Shipping

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ARREST OF THE *SAM HAWK*: REVERSED ON APPEAL AND AUSTRALIAN POSITION ON MARITIME LIENS FALLS BACK INTO LINE WITH ENGLISH AND SINGAPOREAN LAW

Five judges sitting as the Full Court of the Federal Court of Appeal have unanimously rejected a bunker supplier's asserted right to arrest the *SAM HAWK* based on the bunker supplier's contract with the time charterers which incorporated a maritime lien clause subject to US law[1].

As reported in our October 2015 briefing[2] the *SAM HAWK* (vessel) was time chartered to Egyptian Bulk Carriers (EBC) on terms which required EBC to provide and pay for bunkers. EBC was not authorized to contract on behalf of the vessel owner (owners).

EBC contracted with a Canadian bunker supplier (RP) under Canadian law but with an express term that provided that the "laws of the United States and the State of Florida" applied "with respect to the existence of a maritime lien".

RP stemmed the bunkers through a physical supplier in Turkey. The vessel accepted delivery only after owners had issued "no liability" notices to RP and the physical supplier. RP invoiced EBC, EBC did not pay and, over 12 months later, RP arrested the vessel in Australia to obtain security for a claim for unpaid bunkers.

RP asserted that the US lien clause and/or the Canadian law position in their bunker supply contract established a basis for in rem proceedings in Australia being a *"proceeding on a maritime lien"* under s15(1) of the *Admiralty Act 1988 (Cth)* (Act). They also argued that EBC had contracted as agents of the owners and owners were therefore a party to the bunker supply contract and a *"relevant person"* under s17 of the Act, which also entitled RP to arrest.

The owners applied for RP's action to be dismissed on the basis that they were not a party to the bunker supply contract and argued that the foreign maritime lien relied on could not establish jurisdiction under s15 of the Act.

The arrest and subsequent judgment on the owner's application to dismiss was of wide interest because a claim for bunkers supplied to a vessel in Australia does not give rise to a maritime lien[3] under the Act and it had been widely considered that Australian law would apply the law of the jurisdiction of the arrest and not recognise a foreign maritime lien unless the underlying facts and circumstances would also establish a right to a maritime lien under section 15(2) the Act which include:

1 *Ship SAM HAWK v Reiter Petroleum Inc* [2016] FCAFC 26

2 http://www.hfw.com/Arrest-of-the-SAM-HAWK-October-2015

3 *Shell Oil Company v Ship LASTRIGONI [1974] HCA 27; 131 CLR 1*

1. Salvage.
2. Damage done by a ship.
3. Wages of the master, or of a member of the crew, of a ship.
4. Master's disbursements.

The primary judge accepted that a foreign maritime lien could establish jurisdiction under s15(1) even though not falling within s15(2) of the Act and, unsurprisingly, the owners appealed.

Prior to the appeal, RP conceded that the argument under s17 had no reasonable prospect of success and that view was endorsed in the primary appeal judgment in which it was observed that the s17 argument *"appears hopeless"*.

The appeal was heard on the assumption that US or Canadian law did give RP rights in rem against the vessel even though as was noted: (a) those in rem rights were allegedly created by a contract entered into in Turkey with the time charterer who had no rights or interest in the vessel and no connection to US or Canadian law; and (b) the bunkers were solely for the time charterer's benefit and of no benefit to the vessel.

On the assumed facts the five appeal judges were unanimous in deciding that the bunker supply contract between EBC and RP, to which the owners were not a party, could not create a maritime lien enforceable against the vessel. The Full Court concluded that there was no privity of contract between the owners and RP. The substance of the dispute was not contractual in nature and therefore the choice of law clause in the bunker supply contract was irrelevant in the selection of the law governing the substance of the dispute, as decided by the court of the forum of the arrest (*lex causae*). In the absence of any evidence on the law of Hong Kong, where the ship was flagged, or Turkey where the bunkers were supplied, the *lex causae* was assumed to be the same as the law of the forum, and therefore Australian law applied to the substantive issue and Australian law was affirmed as not recognising a maritime lien for the supply of bunkers or other necessaries.

The Full Court also addressed the key issue of interest to the shipping community which was what the position would be if US or Canadian law had been established as the *lex causae* i.e. whether a maritime lien arising by operation of a foreign law would, in principle, be enforceable in Australia where the same facts and circumstances would not give rise to a maritime lien under Australian law.

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Four of the five judges adopted the majority's approach in *Bankers Trust International Ltd v Todd Shipyards Corporation* (the *HALCYON ISLE*[4] where it was held that the foreign right should be *"classified and characterised by reference to the law of the forum"*. While the *HALCYON ISLE* has been criticised as being out of step with principles of freedom of contract and international comity, the Full Court in the *SAM HAWK* followed the *HALCYON ISLE* approach of determining what rights exist by reference to the *lex causae* and then assessing and characterising the *lex causae* to determine whether the those rights are a maritime lien under Australian law.

In short, where the substance of a dispute gives rise to a foreign maritime lien that foreign maritime lien will only be recognised as being a *"proceeding on a maritime lien"* under s15 of the Act if it is in substance sufficiently analogous to a maritime lien identified in s15(2) of the Act. Further, the Full Court made clear that a party seeking to rely on a foreign maritime right cannot do so on an interim basis that it has an arguable case but, if challenged, must prove jurisdiction by production of facts and evidence in support.

A dissenting judgment expressed the view that in principle, a foreign maritime lien – if established - should

4 [1981] AC 221



be recognised notwithstanding that no equivalent maritime lien exists in the laws in the forum of the arrest.

The practical implications of this decision are that:

- Claims giving rise to foreign maritime liens will not now establish jurisdiction in Australia unless the right relied on is analogous to an existing Australian maritime lien.
- Vessels calling in Australia will no longer be subject to the threat of arrest due to payment disputes solely between time charterers and their suppliers.
- The proliferation of supplier driven arrests and demands for security against threat of arrest should now have come to an abrupt halt.
- The threshold for obtaining an arrest will be much more difficult to meet as the party seeking jurisdiction will have to establish that an analogous maritime right exists.

While this decision will have come too late for those owners that have already settled the many bunker supply related arrests and claims that have been commenced in Australia, no doubt others will now be looking at whether it is possible to retrieve security given and/or dismiss the underlying claims.

Notwithstanding the dissenting judgment, the detailed legal analysis in the commercial and international context set out in the majority decisions will make any further appeal a difficult and significant undertaking.

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