model for development of non-statutory maritime law? The rigorous pre-1857 common law? The Alberta *Guarantees Acknowledgement Act*? The Ontario *Mercantile Law Amendment Act?* The Quebec *Civil Code?* The application of each may produce different results[8].

CREDITORS' INGENUITY

Traditionally, shipowners have relied on private financing and retained earnings to finance acquisitions and purchases. The long term decline in real terms of bulk commodity market prices[9], by reducing producers' and traders' margins, has squeezed seaborne freight rates. In the absence of tax incentives, the volatility of most shipowners' earnings makes acquiring capital through equity a challenge.

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8 Authorities are divided whether an action on a guarantee is justiciable in the Federal Court: *Caisse Populaire de St-Pascal de Maizerets v. 'JOANNA I'* (1986). 39 A.C.W.S. (2d) 91 (T.D.) held not. *National Bank Leasing v. Merlac Marine Inc.* (1992), 52 F.T.R. 153 9T.D.) held so.

9 "Economic Affairs: Commodity Prices", *Encyclopaedia Britannica Yearbook* var. years

Lenders to ship operators have long availed themselves of the ship mortgage. However, unlike a mortgage or hypothec on land, even a first registered ship mortgage occupies a relatively modest ranking in priorities among admiralty creditors[10].

Ship operators' need for capital and lenders' need for better security has spawned a range of financing mechanisms. The international community has shown a marked reluctance to expand the range of types of claims giving rise to maritime liens with their high priority[11]. So how does the lender to a maritime venture bootstrap its priority?

A more and more frequently used device is the contractual lien.

In *Textainer Equipment Management B.V. v. Baltic Shipping Ltd.* (1994), 78 F.T.D. 78 the Hon. Mr. Justice Muldoon permitted a creditor to assert an *in rem* claim against a ship of the fleet owned by Baltic Shipping Ltd., on the basis of an agreement by which the shipowner granted a general lien on its vessels as security for the leasing of container inventory. Courts in England and the United States[12] had refused to recognize the mere supply of shipping containers to a fleet of ships as in itself giving a right of arrest, because such supply of mobile equipment lacked the traditional requisite of a claim for supply of necessaries that the equipment be intended for a particular ship.

Under Canadian Maritime Law, the categories of contractual maritime liens are not closed. The lesson for lenders is if sufficiently clear language is used, they may contract for contractual liens upon any form of maritime property. Courts long have recognized contractual liens in charterparties for freight and hire which may attach to cargo and subfreights or subhire[13]. There is no conceptual reason why a lender could not advance funds on the credit of any other form of maritime property with security of a contractual lien on that property.

Contractual liens are attractive rights for creditors. They arguably rank in priority above ship mortgages. Lienholders fall within the definition of 'secured creditors' in the *Bankruptcy and Insolvency Act*[14], and therefore may enforce their security outside of the bankruptcy, subject to the procedural requirements of Part XI of the *Act*.

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10 *Maritime Liens and Claims* c.24

11 Article 4, *International Convention on Maritime Liens and Mortgages, 1993*

12 Compare *Foss launch & Tug Co. v. Char Ching Shipping U.S.A. Ltd.*, 808 F.2d. 697 (9th Cir.) *cert. den sub nom. Itel Containers Corp. v. M/V SAN FRANCISCO,* 484 U.S. 828 (1987)

13 *Scrutton on Charter-Parties* 20th ed. Art. 191

14 s. 2 R.S.C. 1985 c. B.-3 as amended

MARITIME PROPERTY

In its reasons for judgment in *Monk Corporation v. Island Fertilizers* [1991] 1 S.C.R. 779, the Supreme Court expressed a broad functional test of whether an obligation is maritime in nature and therefore governed by Canadian Maritime Law.

The scope of property subject to Federal Court admiralty jurisdiction clearly is broader than ships, cargoes or their proceeds of sale. The *Federal Court Rules, 1998* explicitly provide for arrest of freight[15]. The *Canada Shipping Act,* in both its enacted version[16] and the proposed revision through the *Marine Liability Act*[17], refers to loss of charter hire and passage money as heads of damages recoverable in collision actions.

It is time to expound a general concept of Canadian Maritime Property. This would include:

1. The ship itself and equipment and appurtenances appropriated to the ship;

2. Hire,

3. Freight, including deadfreight

4. Demurrage and Despatch Money

5. Passage Money

6. Proceeds of Insurance of Maritime Property

7. Proceeds of sale *in rem*

8. Security in the place of any maritime property or claim, such as bail for the release of an arrested ship, cargo or freight, or general average security

Treating all these property interests under a general rubric of maritime property would facilitate the task of the Federal Court in administering more elements of the estate of insolvent shipowners. It would also permit a clearer delineation of what choses in action or

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15 Rule 479 (1)(c)

16 R.S.C. 1985 c. S-9, s. 565(5)

17 *Marine Liability Act* Bill S-17, s. 15

choses in possession may be administered, such as enforcement of secured interests in maritime property outside of general bankruptcy administration[18].

ORDERLY ARRANGEMENTS

There are many cases where the amounts at issue do not justify the expense of administration of formal insolvency proceedings, but assets do exist which need to be administered on a basis of fairness to all parties and consistently with creditors' protection legislation. The Federal Court can assist in this process.

