

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL IN SINGAPORE

B E T W E E N :

BANKERS TRUST INTERNATIONAL LIMITED Appellants

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

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

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- 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)

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CASE FOR THE RESPONDENTS

Record

1. This is an Appeal from the Judgment dated the 8th day of December 1977 and two Orders dated the 9th day of March 1978 of the Court of Appeal in Singapore (Wee Chong Jin C.J., F.A.Chua and A.P. Rajah JJ.) whereby an appeal was allowed by the Respondents herein from the Judgment of the High Court of the Republic of Singapore (Kulasekaram J.) dated the 19th day of January 1977. By their Orders the Court of Appeal in Singapore reversed the decision of the learned Trial Judge and held that the Respondents' claim for repairs carried out to and necessaries supplied to the vessel "HALCYON ISLE" should rank in priority to the Appellants' claim in respect of a mortgage over the vessel.

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Pp 82-96

Pp 97-98

Pp 99-100

Pp 58-75

Record

2. The question for decision in this Appeal involves the proper order for priority for payment out of the proceeds of sale of the vessel "HALCYON ISLE" as between the mortgage claim of the Appellants and the ship repair claim of the Respondents.

3. The point raised by this Appeal is whether the Courts of Singapore ought, when deciding the priority of claims against the proceeds of sale of a vessel, to recognise a maritime lien conferred by the law of the United States of America, which was the proper law governing the contract made between the Respondents and the Owners of the vessel, as a substantive right giving the Respondents' claim priority over the claim of the Appellants who were mortgagees of the vessel. 10

Pp 2-4 4. By an action begun by Writ of Summons on the 24th day of August 1974 (Admiralty action in rem. No. 150 of 1974) against the Owners of the vessel "HALCYON ISLE", a British Registered ship, the Respondents claimed Singapore dollars 237,011 with interest for repairs executed, materials supplied and services rendered to the vessel at Brooklyn in March 1974 and a declaration that the Respondents were entitled to have a maritime lien in respect of their said claim. 20

Pp 13-14 As appears from their Statement of Claim in this action and from the Affidavit of Edward P. Degnan, and the exhibits thereto in March 1974 30

Pp 25-42
Pp 13L. 25-
P 14L.1.
P 40L.11-
P 42L.30 the Respondents executed repairs and supplied materials to the "HALCYON ISLE" pursuant to a contract between the Respondents and the Owners of the "HALCYON ISLE" contained in or evidenced by a letter dated the 1st day of March 1974 or alternatively by an oral contract entered into on or about the 1st day of March 1974.

Pp 4-6 5. By an action begun by Writ of Summons on the 28th day of August 1974 (Admiralty action in rem. No. 151 of 1974) against the Owners of the vessel "HALCYON ISLE" the Appellants claimed Singapore dollars 14,413,000 being the amount of the Appellants' mortgage on the vessel. As appears from their Statement of Claim in this action, on the 15th day of February 1973 the Appellants agreed to loan to the Owners of the "HALCYON ISLE" United States dollars 5,800,000 (equivalent to Singapore dollars 14,413,000) in order to purchase two vessels 40

Pp 6-12

10 one of which was subsequently renamed the
"HALCYON ISLE". In consideration for the said
loan the Owners of the "HALCYON ISLE" agreed to
mortgage the said two vessels as security for the
repayment of the said loan and interest. On the
23rd day of February 1973 the purchase of the two
vessels was completed and in compliance with the
terms and provisions of the loan agreement
statutory legal mortgages and a deed of covenant
to accompany the said mortgages were executed in
respect of the two vessels. The statutory
mortgage of the "HALCYON ISLE" was entered with
with the Registrar of British Ships, Port of
London, on the 8th day of May 1974. The said
loan agreement and deed of covenant contained
provisions which provided that in the event of
certain specific acts of default the Appellants
were entitled to declare by notice, all the
principal of and accrued interest on the loan
20 to be due and that the same should forthwith
become due and payable. On the 16th day of
August 1974 following certain (specified)
defaults by the Owners of the "HALCYON ISLE" the
Appellants, by written notice, declared the
principal of the loan (being United States
dollars 5,800,000) together with interest
thereon at the rate of 5 per cent per annum from
the 23rd day of February 1973 to be due and
owing.

