

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**LES NORTHUP BOAT REPAIR, QUALITY
REFRIGERATION CO., INC. and
LOS ANGELES MARINE HARDWARE,
INC.,**

S.CT. CIVIL NO. 83-03
(High Ct. Civil Nos. 1982-052,
1982-052A, 1982-056 through
065, and Consolidated Cases)

Plaintiffs-Appellants,

-v-

**0/S HOLLY ELAINE, 0/S JUDE,
et al.,**

Defendants-Appellees,

and

**ORANGE PRODUCTION CREDIT
ASSOCIATION,**

Plaintiff-Appellee,

-v-

**0/S HOLLY ELAINE, 0/S JUDE,
et al.,**

Defendants-Appellees.

APPEAL FROM THE HIGH COURT

OCTOBER 2, 1989

ASHFORD, C.J.
KONDO, A.J., and PHILIPPO, A.J. (sitting by designation)

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SUMMARY:

In appeals by parties claiming liens against U.S. documented ships, the Supreme Court ruled that the substitution of one person for another as mortgagor did not affect the priority of the mortgage lien. The Court also declined to upset the trial court's ruling that one lien was lost by failure to timely enforce it. Lastly, the Court affirmed the trial court's allocation of costs among claimants, except as to one lienor, whose share it ruled should have been charged against proceeds of sale of the ships.

DIGEST:

1. MORTGAGES – *Construction and Operation – Substitution of New Mortgagor*: A substitution of the primary obligor does not invalidate or necessarily subordinate the priority of the lien on the security.
2. APPEAL AND ERROR – *Review – Questions of Fact*: An appellate court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision.
3. MARITIME LIENS – *Enforcement – Laches*: Absence of a vessel from home waters operates to relieve the lienor, to some extent, from laches; but the question in each case against a subsequent owner who acquired in good faith and without notice is whether the high degree of diligence in the enforcement of lien rights has been shown.
4. MARITIME LIENS – *Same – Same*: Whether laches applies in a given case depends upon the circumstances of the case and is primarily addressed to the trial court's discretion.
5. MARITIME LIENS – *Same – Allocation of Costs*: Trial court has discretion to allocate wharfage charges and costs of government custody of vessels among lienor claimants and holders of mortgages as it thinks appropriate, but portion allocable to lienor who established a lien should be charged against proceeds of sale of the vessels.

OPINION OF THE COURT BY ASHFORD, C.J.

Crewmen, artisans, suppliers and mortgagees filed actions *in rem* and *in personam* against four commercial fishing vessels, their owners and other individual and corporate defendants seeking to impose and enforce liens against the vessels and personal judgments against the other defendants. The actions were consolidated for trial of the *in rem* claims in the

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High Court. These appeals were taken by some of the artisans and suppliers, and by a mortgagee, from the Final Judgment of the High Court on the *in rem* claims. They concern only the vessels Jude and Holly Elaine.

The vessels were documented by the United States Coast Guard of the United States Department of Transportation. In January, 1981, the owners executed a Preferred Mortgage on each vessel, which was duly recorded with the United States Collector of Customs at the Port of Los Angeles-Long Beach, California, and noted on the vessel's documentation certificate. The mortgages were in favor of Orange Production Credit Association (OPCA). The owners also executed a Second Preferred Mortgage on the Jude in favor of Claimants-Appellants Russel O. and Margaret Brown (Brown), which was similarly recorded and noted.

Subsequently, artisans and suppliers Les Northup Boat Repair, Quality Refrigeration Co., Inc., and Los Angeles Marine Hardware, Inc. (collectively, Boat Repair), provided service, goods and materials to the vessels.

In April 1981, the vessels sailed for Majuro from San Pedro. Boat Repair was aware of their departure and their destination, but took no steps to impose or enforce maritime liens against the vessels. In December 1981, the vessels were sold to Western Pacific Seiner Management, Inc. (Westpac), whom the trial court found was a bona fide purchaser for value without notice of the Boat Repair claims. In connection with the purchase, Westpac obtained additional financing from OPCA in the amount of approximately \$389,000, a large part of which was used to bring the debt secured by the first Preferred Mortgages to current status. The loan to Westpac was secured by a supplement to the first Preferred Mortgage on each vessel.

Brown's consent was required, and was given, for recordation with the Collector of Customs of the documents transferring title to Westpac. The supplements to the first Preferred Mortgages were duly recorded and noted on the vessels' certificates of documentation.

In January 1982, this litigation was commenced with Boat Repair claiming maritime liens and other relief, on the basis of which the vessels were arrested at Majuro by the Government of the Marshall Islands. Suits by others followed and in August 1982, OPCA filed its complaints to

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foreclose its mortgages. The following month, the cases were consolidated.

