IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

ADMIRALTY DIVISION

CLAIM NO: A – 000003 OF 2008-08-05

BETWEEN	**HARPA SHIPPING AND CHARTERING GMBH & CO**	**CLAIMANT**
AND	**EUROPE WEST INDIE LIJNEN B.V.**	**DEFENDANT**
AND	**FORBES MANUFACTURING AND MARKETING LIMITED**	**APPLICANT INTENDED 2ND DEFENDANT**

Mr. Jerome Spencer instructed by Patterson, Mair, Hamilton, for the Applicant/Intended 2nd Defendant; Mr. Emile Leiba and Ms. Lisa Russell instructed by Myers, Fletcher & Gordon for the Claimant/Respondent. The Defendant not present or represented.

Admiralty proceedings; Section 1 and 3 of the Administration of Justice Act UK, as applicable to Jamaica pursuant to the **Admiralty Jurisdiction (Jamaica) Order in Council** of March 28, 1962. Whether claim against shipper under Slot Charter Agreement is maintainable as a claim In Rem against third party consignee of freight on ship owned by Claimant.

IN CHAMBERS:
ANDERSON J.

Heard August 4, 8 & 20, 2008.

This is the hearing of an application by Forbes Manufacturing and Marketing Limited (the "Applicant"). The Applicant is the consignee of certain goods contained in a container more particularly described below, which container has been the subject of an arrest warrant issued out of this honourable court on or about June 30, 2008. The facts giving rise to this application are set out in the affidavits which have now been placed before the court and briefly may be summarized as follows.

The Applicant, a Jamaican company based in the Parish of St. Andrew, is the exclusive Jamaican distributor of products for a Canadian company, Recochem Inc, ("Recochem") On June 10, 2008 Recochem shipped from Montreal a forty foot container # CARU9690651, consigned to the Applicant, containing mostly deodorant blocks,. According to the affidavit of Mr. Milton Forbes, managing director of the Applicant, Recochem hired the services of the Defendant to ship the container to the Applicant in Jamaica. The Defendant, however, does not have a direct shipping service to Jamaica and so it, in turn, hired the services of Caribbean Feeder Services

Ltd., of Bermuda (and the Claimant/Respondent's feeder line, hereafter "Caribbean"), to transport the container from Costa Rica to Jamaica. Caribbean used a vessel, the CFS Paradero RPT ("Paradero") to transport the container to Jamaica. The Paradero is one of at least two (2) vessels owned and used by the Claimant in its business of moving freight in the Caribbean region, the other being the MV Panabo.

The Paradero arrived in Jamaica at the Port of Kingston on June 28, 2008. Subsequently, the container referred to above, along with others, was arrested on behalf of the Claimant pursuant to a Warrant of Arrest dated June 30, 2008, on allegations that the Defendant was seriously indebted to the Claimant. The Applicant's consignment of goods, which are said to be perishable (and potentially toxic once exposed to the elements), now remains in the control of the Claimant/Respondent, and it is in these circumstances that the Applicant seeks the following reliefs.

1. That Forbes Manufacturing and Marketing be made a party to this claim.
2. The Order made on June 30th, 2008, be set aside.
3. The cargo in container # CARU9690651which is now under arrest pursuant to the Warrant of Arrest issued by this Honourable Court on June 30, 2008 be released from the said warrant.
4. The costs of and/or consequent upon the application, as well as all the attendant costs of the arrest and storage of the said cargo, be paid by the Claimant.
5. Such further and other relief as may be just.

The grounds upon which the application (or more correctly, "applications") was based were stated to be in the following terms.

1. The Claimant commenced the Claim without Particulars of Claim contrary to Rule 70.3(4) of the Civil Procedure Rules, 2002.
2. There was no evidence before the Court that this is an *In Rem* proceeding.
3. This Honourable Court had no jurisdiction under the Administration of Justice Act 1956, (United Kingdom) to issue a warrant of arrest in this claim.
4. The application is being made pursuant to Rule 70.11(4), 70.11(7) and 70.11(10) of the Civil Procedure Rules 2002.

