Federal Court Cour fédérale

Date: 20160526

Docket: T-1683-14

Citation: 2016 FC 570

Montreal, Quebec, May 26, 2016

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

BALLANTRAE HOLDINGS INC.

Plaintiff

and

THE OWNERS AND ALL THOSE INTERESTED IN THE SHIP "PHOENIX SUN" AND THE SHIP "PHOENIX SUN"

Defendants

JUDGMENT AND REASONS

[1] If things seem too good to be true; they probably aren't good and probably aren't true. So it is with the schemes of Mengu Pasinli. His plan was to buy the Canadian ship, the PHOENIX SUN, then under arrest at the port of Sorel; render her sufficiently seaworthy for one last voyage; find a cargo to carry overseas and then sell her in Turkey for scrap. When all was said and done, he projected a profit in excess of $1,000,000.

[2] On November 26, 2013, he, through one of his companies, Goldrich Waters International Shipping Ltd. of Hong Kong, purchased the PHOENIX SUN from the acting marshal in admiralty for $1,050,000. The ship was then deleted from the Canadian registry. He had borrowed that entire amount from the plaintiff, Ballantrae Holdings Inc., which took out a mortgage and other security. Thereafter he hired a crew in Turkey, and a Canadian welder to work on the ship. He persuaded others to pay the crew's passage to Canada, and ship chandlers to provide necessaries on credit. Some of the crew's wages and some of the claims of the ship chandlers were paid by others. It seems that Mr. Pasinli is not out of pocket at all.

[3] It all came to nought. The PHOENIX SUN was never rendered seaworthy. In fact she never left her berth. Creditors refused to advance further sums. The crew was left penniless and hungry. They were fed by the good people of Sorel.

[4] On July 29, 2014, Ballantrae filed an action *in rem* and *in personam* in this court. The following day the PHOENIX SUN was arrested. She was later sold by the acting marshal on November 12, 2014, for $682,500.

[5] In addition to Ballantrae, various creditors had filed caveats and in accordance with directions of the Court have filed their claims. As is the practice the evidence consists of affidavits and cross-examinations. The only exception is the Master and crew whose evidence was taken *de bene esse*. Not everyone contested the claims of the other creditors. For instance, it was clear that there were sufficient funds available to pay in full the crew and the necessaries men who enjoyed a maritime lien. Unfortunately the proceeds of this sale do not nearly approach

the amount of the claims, so the issues at the hearing in Montreal on April 7 and 8, 2016, were the validity of the claims and the ranking of priorities. I will set out the claims in order of the ranking the claimants assert, leaving aside claims which had been struck before the hearing and the claim of Jarud Corporation Limited which was discontinued during the hearing. The defendant owners did not participate.

[6] When there are insufficient funds to meet the claims of all the creditors they must persuade the Court that their claims enjoy priority. Otherwise valid claims rank *pari passu*.

[7] There is no statute or single case which establishes an exhaustive list of priorities. Limiting myself to this case there are four groups of claims. I need not deal with maritime liens *inter se* or possessory liens.

[8] The first group, enjoying the highest priority, are the claims for costs incurred in converting the ship into a fund available for distribution to the creditors. These are the Marshal's fees and disbursements and the costs of the party which brought the ship to sale.

[9] The second group consists of maritime liens and those liens created by statute which enjoy the same status.

[10] Mortgages came next. One complication is that Ballantrae's mortgage was not registered.

[11] The rest of the claims consist of alleged equitable charges. Some of these claimants may simply be entitled to arrest the ship in an action *in rem* and do not enjoy priority. Some may have claims against the shipowner which do not sound in admiralty at all.

[12] Furthermore, on occasion when the interests of justice so require, our court in the exercise of its admiralty and equitable jurisdiction may alter the traditional ranking.

[13] This case also raises the issues of both pre-sale and post-sale interest. Some, but not all, of the claims carry with them an agreed contractual rate of interest. The fund on deposit in court earns interest, but at a paltry rate.

[14] These reasons are broken down as follows:

Priorities

[15] The claim with the highest priority is without doubt the claim by the acting marshal for his fees and expenses in the amount of $39,106.37.

[16] The second ranking claim would be that of Ballantrae Holdings Inc. for its costs incurred in converting steel into cash. At the hearing its solicitors tentatively asserted $25,000, but were called upon to furnish better particulars. They have now come up with a claim of $42,419.37.

[17] The next ranking claims would be those of the Master and crew members of the PHOENIX SUN (the twelve seafarers) for wages and other remuneration or benefits arising out of their employment. Their best arguable case, converting the principal amount of their claim which is in US dollars to Canadian dollars as of the judgment date (assuming no difference in exchange between the hearing date and the judgment date), is $180,716.68.

[18] There is another alleged crew member, Mr. Mustafa Hakan Etiz, who entered into an employment contract with the owners as a fitter/duty officer. He also asserts a mariner's maritime lien in the amount of $50,875.

[19] The next ranking claim, if well founded, is that of la Ville de Sorel-Tracy for berthage in the principal amount of $75,460.01 and for the supply of electricity in the principal amount of $22,407.02. The interest claimed thereon shall be dealt with later in these reasons. It claims a high ranking statutory lien in accordance with section 122 of the *Canada Marine Act*. Failing

that it claims a statutory lien in virtue of section 139 of the *Marine Liability Act*. Finally, if those provisions, on which more shall be said, do not apply, it submits that if it only has an ordinary right *in rem*, the Court in the exercise of its admiralty and equitable jurisdiction should grant it a higher priority.

[20] Next follows the claims of three necessaries men, Blue Water Agencies Limited, Pronova Systems Limited, and 185888 Canada Inc. (formerly North Star Ship Chandler Inc.). The principal amount of their claims totals $59,571.63. As a result of the enactment of section 139 of the *Marine Liability Act*, all three enjoy a statutory lien, which carries with it the priority of a maritime lien.

[21] Mr. Ian Hamilton and his company, Through Logistics Corp, claim $240,578.47. Mr. Hamilton paid to get the crew from Turkey to Canada, paid some of their wages and paid some of the claims of the ship chandlers. They claim a lien pursuant to section 139 of the *Marine Liability Act* for part of the claim, and an equitable charge over the balance.

[22] Skylane Worldwide Limited asserted a registered Panamanian mortgage, and has claimed USD 1,350,000 which at the hearing, based on an exchange rate of 1.28, was CAD 1,728,000.

[23] The last and remaining creditor is Ballantrae. It lent Mr. Pasinli the $1,050,000 needed to purchase the PHOENIX SUN. It entered into security agreements including a mortgage which, due to a breach of contract on the part of the defendants, was never registered. It nevertheless asserts it has a security interest in virtue of the mortgage. It also asserts priority rights as the

holder of a registered personal property security interest pursuant to the Ontario *Personal Property Security Act*. At the heart of Ballantrae's claim is a loan agreement with Trenton Shipping and Trading Limited, of which Mr. Pasinli represented himself as the sole shareholder. The plan was that Trenton would buy the PHOENIX SUN. However, for reasons Mr. Pasinli did not fully disclose, he had the bill of sale made out to another company of which he claimed to be the sole shareholder, Goldrich Waters International Shipping Co. Ltd. Mr. Pasinli, Trenton, Goldrich, and other Pasinli companies were all *prête-noms*, one for the other, and no distinction should be drawn amongst them.

[24] Thus, the principal amount of the claims asserted at the opening of the hearing on April 7, was $3,496,669.83 against a fund of $682,500.

Skylane's Claim Dismissed

[25] Skylane has prevented the orderly and timely development of this case. It constantly missed deadlines and obtained extensions. It was called upon to file evidence as to the validity of its mortgage under Panamanian law. Finally Prothonotary Morneau ordered it to file its evidence as to Panamanian law, failing which its claim would be struck. It failed to do so. Mr. Hamilton and his company thereafter moved that the claim be struck.

[26] A few days before the scheduled hearing on April 7, Skylane's solicitors stated that they should no longer be considered as Skylane's counsel of record. I pointed out that under Rule 125 they were required to make a formal motion. At the opening of the hearing a motion was ready, but had not been served. I declined to accept it for filing. The Court frowns upon last-minute

motions of this sort and in any event even if granted it could only have taken effect after Skylane was served in the British Virgin Islands. The hearing, which had been scheduled for some time, was not to be postponed.