A. Effect of the Supplements to the First Preferred Mortgages.

[1] Appellants claim that the actions of the parties and execution of the supplements to the first mortgages constituted a novation, by which the liens of the first mortgages were completely extinguished. Testimony by Brown indicates that the original mortgagors were to be relieved of their liability to OPCA, on the assumption of their obligations by Westpac. Also, the supplemental Loan Agreement signed by Westpac recited payment terms for the notes secured by the first mortgages that differed from those in the notes. However, Appellants have not pointed to any evidence from which it can be concluded that OPCA intended to give up its first mortgage liens on the vessels. A substitution of the primary obligor does not invalidate or necessarily subordinate the priority of the lien on the security, nor has anything been pointed to or found in the Ship Mortgage Act (46 USCA 911 *et seq.*, as it then existed) which would dictate that result. Furthermore, the recitals in and language of the December 17, 1981 Supplement to First Preferred Mortgage, on each of the Jude and Holly Elaine, indicate an intent to make the new loan an additional charge on the first lien. This Court is not called upon to decide the effect of that attempt, both because the proceeds of sale of the vessels were insufficient to satisfy even the first mortgages and because, as to the Jude, the trial court ruled that only the sum secured by the first mortgage had priority over Brown's second mortgage. Neither, in the circumstances, need this Court rule on the contentions that the supplements did not satisfy the requirements of the Ship Mortgage Act.

[2] We find nothing in the record which gives us a basis for setting aside the trial court's finding that when Brown consented to recording of the transfer of title to Westpac, he neither believed nor had reason to believe that OPCA relinquished the priority of its first mortgage. Nor is there any evidence to support a conclusion that the supplements destroyed the lien of the first mortgage on either the Jude or the Holly Elaine. An appellate court must refrain from reweighing the evidence and must make every reasonable presumption in favor of the trial court's decision. *Abner, et al. v. Jibke, et al.*, 1 MILR (Rev.) 3, 5 (Aug 6, 1984). *See also*

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29 MIRC Ch. 1, § 30.

B. Boat Repair's Liens.

[3, 4] The High Court found there was insufficient evidence to establish maritime liens in favor of Quality Refrigeration Company, Inc., and Los Angeles Marine Hardware, Inc., and dismissed them as unproved. Although those two suppliers are Appellants, their appeal is only against the judgment that they, together with Les Northup Boat Repair, were liable to OPCA for reimbursement of a portion of the wharfage fees imposed by the Government while the vessels were under arrest. As to Les Northup Boat Repair, the trial court found that while liens for labor and materials could have been imposed prior to the vessels' departure from San Pedro, that claimant failed to act with due diligence to enforce its liens and was barred by laches from doing so after acquisition of the vessels by Westpac, a bona fide purchaser without notice. As noted in *The Everosa*, 93 F.2d 732 (1937), cited by Boat Repair, absence of a vessel from home waters operates to relieve the lienor, "to some extent," from laches; but the question in each case against a subsequent owner who acquired in good faith and without notice is whether the "high degree of diligence" in the enforcement of lien rights has been shown. 93 F.2d at 735. We have not found anything in the record to cause us to upset the trial court's ruling on the application of laches. Whether laches applies in a given case depends upon the circumstances of the case and is primarily addressed to the trial court's discretion. *Rabauliman v. Matagolai*, 7 TTR 424 (1976).

C. Award of Wharfage Fees as Costs Against Boat Repair.

[5] The trial court ruled against all *in rem* claims of Boat Repair and ordered Boat Repair to pay court costs with respect to those claims. Those costs were wharfage charges and costs of government custody of the vessels, of which \$13,680.74 was charged against Boat Repair and \$4,281.26 was charged against the holders of first mortgages, based on the number of days each party had each vessel under arrest. Boat Repair complains that these preservation expenses should be paid solely from the proceeds of sale of the vessels, and not be assessed against parties who recovered nothing. This ignores the facts that two of the three claimants who caused the vessels to be arrested and to incur the majority of that expense failed to prove their liens and that

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the lien of the third claimant was held barred by laches. The trial court had discretion to allocate those costs among the parties as it thought appropriate. The claimants who did not establish liens were, we believe, properly assessed the costs their unfounded claims caused. *See European-American Banking Corp. v. M/S Rosaria*, 486 F.Supp. 245 (1979) (costs assessed against intervenors who failed to establish claims). On the other hand, Les Northup Boat Repair did establish a lien which was defeated by laches. We believe the trial court should have exercised its discretion to charge that lienor's share of the costs, \$3,648.68, against the proceeds of sale of the vessels, as its action in arresting the vessels, as a legitimate lienor, did redound to the benefit of priority lienors.

The judgment in favor of OPCA and against Les Northup Boat Repair in the amount of \$3,648.68 is reversed; in all other respects the final judgment on the *in rem* claims is affirmed.

Donald R. Hazelwood for Appellants Brown
Lawler, Felix and Hall (Did not appear, but filed a brief for Appellants Boat Repair)