20, 1980

No. 19 of 1978

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

ON APPEAL FROM THE COURT
OF APPEAL IN SINGAPORE

BETWEEN

BANKERS TRUST INTERNATIONAL LIMITED

APPELLANTS

(Intervener in Admiralty Action
in Rem No. 150 of 1974)

(Plaintiffs in Admiralty Action
in Rem No. 151 of 1974)

AND

TODD SHIPYARDS CORPORATION

RESPONDENTS

(Plaintiffs in Admiralty Action
in Rem No. 150 of 1974)

(Interveners in Admiralty Action
in Rem No. 151 of 1974)

CASE FOR THE APPELLANTS

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Part 1 p. 97 & 98

1. These are appeals from two Orders of the Court of Appeal of the Republic of Singapore, (Chief Justice Wee Chong Jin, Mr. Justice F.A. Chua, and A. P. Rajah) both dated 8th December 1977, allowing appeals from the judgment of Mr. Justice Kulasekaram, dated 19th January 1977. In his judgment Mr. Justice Kulasekaram, among other things held on the Appellants' motion in Admiralty Action in rem

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No. 151 of 1974 that in the distribution of the fund in Court from the sale of the ship the Appellants' claim for $14,413,000 due under a judgment debt in respect of a mortgage on the vessel HALCYON ISLE should have priority over the Respondents' claim for $237,011 due under a judgment debt in respect of repairs executed, materials supplied and services rendered to the vessel HALCYON ISLE. (All sums are Singapore dollars.) Mr. Justice Kulasekaram also dismissed the Respondents' motion in Admiralty Action in rem No. 150 of

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1974 seeking a declaration that they were entitled to and/or had in respect of their claim a maritime lien on the vessel HALCYON ISLE within the meaning of section 4 (3) of the High Court (Admiralty Jurisdiction) Act of Singapore (Cap. 6 of the Revised Edition 1970).

The hearing before Mr. Justice Kulasekaram lasted about five days in total and the hearing before the Court of Appeal lasted about three days.

2. The motions arise out of a number of actions against the vessel HALCYON ISLE. HALCYON ISLE was a British ship registered in the port of London and was one of the assets of Court Line which suffered a financial collapse in 1974. The Appellants who are an English Bank had a mortgage on HALCYON ISLE dated 27th April 1973. The mortgage was registered by the Registrar of British Ships in London on 8th May 1974. The Appellants started proceedings in Admiralty in the High Court of Singapore. By their writ in an Admiralty Action in rem No. 151 of 1974 issued on 28th August 1974 they claimed the sum of $14,413,000.00 due under their mortgage. On 5th September 1974, while in Singapore waters, HALCYON ISLE was arrested in the Appellants' action. On 28th February 1975 the

Part 1 p. 21 & 22

Appellants obtained judgment on their claim for $14,413,000.00 together with interest thereon and costs. On 6th March 1975, HALCYON ISLE was sold for $1,380,000.00 pursuant to an order of the Court. The proceeds of sale were paid into Court.

3. The Respondents, who are American ship-repairers had executed repairs and supplied materials to HALCYON ISLE at their repair yard at BROOKLYN, New York, in March 1974 pursuant to a contract made in New York on about 1st March 1974. The Respondents also started proceedings in Admiralty in the High Court of Singapore.

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By their Writ in an Admiralty Action in Rem No. 150 of 1974 issued on 24th August 1974 they claimed, *inter alia,* $237,011.00 due and

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Part 1 p. 46 & 47 owing to them under the said contract. By a notice of motion dated 23rd May 1975 the Respondents moved the High Court for a declaration that they were entitled to and/or had a maritime lien in respect of their claim against the HALCYON ISLE within the meaning of Section 4 (3) of the High Court (Admiralty Jurisdiction) Act and for
Part 1 p. 48 & 49 judgment on their claim. The Appellants intervened in the Respondents' action on 2nd July 1975. The Court gave judgment on the Respondents' claim for $237,011.00 together with interest thereon
Part 1 p. 49 & 50 and adjourned the Respondents' application for a declaration.

4. There were a number of other claims apart from those of the Appellants and the Respondents, and on some of them the Court
Part 1 p. 76 & 77 had previously pronounced judgment. By a notice of motion dated
Part 1 p. 50 & 51 18th August 1975 in their Admiralty Action in Rem No. 151 of 1974 the Appellants applied *inter alia* for the determination of the priority of payments to the several claimants from the funds in Court. In the event the only outstanding issue before the Court was the question of the priority as between the Appellants and the Respondents to be paid out of the funds in Court the sums for which they had respectively obtained judgment. The Appellants' motion was heard at the same time as the adjourned application for a declaration on the Respondents' motion in their Admiralty Action in Rem No. 150 of 1974. By consent, it was ordered that the evidence in each motion was to be treated as evidence common to both motions.