The facts as outlined in Mr. Forbes' affidavit are not disputed by the Claimant. However, the Claimant's attorneys at law, while not objecting to the Applicant's request to be made a party to the action, resist the application to set aside the Warrant and order the release of the cargo. Through its affiant, Ms. Lisa Russell, attorney at

law, the Claimant says that it has correctly obtained the Warrant of Arrest. The basis was that the Defendant was indebted to it in the sum of one hundred and ninety three thousand four hundred and seventy dollars and fifty cents, United States currency, (US$193,470.50). These sums are in respect of freight due for goods transported around the Caribbean between September 12, 2007 and June 18, 2008. The Claimant says that it has been unable to collect on this debt and that pursuant to the Slot Charter Agreement which is the agreement purportedly covering the carriage of goods as between the Claimant and the Defendant, it has a lien over these goods in question. According to the relevant provision (Clause 20) in the agreement cited by the Claimant, "The owners shall have a lien including after discharge upon all goods and containers for all sums due to the Owners from the Charterer, their servants, agents, sub-contractors or principals in respect of services provided by the Owners to the Charterer under the terms of this slot agreement.

With respect to the application for the Applicant to be made a party, in light of the fact that the Claimant is not resisting this point, I order, therefore, that the Applicant be made a defendant.

The Applicant attacks the grant of the Warrant of Arrest and supports its application to set aside the Warrant on the basis that the Court which had granted the warrant had no evidential basis to support the assertion that this was a claim *in rem*. Mr. Spencer further submitted that a claim for unpaid freight did not qualify as being a claim *in rem.* It was submitted on behalf of the Applicant that the warrant should be set aside because of procedural irregularities or in the alternative on the substantive basis that the claim was not properly a claim in rem.

It was the Applicant's submission, and this is not in dispute, that the Admiralty jurisdiction of this court is grounded in the Administration of Justice Act (1956) an Act of the United Kingdom ("the Act") as amended and applied pursuant to the **Admiralty Jurisdiction (Jamaica) Order in Council** made on March 28, 1962. The Order in Council provided in section 3 that:

> The provisions of section three, four, six, seven and eight of Part 1 of the Administration of Justice Act 1956shall extend to Jamaica with the adaptations and modifications that are specified in Column 11 of the Second Schedule of this Order.

Section 3(2) of the Act provides that:

> The Admiralty jurisdiction of the High Court may in the cases mentioned in paragraphs (a) to (c) and (s) of sub-section 1 of section one of this Act be invoked by an action in rem against the ship or property in question.

While section 1(1) of the Act sets out the jurisdiction of the Court of Admiralty in general, the paragraphs to which in rem proceedings are applicable pursuant to section 3(2) of the Act, are as follows"

a. any claim to the possession or ownership of a ship or to the ownership of any share therein;
b. any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
c. any claim in respect of a mortgage of or charge on a ship or any share therein;
s. any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

The Act further provides in section 3(3) as follows:

> In any case in which there is a maritime lien or other charge on any ship aircraft or other property for the amount claimed, the Admiralty jurisdiction of the High Court, the Liverpool Court of Passage and any County Court may be invoked by an action in rem against that ship, aircraft or property.

Both the Applicant and the Claimant agree that the claim in the instant matter, if it can be pursued, ought properly to be pursued pursuant to section 3(3) of the Act, as the other paragraphs referred to above do not apply. Mr. Spencer submitted that in order to pursue the arrest of cargo as has been done in this case, a claimant must, pursuant to Rule 70 of the Civil Procedure Rules (CPR) 2002, establish that the claim is a claim in rem; provide evidence that there is no caution against the property which is the subject of the application to arrest and file an affidavit under CPR 70.7(4).

