IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION
In Bankruptcy and Insolvency

Citation: *Inaminka Marine Services Limited (Re)*, 2024 NLSC 171
Date: December 12, 2024
Docket: 202201G0709

IN THE MATTER OF at appeal of the Monitors decision Inaminka Marine Services Limited and Richard Spellacy with respect to 92834 Newfoundland and Labrador Inaminka

AND IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. 36, as amended.

Before: Justice Alexander MacDonald

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: September 19, 2024

Appearances:

Geoffrey L. Spencer and Meghan M. King — Appearing on behalf of 92834 Newfoundland and Labrador Inc.

or

Deborah L.J. Hutchings, KC — Appearing on behalf of Inaminka Marine Services Limited and Richard Spellacy

Authorities Cited:

CASES CONSIDERED: *Housen v. Nikolaisen*, 2002 SCC 33

STATUTES CONSIDERED: *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; *Canada Shipping Act, 2001*, S.C. 2001, c. 26; *Marine Liability Act*, S.C. 2001, c. 6; *Fisheries Act*, *Ballast Water Regulations*, SOR/2021-120

RULES CONSIDERED: *Rule of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

REASONS FOR JUDGMENT

MACDONALD J.

INTRODUCTION

[1] Inaminka Marine Services Limited and Richard Spellacy appealed the Monitor's decisions disallowing their claim against Canada Fluorspar Inc. and Canada Fluorspar (NL), the former owner of a fluorspar mine near St. Lawrence, Newfoundland and Labrador. I will call them the Owners.

[2] On March 8, 2022, the Owners applied for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*). On March 11, 2022, I granted a stay of proceedings against them. On March 18, 2022, I granted the Owners protection under the *CCAA* and extended the stay. On June 7, 2023, I granted an Approval and Reverse Vesting Order (ARVO) authorizing the sale of the mine.

[3] Pursuant to the ARVO, I ordered that "Excluded Liabilities" vest in a so-called "ResidualCo.," a newly incorporated company that is now called 92834 Newfoundland and Labrador Inc. Inaminka's and Spellacy's claims were such excluded liabilities.

[4] The purchaser then acquired the shares in the Owners and did not assume any liability for the Excluded Liabilities.

[5] On October 25, 2022, I granted a Claims Procedure Order. This order allowed the Monitor to decide on the validity of Inaminka's and Spellacy's claims. The Monitor has money to satisfy these claims if they are valid.

[6] The Inaminka and Spellacy claims against 92834 are for services relating to the Barge H-404. The Owners used the barge near the mine as a floating dock at a facility in Great St. Lawrence Harbour. This then allowed the Owners to operate a port to ship ore to market.

[7] The Owners could not operate the port year-round because they had to tow the barge to another port during harsh weather and during the winter to avoid damage to the barge.

[8] Before the Owners were subject to the *CCAA*, Inaminka developed a concept to allow the Owners to protect the barge during harsh weather and thus operate the port year-round. Inaminka proposed that the Owners build a series of anchors and pulleys which would pull the barge away from shore during inclement weather and return it later. The Owners did not implement this concept.

[9] Inaminka claims a maritime lien of $146,870 for its fees for this work.

[10] Spellacy says he was master of the barge before and after I granted the Owners protection under the *CCAA*.

[11] Spellacy claims a maritime lien for $114,350 for wages or services. $68,000 relates to services rendered between December 16, 2021, and February 21, 2022, and $46,350 between February 22, 2022, and September 26, 2022.

[12] Pursuant to the Claims Identification Order:

(a) Inaminka and Spellacy, delivered to the Monitor their Proofs of Claim, together with their supporting documents;

(b) The Monitor reviewed the Proofs of Claim in consultation with 92834. It disallowed Spellacy's claim on January 19, 2024, and Inaminka's on January 23, 2024. The Monitor provided Inaminka and Spellacy with written explanations;

(c) Inaminka and Spellacy appealed the decisions by objecting to them within the required time; and

(d) The Monitor then referred the appeals to me as provided for in the Claims Identification Order for "a judicial determination."

