



Newsletter



IN THIS ISSUE

PAGE 1
SHIP BUNKERS AND NECESSARIES MEN

PAGE 2
FIRM AND INDUSTRY NEWS

PAGE 6
MOSREGION V. UKRAINIAN AIRLINES

PAGE 8
INSURER REQUIRED TO DEFEND CARRIER FOR CONSEQUENTIAL LOSSES CLAIM

PAGE 10

FERNANDES HEARN LLP NAMED ONE OF TOP 6 MARITIME LAW FIRMS IN CANADA

PAGE 11
AND FINALLY...

Ship Bunkers and Necessaries Men

The recent decision of Justice Harrington of the Federal Court of Canada of *World Fuel Services Corporation v. The Ship "Nordems"* 2010 FC 332 shows that the facts of a case are occasionally as complicated as the law of maritime liens and statutory liens.

Parkroad Corporation, a Korean sub-time charter of the vessel "Nordems," contracted (through communications in Korea) with either the plaintiff, an American corporation, or its affiliate World Fuel Services (Singapore) Pte Ltd., a Singapore corporation, for the purchase of bunkers which taken on board in South Africa. The vessel flew the Cyprus flag.

Parkroad Corporation went bankrupt without paying for the bunkers.

Thereafter the plaintiff arrested the "Nordems" in Baie Comeau Canada. The ship was released on bail furnished by her German owners. Parkroad was named as a defendant but did not appear.

The plaintiff's claim was that Parkroad contracted not only on its own behalf, but also on behalf of the ship and her owners. The provisions of the contract deemed it to have been made in the United States. It was expressly governed by American law, which created a maritime lien over the ship, even should it be that her owners and managers were not personally liable.

continued on page 3

FIRM AND INDUSTRY NEWS

- **May 7th, 2010** U.S. Maritime Law Association Semi-Annual Meeting, New York
- **May 26th and 27th 2010** - Canadian Board of Marine Underwriters Semi Annual Meeting, Montreal Canada.
- **June 3rd, 2010** Canadian Maritime Law Association Seminar - Current Developments in Canadian Maritime Law, Halifax
- **June 4th, 2010** Canadian Maritime Law Association Annual General Meeting, Halifax
- **June 16th 2010** Annual Meeting and Luncheon, Association of Average Adjusters of Canada, Toronto
- **September 12-15** IUMI Conference, Zurich Switzerland

- **Rui Fernandes, Gordon Hearn and Kim Stoll** represented the firm at a joint meeting of the Transportation Lawyers Association and the Canadian Transport Lawyers Association held at Hilton Head, South Carolina April 28 - May 1st. **Gordon Hearn** was appointed First Vice-President of the Transportation Lawyers Association at the meeting. **Kim Stoll** is the current Treasurer of the Canadian Transport Lawyers Association.



The court was required to decide the proper law governing the relationship. The defendant German owners denied there was a contractual relationship with the plaintiff. Both sides however agreed to allow the Canadian court to decide the issues.

Justice Harrington made two findings which drove his analysis of the legal issues in the case. He summarized these as follows:

Parkroad had no actual authority from the owners or managers of the Nordems to contract for the supply of bunkers on their behalf, or on the credit of the ship. They were expressly prohibited from so doing. However, World Fuel Services Corporation had no actual knowledge of that fact. The importance of these findings is that, briefly put, the maritime law of the United States, the law selected by World Fuel Services Corporation and Parkroad to govern their contract, is such that a necessities man is presumed to have contracted on the credit of the ship. That presumption can only be rebutted by establishing that the necessities man had actual knowledge that the contracting party did not have authority to bind the ship. If that presumption is not rebutted, American law creates a maritime lien on the ship. On the other hand, under Canadian maritime law, apart from a few exceptions which are not relevant here, a necessities man does not enjoy a maritime lien. Under sections 22 and 43 of the *Federal Courts Act*, he has a statutory right *in rem* against the ship, but only if her owners are personally liable. As in American law, there is a presumption that the necessities were ordered on the credit of the ship. However it is not necessary to establish actual knowledge of lack of authority on the part of the necessities man to rebut that presumption.