Mr. Spencer submitted that the affidavits which had been sworn and offered as evidence at the hearing of the application for the warrant of arrest for the container, were in each case, "sworn before an employee of the Claimant's attorneys at law. As a result, neither of these affidavits should have been admitted into evidence in accordance with Rule 30.4(3) of the CPR". This rule prohibits the admitting into

evidence of any affidavit sworn before "the attorney at law of the party on whose behalf it is to be used or before any agent, partner, employee or associate of such attorney at law". It was submitted that in light of the assertion about the affidavit being "sworn" before an employee of the Claimant's attorney at law, once the evidence adduced by the affidavit in question was excluded as it should be, the evidential basis for any action let alone an action against the goods, in rem, would have disappeared and the previous order of the court would have to be set aside.

Let me deal here with what I may call, an ingenious but ultimately unsustainable proposition. The evidence that the person before whom the affidavit was sworn, Mrs. Gail Rousseau, was "an employee" is contained in the affidavit of Milton Forbes who depones that he was advised by his attorneys at law and verily believed that this was so. On the basis of this, Mr. Spencer submits that without more, it should be accepted that Mrs. Rousseau is "an employee" of the Claimant's attorneys at law. I would have thought that the assertion in Mr. Forbes' affidavit was tenuous at best and would have needed some reinforcement for it to be accepted as having the grave negative consequences suggested by counsel for the Applicant. In any event, the third affidavit of Lisa Russell makes the point that Mrs. Rousseau is employed to a company, Seramco Limited, which is a separate legal entity to the partnership, Myers, Fletcher & Gordon. If the Justice of the Peace (Gail Rousseau) before whom the affidavit was sworn is not an "agent, partner or employee" of the Claimant's attorneys-at-law, the Rule would only be relevant if she then were an "associate" of that firm. In the context of the rule, it seems to me that "associate", in the context of a law firm, must mean "associate" as distinct from "partner'; that is a qualified attorney-at-law who exercises his vocation within the firm, but has not been invited into partnership. There is no evidence that Mrs. Rousseau is in such a position. Despite Mr. Spencer's kind invitation, it would be difficult to see how I could come to the view that it is open to me to conclude without much more substantial and compelling evidence canvassed before me, that an entity (a partnership) and a corporate entity which it owns or controls should be treated as being one and the same for the purposes of litigation. It should also be noted that as part of the procedural challenge mounted by the Applicant, it was also stated that the exhibits of the affidavit of Ms. Russell did not comply with the CPR 30.5(4) dealing with the accurate identification of exhibits. I am again of the view that this is the kind of procedural irregularity which is not fatal to

the action, but its treatment is open to the exercise of judicial discretion. I might add that the Claimant/Respondent, having been made aware of the procedural challenges being launched by the Applicant, while not conceding the correctness of that challenge, filed an application for relief from sanctions in the event the court found against it. Having decided that the procedural challenge is not well founded, I do not have to rule on that application.

Mr. Spencer submitted that in the event the court was not with him on the procedural point, the second limb of the Applicant's application was a substantive challenge as to whether the claim in rem against the cargo for freight due and owing to the Claimant by the Defendant was properly sustainable. In particular, the Applicant argues that a claim for unpaid freight is not actionable in rem and certainly not in these proceedings. It was the submission of counsel, and not disputed by the Claimant/Respondent, that a claim in the instant circumstances could only be grounded if it could be fitted under section 3(3) of the Act. As noted above this provides that there is jurisdiction in Admiralty to bring an action in rem:

> "In any case in which there is a maritime lien or other charge on any ship aircraft or other property for the amount claimed".