An example is *Halla Merchant Marine Co. Ltd.* v. *Portserv Ltd., Transmar Shipping Inc. et al* T - 279 - 96. The Korean Plaintiff head charterer subchartered the 'LOK MAHESHWARI' to a Canadian company, Transmar Shipping Inc., which in turn voyage chartered the ship to Portserv Ltd. Affidavit exhibit correspondence filed with the court state that the subcharterers faced cashflow interruptions during the spring of 1996 as a result of the budget impasse between President Clinton and the United States Congress, which had delayed payments of freight due on other charter fixtures from US government agencies to the subcharterers.

In his reasons for partial summary judgment for hire payable under the head charter[19] , the Hon. Mr. Justice Lutfy noted that the voyage charterers were engaged in London arbitration with their cargo interests over a demurrage claim for delay in unloading of the 'LOK MAHESHWARI' after a voyage from Vancouver. Halla Merchant Marine in its pleadings claimed its contractual lien on subfreights under the head charter, by the wording of the subcharters, extended down the chartering chain to attach the proceeds of the London arbitration.

Affidavits filed in the action show the London arbitration was settled with proceeds of $ 171,236.97. Entitlement to this fund had to be decided.

Between the commencement of the action and its conclusion, one of the voyage charterers had ceased actively carrying on business and the shipping press reported the Halla group of companies faced reorganization as a result of the impact of the Asian economic crisis on the Korean economy. By that time, in addition to Halla Merchant Marine's contractual lien claim on the proceeds of the demurrage arbitration, the London solicitors in the arbitration also claimed a solicitor's lien[20] on the proceeds for their legal expenses.

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18 Melissa K.S. Alwang "Steering the Most Appropriate Course Between Admiralty and Insolvency: Why an International Insolvency Treaty Should Recognize the Primacy of Admiralty Law over Maritime Assets" (1996), 64 Frdham L. R.. 2613.

19 (1997) 126 F.T.R. 300

20 Herman, Carman, Hardy & Traviss, "Solicitors' Liens" (1985) 19 *Law Society Gazette* 91

It was apparent to counsel that with a judgment debtor on one side and a two lien claimants on the other, it was important to administer the disposition of the fund so that other creditors, if any, of any of the companies in the chartering chain would not be in a position to allege a private commercial distribution of the proceeds constituted a preference or otherwise offended creditors' relief legislation.

By analogy to the judicial sale *in rem* of arrested property, it was decided to move for leave to pay the proceeds of the arbitration into the Federal Court, to advertise for creditors, permit proof of other creditors' claims and then move for a determination of priorities to and payment out of the fund. The Hon. Mr. Justice Blais by his November 10, 1998 order granted leave to pay the proceeds of the London arbitration into court and gave directions for advertisement for creditors and delivery of affidavits of verification. In the end, affidavits of verification were filed only on behalf of the Plaintiff's solicitors, the London solicitors and on behalf of Halla Merchant Marine. By his December 7, 1998 Order, the Hon. Mr. Justice Whetston gave declarations of entitlement to the monies in court, and determined the priorities among creditors, being:

- The Plaintiff's party and party costs of creating a fund for the benefit of creditors;

- The account of the London solicitors secured by a charging order[21] in that firm's favour, made absolute; and

- The Plaintiff's damages, interest and costs awarded by the partial summary judgment.

These Orders are shown in the Appendix. .

The procedural steps followed in these two orders are analogous to the procedural rights conferred on creditors by the Ontario *Assignments and Preferences Act*.

EFFICIENCY OF ADMINISTRATION

Even with a broad concept of maritime property, a ship operating debtor may have non-maritime assets or liabilities, such as shore office equipment or general trade payables not provided in respect of any of the fleet. To the extent possible under the constitutional division of powers, multiplicity of litigation and multiplicity of administration of estates is to be avoided, lest proceeds of assets be consumed by the costs of litigation and administration.

After the Supreme Court of Canada decisions of *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.* , [1989] 1 S.C.R. 206, and *Ordon Estate v. Grail*, [1998] 3 S.C.R.

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21 *Weight Watchers Int. Inc. v. Burns*, [1976] 1 F.C. 237, 62 D.L.R. (3d) 374, 23 C.P.R. (2d) 205 (T.D.)

437, it is clear that provincial superior court judges have inherent jurisdiction to administer Canadian Maritime Law, as with any other law of Canada, unless such law is expressly reserved to the Federal Court or another federal tribunal by statute[22].

Therefore, in appropriate cases, it is possible to call upon a provincial superior court to administer the entirety of an insolvent estate, applying Canadian Maritime Law to maritime claims and property and federal insolvency legislation and provincial laws respecting civil rights to non-maritime property.

An example of this process is the pending insolvency administration of Shaker Cruise Lines Inc. The Toronto Harbour Commissioners commenced an *in rem* action against Shaker Cruise Lines and arrested the ship 'LAKE RUNNER', relying the right of arrest of port authorities for dock charges under s. 22(2)(s) of the *Federal Court Act* and in addition pleaded various statutory liens. After the arrest, ship mortgagees, although entitled to intervene in the Federal Court action, instead obtained a Superior Court of Justice (Ontario) Order appointing an interim receiver. The interim receiver made an assignment of Shaker Cruise Lines Inc. in bankruptcy.

Shaker Cruise Lines Inc.'s statement of affairs disclosed assets other than maritime property and listed general trade creditors whose claims could not easily be classified as maritime obligations within the jurisdiction of the Federal Court.

