Maritime Lien for Maritime Necessaries Suppliers

By David K. Jones

A recent decision of the Federal Court of Canada, *World Fuel Services Corporation v. The Ship "Nordems",* 2010 FC 332, released on March 25, 2010, is of interest for its analysis of a claim for a maritime lien relating to the supply of bunkers. Andrew Lau's article in this space in September/October 2009 reviewed the recent amendments to the *Marine Liability Act* in Bill C-7 which included the addition of s. 139 to the *Act*, creating a maritime lien in favour of Canadian ship suppliers against foreign vessels for claims that arise in respect of goods, materials or services wherever supplied to the foreign vessel for its operation of maintenance. This article discusses the decision in the *Nordems* case which, although not involving a Canadian ship supplier, provides the context for a discussion of maritime liens generally, and the new maritime lien for Canadian ship suppliers in the *Marine Liability Act*.

In the *Nordems* case, a bunker supplier claimed for unpaid bunkers against the owners and managers of the ship, and against the ship itself *in rem*. The bunker supplier had contracted with the time charterer, but the time charterer had subsequently become bankrupt. The issue in the case was whether the owners, manager or ship could be found liable for the unpaid bunkers. The plaintiff bunker supplier argued that the time charterer had contracted not only on its own behalf, but also on behalf of the ship and her owners. The contract provided for American law to apply, which could create a maritime lien attached to the ship. The defendants argued that they could not be found liable because they were not in a contractual relationship with the bunker supplier.

Generally, a lien is a form of security for a claim. A common form of lien is the possessory lien, available at common law and also in some cases by statute. As an example, a person entitled to a possessory lien allows that person, typically one who has provided services such as repairs to a chattel, to hold the chattel until payment is made for the services.

Maritime liens are a special kind of lien that provide security for certain classes of claimants. The maritime lien attaches to a ship and can be enforced by a claimant by taking an action *in rem* against the ship. Historically, the maritime lien has been available for collision claims, life and property salvage claims, seamen's wage claims, and master's disbursements claims.

A maritime lien is distinguished from a statutory right *in rem*. A statutory right *in rem* is a right to take action *in rem* against the ship for the specific claims listed in section 22 of the *Federal Courts Act*, including such claims as related to ownership, mortgages, carriage of goods, loss of life or personal injury, salvage, towage, pilotage, goods supplied to a ship, construction and repair, marine insurance, and general average. A statutory right *in rem* allows a claimant to take action against the ship, but the shipowner must be personally liable, the claim ranks behind previous claims, and these claims *in rem* may be defeated by a change in the ship's ownership if an action has not been commenced before the change in ownership. Even if the right *in rem* against the ship is lost through a chance in ownership, however, the original shipowner may be found personally liable. The maritime lien does not require that the shipowner be personally liable, and the maritime lien is not extinguished by a change of ownership.

Where a ship is sold and there are insufficient funds to pay all claims, the benefit of a maritime lien is that the lien enjoys a high priority, including priority over other claims such as mortgages and unsecured creditors.

These differences between a statutory right *in rem* and a maritime lien were important in the *Nordems* case, as described by the Court as follows:

> "Parkroad [the charterer] 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 Service Corporation [the bunker supplier] 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 necessaries man is presumed to have contracted on the credit of the ship. That presumption can only be rebutted by establishing that a necessaries 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 necessaries 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 necessaries 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 necessaries man to rebut that presumption."

The Court in the *Nordems* case also referred to another important feature of maritime liens, that being that if a Canadian court decides that the proper law of the contract is another jurisdiction's law providing a necessaries claimant with a maritime lien, that necessaries claim in a Canadian court action can gain priority over a Canadian necessaries claimant (before Bill C-7). It was the perceived inequity that an American necessaries claimant could gain priority in Canadian courts based on the application of American law, over Canadian necessaries claimants claiming under Canadian law, that led to the Bill C-7 amendment to the *Marine Liability Act,* s. 139*,* which provides a Canadian necessaries claimant with a maritime lien where the Canadian necessaries claimant has supplied necessaries to a foreign vessel.

In the *Nordems* case, the ship had been arrested and bail had been paid as security for the claim. In these circumstances, the distinction between a maritime lien and a statutory right *in rem* was insignificant because there were no competing claims to the security and consequently the Court did not need to consider the priority of competing claims. The result as stated by the Court was that it did not matter if the bunker supplier had a maritime lien or only a statutory right *in rem*. In either case the bunker supplier would be entitled to judgment and payment, but if it had neither a maritime lien nor a statutory right *in rem*, the action *in personam* against the owners and the action *in rem* against the ship would result in the bunker supplier's claim against owners and the ship being dismissed.