ISSUES

[13] I am to decide:

(a) What is the standard of review for the appeals?

(b) Was Spellacy master of the barge?

(c) Is Spellacy entitled to a maritime lien for wages under section 86(1), of the *Canada Shipping Act, 2001*, S.C. 2001, c. 26;

(d) Is Spellacy entitled to a maritime lien for his services under section 139(2), of the *Marine Liability Act*, S.C. 2001, c. 6; and

(e) Is Inaminka entitled to a maritime lien for its services under section 139(2), of the *Marine Liability Act*.

[14] I allow Spellacy's appeal. I dismiss Inaminka's appeal. I will now explain why I made these decisions. I will first deal with the standard of review for the judicial determination.

ANALYSIS

What is the Standard of Review for the Appeals?

[15] The parties say, and I agree that the standard of review for this judicial determination is the appellant standard, which is:

(a) questions of law, correctness; and

(b) questions of fact and of mixed fact and law where the legal issue is not readily extricable, palpable and overriding error.

[16] I now turn to whether Spellacy was master of the barge.

Was Spellacy Master of the Barge?

[17] I find that Spellacy was master of the barge. The Monitor disallowed Spellacy's claim because "[he] has not provided any written confirmation that he was ever appointed as master of the barge by [the Owners] or that the appointment was ongoing."

[18] This decision is on a question of fact. I must decide whether the Monitor made a palpable and overriding error.

[19] The Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, said:

(a) "the standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a 'palpable and overriding error'" (at para. 10);

(b) "… defines … 'palpable' as 'clear to the mind or plain to see' … as 'so obvious that it can easily be seen or known' … as 'readily or plainly seen'" (at para. 5);

(c) "We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the *inference-drawing process itself* is palpably in error that an appellate court can interfere with the factual conclusion." [emphasis original] (at para. 23); and

(d) It continued, "The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts." (at para. 23)

[20] The Record shows there is evidence that Spellacy was the master of the barge. In particular:

(a) Everyone agrees that he qualifies as a master under the *Canada Shipping Act*;

(b) He was responsible for the barges *Ballast Water Record Book*. (See exhibit M of Appellants' Exhibits filed July 3, 2024); and

(c) He initialed reports and notes in that record book at least three times.

[21] Section 190(1)(f) of the *Canada Shipping Act* provides that the Governor in Council may make regulations "respecting the control and management of ballast water." The Governor in Counsel issued such regulations in the *Fisheries Act, Ballast Water Regulations*, SOR/2021-120.

[22] Regulation 4(3) says the *master* must ensure, in respect of the Ballast Water Record Book, that:

(a) the requirements to make entries are met;

(b) the signature requirements set out in the regulations are met;

(c) all entries are maintained onboard the barge in accordance with the requirements set out in the regulations; and

(d) the record book is kept readily available for inspection.

[23] The barge master *must* ensure the ballast requirements are met. There is evidence that Spellacy did so. Therefore, it is obvious that he was the ship's master while he maintained these ballast records.

[24] Why else did he provide his services to allow the Owners to comply with the *Canada Shipping Act*? It is unlikely that he acted altruistically for the Owners' benefit without their authority.

[25] Thus, I allow Spellacy's appeal. I refer the matter back to the Monitor to decide:

(a) how long was Spellacy the master of the barge; and

(b) what should it pay Spellacy for his services while he was the master?

[26] As the Monitor made his decision on the narrow ground that Spellacy was not the master, it did not deal with the other issues raised in the appeal. I will give the Monitor guidance on these issues as the parties argued these matters before me. I will first deal with whether Spellacy is entitled to a maritime lien for wages under section 86(1), of the *Canada Shipping Act.*

Is Spellacy entitled to a maritime lien for wages under sections 86(1) and 86(2.1) of the Canada Shipping Act?