It was accordingly submitted that in order for the proceedings to be accommodated under the Admiralty provisions of the CPR, it must fall within the term "maritime lien or other charge". The question to be determined therefore, is whether a claim for unpaid freight is within that term. The Applicant says it is not and the Claimant says it is. Mr. Spencer conceded that the term maritime lien is not defined in the Act, but argued that based on authority, a maritime lien is "a claim or privilege on maritime *res* in respect of service done to it or injury caused by it". He cited ***The Ripon City*** **[1895-9] All ER Rep 487**, in which Gorrell Barnes J in considering the issue of maritime liens and having reviewed numerous authorities said (at page 497):

> 'The result of my examination of these principles and authorities is as follows – The law now recognises maritime liens in certain classes of claims, ***the principal being bottomry, salvage, wages, masters' wages, disbursements and liabilities, and damage.*** According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another – a

jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing.

It was accordingly submitted that at Common Law, the list of classes of claims to which a maritime lien attached did not include claims for unpaid freight and even with the statutory expansion of the term maritime lien provided in the Shipping Act 1998, it is still not within the class of such claims. While I agree with the submission that it does not appear on the face that the expression "maritime lien" includes unpaid freight, it should be noted that Gorrell-Barnes J. in the cited case specifically referred to the "principal" classes of such claims and did not purport to give an exhaustive list.

Starting with the proposition above, counsel for the Applicant then turns to the question whether unpaid freight could be covered by the term "other charges" so as to bring it within the purview of section 3(3). He cited **The St. Merriel [1963] 1 All ER 537** as authority for the proposition that it could not. In that case, ship owners sought to set aside the writ on the grounds that the action was brought against the wrong persons and that proceedings in rem were not allowable. It was held that the writ must be set aside because, although the plaintiffs had at the time when the writ was issued a possessory lien, (as distinct from a "maritime lien") on the vessel, their rights and remedies did not amount to a charge within the meaning of the words "other charge" in section 3(3) of the act of 1956, (the meaning of which phrase did not extend beyond such charges as were referred to in the merchant shipping enactments. The consequence of that determination was that the plaintiffs could not proceed by an action in rem. The learned judge, Hewson J. expressed the view that although charge was not defined in the Act, the shipping statutes use the term "a charge upon the ship" and that in the absence of any direct words included by the legislature to enlarge the meaning, he was prepared to hold that "charge" only referred to those things contained in the Merchant Shipping Acts. The proceedings were set aside. It was argued that under the Merchant Shipping Acts the only classes of claims which qualify to be considered as "other charges" for the purpose of section 3(3) of the Act are those:-

a) under s. 513(2) of the ***Merchant Shipping Act, 1894 UK*** whereby damage is caused by a vessel, cargo or articles aboard the vessel and remains unsettled, a charge is thereby created;

b) under s. 35(2) of the ***Merchant Shipping Act, 1906 UK*** whereby expenses are incurred on behalf of an ailing seaman and are not paid, there will be a charge on the ship; and

c) under s. 42(2) of the ***Merchant Shipping Act, 1906 UK***, whereby expenses are incurred to rescue a distressed seaman, such expenses, if unpaid, amount to a charge upon the ship.

It was further submitted that the categories of other charges are now closed and restricted to those in the Merchant Shipping Acts of 1894 and 1906. The learned judge, Hewson J. applied similar reasoning in the later case, **The Acrux Cassa Nazionale Della Previdenza Marinata** heard in the Probate, Divorce and Admiralty Division in 1965. Here an agency of the Italian Government was seeking to recover from the UK Receiver, statutorily mandated deductions which should have been made from the wages of seamen on an Italian registered vessel. It was held that there was no charge such as that sought to be enforced known to English Law.

