



MARITIME LIENS

AN AUSTRALIAN Federal Court, which had to decide priorities among various claims against a vessel, has held that a bank's mortgage over a vessel does not include bunker fuel or lubricating oil in the vessel, because these cannot be considered physical parts of the ship.¹

MV Mawashi Al Gasseem, was arrested by OW Bunker Trading Company, for non payment of monies due to it, for supply of bunkers to the vessel. The ship was sold for about US \$5.75 million and unused bunker fuel and lubricating oil on board were sold for about \$ 535000, under court orders.

The Bank of Kuwait and the Middle East, claimed all remaining proceeds in both the funds, as mortgagee of the ship, after bunker supplier was fully paid for fuel it supplied to the vessel.

The court held on 3-8-2007, that the bank, as mortgagee, was entitled to payment of all of the money for which the ship was sold, after covering costs of the admiralty marshall and the original arresting party, plus wages of master and crew. But the bank was not entitled to about \$ 60000 that was left over after the bunker supplier was fully paid, as this did not enjoy priority above other unsecured creditors.

In this case, the words in the mortgage document provided that the security would include 'all parts' of the vessel, including its 'components' and 'all appendages and annexes' that may be found after conclusion of the mortgage. The federal court held that the question of whether fuel oil was included as security in a ship mortgage was a matter of construction of words of the mortgage and that the words 'component', 'appendage' and 'annexe' imply a feature of being a physical part of or of being physically attached to a ship, and do not extend to bunker fuel in their natural meaning. The court also pointed out that these days bunker fuel is more commonly property of charterers, not the ship.

Comment

Maritime lien can be defined as a "privileged claim or a right to part of property in the res *i.e.*, the ship". If she receives a necessary

1. *OW Bunker Trading Company Ltd A/S v. The Ship 'MV Mawashi Al Gasseem' (No 2)* (2007) FCA 1139, Federal Court of Australia, Aug 3, 2007 available at www.austlii.edu.au.



service, she must pay for it as debtor. If she causes harm, she must make good the loss as wrongdoer. Being personally against the ship herself, maritime lien attaches to her like a leech even in the hands of an innocent purchaser, even if her flag and registry are changed.

Whereas a ship may be in a foreign country, her owners are not! If local citizens have a claim for damage done by a foreign ship, supplies made or services rendered to her, they cannot proceed against her owners in another country, because of sovereignty rules and jurisdiction problems. Hence action against the ship herself, present under local jurisdiction, is enforceable through local courts.

One peculiarity about international maritime liens is, that if there are more than one liens on the same ship and her value is not adequate, a higher ranked lien holder is paid fully first, and then holder of next ranked lien and so on. Also ranking is not according to dates when liens were earned.

But rules pertaining to ranking and laws applicable to maritime liens, are not uniform. In some countries wages of crew take priority; in others salvage takes first place because unless the ship was saved all liens would have died with her. This is because maritime lien is against the ship herself and all rights against the ship die with the ship. Also, liens arising from tort rank higher over liens arising out of contract even if they accrued earlier.

Article 4 of International Convention on Maritime Liens, 1993, which came into force on 5-9-2004, lists following maritime liens in order of priority.

- a) Wages of crew and master.
- b) Claims for loss of life or personal injury.
- c) Claims for salvage reward
- d) Claims for port canal and pilotage dues.
- e) Claims in tort for physical loss or damage.

Under this convention, in case funds available from value of a ship are not enough to meet all her liabilities, wages of master officers and crew and claims for loss of life and personal injury rank equally with each other, and share, in proportion to each other's claim. Only then, entitlement of other maritime lien holders is considered. Restitution is in order of priorities as listed above, unless local laws accept other priorities.

Under article 2 of the 1993 Convention, mortgages and or hypothèques, which are registered against a ship, are enforceable in accordance with law of the flag state, but maritime liens listed in article 4 take priority and follow the vessel notwithstanding any change of ownership or of registration or of flag.



In the above cited recent Australian case, the court has taken cognizance of the priority of maritime liens and has held that wages of master officers and crew take priority. Apparently there were no other maritime liens against the ship as otherwise those liens would have been satisfied first before the mortgagee could be paid out of the value of the ship. The court rightly pointed out that these days bunker fuel is more commonly the property of charterers, not the ship. This is because under most time charter parties, charterer is to provide fuel to the ship he has chartered. In such a case, property in the fuel vests with the fuel supplier till he is paid by the charterer and after that it vests in the charterer and not in the ship or her owner. It is for this reason that masters of ships on time charter always endorse the bunker receipt, “for and on behalf of Time Charterers,” lest they create a maritime lien on the ship in the hands of an innocent bunker supplier.²

As against this case, in an earlier Australian case reported in the press in 1996, owners tried to establish that mobile equipments placed on board to assist loading and discharging operations, are not part of the ship. Therefore, these should not be subjected to arrest along with the ship to enforce a maritime lien. It was held by the Supreme Court of New South Wales that such equipment being owned by owners, voluntarily placed on board, on ship’s business is part of the ship and is also subject to arrest.

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2. See also *Eurosun and Eurostar*, (1993) 1 Lloyd’s Rep 106; *The Rutta*, 2000, 1 Lloyd’s Law Reports 359; *MV Elizabeth v Harwan Investments* 1993 Supp (2) SCC 433; *Epoch v. Won Fu*, 2003 1 SCC 305 and *Konavalov v. Coast Guard*, 2006, 4 SCC 620.

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