Federal Court  Cour fédérale

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T-1-12

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Ottawa, Ontario, January 10, 2013

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

CAMECO CORPORATION
CAMECO INC. AND
CAMECO EUROPE LTD.

Plaintiffs

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD., FRASER SURREY DOCKS LP AND PACIFIC RIM STEVEDORING LTD.

Defendants

REASONS FOR ORDER AND ORDER (PRIORITIES)

[1] This chapter in the ongoing saga of the MCP Altona deals with the distribution of the proceeds of her judicial sale. After payment to the acting marshal in admiralty for his fees and disbursements, there are two contenders.

[2] One is the caveator HSH Nordbank AG. It held a German mortgage, the balance owing on which is more than Euros 6,862,139.60. The ship was sold for US$4,800,000 plus incidentals. The owners are now in bankruptcy. Although the Bank is being treated as a secured creditor, it is common ground that it will receive little, if anything, out of the estate. It moves for payment out on the basis that it has priority over the other contender the Cameco plaintiffs (hereinafter referred to in the singular), even on their best arguable case. Cameco opposes the motion but does not seek payment out to it at this time.

[3] The Cameco situation is complicated. It was the shipper, owner, and otherwise interested in the cargo of radioactive uranium which spilled in hold number 1 during the MCP Altona's voyage from Vancouver to China. Liabilities for that spill have yet to be sorted out. The Cameco position is that it is an innocent victim, blameless for the spill and aftermath. It has taken action against the shipowners, bankrupt as aforesaid, the ship managers, the stevedores, their freight forwarders and the supplier of the containers in which the cargo was stowed. The Bank submits that even if Cameco is blameless, it still enjoys priority, hence its motion at this time.

[4] The ship managers and others, such as Saxon Energy Services Inc. (plaintiff in T-2081-11) and ITAC Services (Aust) Pty Ltd. (plaintiff in T-2082-11), interested in the oil rig also on

board, put the blame on Cameco and others. Thus, there are various claims, counterclaims, and third party proceedings. If Cameco is liable, it cannot very well claim the proceeds of the sale.

[5] As shipper and cargo owner, but no more, Cameco is an ordinary creditor and is outranked by the Bank. However, it asserts four grounds by which its claim, pitched in excess of Canadian $8,000,000, but yet to be established, outranks the Bank.

[6] It was Cameco which discharged not only its cargo in Vancouver, but also the other cargo, the oil rig, which had been on board. This was, it says, a necessary element in bringing the ship to sale and so it enjoys a high priority akin to marshal's fees and expenses.

[7] Secondly, it says it enjoys a maritime lien for necessaries and stevedoring services in accordance with the recently enacted section 139 of the *Marine Liability Act*.

[8] Thirdly, it says it rendered salvage services, which carry with them a maritime lien. It relies upon the *International Convention on Salvage, 1989,* which has been incorporated into Canadian domestic maritime law.

[9] Finally, it invokes this Court's equitable jurisdiction. Although historically the equitable jurisdiction of admiralty courts was somewhat limited, within the subject matter of its jurisdiction, the Federal Court now has full equitable jurisdiction in virtue of section 3 of its enabling statute. The Court has the power to alter the usual ranking of priorities.

[10] Other parties monitored the hearing, but did not file written representations, except the shipowners and trustee in bankruptcy who support the Bank. In brief commentary, others took the position, correctly so in my view, that even if Cameco has a valid cargo claim against them, it must first exhaust its rights, if any, against the proceeds of sale.

RANKING OF PRIORITIES

[11] The normal rule in the distribution of the proceeds of the sale of a ship is that *in rem* creditors rank *pari pasu*; after deducting the fees and disbursements of the admiralty marshal and the costs of converting the ship into cash, such as the cost of issuing a statement of claim, affidavit to lead warrant, warrant of arrest, the arrest and other expenses instrumental in bringing the ship to sale.