In opposing the application for setting aside the warrant of arrest ordered by Campbell, and ordering the release of the cargo which had been arrested, Mr. Leiba for the Claimant, submitted that as a matter of interpretation, a statute should be given its natural and ordinary meaning. It is suggested that a lien, without more, given its natural and ordinary meaning constitutes a charge. Further, the term "other charge on other property" as set out in section 3(3) of the Act is wide enough to encompass a charge on cargo. It was said that it was clear that the legislature did not intend to limit the types of property which could be arrested once a charge existed over the property. It was further submitted that **The St. Merriel** cited by the Applicant was distinguishable on the facts as it related to a possessory lien for repairs done to a ship and did not relate to a contractual lien and therefore, any reference in the case to a "general definition" of a "charge" was obiter. The difficulty for the Claimant here however, is that Hewson J. did not make the distinction which counsel seeks to place on the construction of the phrase "other charge". He specifically distinguished maritime liens from "other charges" and concluded that "other charges" meant "charge upon a ship". If that view is correct, then the limitation placed upon the construction by the learned judge would preclude an act to enforce the payment of unpaid freight against cargo.

Counsel argues that there is an important distinction between the phrases "other charge" and "other charge upon other property", as none of the Merchant Shipping Acts makes reference to "a charge upon other property". The sections cited by the learned Judge and relied upon by the Applicant are limited to a "charge upon a ship". It is therefore the Claimant's submission that the term "other charge upon other property" not having been limited or defined by any other statute should be given its natural and ordinary meaning. When this is done, he says, it is clear that a lien upon cargo would constitute another charge upon other property.

Another submission of the Applicant's counsel with regard to the basis for ordering the release of the container from arrest was the fact that the Bill of Lading stated that the freight was prepaid and as such the consignee did not owe the carrier any freight. In this regard, Claimant's counsel urges the court to consider the averments in the Third Affidavit of Lisa Russell. Here I should note, en passant, that the affidavit does not properly identify the items referred to as exhibits LR5, LR6 and LR7 and creates undue confusion. Thus, for example, the affidavit refers to a letter written on behalf of the Claimant as exhibit LR5; the "back of the bill of Lading issued" by the Defendant to the Applicant as exhibit LR6, and the Bill pf Lading issued to the Defendant by the Claimant as exhibit LR7. The exhibits are, however, not marked accordingly and this creates some difficulty.

In that affidavit, the affiant points out that the Claimant Respondent is not a party to the Bill of Lading which is between the Defendant and the respective consignees including the Applicant. What is exhibited as exhibit LR6 purports to be the back of the Bill of Lading issued by the Defendant to, inter alia, the Applicant as consignee (the "Defendant's BoL"). Exhibit LR7 purports to be the Bill of Lading issued to the Defendant by Caribbean Feeder Lines, the line manager of the Claimant, for and on its behalf (the Claimant's BoL). There is attached to this second Bill of Lading, what purports to be a "Slot Charter Agreement" between the Claimant and the Applicant.

Mr. Leiba refers to clause 10 of the Defendant's BoL and points out that the clause provides:

> "The Carrier (i.e. the Defendant) shall have a lien on the goods for all freight, deadfreight, demurrage, detention and all other costs and charges resulting from the carriage, hire, detention, demurrage for containers, and stripping and storage costs, as well as all other monies which are or become due to the Carrier by the

> Merchant in respect of previous carriages for account of Merchant. The Carrier shall be entitled to sell the goods privately or by auction to cover such claims".

This, he says, shows that there can be a lien against cargo for unpaid freight, and this would be a contractual lien, which could be enforced by an action against the res. If I understand his submission correctly, this would amount to "a subtraction from the absolute property of the owner in the thing" as suggested by Hewson J. in **The St. Merriel**, so that there is a clear lien in favour of the Carrier. Secondly, he refers to the fact that the Slot Charter agreement by Clause 11.1 prohibits the Defendant from "issuing any contracts of carriage whereby contractual relationship is established between the cargo interests and the master or Owner (Claimant) respectively". There is accordingly no privity of contract between the applicant and the Claimant, nor is the Claimant bound by any BoL as between the Defendant and the Applicant. He further points out that it is to be noted that clause 20 of the purported Slot Charter Agreement states:

> The Owner (Claimant) shall have a lien, including after discharge, upon all goods and containers for all sums due to the Owners from the Charterer, their servants, agents, sub-contractors or principals in respect of services provided by the Owners to the Charterers under the terms of this Slot Charter Agreement.