[27] I then granted Mr. Hamilton's motion with costs against Skylane.

[28] As stated during the hearing there were at least two other reasons why Skylane's claim should be struck. The first was that the only evidence as to the validity of its mortgage under Panamanian law was the expert evidence of Eduardo Antonio Real Solis, a Panamanian attorney. His evidence, which in no way was contradicted, and which the Court accepts, is that for several reasons Skylane's alleged mortgage was null and void and of no effect.

[29] The third reason is that the alleged mortgage was entered into November 11, 2014. The PHOENIX SUN had been under arrest in this court since July 30, 2014, and had been advertised for sale by auction the following day, November 12, 2014.

[30] A shipowner cannot deal with a ship under arrest in such a way as to dissipate its value to the then existing creditors.

[31] I referred to the *obiter* remarks of Mr. Justice Forest of the Quebec Superior Court in *Security National Bank c Fournier* (24 February 1976), Montreal 05-000357-75. Peripheral to the claim in that action which was on loan guarantees, the ship in question, the *Atlantean I* had been sold by the Small Claims division of the Quebec Provincial Court while she was under

arrest in this court. Mr. Justice Forest was of the view that the alleged sale was null and of no effect. In the circumstances he had no need to cite the cases which he said had been put before him.

[32] Those authorities would have included the *Cella*, (1888) 13 PD 82, where Lopes L.J. said at page 88:

> From the moment of the arrest the ship is held by the court to abide the result of the action, and the rights of parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently.
>
> (As quoted by Brandon J. as he then was, in *The Monica S.*, [1967] 3 All ER 740 at 754)

The Marshal's fees and disbursements

[33] The acting marshal's fees and disbursements of $39,106.37 have already been paid out by court order, without interest.

Ballantrae's costs

[34] It is well established that the costs of the moving party, usually, as in this case, the plaintiff, in bringing the ship to sale rank with Marshals' costs: McGuffie, Fugeman & Gray, *British Shipping Laws: Admiralty Practice*, vol 1 (London, UK: Stevens & Sons, 1964) at para 1574; Chircop et al, eds, *Canadian Maritime Law*, 2nd ed (Toronto: Irwin Law, 2016) at 263–265. The underlying philosophy is that all creditors benefit from a fund against which they can

claim, and hopefully receive payment. However, the costs of Ballantrae, and the others, in asserting their own claims and contesting the claims of others do not fall into this category.

[35] There is one caveat in this case. Long after the sale, Prothonotary Morneau ordered Ballantrae to prepare a "joint record for adjudication and ranking of claims". These three volumes were of great assistance to the Court, and I daresay to all parties, and so Ballantrae should receive some compensation.

[36] Ballantrae claims $42,419.37 on a solicitor-client basis. It points out that Mr. Justice MacKay ordered solicitor-client costs in *Holt Cargo Systems Inc v The Ship Brussel et al*, 185 FTR 1, 2000 FCJ No 197 (FCTD) (QL). However, it is rare for costs to be awarded on a solicitor-client basis. I see no reason why I should not apply the default provision of Tariff B, Column III, mid-range.

[37] Mr. Hamilton suggests that since Ballantrae is receiving some funds from a guarantor, the equitable doctrine of Marshaling should apply. I disagree. Such sums as it may receive from guarantors of the shipowners' debt simply reduce the capital amount of that debt. Any such payment does not relate to the costs of bringing the ship to sale.

[38] Ballantrae is entitled to the preparation of and filing of the statement of claim, affidavit to lead warrant, warrant of arrest, the motion to sell, appearances on motions including attending at the sale and preparing the joint record. I grant it 40 units at $140 per unit, or $5,600. I accept its

disbursements in the amount of $5,819.60 – of which $5,252.74 is subject to Ontario HST of 13% – for a total of $12,830.46.

The Claim of the Twelve Seafarers

[39] The contracts of the Master and eleven crew members called for payment of wages and benefits in US dollars. Most of their claim is beyond doubt. However, there are three unresolved issues. They were promised a retainer or stand-by fee of one-third of a month's salary for not working on the ship. Although this claim is perfectly valid against the owners, does it benefit from a maritime lien? The second issue is the length of their employment contract. The third is the date on which their claim should be converted into Canadian dollars. They submit that in the circumstances the conversion should be at the date of judgment (or at the date of hearing) rather than on the date of breach. On the breach day rule, the US dollar was worth CAD 1.10. On the judgment day (or hearing day) the rate would be CAD 1.28.

[40] The Master and crew submit that they suffered a loss in the rate of exchange due to delays in obtaining a hearing date. In equity they should be compensated.

[41] As stated during the hearing, I am not prepared to depart from the breach day rule. This court is not a currency speculator. Our dollar goes up and our dollar goes down against the US dollar, the Euro and the Special Drawing Rights of the International Monetary Fund. At times the breach day rule will benefit claimants, other times not.

[42] Furthermore the breach day rule is the rule set down by the Supreme Court (*Gatineau Power Company v Crown Life Insurance Company*, [1945] SCR 655). In *NV Bocimar SA v Century Insurance Co*, (1984) 53 NR 383, [1984] FCJ No 510 (FCA) (QL) (*The Hasselt*), Mr. Justice Hugessen, speaking for the Federal Court of Appeal, held it was not open to that court to change the rule adopted by the Supreme Court. That decision was reversed in the Supreme Court, but not on this point: [1987] 1 SCR 1247, [1987] SCJ No 39 (QL).

[43] I am bound by the rule of *stare decisis*. In *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, the Supreme Court set out the narrow circumstances in which a lower court might not follow the decisions of a higher court:

> [44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[44] There is nothing new in this case. Currencies go up and currencies go down.

[45] It is unfortunate that there has been a delay in paying the crew members. That delay was attributable to parties who had departed the scene by the time of the hearing. It was clear that parts of the claim of the Master and crew were unassailable and so I ordered the immediate payment out of $62,775.54 in principal plus interest of $407.67. It should be noted that the other

parties were prepared to consent to a higher interlocutory payout, but I had to study the evidence with respect to the termination of the contract.

[46] Ballantrae, supported by Mr. Hamilton, contests two parts of the claim by the Master and the eleven crew members. Each claims a retainer or stand-by fee of one-third of a month's wages. The crew members were supposed to be dispatched to the ship earlier than they were. In consideration of their not seeking employment elsewhere, Mr. Pasinli promised this additional payment. The issue is not whether the promise was made; I accept that it was. The issue is whether this portion of the claim benefits from a maritime lien. In my opinion, it does not.

[47] The second issue is the date employment was terminated. Ballantrae submits that the cut-off date should be September 21, 2014, the date on which the crew left the ship and returned to Turkey. The twelve seafarers submit that under the terms of their contract they were entitled to further payment. I agree.

[48] It should be mentioned that neither they, nor anyone else, is claiming the cost of repatriation from Canada to Turkey. It appears that an unnamed Good Samaritan paid their way but does not seek compensation from the fund generated by the sale of the ship.

[49] Turning now to the retainer fees, they total some USD 11,766.69.

[50] The courts both here and elsewhere have been increasingly generous when it comes to crew wages, which include emoluments as set out in section 22(2)(o) of the *Federal Courts Act*

and sections 2 and 86 of the *Canada Shipping Act, 2001*. See also Tetley, *Maritime Liens and Claims*, 2nd ed (Montreal: Yvon Blais, 1998), ch 8.

[51] Counsel for the seafarers submits that the retainer or stand-by fee was an integral part of their employment contracts, even though not reduced to writing. Reliance was placed on a general statement by Fisher J. in *Mobil Oil New Zealand Ltd v The ship "Rangiora" (No 2)*, [2000] 1 NZLR 82 (HC), that wages should include "any form of payment which has been promised in return for the seafarers' agreement to work on the ship". It was submitted that this New Zealand case is in line with Canadian jurisprudence particularly the decision of Madam Justice Snider in *Canadian Imperial Bank of Commerce v Le Chene No. 1*, 2003 FC 873. Madam Justice Snider accepted that the scope of the seamen's maritime lien has evolved and expanded to meet the ever changing nature of their employment.