[12] The normal rule of equality is riddled with exceptions. Historically, Canadian maritime law has given some creditors priority over others, a point recognized in part in sections 22 and 43 of the *Federal Courts Act*.

[13] We are not concerned with possessory liens in this case, so the next ranking priority after the marshal would be that of maritime liens, followed by mortgages, be they foreign or domestic, and then by statutory rights *in rem*, including claims by necessaries men, such as stevedores, and those whose cargo has been lost, damaged or delayed.

[14] This ranking is not cast in stone, and in certain cases has been varied taking into account equitable matters such as the conduct of the parties, public policy and commercial reality.

FROM VANCOUVER AND BACK AGAIN

[15] Cameco retained the services of Tam International Inc. as freight forwarder, to arrange for its shipment from Vancouver to the China Nuclear Energy Industry Corporation at Zhanjiang. A total weight of 348,054.7 kilograms was placed within 840 steel drums which were secured within 24 twenty foot containers. The cargo comprised natural uranium or concentrates, commonly called "yellow cake". It was described as radioactive and as class 7 dangerous goods. As such, it was subject to severe regulatory scrutiny.

[16] Tam entered into a Gencon voyage charterparty with the ship's commercial managers. For the purposes of this motion, I take the carrier to be the shipowner. In addition, another cargo, an oil rig, was laden onboard for shipment to Australia. The uranium was stowed in hold number 1. Parts of the oil rig were in other holds or secured on the hatch covers of hold number 2.

[17] After departing Vancouver, on or about 3 January 2011, during heavy weather, some of the stow collapsed in hold number 1. Cargo had broken loose and some of the uranium spilled out of the drums and onto the tank tops. Those onboard informed Tam, who informed Cameco, who in turn informed the Canadian Nuclear Safety Commission.

[18] Cameco was concerned that those onboard the MCP Altona did not appreciate the extent of the danger they were in. It recommended that the ship divert to Honolulu, the closest port. However, the US Coast Guard did a fly over and refused entry. The ship returned to Canada and after twice anchoring was permitted to berth at DP World's Pier in Vancouver, at Cameco's expense. It berthed there 20 January 2011. Transport Canada put a detention order on the ship and cargo.

THE DISCHARGE OF THE CARGO

[19] Section 7 of the *Transportation of Dangerous Goods Act, 1992*, provides that no person shall, among other things, offer for transport, handle or transport dangerous goods in quantities or concentrations beyond what is specified by regulation unless that person has an approved emergency response assistance plan (ERAP). Cameco had such a plan. Others, such as the shipowners, were entitled to rely upon that plan, which is what they did in this particular case.

[20] Section 7.1 of the Act authorizes the Minister to direct a person with an ERAP to implement it so as to respond to an actual or anticipated release of dangerous goods.

[21] No governmental order was in fact issued as Cameco, to use counsel's words, "stepped up to the plate". Cameco recognizes however that it was not acting as a volunteer. At that point, it was acting responsibly, discharging obligations which were imposed upon it by law.

[22] There were various phases to the plan to discharge the cargo, to remove it to Cameco's facilities in Key Lake, Saskatchewan, and to rehabilitate the ship which was radioactive in hold number 1 and in a bilge well.

[23] Because great care had to be taken in handling the cargo, Cameco's expenses are extraordinary, said to be in excess of $8 million. No precise breakdown has been made among the cost of discharge, the cost of returning the cargo to Key Lake, and the remediation of the ship.

[24] By 18 March 2011, the 24 containers, some of which had been crushed, and the spilled "yellow cake" had been removed. Cameco arrested the ship on 24 March 2011. An arrest under Canadian law does not put the ship into the possession of the marshal. She remained in the possession of her owners, or bareboat charterers. There is an in-house bareboat charter which does not figure in the case at this stage.

[25] The ship was moved under court order to anchorage. The third phase of Cameco's plan, the clean up of the ship, was approved by the Canadian Nuclear Safety Commission. On 5 May 2011, it formally confirmed that the MCP Altona was no longer a regulatory concern.