5. These two motions were heard by Mr. Justice Kulasekaram from 22nd March to 26th March 1976. The Respondents adduced the
Part 1 p. 43–46 expert evidence of Mr. George L. Varian in the form of an affidavit sworn on 21st April 1975 on the existence of a maritime lien on the vessel for the Respondents' claim under the law of the United States of America and connected matters. Mr. Varian's evidence was to the effect that under the maritime law of the United States of America the Respondents were entitled to a maritime lien by virtue of the fact that they had furnished repairs and supplies to HALCYON ISLE. The Appellants accepted that the Respondents were entitled to a maritime lien under the law of the United States. However the Appellants contended that nevertheless under the law of Singapore the Respondents ought not to be regarded as holders of a maritime lien and that in any event, the Appellants as mortgagees were entitled to have their judgment satisfied in priority to the Respondents.
Part 1 p. 58–75 Mr. Justice Kulasekaram held that the law of Singapore would not recognise or confer on a claim for ship repairs a maritime lien because the law of Singapore did not recognise or confer a maritime lien for this class of claim. Accordingly he held that the Appellants had priority
Part 1 p. 78 over the Respondents and dismissed the Respondents' motion for a
Part 1 p. 79–81 declaration. The Respondents appealed against this decision. In reversing the decision of Mr. Justice Kulasekaram, the Court of Appeal

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Part 1 p. 82–96

held that the Respondents' maritime lien was a substantive right to which the law of Singapore would give effect and in consequence gave the Respondents' priority over the Appellants.

6. The issue which arises on this appeal is whether or not the Respondents' judgment debt for the execution of repairs and materials supplied to HALCYON ISLE takes priority over the Appellants' judgment debt for sums due under a registered mortgage in the distribution of the proceeds of sale. The resolution of this issue depends on:

(a) whether (as the Appellants contend) the Courts of Singapore, applying the *lex fori,* will determine the priority of competing judgment debts in accordance with the nature of the particular claim and will only look to the *lex causae* to assist in determining the nature of a particular claim where it is unknown to the law of Singapore, or alternatively:

(b) whether (as the Respondents contend) a maritime lien which arises under the *lex causae*, but not under the *lex fori*, is a substantive right to which the Courts of Singapore should give effect in determining the priority of competing judgment debts.

7. The Appellants will make submissions under the following headings:

(i) The relationship between jurisdiction and priority (see paragraphs 8 to 12);

(ii) The priority of competing claims in private international law (see paragraphs 13 and 14);

(iii) The relevance of the distinction between procedure and substance (see paragraphs 15 to 20);

(iv) The differences between a maritime lien in the law of Singapore and in the law of the United States of America (see paragraphs 21 to 22);

(v) The rules of priority in public international law (see paragraph 23) and in other commonwealth jurisdictions (see paragraphs 24 to 28); and

(vi) The rules of priority in French, Belgian, Dutch and West German Law (see respectively paragraphs 29, 30, 31 and 32).

There is no material difference between the law of Singapore and the law of England.

8. The relationship between jurisdiction and priority

This relationship arises from the fact that before a Court can determine issues of priority between competing judgment debts it must have jurisdiction to hear the claims and to determine them and to order the sale of the vessel. Whether or not a foreign system of law entitles a Plaintiff to a maritime lien in respect of a claim, two questions arise. First does the Court have jurisdiction to try a claim of that nature? Secondly, if so, what priority does a judgment debt founded upon that claim have against the proceeds of sale of a vessel?

9. The Admiralty jurisdiction of the High Court of Singapore and its mode of exercise are governed by the High Court (Admiralty Jurisdiction) Act (Cap. 6). The provisions of the Act which are most relevant to these appeals are as follows:

> "3.—(1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
>
> (d) any claim in respect of a mortgage of or charge on a ship or any share therein;
>
> (l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
>
> (m) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;
>
> 4.—(1) Subject to the provisions of section 5 of this Act, the admiralty jurisdiction of the Court may in all cases be invoked by an action *in personam.*
>
> (2) The admiralty jurisdiction of the Court may in the cases mentioned in paragraphs (a) to (c) and (r) of subsection (l) of section 3 of this Act be invoked by an action *in rem* against the ship or property in question.
>
> (3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, the admiralty jurisdiction of the Court may be invoked by an action *in rem* against that ship, aircraft or property.

(4) In the case of any such claim as is mentioned in paragraphs (d) to(q) of sub-section (1) of section 3 of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action *in personam* was, when the cause of the action arose, the owner of or charterer of, or in possession or in control of the ship, the admiralty jurisdiction of the Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action *in rem* against:

(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.

(7) Where in the exercise of its admiralty jurisdiction the Court orders any ship, aircraft or other property to be sold the Court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale."