With one group of secured creditors of the same maritime asset having chosen to proceed outside the Federal Court, rather than expend estate assets in a tussle over jurisdiction, or conduct expensive parallel administration, counsel agreed to consent to stay the Federal Court Action and seek an order that the Toronto Harbour Commissioners' Federal Court in rem claim attach to the proceeds of sale of the 'LAKE RUNNER' by the Superior Court appointed interim receiver. In that way the entire estate of the bankrupt could be administered in one proceeding.

Similarly to the Federal Court sale process, the interim receiver advertised the sale and obtained a Superior Court of Justice Order approving the sale. This Order was granted by the Hon. Mr. Justice Lissaman on November 8, 1999. A full copy may be found in the Appendix. The operative paragraphs of this Order are very similar to Federal Court orders pronounced under Rule 490 respecting admiralty sale proceeds.

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> 6. THIS COURT ORDERS that the proceeds of sale of the Lake Runner shall stand in the place and stead of the Lake Runner in respect of any and

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22 Examples of such statutory conferral of exclusive jurisdiction on the admiralty court are seafarers' wage claims, salvage claims and the constitution and distribution of a shipowner's limitation fund: ss. 209(2), 453 and 580(1) *Canada Shipping Act*.

all claims in, to, against or in respect of the Lake Runner, including in rem claims in Federal Court Trial Division action T-2279-98.

7. THIS COURT ORDERS that all questions relating to the right of any claimant in rem against the Lake Runner, or the proceeds of sale of the Lake Runner and all questions respecting the priority of all creditors of the Lake Runner and of Shaker are reserved until further Order of this Court.

. . .

Before creditors lunge to invoke full bankruptcy proceedings, or engage in a multijurisdictional race to court registry offices, they may do well to consider negotiated administration strategies, with a mix of commercial arrangements and focussed recourse to courts only when required or appropriate. This hybrid type of workout may result in greater net proceeds to creditors. An example of such a workout was the decision of private debenture holders to seize and sell only some of the 84 ship fleet of Adriatic Tankers, and administer the proceeds in a controlled fashion[23]. If one bankruptcy trustee had attempted to sell 84 tankers simultaneously, the entire sale and purchase market would have been artificially depressed, leading to lower recoveries for all creditors.

CLEARING PROCEDURAL THRESHOLDS

Where secured creditors choose to assert their claims in Federal Court *in rem* process, the present law is that the Court may proceed to determine the entitlement of maritime lien holders and other secured creditors over proceeds of sale where the shipowner is subject to bankruptcy proceedings[24].

Before the 1992 amendments to the *Bankruptcy and Insolvency Act*, secured creditors could enforce secured claims against collateral owned by a bankrupt with relatively little procedural hindrance, save for the need for the creditor to declare its interest in its Proof of Claim and Trustee's rights to seek rulings on the enforceability of the security interest and to police preferences.

The new *Bankruptcy and Insolvency Act* Part XI creates practical difficulties for secured creditors against maritime property.

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[23] Thomas J. Whalen, Carter, Ledyard &Milburn "Adriatic Tankers: A Case Study" www.clm.com/pubs/pub-872121 1 .html

[24] *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)* [1997] 3. F.C. 187, (T.D.), aff A-307-97, 12 March 1999.

The 'one ship company' is a very common tax planning and risk management choice of shipowners. Section 244 of the *Bankruptcy and Insolvency Act* requires secured creditors such as mortgagees and lienholders to give ten days notice of their intention to enforce their security if the debtor is insolvent and the security is sought to be enforced on all or substantially all of the property of the insolvent person. Unless the intended defendant ship owned by a one ship company is immobilized by a port state control detention order, or cannot obtain bunkers and victuals, during the ten day notice period it can raise anchor and arrive at the other side of the ocean before the secured creditor can act to arrest the vessel.

If a secured creditor acts aggressively against a vessel owned by a one ship company without giving notice, it is exposed to the risks of the shipowner applying under s. 248(b) to the Bankruptcy Court for a restraining order and an action for damages for wrongful exercise of creditors' remedies.

By section 244(4) the requirement for notice does not apply where there is a receiver in respect of an insolvent person. Ship mortgagees and contractual lienholders have the opportunity of contracting for rights of enforcement, including the right of appointment of private receivers, in the mortgage deeds of covenants or security agreements. However, maritime lienholders such as personal injury victims of accidents caused by ships and unpaid crew do not have the luxury of preplanned contractual remedies.

These involuntary lienholders, if affected by the acts of a one ship company, must obtain the assistance of a court to appoint a receiver if they wish to arrest the ship immediately. The appointment of an interim receiver may be sought under s. 47(1) of the *Bankruptcy and Insolvency Act* from only the Bankruptcy Court, but this remedy is restricted to cases where the creditor proposes to invoke full bankruptcy proceedings. A maritime lienholder, with its high priority, may not have any need or desire to launch into the entire administration of the estate, if the value of the ship is sufficient to meet the lienholder's claim and the claims of any other admiralty creditors of higher or equal priority to that of the lienholder. In such cases, the appropriate remedy may be to seek the aid of the Federal Court to appoint a receiver.

Section 44 of the *Federal Court Act* gives the court a broad discretion to appoint a receiver

> in all cases in which it appears to the Court to be just and convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.

This statutory wording is similar to that empowering superior courts of the provinces to appoint receivers.