[26] Although the ship remained in the possession of her owners, or bareboat charterers, they, from the outset, had washed their hands of the entire matter. They took the position that this catastrophe had been caused by Cameco, and therefore it was its responsibility to remove the cargo and rehabilitate the ship. Although it can be said that they permitted Cameco access to the

ship, it would be illusory to suggest that they somehow retained Cameco to discharge the cargo. Had they refused access, they would have had to answer to the Canadian Nuclear Safety Commission, and indeed could have been ordered themselves to remove the cargo in accordance with section 42 of the *Nuclear Safety Control Act*, which is a strict liability provision. Such an order would have been meaningless given the owners' financial situation.

[27] The owners applied for bankruptcy protection in Germany in mid-February 2011 and were formally put into bankruptcy in early March. However, they did not bother to inform Cameco until July of that year.

[28] In the meantime, the Bank, which was well aware of the situation, filed a caveat release on 11 May 2011. At that point, the ship was fully seaworthy and cargo worthy, but unable to sail because of her arrest.

[29] Eventually, the Bank moved for an order for the sale of the ship. On 4 August 2011, its motion was granted and a broker was appointed as an acting marshal in admiralty to solicit interest in the ship. However, he was not put in possession. From that point on the Bank financed the acting marshal and took care of all reasonable expenses, including crew wages. All expenses so funded by the Bank were ordered to be treated as marshal's expenses.

[30] These are the essential facts which give rise to Cameco's contestation of the Bank's claim for payment out.

COSTS OF CARGO DISCHARGE - MARSHAL EXPENSES?

[31] Cameco takes the position that at the time the MCP Altona returned to Vancouver, she was radioactive and had a negative value. It would be inequitable that it spent in excess of $8 million to discharge the cargo and to remediate the ship, only to have the Bank enjoy the proceeds of sale. The Bank sat on its hands and only came forward in May 2011. This point will be dealt with in greater detail when I consider whether equity demands that priorities be rearranged in this case.

[32] Cameco cites a number of cases, including *Nordea Bank Norge ASA v Kinguk (The)*, 2007 FC 434, [2007] FCJ No 593 (QL). In that case, the bank, as mortgage creditor, incurred various expenses, including a broker's commission, in arranging for the sale of the ships under arrest. It did so without a marshal being put in possession and without a court order that expenses incurred would rank as marshal's costs. As I said in that case, a creditor who incurs fees and disbursements in converting a ship into cash is entitled to repayment in priority akin to marshal's fees. I so treated the Bank's disbursements in that case.

[33] I believe that the *Kinguk* is consistent with earlier jurisprudence. Certainly no departure from that jurisprudence was intended. It is also to be noted that the cost of discharging cargo was not in issue.

[34] Cameco's position is that in the normal course the cargo would have been discharged by the carrier. This ignores the fact that under the charterparty it was Tam who was to discharge,

albeit in China, not back in Vancouver. Be that as it may, there is no Canadian case specifically on point, but two come close. The first is a decision of Mr. Justice MacKay in *Holt Cargo Systems Inc v ABC Containerline NV (Trustee of)*, 131 FTR 41, [1997] FCJ No 626 (QL). In that case, the Belgian shipowners went bankrupt with some 1,100 containers onboard their ship, the *Brussel*, when she was arrested in Halifax. A cooperative plan was put forward and approved by the Court. Cargo interests were to pay for the cost of discharge of cargo in first instance. Some cargo interests later reneged. The stevedore, Halterm, even after selling the unclaimed cargo, was still out of pocket. Mr. Justice MacKay held, in those particular circumstances, at paragraph 16:

> The only issue remaining is whether this claim by Halterm should be recoverable out of the proceeds of sale of the vessel as if they were marshall's expenses. I am prepared to so order, and direct their payment without delay after the elapse of the time fixed for appeal of my Order. I so direct, because I consider the claim to be related to an expense or costs absorbed by Halterm, in a cooperative arrangement directed by Order of the Court which was for the benefit of all cargo owners, of the defendants in the long term, and in the interest of the Court in facilitating sale of the vessel. The circumstances in which the claim arose warrant treating the claim as if it were a marshall's expense. Had the ship not been unloaded when it was, the marshall would have had to arrange for that to be done before the "Brussel" was sold under Court Order.