[52] Both the *Rangiora* and *Le Chene No. 1* relate to termination of employment issues after the seamen joined the ship in question. There are many reasons why a seaman may be employed and paid before joining a specific ship. A prudent shipowner may well wish to provide training in its policies and procedures and alert the prospective crew to the intricacies and particularities of the ship in question. While I am prepared to accept that the Master and crew have a claim *in personam* against the owners and *in rem* against the ship, they do not benefit from a maritime lien arising from a promise that they not work elsewhere.

[53] Turning now to the length of employment, as noted by Madam Justice Snider in *Le Chene No. 1*, our law has evolved with respect to entitlements after the ship and crew have

parted company. The owner may have gone into formal liquidation or wrongfully dismissed the crew.

[54] In this case, the first six crew members (Messrs. Karasu, Ergun, Cenik, Meral, Guray and Ucman) signed on the ship in Canada on April 6, 2014, four more (Captain Ozkan and Messrs. Kan, Ates and Kaan) on April 12, 2014 and the remaining two (Messrs. As and Gumusoz) on June 2, 2014. All signed a "Seafarer Employment Agreement" with Menpas Shipping and Trading Inc., a Pasinli company which acted, among other things, as the crewing agent. Each was "employed for a period of 2+2+2 months (at shipowner's option) commencing on the date of embarking to the ship at Sorel --".

[55] It was further provided that unless a notice of termination was given before the end of each two-month period, the contract was prolonged for another two months. The required notice if given by the shipowner was seven days; if given by the seafarers, fifteen days. No formal notice, so called, was ever given.

[56] The crew were paid through to the end of June 2014 and should have received their July wages by August 5th. Nevertheless, Mr. Pasinli assured them they would eventually be paid and so they continued to work the ship until they left on September 21, 2014.

[57] Mr. Pasinli was served with the seafarers' caveat and motion to have their evidence taken *de bene esse* on September 9, 2014. Both the notice of motion and the supporting affidavit of the Master, Semih Ozkan, stated that all twelve were scheduled to leave Canada and return to

Turkey on September 21, 2014. In the circumstances, I find that the service of the motion upon Mr. Pasinli on September 9th served as constructive notice of termination of employment.

[58] On that basis, the contracts of the six crew members who arrived on April 6th and the four who arrived on April 12th were extended on August 6th and August 12th respectively. As no timely termination notice was given during the second term, the third two-month employment term came into play so that they are entitled to compensation to October 6 and to October 12, 2014. Based on *Le Chene No. 1*, it matters not whether compensation for the period after they left the ship on September 21, 2014 is characterized as severance pay, wrongful dismissal or simply completion of the contract.

[59] Unfortunately, the situation with respect to the remaining two crew members who joined on June 2nd is somewhat different. The initial two-month period ended August 2nd and the second on October 2nd. They gave notice within the required fifteen days and so are only entitled to four months' payment, all told, while the first ten crew members are entitled to six months' payment.

[60] I shall calculate the principal amount to which each is entitled, before subtracting the amounts in principal ordered to be paid out on April 11, 2016. I have also taken into account that each of the twelve members was paid $100.00 after July 1, 2014 by Mr. Hamilton and that, furthermore, Captain Ozkan is entitled to additional back pay, due to a change of position, of USD 818.67 and Mr. Ucman is entitled to back pay of USD 532.00.

[61] On that basis, Captain Ozkan is entitled to $28,741.89 less the earlier payment out by the Court of $13,448.34 leaving a balance owing in principal of $15,293.55. Likewise the rest of the crew is owed, in Canadian dollars:

Crew Member	Total Owed	- Already Paid	= Remaining Owed
Mr. Karasu	$26,246.77	- $12,550.00	= $13,696.77
Mr. Ergun	$9,560.49	- $4,538.50	= $5,021.99
Mr. Kan	$7,351.61	- $3,273.50	= $4,078.11
Mr. As	$6,641.93	- $3,273.50	= $3,368.43
Mr. Cenik	$5,169.35	- $2,430.00	= $2,739.35
Mr. Gumusoz	$6,641.93	- $3,273.50	= $3,368.43
Mr. Meral	$5,169.35	- $2,430.00	= $2,739.35
Mr. Guray	$6,925.81	- $3,273.50	= $3,652.31
Mr. Ates	$5,127.13	- $2,261.50	= $2,865.63
Mr. Kaan	$12,754.03	- $5,719.00	= $7,035.03
Mr. Ucman	$12,604.71	- $6,304.20	= $6,300.51

Mustafa Hakan Etiz

[62] According to his evidence, Mr. Etiz joined the PHOENIX SUN on December 7, 2013, and worked through until June 16, 2014. He signed a "Seafarer Employment Contract" in the same form as did the Master and the crew members. He was said to be employed as a "fitter/duty officer". He claims unpaid wages of $50,875 and asserts a maritime lien.

[63] Mr. Etiz had no qualifications whatsoever which would allow him to serve as a duty officer. Furthermore, he was not going to sail with the ship if, as and when she ever departed Sorel. He was self-represented throughout and acted through a Turkish-English interpreter. His evidence was extremely vague. When there was no work onboard he carried out unspecified tasks ashore for Mr. Pasinli. He did not state what these tasks were and gave no breakdown as to how his time was divided between ship and shore.

[64] He may possibly have served as a watchman from time to time before the Master and crew began to arrive in April 2014. On the other hand, he slept ashore, which detracts from his submissions.

[65] Nevertheless, he was a qualified welder and did some work on the ship's piping.

[66] I find he was not a crew member at all. It seems that only one crew member was even aware of his existence. He was shore labour. He has no maritime lien and does not benefit from section 139 of the *Marine Liability Act*. He was an employee. He was not carrying on business.

[67] Giving him every benefit of the doubt, I fix his onboard work at $25,000. He has a statutory right *in rem* for that amount with no priority. To the extent he was a watchman he was not a crew member (*Jorgensen v The Christina*, [1926] Ex CR 110). To the extent he was a welder he was shore labour (*MacBeth v Chislett*, [1910] AC 220). The balance of his claim could only be considered after all maritime claims are met. However by that time the fund will be exhausted.

Ville de Sorel-Tracy

[68] The city of Sorel-Tracy, through its organization La Société des parcs industriels Sorel-Tracy, claims $105,402.31 comprising unpaid berthage of $81,441.83 and unpaid electricity in the amount of $23,960.48. The claims in principal are for $75,460.01 and $22,407.02, respectively. I have no hesitation in finding that the owners and the ship are liable in that amount. What is in dispute is the ranking which should be given the city's claim. It asserts the

priority of a maritime lien, only subservient to crew wages, in accordance with section 122(1) of the *Canada Marine Act* which provides:

122 (1) A port authority, the Minister or a person who has entered into an agreement under subsection 80(5), as the case may be, has at all times a lien on a ship and on the proceeds of its disposition for an amount owing to the port authority, the Minister or the person, and the lien has priority over all other rights, interests, claims and demands, other than claims for wages of crew members under the Canada Shipping Act, 2001, if the amount is owing in respect of	122 (1) L'administration portuaire, le ministre ou la personne qui a conclu une entente en vertu du paragraphe 80(5) est toujours titulaire d'un privilège sur le navire et sur le produit de toute disposition qui en est faite, pour sa créance; ce privilège a priorité sur tous autres droits et créances, quelle qu'en soit la nature, à la seule exception des créances salariales des membres de l'équipage, visées par la Loi de 2001 sur la marine marchande du Canada, dans les cas suivants :
(a) fees and interest in respect of the ship or goods carried on the ship; or	a) pour défaut de paiement des droits et des intérêts exigibles à l'égard du navire ou de sa cargaison;
(b) damage to property caused by the ship or through the fault or negligence of a member of the crew of the ship acting in the course of employment or under the orders of a superior officer.	b) pour dommages causés à des biens par le navire ou par la faute ou la négligence d'un membre de son équipage agissant dans l'exercice de ses fonctions ou sous les ordres d'un officier supérieur.

