[1980–87 Gib LR 517]

BANKERS TRUST COMPANY v. OWNERS OF M.V. "ESPERIS" and A. HALCOUSSIS AND COMPANY

SUPREME COURT (Kneller, C.J.): June 18th, 1987

Shipping—mortgage of ship—priorities—crew's maritime lien for unpaid wages and costs has priority over mortgage—lien not assignable without court approval since Administration of Justice Act 1956, s.1(1)(o) allows it only to master and crew

The plaintiff company applied to the Supreme Court for the proceeds from the sale of a ship.

The plaintiff company was a mortgagee of the ship *Esperis*. The defendants owned the ship, and the intervenor, a firm of ship managers, managed it. When the owners were unable to pay wages and other costs due to the crew, the intervenor paid these in return for the crew assigning to it their rights to wages and against the ship. When the ship was sold, the plaintiff applied for an order that it be paid the proceeds of the sale as mortgagee; the intervenor opposed this, claiming that the purported assignment of the crew's rights subrogated them to the crew's maritime lien, which they held over the ship and freight to the value of their unpaid wages and costs, and that this lien had priority over the plaintiff's claim.

The plaintiff submitted that there was no authority to suggest that such a lien—which arose by statute rather than contract and by virtue of the crew's service—was capable of being assigned; the intervenor had chosen as a volunteer to pay off the owners' debts and therefore had no rights *in rem* over the ship. The intervenor submitted in reply that it claimed as an agent for the master and the seamen, and that as the master and seamen were entitled to a maritime lien over the ship, there was no reason that their agent should not be allowed it; this was something for the court to decide under its wide equitable jurisdiction.

Held, granting the order sought:

The money was to be paid out to the plaintiffs. The intervenor had acted as a volunteer, and had done so without the sanction of the court. The crew were unable to assign their maritime lien, as s.1(1)(o) of the Administration of Justice Act 1956 allowed only the master and crew to make a claim *in rem* for wages. The Act could easily have allowed for such a right to be assigned, but it did not. There was no call here to exercise the court's equitable jurisdiction (para. 13).

Cases cited:
(1) *Acrux, The*, [1965] 2 All E.R. 323, considered.
(2) *Chieftain, The* (1863), Br. & Lush. 104; 167 E.R. 316, referred to.
(3) *Hobbs, Savill & Co.* v. *The Vasilia (Owners)*, [1972] 1 Lloyd's Rep. 51, considered.
(4) *Leoborg, The (No. 4)*, [1964] 1 Lloyd's Rep. 380, considered.
(5) *Petone, The*, [1917] P. 198, considered.
(6) *Sameiet Stavos (OH Meling Rederi)* v. *The Berostar (Owners)*, [1970] 2 Lloyd's Rep. 403, referred to.

P.R. Caruana for the plaintiff;
A. Stagnetto, Q.C. for the intervenor.

1 **KNELLER, C.J.:** Bankers Trust Co. moves the court—

(a) pursuant to the Rules of the Supreme Court, O.75, r.22, to determine the order of priority of the claims against the proceeds of sale of the ship *Esperis*;

(b) pursuant to R.S.C., O.75, r.24, to order that the proceeds of sale—after the Admiralty Marshal's expenses and all outstanding claims against the ship before the court—be paid out to Bankers Trust or their solicitors; or, alternatively,

(c) pursuant to R.S.C., O.75, r.27, that the proceeds of sale, above those claims which have priority to the Bankers Trust claim, be paid out to Bankers Trust or their solicitors.

The intervenor, A. Halcoussis & Co., opposes the grant of any of these orders.

2 The plaintiffs are a banking corporation whose business is carried on in Old Broad Street, London. They are the first priority mortgagees of *Esperis* under a mortgage dated January 31st, 1984. They obtained in these consolidated actions a judgment *in rem*, on October 8th, 1986, for US$1,757,054.69.

3 Halcoussis is a firm of ship managers, based on Iasous Street, Piraeus. It is a Greek-registered limited partnership company. It managed *Esperis*, which is owned by Westfield Shipping Co. S.A. of Panama. It claims that the owners are in its debt in the sum of US$205,086 for wages and advances paid to the crew, and their repatriation costs. Halcoussis avers in Admiralty Cause 25 of 1986 that in its capacity as manager it paid these to each crew member in consideration of the crew assigning to them their debts and rights against *Esperis*, to which the owners consented.

4 Bankers Trust concede that Halcoussis's business is that of ship managers, but nothing else in the latter's statement of claim. Bankers Trust disputes that if Halcoussis paid those wages, advances and costs to the

crew of *Esperis*, Halcoussis is subrogated to the maritime lien of the crew for their wages. There is no judgment *in rem* in Admiralty Cause 25 of 1986 yet. Supposing, however, that Halcoussis obtains a judgment for its claim in Admiralty Cause 25 of 1986, would it have priority against Bankers Trust's judgment *in rem*?

5 The admiralty jurisdiction of the High Court in England is set out in s.1 of the Administration of Justice Act 1956. The court has jurisdiction to hear and determine various questions or claims including—

> "(c) any claim in respect of a mortgage of or charge on a ship or any share therein . . .
>
> (o) any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which, under the provisions of the Merchant Shipping Acts, 1894 to 1954, is recoverable as wages or in the court and in the manner in which wages may be recovered . . . "

The Supreme Court of Gibraltar has the same jurisdiction, according to s.12 of the Supreme Court Ordinance (1984 Edition).