In **Richmond Shipping Ltd. V D/s and A/s Vestland ("The Vestland") 1980 2 Lloyd's Report 171 (UK Commercial Court)**, Mocatta J. canvassed the choice of the terms "statutory lien" or statutory right of an action in rem". He stated that, like Hewson J in the Merriel, he thought that the latter phrase was the more appropriate. He expressed the view that the expression "statutory lien" is a convenient one if it is used to mean no more than an irrevocably accrued statutory right of action in rem.

The clause in the Slot Charter Agreement above would seem to provide for the Claimant, a statutory right of an action in rem. It will be recalled that section 3(2) of the Act provides that an action in rem is sustainable, inter alia, in the circumstances of paragraph s of section 1(1) of the Act. That paragraph allows such an in rem action where there is "any claim for forfeiture or condemnation of a ship *or of goods which are being or have been carried or have been attempted to be carried in a ship*....." It

may well be that this is such case at any rate where the lien is more than a mere possessory one.

I have reviewed the submissions because I am of the view that the issues raised were deserving of some ventilation. It seems to me that the submission by Mr. Leiba that there may be contractual liens which may, (and I put it no higher than "may"), give rise to a statutory right of an action in rem is correct. The question in the instant case, however, is whether the Claimant has shown by the evidence adduced, that it was entitled to proceed in this way. Here, I return to the evidence presented in the affidavits.

There is, regrettably, not before me a signed copy of the Slot Charter Agreement or either of the Bills of Lading referred to above. Nor is there any averment that the photocopies which have been exhibited are true copies or identical to those agreements purportedly signed between the parties in question, or why those agreements are not exhibited. If this is view is correct, then it would seem to follow that the Claimant would not have provided the evidential basis needed to establish its right to proceed by way of an action in rem, and to have demonstrated its right to a warrant of arrest, and I so hold.

The only other question which arises for consideration and which I had asked counsel to address at the time of the hearing was whether, assuming I found that the Applicant was correct in its submissions that the warrant of arrest should not have been ordered, I would have jurisdiction to set the earlier order of this court aside. Counsel for the Applicant submitted that this court had power to set aside the earlier order made ex parte pursuant to rule 11.16 and 11.18 of the CPR. Counsel Mr. Leiba, on the other hand, was of the view that rule 11.16 only applied where the applicant to set aside was a respondent to the initial ex parte application. I disagree. It seems to me to be logical that where, as here, the Applicant has an interest in the proceedings, such that it is entitled to be joined as a party, then it is entitled to receive a copy of the order made on the ex parte application with the notice telling it of its right to make the application to set aside the ex parte order. The order for the arrest of the Applicant's container is accordingly set aside. And costs of the application, to be taxed if not agreed are to be the Applicant's.

Before I had had a chance to deliver judgment as I had planned on Friday August 8, 2008, I was advised by counsel for the Applicant in an e-mail which was copied to counsel for the Respondent, that he had become aware of a couple of cases which were relevant and on point with respect to the issues raised in this matter. In particular, it was suggested that the cases could be helpful in determining whether any lien would amount to a charge so as to bring it within the terms of section 3(4) of the Administration of Justice Act 1956, already cited above. In the circumstances I agreed to hear further submissions from both sides on the cases to determine whether it affected the decision at which I had arrived.