[69] Unfortunately the city it is not a "Port Authority" as defined in section 2, as it was not incorporated or continued under that Act. Section 80(5) gives the Minister certain powers to make agreements with respect to parts of the Saint Lawrence Seaway. However, Sorel is not within the Seaway.

[70] The city also submitted, in the alternative, that it is entitled to a maritime lien in virtue of section 139(2) of the *Marine Liability Act* which provides:

139 (2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise	139 (2) La personne qui exploite une entreprise au Canada a un privilège maritime à l'égard du bâtiment étranger sur lequel elle a l'une ou l'autre des créances suivantes :
(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or	a) celle résultant de la fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage;
(b) out of a contract relating to the repair or equipping of the foreign vessel.	b) celle fondée sur un contrat de réparation ou d'équipement du bâtiment étranger.

[71] Unfortunately for the city its claim does not fall within section 139 of the *Marine Liability Act* either. Mr. Hamilton submitted that the city was not carrying on business as it was a non-profit organization. I am not prepared to so find. Many not-for-profit organizations, such as mutual insurance companies, well known in marine insurance circles, carry on business.

[72] The next question is whether the city provided services for the PHOENIX SUN's operation or maintenance. I find it did not. Section 22(2) draws a distinction between necessaries and dock charges. Sections 22(2)(m) and (s) read:

(m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance	m) une demande relative à des marchandises, matériels ou services fournis à un navire pour son fonctionnement ou

of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;	son entretien, notamment en ce qui concerne l'acconage et le gabarage;
(s) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.	s) une demande de remboursement des droits de bassin, de port ou de canaux, notamment des droits perçus pour l'utilisation des installations fournies à cet égard.

[73] Section 139 of the *Marine Liability Act* was intended to put Canadian necessaries men such as ship chandlers, bunker suppliers and stevedores on equal footing with those, such as their American counterparts, who enjoy maritime liens under their own laws. Previously, necessaries men had a statutory right *in rem*, with no priority, if they had contracted with the shipowner. If they knew they were contracting with the charterer they had no action *in rem* and no right to arrest the ship (*Marlex Petroleum Inc v The Ship Har Rai and the Shipping Corp of India*, [1984] 2 FC 345 (FCA), affm'd [1987] 1 SCR 57; *Holt Cargo Systems Inc v ABC Containerline NV (trustee of)*, 2001 SCC 90, [2001] 3 SCR 907 (the *Brussel*).

[74] If there were any doubt at all about Parliament's intention, one need only read the House of Commons debates for February 25, 2009, as well as the Senate sponsor's speech.

[75] It is true that section 22(2)(s) of the *Federal Courts Act* is somewhat peculiar in that, like a maritime lien, port charges survive the sale of the ship (section 43(3) of the *Federal Courts Act*). However, Parliament would have had to have been much more direct and specific before granting ports a statutory lien equivalent to a maritime lien.

[76] Although it follows that under the traditional ranking the city has only a statutory right *in rem*, without priority, it is well recognized that this Court in the exercise of its admiralty and equitable jurisdiction, if the interests of justice so require, may alter the traditional ranking. For instance in *Osborn Refrigeration Sales and Service Inc v The Atlantean I*, [1979] 2 FC 661 (FCTD), Mr. Justice Walsh referred to fuel deliveries having been made after an arrest, which were essential to preserve the ship in severe winter conditions, and hence tended to preserve the security of the mortgage creditor. Furthermore, if upon the arrest, Ballantrae, or others, had moved to have the Marshal put in possession both berthage and the supply of electricity would have ranked as Marshal's costs.

[77] The authorities were reviewed in considerable depth by the late Prothonotary Hargrave in *Fraser Shipyard and Industrial Centre Ltd v Expedient Marine Co*, (1999) 170 FTR 1, 1999 FCJ No 947 (QL), varied but not on this point (1999), 170 FTR 57, [1999] FCJ No 1212 (FCTD) (QL). I also touched upon the issue in *Nordea Bank v The Kinguk*, 2007 FC 434.

[78] Prior to Goldrich's purchase of the PHOENIX SUN, berthage and electricity had been paid by the then acting marshal in admiralty under the previous arrest.

[79] While it could be argued that it was necessary for the PHOENIX SUN to lie alongside as she was a dead ship, and could hardly have gone to anchor, I am not prepared to go so far. In the circumstances I find it plain and obvious that the mass of creditors have benefitted from the supply of electricity. Consequently, I rank the city's claim for the supply of electricity in the amount of $22,407.02 immediately after the claims of the Master and crew. The balance of

$75,460.01 benefits from a statutory right *in rem*, but enjoys no priority. Pre-sale interest will be dealt with later.

The Necessaries Men

[80] Unlike the Ville de Sorel-Tracy, the three ship chandlers who filed claims do benefit from section 139 of the *Marine Liability Act*. The PHOENIX SUN had been deleted from the Canadian registry and so was not a Canadian ship. The principal amounts of their claims are not in controversy and they rank after the claims of the Master and crew, and that part of la Ville de Sorel-Tracy's claim referred to above.

[81] Blue Water Agencies Limited's claim is for the supply of necessaries being foodstuffs and provisions in the amount of $9,041.78. It was also claiming interest at the rate of 24% per annum from July 11, 2014, and administrative fees, bringing the claim to $12,511.44. However, it is no longer claiming pre-sale interest, which for reasons set out in another portion hereof, I would not have granted anyway. It is entitled to the principal amount of $9,041.78.Likewise Pronova Systems Inc. provided necessaries in the amount of $28,182.15. It also claimed, but is now waiving, interest at 24% per annum from December 29, 2013, which included administrative fees. Furthermore, it acknowledges that Mr. Hamilton had paid $2,000.00 against one of the invoices. I fix its claim in the principal amount of $26,182.15.

[82] The third ship chandler is 185888 Canada Inc. (formerly North Star Ship Chandler Inc.), currently in bankruptcy. The principal amount of its claim, which is not contested, is $24,347.70. However, unlike the other two chandlers it is claiming the invoice interest rate of 24% per

annum from April 11, 2014, including administrative fees. I fix the principal amount of its claim at $24,347.70, without interest prior to the date on which the funds deposited in Court on the purchase of the PHOENIX SUN began to earn interest. I disallow its claim for pre-sale interest payable from the fund.

Ian Hamilton and Through Logistics Corp.

[83] Mr. Hamilton had a business relationship with Mr. Pasinli and his many companies. He incorporated Through Logistics Corp. to give partial effect to that relationship. In the circumstances I draw no distinction between Mr. Hamilton and his company.

[84] The claim falls into four categories:

a) Rental of Mr. Hamilton's van to transport crew and spare parts. $13,250 is claimed in principal, supported by the lien at section 139 of the *Marine Liability Act*;

b) Advances directly to the PHOENIX SUN's crew and service providers in the amount of $130,963.71. Priority under section 139 is again claimed;

c) Advance of monies to Mr. Pasinli and his companies for the specific purpose of paying for the supply of goods, materials and services to the PHOENIX SUN. $48,244.76 is claimed. Mr. Hamilton asserts an equitable charge which he submits outranks a statutory right *in rem*; and

d) General payments to Mr. Pasinli and his companies in the amount of $48,120.00 to be used to assist in the maintenance and upkeep of the PHOENIX SUN and expenses relating to the crew. Again an equitable charge is asserted.

[85] Interest is claimed at the rate of 4.9% per annum.

[86] Ballantrae does not contest the amounts owing. However, it asserts that Mr. Hamilton was in a joint venture with Mr. Pasinli and his companies and therefore is only entitled to payment out of the fund after all third party creditors have been paid. Nothing will be left over and so Mr. Hamilton is out of luck, and remains out of pocket.

[87] At the heart of Ballantrae's submissions is a written agreement dated May 2, 2013, between Menpas Shipping and Trading Inc. and Mr. Hamilton. Menpas was another one of Mr. Pasinli's companies which appears to have acted as ship manager and crewing agent. It was specifically agreed "that the project is a joint venture between Ian Hamilton and Mengu Pasinli". Decisions were to be made jointly. The ship would be purchased, repaired to a suitable standard for a last voyage, registered under the Panamanian flag, carry an eastbound cargo to the Mediterranean and then be sold for scrap, all at a total profit estimated to be in excess of $1,000,000. The profit was to be divided equally.