There are a significant number of Federal Court cases in which privately appointed receivers under mortgages or debentures, or receivers appointed by other superior courts or the Bankruptcy court, have sought remedies. The Federal Court often has appointed

receivers in intellectual property litigation. However, a review of reported Federal Court decisions, and those unreported decisions for which there is computer database access, does not disclose any instance where a maritime lienholder, without the aid of a mortgage or debenture agreement, has sought the aid of the Federal Court to appoint a receiver.

It is respectfully suggested that it is an appropriate exercise of the Federal Court's discretion to appoint a receiver on motion of involuntary maritime lienholders such as unpaid seafarers or maritime accident victims in order to permit the immediate arrest of a vessel owned by a 'one ship company', particularly where that company has no other assets in Canada. A shipowner which has not paid its crew or made interim arrangements for the treatment of passengers or others injured on board may well be also in arrears of its P&I insurance calls or premiums. In such case the P&I club or insurer may be reluctant to voluntarily put up a letter of undertaking to provide security *in rem* without an arrest being effected. If claimants cannot obtain effective security for their claims through prompt exercise of *in rem* process, they may become a public charge either for repatriation expenses[25] or social benefits.

The non-statutory maritime lien of a seafarer for unpaid wages and benefits may increase in importance if the Government of Canada proceeds with its policy of *Canada Shipping Act* revision in which it is proposed to repeal the summary statutory remedies available to seafarers for unpaid wages under Part III of the *Canada Shipping Act*[26].

Federal Court Rule 372 permits motions before proceedings are commenced. Rule 375 requires a receivership order to set out the remuneration to be paid to and the security to be given by, the receiver.

MULTIJURISDICTIONAL INSOLVENCIES

The interplay between secured creditors' admiralty remedies and the bankruptcy process has been thrown into sharp relief by the pending multiple proceedings in Canada arising from the Belgian bankruptcy of Antwerp Bulkcarriers, N.V. In view of the pendancy of the proceedings and the audience before me today, I consider myself somewhat constrained in comment, but do wish to outline the proceedings and identify some issues. I will then discuss how other jurisdictions have dealt with similar issues.

On March 30, 1996, Holt Cargo Systems, Inc. commenced a Federal Court action and arrested the 'BRUSSEL' in Halifax. This Plaintiff asserted a maritime lien given by United States law. Six days later, the defendant ship's owner, Antwerp Bulkcarriers, N. V. was

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25 There have been many recent press reports of insolvent shipowners abandoning crew and vessels in Canadian and other ports "Crisis -hit Shipowners leaving Crew in the Lurch" *Shipping Times* Singapore February 24, 1999

26 ss. 205-212

adjudged bankrupt in Belgium and Trustees appointed. On May 9, counsel for the Belgian Trustees obtained an ex parte order from the Quebec Superior Court in Bankruptcy requiring, inter alia, that all other proceedings be stayed and that the 'BRUSSEL' be delivered to the Belgian Trustees. The court was not advised that the in rem action had already been commenced and the ship arrested. On May 17, 1996 the Federal Court issued an order that the 'BRUSSEL' be sold in rem.

On June 26, counsel for creditors including Holt, Inc. moved before the Quebec Superior Court to review or vary the May 9 ex parte order. Guthrie, J. upheld substantial elements of the original order recognizing the Belgian administration, holding that the expeditious and economical administration of Antwerp Bulkcarriers N.V.'s estate could best take place before the Belgian Commercial Court. To do so would not infringe public policy or natural justice. The order was varied to permit the sale of the 'BRUSSEL' in the Federal Court action, but then that the proceeds of sale were to be paid to the Belgian trustees.

The trustees then applied to the Federal Court for an order that the proceeds of sale be paid out to them. By its decision of April 9, 1997, the Honourable Mr. Justice MacKay declined to grant the relief requested. This decision was upheld by the Federal Court of Appeal[27]. The Trustees have obtained leave to appeal to the Supreme Court of Canada.

It is vital that the maritime industry and its advisors have clear guidance as to how international admiralty insolvencies are to be administered.

In *Rolfe v. Transworld Marine Agency Company NV* (Federal Court of Australia, NSW District, May 19, 1998) the Plaintiff was appointed a recovery agent to claim on behalf of the Defendant Belgian shipping company against the proceeds of sale of two ships arrested in Australia. The Plaintiff claimed both in contract and as an equitable lienholder upon the proceeds of sale.

After the two arrested ships had been sold, the Defendant was adjudged bankrupt by the Belgian Commercial Court of Antwerp, which issued a letter of request to the Federal Court of Australia that the Australian action be stayed and the proceeds of sale be delivered to the Belgian trustee to be administered according to Belgian law.

Tamberlin, J. after reviewing Australian corporate and insolvency legislation, determined that these statutes did not compel the Australian Federal Court to give effect to the letter of request, but rather that the Australian court had a discretion to decide whether the request should be acceded to at all, and if so, on what terms.

The Judge considered the following balancing factors:

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[27] Ftn. 23

- *the proper law of the claimant's cause of action*

  the court found the recovery agreement and the right to assert an equitable charge on the proceeds was governed by Australian law

- *the avoidance of duplication*

  there had already been a hearing and a substantive determination of the Plaintiff's rights before the Australian court.

- *security for the claim*

  the court was not prepared to release the monies to the Belgian trustee until the Plaintiff's equitable charge was satisfied

- *delay*

  there was no evidence before the court as to the extent of the estate available for distribution or as to when the Belgian proceedings could be expected to be completed

- *uniformity of administration*

  the court acknowledged the interest of the Belgian trustee in ensuring a consistent administration of the bankrupt's global assets

- *mutual co-operation*

  it is desirable that national courts, in appropriate circumstances, co-operate in aid of one another in this time of increasing international economic interdependence, especially in relation to enforcement of insolvency laws.

