NOTES OF CASES

CLASSIFICATION OF A CREDITOR'S CLAIM TO A LIMITED FUND

Bankers Trust International Ltd. v. *Todd Shipyards Corporation (The Halcyon Isle)*[1]

FACTS

The facts were uncontroverted. The *Halcyon Isle* is a British-registered ship. Bankers Trust International Ltd. is an English bank which held a mortgage on the ship. Todd Shipyards Corporation is a ship-repairer in New York which had done repairs to the *Halcyon Isle;* it was the "necessaries man". The *Halcyon Isle* was subsequently arrested in Singapore in an action *in rem* begun by Bankers Trust International Ltd. The sum obtained from her sale was insufficient to meet the claims of all her creditors. In consolidated motions by Bankers Trust International Ltd. and Todd Shipyards Corporation the Singapore High Court was asked who between them (one the mortgagee, the other the necessaries man) should rank in priority in respect of the limited fund.

The High Court decided the mortgagee outranked the ship-repairer. The Court of Appeal reversed the decision. The majority of the Judicial Committee of the Privy Council reverted back to the original decision and decided the mortgagee outranked the ship-repairer while the minority delivered a spirited dissent.

LAW

The reason for this vacillation is not that Singapore law on the priority of creditors to a limited fund is indeterminate. On the contrary, as Chief Justice Wee Chong Jin made clear,[2] Singapore law is certain: a mortgagee has priority over a ship-repairer, while a holder of a maritime lien has priority even over the mortgagee.[3] What then was the problem? The problem lay in the fact that the repair on the *Halcyon Isle* had occurred not in Singapore but rather in the state of New York, U.S.A., and New York law differs from Singapore law in the matter of the nature of a ship-repairer's claim. By New York law a ship-repairer becomes entitled to a maritime lien[4] whereas

[1] The decision of the Privy Council is reported in [1980] 3 W.L.R. 400; Singapore Court of Appeal in [1978] 1 M.L.J. 189; Singapore High Court in [1977] 1 M.L.J. 145. This is a comment on all three decisions. For an article on the lower courts' decisions, see T.A.G. Beazley, "Maritime Liens in the Conflict of Laws" (1978) 20 Mal. L.R. 111.

[2] [1978] 1 M.L.J. 189, 190.

[3] The scheme, so stated, would appear to be exactly alike that which exists in England.

[4] 46 United States Code section 971.

by Singapore law a ship-repairer does not become so entitled.[5] So the problem is to which of the two legal systems, Singapore or New York, is the Court to turn in order to decide the nature of this ship-repairers' claim? If it is the former then Bankers Trust International Ltd. ranks before Todd Shipyards Corporation whereas if it is the latter then Todd Shipyards Corporation, being a lienor, ranks before Bankers Trust International Ltd.

ISSUE

The issue may be restated. There was no question that the Singapore court should use the scheme of priority of creditors' claims provided by Singapore law. This was taken for granted in all the judgments.[6] The justification for the use of the *lex fori's* scheme of priority is that the matter of the distribution of a limited fund by court is a matter of mere procedure.[7] The court, however, cannot use the scheme of priority until it has determined what exactly is the nature of the creditor's claim. The question then is: is the determination of the nature of the claim a matter to be done according to the forum's domestic law (the *lex fori)* as well, irrespective of where the facts had occurred? More specifically, where the creditor's claim is based upon an event which occurred in a foreign country, should the forum court still determine the nature of the claim according to the *lex fori,* or should the forum court look to the law of that country (the *lex causae)* to determine the nature of the claim and only after that grant to it the priority due under the *lex fori's* scheme of priority?

TWO OPTIONS

The majority of the Judicial Committee explained the two options in some detail.[8] The first is for the forum court to classify the nature of the claim according to the *lex fori.* The proposition is this: when one speaks of the nature of a creditor's claim, in particular whether the claim gives rise to a maritime lien or not, one is speaking of a remedy; one is not speaking of a substantive right. If a maritime lien is essentially a mere remedy, then the forum court must look to its own law to determine whether such remedy is available irrespective of where the event which created the claim occurred. The theoretical basis is that matters of remedies should be subsumed under

[5] *Semble* the categories of claims which give rise to maritime liens in English law are determinate: bottomry and respondentia bonds, salvage, seamen's wages and damage. It is well-established that necessaries does not give rise to a lien: *The Henrick Bjorn* (1886) 11 App. Cas. 270. The judgments in the instant case confirm that Singapore law is the same as English law in this respect.