30 6. On the 5th day of September 1974 the
"HALCYON ISLE" was arrested whilst lying in
Singapore by the Appellants in their action (No.
151 of 1974). As appears from the sworn
affidavit of Mootatamby Karthigesu, Advocate
and Solicitor of Singapore, the vessel was ordered
to be appraised and sold by an Order of the Court
on the 18th day of October 1974 and the proceeds
of sale to be paid into Court. On the 6th day
of March 1975 the vessel was sold for dollars
40 1,380,000 and the proceeds of sale were paid into
Court.

P59-11.18-22
Pp 17-21

P 18 11.5-9

P57 11.25-30

50 7. Upon a Notice of Motion in action No. 151 of
1974 dated the 26th February 1975 the Appellants
sought a declaration as to the validity of the
mortgage, judgment for the sum of Singapore
dollars 14,413,000 together with interest thereon
at 5 per cent per annum from the 28th day of
February 1974 and costs and an order that payment
of the said sum be deferred until after the
determination of priorities. By an Order dated
the 26th day of February 1975 the High Court of

Pp 15-16

Pp 21-22

Record

- P 23 the Republic of Singapore (Tan Ah Tah J.) gave judgment for the Appellants. By a further Order of the same date the Court ordered that the order of priority of the claim against the proceeds of sale of the vessel should not be determined until after the expiration of 60 days from the date when the proceeds of sale were paid into Court.
- P 47 8. Upon a Notice of Motion in Action No. 150 of 1974 dated the 23rd day of May 1975 the Respondents sought a declaration that they were entitled to 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 (Cap. 6 of the Revised Edition 1970), judgment in the sum of Singapore dollars 237,011 (equivalent to United States dollars 95,569) together with interest at the rate of 8 per cent per annum from the 1st day of August 1974 or as might be just, costs, and an order that the said sum together with interest and costs be paid out of the proceeds of sale of the "HALCYON ISLE". The Appellants intervened by entering an appearance dated the 2nd day of July 1975. ~~On the 4th day of July 1975.~~ On the 4th day of July 1975 the High Court of the Republic of Singapore (Wee Chong Jin C.J.) ordered that judgment be entered for the Respondents in the sum of Singapore dollars 237,011 together with interest but that the prayer for a declaration that the Respondents were entitled to or had a maritime lien in respect of their claim, the prayer for costs and the prayer for payment of the said judgment sum out of the proceeds of sale were adjourned sine die.
- Pp 48-49
- Pp 49-50
- Pp 50-51
9. By a Notice of Motion in action No. 151 of 1974 dated the 18th day of August¹⁹⁷⁵ the Appellants' moved the Court for the determination of the priority of payments to the several claimants against the funds in Court and for the payment out of the amounts found due to the various claimants. The only dispute as to a right of priority was between the Appellants and the Respondents.
10. At the hearing of the Motions in the Admiralty Action in Rem.No.150 of 1974 and the Admiralty Action in Rem.No.151 of 1974 before the

High Court of the Republic of Singapore
(Kulasekaram J.) expert evidence was given on
the law of the United States of America by an
affidavit of George L. Variansworn on the 21st
day of March 1975 as to the existence of a
maritime lien on a vessel in respect of a claim
for furnishing repairs, supplies or other
necessaries to a vessel. In particular he
referred to 46 United States Code, sections
971 which provides:-

Pp 43-46

P 44 1 35 -
P 45 1 7

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"S.971 Persons entitled to lien. Any
person furnishing repairs, supplies,
towage, use of dry dock or marine railway
or other necessaries, to any vessel, whether
foreign or domestic, upon the order of the
owner of such vessel, or of a person
authorised by the owner, shall have a
maritime lien on the vessel, which may be
enforced by suit in rem, and it shall not
be necessary to allege or prove that
credit was given to the vessel."

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He further stated

"I have examined TODD'S records relating to
the services and repairs it performed on the
"HALCYON ISLE" and it is my considered
opinion that under the substantive United
States Maritime law the rendition of such
services and repairs gives rise to a valid
maritime lien in favour of TODD against the
vessel which confers upon TODD rights of the
same nature and quality as are conferred upon
the holder of a maritime lien under English
law."

P 4511.19-29

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There was no serious dispute on the evidence of
George L. Varian.