Justice Harrington then goes on to highlight some of the distinctions between a maritime lien and a statutory right *in rem* and to

explain why Canadian choice of law rules make Canada a popular forum for American necessities men who extend credit to time charterers.

There are a number of important distinctions between a maritime lien and a statutory right *in rem*. Only one is relevant in this case, that being that a maritime lien may exist even though the owners of the ship are not personally liable. A maritime lien arises at the moment of the transaction, be it for instance a collision, while a statutory right *in rem* only comes into existence when proceedings are instituted, or perhaps only when the action *in rem* is served on the ship (this issue was extensively reviewed in the light of English statutes by Mr. Justice Brandon in the “Monica S”, [1968] P. 741, [1967] 3 All E.R. 740, [1967] 2 Lloyd’s Rep. 113). The maritime lien travels with the ship into the hands of third-party purchasers for value. However a potential action *in rem* is defeated by a legitimate change of ownership, although the original owners, of course, if personally liable in the first place, remain liable.

The court also highlighted the fact that Canadian choice of law rules dictate that if a transaction is governed by another system of law, such as American, and that law has been proven to differ from Canadian law, Canada will give effect to it. Canada is an attractive forum for necessities men who enjoy a maritime lien under the proper law of their transaction in that in ranking priorities Canadian law gives the necessities men the status of a maritime lien, a status which a Canadian necessities man does not enjoy. Justice Harrington points out that this is not the situation in England, where priorities are considered to be a matter of procedure governed by the *lex fori*, rather than a matter of substance.

Canadian domestic law was amended last year to give necessities men carrying on business in Canada a maritime lien against a foreign ship. The services must have been provided at the request of the owner or a person acting on his behalf. See *An Act to Amend the Marine Liability Act and the Federal Courts Act and to make consequential amendments to other Acts*, S.C. 2009, c. 21, s. 139.

Justice Harrington then went on to look at the evidence in this case and to come to some conclusions on this summary judgment application. The evidence consisted of some affidavit evidence including from two American attorneys regarding American law.

The court found that the “Nordems” was subject to a number of time charters. There was an original time charter and seven sub-time charters, the last being from Cosco Oceania Chartering Pty Ltd. of Australia to Parkroad Corporation of South Korea. This charter contains the usual prohibition against a lien for supplies or necessities – “the charterers undertake ...they will not procure any supplies or necessities or services, including any port expenses and bunkers, on the credit of the owners.”

At no time during the course of the Parkroad charter, or thereafter prior to her arrest at Baie Comeau, did the Nordems call at an American port.

The court then looked at the receipts, invoices, and general terms and conditions of World Fuel Services in the supply of the bunkers. Justice Harrington commented:

These general terms and conditions, and confirmation of order, attempt to cover every possible permutation and combination which may arise in the delivery of bunkers to a ship. They recognize the possibility that the bunkers may have been ordered by and on the account of a charterer who had no authority to bind the ship or her owners. Indeed, if the plaintiff relied upon Lloyd’s Register of Shipping, it would have known perfectly well that Parkroad was not the owner of the Nordems and that the owners could be found at an address in Germany. It knew, or ought to have known, that Parkroad was not the ship’s port agent, as another was identified in the order confirmation. Furthermore, it accepted orders from Parkroad with respect to other ships which according to Lloyd’s have no connection whatsoever to the owners of the Nordems.

Justice Harrington first needed to decide if the owners of the Nordems were bound by the contract purportedly made on their behalf by Parkroad. “If so, that is the end of the matter. If not, then the issue becomes whether the presumption that the necessities were supplied on the credit of the ship has been successfully rebutted.”