[88] Mr. Hamilton signed the agreement but says he never returned it to Mr. Pasinli as it was evident that he could not fulfill his part of the bargain. The sums he advanced were really by way of loans at the interest rate of 4.9% per annum.

[89] In February 2014, Mr. Hamilton e-mailed Mr. Pasinli under the subject "Ian Hamilton investments to date", which were some $85,000.00. Mr. Pasinli replied "cash investments are o.k.". Notice the word "investments".

[90] In August 2014, (which is after Ballantrae arrested the PHOENIX SUN) Mr. Hamilton e-mailed Mr. Mengu to say "the total amount I have loaned to date --".

[91] Mr. Hamilton submits that in determining whether or not there was a partnership or joint venture, one must not only consider the documentary evidence but also the surrounding facts including what the parties actually did (*Backman v Canada*, [2001] 1 SCR 367 at para 25).

[92] Mr. Hamilton never knew the ship was purchased in the name of Goldrich, had never heard of Ballantrae until after the arrest and was not privy to joint financial records or a joint bank account. What Mr. Hamilton is really saying is that he did not insist upon his rights.

[93] I am afraid all of this is wishful thinking on Mr. Hamilton's part. He was hoodwinked by Mr. Pasinli, as were all the other creditors. What he did was lend money to the joint venture. Had the venture been fruitful, after taking care of expenses, including funds advanced by Mr. Hamilton, the profits would be split 50/50. There was nothing in the record to indicate that the relationship was changed by mutual agreement and that Mr. Hamilton renounced the profit motive which got him into this arrangement in the first place. Mr. Pasinli's breach of contract did not convert the joint venture into a series of loans.

[94] The Court did not benefit from seeing Mr. Hamilton, or any of the other witnesses (apart from Mr. Etiz), but this does not prevent me from making adverse credibility findings. Although Mr. Justice O'Halloran, speaking for the British Columbia Court of Appeal in *Faryna v Chorny*, [1952] 2 DLR 354, [1951] BCJ No 152 (QL), was dealing with the assessment by the Trial Judge

of a witness who had actually appeared before him, his remarks still hold true. The test of credibility is this:

> The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[95] In the *Hasselt*, above, the Court of Appeal was of the view that it was in as good a position to assess expert witnesses as the trial judge, as the evidence was in written form. However the Supreme Court disagreed: [1987] 1 SCR 1247, 1987 SCJ No 39 (QL).

[96] Thus Mr. Hamilton is equated with the owner and is only entitled to claim against such funds as would be left over after third party creditors were paid (the *Kinguk*, above). Unfortunately, there is nothing left for Mr. Hamilton, which, of course, does not prevent him from pursuing Mr. Pasinli and his companies *in personam*.

Ballantrae Holdings Inc.

[97] Ballantrae, an investment company and lender of funds, entered into a loan agreement with Trenton Shipping and Trading Limited to finance its purchase of the PHOENIX SUN. The principal amount of the loan was $1,050,000.00, with interest at 20% per annum, compounded monthly. The operative loan agreement was dated November 22, 2013, superseding earlier loan agreements of October 21, 2013 and November 8, 2013. The loan was guaranteed by Goldrich International Shipping Co., and by Mr. Pasinli. For reasons not stated, although Trenton, a Canadian company, was originally designated to purchase the ship, the bill of sale was taken out

in the name of Goldrich. In addition, Trenton was to obtain a guarantee and general security agreement from Goldrich.

[98] Other security took the form of a marine vessel mortgage-collateral to loan agreement and the registration of a financing statement under the Ontario *Personal Property Security Act*.

[99] The loan was supposed to be short term, seventy-five days. No payments were made and so Ballantrae took action *in rem* and *in personam* for the amount owing, including interest and costs. I will only deal with the principal amount of the claim under this heading.

[100] The ship was deleted from the Canadian registry and was supposed to be registered in Panama, along with the mortgage. It did not turn out that way. Ballantrae filed the uncontested affidavit of a Panamanian attorney, Eduardo Antonio Real Solis. His opinion is that the procedures for registering the PHOENIX SUN under the Panamanian flag, as well as the Skylane mortgage, were never correctly and timely completed and therefore have no legal effect. All that happened is that the PHOENIX SUN was "flagged" under a special temporary registry for ships which undertake a single voyage, such as a voyage to a scrapyard. No steps were ever taken to register Ballantrae's mortgage. Indeed, it appears that it could not have been registered in Panama. After her deletion from the Canadian registry, the PHOENIX SUN was an unregistered ship.

[101] Ballantrae nevertheless claims a security interest in virtue of the mortgage, and via registration under the Ontario *Personal Property Security Act*.

[102] Counsel for Mr. Hamilton suggested that at best Ballantrae has an equitable charge in virtue of the unregistered mortgage and that this Court cannot take cognizance of security registered under the Ontario *PPSA*. Furthermore, even if that provincial statute forms part of Canadian Maritime Law, on the facts of this case it does not give Ballantrae any advantage over other creditors.

The Mortgage

[103] The Court is first called upon to determine the nature of Ballantrae's security under the mortgage contract. Is it a legal mortgage, although unregistered, or is it an equitable mortgage? Does it outrank or is it outranked by statutory rights *in rem* or rank *pari passu*?

[104] Counsel for Mr. Hamilton submitted that Ballantrae benefits from an equitable mortgage which will rank *pari passu* with that portion of the Hamilton claim which is not secured by section 139 of the *Marine Liability Act*, and that both those claims outrank ordinary creditors *in rem* (such as Mr. Etiz). He referred to the decision of Mr. Justice Cullen in *Lewmar Marine Limited v C & C Industries Ltd* (1991), 44 FTR 49 (FCTD), and more particularly the opinion of Professor William Tetley referred to therein. Paradoxically, the case had also been cited by Ballantrae to support its proposition that this Court has jurisdiction to entertain claims by provincially secured creditors.

[105] The *Lewmar* decision is not really on point, but Mr. Justice Cullen referred to the first edition of Professor Tetley's *Maritime Liens and Claims* (London, UK: *Business Law Communications*, 1985), where he said at page 213:

> Equitable mortgages (including unregistered mortgages) rank after registered mortgages even if the existence of the equitable mortgage was known to the registered mortgagee at the time of registration.
>
> The equitable mortgage will however rank ahead of a necessaries man who brings an action *in rem* after the date of the mortgage.

[106] As authority Professor Tetley cited the decision of Mr. Justice Langton in first instance in the *Zigurds*, [1932] P 113, also reported at (1932) 43 Ll LR 387.

[107] With the greatest respect, I do not think that a non-registered mortgage is necessarily an equitable mortgage, although it will rank after a registered mortgage.

[108] The *Zigurds* has to be read with great care. It dealt with three distinct judicial sales, the sale of the ship, the sale of pending freight and the sale of demurrage. Each had its own set of creditors. Clamoring for the freight were Casper Edgar & Co., an English ship agent and necessaries man and Alfred Harris Smith, the holder of a registered legal mortgage. Both claimed to be assignees of the freight. Mr. Justice Langton held that the mortgage creditor properly laid claim to the freight because its equitable assignment pre-dated Casper Edgar's equitable assignment.

[109] However, Mr. Justice Langton was reversed in appeal [1933] P. 87, (1933) 45 Ll LR 1. The Court held that the notice given by Casper Edgar to the receivers of the cargo had constituted sufficient notice of the assignment. They were the first to give actual notice and so were entitled to the freight. That decision was affirmed by the House of Lords, [1934] AC 209,

(1933) 47 Ll LR 267. The case relating to the freight had nothing to do with the relative rankings of mortgage creditors and necessaries men.

[110] There was a separate contest for payment out of the proceeds of the ship between the same mortgage creditor and a German necessaries man, Kohlen Co., who claimed a maritime lien under German law and submitted that at the very least in equity it should be given priority over the mortgagee. Mr. Justice Langton ranked the mortgage creditor ahead of the necessaries man as a matter of procedure. That dispute did not proceed further. An English ship repairer also submitted the traditional ranking should be altered, but did no better ((1932) 43 Ll LR 156).