The judge observed:

> ... on the evidence presented to me as to the Belgian law it is by no means clear that the Belgian bankruptcy law recognizes the concept of an equitable charge and accordingly, if the matter were to be remitted, there is at least a real possibility that the rights of Mr. Rolfe under Australian law would not be recognized.

The Court decided on the balancing of factors that it would not exercise its discretion to impose a stay of proceedings or remit all of the proceeds to the Belgian trustees. Rather it ordered that after determination of the Plaintiff's costs of his substantive claim and in

successful opposition to the motion for a stay, the Plaintiff's damages and costs be paid out of the proceeds and the balance remitted to the Belgian Trustee.

This decision is under appeal. As of April 5, 2000, no determination of the appeal is available.

The application of known criteria to a request for a stay, on prior notice to interested parties, is an appropriate method of resolving which forum is to have conduct of admiralty claims. This, however, need not be a contest as to which forum should have exclusive conduct.

While UNCITRAL grapples with the difficult task of drafting an international insolvency treaty, the international insolvency bar has worked to develop private protocols for the coordinated administration of estates. The International Bar Association Committee J's Cross-Border Insolvency Concordat, formally adopted in 1996, has been applied by North American bankruptcy courts[28], including the Canadian superior courts in bankruptcy.

In 1997, the *Bankruptcy and Insolvency Act* was amended with a new Part XIII dealing with international insolvencies. This gives the Bankruptcy court wide discretion as to granting foreign trustees' authority to administer assets in Canada, controlling the scope of assets to be administered, granting stays and appointing interim receivers. Subsection 268(6) confirms that nothing in Part XIII requires the Bankruptcy court to make any order that is not in compliance with the laws of Canada.

Admiralty proceedings in rem, like bankruptcy proceedings, are intended to bind the world and to maximize recovery from a debtor's assets for the benefit of creditors. It behooves the admiralty bar, and, with respect, the admiralty judiciary, to consider what benefits can be gained by cooperative international development of guidelines for administration of international shipping insolvencies. The economic and commercial realities of the international shipping industry require no less.

April 28, 2000

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[28] Geoffrey B. Morawetz and L. Joseph Latham "Cross-border Insolvency Proceedings" Canadian Bar Association - Ontario 2000 Institute of Continuing Legal Education

APPENDIX

Court File No. 98-CL-3238

ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE M. JUSTICE Mr. A. H. LIGHTMAN

MONDAY, THE 8TH DAY OF NOVEMBER, 1999

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

SHAKER CRUISE LINES INC.

Respondent

O R D E R

THIS MOTION, made by Solursh Feldman Goldberg Inc. (the "Interim Receiver"), the Interim Receiver of Shaker Cruise Lines Inc. ("Shaker") for an Order approving the accepted Offer to Purchase dated September 23, 1999, as amended (the "Offer to Purchase") of Sunset Bay Charters Ltd. ("Sunset") for the purchase of the Lake Runner (Official Number 803712) (the "Lake Runner") and other relief, was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the Report of the Interim Receiver dated October 29, 1999, filed, and upon hearing the submissions of counsel for the Interim Receiver and :

1. THIS COURT ORDERS that the Offer to Purchase of Sunset for the Lake Runner be and the same is hereby approved.

2. THIS COURT ORDERS that a Vesting Order in the terms of the draft Order attached hereto is hereby granted vesting title to the Lake Runner in 832660 Alberta Ltd. free and clear of any and all encumbrances.

3. THIS COURT ORDERS that the Interim Receiver be and is hereby authorized and empowered if, in its discretion, it is considered necessary or desirable to do so, to execute in favour of 832660 Alberta Ltd. a Bill of Sale for the Lake Runner in Form No. 6 pursuant to the *Canada Shipping Act* of all 64 shares in the Lake Runner stated to be pursuant to the Order of this Court approving the sale, free and clear of any and all encumbrances.

4. THIS COURT ORDERS that the encumbrances listed in Schedule "1" hereto be deleted from the Ship Registry for the Lake Runner.

5. THIS COURT ORDERS that the Toronto Port Authority consent to the release from arrest of the Lake Runner in Federal Court Trial Division action T-2279-98 upon completion of the sale of the Lake Runner to 832660 Alberta Ltd.

6. THIS COURT ORDERS that the proceeds of sale of the Lake Runner shall stand in the place and stead of the Lake Runner in respect of any and all claims in, to, against or in respect of the Lake Runner, including in rem claims in Federal Court Trial Division action T-2279-98.

7. THIS COURT ORDERS that all questions relating to the right of any claimant in rem against the Lake Runner or the proceeds of sale of the Lake Runner and all questions respecting the priority of all creditors of the Lake Runner and of Shaker are reserved until further Order of this Court.