P 61 11 27-28

11. Kulasekaram J. gave judgment on the 19th day
January 1977. He first described the nature of the
claims and set out certain of the facts. He
correctly found that it was not in dispute that
the Respondents' claim for repairs under the laws
of the United States of America conferred a
maritime lien on the vessel. After setting out
the relief sought by the Respondents in their
motion and the nature of the evidence contained
in the affidavit of George L. Varian he found
that there was no serious dispute on that

Pp 58-75
P 59 1.18-
P 60 1.30

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P 60 LL.31-34
P 60 1.37 -
p 61 1.28

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evidence. He continued:

P 61 11.29-31

"What is in issue here is whether Todds on their claim are entitled to maritime lien under our laws.

P 61 11.32-39

It is also not in dispute that the substantive rights of Todd's contract like any other contract is to be decided by the proper law of the contract which here is United States law. It is also not in dispute here that rights concerning the remedies under a contract and procedure are governed by the lex fori, and so here it will be our laws.

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P 61 11.40-44

So the main question that has to be answered is whether a maritime lien is on the one hand a substantive right of Todd's contract or on the other hand a remedial or procedural right,"

It is respectfully submitted that the learned Trial Judge adopted the correct approach in analysing the question at issue.

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P 64 11. 4-7

12 The learned Trial Judge held that a maritime lien is essentially a remedy although it appears to have some attributes of a substantive right. It is respectfully submitted that the learned Trial Judge erred in coming to this decision. It is submitted that a maritime lien is a "jus in re aliena" and as such is a substantive right against the vessel, THE RIPON CITY /1897/ P 226, which accrues from the instant of the circumstances creating it - THE PACIFIC 1 Brown & Lush 243; THE HEINRICH BJORN (1885) 10P.D.44; The "CELLA" (1888) 13 P.D.83. The Learned Trial Judge continued by citing the TERVAETE /1922/ P.259 and the ACRUX /1965/ P. 391 as authority for the proposition that a maritime lien is not a substantive right and that English law and therefore Singapore law would not recognise a maritime lien for ship repairs even though the proper law of the contract for ship repairs confers a maritime lien. It is respectfully submitted that the learned Trial Judge was wrong and that he ought to have recognised the existence of a maritime lien as a substantive right and ought to have held that it should be recognised by the Courts of Singapore in accordance with rules governing Private

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P 64 1. 13-

P 68 1.12

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- 10 International Law. The learned Trial Judge considered the case of THE COLORADO [1923] P.102 but it is respectfully submitted he erred in his interpretation of the decision of the Court of Appeal in that case and further that he erred in failing to follow the decision of the Supreme Court of Canada in the case of the "IOANNIS DASKALELIS" [1974] 1 Lloyd's Rep 174. It is respectfully submitted that the learned Trial Judge was wrong in failing to recognise and give effect to the maritime lien attaching to the res by the proper law of the Respondents' contract and failing to accord the priority that Singapore law, as the lex fori, gives to such a lien holder over the competing claimant on a registered mortgage.
- 20 13. By notice of appeal dated the 13th day of May 1977 the Respondents appealed to the Court of Appeal in Singapore. The appeal came on before Wee Chong Jin C.J., F.A.Chua and A.P.Rajah JJ. on the 2nd 3rd and 4th days of August 1977.
- 30 14. The judgment of the Court of Appeal was delivered on the 8th day of December 1977. The Court first described the nature of the appeal and set out certain of the facts. They found that the sole question in the two appeals was whether or not the claim of the Respondents, as ship repairers in New York, had priority as against the proceeds of sale of the ship over the claim of the mortgagees of the ship. They further found that it was not in dispute that under Singapore law the claim of a mortgagee has priority over the claim of a ship repairer for repairs executed in Singapore, that under the law of Singapore, ship repairers do not have a maritime lien and that under the law of Singapore a claimant who has a maritime lien under the law of Singapore has priority over a mortgagee claimant.
- 40 15. Of the Respondents' case the Court said
- "The foundation of the ship repairers claim that they are entitled to priority over the mortgagees is that by American law they have acquired a maritime lien on the ship and that the law of Singapore will recognise and enforce their maritime lien on the ship in determining the priority of competing claimants. Their argument is that a maritime lien is a substantive right in a ship attaching
- P 68 l. 15-
P 72 L. 33
Pp 79-81
P 83 1.17-
P 85 1.37
P 85 1.5-1.11
P 85 1. 11 -
1. 21
P 85 11.22-37

Record

at the time the cause of action arose and not defeated by a subsequent bona fide purchaser without notice. It being a substantive right in the ship the law of Singapore recognises that right and enforces it when determining the priorities of competing claimants to the proceeds of sale of the ship."