[27] He is not. Under the *Canada Shipping Act* a "Canadian vessel" is a vessel that is registered or listed under Part 2 (Registration, Listing and Recording) or that is exempted under the regulations from the registration requirement in subsection 46(1).

[28] Everyone agrees that the barge is registered in Panama. Thus, sections 86(1) and 86(2.1) does not apply to the barge, and Spellacy cannot claim a maritime lien under that provision. I will now deal with whether Spellacy is entitled to a maritime lien for his services under section 139(2), of the *Marine Liability Act.*

Is Spellacy Entitled to a Maritime Lien for his Services under section 139(2) of the Marine Liability Act?

[29] He is. Section 139(2)(a) of the *Marine Liability Act* says, "A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise in respect of … services wherever supplied to the foreign vessel for its operation or maintenance…" Spellacy carries on business in Canada.

[30] The *Marine Liability Act* does not require that Spellacy is the master of the vessel to have a maritime lien for his services. However, Spellacy's role in keeping a ballast log is likely such service. He can only do this if he is the master.

[31] Furthermore, acting as a master generally may constitute such a service. In either case, Spellacy provided these services to both the barge and the Owners. I have asked the Monitor to decide how long he was the master and whether it extended beyond the time he kept the ballast log.

[32] I now turn to Inaminka's appeal and whether it is entitled to a maritime lien under section 139(2), of the *Marine Liability Act*

Is Inaminka Entitled to a Maritime Lien under section 139(2), of the Marine Liability Act?

[33] The Monitor decided Inaminka is not entitled to a maritime lien. It said "the monitor **DISALLOWS** your priority claim. No actual repairs were performed or [*sic*] the barge nor was [the Owner] provided any equipment. Consulting services of this nature do not constitute a maritime lien." [emphasis original]

[34] This is a question of law. I must decide if the Monitor was correct. I find that Inaminka is not entitled to a maritime lien for its service related to:

(a) inspecting the barge for damage caused by maritime storms;

(b) the mooring system proposed to be installed in great St. Lawrence Harbour; or

(c) inspection services to decide if the barge could structurally use the proposed mooring system.

[35] Section 139(2) of the *Marine Liability Act* creates a maritime lane for foreign vessels. It says, "A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise: (a) in respect of goods, materials or services wherever *supplied* to the foreign vessel for its operation or maintenance

…; or (b) out of a contract relating to the repair or equipping of the foreign vessel." [emphasis added]

[36] The service must either "be *supplied to* the foreign vessel" or relate to "repair or equipping" the foreign vessel. I will first deal with Inaminka's services related to inspecting the barge for damage caused by maritime storms.

[37] Inaminka's services related to an estimate of the work that might be required if the barge was damaged. The estimate did not result in actual repair work on the barge. Therefore, Inaminka did not provide services to the barge but to the Owners, who may or may not have decided to hire someone to provide services to the barge that relate to repairs to or equipping the barge. This did not happen.

[38] Thus, Inaminka cannot obtain a maritime lien for estimates of damage rather than repairs for the damage itself. I now turn to the services related to the mooring system proposed to be installed in the port.

[39] I find that this claim fails on two grounds. The first ground is whether Inaminka's services were "supplied" to the foreign vessel. The second is whether they relate to the "equipping" it.

[40] Inaminka provided the Monitor with a description of its services in Exhibit J of the record in a document entitled *Description of the Work on the Barge*. This description says that:

(a) Inaminka was to "assess the condition of the barge… to ensure that the existing structure was sufficient to continue as planned;" and "To accomplish this, … a physical inspection, both internal and external, of the barge … was necessary;"

(b) "Once these actions had been completed, the following documents were presented to [the Owners]":

(i) A report for the inspection company (attached);
(ii) Repair options (attached)[1];
(iii) Repair cost estimates (attached);
(iv) Preliminary mooring plan for year-round operations (attached);
(v) Modifications to the barge necessary to achieve the mooring plans in (iv) above including the equipment that had to be fitted to the barge to achieve the foregoing;
(vi) Detailed designs of the deck strengthening necessary to accommodate the two "tugger" winches that would be required;
(vii) A detailed list of the cost and location of the equipment necessary to achieve these moorings; and
(viii) A treatment plan for untreated ballast water from the barge.