The court found that:

According to its contract with Parkroad, World Fuel Services relied on commercial registries, such as *Lloyd’s Register of Shipping*, to identify the owners of ships. I directed during the hearing that the relevant entries from the Register at the time be produced. The owners are stated to be Partenreederei m.s. Nordems. The contract clearly demonstrated World Fuel Services’ own experience that the person ordering bunkers may not have actual authority to bind the ship. Had it followed the general provisions of its contract, which was not to extend credit, it would either have been paid or would not have delivered the bunkers at

all. In my opinion it was on notice and should have verified with the owners whether or not Parkroad had authority.
[Emphasis added]

Justice Harrington concluded that under domestic Canadian maritime law the owners of the Nordems, much less her managers, were not personally liable and so the action would be dismissed *in rem* and *in personam*.

The court then had to determine if American law applied and whether American law would grant World Fuel Services a maritime lien. The court considered the factors that connect the case to the United States:

The plaintiff's best case is that it is an American corporation and that because credit was extended the contract was deemed to have been made in the United States. Payment was to be made to a bank in the United States. The contract with Parkroad was governed by American law, with non-exclusive American jurisdiction. On the other hand, the bunkers were ordered in South Korea and delivered in South Africa to a Cypriot flag ship, owned and managed out of Germany. At no relevant time did the Nordems ply American waters, and the ship was arrested in Canada.

After reviewing the case law on how factors are weighed the court concluded that the non-American factors outweigh the American ones, stating:

These include the flag of the ship (Cyprus), the domicile of her owners (Germany), the place where the offer to purchase bunkers was accepted (South Korea), the place where the bunkers were delivered (South Africa), and the place where the ship was arrested (Canada). If it is necessary to choose among these laws, the proper law is that of South Africa. There are only two points of contact between the ship owner and the plaintiff. The first is South Africa where the bunkers were

supplied. If a maritime lien exists, it existed from that moment. Had credit not been extended, the plaintiff would have been in position to arrest the ship then and there. Since the law of South Africa has not been alleged and proven to differ from Canadian law, the arrest would be set aside as there is no personal liability on the part of the owners and as the presumption that the bunkers were delivered on the credit of the ship has been rebutted. The bunker receipt signed by the master does not even refer to World Fuel Services. The receipt is on the letterhead of Caltex Oil (SA) (Pty) (Ltd), with a Cape Town post office address and Cape Town telephone number. That receipt gives no indication whatsoever that the plaintiff was Caltex's unnamed principal. The second point of contact was Canada, the place of arrest.

The court held that the shipowners were not party to the World Fuel Services contract and were not bound by its terms. Parkroad had no actual or ostensible authority to contract on their behalf or on the credit of the ship. The presumption that the bunkers were supplied on the credit of the ship was successfully rebutted. United States law was not the proper law.

Rui Fernandes

PHRASE ORIGIN

"TAKEN ABACK"

A dangerous situation where the wind is on the wrong side of the sails pressing them back against the mast and forcing the ship astern. Most often this is caused by an inattentive helmsman who had allowed the ship to head up into the wind

MOSREGION V. UKRAINE AIRLINES**A Plaintiff Need Only Issue a Lawsuit Within Two Years Under the Provisions of the Warsaw Convention**

The case of *Mosregion Investments Corporation et al v. Ukraine International Airlines et al* (2010) 99 O.R. (3d) p. 49 (Ont Sup. Ct.) involved a claim brought by a plaintiff passenger against Ukraine International Airlines [the “Airline”] arising from an August 2, 2005 incident at the Pearson International Airport when an Air France aircraft overran a runway at Pearson International Airport and shortly thereafter caught fire.

The plaintiff brought a lawsuit on August 1, 2007 seeking damages for the loss of cargo destroyed in the fire. In this claim, the plaintiff claimed that critical documents in checked baggage were destroyed in the fire resulting from the Air France plane leaving the runway. This baggage had been loaded in Kiev, Ukraine, by the Airline and transferred to the Air France flight at Paris bound for Toronto.

The law suit [the “statement of claim”] was timely filed under the applicable law [see below] but it was not served on the Airline within the time frame prescribed by Ontario’s rules of court [specifically, being six months from the date of the issuance of the law suit]. On application by the plaintiff, the time for service on the Airline was extended by an order of an Ontario court “Master” permitting ‘late’ service of the claim. The Airline appealed this initial order to another “Master” of the court. This appeal was unsuccessful.