10. The jurisdiction of the High Court depends on the claim coming within one of the classes listed in section 3(1). If it does not fall within one of these classes the Court has no jurisdiction, even if rights which are the same as or similar to a maritime lien arise under a relevant foreign law; see The Tolten [1946] P. 135 (C.A.) per Scott L. J. at p. 161 and The Acrux [1965] P. 391. Conversely, the High Court has jurisdiction if the claim falls within one of these classes, even if under some other relevant system of law there is no maritime lien or jurisdiction in rem; see The Milford (1858) Swabey 362, The Tagus [1903] P. 44, The Colorado [1923] P. 102 (C.A.) at pp. 108 and 110. Section 4 provides for the procedure by which this jurisdiction may be invoked; see The Eschersheim [1976] 1 Lloyd's Rep. 81 C.A. and [1976] 2 Lloyd's Rep. 1 H.L. (E.) and The Acrux (supra). If a claim is within one of the classes listed in Section 3 (1) and gives rise to a maritime lien or other charge on the ship, the jurisdiction can be exercised against the ship regardless of any subsequent change of ownership by reason of Section 4 (3). The construction of this subsection confines the meaning of "maritime lien" to a maritime lien which arises only under the law of Singapore and not under the law of any other country; see The Acrux (supra) at p. 402. The meaning of "other charge" is confined to a charge on a vessel given under the law of any nation to secure claims similar to those which under the law of Singapore would give rise to a maritime lien; see The Acrux (supra) at p. 403. It is submitted that in this case although the Court of Singapore has jurisdiction over the Respondents' claim under Section 3(1)(1) and (m), that jurisdiction

could not be invoked under Section 4(3) as a maritime lien or other charge but only under Section 4(4) as a claim falling within Section 3 (1) (1) and (m).

11. It is submitted that in principle and on authority the priority of competing judgment debts should also be determined according to the nature of the claims. In principle it is desirable that the approach to priority should be the same as the approach to jurisdiction for three reasons. First this approach provides simplicity and consistency. The law of the forum controls the determination of the order of priorities according to the policies applied by that system of law. Secondly, it avoids the problem of determining whether or not a right given by some other system of law is analogous to a maritime lien. Thirdly, since priorities are ranked in the order of (i) those claims with maritime liens which are recognised by the law of Singapore, followed by (ii) mortgages followed by (iii) other statutory liens, the nature of each claim must be considered in order to determine whether it falls within one of these categories and what its priority is within that category. The authorities establish that even where a claim does not give rise to a maritime lien under the relevant foreign law but would under the *lex fori*, a judgment debt for that claim will be given the priority appropriate to claims of that nature under the *lex fori;* see The Union (1860) Lush. 128, The Tagus [1903] P. 44, The Colorado [1923] P. 102, Dicey: Conflict of Laws (9th edition) p. 1113. Conversely where a claim does give rise to a maritime lien under the relevant foreign law but not under the *lex fori* it will be given the priority appropriate to the class of claim. This may be below some other claim which does not give rise to a maritime lien under either the *lex fori* or any other system of law; see The Zigurds [1932] P. 113.

12. Where a Plaintiff makes a claim with which the *lex fori* is not familiar, the Court must consider what the nature of the claim is in order to determine whether the Court has jurisdiction and, if it has, in order to determine the priority of a judgment debt for that claim. In performing this task, the Court must consider what characteristics the claim has under the relevant foreign law. Once it has determined with which of the established classes of claim the unfamiliar claim is most closely analogous, the Court assumes jurisdiction and determines priority as though the unfamiliar claim belonged to that class; see The Colorado [1923] P. 102, Dicey: Conflict of Laws (9th edition) p. 1113.

13. The priority of competing claims in private international law.

The determination of the order of priority of competing claims or judgment debts which arise on the distribution of a fund is essentially the process of administering the equities as developed by legislation. Examples are such matters as bankruptcy, company liquidations,

mortgages, the administration of insolvent estates and claims against the proceeds of sale of a vessel. This was recognised in The Colorado (supra) per Scrutton L. J. at pages 108–109. In every case in which the Court determines questions of priority, it will first identify the nature of the claim. In order to do this the Court will consider the foreign law to determine the characteristics of a particular claim if the particular claim is unfamiliar to the *lex fori*. On the basis of those characteristics, the Court will identify the claim according to the class of claim with which it is most closely analogous. Having identified the class of claim, the Court will give priority to the claim in accordance with the priority given by the *lex fori* to claims of that particular class. This process is apparent in the field of Admiralty Law; see The Colorado [1923] P. 102: in the field of bankruptcy; see Ex. p. Melbourn (1870) L.R. 6 Ch. App. 64: in the field of company liquidations; see In re Suidair International Airways Ltd. [1951] Ch. 165 at 173: in the field of mortgages; see Re Courtney Ex. p. Pollard (1840) Mont. & Ch. 239: in the field of the administration of insolvent estates; see In re Kloebe (1884) 28 Ch. D. 175 and In re Lorillard [1922] 2 Ch. 638 (C.A.) and in the field of the administration of trust funds; see Kelly v. Selwyn [1905] 2 Ch. 117. In all these cases the *lex fori* is applied to the administration of equities in order to avoid the confusion that would otherwise arise in determining priorities by reference to other laws with conflicting rules of priority. It is not applied on the basis of a distinction between matters of procedure and matters of substantive right; see In re Suidair International Airways Ltd. (supra).