[41] Three of the tasks then seem to be complete but despite this, Inaminka's work is not a detailed proposal, but a conceptual anchoring plan. No one could construct the scheme based on the work product.

[42] The plan view drawing shows mooring lines and anchor points in the port. The barge is represented by a simple rectangular block that does not provide any detail of how the barge could use the anchor system.

[43] Inaminka acknowledges this in paragraph 3 of the *Description of the Work*, when it says, "Once all of the above has been submitted and approved, [Inaminka] worked with [the Owners] to compile a detailed plan, schedule and cost of the process."

[44] It continued, "This was a quite complex document (attached) comprising as it did the engagement of a high-powered anchor handling vessel to lay the mooring, the location, and cost of the anchors and chains as well as two new tugger winches in addition to various shackles, chains buoys, and pennant wires."

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[1] The estimate was not in the record.

[45] Everyone agrees that no one purchased or installed any of the components of the project. Everyone agrees that the Owners did not engage an anchor handling vessel. Furthermore, the Record does not contain "a detailed plan."

[46] Furthermore, in Exhibit K, documents dated November 4, 2021, called *Emergency Mooring Project to Date* and *CFI Barge*, provide that except for the specifications of the anchor chains, Inaminka's services were related to preliminary design work. Inaminka did provide a more detailed plan for the chains in a document entitled *Anchor Specifications*.

[47] The barge is mentioned in only two of the 10 sections of paragraph 2 of the *Emergency Mooring Project to Date*. In the first, Inaminka says in paragraph 5, "We have contacted [an inspector] to get a quote for a condition survey of the barge to ensure that there are no show stoppers and that we will have a suitable deck mounting capabilities for two winches."

[48] In the second, in paragraph 6, it refers to a general description of these winches that Inaminka proposes the Owners install on the barge. It gives no detailed specifications or installation instructions.

[49] Therefore, I find that the services relate to altering the port to allow the barge, and any vessel for that matter, to use the proposed anchor system. It is only incidentally related to the inspection of the barge and potential future installation of a winch system on the barge.

[50] Therefore, I find that Inaminka's services relate to the port not the barge. Inaminka does not have a maritime lien.

[51] Even if its services did relate to the barge, the conceptual plan did not arise out of services *supplied to the barge*. It was an estimate provided to the Owners who might decide to contract to install the system. Inaminka's plan does not create a maritime lien, but any subsequent installation may have.

[52] I now turn to whether Inaminka's inspection services used to decide if the barge could structurally use the proposed mooring system constitute a maritime lien. I find they do not.

[53] Inaminka's evidence shows that it recommended the Owners ask a third party to decide if the winches *could be* installed on the barge. This recommendation was not a service Inaminka provided to the barge. Therefore, Inaminka does not have a maritime lien for this recommendation.

[54] I therefore dismiss Inaminka's appeal. I now turn to costs.

COSTS

[55] Spellacy succeeded on his appeal. He is entitled to his appeal costs on a Column 3 basis of the *Rule of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. I dismissed Inaminka's appeal. The Monitor is entitled to its appeal costs on a Column 3 basis.

DISPOSITION

[56] I hereby dismiss Inaminka's appeal. Inaminka shall pay the Monitor's appeal costs on a Column 3 basis. I allow Spellacy's appeal. The Monitor shall pay Inaminka's appeal costs on a Column 3 basis.

[57] I refer Spellacy's claim back to the Monitor to decide:

(a) How long was Spellacy master of the barge; and

(b) What should it pay Spellacy for his services while he was the master?

ALEXANDER MACDONALD
Justice