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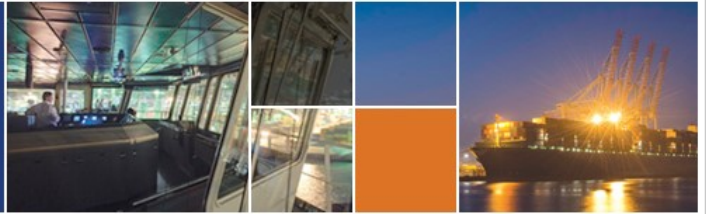

Limited Recognition of Foreign Maritime liens in Australia

October 2016

Ship 'Sam Hawk' v Reiter Petroleum Inc [2016] FCAFC 26

Factual background

The "Sam Hawk" was owned and registered in Hong Kong, under Greek management, and operated by a Swiss company. It was under time charter to Egyptian Bulk Carriers ('EBC').

EBC contracted with Reiter Petroleum for the provision of bunkers at Istanbul. The supply of bunkers was subject to Reiter's general terms and conditions, which required that the contract was to be construed according to the law of Canada, However there was a further term that Reiter was permitted to assert a lien wherever it finds the vessel, and that the law of the United States would apply to determine the existence of any maritime lien.

Reiter arranged for the provision of bunkers by a Turkish bunkers supplier. The Owner of the 'Sam Hawk' was not a party to this bunkers supply contract, and was unaware that Reiter was involved in the provision of bunkers. Prior to receiving the bunkers it sent a 'no liability' notice to the Turkish bunkers supplier. When bunkers were provided on 7 December 2013 the Master of the 'Sam Hawk' sent a further 'no liability' notice to the supply barge.

Reiter commenced proceedings in the Federal Court of Australia and arrested the vessel at Albany, Western Australia, in November 2014. Reiter asserted jurisdiction on the basis of s15 of the *Admiralty Act 1988* (being a claim on a maritime lien), and ss17 and 4(3)(m), (being a general maritime claim on the basis that the Owner was a 'relevant person' who would be liable on the claim in proceeding commenced as an action *in personam* in respect of goods supplied to ship for its operation).

The Owner applied to have the action dismissed and have the arrest set aside, challenging jurisdiction and seeking summary judgment on each of the s15 and s17 bases.

First instance decision

At first instance McKerracher J dismissed the owner's application. The decision principally concerned whether the phrase 'maritime lien' in s15 of the *Admiralty Act* included foreign maritime liens arising in circumstances that would not give rise to a maritime lien under Australian law. His Honour found that because the existence or otherwise of a maritime lien was a matter of substance rather than procedure (in light of the decision of the Australian High Court in *John Pfeiffer Pty Ltd v Rogerson*[1]), the question fell to be determined under the *lex causae*. In the course of the reasons His Honour expressed a preference for the decision of the minority in the Privy Council decision in *The Halcyon Isle*[2] to that of the majority. On that basis, His Honour found that the proper law clause in the bunkers supply contract determined the *lex causae.*, and that the Court would therefore recognise a maritime lien arising under the law of the United States as a valid basis for its jurisdiction.

Having found that the Court had jurisdiction His Honour declined to grant summary judgment.

The Owner sought leave to appeal on both grounds.

Decision on appeal

The Full Federal Court, comprising five judges, unanimously granted leave to appeal, allowed the appeal, and ordered that the arrest be set aside and the proceedings dismissed.

Allsop CJ and Edelman J, with whom Besanko and Kenny substantially JJ agreed, decided the maritime lien jurisdiction question by applying a two-step rule of private international law under s 15. The first step is to identify the foreign law right. The second is to characterise that right by reference to Australian law to determine whether it is, or is sufficiently analogous to, a maritime lien as recognised in Australian law.

In the course of a lengthy judgment, Allsop CJ and Edelman J made clear that a maritime lien is a legal concept which necessarily includes the circumstances in which it might arise. Thus, in Australia, a maritime lien can only arise in relation to the familiar categories of salvage, damage done by a ship, wages of master or crew, and master's disbursements. Foreign maritime liens which do not arise from these circumstances will not be a 'maritime lien' for the purposes of s 15, and therefore will not be a basis for the Court's jurisdiction.

Further, Allsop CJ and Edelman, Besanko and Kenny JJ placed considerable importance on the fact that a maritime lien grants not only a basis for jurisdiction, but also a privileged priorities position in relation to the proceeds of sale of a vessel. Thus, to recognise foreign maritime liens in circumstances where Australian law would not do so would be to disturb the well-established domestic system of priorities, potentially with unjust results. Their Honours rejected the idea that it might be possible to recognise foreign maritime liens for the purposes of jurisdiction but not to accord such liens the privileged place that Australian maritime liens have in relation to priority.

In the course of their joint judgment Allsop CJ and Edelman J expressed a preference for the majority decision in The Halcyon Isle to that of the minority, principally because it was, in their view, an example of the two-stage choice of law process that was the basis for their decision in this case.

While Rares J agreed with the result, his reasoning was different. His Honour set out at length the basis for his agreement with the minority reasoning in The Halcyon Isle, and suggested that the correct approach would be, in an appropriate case, to allow the lex loci contractus to determine whether a maritime lien exists, but the lex fori to determine its priority. Ultimately this was not such a case, because the circumstances of the supply of bunkers established no relevant connection between the Owners and the laws of the United States.
The summary judgment issue was dealt with shortly. In circumstances where the Owner was not a party to the bunkers supply contract, had no notice of the involvement of Reiter in that supply, had not expressly or impliedly held out EBC as its agent, and had issued 'no liability' notices to the physical bunkers supplier, the Court found that there was no reasonable prospect that Reiter would be successful on general maritime claim for supply of necessaries under s17.

Conclusion

The ‘Sam Hawk’ decision makes clear that in limited circumstances an Australia court will recognise a foreign maritime lien as a basis for its jurisdiction under s 15. However such a lien will have to display the characteristics of a maritime lien under Australian law (including inalienability and a privileged priorities position) and arise in circumstances recognised as giving rise to a maritime lien by Australian law, described above. In effect, then, Full Court has all-but-closed the door that appeared to have been opened by this case at first instance.

Article by Paul Hopwood, Associate, Cocks Macnish who acted for the successful Owner.

The “Sam Hawk” is entered with the Club and their defence was supported under their FDD cover with the Club.

We are grateful to Mr Paul Hopwood
Associate with Cocks Macnish for this article

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[1] (2000) 203 CLR 503

[2] *Bankers Trust International Ltd v Todd Shipyards Corporation* [1981] AC 221 which is authority for the proposition that questions as to the existence of an asserted maritime lien are procedural or remedial in nature and are therefore to be determined in accordance with the law of the forum.

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