ENTERED AT/INSCRIT À TORONTO
ON/BOOK NO:
LE/DANS LE REGISTRE NO:

NOV 0 8 1999

PER/PAR:

SCHEDULE "1"

ENCUMBRANCE DETAILS
Mortgagor : SHAKER CRUISE LINES INC.
Number of Shares: 64
Reference Letter: A
Date of Deed : 96-11-22
Details : $250,000.00 WITH INTEREST AS AGREED
Mortgagee : ROYAL BANK OF CANADA
Address : 180 WELLINGTON ST.W
TORONTO, ON

ENCUMBRANCE DETAILS
Mortgagor : SHAKER CRUISE LINES INC.
Number of Shares: 64
Reference Letter: B
Date of Deed : 96-11-22
Details : $425.000.00 WITH INTEREST AS AGREED
Mortgagee : BUSINESS DEVELOPMENT BANK OF CANADA
Address : 100-150 KING ST. W.
TORONTO, ON , M5H1J9

ENCUMBRANCE DETAILS
Mortgagor : SHAKER CRUISE LINES INC.
Number of Shares: 64
Reference Letter: D
Date of Deed : 98-03-24
Details : LINE OF CREDIT UP TO $50,000.00 AND INTEREST AS AGREED
Mortgagee : BROX COMPANY LTD
Address : 1122 LAKESHORE RD
NIAGARA-ON-THE-LAKE, ON , L0S1J0

ENCUMBRANCE DETAILS
Mortgagor : SHAKER CRUISE LINES INC.
Number of Shares: 64
Reference Letter: E
Date of Deed : 98-04-23
Details : TO SECURE THE SUM OF $100,000.00 AND INTEREST
Mortgagee : ROYAL BANK OF CANADA
Address : 180 WELLINGTON ST. W.,
TORONTO, ON , M5J1J1

ENCUMBRANCE DETAILS

Mortgagor : SHAKER CRUISE LINES INC.
Number of Shares: 64
Reference Letter: F
Date of Deed : 98-11-25
Details : $75,000.00 AND INTEREST AS AGREED
Mortgagee : GS INDUSTRIES INC.
Address : 31-8461 KEELE ST.,
CONCORD, ON
Postal Code : L4K1Z3

I hereby certify that the foregoing particulars are true.

Don Powers
Registrar of Ships,
Toronto

TRANSPORT CANADA TRANSPORTS CANADA
TORONTO
REGISTRAR OF SHIPS
IMMATRICULATION DES NAVIRES

ROYAL BANK OF CANADA
Applicant

- and -

SHAKER CRUISE LINES INC.
Respondent

Court File No. 98-CL-3238

ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

ORDER

Amended 1998

CHAITON & CHAITON
Barristers and Solicitors
185 Sheppard Avenue West
Toronto, Ontario
M2N 1M9

Harvey G. Chaiton
Tel: (416) 222-8888
Fax: (416) 222-8402

Solicitors for Solursh Feldman Goldberg Inc., the Interim Receiver of Shaker Cruise Lines Inc.

No. T - 279 - 96

FEDERAL COURT - TRIAL DIVISION

ADMIRALTY ACTION *IN REM*

TORONTO, ONTARIO, Tuesday, the 10th day of November, 1998

PRESENT: The Honourable Mr. Justice Blais

BETWEEN:

HALLA MERCHANT MARINE CO. LTD.

Plaintiff

- and -

PORTSERV LTD., TRANSMAR SHIPPING INC. and NAZIR GULAMHUSEIN and THE OWNERS AND ALL OTHERS INTERESTED IN FREIGHTS, SUB-FREIGHTS AND CHARTER HIRE OF THE SHIP "LOK MAHESHWARI"

Defendants

ORDER

THIS MOTION, made by the Plaintiff, was heard at Toronto this day.

ON READING the Notice of Motion dated November 4, 1998, the Affidavit of Nigel Harvey Hugh Frawley sworn November 4, 1998, the Consent of the corporate *in personam* Defendants to the Plaintiff's assertion of lien rights dated October 30, 1998, the Plaintiff's written representations dated November 3, 1998 and the proposed form of Tender of Payment into Court:

1. THIS COURT ORDERS that the Plaintiff has leave to pay the amount of $ 11,936.02 US, duly converted into Canadian currency, into Court to the credit of this action, being proceeds of settlement in respect of the in rem Defendants.

2. THIS COURT ORDERS that the Plaintiff advertise for any claimants by placing one advertisement in the Globe and Mail to be published not later than November 14, 1998, which advertisement shall be in the text attached hereto.

3. THIS COURT ORDERS that any person wishing to assert a claim to the proceeds of the in rem Defendants shall serve upon the Plaintiff and upon the in personam Defendants in this action and file an Affidavit of Verification setting out particulars of the amounts claimed and the grounds for such claims under the style of cause in this action, no later than November 23, 1998.

4. THIS COURT ORDERS that any claim that is not so served and filed by November 23, 1998 is barred and the Court may proceed to determine other claims and distribute the monies paid into Court amongst the parties entitled thereto without any reference to any claim so barred;

5. THIS COURT ORDERS that any person filing an Affidavit of Verification shall have liberty, if so advised, to cross-examine any other person filing an Affidavit of Verification on notice to the parties to this action and to all persons who have filed an Affidavit of Verification. Rules 83 to 100, with the exception of Rule 86 shall apply as if each person filing an Affidavit of Verification were an adverse party.

6. THIS COURT ORDERS that cross examinations on Affidavits of Verification shall be completed no later than December 7, 1998.

7. THIS COURT ORDERS that any party wishing to rely on cross examines of Affidavits of Verification at the hearing of the determination of claims shall file three copies of only those parts of the transcript on which it intends to rely at least two days before the date of the hearing for determination of claims.