The Court reviewed the NYPE charterparty and the final of seven sub-charters, all containing the same clause providing for charterers to provide for and pay for all bunkers, and not permit any lien. Some of the other relevant facts were that the bunkers were delivered at Cape Town pursuant to correspondence from the bunker supplier to the

charterer indicating that the bunkers were supplied to the ship and/or master and/or owners, on the credit of the vessel, buyer presumed to have authority to bind the vessel with a maritime lien, and incorporating the supplier's general terms and conditions.

The bunker supplier's general terms and conditions asserted a maritime lien, stated that supply was made to the registered owner of the vessel, and that the sale was governed by American law. Importantly, even though the general terms and conditions were characterized by the Court to "attempt to cover every possible permutation and combination which may arise in the delivery of bunkers to a ship", the Court noted that the terms and conditions recognized that the bunkers may have been ordered by a charterer without the authority to bind the ship or owners, and the bunker supplier in this case could easily have determined that the charterer was not the owner of the ship.

Interestingly, the Court stated that the master's stamp on the bunker delivery receipt that the supply was for the account of charterers, not owners nor vessel, was meaningless because the evidence was that the disclaimer was issued after the bunkers had been accepted on board.

The central issue for the Court in the *Nordems* case was whether the owners of the ship were bound by the contract said to have been made by the charterers on the owners' behalf. If so, the bunker supplier would be entitled to judgment. If not, the Court would then have to consider whether the owners had successfully rebutted the presumption that the necessaries were supplied on the credit of the ship.

In analyzing the question of the owners' liability, the Court considered the law of agency, that is, whether or not the owners were bound by the contract said by charterers to be made on owners behalf. The Court found that the owners of the ship did not expressly authorize charterers to order bunkers on their credit or the credit of the ship, in fact the charterer was prohibited by the terms of the charterparty from doing that. However, the Court stated that lack of actual authority was not conclusive and the actions of the parties had to be considered. The Court concluded that because the bunker supplier was obviously aware from its own terms and conditions that the person ordering bunkers did not necessarily have authority to bind the ship, and that the bunker supplier relied on

Lloyd's Register to identify the shipowner, since the Lloyd's Register at the time clearly identified the shipowner as someone other than the charterer, the bunker supplier was put on notice and should have verified with owners whether or not the charterer had authority to bind owners and the ship. In these circumstances, the Court held that under domestic Canadian law the owners of the ship were not personally liable and the action would be dismissed *in rem* and *in personam*.

The next question for the Court was whether or not American law applied to the transaction, and if so whether that law gave the bunker supplier a maritime lien on the ship, which would lead to judgment against the ship regardless of the owners not being liable *in personam*.

To decide the question of whether or not American law applied, the Court considered the Canadian conflict rules in the circumstances where the owners were not a party to the bunkers contract in which the choice of law clause provided for American law to apply. The Court first considered what factors connected the case to the United States, as follows:

> "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 [the charterer] 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 considering a number of cases, the Court concluded that the "non-American factors" outweighed the American factors. The non-American factors included the Cypriot flag of the ship, the domicile of owners in Germany, the acceptance of the offer in South Korea, the delivery of bunkers in South Africa, and the arrest of the ship in Canada. The Court stated that if it were necessary to decide the proper law of the transaction from these jurisdictions, given that any maritime lien would have arisen at the time of delivery of the bunkers in South Africa and the plaintiff could have arrested the ship in South Africa if credit had not been extended, the proper law of the transaction

would be South Africa. However, since South African law had not been alleged or proven to differ from Canadian law, any arrest would have been set aside based on the conclusion above that the owner was not personally liable and the presumption that the bunkers had been delivered on the credit of the ship had been rebutted.

The result of the choice of law analysis was that the bunkers supplier was not entitled to a maritime lien and the bulkers supplier's action was dismissed against all defendants except the charterer. As Courts sometimes do, the Court stated that if it was wrong on the American law issue, and the proper law of the transaction was the United States, the Court proceeded to make findings of fact on what American law would be in these circumstances. The Court was able to conduct this analysis because it had as evidence the opinions of American law experts, one for the bunker supplier, and one for the defendants, regarding American law. As often occurs, the experts did not agree and the Court is entitled to consider the opinions and choose one opinion over the other. In this case, after careful analysis of the two expert opinions, the Court concluded that in order for an American court to give effect to a maritime lien, there must be more than an American choice of law clause in a contract to which the owners were not privy. The Court stated that three important elements were missing, that is, the bunkers were not supplied in the United States, the ship never traded to the United States, and the ship was not arrested in the United States. Consequently, since United States law was not the proper law of the transaction, and even if it were it did not create a maritime lien on the ship or impose personal liability on her owners or managers, the action *in rem* against the ship and the action *in personam* against owners failed.

There have not yet been any cases considering the new maritime lien for Canadian necessaries suppliers under s. 139 of the *Marine Liability Act*, but the *Nordems* case is of interest in highlighting some of the factors a court will consider when inevitably a Canadian necessaries supplier will pursue a claim relating to a supply of necessaries and a maritime lien.