[6] See the majority decision of the Privy Council, "The priorities as between claimants to a limited fund which is being distributed by a court of law are matters of procedure which under English rules of conflict of laws are governed by the lex fori...." [1980] 3 W.L.R. 400, 403.

[7] See Dicey & Morris, *The Conflict of Laws* (10th ed.) Rule 209: "All matters of procedure are governed by the domestic law of the country to which the court wherein any legal procedings are taken belongs *(lex fori).* In this *Rule,* the term "procedure" includes *(inter alia)* certain aspects of the following matters; 1. Remedies and Process.... 6. Priorities...."

[8] [1980] 3 W.L.R. 400, 403.

the general head of "procedure" and there is no argument that the forum court must follow its own rules of procedure.[9]

The second option is for the forum court to classify the nature of the claim according to its *lex causae.* This involves

> a complicated kind of partial *renvoi* by (i) first ascertaining in respect of each foreign claim the legal consequences, other than those relating to priorities in the distribution of the limited fund, that would be attributed under its own *lex causae* to the events on which the claim is founded; and (ii) then giving to the foreign claims the priority accorded under the *lex fori* to claims arising from events … which would have given rise to the same or analogous legal consequences if they had occurred within the territorial jurisdiction of the distributing court.[10]

Besides being more complicated this option invites the difficulty, though not present here, that the court may be brought to face with a nature of claim that is unknown to itself. In that case the court has the unenviable task of having to draw the closest possible analogy between that alien nature of claim and one known to the court. This may be difficult but it can be done and indeed has been done by an English court in this very area of law.[11] Moreover that the second option is more involved should not lead to its dismissal if it must be adopted to do justice to the claimant because the *raison d'etre* of private international law is to come to the aid of a party who seeks to prove that he has a claim accrued under a foreign legal system which is the legal system most closely connected to the event. Inevitably, proof of such a claim is more involved than proof of a claim which accrued under the court's domestic law.

DECISIONS OF THE COURTS

It may be deduced from the foregoing that the Singapore High Court's decision is consistent with the first option. Kulasekaram J. held, on a review of the authorities, that a maritime lien is a mere remedy and thus that whether or not the ship repair in New York gave rise to a lien is to be governed by the *lex fori,* by which law it did not. The Singapore Court of Appeal by a unanimous decision reversed this: Their Lordships held, on a review of the very same authorities, that a maritime lien is a substantive right in which case it fell to the *lex causae* to determine whether a maritime lien arose from the event, by which law it did. The majority of the Judicial Committee reversed this decision yet again and decided that the authorities favoured viewing a maritime lien as a mere remedy. The minority delivered

[9] By way of contrast the prevailing view in the U.S. is a rejection of this automatic reference of all matters of procedure to the *lex fori,* see Second Restatement, Conflict of Laws, section 139 where it is suggested that it should not automatically be inferred that the forum's rules as to Privileged Communications must be applied. It should not be unless and until the court determines that the forum does indeed have the most significant relationship with the communication concerned. This section in effect erodes the *lex fori's* competence in matters which English courts traditionally view as matters of procedure.

[10] *Op. cit.* See also Cheshire and North's *Private International Law* (10th ed.) pp. 704-706 where the authors make a convincing argument favouring this option.

[11] In *The Colorado* [1923] P. 102 the court was faced with a claim arising out of facts which occurred in France and which by French law created a "hypotheque". The court accepted this and thus had to proceed to analyse the "hypotheque" in order to find its closest equivalent in English law, which it found to be a "mortgage".

a stinging dissent and chose to agree with the Singapore Court of Appeal.

COMMENTS

1. *Analysis of the decisions*

A total of nine judges sat on this case in one court or another. For sheer convenience alone the two sides with which the judges aligned themselves shall be referred to as the "Privy Council majority" side[12] which finally carried the day, and the "Court of Appeal" side[13] which finally lost.[14]

2. *State of the authorities*

A more productive enquiry would be: was the "Privy Council majority" correct in interpreting the authorities as holding that a maritime lien is a mere remedy and not a substantive right? It has been mentioned that the "Court of Appeal" used the same authorities to reach the opposite conclusion. What were these authorities? On the one hand there were those which no doubt held that the creation of a maritime lien is a mere matter of remedy. The outstanding authorities were *The Tagus,*[15] *The Zigurds*[16] and *The Acrux,*[17] where the English court ignored altogether the *lex causae's* classification of the nature of the creditor's claim. On the other hand there was the controversial English Court of Appeal's decision in *The Colorado*[18] which was followed in two decisions of the Supreme Court of Canada in *The Strandhill*[19] and *The loannis Daskalelis.*[20] As one may expect it was the judges' interpretation of these three decisions which Jed them to hold one way or the other.