8. THIS COURT ORDERS that the Plaintiff has leave after November 23, 1998 to apply to this Court for directions and to fix a date for the hearing of determination of claims.

"P.B." AND THIS COURT ORDERS that the other costs of this motion and incident to the giving of notice and advertisement to possible claimants are reserved.

"Pierre Blais"
Judge

I HEREBY CERTIFY that the above document is a true copy of the original filed of record in the Registry of the Federal Court of Canada the 10 day of Nov A.D. 1998

Dated this 12 day of Nov 1998

Jeff Weir
Registry Officer

FEDERAL COURT - TRIAL DIVISION
ADMIRALTY ACTION *IN REM*

No. T-279-96

N O T I C E

TO THE OWNERS AND ALL OTHERS INTERESTED IN FREIGHTS, SUB-FREIGHTS AND CHARTER HIRE OF THE SHIP "LOK MAHESHWARI"

This action was commenced by the Plaintiff Halla Merchant Marine Co. Ltd. against the Defendants Portserv Ltd., Transmar Shipping Inc., Nazir Gulamhusein and the Owners and All Others interested in Freights, Sub-freights and Charter Hire of the ship "LOK MAHESHWARI" under a voyage between Vancouver, British Columbia and Mumbai, India from November 1, 1995 to January 21, 1996.

On November 9, 1998, the Court ordered that proceeds of a settlement in respect of the in rem Defendants, being the net amount after Bank charges of $, be paid into Court to abide the outcome of a determination of the Court to entitlement to such monies and directions for payment of such monies.

TAKE NOTICE that any person wishing to assert a claim to the proceeds of the in rem Defendants shall serve upon the Plaintiff in this action and file with an office of the Registry of the Court an Affidavit of Verification setting out particulars of the amounts claimed and the grounds for such claims under the style of cause in this action, NO LATER THAN NOVEMBER 23, 1998.

TAKE NOTICE THAT ANY CLAIM THAT IS NOT SO SERVED AND FILED BY NOVEMBER 23, 1998 IS BARRED AND THE COURT MAY PROCEED TO DETERMINE OTHER CLAIMS AND DISTRIBUTE THE MONIES PAID INTO COURT AMONGST THE OTHER PARTIES WITHOUT ANY REFERENCE TO ANY CLAIM SO BARRED.

Any person filing an Affidavit of Verification shall have liberty, if so advised, to cross-examine any other person filing an Affidavit of Verification on notice to the parties and all persons who have filed an Affidavit of Verification. Cross-examinations on Affidavits of Verification shall be completed no later than December 4, 1998. Rules 83 to 100, with the exception of Rule 86, of the *Federal Court Rules, 1998* shall apply as if each person filing an Affidavit of Verification were an adverse party. Any party or claimant wishing to rely on cross-examinations of Affidavits of Verification at the hearing of the determination of claims shall file three copies of only those parts of the transcript on which it intends to rely at least two days before the date of the hearing for determination of claims. The Plaintiff has leave after November 23, 1998 to apply to the Court to fix a date for the hearing of determination of claims.

The address for service of the Plaintiff is:

MEIGHEN DEMERS
Box 11, 200 King Street West
Toronto, Ontario M5H 3T4

Nigel H. Frawley
Tel: (416) 340 - 6008
Fax: (416) 977 - 5239

Solicitors for the Plaintiff

DATED: November , 1998

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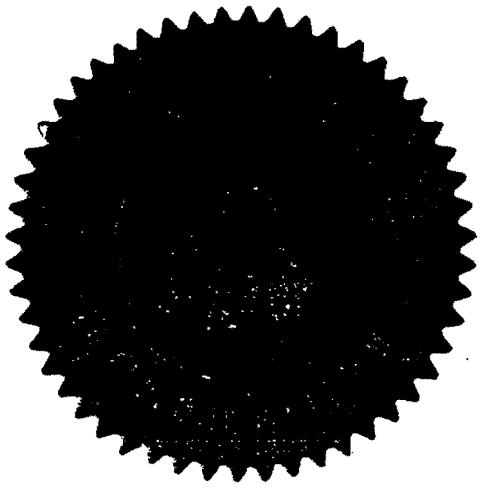


No. T - 279 - 96

FEDERAL COURT - TRIAL DIVISION

ADMIRALTY ACTION *IN REM*

BETWEEN:

HALLA MERCHANT MARINE CO. LTD.

Plaintiff

- and -

PORTSERV LTD., TRANSMAR SHIPPING INC. and NAZIR GULAMHUSEIN and THE OWNERS AND ALL OTHERS INTERESTED IN FREIGHTS, SUB-FREIGHTS AND CHARTER HIRE OF THE SHIP "LOK MAHESHWARI"

Defendants

ORDER

MEIGHEN DEMERS
Box 11
200 King Street West
Toronto, ON
M5H 3T4

Nigel H. Frawley
Tel: (416) 340-6009
Fax: (416) 977-5239
Solicitors for the Plaintiff

No. T-279-96

FEDERAL COURT - TRIAL DIVISION

ADMIRALTY ACTION *IN REM*

B E T W E E N:

HALLA MERCHANT MARINE CO. LTD.

