
**Atlantic Salvage & Dredging Ltd et al (Plaintiffs) v. The Calgary Catalina
(Defendant)**

Walsh J.— Nova Scotia Admiralty District. Halifax, April 21, 1971.

Admiralty—Shipping—Admiralty Court—Jurisdiction—Bankruptcy of ship's owner—Action in rem for necessities, wages and damage to wharf by ship—Consent of Bankruptcy Court, when necessary—Supplier of necessities not a secured creditor—When maritime lien arises—Bankruptcy Act, R.S.C. 1952, c. 14, secs. 40(1) and (2).

Following the bankruptcy of defendant ship's owner seven actions *in rem* were brought against the ship for necessities, an eighth action *in rem* for wages of master and crew and a ninth for damage done to a wharf by the ship. The trustee in bankruptcy of the ship's owner moved to cancel the writ of summons and warrant of arrest in each of the nine actions.

Held, granting the motion in the seven actions for necessities but rejecting it in the other two actions—

(1) A right of action *in rem* against a ship for necessities gives the claimant no privilege, lien or preference, and as an unsecured creditor he therefore requires leave of the Bankruptcy Court under s. 40(1) of the *Bankruptcy Act* before instituting proceedings against the debtor. *Coastal Equipment Agencies Ltd. v. The "Comer"* [1970] Ex.C.R. 13, followed.

(2) The actions *in rem* for wages of master and crew and for damages to the wharf created maritime liens against defendant ship, and the claimants were therefore secured creditors within the meaning of s. 40(2) of the *Bankruptcy Act* and as such entitled to realize on their security unless a judge of the Bankruptcy Court otherwise ordered. The Exchequer Court has no jurisdiction to interfere with creditors' rights.

APPLICATION by trustee in bankruptcy of owner of defendant ship to cancel writ of summons and warrant of arrest of defendant ship in each of nine actions.

Gordon Black, Q.C., for trustee in bankruptcy, applicant.

Donald A. Kerr, Q.C., for plaintiffs in seven actions, *contrâ*.

James E. Gould and George G. Simms for plaintiffs in two actions, *contrâ*.

WALSH J.—These nine motions came on before me for hearing in Halifax on April 21, 1971, and after hearing counsel for the various parties and adjourning the hearing until April 23, 1971, to permit counsel for defendant to file proof that Catalina Explorations & Developments Ltd. was owner of the motor vessel "*Calgary Catalina*", which proof was duly made that day by the deposit of a transcript from the Registry of Shipping, and after considering the affidavit of Robert Hemming of Halifax, a partner in the firm of Riddell Stead & Co., to the effect that J. Gordon Hutchinson, a partner in the said firm, is trustee of Catalina Explorations & Developments Ltd., which company became bankrupt on the 4th day of March, A.D. 1971, and examining the further transcript from the Registry of Shipping dated April 23, 1971, confirming registration of James Gordon Hutchinson, trustee, as owner, I find that the material in the record is now sufficient to enable judgment to be rendered on the nine motions herein.

Nine separate actions were instituted *in rem* against defendant vessel, all subsequent to the said bankruptcy, seven of these being actions for necessities, but two of them, to wit numbers 2295 and 2298, being actions for the master's and crew's wages, and for damage allegedly done to a wharf when struck by defendant vessel on three separate occasions, respectively. In seven of the actions, plaintiffs were represented by Donald A. Kerr, Q.C., but the plaintiffs in actions numbered 2296 and 2297 were represented by James E. Gould and George G. Simms respectively. Defendant was represented in all the proceedings by Gordon S. Black, Q.C., attorney for the trustee in bankruptcy, who presented motions in each case for an order cancelling the writ of summons and warrant for attachment and seizure of defendant vessel.

After hearing argument from the learned counsel for all parties concerned I have reached the conclusion that, with respect to the claims for necessities, it has been finally and definitively settled by the judgment of Noël J. in this court in the case of *Coastal Equipment Agencies Ltd. v. The Ship "Comer"*¹ which was confirmed by the Supreme Court of Canada,

¹ [1970] Ex.C.R. 13.

that the action *in rem* given for such claims for necessities does not give any privilege or lien or preference whatsoever and the claimant for necessities is in the same position as an ordinary unsecured creditor who requires the authorization of the court to institute proceedings following the bankruptcy of the debtor in accordance with the provisions of s. 40(1) of the *Bankruptcy Act*² reproduced hereunder:

40. (1) Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose;

and not a secured creditor who may realize or otherwise deal with his security in accordance with the provisions of s. 40(2) of the said Act, reading as follows:

40. (2) Subject to the provisions of section 48 and sections 86 to 93, a secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his security, except as follows:

- (a) in the case of a security for a debt due at the date of the bankruptcy or of the approval of the proposal or which becomes due not later than six months thereafter such right shall not be postponed for more than six months from such date; and
- (b) in the case of a security for a debt that does not become due until more than six months after the date of the bankruptcy or of the approval of the proposal such right shall not be postponed for more than six months from such date, unless all instalments of interest which are more than six months in arrears are paid and all other defaults of more than six months' standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by such security becomes payable under the instrument or law creating the security, except under paragraph (a).

The motions in cases numbered 2292, 2293, 2294, 2296, 2297, 2299 and 2300 are therefore maintained and the writ of summons, the warrant for attachment and the seizure of the motor vessel "*Calgary Catalina*" made in each of these cases is cancelled with costs against the plaintiff. However, since the motions were all heard at the same time, there will be only one counsel fee payable to defendant's attorney, to be shared by the seven plaintiffs in the said actions.

With respect to actions bearing numbers 2295 and 2298 respectively, which create maritime liens against defendant, I find that claimants holding a maritime lien are secured creditors within the meaning of s. 40(2) of the *Bankruptcy Act* and may realize or otherwise deal with their security in the same manner as they would have been entitled to realize or deal with

²R.S.C. 1952, c. 14.

it if that section of the Act had not been passed unless a judge of the Supreme Court of Nova Scotia, sitting in bankruptcy, otherwise orders. This court has no jurisdiction to interfere with the rights of these secured creditors and the motions for an order cancelling the writ of summons and warrants for attachment and seizure of the defendant vessel by the plaintiffs in the actions bearing numbers 2295 and 2298 will therefore be dismissed with costs, including one counsel fee payable to plaintiff's attorney in the two actions.