14. The approach contended for by the Respondents would result in that very confusion which the application of the *lex fori* to the administration of equities is designed to avoid. There are, it is submitted, the folowing objections to their approach. Firstly, it would mean that the Court must determine questions of policy not in accordance with the equitable or statutory rules of the *lex fori* but in accordance with the policy of some other system of law. Secondly, the characteristics of a claim under a foreign system of law, while material under the *lex fori*, might not be material in determining priorities under that foreign system of law. An example is such a case as the present where under the foreign law a mortgage has priority over a repairers' maritime lien. Thirdly, claims of the same class but subject to a number of different systems of law would be ranked differently by the Court accordingly to their characteristics under the different systems of law. Fourthly, the Court would need to consider evidence of foreign law about the characteristics of a claim even where claims of its class are well known to the Court.

15. The relevance of the distinctions between substance and procedure

Before Mr. Justice Kulasekaram and the Court of Appeal the Respondents argued that a maritime lien is a substantive right and that if a maritime lien arises under the *lex causae* the Court should give effect to it. The Appellants contended that a maritime lien is a procedural remedy and should be given effect to in determining priorities only where a maritime lien arises under the *lex fori*. The Court of Appeal held that the Respondents' maritime lien was a substantive right and should be carried into effect in the determination of priorities.

16. It is respectfully submitted that there are two serious objections to this traditional approach. Firstly, the traditional analysis of the problem in terms of substance and procedure is artificial and disguises the policy decision inherent in giving one judgment debtor priority over another; see Boys v. Chaplin [1971] A.C. 356 per Lord Wilberforce at pp. 392 and 393 and The Monica S. [1968] P. 741 per Brandon J. at 768. If a maritime lien is characterised as a remedy the Court applies the policy of the *lex fori*. If it is characterised as a substantive right, the policy of the *lex causae* is applied. It is respectfully submitted that the policy of the *lex fori* should be, and is, applied to determine priorities of competing judgment debts.

17. Secondly, it is submitted that the approach characterises the wrong issue. It is submitted that the issue which should be characterised is the order in which competing judgment debts should be ranked and not the status of a maritime lien either as a procedural remedy or a substantive right. If the traditional approach is adopted, it is submitted that the relevant issue for characterisation is the order in whcih judgment debts are ranked in the distribution of a fund in Court, and that this issue is to be characterised as a procedural or remedial matter to which the *lex fori* applies; see The Colorado (supra) at pp. 109, 110 and 111. On this basis the traditional approach achieves a result consistent with the authorities on the administration of equities between competing claims in other fields of the law. It is submitted that the Respondents' selection of the maritime lien as the proper issue for characterisation is neither justified by authority nor relevant to the determination of priorities.

18. If contrary to this submission it is relevant to characterise the status of a maritime lien, it is submitted that the weight of authority is in favour of characterising a maritime lien as a procedural remedy. The nature of a maritime lien has been considered in a variety of contexts. Three distinct views are discernible in the authorities, the first two of which favour the Appellants' submission. The first is the view of the Privy Council in The Bold Buccleugh (1851) 7 Moo P.C. 267 at 284 where it was held in a judgment delivered by Sir John Jervis that a maritime lien means "a claim or privilege upon a thing to be carried into effect by legal process". This decision was approved by the

House of Lords in Currie v. McKnight [1897] A. C. 97. This defiintion of a maritime lien was expressly approved by Gorell Barnes L.J. in The Ripon City [1897] P. 226 at 241 and by Bankes L.J. and Scrutton L.J. in The Tervaete [1922] P. 259 at pp. 264 and 270. The second view was put forward in this last case by Atkin L.J. at p. 274 where he held that a maritime lien was confined to a right to take proceedings in a Court of Law to have the ship seized and if necessary sold and was essentially different from a right of property. The third view was expressed by Scott L.J. in The Tolten [1946] P. 135 at 145. Having considered the first view, he described a maritime lien as a rule of substantive law in admiralty and a vested right of property. This view was adopted by the Court of Appeal. It is submitted that the view expressed by Scott L.J. is *obiter dicta* and should not be applied out of the context of the issues arising in that case, namely the jurisdiction of the Court in a case in which a ship damages a wharf forming part of the soil of a foreign territory.

19. The third view takes no account of the historical development of the maritime lien. The maritime lien developed as a procedural method of securing the personal appearance of a Defendant and the provision of a fund to meet a judgment, by the arrest of property belonging to the Defendant within the jurisdiction of the Court; see The Dictator (1892) P.D. 304. A maritime lien arises only in a limited class of case, the principal of which are bottomry, salvage, wages, master's wages, disbursements and liabilities and damage; see The Ripon City [1897] P. 226 at 242. In other cases such as claims for necessaries, there is jurisdiction *in rem,* but no maritime lien; see The Two Ellens (1872) L.R. 4 P.C. App. 161, and The Heinrich Bjorn (1886) 11 A.C. 270. It is submitted that the history of the evolution of the maritime lien demonstrates that it is a procedural remedy and not a vested right of property.