[35] The second is the decision of Prothonotary Hargrave in *Royal Bank of Canada plc v Kimisis III (The)*, 87 ACWS (3d) 3, [1999] FCJ No 300 (QL). That was a case in which the mortgage creditor moved for an order that the cargo owner be required to remove its cargo of wheat from the arrested ship so that she could be sold. He dismissed the motion on the grounds that it was premature. Thus, his remarks are *obiter*. However, given his great expertise in this area and the fact he comments upon the foreign cases referred to by both the Bank and Cameco, they deserve careful attention.

[36] Cameco relies upon two American decisions: *New York Dock Company v Steamship Poznan, etc. et al,* 274 U.S. 117; 47 S. Ct. 482; 71 L. Ed. 955; 1927 A.M.C. 723, a decision of the United States Supreme Court; and *Turner & Blanchard, Inc v The S.S. Emilia and A.H. Bull Steamship Co et al,* 322 F.2d 249; 1963 A.M.C. 1447, a decision of the United States Court of Appeals for the Second Circuit. In *The Poznan,* it was held that a wharfinger was entitled to payment by priority for services rendered while a ship was in *custodia legis*. The right of recovery did not depend upon the existence of a maritime lien, but rather on the general principle that expenses which have contributed to the preservation of a fund should be paid out in priority before a distribution to ordinary creditors.

[37] In *The Emilia*, the ship laden with general cargo was arrested and ordered sold. The Court directed the marshal to discharge the cargo, and to be paid out of the proceeds of the sale of the ship. It was held, following *The Poznan*, that the discharge was a service furnished on the authority of the Court and should be paid out by priority as an "expense of justice".

[38] Strictly speaking, those two cases are distinguishable for no other reason than that the ships were under arrest and in custody. The stevedoring services had been ordered by the Court.

[39] The Bank relies upon *Dharamdas & Co Nigeria Ltd et al v The Owners of The Mingrin Development*, [1979] H.K.L.R. 159, *The Jogoo*, [1981] 3 All ER 634, [1981] 1 Lloyd's Rep 513, and *The Myrto (No 2),* [1984] 2 Lloyd's Rep 341, the latter two being decisions of Mr. Justice Sheen.

[40] In the *Mingrin Development*, the Hong Kong Court relied upon *Roscoe's Admiralty Practice,* 5th Edition, as well as McGuffie, Volume 1, *British Shipping Law*, 1961, to the effect that when the marshal has in custody a ship with cargo onboard and is ordered to sell the ship only, the cargo interests will be given a reasonable time to take delivery of their cargo.

[41] In *Jogoo,* Mr. Justice Sheen held:

> … Such few cases as have been reported show that in England the Admiralty Court has consistently taken the view that the cargo-owners must pay for removal of their own cargo in the event of the contract of carriage not being completed by the ship-owners, and then make a claim against the ship-owners for the damage for which they have suffered. It seems to me that this is correct in principle.

[42] In *Myrto,* in which he was invited to reconsider his earlier decision, Mr. Justice Sheen noted that the United States law on priorities is not always in accord with English law (or, may I say, with Canadian maritime law). He concluded that the owners of cargo had a claim against the shipowners in damages for breach of contract. That claim is not secured. Part of the loss arising from the shipowners' alleged breach of contract is the cost of discharging the cargo. He stated that if that cost were treated as part of the marshal's expenses, then it would acquire a priority over other claims, for which he could see no justification. In the present case, the Bank paid the crew, even before the Court order of 4 August 2011. Although it did not do so pursuant to a court approved assignment of priority, the fact remains that in the abstract a crew claim for wages outranks a cargo claim, as well as a mortgage.

