STRANGE DECISION PURSUANT TO A NORMAL ARREST

- REITER PETROLEUM INC. vs. THE SHIP “SAM HAWK” [2015] FCA 1005
- THE SHIP "SAM HAWK" vs. REITER PETROLEUM INC. [2016] FCA FC 26
- Reiter Petroleum Inc., a Canadian bunker trader, claimed it was not paid for bunkers supplied in Istanbul, Turkey to the Ship “SAM HAWK”.
- Reiter contracted with the Charterer of the Ship but contended that the Owners of the Ship had to pay for the bunkers supplied to the Ship.
- Reiter arrested the Ship in Albany, Western Australia.

de Man Pillet

QUESTION TO BE DECIDED

Reiter claimed that Canadian and the US law applied as per its Terms and Conditions which entitled it to a maritime lien against the Ship pursuant to Section 15 of the *Australian Admiralty Act* of 1988. The *Australian Admiralty Act* at Section 15 grants jurisdiction in case of:

> "*a proceeding on a maritime lien or other charge in respect of a ship or other property subject to the lien or charge.*"

The Australian law has a very restricted number of maritime liens, as is the case in England. They are:

(a) Salvage
(b) Damage done by a ship
(c) Wages of the Master, or a member of a crew of a ship; or
(d) Master's disbursements

and nothing else.

Is a FOREIGN MARITIME LIEN ENFORCEABLE in Australia, even though it is common ground that the provision of bunkers would NOT give rise to a maritime lien under Australian substantive law?

de Man Pillet

THE PRIVY COUNCIL DECISION OF "HALCYON ISLE"

To succeed Reiter had to persuade the Australian Court that the Privy Council decision of the HALCYON ISLE (*Bankers Trust* v. *Todd Shipyards* [1981] A.C. 221) should no longer be followed in Australia.

FACTS OF HALCYON ISLE PRIVY COUNCIL DECISION

If you recall, in that case the Ship was repaired in Brooklyn, New York, USA enjoying a US maritime lien. The Ship was arrested in Singapore by the Mortgagee Bank, Bankers Trust. She was sold via judicial sale and the proceeds could not satisfy in full the ship repairer and the mortgagee. The question arose whether the Ship repairer with a US maritime lien would rank higher than the mortgagee.

MAJORITY

The majority led by Lord Diplock and two other judges decided that because the nature of a maritime lien under English/ Singapore law was PROCEDURAL or REMEDIAL, it was governed by the law of the jurisdiction in which the proceeding is brought, namely the LEX FORI.

MINORITY

On the other hand, the minority, Lord Salmon & Lord Scarman asked the following question:

> *Does English law, in the situation presented by the facts, recognize a maritime lien created by the law of the United States, i.e. the LEX LOCI CONTRACTUS where no such lien exists by its own internal law*?

It answered as follows:

> *"In our view, the balance of authorities, the comity of nations, private international law and natural justice all answer this question in the affirmative. If this be correct, the English law (the LEX FORI) gives the maritime lien created by the LEX LOCI CONTRACTUS precedence over the mortgagee's mortgage. If it were otherwise, injustice would prevail."*

de Man Pillet

THE DECISION AT FIRST INSTANCE BY MR. JUSTICE McKERRACHER

Returning to the SAM HAWK, the learned trial judge against the background of different views states at the outset that the language of Section 15 of the *Australian Admiralty Act* is BROAD.

At paragraph 105 of his decision, he says:

> "*HALCYON ISLE is NOT binding on this Court, although as a decision of the Privy Council, it is accorded great respect and weight*".

THE DECISION AT FIRST INSTANCE BY MR. JUSTICE McKERRACHER

He states at paragraph 117:

> *"Notwithstanding the majority view of the Privy Council in the HALCYON ISLE, there is much to be said for Reiter's contention that the nature of the maritime lien is necessarily substantive. It is an inchoate right which attaches to the vessel and travels with the vessel independent of changes of ownership."*

At paragraph 119, he states:

> *"The minority view in the HALCYON ISLE should or indeed MUST be preferred in Australia as it accords with the substantive value of a maritime lien... A lien will operate independent of the fortuitous choice of venue at which a ship is arrested."*

de Man Pillet

THE DECISION OF THE AUSTRALIAN COURT OF APPEAL

Four of the five judges adopted the HALCYON ISLE majority decision and reversed the first instance judge.

The four judges cover 290 paragraphs to conclude that there should be certainty in the law, clarity and predictability. Ranking of priorities is a matter for the LEX FORI and the machinery of remedies cannot be altered by the existence of a foreign system.

The Appeal Court concludes that whatever foreign rights might have arisen by the transaction, they are neither a maritime lien nor analogous to a maritime lien as that concept is known in Australian law. The majority decision in the HALCYON ISLE was maintained as consistent with the evolution of English law.

DECISION OF MR. JUSTICE RARES

Upholds the minority decision of the HALCYON ISLE

Referring to the majority decision in the HALCYON ISLE he states at paragraph 356:

> *"With great respect, Lord Diplock's reasoning in the HALCYON ISLE that a maritime lien is procedural or remedial is difficult to reconcile with his acknowledgement of its potent and substantive impact on third parties' rights."*

DECISION OF MR. JUSTICE RARES

At paragraph 357, he states:

> *"I am of the opinion that such a right is not "procedural or remedial". It is so substantive that it transcends a change of ownership."*

He concludes, at paragraph 394, that:

> *"I agree with the dissenting reasons of Lords Salmon and Scarman and their conclusion in the HALCYON ISLE that the LEX LOCI CONTRACTUS determines whether as a matter of SUBSTANCE a maritime lien exists, but the LEX FORI determines its priority."*

THE CANADIAN PERSPECTIVE

It is interesting to note that Canada, a jurisdiction that derives its admiralty law from England applied exactly what Mr. Justice Rares states in the SAM HAWK in the IOANNIS DASKALELIS (*Todd Shipyards* vs. *Altema*, 1974 S.C.R. 1248). (The LEX LOCI CONTRACTUS determines whether as a matter of substance a maritime lien exists, but the LEX FORI determines its priority).

The IOANNIS DASKALELIS decision was rendered six years prior to the HALCYON ISLE and is highly respected by the minority judges in the HALCYON ISLE but hardly analyzed by the majority judges in the HALCYON ISLE, and for that matter the SAM HAWK, with the exception of Mr. Justice Rares and, of course, the first instance judge, Mr. Justice McKerracher.

THE CANADIAN PERSPECTIVE

In that case a Greek ship, the IOANNIS DASKALELIS, owned by a Panamanian company, and already subject to a Greek mortgage registered in 1961, was repaired in March 1963 in a Brooklyn, New York shipyard (Todd Shipyards, the same shipyard involved in the HALCYON ISLE!) and she left without paying the cost of repairs (U.S. $82,000). American law grants a maritime lien to an *American* ship repairer, which lien ranks ahead of an even earlier *foreign* mortgage (but not ahead of a recorded U.S. mortgage). The ship was diverted by the mortgagee away from the American port of Seattle and was sent to Vancouver, Canada, where she was arrested by the mortgagee. The Canadian Supreme Court accepted jurisdiction and recognized the U.S. maritime lien under U.S. law. The Court applied U.S. law, because it held that the lien was a *right* and therefore *substantive*. The Canadian Supreme Court used its own ranking (of the forum) and ranked the lien ahead of the ship mortgage.

CONCLUSION

The Australian Court of Appeal decision in the SAM HAWK is regressive. The minority decision of the HALCYON ISLE and the decision of the first instance judge in the SAM HAWK are progressive and should be followed.