20. The only feature which a maritime lien has which is similar to a right of property is that a maritime lien is valid against a person who purchases the vessel after the lien has arisen. However, this feature is not an exact parallel. A maritime lien is not defeated by a sale even where the purchaser is *bona fide* and without notice of the lien. However a legal interest may be defeated by a sale to a *bona fide* purchaser without notice of the interest if one of the exceptions to the doctrine of *nemo dat quod non habet* applies. An equitable interest is generally defeated by a sale to a *bona fide* purchaser without notice of the interest. The reason that a maritime lien is valid against a subsequent purchaser is that this characteristic is necessary to preserve the usefulness of a lien which would otherwise be defeated by a transfer of the vessel; see The Ripon City (supra) 246. It does not, it is submitted, derive from a proprietary interest. A maritime lien has none of the other characteristics of a right of property. It gives the holder no

right to possession of the ship; see The Bold Buccleugh (supra) at 284. It is doubtful whether it can be transferred: see The Petone [1917] P. 198. A further distinction can be drawn between a right of property in a ship and a maritime lien. A right of property will not be lost through a failure to exercise it. A right of property will be lost either by (a) a valid transfer or (b) acquiescence in the assertion of some other inconsistent right over the ship or (c) the failure to seek redress against a violation of the right within the appropriate statutory limitation period. A maritime lien may be lost by (a) a failure to exercise the right of action from which it arises, either within the period of statutory limitation or the time permitted by the doctrine of laches or (b) by merger with a judgment in the action; see The Alletta [1974] 1 Lloyd's Rep. 40. It is submitted that a maritime lien is more closely analogous to a statutory lien which is a procedural remedy than to a right of property; see The Monica S. [1968] P. 741 at p. 768. It is further submitted that if it is necessary to characterise a maritime lien in order to determine the priorities of the judgment debts, it should be characterised as a procedural remedy and the *lex fori* should accordingly be applied to determine whether the law of Singapore will recognise a maritime lien in respect of the Respondents' claim.

21. The difference between a maritime lien in the laws of Singapore and the United States of America

The Respondents' approach assumes that a maritime lien is the same concept regardless of the system of law under which it is created. This is not so and there are significant differences between a maritime lien in the law of Singapore and in the law of the United States of America. The fundamental difference is that under the law of Singapore a maritime lien is essentially a procedural device for securing jurisdiction over those interested in the vessel; see The Utopia [1893] A.C. 492, 499 and The Cristina [1938] A.C. 485, 491, 505. Under the law of the United States of America, the vessel itself may be liable even where there is no liability on those interested in her; see The China 74 U.S. (7 Wall) 53 (1869); Homer Ramsdell Transportation Company v. La Compagnie Generale Transatlantique 182 U.S. 406. In the law of Singapore maritime liens arise in only a restricted number of the claims listed in Section 3(1) High Court (Admiralty Jurisdiction) Act, namely bottomry, salvage, wages, master's wages disbursements and liabilities, and damage; see The Ripon City [1897] P.226. There is jurisdiction in rem against the ship for other claims, including claims under Section 3(1)(l) and (m) but no maritime lien arises; see The Two Ellens (1872) L.R. 4 P.C. App. 161, and The Heinrich Bjorn (1886) 11 A.C. 270, 277. All claims within the Admiralty jurisdiction may be brought either in rem or in personam; see Section 4, High Court (Admiralty Jurisdiction) Act. The position is different in the law of the United States of America where a maritime lien exists for every

claim (including both claims under preferred mortgages and claims for repairs and supplies; see respectively subsections K and P of the Ship Mortgage Act 1920 as amended) in which there is jurisdiction in rem; see The Rock Island Bridge 73 U.S. (6 Wall) 213, 215 (1867). Some maritime claims within the Admiralty jurisdiction of the American Courts do not give rise to a maritime lien. A seaman's claim under statute for personal injuries, claims for premiums and marine insurance policies and claims for wages by Masters of foreign ships and some other claims can only be pursued *in personam.*