[43] After referring to the difference between American and English (as well as Hong Kong) law, and noting that Mr. Justice Cons of the High Court of Admiralty in Hong Kong in the *Mingrin Development*, above, followed the English rule, Prothonotary Hargrave commented in the *Kimisis III*, above, as follows:

> Mr. Justice Cons […] did suggest a modern equitable approach for he felt there was no perfect solution, the English and American Courts having taken very different approaches:
>
> > Obviously there is no perfect solution. Financial disaster, like any other disaster at sea, is likely to cause suffering to the innocent. The argument that the suffering should fall primarily on the mortgagee I find largely emotional. It is true that he may sometimes have a free choice of when and where he arrests the ship and may thus be able to lessen the impact on others. But so sometimes do other claimants. No one can, as a general rule, be blamed for exercising his rights at such time as he thinks most proficious himself. If he takes undue advantage in any particular circumstance the Court may take that into account against him when exercising its discretion. [page 163]
>
> The important concept from The Mingren Development is that while there is no perfect solution to shield an innocent cargo owner when a marine mortgagee enforces its security, a court may look to see if the mortgagee has taken undue advantage of the situation and then the court may exercise its discretion accordingly.

[44] I am more persuaded by the English and Hong Kong authorities and hold that the cost of discharging the cargo of uranium and cleaning the ship, assuming the contract was frustrated due to a breach of contract on the part of the carrier, forms part of Cameco's cargo claim, and is not to be equated with marshal's expenses. This is not to say that in this particular case the exercise of equitable discretion might not give Cameco priority over the mortgage.

[45] Cameco took the position with owners and others interested that its primary goal was getting its $33 million cargo out of the ship and back to Saskatchewan. Had this been an ordinary innocuous cargo, such as wheat, it may have left small residues as "sweepings". However, in this case it could not do so because the residue was radioactive and in remediating the ship it was not acting as a volunteer, but under the compulsion of law.

NECESSARIES AND STEVEDORING SERVICES – *MARINE LIABILITY ACT s 139*

[46] Cameco also submits that in discharging the cargo it rendered stevedoring services and in remediating the ship it carried out repair work. Prior to 2010, such services, even if ordered by the shipowners, only gave rise to a statutory right *in rem*, and would be outranked by the Bank's mortgage. The enactment of section 139 of the *Marine Liability Act* created a new maritime lien in certain circumstances. As aforesaid, a maritime lien outranks a mortgage.

[47] The relevant portions of section 139 read as follows:

[…]	…
(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise	(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	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

and lighterage; or	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.
(2.1) Subject to section 251 of the *Canada Shipping Act, 2001*, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.	(2.1) Sous réserve de l'article 251 de la *Loi de 2001 sur la marine marchande du Canada* et pour l'application de l'alinéa (2)a), dans le cas de l'acconage et du gabarage, le service doit avoir été fourni à la demande du propriétaire du bâtiment étranger ou de la personne agissant en son nom.
[…]	...
(4) Subsection 43(3) of the *Federal Courts Act* does not apply to a claim secured by a maritime lien under this section.	(4) Le paragraphe 43(3) de la *Loi sur les Cours fédérales* ne s'applique pas aux créances garanties par un privilège maritime au titre du présent article.

[48] The section comes into play in the sense that the MCP Altona is a foreign ship, German registered with a bareboat charter registered in Liberia. Cameco carries on business here. The issue is whether it supplied services, including stevedoring, and whether it had a contract for her repair. Subsection 139(4) simply provides that, as with all maritime liens, the claim is not defeated by a subsequent sale of the ship.

[49] As far as the parties, and the Court, are aware, there are only two cases which refer to this section; both decisions of my own.