The Airline filed a further appeal, to a judge of the Ontario Superior Court. On the appeal the Airline asserted that the extension of the time for the service of the statement of claim ought not to have been awarded by the court. It was common ground that the case was governed by the *Convention for the Unification of Certain Rules for International Carriage by Air*, [the “Warsaw Convention”] in force in Canada by virtue of the *Carriage by Air Act*. That Convention requires that a claimant bring a claim against an air carrier, such as the Airline, within two years. The Airline argued that there was a ‘hard deadline’ in the law, whereby the claim had to be both filed in court *and* served within two years. If the claim was not served within this time frame, it was argued, the court had no basis to ‘extend’ the time, or, in effect, “rewrite” the law on point. As such, the claim should be ‘stopped in its tracks’ as being out of time.

Accordingly the Ontario Superior Court had to address whether the “two year” requirement merely required the filing of suit within this time frame, or whether it must also be served on a defendant such as the Airline. Of course, if the latter possibility were to prevail, this would have a very significant effect on anyone bringing a claim against an airline for an incident arising from international carriage subject to the *Warsaw Convention*. [It should be noted that the *Warsaw Convention*, or various similar manifestations or amendments to the same, governs the bulk of international carriage of passengers and cargo by air].

In challenging the decision in the court level below to permit the extension of time to serve the claim – outside of the two year time

frame - the Airline cited article 35 of the Convention which provides:

“... the right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at a destination...”

On the appeal the Airline advanced the argument that the two year limitation period under the Warsaw Convention is a special regime providing for a clear limitation period, which should not be “watered down” by Ontario procedural law. In essence, the Airline argued that an action is only “brought” when it is both initiated [filed in

court] and served on the defendant[s] within the two year limitation period stipulated in the Convention.

The Airline was unsuccessful in its appeal to the Ontario Superior Court on this issue. The Court first noted that article 29(2) provides that *“... the method of calculating the period of limitation shall be determined by the law of the Court seized of the case”*. It was common ground that Ontario was the ‘court seized of the case’. The Superior Court noted Ontario court rule 3.02, which allows for a request for an extension of time to be brought *after* the time period for service of a particular lawsuit may have expired.



In ruling against the Airline, the Court applied a straightforward meaning to the word “brought” in the above phrase from the Convention as meaning “to sue, or initiate legal proceedings”. The Court refused to rule the word “brought” would include service of the documents initiating the proceeding. This ran counter to established case law considering the

meaning of the word, and, no doubt, the Court in ruling against the Airline on the point would have needed to see stronger language with little or no ambiguity so as to impose both a ‘filing and service’ requirement on future plaintiffs within the two year period following loss or injury.

Gordon Hearn



PHRASE ORIGIN

“LET THE CAT OUT OF THE BAG”

In the Royal Navy the punishment prescribed for most serious crimes was flogging. This was administered by the Boson's Mate using a whip called a cat o' nine tails. The cat was kept in a leather or baize bag. It was considered bad news indeed when the cat was let out of the bag. Other sources attribute the expression to the old English market scam of selling someone a pig in a poke (bag) when the pig turned out to be a cat instead.

**INSURER REQUIRED TO DEFEND
CARRIER FOR CONSEQUENTIAL
LOSSES CLAIM**

In *Intact Insurance Company v. Keith Hart Holdings Ltd.*, 2010 B.C.S.C. 209, the insurer sought a declaration that a policy providing “Motor Truck Cargo Carrier’s Liability” coverage required it to only provide a defence to an action commenced and to indemnify for liability for direct damage to any goods covered under the policy. The insurer also sought a declaration that it was not obligated to defend or indemnify Keith Hart Holdings Ltd., its insured, for any liability for damages relating to consequential damages because consequential losses were excluded under the policy.