22. By the law of Singapore the order of priority is derived from caselaw except in the case of life salvage and the priority of registered mortgages *inter se.* In determining the order of priorities the Courts are guided by previous authority, equity and justice; see The Mons [1932] P.109. By the law of Singapore those claims which give rise to maritime liens generally have priority over mortgages and claims which do not give rise to maritime liens. However under the law of the United States of America the fact that a claim gives rise to a maritime lien is not in itself significant in determining priorities between claims over which the Courts have jurisdiction *in rem.* There is a greater degree of regulation by statute. The Ship Mortgage Act 1920 as amended in 1954 provides that a preferred mortgage lien has priority over all claims against the vessel except, *inter alia,* a lien arising prior in time to the recording or endorsement of a preferred mortgage. There is a further exception in the case of a preferred mortgage lien on a foreign vessel which is subordinate to maritime liens for repairs, supplies, towage, use of dry dock or marine railway, or other necessaries performed or supplied in the United States. The position under the law of the United States of America is therefore that the claim of a preferred mortgagee of a United States vessel has priority over all claims for supplies and repairs arising after the recording and indorsement of the mortgage. A preferred mortgage of a foreign vessel will have priority over claims for such supplies and repairs arising outside the United States. Claims for supplies provided and repairs executed within the United States have priority against a preferred mortgage of a foreign ship. This situation arises because it is the policy of the legislature of the United States to give priority to the claims of American necessaries men over preferred mortgagees of foreign vessels. It is respectfully submitted that there is no reason for the Courts of Singapore to give effect to this aspect of the legislative policy of the United States in preference to the policy of the law of Singapore.

23. The rules of priority in Public International Law

Two international conventions have considered the question of the priority of the claims of mortgagees and claims for supplies and

repairs to a ship. Article 3 of the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages 1926 provides that mortgages shall rank immediately after certain secured claims. The only circumstances in which a claim for supplies or repairs is a secured claim for the purposes of the Convention are those where the vessel is away from the home port and the supplies or repairs are necessary for the preservation of the vessel or the continuation of the voyage. All other claims for supplies and repairs rank after the claim of the mortgagees. Under Article 6(2) of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967, a ship repairer is entitled to a lien which takes priority to a registered mortgage but only while the vessel is in the possession of the ship-repairer. When the vessel ceases to be in the possession of the shiprepairer the lien is extinguished together with the priority it confers. The 1926 Convention came into force on 2nd June 1931. The Convention was signed but not ratified by Great Britain. The 1967 Convention has been signed but not ratified by Great Britain. It has not yet been ratified by a sufficient number of countries to bring it into force. Neither Convention has been signed or ratified by the Republic of Singapore. It is respectfully submitted that there is no reason, in public international law, for the Courts of Singapore to give the Respondents' judgment debt priority over that of the Appellants.

24. The rules of priority in other Commonwealth Jurisdictions.

Many Courts in various Commonwealth countries have considered issues similar to those arising on the present appeal. With one exception, they have consistently held, applying the *lex fori,* that ship mortgagees have priority over other judgment debtors claiming a maritime lien only under the *lex causae*; see The Zigurds [1932] P. 113 (the English Admiralty Court); Robert Clark v. Bowring & Co. [1908] SC 1168 and Constant and Klompus [1912] S.C.R. 27 (the Scottish Court of Sessions), Coal Export Corporation v. Notias George & Others [1962] E.A.R. 220 (the Court of Appeal of Aden), and The Christine Isle [1974] A.M.C. 331 (the Supreme Court of Bermuda).

25. The exception to this otherwise uniform approach is the decision of the Supreme Court of Canada in Ioannis Daskelelis [1974] 1 Lloyd's Rep. 174. In that case the Court held that the claim of an American shiprepairer with a maritime lien under the law of the United States, but not under Canadian law, had priority over the claim of a mortgagee. It is respectively submitted that the deceision is not supported by the authorities on which it is based, and is wrong. Alternatively, it is submitted that the law of Canada has diverged from the law in all the other Commonwealth countries where the issue has arisen and should not be followed. In either case the result could be supported upon the particular facts of the case.

26. Canadian law has developed from the decision of the Supreme Court of Canada in The Standhill v. Walter W. Hodder [1926] 4 D.L.R. 801. This case concerned a claim for necessaries supplied to the "Standhill" while she was in an American port. The issue was whether the Statement of Claim should be struck out on the ground that it disclosed no cause of action within the jurisdiction of the Exchequer Court of Canada in Admiralty. The Supreme Court held that Section 5 of the Admiralty Court Act 1861 gave the Court jurisdiction in that case. The Court also held that the defence that the owners of the vessel had purchased the vessel since the supply of the necessaries should be determined at the trial. The Court went on to express the view that the Court might enforce a maritime lien notwithstanding the fact that the lien had been acquired in a foreign country. It appears from the judgment that in the view of the Court it could only enforce such a lien where it had jurisdiction to do so. The Court was careful to make clear that priorities should be determined by the *lex fori*. The Court was also careful not to express any opinion on the effect that a maritime lien, existing only under the law of the United States, might have on priorities. It is submitted that the view expressed by the Court was not necessary for its decision and was *obiter dicta*. It is further submitted that it is wrong if it is to be inferred from that view that the existence of a foreign maritime lien can either confer jurisdiction over a claim where the Court would not otherwise have jurisdiction or require the Court to administer the equities of competing claims in an order different from that of the *lex fori*.