Plaintiff

- and -

PORTSERV LTD., TRANSMAR SHIPPING INC. and NAZIR GULAMHUSEIN and THE OWNERS AND ALL OTHERS INTERESTED IN FREIGHTS, SUB-FREIGHTS AND CHARTER HIRE OF THE SHIP "LOK MAHESHWARI"

Defendants

O R D E R

MEIGHEN DEMERS
Box 11, 200 King Street West
Toronto, Ontario M5H 3T4

Nigel H. Frawley
Tel: (416) 340-6008
Fax: (416) 977-5239

Solicitors for the Plaintiff

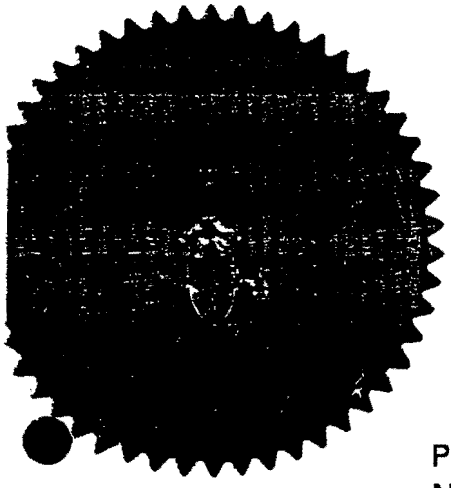
No. T-279-96

FEDERAL COURT - TRIAL DIVISION

ADMIRALTY ACTION *IN REM*

TORONTO, ONTARIO, this 7th day of December, 1998
PRESENT: THE HONOURABLE Mr. Justice Wetston

B E T W E E N :



HALLA MERCHANT MARINE CO. LTD.

Plaintiff

- and -

PORTSERV LTD., TRANSMAR SHIPPING INC. and NAZIR GULAMHUSEIN and THE OWNERS AND ALL OTHERS INTERESTED IN FREIGHTS, SUB-FREIGHTS AND CHARTER HIRE OF THE SHIP "LOK MAHESHWARI"

Defendants

O R D E R

THIS MOTION made by the Plaintiff and the Claimant Holman, Fenwick & Willan, was heard at Toronto this day.

ON READING the Notice of Motion dated November 30, 1998, the Judgment of the Honourable Mr. Justice Lutfy pronounced February 26, 1997 in this action, the Affidavit of Nigel Harvey Hugh Frawley sworn November 4, 1998, filed, the Affidavits of Verification of Nigel Harvey Hugh Frawley and Richard Paul

Dean sworn November 23, 1998, the Affidavit of Nazir Gulamhusein sworn November 24, 1998, the Consent on behalf of the Defendants Portserv Ltd. and Transmar Shipping Inc. dated October 30, 1998, the Consent of the Plaintiff dated November 30, 1998, the Tender of Payment into Court dated November 12, 1998 and receipt acknowledged November 20, 1998 filed, and upon hearing counsel for the Applicants, the in personam Defendants not appearing although duly served:

ON BEING ADVISED that Notice to the Owners and All Others Interested in Freights, Sub-Freights and Charter Hire of the Ship "LOK MAHESHWARI" was published in a November 13, 1998 newspaper advertisement pursuant to the November 10, 1998 Order of the Honourable Mr. Justice Blais, no claimants other than the applicants in this motion having filed Affidavits of Verification pursuant to the said November 10, 1998 Order by November 23, 1998, or at all, and the applicants being ready to proceed to have this Honourable Court determine their claims:

1. THIS COURT ORDERS that this day, December 7, 1998, be fixed as the day for the hearing of the determination of entitlement to $171,236.97 paid into Court.

2. THIS COURT ORDERS AND ADJUDGES that the Plaintiff do recover costs fixed in the amount of $ 3,087.88 as costs of creating a fund from such monies paid into Court.

3. THIS COURT ORDERS AND ADJUDGES that the Claimant, Holman, Fenwick & Willan do recover the amount of $10,120.74 as their fees and disbursements for recovering a fund for the benefit of creditors.

4. THIS COURT ORDERS AND ADJUDGES that the Claimant Holman, Fenwick & Willan have a Charging Order upon the said monies paid into Court for the monies awarded to them by paragraph 3 of this Order, and that such Charging Order now be made absolute.

5. THIS COURT ORDERS AND DECLARES that the Plaintiff has a lien upon the monies paid into Court as being the proceeds of sub-freights of the Ship "LOK MAHESHWARI".

6. THIS COURT ORDERS AND DECLARES that the Plaintiff be entitled to recover from the said monies paid into Court, the amounts pronounced in the February 26, 1997 Judgment of the Honourable Mr. Justice Lutfy in this action $289,616.51 damages, $20,832.50 pre-judgment interest, $5,000.00 costs, accrued post-judgment interest of $34,191.66 from February 26, 1997 to this date, and pre-judgment interest of $48.43 per day from this date to the date of payment out.

7. THIS COURT ORDERS AND ADJUDGES that the priorities of entitlement as between the Plaintiff and the Claimant Holman, Fenwick & Willan be first to the Plaintiff's solicitors, Meighen Demers, in respect of the costs awarded pursuant to paragraph 2 of this Order, secondly to Holman, Fenwick & Willan in respect of the absolute Charging Order pronounced in paragraph 4 of this Order, and thirdly to the Plaintiff in respect of the monies to which the Plaintiff is determined to be entitled to be paid pursuant to paragraph 6 of this Order.

8. THIS COURT ORDERS that the said monies paid into Court, plus any interest accrued thereon, be paid out of Court to "Meighen Demers in Trust" to the benefit of the Plaintiff and Claimant Holman, Fenwick & Willan as provided in this Order.

"Howard I. Wetston"
Judge

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