[111] The result with respect to the German necessaries man may well have been different in Canada. On this point, the *Zigurds* was completely in line with the English position that a claim is characterized in accordance with the law of the forum, not the proper law of the transaction. This point was clearly reiterated by the Privy Council in *Bankers' Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)*, [1981] AC 221, [1982] 2 Lloyds' Rep 325.

[112] On the contrary, in Canada, if under the proper law a necessaries man enjoys a maritime lien he will be given that priority (the *Har Rai* and the *Brussel*, above). I had occasion to review the authorities in *World Fuel Services Corp v Nordems (The)*, 2010 FC 332, 366 FTR 118, aff'd 2011 FCA 73, [2012] 4 FCR 183. In Canada a necessaries man only enjoyed a statutory right *in rem*, with no priority, and had no action *in rem* at all if it knew it was dealing with a charterer, rather than a shipowner. As discussed above, it was this unfairness which led to the enactment of section 139 of the *Marine Liability Act*.

[113] Although the *Zigurds* is not helpful, a case which is very much on point is the *Shizelle*, [1992] 2 Lloyd's Rep 444, a decision of the English Admiralty Court. The plaintiffs financed the purchase of the yacht *Shizelle* on the terms of a loan agreement and marine mortgage. The yacht and mortgage were to be registered. However neither was.

[114] The purchaser then sold the *Shizelle* to the defendants allegedly free and clear of liens and encumbrances. The issue was whether the purchasers, who were innocent purchasers for value without notice, held the yacht free and clear of the mortgage.

[115] Deputy Judge Hamilton referred to doctrine to the effect that an unregistered mortgage was equivalent to an equitable mortgage, and referred to the view expressed by Professor Tetley. On that basis, the purchasers would have prevailed.

[116] However the learned judge disagreed. He was of the view that a mortgage of chattels at common law, before the intervention of any statute, did not require any formality, such as registration. The mortgage was a legal mortgage, not an equitable mortgage, even though it was not registered. It was opposable to a *bona fide* purchaser for value without notice.

[117] In this case, the PHOENIX SUN was not registered in any country. If the *Shizelle* mortgage is opposable to a *bona fide* purchaser for value without notice, it certainly follows that a non-registered legal mortgage outranks equitable charges and statutory rights *in rem*.

[118] In the second edition of his *Maritime Liens and Claims*, from 1998, Professor Tetley reiterated his view that a non-registered mortgage constitutes an equitable mortgage. At p 481, in a footnote, he referred to the *Shizelle* as a "controversial decision". It may be but I agree with it.

[119] In my opinion, Ballantrae holds an unregistered legal mortgage on the PHOENIX SUN. Although it would face difficulties in ranking against a subsequently registered legal mortgage, that is not the case here as Skylane's mortgage has been struck. Ballantrae's claim outranks equitable charges, if any, the claims of holders of statutory rights *in rem*, as well as Mr. Hamilton's claims.

[120] Ballantrae was called upon to report which sums, if any, it has, or will, recover from the various guarantors. It appears likely it will recover $199,500 from one of the guarantors. This does not affect its entitlement to the balance of the fund generated by the sale of the PHOENIX SUN. It would of course be relevant if it pursues the *in personam* portion of its action to judgment.

Ontario *Personal Property Security Act*

[121] In addition to the execution of mortgage documents, Ballantrae was given security under the Ontario *Personal Property Security Act* which, it submits, also gives it priority over ordinary creditors *in rem*. Mr. Hamilton has mounted a vigorous challenge to this proposition. He emphasizes that Canadian Maritime Law is federal law, not provincial law, and is uniform throughout Canada. The Federal Court may only apply such provincial law as is incidentally relevant. The cornerstone of this submission is the decision of the Supreme Court in *ITO* –

International Operators v Miida Electronics, [1986] 1 SCR 752 (the *Buenos Aires Maru*). The Ontario *PPSA* is a provincial statute of general application applying to marine and non-marine property alike. Since it creates security interests in property it can hardly be considered incidental.

[122] Mr. Hamilton adds that even if this Court could take cognizance of and apply the *PPSA* Ballantrae would gain no benefit as the requirements of that Act were never met.

[123] The PHOENIX SUN was never in Ontario at any relevant time and was never intended to be brought into Ontario. The unwavering intention of her owners was to sail her from Sorel, Quebec, to Turkey and there sell her for scrap.

[124] The short answer is that Mr. Hamilton is right. The *PPSA* contains conflict of law provisions. In order for the perfection and priorities provisions of that Act to apply, the collateral, such as the PHOENIX SUN being tangible personal property, must have been in Ontario, or have recently arrived in Ontario and then be perfected. For the purposes of this case it is sufficient to say that the rules relating to the perfection of the security are based on the location of the property, and not on the debtor's or creditor's residence (RSO 1990, c P.10, ss 5–7). If any provincial statute were relevant it would have been the provisions of the *Civil Code of Quebec* relating to hypothecs on moveable property (Articles 2714, 3012). There was no registration under Quebec law.

[125] However the point raised is so important to this Court's jurisdiction and was so well argued on behalf of Ballantrae and Mr. Hamilton that I am compelled to comment.

[126] Section 22(3)(d) of the *Federal Courts Act* provides:

22. (3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies	22. (3) Il est entendu que la compétence conférée à la Cour fédérale par le présent article s'étend :
(d) in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not.	d) à toutes les hypothèques ou tous les privilèges donnés en garantie sur un navire — enregistrés ou non et reconnus en droit ou en equity — , qu'ils relèvent du droit canadien ou du droit étranger.

[127] The Ontario *PPSA* is capable of creating a charge by way of security on a ship. For present purposes, it is not necessary to consider federal paramountcy or interjurisdictional immunity.

[128] In *Tropwood AG et al v Sivaco Wire & Nail Co et al*, [1979] 2 SCR 157 (the *Tropwood*), the Court was dealing with a cargo claim arising on a shipment from France to Montreal governed by the *Hague Rules* as in force in France. The issue was whether the Federal Court could apply French law. The *Hague Rules* as in force in Canada only applied to bill of lading shipments from Canadian parts. Chief Justice Laskin stated at pages 166–167:

> What is raised by the appellant, shortly put, is whether it is open to the Federal Court, in exercising its jurisdiction in the matter brought before it, to determine, pursuant to conflict of law rules of the forum, a choice of law rule to govern the determination of the suit. In the present case, the Federal Court has jurisdiction over the appellant and over the cause of action and there is a body of law which it can apply. It is my opinion that this body of law embraces

> conflict rules and entitles the Federal Court to find that some foreign law should be applied to the claim that has been put forward. Conflicts rules are, to put the matter generally, those of the forum. It seems quite clear to me that section 22(3) of the *Federal Courts Act*, which I have already referred to, envisages that the Federal Court, in dealing with a foreign ship or with claims arising on the high seas may find it necessary to consider the application of foreign law in respect of the cause of action before it.

[129] If this Court may take into account foreign law, it certainly may take into account provincial law.

Federal Court Jurisdiction

[130] The greater question still remains. Is the Ontario *PPSA* incidental? I can only conclude it is and thus, even absent section 23, may be applied by this Court. This is the only way the *Buenos Aires Maru* can be reconciled with the later Supreme Court decisions in *Ordon Estate v Grail*, [1998] 3 SCR 437, and *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 (the *Ryan's Commander*).

[131] In *Ordon*, the Supreme Court enumerated four factors to take into consideration in determining whether a provincial statute is applicable in a maritime negligence action;

a) Does the subject matter of the action fall within the exclusive federal power over navigation and shipping?

b) If yes, is there a counterpart under existing Canadian Maritime Law?

c) If not, should the *lex non scripta* of Canadian Maritime Law be changed?

d) If the *lex non scripta* should not be changed, a provincial law of general application is inapplicable if it indirectly regulates Canadian Maritime Law in that it alters rules which Parliament has exclusive competence to amend. This is interjurisdictional immunity. The provincial statute must be read down.