Mr. Spencer for the Applicant, submitted that the cases were authority for the proposition that a possessory lien which had attached to it a right of sale, as submitted by the Claimant in this matter was the case, did not amount to such a charge. He referred to **Re Hamlet International plc (In Administration) Trident International Ltd. v Barlow and Others [2000] B.C.C. 602**, a decision of the English Court of Appeal Civil Division delivered July 30, 1999. A brief summary of the case is in the following terms:

> Trident carried on a freight forwarding, warehousing and distribution business. It dealt with two customers, International and Imports, on the standard trading conclusions of the British International Freight Association (the BIFA terms), and the United Kingdom Warehousing Association (the UKWA terms). A common feature of the BIFA and the UKWA terms was that the company, Trident, should have a general lien on goods in its possession, coupled with a right to sell the goods and use the proceeds of sale to discharge debts due to Trident from its customers, International or Imports. International and Imports went into administration owing money to Trident. Trident applied to the Court pursuant to section 11(3) of the Insolvency Act 1986 for liens to exercise liens over stock held by it for International and Imports. The stock was sold by consent under the terms of an order made by Neuberger J.
>
> The administrators argued that the relevant provisions of the BIFA and the UKWA terms created floating charges registrable under s. 395 of the Companies Act 1985 and which were void against the administrators for non-registration. The company applied under s. 11(3) (c) of the Insolvency Act 1986 for leave to enforce the liens. The deputy judge held that the company's contractual possessory lien was not a registrable charge. The administrators appealed to the Court of Appeal.
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> *Held*, dismissing the appeal:

> **1** The deputy judge was right that the company did not have a floating charge over its customers' goods. It had a contractual possessory lien, coupled with a right to sell and use the proceeds to discharge the customer's outstanding indebtedness. The contract did not confer on the company, and the company did not purport to exercise, any right to take possession, as distinct from the right to detain possession. It was a legal possessory lien conferred by contract.
> **2** Nor did the contract transfer to the company, and the company did not purport to exercise, any proprietary right, independently of actual possession of the stock (or of the moneys representing the proceeds of sale of that stock in its possession), such as an equitable right or interest in or charge or encumbrance over present or future stock belonging to the two companies.
>
> **3** The company's right over the goods was not registrable under s. 395 because a power of sale did not make a possessory lien into an equitable charge (Great Eastern Railway Co v Lord's Trustee [1909] AC 109 and Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd [1974] 1 NZLR 484 applied

In **Hamlet**, Mummery L.J. made a distinction between *a right which was based entirely upon possession and one which gave rise to some proprietary interest in the goods.* (My emphasis) Thus he said:

> The power of sale was attached to and dependent upon the possessory lien. The contract did not confer on Trident, and Trident did not purport to exercise, any right to take possession, as distinct from the right to detain possession. It was a legal possessory lien conferred by contract. The contract did not transfer to Trident, and Trident did not purport to exercise any proprietary right, independently of actual possession of the stock (or of the moneys representing the proceeds of sale of that stock in its possession) such as an equitable right or interest in or charge or encumbrance over present or future stock belonging to International or Imports.

The distinction which seems to be canvassed here, between a *right based upon possession* and one which gives *a right to a proprietary interest* in goods was also explored in **Re Coslett (Contractors) Ltd. [1998] 2 W.L.R. 131**, also reported at **[1997] 4 All ER 115**. In the **Coslett** case, provisions in a contract entitled the employer, in certain defined circumstances, to sell property which the contractor had brought on site and to satisfy any debts due it from the contractor, including the costs incurred in effecting the sale. For the purposes of this judgment, I shall only set out a part of the clause which became the subject matter of a decision of the High Court and

then the English Court of Appeal. Clause 53(2), to the extent relevant, was in the following terms:

> If the contractor shall fail to remove any plant goods or materials as required pursuant to clause 33 within such reasonable time after completion of the works as may be allowed by the engineer then the employer may: - (a) sell any which are the property of the contractor; and (b) return any not the property of the contractor to the owner thereof at the contractor's expense; and after deducting from any proceeds of sale the costs charges and expenses of and in connection with such sale and of and in connection with return as aforesaid shall pay the balance (if any) to the contractor but to the extent that the proceeds of sale are insufficient to meet all such costs charges and expenses the excess shall be a debt due from the contractor to the employer and shall be deductible or recoverable by the employer from any moneys due or that may become due to the contractor under the contract or may be recovered by the employer from the contractor at law.