P 85 l.39- p.86 l. 19 16. After setting out the Appellants' case that in determining priorities the Court should appeal the lex fori only and disregard the position under American law the Court considered the nature of a maritime lien as dealt with by Scott L.J. in the "TOLTEN" /1946/ P.135 at page 144 where he said of a maritime lien:- 10

P 86 l.20 - p 88 l. 15

"It is a right acquired by one over a thing belonging to another - a jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing."

P 87 ll.31-35

and at page 145 where Scott L.J. said:-

"The positive principle of the automatic attachment to the ship of the creditor's lien on it is, at least, as indubitably a rule of substantive law in admiralty"

P 87 ll.37-40

P 88 l.23- P 90 l.24

17. The Court of Appeal of Singapore also considered the judgments of the Court of Appeal in the "TERVAETE" /1922/ P.259 and the "COLORADO" /1923/ P.102 and said

P 90 l.25-1.36

"In our opinion, having regard to the authorities which were referred to in the judgment of Scott L.J. in the "TOLTEN", a maritime lien is a substantive right in the ship which attaches at the time the cause of action arose and which is not defeated by a subsequent bona fide purchase of the ship without notice of the lien." 30

18. As to the question of whether a Singapore Court will give effect to the ship repairers' maritime lien acquired under foreign law the Court of Appeal held 40

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"Apart from authority, we are of the opinion that in principle the courts of this country ought to recognise the substantive right acquired under foreign law as a valid right and to give effect to that recognition when determining the question of priorities between the ship repairers and the mortgagees of the res".

P 90 1.47-
P 91 1.6

10 It is submitted that the Court of Appeal were correct in coming to this decision and further were correct in following the decision of the Supreme Court of Canada in the "IOANNIS DASKALELIS" [1974] 1 Lloyd's Rep.174. The Court of Appeal of Singapore stated

"In our opinion the interpretation put by the Supreme Court of Canada on the decision in the "COLORADO" is the correct one. In our opinion all the three appellate judges, in affirming the decision of Hill J. in the Court below, were of the view that having ascertained that under French law the right created by a hypothec is a right equivalent to a maritime lien, an English court, applying English remedies, would rank a claimant under a hypothec above on English necessariesman.

P 95 1. 39-
p 96 1.2

20 Similarly, having ascertained that under American law a person who furnishes in America repairs to a ship acquires a valid maritime lien on the ship, a Singapore Court, applying Singapore remedies, would rank a claimant who has a valid maritime lien, which is in its nature a substantive right in the ship, above a claimant who has a mortgage over the ship".

P 96 11.3-11

30 19. On the 22nd day of March 1978 the Court of Appeal of Singapore made two orders granting the Appellants leave to appeal to Her Majesty in Council.

Pp 101-104

40 20. The Respondents respectfully submit that this Appeal should be dismissed with costs for the following amongst other

REASONS

1. Because the Court of Appeal in Singapore

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rightly held that a maritime lien acquired under the law of the United States of America is a substantive right which should be recognised as such by the Courts of Singapore.

2. Because the Court of Appeal in Singapore rightly held that the holder of such a maritime lien should rank above a claimant who has a mortgage over a ship.

3. Because the learned Trial Judge was wrong

(i) in holding that a maritime lien was remedial and procedural; 10

(ii) in failing to recognise and give effect to the maritime lien acquired by the Respondents;

(iii) in failing to follow the decision of the Supreme Court of Canada in the "IOANNIS DASKALELIS" [1974] 1 Lloyd's Rep 174.

4. Because the learned Trial Judge was wrong.

5. Because the judgment of the Court of Appeal in Singapore was right. 20

R.F.STONE Q.C.

JERVIS KAY

No. 19 of 1978

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL IN SINGAPORE

B E T W E E N :

BANKERS TRUST INTERNATIONAL LIMITED

Appellants

(Interveners in Admiralty Action
in Rem No. 150 of 1974)
(Plaintiffs in Admiralty Action
in Rem No. 151 of 1974)

- and -

TCDD SHIPYARDS CORPORATION

Respondents

CASE FOR THE RESPONDENTS

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