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Briefing note December 2015

Landmark decision: arrest of the vessel "Sam Hawk" – foreign maritime lien enforceable in Australia

In the recent landmark case of *Reiter Petroleum Inc v The Ship "Sam Hawk"* [2015] FCA 1005, the Federal Court of Australia held that a **foreign** maritime lien was enforceable in Australia, and capable of founding the arrest of a ship under the *Admiralty Act, 1988 (Cwth)* (**AA**). This is despite the underlying claim on which the lien was based not being recognised as a maritime lien under Australian maritime law.

In so finding Justice McKerracher held that the Privy Council decision in the "Halcyon Isle" case no longer represents the law in Australia. "Halcyon Isle" had established that a maritime lien was procedural or remedial in nature (rather than substantive). As such, existence of the lien was determined by the lex fori. While not binding, the Halcyon Isle had been of persuasive value in Australia - until recently. Had this remained the law in Australia, the Sam Hawk could not have been arrested based on the foreign maritime lien.

Key issues

- the *Halcyon Isle* no longer represents the law in Australia
- in *rem* jurisdiction can be established in Australia by a claim which gives rise to a maritime lien under foreign law, even though it is not recognised as a maritime lien under Australian law
- Australia is an arrest friendly jurisdiction: this may be useful to claimants seeking security for their claims, but it presents challenges to shipowners whose vessels operate in Australian waters
- the Sam Hawk is under appeal; so watch this space.

The Sam Hawk has significant ramifications for vessels operating in Australian waters. By finding that *in rem* jurisdiction can be established in Australia by a foreign maritime lien (even if the claim is not a maritime lien under Australian law), the Federal Court expanded the basis on which vessels can be arrested in Australia. This is consistent with Australia's recognised status as a nation of shippers (not a nation of shipowners). The decision is welcomed by maritime claimants who can now more readily invoke the *in rem* jurisdiction to arrest vessels in Australia. Shippers also argue it promotes international comity and harmonisation of maritime laws. However, it is less welcomed by shipowners and operators who face a heightened risk of their vessels being arrested in Australian waters.

We await the outcome of the appeal in 2016.

Facts

The Egyptian time charterers of the Sam Hawk (a Hong Kong-registered vessel) contracted with the plaintiffs (a Canadian bunker supplier) to supply bunkers to the vessel in Turkey. The proper law of the contract was Canadian law, but the

contract also provided for maritime liens to be governed by US law. The plaintiffs were not paid for the bunkers and they arrested the Sam Hawk in Albany, Western Australia. The arrest was based on a maritime lien under US or Canadian law, being the proper law of the contract (s15 AA), even though the claim was not a maritime lien under Australian law.

An alternative basis relied on by the plaintiffs was that the vessel's owners were liable in personam (as the "relevant person") for "necessaries" supplied to the vessel under ss 4(3)(m) and 17 AA even though they were not a party to the bunker supply contract. This note focuses only on the first ground.

The Sam Hawk's owner entered a conditional appearance and applied to set aside the arrest and to summarily dismiss the action, arguing that the claim was not recognised as a maritime lien under Australian law and therefore did not vest the Australian Court with jurisdiction to arrest the vessel under s15 AA and there was no reasonable prospect of the action succeeding.

To found the court's jurisdiction for an action *in rem* under s15, the plaintiffs had to establish that the claim fell within the definition of a maritime lien recognised by Australian law, including Australian rules of private international law (see *Elbe Shipping SA v The Ship "Global Peace"* (2006) 154 FCR 439). The parties agreed that the supply of bunkers did not give rise to a maritime lien under Australian law. The remaining question was whether Australian rules of private international law would recognise a maritime lien arising under US or Canadian law.

The principal issue was whether the decision in *Bankers Trust International Ltd v Todd Shipyards Corporation (The Halcyon Isle)* [1980] 2 Lloyd's Rep 325 was still the law in Australia. The *Halcyon Isle* was authority for the principle that the question whether a maritime lien exists is to be determined in accordance with the law of the forum. This principle had previously been accepted by the Federal Court in *Morlines Maritime Agency Ltd & Ors v Ship "Skulptor Vuchetich"* [1997] FCA 432. If this continued to represent the law in Australia, the plaintiffs could not establish jurisdiction under s15 AA and could not arrest the ship because the supply of bunkers was not recognised as a maritime lien under Australian law, the lex fori, although the claim was a maritime lien under the proper law of the supply contract.

Decision

Justice McKerracher at first instance held that *Halcyon Isle* "*does not represent the state of law in this country*". His Honour summarised the judicial and academic criticism of that judgment, pointing out that Australian law had moved away from that decision in the distinction between substantive and procedural issues. His Honour referred to the High Court's decision in *John Pfeiffer v Rogerson* (2000) 203 CLR 503, where it was decided that matters going to the existence, extent or enforceability of the rights or obligations of parties were, prima facie, matters of substance, and not matters of procedure directed solely at governing the conduct of court proceedings.

Justice McKerracher noted that a maritime lien is a creature of maritime law, and under foreign law was seen as a substantive claim, and not a procedural claim, as a maritime lien goes to the existence, extent or enforceability of the rights and duties of the parties. His Honour concluded that having regard to the characteristics of maritime liens, they are substantive in nature. At [117] his Honour described a maritime lien as "*an inchoate right which attaches to the vessel and travels with the vessel independent of changes in ownership.*"

His Honour also noted that historically maritime liens were seen as more than procedural or remedial rights. His Honour cited the passage from Scott LJ in *The Tolten* [1946] P 135) which described a maritime lien as a "*vested right of property*" which was a "*substantive right of putting into operation the admiralty court's executive function of arresting and selling [a] ship…"*. (See also *Goulandris* [1927] PD 182).

Justice McKerracher noted that his conclusion as to the substantive character of a maritime lien was consistent with the rejection by the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [99]-[129] of the approach taken in the *Republic of India v India Steamship Co (Indian Grace) (No 2)* [1998] AC 878.

It followed that Justice McKerracher was satisfied that as a matter of substantive law, the plaintiffs' claim for non-payment of bunkers gave rise to a maritime lien under the proper law of the contract), and as such, under s15 AA, the Federal Court of Australia had jurisdiction in rem to arrest the vessel based on the foreign maritime lien, even though the same claim would not have been recognised as a maritime lien under Australian maritime law.

Conclusion

As set out above, as claims giving rise to maritime liens in foreign jurisdictions are now capable of establishing jurisdiction in Australia for the purpose of arresting a ship, the decision in The Sam Hawk serves to highlight Australia's position as an arrest favourable jurisdiction.

The Sam Hawk is under appeal to the Full Court of the Federal Court. The appeal is likely to be heard in early 2016, so watch this space.

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