South Caribbean Supplies Limited commenced an action against Keith Hart Holdings Ltd. for damages caused by the damage to a shipment of poles. The shipper also claimed for the costs it incurred to ship another cargo of replacement poles. Keith Hart Holdings Ltd. defended both claims. It asked its insurer, Intact Insurance Company, to take over the defence of the entire action. In its application, Intact conceded that it was obligated to provide a defence at least to the extent of the cost of the replacement poles. It took the position that since the damages for the extra costs of shipping were consequential damages, it was not required to defend Keith Hart Holdings Ltd. for this part of the action.

The policy provided as follows:

1. This policy covers the legal liability of the Insured as a carrier, against all risks of direct physical loss or damage from any external

cause, except as hereinafter provided, with respect to lawful goods and merchandise accepted for shipment by the Insured (hereinafter referred to as “property”), while such property is on land or on regularly scheduled ferries within and between Canada, and the Continental United States while such property is:

(a) in due course of transit in or on or towed by a vehicle owned by, or operated by, or on behalf of the Insured, including during direct loading and unloading of such “vehicles for the amount shown on the “Declaration Page(s)” for any “vehicle”;

6. This policy does not cover liability or expense for: ...c. delay, loss of market or loss of use, or any other indirect or consequential loss of any kind.

Having determined that at least some of the claim of South Caribbean was covered within the policy, the judge was of the opinion that it was necessary for Intact to defend those claims that potentially fall under the policy. He also held that Intact could not call upon Keith Hart to obtain their own independent counsel with respect to claims that potentially fell outside the terms of the policy. Keith Hart was not entitled to be represented by separate counsel in court in the action commenced by South Caribbean. The judge went on to elaborate that:

In this regard, Boyd J. in *Continental Insurance Co. v. Dia Met Minerals Ltd.* 1994 CanLII 640 (BC S.C.), (1994), 5 B.C.L.R. (3d) 222 (S.C.), declined to direct the insurers to appoint counsel to defend only those claims that potentially fell under the policy while calling on the insured to obtain their own independent counsel with respect to claims falling outside the policy, stating that such an order would be impractical and unworkable. I am in agreement with that assessment.

However, the judge held that the duty to defend the entire action of South Caribbean was subject to an assessment after the action was concluded regarding those costs which were to be payable by Intact and those costs which were to be payable by Keith Hart. Defence costs would be assessed retrospectively as opposed to “the almost insurmountable difficulty of apportioning defence costs, on the basis of pleadings alone, before or even after trial.”

The judge was also uncomfortable in making a decision as to whether the additional costs of transporting the replacement poles were or were not direct physical loss or damage as per the policy wording. Justice Burnyeat added:

As well, it is not clear at this stage whether the cost of transporting the replacement poles would be determined as being a “direct physical loss or damage” or whether the exclusion for liability or expense for “delay, loss of market or loss of use, or any other indirect or consequential loss of any kind” applies. On the basis of the current state of the pleadings, on the basis of pleadings that might be amended in the future, and on the basis of any decisions that the trial judge may make, it is not clear that the cost of transporting the replacement poles would not be found to be a “direct physical loss or damage”.

The court dismissed Intact’s application for a declaration that it was not required to defend the consequential claim.

Rui Fernandes



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Fernandes Hearn LLP (Toronto)

This boutique came on the scene in 1996, when Rui Fernandes and Gordon Hearn left Cassels Brock & Blackwell LLP. Maritime law is a major component of its general transportation law practice, which also deals with matters involving aviation, trucking, and rail carriage. Its nine lawyers serve key clients such as Royal & Sun Alliance Insurance, Allianz Insurance, Chubb Group of Insurance Companies, JEVCO Insurance Co., NYK Logistics, Quik X Transportation Inc., and Whirlpool Jet Boat Tours. Fernandes has helped solidify the firm’s strong reputation by publishing five texts on transportation law.

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AND FINALLY,

1. The Bathtub Test

During a visit to the mental asylum, I asked the director how he determines whether or not a patient should be institutionalized.

"Well," said the director, "we fill up a bathtub, then we offer a teaspoon, a teacup and a bucket to the patient and ask him or her to empty the bathtub."

"Oh, I understand," I said "A normal person would use the bucket because it's bigger than the spoon or the teacup."

"No." said the director, "A normal person would pull the plug. Do you want a bed near the window?"