[50] In *World Fuel Services Corp v Nordems (The)*, 2010 FC 332, [2010] FCJ No 391 (QL), affirmed 2011 FCA 73, [2011] FCJ No 293 (QL), I referred in passing to section 139. I suggested that there had been no indication that the previous case law pertaining to the rebuttable presumption of authority on behalf of the owner had been changed.

[51] That remark was *obiter*, which I acknowledged in the second case, *Comfact Corp v Hull 717 (The)*, 2012 FC 1161, [2012] FCJ No 1228 (QL), currently in appeal .That case is not particularly helpful in that Comfact was a creditor of a shipbuilder which went into reorganization while the ship was being constructed. I held, as a matter of statutory interpretation, that section 139 did not benefit such creditors.

[52] Turning now to the present case, section 139 provides that stevedoring services must be provided at the request of the shipowner, its agent, or in virtue of section 251 of the *Canada Shipping Act, 2001*, a bareboat charterer, still in possession when the ship was arrested. I find that there was no such contract. The owners, through counsel, made it perfectly clear from the outset that they considered Cameco was liable and had to discharge the cargo. A contract cannot be made out of the fact that they permitted Cameco onboard to effect that discharge.

[53] To the extent the remediation, after discharge of the cargo, *i.e.* eliminating the radioactivity, could be considered repair of the ship, there was no contract with anyone as required by section 139(2)(b). There certainly was no contract with the owners/bareboat charterers. Cameco was discharging obligations imposed by law in order to satisfy the Canadian Nuclear Safety Commission.

[54] Thus, once again, it is not necessary to consider whether section 139 has rendered obsolete the following comment of Mr. Justice Marceau, speaking for the Federal Court of Appeal, in *Mount Royal/Walsh Inc v Jensen Star (The)*, [1990] 1 FC 199, 99 NR 92, [1989] FCJ No 450 (QL) at paragraph 30:

> […] To contend that an action *in rem* could be sustained even in the absence of any personal liability on the part of the owner would go against the whole idea behind the system which is, again, the protection of the owner. A claim against a ship cannot be viewed apart from the owner; it is essentially a claim against the owner, […] But I essentially agree that liability as a result of some personal behaviour and attitude on the part of the owner is required.

SALVAGE MARITIME LIEN

[55] Sections 22 and 43 of the *Federal Courts Act* recognize that claims in salvage carry with them a maritime lien. At the risk of being considered old school, I challenged counsel at the outset. Assuming the MCP Altona (with her cargo) was in peril, she made it back to Vancouver, and more particularly safely berthed alongside 20 January 2011. Had she been under a Lloyd's Open Form agreement or subject to common law salvage, she (and her cargo) would have been redelivered at that time. Such danger, as there may have been, was over. Furthermore, Cameco was not acting as a volunteer.

[56] My understanding of the law of salvage was that the services rendered must be voluntary, irrespective of whether or not they are rendered under contract, the adventure must be in danger at sea and the result must have been successful. See for instance, Brice, *Maritime Law of*

Salvage, London, 1999, at pages 1 and 2, and the decision of the Federal Court of Appeal in *Iron Mac Towing (1974) Ltd v North Arm Highlander (The)*, [1979] 28 NR 348, at page 352.

[57] Counsel for Cameco, however, submits that the underpinnings of our law were changed in virtue of section 142 of the *Canada Shipping Act, 2001*, which gives force and effect to the *International Convention of Salvage, 1989*. I do not see how this is so. The Convention recognized increased concern for the protection of the environment, which is now one of the criteria for fixing the award pursuant to article 13, and, if need be, for special compensation under article 14. To that extent, our domestic law was changed, but no more.