27. In Baker, Carver & Morrell v. The Astoria [1927] 4 D.L.R. 1022, the Exchequer Court of Canada purported to follow The Standhill (supra). It held that if a necessaries man had a maritime lien under American law by virtue of the Ship Mortgage Act 1920, the Canadian Courts would have jurisdiction by virtue of that maritime lien regardless of whether the claim was within Section 5 Admiralty Court Act 1861. It is submitted that the Exchequer Court was not bound by The Standhill (supra) to reach this conclusion and that it was a wrong decision.

28. In The Ioannis Daskelelis (supra), the Supreme Court of Canada was faced with the task upon which the Court in The Standhill (supra) was careful to avoid expressing any view, namely to determine priorities between a necessaries man with a maritime lien under the law of the United States under the Ship Mortgage Act 1920 and the mortgagee of the ship. It is submitted that The Standhill (supra) and Baker Carver & Morrell v. The Astoria (supra) are not relevant to this issue. Another Canadian case, Marquis v. The Ship Astoria [1931] Ex. C.R. 195, in which the Court held that an American mortgagee took priority to an American necessaries man with a maritime lien

under the law of the United States, was not followed by the Supreme Court. The authorities on which the Supreme Court relied in refusing to follow this decision were a passage in Chesire's Private International Law 8th Ed. at p. 676 and The Colorado [1923] P. 102. It is submitted that in the passage cited from Chesire's Private International Law, the learned editors fail to distinguish between the nature of a right given by a foreign law and the nature of a claim under a foreign law. It is submitted that the Court is if necessary entitled to consider the *lex causae* to determine the nature of a claim for which judgment has been given, in order to determine the priority of the judgment debt. It will then apply the *lex fori* in determining the right of the judgment debtor to priority over others; see Dicey: Conflict of Laws (9th Ed.) p. 1113. In The Colorado (supra) the Court of Appeal held that the claim under a French *hypothèque* was most closely analogous to a mortgage because the claim *in rem* under a *hypothèque* was not defeated by a sale of the ship. In this respect the claimant under a French *hypothèque* is in a similar position to a mortgagee in English law, see Section 34 Merchant Shipping Act 1894. The decision of the Court of Appeal turned on the analogy between claims under a French *hypothèque* and an English mortgage. On the basis of that analogy, the Court held that a claim under a *hypothèque* took priority to a claim for necessaries. It is submitted that the Supreme Court of Canada was wrong to hold that the case was authority for the contention that where a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English Courts will recognise it and will accord it the priority which a right of that nature would be given under English procedure. For these reasons, it is submitted that The Ioannis Daskelelis (supra) is wrong in law, or alternatively that the law of Canada is different from the law of Singapore and should not be followed. In any event consideration of the particular facts of that case will show that in order to reach an equitable result, there may well have been good grounds for departing from the ordinary rules of priority to allow the necessaries man to come before the mortgagees; see [1974] 1 Lloyd's Rep. 174 at pp. 178-9.

29. French law. France signed the 1926 Convention and ratified it in 1935. The provisions of the Convention were incorporated into French Law by the Law of 3rd January 1967. France is not a party to the 1967 Convention. Writers differ on the question of whether the validity of a maritime lien granted under the *lex causae* should be determined by the law of the flag or by the *lex fori*. They also differ as to whether priority between securities (i.e. between maritime liens and mortgages) should be determined by the law of the flag or by the *lex fori*. The published cases indicate that except in the case of a properly registered mortgage, French Courts have always applied French law to determine these questions as a matter of public policy. The validity of a properly

registered mortgage is determined by the law of the flag. The priorities between such a mortgage and maritime liens are determined by French law. A mortgage which was not properly registered would not be recognised as a valid security against a ship by a French court. In the present case the French courts would rank the judgment debt of the Respondents over that of the Appellants only if the situation which gave rise to the maritime lien granted under U.S. law would give rise in French law to a maritime lien which has priority over the mortgage. Only if the Respondents claim fell within Article 2 (5) of the 1926 Convention, which has been incorporated into French law by Article 31 (6) of the Law of 3rd January 1967, would it have such priority in French law.

30. Belgian Law. Belgium signed the 1926 Convention and ratified it in 1928. The provisions of the Convention were incorporated into Belgian Law by the Belgian Law of 20th November 1928. Belgium is not a party to the 1967 Convention. Under the rules of Belgian private international law the priority of claims against a foreign registered ship would be determined by Belgian Law as the *lex rei sitae* or the law of the country where the ship was arrested and sold. Foreign registered mortgages and foreign liens are only admitted and enforced if and to the extent that their equivalent is found in the Belgian Commercial Code. In this case the Belgian Courts would apply Belgian Law to the determination of the priorities between the respective judgment debts of the Appellants and the Respondents. In Belgian Law, the Appellants' mortgage would be treated as a mortgage falling within Article 1 of the 1926 Convention. By virtue of Article 3 of the Convention the Respondents' judgment debt would only take priority over that of the Appellants' in Belgian Law if it fell within Article 2 (5) of the Convention. Because the Convention is part of the Belgian "Loi Maritime", its provisions apply even if neither of the countries whose laws govern the mortgage and the contract for repairs and supplies are among the contracting States of the Convention, provided the circumstances giving rise to the claims under the *lex causae* are in accordance with the conditions laid down in the "Loi Maritime."

