

There is no wrong in *The Halcyon Isle* - A confirmation from Australia!

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Introduction

- ▶ 28 September 2016 = [#teamrares](#)



What went wrong with Rares J's judgment?

- ▶ 1. Seeking to equate foreign maritime liens for necessities with hypothecations used in old days is simply a gloss.
- ▶ 2. Trying to interpret *The Colorado* is going nowhere.
- ▶ 3. Attempting to classify maritime liens is futile.
- ▶ 4. Providing no solution for the priority issue when it is disassociated from the question of recognition is unhelpful.

Seeking to equate foreign maritime liens with hypothecations is simply a gloss

- ▶ **Hypothecation** - similar to the bottomry bond was a mechanism by which a ship could be used as a security, enabling the master to obtain funds in an overseas port to effect repairs or to complete the voyage
- ▶ **Hypothecation** - travelled with the ship and was enforceable wherever and whenever the ship may arrive in a port.
- ▶ **Referring to many old authorities, Rares J maintained the English courts had recognised a maritime lien for necessaries created overseas in the form of a hypothecation.**

Seeking to equate foreign maritime liens with hypothecations is simply a gloss

- ▶ **BUT:**
- ▶ “The admiralty court did not ... entertain proceedings *in rem* for necessaries where there had been no hypothecation of the vessel, and there was no doubt that the supply of necessaries conferred no maritime lien on the person supplying them”.
- ▶ Anton P. Trichardt, *Maritime Liens and The Conflict of Laws* (a monograph published within Transactions of the Centre for Business Law, University of Free State 2011) 200.

Seeking to equate foreign maritime liens with hypothecations is simply a gloss

- ▶ In *The Bold Buccleugh* (1851) 7 Moo P.C 267; 13 ER 884 at 283-284 and 890-891 respectively, Jervis CJ explained the nature of a maritime lien by equating it with an action *in rem*:
- ▶ “A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches...in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists...”
- ▶ In the same case at 282-283 and 290 respectively, Jervis CJ explained:
- ▶ “[T]he proceeding *in rem*, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance”.
- ▶ **In conceptualising the maritime lien in English law, Jervis CJ did not have cases on hypothecations in mind!**

Trying to interpret *The Colorado* is going nowhere

- ▶ In paragraph 355 of the judgment, Rares J explained *The Colorado*:
- ▶ “That approach involved the court ascertaining what rights existed under the *lex loci* and then characterising those, as best could be done, in relation to the same or similar rights that arose for persons in a similar position in the forum. Once that characterisation was done, the forum would give the creditor its remedies in its order of priority for rights of that nature”.
- ▶ *The Colorado* is a problematic judgment which is prone to different interpretations and cannot be regarded as a definite authority on the matter.

Attempting to classify maritime liens is futile

- ▶ Substance v Procedure
- ▶ How can the maritime lien be considered as a mere procedure or a remedy when it follows a ship?
- ▶ The nature of maritime lien is *sui generis*.
- ▶ A maritime lien is “an amalgam of jurisdictional, procedural, remedial, substantive, and proprietary rights” - Hilton Staniland, ‘Should Foreign Maritime Lien Be Recognised?’ (1991) 108 *The South African Law Journal* 293, 294.

Providing no solution for the priority issue when it is disassociated from the question of recognition is unhelpful

- ▶ On this, Rares J said in paragraph 411 of the judgment:
- ▶ “In any situation in which the law of a forum has to classify a claim arising under a foreign law so as to allocate it with legal consequences under the domestic law, it can be expected that there will be occasions when the result appear to be anomalous. However, like beauty, the actual anomaly may be in the eye of the beholder, depending on whether one views the result from the perspective of a foreign or domestic observer or ... from both of their perspectives”.
- ▶ In comparison with the majority judgment, Rares J’s opinion on this point provided no certainty.
- ▶ Certainty is a cornerstone of any business transaction.

Where to go from here?

- ▶ **No achievement in harmonising the laws relating to maritime liens:** The 1926 Convention on Maritime Liens and Mortgages; International Convention on Maritime Liens and Mortgages 1993
- ▶ **Significant of *The Sam Hawk*:** Viewing detailed research and depth of analysis, it is likely *The Sam Hawk* will produce final words on the issue and it will certainly receive attention in Anglo-common law jurisdictions when the issue of the foreign maritime lien is raised before the court.

Thank you!

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