[132] This leads us to the *Ryan's Commander*. The Ryan brothers were Newfoundland fishermen who died in a maritime accident. Their heirs brought suit in the Supreme Court of Newfoundland and Labrador against the employer. Section 6(2) of the *Marine Liability Act* specifically provides that a dependant may bring a claim "under circumstances that would have entitled the person, if not deceased, to recover damages". However the Newfoundland and Labrador's *Workplace Health, Safety and Compensation Act*, like other provincial statutes, bars a fault-based negligence action in favour of a no-fault compensation scheme. The Supreme Court, in overturning the Court of Appeal, held that the Newfoundland statute trumped the federal statute.

[133] Unfortunately, the Supreme Court offered no guidance as to whether or not the result would have been the same had the heirs taken action in the Federal Court which, after all, has concurrent jurisdiction. Mr. Hamilton submits that a provincial statute which bars a federal cause of action is hardly "incidental". Since the Federal Court may only apply provincial law in limited circumstances, the result could vary depending upon the choice of forum. This is a scenario simply too shocking to contemplate!

[134] The Supreme Court considered *Ordon* in great detail. On the first point it held that *Ryan's Commander* was also a maritime negligence action, in pith and substance, a federal matter.

[135] On the second point, there was no federal counterpart. There is a federal *Merchant Seamen Compensation Act*, but it specifically does not cover fishermen.

[136] On the third point, the *lex non scripta* of the Canadian Maritime Law could hardly be changed because the *lex scripta* specifically gave the heirs a cause of action.

[137] *Ordon* was distinguished on the fourth point. In *Ordon*, it was held that a provincial law of general application was not applicable if it indirectly regulated Canadian Maritime Law. The provincial statute had to be read down based upon interjurisdictional immunity.

[138] In *Ryan's Commander* the Supreme Court, like in *Ordon*, stated at para 53 that "the present appeal involves reliance on provincial law in relation to a maritime negligence action".

[139] The Court then focussed on interjurisdictional immunity. Subsequent to *Ordon*, the Court had developed a two-pronged test. The first is to determine whether a provincial law trenches on the protected "core" of federal competence. If so, rather than just "affect" the core, as suggested in *Ordon*, the provincial law must "impair" it for interjurisdictional immunity to apply (*Ryan's Commander* at paras 54 and following; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536).

[140] The Supreme Court went on to hold that the Newfoundland statute did indeed trench on the core of federal power over navigation and shipping. However it concluded that the statute did not "impair" the exercise of federal power over navigation and shipping. At para 63 it pointed out that workers' compensation schemes have been applied in the maritime context for close to a century.

[141] I can only conclude that the application of "incidental" provincial law in the maritime context is much broader than I, for one, had thought.

[142] I revert back to the words of Mr. Justice McIntyre in the *Buenos Aires Maru* at p 782:

> The Federal Court is constituted for the better administration of the laws of Canada. It is not, however, restricted to applying federal law in cases before it. Where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties; see *Kellogg Co. v. Kellogg*, [1941] S.C.R. 242, where, in a case involving a dispute over patent rights, the effect of an employment contract had to be considered in the Federal Court, and see as well: *McNamara Construction (Western) Ltd. v. The Queen, supra*, where Laskin C.J. suggested that the provincial law of contribution indemnity may be applied by the Federal Court where jurisdiction is otherwise founded on federal law.

[143] Post *Buenos Aires Maru* the Supreme Court did not find it necessary to apply provincial contributory negligence statutes as it "incrementally" changed the *lex non scripta* of Canadian Maritime Law (*Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210).

[144] If I am right in this interpretation and the Federal Court would have applied provincial law in *Ryan's Commander* notwithstanding section 6(2) of the *Marine Liability Act*, how can the *Ryan's Commander* be reconciled with *Quebec North Shore Paper v CP Limited*, [1977] 2 SCR 1054? That case taught us that it is not enough that the subject matter of an action fall within a federal legislative power and that jurisdiction has been given to the Federal Court. In addition there must be actual applicable federal law at the core of the dispute. *Quebec North Shore* was characterized as a case based on interprovincial trade and commerce. There was no federal law. However, because of the definition of Canadian Maritime Law in section 2 of the *Federal Courts Act*, there is federal maritime law which includes the law which would have been administered by our predecessor court, the Exchequer Court, had it had unlimited jurisdiction in maritime and admiralty matters, co-extensive with Parliament's legislative power over navigation and shipping. Thus, if as in *Ryan's Commander*, and in this case, the dispute is one which in its pith and substance is based on Canadian Maritime Law, the Federal Court may apply provincial law. Obviously, "incidental" does not mean unimportant.

[145] I conclude that this Court may take cognizance of the Ontario *PPSA* not only under section 23 of the *Federal Courts Act* but also in virtue of the *Buenos Aires Maru* and the *Ryan's Commander*.

[146] After deducting the Marshal's costs of $39,106.37, Ballantrae's costs of $12,830.46, the crew claims of $132,935.00, la Ville de Sorel-Tracy's claim of $22,407.02, Blue Water's of $9,041.78, Pronova's of $26,182.15, and 185888 Canada's of $24,347.70, which total $266,850.48, Ballantrae is entitled to the balance of the $682,500.00 being $415,649.52.

Interest

[147] Section 36 of the *Federal Courts Act* speaks to prejudgment interest, but subsection 7 thereof specifically provides that this section does not apply to cases which arise under Canadian Maritime Law. Post-judgment interest is covered by section 37 of the Act. If the cause of action arose in a province, then the provincial law is incorporated and applied. Otherwise, the Court applies an interest rate it considers reasonable in the circumstances. Some of the claims, such as that of la Ville de Sorel-Tracy and the ship's necessaries men appear to have arisen in Quebec. Others, such as the claims of the crew and Ballantrae did not, at least not in their entirety. In the circumstances, and taking into account the great wealth of jurisprudence relating to interest on the funds generated by the sale of a ship, I shall apply what I consider to be reasonable.

[148] In Canadian Maritime Law prejudgment interest is a function of damages, left to the discretion of the Court (*Bell Telephone Company of Canada v The Mar-Tirenno*, [1974] 1 FC 294 (FCTD); *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303). The Court in its discretion may decide not to apply the contractual rate agreed between the parties (*Mount Royal/Walsh Inc v The Jensen Star*, 17 FTR 289, [1988] FCJ No 141 (FCTD) (QL), varied but not on this point [1990] 1 FC 199, 1989 FCJ No 450 (FCA) (QL), leave to appeal to SCC refused, 21593 (23 November 1989) (QL)).

[149] The Court more often than not applies a commercial rate but, given that commercial rates are very low at the moment, sometimes applies the legal rate of 5%. Any award of prejudgment interest would, in effect, be taken out of Ballantrae's pocket, as I have ordered that it shall

receive whatever is left over after payments out to the Marshal, Ballantrae as to costs, the Master and crew, la Ville de Sorel-Tracy, and the necessaries men.

[150] In the circumstances, I consider it appropriate that no prejudgment interest be awarded. It must be borne in mind that none of the claimants has actually obtained a judgment *in personam* against the shipowners. In such a case they certainly would have been entitled to prejudgment interest, but not against the fund.

[151] As to post-judgment interest, it is customary to award interest at the rate paid by the Court on funds on deposit. The *Kinguk*, above, is but one example. This is exactly what I did on the first payment to the crew.

[152] Interest on the deposit in court accumulates monthly. Since it is not clear when payments out will be made, payment of interest should be at the same proportion the award in principal bears to the amount on deposit, factoring in the fact that the payment out to the Marshal of $39,106.37 carried no interest with it. For example, Ballantrae's claim in principal is $415,649.52. By dividing that sum by $643,393.63 (the $682,500.00 deposit minus the $39,106.37 paid to the Marshal), it should be awarded 64.603% of the total accumulated interest. To take another example, Captain Ozkan's claim in principal is $28,741.89. That is 4.467% of the principal balance of the proceeds of sale, and thus Captain Ozkan shall receive 4.467% of the accumulated interest. The $87.33 of interest he was awarded on April 11, 2016, shall have to be deducted therefrom, as will the previous payments of interest to the rest of the crew.