31. Dutch Law. The Netherlands signed the 1926 Convention but has not ratified it. The Netherlands is not a party to the 1967 Convention. Under the rules of Dutch private international law, the validity of a claim against a foreign registered ship is determined by the *lex causae*. The priority of competing claims against such a ship is determined by Dutch Law as the *lex fori*. Claims governed by a foreign law are given the same priority as analogous claims in Dutch Law. In Dutch Law a mortgagee has priority over a claimant who has supplied goods or carried out repairs to the ship. In this present case, the Dutch Courts would rank the judgment debt of the Appellants over that of the Respondents.

32. West German Law. West Germany signed but did not ratify the 1926 Convention. West Germany is not a party to the 1967 Convention. Under the rules of West German private international law, the West German Courts will apply the *lex causae* in determining the validity of a claim against foreign registered ships and whether such claim gives rise to a maritime lien. The Courts will apply the *lex fori* in determining the priority of competing claims. The West German Courts will recognise foreign maritime liens only if analogous German maritime liens exist and will rank foreign maritime liens in the same order as analogous German maritime liens, provided that such recognition and ranking is not contrary to public policy. In West German Law a maritime lien has priority over a mortgage. Until 1972, a maritime lien arose in West German Law in respect of debts due under, *inter alia,* repair, supply and service contracts which had been concluded on the part of the vessel by the master, while acting within the scope of his statutory authority. In 1972, the Maritime Law Amendment Act 1972 significantly reduced the number of claims which give rise to a maritime lien in West German Law. In particular it abolished maritime liens for debts due under a master's contract for, *inter alia,* repairs, supplies and services. In this present case, the West German Courts would not give effect to the Respondents' maritime lien because it arises only in the Law of the United States of America and an analogous maritime lien does not exist in West German Law. The West German Courts would therefore rank the Appellants' judgment debt over that of the Respondents.

33. Two conclusions, it is submitted, can be drawn from this summary of French, Belgium, Dutch and West German law. Firstly, except where Article 2 (5) of the 1926 Convention applies, those systems of law give the judgment debt of a foreign mortgagee, such as the Appellants, priority over the judgment debt of a foreign supplier or repairer, such as the Respondents. Secondly, although the Courts of each of these Countries may determine the validity of a claim by some system of law other than the *lex fori,* in all these systems of law priorities of cempeting claims are determined according to the *lex fori.* Accordingly, it is submitted that the application by the Courts of Singapore of the *lex fori* to determine the priority of competing judgment debts would be in line with the systems of law in these countries.

34. The Appellants therefore submit that the appeals should be allowed and the decision of Mr. Justice Kulasekaram restored for the following amongst other

REASONS

1. The Court of Appeal were wrong to hold that a maritime lien is

a vested right of property which confers a true charge on the ship of a proprietary kind. A maritime lien is a procedural remedy.

2. The Court of Appeal wrongly proceeded on the basis that a maritime lien under the law of the United States of America was in all respects the same as a maritime lien under the law of Singapore.

3. Priorities as between the judgment debtors are determined under the law of Singapore according to the nature of the competing claims upon which they are founded and not according to any rights, substantive or procedural, which may arise under the proper law of those claims.

4. There is no reason in principle why in determining priorities the Court of Singapore should give effect to a maritime lien acquired only by virtue of a foreign law. The effect of doing so is to create uncertainty, difficulty, and injustice for other claimants upon the proceeds of sale.

5. There is no authority which compels the Court of Singapore to give priority to the Respondents. There is no persuasive authority which supports the Respondents' case. All the relevant authorities (with the exception of The Ioannis Daskelelis) support the Appellants' case.

6. The interpretation of The Colorado (supra) by the Supreme Court of Canada in The Ioannis Daskelelis (supra) is wrong. The correct interpretation is that the claim under a *hypothèque* was treated as analogous to a claim under a mortgage and was ranked accordingly.

7. It would accord with the legal approach of other friendly maritime nations if this appeal were to be allowed.

8. The Court of Singapore ought not to have ranked a judgment debtor with a maritime lien valid only under the law of the United States above a judgment debtor with a valid registered mortgage.

MICHAEL THOMAS
SIMON GAULT

No. 19 of 1978

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

ON APPEAL FROM THE COURT
OF APPEAL IN SINGAPORE

BETWEEN

BANKERS TRUST INTERNATIONAL LIMITED

APPELLANTS

(Intervener in Admiralty Action in Rem No. 150 of 1974)

(Plaintiffs in Admiralty Action in Rem No. 151 of 1974)

AND

TODDS SHIPYARDS CORPORATION

RESPONDENTS

(Plaintiffs in Admiralty Action in Rem No. 150 of 1974)

(Interveners in Admiralty Action in Rem No. 151 of 1974)

CASE FOR THE APPELLANTS

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