In *The Colorado* the event out of which the claim arose occurred in France. By the law of France a "hypotheque" was created by the event. The English Court was asked how the claimant should rank along the English scheme of priority. The court's decision was reached by first accepting that by the *lex causae* a "hypotheque" was created and then by holding that on a close scrutiny of its characteristics a "hypotheque" is close enough to a mortgage so that the claimant should be given the priority of a mortgagee on the scheme of priority. A similar process of reasoning occurred in the Supreme Court of Canada in *The Strandhill* and *The loannis Daskalelis.* In both cases the event, ship repair, had occurred in one of the states of the U.S.A. by which law the ship-repairer acquired a maritime lien. The Canadian

[12] The majority of three of their Lordships on the Judicial Committee and Kulasekaram J. in the High Court formed this "side".

[13] All three of their Lordships on the Court of Appeal and two of their Lordships on the Judicial Committee formed this "side".

[14] It is curious to note that the final "victors" comprise only four of the total of nine judges meaning that the majority were the final "losers"; although the commentator would not expect this numerical oddity to have any effect of the binding precedent value of the majority decision of the Judicial Committee.

[15] [1903] P. 44.

[16] [1932] P. 113.

[17] [1965] P. 391.

[18] See n. 11 *supra.*

[19] [1926] 4 D.L.R. 801.

[20] [1974] 1 Lloyd's Rep. 174.

court gave effect to this classification and ranked the ship-repairers as lienors on the Canadian scheme of priority despite the fact that under domestic Canadian law a ship-repairer does not acquire a lien.

It may be noted that the facts in *The Halcyon Isle are* closely similar to those in these Canadian cases. It does not come as a surprise then that Wee Chong Jin C.J., referring to *The loannis Doskalelis,* said:

> A decision of the Supreme Court of Canada, particularly a unanimous decision, is of the highest persuasive authority.... 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.[21]

How then could the "Privy Council majority" have refrained from reading these decisions as having held that the matter of the creation of a maritime lien is a substantive right and must therefore be referred to its *lex causae?* Their observations on these cases were, it is submitted, at the least vague and most unconvincing. Kulasekaram J. dismissed all three decisions on extremely weak grounds. Of *The Colorado* he said it did not go so far as "to be authority for the proposition that a maritime lien is a substantive right." However he earlier admitted that the case held that the *lex causae* did confer "some sort of a proprietary right on the ship."[22] By this earlier statement he had admitted that the court in *The Colorado* did indeed accept the *lex causae's* classification of the nature of the claim as being "some sort of a proprietary right." How then can this stand with his refusal in the instant case to have regard to New York's classification? His treatment of *The loannis Daskalelis* was even more strained. All he said was "while I do not agree with respect with the decision in this case I would like to observe that the very peculiar facts and circumstances of this case are such as could justify and support such a decision merely on them."[23] The earlier portion of the statement implies his having accepted that the Canadian case decided contrary to his instant decision while, with respect, his Lordship did not substantiate his subsequent observation that *The loannis Daskalelis* involved peculiar circumstances. It is submitted that the facts and circumstances in *The loannis Daskalelis* are no more peculiar than those in the instant case.

The interpretation of the cases put by the majority of the Judicial Committee of the Privy Council is just as unconvincing. They chose to criticise the Canadian cases as having misunderstood *The Colorado.* Of *The Colorado* they said:

> The only question [there] was whether a hypotheque executed and registered in France over a French ship created a proprietary right in the ship which the court would recognise as similar enough in legal character to an English mortgage to justify according it the priority over the claim of necessaries men to which a mortgagee would be entitled in English law.[24]

[21] [1978] 1 M.L.J. 189, 191 and 192.
[22] [1977] 1 M.L.J. 145, 149.
[23] *Ibid.,* 150.
[24] [1980] 3 W.L.R. 400, 409.