Millett L.J. in commenting on the clause and exploring the distinction between a mere contractual possessory lien and a charge delivered himself of the following dicta.

> But the clause cannot possibly operate at law to pass title to property owned by a company not a party to the contract. Accordingly I agree with the judge that clause 53(2) of the contract does not pass legal ownership in the plant to the council.
>
> In my judgment the council's right to retain possession of the plant and use it to complete the works does not constitute an equitable charge because (i) it does not give the council a proprietary interest in the plant but only rights of possession and use and (ii) it is not by way of security.
>
> It is of the essence of a charge that a particular asset or class of assets is appropriated to the satisfaction of a debt or other obligation of the chargor or a third party, so that the chargee is entitled to look to the asset and its proceeds for the discharge of the liability. This right creates a transmissible interest in the asset. A mere right to retain possession of an asset and to make use of it for a particular purpose does not create such an interest and does not constitute a charge.
>
> **But there is an even more fundamental reason why this right of the council in the present case does not constitute a charge. This is that it does not constitute any kind of security interest, since it is not given to the council by way of security.** (My emphasis) It does not secure the performance of the contract

> by the company, but merely enables the council to perform the contract in its place. It does not, therefore, secure the discharge of any debt or other legal obligation of the company or of any third party, whether to complete the works or to pay damages for its failure to do so. Completion of the works by the council does not discharge either of these obligations.

His Lordship continued:

> There are only four kinds of consensual security known to English law: (i) pledge; (ii) contractual lien; (iii) equitable charge and (iv) mortgage. A pledge and a contractual lien both depend on the delivery of possession to the creditor. The difference between them is that in the case of a pledge the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of goods previously delivered to him for some other purpose. Neither a mortgage nor a charge depends on the delivery of possession. The difference between them is that a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an equitable charge does not.

Mr. Spencer submits that these cases provided further support for the position of the Applicant. He urged that, by parity of reasoning, clause 20 of the Slot Charter Agreement only created a contractual possessory lien with a right to sell the goods and this did not rise to the level of a charge for the purposes of the Act. Further, he submitted that clause 11 of the BIMCO Bill of Lading relied upon by the Claimant was for all practical purposes *in pari materia* with the clause being considered in **Hamlet** and accordingly the case was authority for the proposition that a charge did not arise so as to give a right to commence in rem proceedings against the goods. He reiterated that "charge" must mean, as suggested by the authority of St. Merriel, a "charge upon the ship".

Mr. Leiba, for his part, submitted that the Hamlet and Coslett cases were distinguishable as they related to the question of a floating charge under the appropriate Companies legislation. It could not therefore be any authority for construing the relevant provision of the Act. He also suggested that the 3rd affidavit of Lisa Russell made it clear that the lien was not limited to the period while it was in the Claimant's possession, but included the period "after discharge".

There is some truth in the distinction which the Claimant seeks to draw insofar as the issue of a floating charge under the Companies Act 1985 is concerned. However, I accept that the analysis as to whether a "charge" has arisen at all, even an equitable one, is relevant to whether a "charge" has been established for the purposes of section 3(4) of the Act. I am prepared to hold on the authority of the Hamlet and Coslett cases, that the Claimant has failed to show that it has a charge which is sustainable by proceedings in rem against the freight in question. On this basis, as well as on my reasoning set out above before I heard the additional submissions, I hold that the Applicant must succeed. I accordingly make the order in respect of the Applicant's application, as set out at page 11 above. Leave to appeal this Order is granted, if that is necessary. I also order that this order is stayed for seven (7) days from today's date. Leave is also granted to the Applicant to appeal the order for a stay of execution of the judgment. Formal Order consistent with this ruling is to be prepared by the attorneys at law for the Applicant.

~~The Formal Order is to be prepared by counsel~~

Roy K. Anderson
Puisne Judge
August 20, 2008