6 Where a firm paid the master's disbursements, and wages and return fares of the crew on behalf of the owners of the ship to prevent the arrest of the ship by the master and crew, Hill, J. in *The Petone* (5) said ([1917] P. at 208):

> "I know of no principle of English Law which says that one who, being under no compulsion and under no necessity to protect his own property, but as a volunteer, makes a payment to a privileged creditor, is entitled to the rights and remedies of the person whom he pays. That is the position of the plaintiffs. They chose as volunteers to pay off debts which constituted a marine lien upon the ship. They did not, in my opinion, thereby acquire any maritime lien. They have, therefore, no right in rem based upon a maritime lien. They have no right in rem independent of a maritime lien."

7 Earlier Hill, J., having reviewed the authorities and text-writers, made it plain (*ibid.*) that—

> ". . . they treat maritime liens, other than liens for bottomry, as not transferable.
>
> In my view the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and his lien, whether it be regarded as a general doctrine or as applied to wages only . . .

> In the present case there is no question of assignment. The plaintiffs paid the wages and/or disbursements. The master and crew have been paid and their debts satisfied. They assigned nothing to the plaintiffs. The plaintiffs do not claim as their assignees but in their own right as having paid the men off."

8 Hewson, J. in *The Leoborg (No. 4)* (4) noted ([1964] 1 Lloyd's Rep. at 383) that it had never been challenged, and accepted that as good law. He was dealing with the claims of some ship chandlers for necessaries and disbursements to the crew. The crew were paid when the first mortgagees, who were operating the ships at the time, knew that the owners were insolvent. The ship chandlers submitted that they should on equitable grounds have priority over the claims of the mortgagees. Hewson, J. acknowledged that the court exercises a wide equitable jurisdiction but refused to apply equity to one party to the detriment of the other, since there was insufficient evidence as to how these payments came to be made. There were some grounds, but no more, for supposing that the moneys were advanced by them in the ordinary course of business to the master of *The Leoborg*, acting as agents for her owners for the benefit of the crew. The ship's chandlers had had more than sufficient time to put the facts before the court.

9 Hewson, J. also held in *The Acrux* (1) that an employer's compulsory insurance contributions are not the "emoluments" of seamen and so not a maritime lien that was recognized by an English court. He explained that unless a right *in rem* was expressly given in plain terms, he would not find the legislature intended there should be one. And Brandon, J. (as he then was) appears to have accepted in *Sameiet Stavos (OH Meling Rederi)* v. *The Berostar (Owners)* (6) and *Hobbs, Savill & Co.* v. *The Vasilia (Owners)* (3) that a volunteer who pays wages without the sanction of the court is not allowed to "stand in their shoes" by subrogation or otherwise, for in those cases he granted leave to the applicants to make payments through the Admiralty Marshal to the master and crew to enable them to be signed off and repatriated. He also gave them leave to be subrogated to the rights of the master and crew in respect of their claims for wage arrears.

10 The text book writers support all this. McGuffie, Fugelman & Gray in *British Shipping Laws*, 1st ed., vol. 1, para. 1574, at 746 (1964) note that in certain circumstances, subrogation, depending on leave of the court, may affect the priority of claims and cite *The Leoborg (No. 4)* (4) for this. This is also summarized in this form in 1 *Halsbury's Laws of England*, 4th ed., at 223, n.4.

11 The admiralty jurisdiction of the High Court includes "claims by a master, shipper, charterer or agent in respect of disbursements made on

account of a ship" (Administration of Justice Act 1956, s.1(1)(p)). Halcoussis claims as an agent, and claims that the wages it paid were on account of *Esperis*. The seamen and master have a maritime lien on the ship and freight for wages; this arises not from contract but from services rendered (see *The Chieftain* (2)). Halcoussis asks: Why should the master have such a right and the agent not have it? This is something for the court to assert under its wide equitable jurisdiction (*The Acrux* (1)). The trial of Admiralty Cause 25 of 1986 would reveal that the master of the *Esperis* expected trouble from the crew if their wages were not paid, so he undertook to the managers that if they paid the crew on his behalf the managers would be reimbursed. The master at that time represented the owners. The managers sent the master the wages, which he paid to the crew. Halcoussis suggested the amount of the fund in court in excess of its claim should be paid out to Bankers Trust, but the balance should be retained until the claim of Halcoussis had been heard.

12 So much for the facts and the law in this matter. The issue is whether the claim of Halcoussis for wages, advances and costs to the crew of *Esperis* in consideration of the assignment of the crew's rights, if proved, is subrogated to the maritime lien of the crew?

13 In my view, the answer in the circumstances of this case is "No." Halcoussis was a volunteer. It did not apply for or obtain the leave of any court to make these payments. The crew has a maritime lien for their wages. This springs from their service and not from any contract. Only the master and crew can sue for their wages under s.1(1)(o) of the Administration of Justice Act 1956. There is no authority for the proposition that the master or crew can assign their lien or that if they purport to do so then the volunteer can stand in their shoes. The crew could assign a contractual debt but not a priority conferred by statute. The relevant legislation does not say so and it so easily could. There is no reference in Halcoussis's statement of claim to any equitable right and, in my view, there is no call here to exercise the court's equitable jurisdiction.

Order accordingly.