Their Lordships dismissed the case by saying it "was not concerned with a claim to a maritime lien at all." While it is true that *The Colorado* did not involve a maritime lien but rather a "hypotheque" which was held to be the equivalent of a mortgage, it is submitted that it is not correct to imply, as their Lordships did, that the decision is thus of no relevance. On the contrary the relevance of the decision lay in the process of reasoning adopted *viz.* the forum court regarded it proper and indeed necessary to look to the *lex causae's* classification of the nature of the claim before ranking it along the English scheme of priority. Surely it was only that the English court in *The Colorado* felt it had to look to French law as the *lex causae* to find out what the real nature of the claim was that led the court to embark on the process of examining what is involved in a "hypotheque" and then to look for its closest analogy under English law. It was this process the Canadian Supreme Court adopted. Thus it is submitted their Lordships on the Judicial Committee in the instant case had not managed to discredit the decisions in *The Colorado, The Strandhill* and *The loannls Daskalelis* cases nor had they convinced us that the courts there had ignored the *lex causae's* classification of the nature of the claim.

The truth is thus that the authorities were divided as to whether a maritime lien is a substantive right or a mere remedy. This was why the majority of the Judicial Committee could claim "the characterisation of a maritime lien in English law [involves] rights that are procedural or remedial only"[25] while the minority could equally claim "A maritime lien is a right of property... ,"[26]

3. *On principle*

Where there are authorities to support two views it is normally expected that the view which leads to a better result is chosen. The question then is does the decision of the "Privy Council majority" lead to a better result? Their decision was that, wherever the event which gave rise to the claim may have occurred, the nature of such claim will be determined according the *lex fori.*

The effect of such a result is to deny any significance to the foreign element (the occurence of the ship-repair in New York). The nature of the ship-repairer's claim was determined just as if it had not occurred in New York but rather here in Singapore. It is at the very least arguable that, the state of the authorities being indecisive, the better approach would have been to look to the law of the place where the event occurred because that law is more closely connected with the event than the *lex fori.* Where the authorities are divided, it is grave indeed that the judges chose to be insular and to ignore an obvious contact with a foreign law. In the words of the dissenting judges on the Judicial Committee, the majority decision ignored the concerns for "the comity of nations, private international law and natural justice"[27] all of which would favour that the *lex causae,* the legal system most connected with the events, be determinative of the crux of the matter *viz.* nature of the claim. It may

25 *Ibid.*, 410.
26 *Ibid.*, 421.
27 *Ibid.*, 418.

further be said that denying the foreign element also frustrates the legitimate expectations of both parties to the event of the repair *viz.* the ship-repairer as well as the ship-owner. Both of them had entered into the contract for the repair in New York and both no doubt believed that their rights and liabilities arising from the repair were to be governed by New York law. The ship-owner must have expected to pay New York rates for ship-repairs whereas the repairer expected to obtain payment from the ship as a preferential creditor since by New York law he is one. It behoves the local forum to uphold such expectation unless to do so would frustrate our public policy. There was no discussion of any local public policy that may be frustrated and so the writer assumes that this was not a consideration. This being so the "Privy Council majority" should not have denied the court's obligation to meet these legitimate expectations.

CONCLUSION

In view of the indecisiveness of the authorities on the question of whether a maritime lien is a substantive right or a mere remedy, it appears that the decision of the majority of the Judicial Committee of the Privy Council and Kulasekaram J. was unnecessarily insensitive to the obligation of the forum court to take account of and give effect to a material foreign element. By deciding that the question is merely procedural they have effectively prohibited themselves and future courts of giving consideration to the view the *lex causae* takes of the matter. In so doing they frustrate the cause of private international law. Until the decision in *The Halycon Isle* is upset however the state of Singapore law is that the question of the creation or otherwise of a maritime lien is to be governed by Singapore law as if the event which gave rise to the claim occurred in Singapore and the fact that it may have occurred in another legal system which classifies the nature of the claim differently from Singapore law is to be ignored.

Lastly it may be noted that another unsatisfactory aspect of the decisions is their premise that a rational and fair result can be reached by merely answering one key question: what is the essence of a maritime lien, is it a mere remedy or a substantive right? It is submitted that it is simplistic to think that anyone can distill the essence of a legal concept *in vacuo* without considering the function such a concept serves and the implications of deciding one way or another. It may well be that there are sound and perfectly legitimate interests that are protected by the instant decision. The fault is that these interests were never articulated nor were the competing interests identified and discussed. By so failing the decisions mislead us when they could have clarified the policy considerations that went towards making the choice between regarding a maritime lien as a right or a remedy, and between ignoring or paying regard to a foreign law.

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