[58] If Cameco had a salvage claim, then it also saved its own cargo. The value of the MCP Altona may well have been assessed at more than the US$4.8 million she fetched in her distressed sale. Prior to the sale, the Bank had a "desktop valuation" of US$6,250,000. As well, there were expressions of interest higher than that. Nevertheless, it is safe to say that the cargo was worth about five times the ship. A salvage claim against the proceeds of the sale would have to be reduced accordingly.

EQUITABLE RANKING OF PRIORITIES

[59] This is the most difficult of Cameco's four submissions to assess. Ranking is not dictated by statute. In the interests of justice, the Court has varied the usual ranking from time to time. Cameco's main thrust is that it would be inequitable to allow the Bank to sit idly by while it spent more than $8 million in discharging its cargo and remediating the ship, and then reap the

benefit of that work. Before Cameco stepped in, the ship had a negative value. She was a liability, not an asset.

[60] The Bank, in turn, submits that equity requires that one come to the Court with clean hands. It says Cameco has not in two respects. It failed to disclose in its affidavits that some of the material purchased for the discharge was never used and was not resold. It also claimed Goods and Services Tax (GST) in full, notwithstanding that it had in the normal course received rebates of close to $500,000.

[61] I am not satisfied that should equity work in Cameco's favour it should be deprived thereof because of its behaviour. The material which was not used would not have been purchased had it not been for the MCP Altona. It may well be that this issue, including resale value, will come into better focus during examinations for discovery on the cargo claim, but I do not find that Cameco acted in bad faith in listing the purchase price of all items bought.

[62] With respect to GST, it was Ms. Guenther, who as junior treasury analyst had given an affidavit of costs and expenses incurred by Cameco, who voluntarily raised the point during cross-examination. She understood her duty was to collect all relevant invoices. The invoices included GST. It would have been confusing to delete them from the get-go in that parties might have difficulty matching claims with invoices. Certainly, no double dipping was intended. Again, I find no evidence of bad faith.

[63] Turning then to the cases, the first to be considered is the decision of the Exchequer Court in *Halifax Shipyards, Ltd v Montreal Dry Docks* (1919), 19 Ex C R 259, 50 DLR 541, slightly modified the following year by the Supreme Court as *Montreal Dry Docks and Ship Repairing Co v Halifax Shipyards, Ltd* (1920), 60 SCR 359. In that case, Halifax Shipyards was working on a ship and had possession of her when she was arrested by other creditors and eventually sold. It completed the work without court approval, and claimed payment in full for the value of work done and material supplied after the arrest. Mr. Justice Anglin, speaking for the majority in the Supreme Court, held, based on what Dr. Lushington held in *The Aline*, 1 W. Rob. 111, that the right to participate in an increase in value after a ship has been arrested depends on how that increase arose and to whom in equity it belonged. Halifax Shipyards succeeded.

[64] Two of the premises of that case no longer hold true. At that time, an arrest vested possession of the ship in the hands of the marshal. As a result, Halifax Shipyards lost its possessory lien. Nevertheless, the case illustrates equitable principles which can be at play.

[65] Referring back to the *Kimisis III*, indeed Cameco asserts that the Bank as mortgagee had taken undue advantage of the situation. It was aware that the owners were in financial difficulty even before her fateful last voyage. On the other hand, the uranium and oil rig charters should have been profitable and so the Bank cannot be called into account for not asserting its rights earlier. Indeed, if it had, the voyage would not have taken place at all. As Francis Bacon said, the law does not judge the cause of causes.

[66] However, by 20 January 2011, when the MCP Altona was safely alongside at Vancouver, the Bank was well aware that it was all over and, certainly, was in position to arrest the ship. So to, for that matter, was Cameco. I do not see how an arrest by the Bank would have changed the situation.

[67] As Cameco asserts, dealing with the discharge of the cargo and the radioactive contamination and cleanup of the ship would require specialized expertise. It says that only a few companies in the world, and only one in Canada, Cameco itself, were so qualified. It suggests that even if this had not been Cameco's cargo, it likely would have been the company employed to oversee the discharge and remediation. That may well be so, but at whose expense? Cameco seems to be implying that the Bank should have arrested the ship, moved to have the marshal put in possession, and then have funded the marshal to hire Cameco to do what it, in fact, did. This would have been a ludicrous business decision on the part of the Bank.