2. Cause of Death

Three dead bodies turn up at the mortuary, all with very big smiles on their faces. The coroner calls the police to tell them what has

happened.

"First body: Frenchman, 60, died of heart failure while making love to his mistress. Hence the enormous smile, inspector", says the Coroner.

"Second body: Scotsman, 25, won a thousand dollars on the lottery, spent it all on whisky. Died of alcohol poisoning, hence the smile."

The Inspector asked, "What of the third body?"

"Ah", says the coroner, "this is the most unusual one. Billy-Bob the redneck from Oklahoma, 30, struck by lightning."

"Why is he smiling then?" inquires the Inspector.

"Thought he was having his picture taken."

3. History Lesson – How things were in the 1500s

Most people got married in June because they took their yearly bath in May, and still smelled pretty good by June. However, they were starting to smell, so brides carried a bouquet of flowers to hide the body odour. Hence the custom today of carrying a bouquet when getting married.

Baths consisted of a big tub filled with hot water. The man of the house had the privilege of the nice clean water, then all the other sons and men, then the women and finally the children. Last of all the babies. By then the water was so dirty you could actually lose someone in it. Hence the saying, Don't throw the baby out with the bathwater..

Houses had thatched roofs–thick straw–piled high, with no wood underneath. It was the only place for animals to get warm, so all the cats and other small animals (mice, bugs) lived in the roof. When it rained it became slippery and sometimes the animals would slip and fall off the roof. Hence the saying, "It's raining cats and dogs."

There was nothing to stop things from falling into the house.. This posed a real problem in the bedroom where bugs and other droppings

could mess up your nice clean bed. Hence, a bed with big posts and a sheet hung over the top afforded some protection. That's how canopy beds came into existence.

The floor was dirt. Only the wealthy had something other than dirt. Hence the saying, Dirt poor. The wealthy had slate floors that would get slippery in the winter when wet, so they spread thresh (straw) on floor to help keep their footing. As the winter wore on, they added more thresh until, when you opened the door, it would all start slipping outside. A piece of wood was placed in the entranceway. Hence the term, "threshold."

(Getting quite an education, aren't you?)

In those old days, they cooked in the kitchen with a big kettle that always hung over the fire. Every day they lit the fire and added things to the pot. They ate mostly vegetables and did not get much meat. They would eat the stew for dinner, leaving leftovers in the pot to get cold overnight and then start over the next day. Sometimes stew had food in it that had been there for quite a while. Hence the rhyme, "Peas porridge hot, peas porridge cold, peas porridge in the pot nine days old.."

Sometimes they could obtain pork, which made them feel quite special. When visitors came over, they would hang up their bacon to show off. It was a sign of wealth that a man could, bring home the bacon. They would cut off a little to share with guests and would all sit around and "chew the fat.."

Those with money had plates made of pewter. Food with high acid content caused some of the lead to leach into the food, causing lead poisoning death. This happened most often with tomatoes, so for the next 400 years or so, tomatoes were considered poisonous.

Bread was divided according to status. Workers got the burnt bottom of the loaf, the family got the middle, and guests got the top, or the "upper crust."

Lead cups were used to drink ale or whisky. The combination would sometimes knock the imbibers out for a couple of days. Someone

walking along the road would take them for dead and prepare them for burial. They were laid out on the kitchen table for a couple of days and the family would gather around and eat and drink and wait and see if they would wake up. Hence the custom of holding a wake.

England is old and small and the local folks started running out of places to bury people. So they would dig up coffins and would take the bones to a bone-house, and reuse the grave. When reopening these coffins, 1 out of 25 coffins were found to have scratch marks on the inside and they realized they had been burying people alive. So they would tie a string on the wrist of the corpse, lead it through the coffin and up through the ground and tie it to a bell. Someone would have to sit out in the graveyard all night (the graveyard shift.) to listen for the bell; thus, someone could be, saved by the bell or was considered a ...dead ringer..

And that's the truth...Now, whoever said History was boring!!!



How Not To Pack a Volvo For Transit