[153] On that basis payment of accumulated interest is as follows:

(a)	The Marshal	nil
(b)	Ballantrae's costs	1.994%
(c)	The Twelve Seafarers:	
	(i) Captain Ozkan	4.467% less $87.33
	(ii) Mr. Karasu	4.079% less $81.50
	(iii) Mr. Ergun	1.486% less $29.47
	(iv) Mr. Kan	1.143% less $21.26
	(v) Mr. As	1.032% less $21.26
	(vi) Mr. Cenik	0.803% less $15.78
	(vii) Mr. Gumusoz	1.032% less $21.26
	(viii) Mr. Meral	0.803% less $15.78
	(ix) Mr. Guray	1.076% less $21.26
	(x) Mr. Ates	0.797% less $14.69
	(xi) Mr. Kaan	1.982% less $37.14
	(xii) Mr. Ucman	1.959% less $40.94
(d)	La Ville de Sorel-Tracy	3.483%
(e)	Blue Water	1.405%
(f)	Pronova	4.069%
(g)	185888 Canada Inc (North Star)	3.784%
(h)	Ballantrae	64.603%

Costs

[154] The only party seeking payment of costs from the fund on deposit in Court is Ballantrae, for well-founded reasons. The only other claim with respect to costs is by Mr. Hamilton, who seeks costs from Jarud, which only discontinued its claim on the first day of the hearing.

[155] Jarud had filed a claim through counsel. It then gave notice that it intended to represent itself through its president, Mr. Rudnick. This notice was meaningless as Rule 120 of the *Federal Courts Rules* provides that a corporation shall be represented by a solicitor unless the Court, in special circumstances, grants it leave to be represented by an officer. Jarud made no such motion.

[156] Nevertheless, its claim was still in the record and would have had to have been considered by the Court absent the discontinuance. Jarud was a middle man which essentially claimed a finders fee. However, it also asserted that it was entitled to priority pursuant to section 139 of the *Marine Liability Act*. Consequently it was in the interests of both Mr. Hamilton and Ballantrae to contest the claim, which they did.

[157] Mr. Hamilton's motion was in writing pursuant to Rule 369. It is customary to give the respondent 10 days to reply. As nothing had been heard from Jarud I directed the Registry to communicate with its President, Mr. Rudnick. This resulted in a letter from Mr. Rudnick, not served upon the other parties, and which he asked to be kept confidential. Naturally, I directed the Registry not to accept the letter for filing.

[158] I might have been open to allow Jarud to respond through its President with respect to a claim against it, as opposed to its claim against the fund. However, the Court does not deal with "confidential" letters which in any event was hardly responsive to the Hamilton claim for costs.

[159] Rule 402 provides that unless otherwise ordered or agreed when a motion has been abandoned the other party is entitled to costs. On the other hand, the Court is somewhat loathe to put roadblocks in the way of discontinuances.

[160] A small portion of Mr. Hamilton's efforts did relate to Jarud's claim. However, the main focus was asserting his own claim, and defeating the claims of others, or submitting that they were not entitled to priority.

[161] It is somewhat ironic that Mr. Hamilton's claim was dismissed outright. Yet Ballantrae is not seeking costs as against it.

[162] In the circumstances, I award Mr. Hamilton $1,000.00 against Jarud, all in.

Official Languages Act

[163] La Ville de Sorel-Tracy's written and oral submissions were in French. The other parties pleaded in English. Section 20 of the *Official Languages Act* provides that final judgments should be issued simultaneously in both English and French when the proceedings were conducted in whole or in part in both official languages. However the section goes on to provide that a judgment may be first issued in one language if simultaneous publication would, among

other things, result in an injustice or hardship to any party. The twelve seafarers were in dire straits. Given that it will probably take a few months for a translation, their counsel moved that judgment be first issued in one language, with a translation to follow. Counsel for the other parties, particularly la Ville de Sorel-Tracy, kindly agreed.

JUDGMENT

For reasons given;

UPON MOTION for payment out of the sum of $682,500, being the proceeds of the sale of the PHOENIX SUN together with accumulated interest thereon;

TAKING INTO ACCOUNT THAT the acting Marshal, by order dated December 16, 2014, has already been paid his fees and expenses in the amount of $39,106.37, without interest and that, by order dated April 11, 2016, the twelve seafarers have already been paid a total amount in principal of $62,775.54 with accumulated interest of $407.67;

THIS COURT ORDERS the following payments:

1. To Ballantrae Holdings Inc. by way of costs $12,830.46 with 1.994% of accumulated interest;

2. To the twelve seafarers:

i.	Captain Oskan	$15,293.55 + 4.467% of accumulated interest less $87.33
ii.	Mr. Karasu	$13,696.77 + 4.079% of accumulated interest less $81.50
iii.	Mr. Ergun	$5,021.99 + 1.486% of accumulated interest less $29.47
iv.	Mr. A. R. Kan	$4,078.11 + 1.143% of accumulated interest less $21.26
v.	Mr. As	$3,368.48 + 1.032% of accumulated interest less $21.26
vi.	Mr. Cenik	$2,739.35 + 0.803% of accumulated interest less $15.78
vii.	Mr. Gumusoz	$3,368.48 + 1.032% of accumulated interest less $21.26
viii.	Mr. Meral	$2,739.35 + 0.803% of accumulated interest less $15.78
ix.	Mr. Guray	$3,652.31 + 1.076% of accumulated interest less $21.26
x.	Mr. Ates	$2,865.63 + 0.797% of accumulated interest less $14.69
xi.	Mr. A. Kaan	$7,035.03 + 1.982% of accumulated interest less $37.14
xii.	Mr. Ucman	$6,300.51 + 1.959% of accumulated interest less $40.94

3. To Ville de Sorel-Tracy $22,407.22 + 3.483% of accumulated interest

4. To Blue Water Agencies Ltd. $9,041.78 + 1.405% of accumulated interest

5. To Pronova Systems Inc. $26,182.15 + 4.069% of accumulated interest

6. To 185888 Canada Inc. $24,347.70 + 3.784% of accumulated interest

7. To Ballantrae Holdings Inc. $415,649.52 + 64.603% of accumulated interest

Payments may be made to the Solicitors of Record, in trust.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1683-14
STYLE OF CAUSE:	BALLANTRAE HOLDINGS INC v THE OWNERS AND ALL THOSE INTERESTED IN THE SHIP "PHOENIX SUN" AND THE SHIP "PHOENIX SUN"
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	APRIL 7-8, 2016
JUDGMENT AND REASONS:	HARRINGTON J.
DATED:	MAY 26, 2016

APPEARANCES:

David G. Colford	FOR THE PLAINTIFF
Vanessa Major	Blue Water Agencies Limited, Pronova Systems Inc. and 185888 Canada Inc.
Gary H. Waxman, Lionel Lieber	Semih Ozkan, Akpinar Kaan, Serdar Recep Karasu, Ufuk Ucman, Ersin Ergun, Ali Riza Kan, Zekai As, Serhat Cenik, Mehmet Gumusoz, Mesut Meral, Seydi Guray and Umut Ates
William M. Sharpe, Marcos Cervantes-Laflamme	Ian Hamilton and Through Logistics Corp.
Christian Crevier	Ville de Sorel-Tracy
Shahzad Siddiqui	Skylane Worldwide Limited
Mustafa Hakan Etiz	(on his own behalf)
No one appeared	FOR THE DEFENDANT

SOLICITORS OF RECORD:

BRISSET BISHOP Montreal, Quebec	FOR THE PLAINTIFF
DE MAN, PILLET Montreal, Quebec	Blue Water Agencies Limited, Pronova Systems Inc. and 185888 Canada Inc
GARY H. WAXMAN Montreal, Quebec	Semih Ozkan, Akpinar Kaan, Serdar Recep Karasu, Ufuk Ucman, Ersin Ergun, Ali Riza Kan, Zekai As, Serhat Cenik, Mehmet Gumusoz, Mesut Meral, Seydi Guray and Umut Ates
WILLIAM M. SHARPE Toronto, Ontario	Ian Hamilton and Through Logistics Corp.
FRAPPIER CREVIER TREMPE Sorel-Tracy, Quebec	Ville de Sorel-Tracy
ABRAHAMS LLP Toronto, Ontario	Skylane Worldwide Limited