[68] The Bank was not a direct party to the adventure. Even others who were, such as Saxon and ITAC, refused to pay for the discharge of their oil rig. Cameco did so primarily in order to build a staging area on the hatch covers of hold number 2. The Bank also continued to pay for the crew, even before Court order.

[69] There are several cases dealing with equitable re-ranking of priorities. The more recent ones include *Scott Steel Ltd v Alarisa (The)*, [1996] 2 FC 883, [1996] FCJ No 534 (QL), *Fraser Shipyard and Industrial Centre Ltd v Expedient Maritime Co*, 170 FTR 1, [1999] FCJ No 947

(QL), and *Governor & Company of the Bank of Scotland v Nel (The)*, [2001] 1 FC 408, [2000] FCJ No 1305 (QL).

[70] The thread which ties these cases together is that of unjust enrichment. There certainly are instances in which a mortgage creditor keeps throwing good money after bad in the faint hope that matters will right themselves out. It does so on the basis that this additional funding forms part of the mortgage, as indeed mentioned in the *Kinguk*, and thus may have the effect of defeating ordinary creditors.

[71] In my opinion, it would not be inequitable to maintain that the Bank, as a mortgage creditor, has priority over Cameco as a cargo claimant. The Bank's inaction did not lull Cameco into doing something it would not have done in any event. Cameco incurred the expenses it did as a cost of doing business. It was a condition of its license that it have an emergency plan in place. It acted as it should have acted as it was required to act, not as a volunteer, but rather to satisfy the obligations imposed upon it by law. There is no reason to change the priorities.

[72] It may have had a claim against the shipowners, on the assumption that the loss was not caused by an excepted peril. It is unfortunate that they are insolvent and that it will receive nothing out of the estate. It asserts claims against its freight forwarder, the ship managers, and the stevedores. The merits of those claims are not before me.

[73] At the request of the Bank, costs shall be deferred. The Bank shall have twenty (20) days to make representations, and Cameco ten (10) days to reply.

[74] The effect of this order shall be delayed until 1 February 2012 in order to allow Cameco to seek a stay from this Court or from the Federal Court of Appeal should it intend to appeal. If to this Court, the motion should be made presentable at the Case Management Conference scheduled for Vancouver, 31 January 2013.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion for payment out is granted, but stayed until 1 February 2013.

2. After payment of the marshal's fees and disbursements, the balance remaining in trust from the sale of the MCP Altona, including accumulated interest, shall be paid out to the caveator HSH Nordbank AG.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS	T-484-11 T-1-12
STYLE OF CAUSE:	CAMECO CORPORATION, CAMECO INC. AND CAMECO EUROPE LTD. v THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD., FRASER SURREY DOCKS LP AND PACIFIC RIM STEVEDORING LTD.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARING:	DECEMBER 18-19, 2012
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	JANUARY 10, 2013

APPEARANCES:

Marc D. Isaacs Cameron Grant	FOR THE PLAINTIFFS
Michael Parrish	FOR THE DEFENDANTS FRASER SURREY DOCKS LTD. AND PACIFIC RIM STEVEDORING LTD.
David F. McEwen, Q.C.	FOR THE CAVEATOR HSH NORDBANK AG
Shelly Chapelski	FOR TAM INTERNATIONAL INC.
Jennifer Farquharson Articling Student	FOR BURCHKHARDT REIMER, INSOLVENCY ADMINISTRATOR FOR THE DEFENDANTS THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS 'MCP ALTONA' GMBH & CO., KG, HARTMANN SCHIFFAHRTS GMBH & CO., HARTMANN SHIPPING ASIA PTE LTD.

SOLICITORS OF RECORD:

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