The Enforcement of Maritime Claims – Who loses out?

BY

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THE ENFORCEMENT OF MARITIME CLAIMS - WHO LOSES OUT?

1. INTRODUCTION

1.1 This session is titled - the enforcement of maritime claims - who loses out? It deals with the problem where a ship is arrested and, due to the insolvency of the owner, it is sold by the arresting court. Once the dust is settled from the arrest proceedings, and the vessel has been sold, there will often be conflicting interests who each seek payment out of the sale fund. It is a sad fact of commercial life in circumstances where owners have insufficient financial backing, or club support, to secure the release of their vessel once it is arrested by a mortgagee or other creditor, that it is often the case that the value of the vessel is insufficient to meet all claims. In this situation, owners are invariably a one ship company with no assets but the arrested vessel and there are often numerous creditors. This unsatisfactory situation is also often compounded by the arrest itself, where the cost of the arrest and detention of the vessel by the Court can make considerable inroads into the already limited sale fund.

1.2 So, we are faced with a situation where a vessel has been sold and the proceeds of sale are lying in Court. The next step is that the Court must distribute the sale proceeds amongst the creditors. If the fund is insufficient to meet all creditors then the Court must, in short, decide who loses out.

1.3 At this point, an international element enters the situation. The ship may well be registered in a port foreign to the arresting country, and the claimants may come from anywhere in the world; not just limited to the country of registration of the vessel or to those countries into whose waters the vessel has travelled. Accordingly, their claims against the vessel, which have now become claims against the sale fund, may have arisen by virtue of several different systems of law.

1.4 Under English law, as well as under the law of many other countries, it is clear that the local Court is obliged to decide the priority of the claims according to its own law. Therefore, regardless of the country or origin, English, New Zealand and Australian law will rank the competing claims against a vessel as follows:

(a) **First:** Arrest costs and expenses

(b) **Second:** Maritime liens (for salvage, collision damage, Seaman's and Master's Wages and Master's disbursements)

(c) **Third:** Registered mortgages

(d) **Fourth:** All other claims giving rise to a maritime right in rem

1.5 Further, within each of these categories, the competing claims will be subject to additional rules that determine their priority in relation to other claims of the same class.

1.6 The inherent problem that has arisen in applying these superficially simple rules for the distribution of a sale fund, is that the local court is called upon the analyse claims that have arisen in foreign jurisdictions and in the context of foreign legal systems, in circumstances where these claims may not clearly fit into its own categories of priority. This is best illustrated by example and shortly, to achieve this, I will run through a number of cases where the problem has arisen.

1.7 The problem is an important one. Most of the claimants to a sale fund in rem will have claims on the vessel that have arisen from arrangements that they entered into voluntarily. For example, a mortgagee, a salvor, and a repairman will each have decided to render their particular kind of assistance to the vessel on the understanding that, if the need arose, they could find the vessel, wherever on the globe she might be, arrest her, and sell her to recover on their claim. Further, each of them may have rendered assistance with the expectation that their claim would be met with a certain priority as against certain other types of claim. Therefore, for all those who provide finance or services to a vessel, it is important that they have some certainty as to what rights they will have against the vessel as in most cases, it will be only their rights against the vessel, rather than any rights they might have against the owning company, that will be of any practical significance.

1.8 It is trite that certainty promotes commerce, and this applies in particular to maritime adventures, where so much is already unavoidably uncertain. Accordingly, it is important to understand how much certainty exists in this area of law internationally, and whether the rules of private international law applied throughout the world promote, or diminish, certainty.

1.9 To deal with this subject, the determination of priorities against the limited sale fund, I propose:

(a) first, to set out the present English and New Zealand law positions;

(b) second, to provide a brief resumè of the relevant cases in this area, setting out the actual problems encountered and how they were resolved; and

(c) lastly, to discuss one of the main criticisms of the approaches taken by the Courts and, then, to look at the alternatives.

1.10 I hope that, by doing this, I will be able to highlight the issues involved in this area of the law as well as some of the solutions to this international problem that have been adopted by different courts. This debate, as to the determination of priorities between competing claims in rem, continues to be carried out both through the courts as well as through international journals and publications. Lastly, and far from least, it would be interesting indeed to hear some views from members of the audience as to which approach they prefer.

2. THE ENGLISH POSITION - THE *HALCYON ISLE*

2.1 The logical starting point when looking into the debate on the determination of priorities is the English law position and the 1981 case of the *Halcyon Isle*. It is this decision, with its diametrically opposed majority and minority views, that has fuelled the fires of this debate. The *Halcyon Isle* is a Privy Council decision on appeal from the Court of Appeal at Singapore. It is, however, most persuasive as a statement of the English law position as the judgments in the Privy Council were given on the basis of English law alone. During the judgments there is no reference to any particular aspect of Singapore law and, indeed, at the outset of the case, Lord Diplock makes it clear that he did not consider there to be any "relevant difference between the law of Singapore and the law of England".

2.2 The *Halcyon Isle* was a British ship, registered in London. In September 1974 it was arrested in Singapore by its mortgagees, Bankers Trust Limited, an English Bank. Bankers Trust had registered its mortgage in London four months before the arrest. Six months before the arrest, the *Halcyon Isle* had been repaired by

Todd Shipyards in New York. The vessel left the shipyards, and ultimately found its way to Singapore, without having paid the repairers for the work done.

2.3 After arrest in Singapore, the vessel was sold by the Singapore Court and, when it came to the distribution of the sale proceeds, a direct contest as to priority eventuated between the British mortgagee and the American repairer. The High Court of Singapore held that the mortgagee had priority which resulted in the repairer remaining unpaid. This was reversed by the Singapore Court of Appeal whose judgment was, in turn, reversed by the Privy Council by a majority of three (Lords Diplock, Elwyn-Jones and Lane) to two (Lords Salmon and Scarman). So ultimately, Todd shipyards were not paid for their repairs, and Bankers Trust gained priority for their mortgage.

2.4 It is most helpful to look at the reasoning behind both the majority and the minority judgments, in that they set out quite clearly the competing approaches that can be taken by a common law court on this issue. I will refer throughout this paper to these two judgments, the majority and the minority, as they each represent one side of the debate on this issue.

The majority decision

2.5 In a decision given by Lord Diplock, the majority decided that the registered mortgage on an English ship should take priority over the American repairer's claim, despite the fact that the repairer was entitled to a maritime lien for its claim under American law. As you know, under English law, a maritime lien, if it is recognised as such, will take priority over a registered mortgage.

2.6 The majority reached their decision by accepting "the principle that, in the application of English rules of conflicts of laws, maritime claims are classified as giving rise to maritime liens which are enforceable in actions in rem in English courts **where and only where the events on which the claim is founded would have given rise to a maritime lien in English law, if those event had occurred within the territorial jurisdiction of the English Court**".

2.7 On this reasoning, to determine priority, it was necessary to transfer into England the **events** that gave rise to the claim in America, and then to determine what priority the claim should have on the basis of where those events would be

recognised in the English list of priorities. Applying this, on the basis of the fiction that the repairs were carried out in Singapore and not in New York, the repairer was only entitled to a right in rem against the vessel by virtue of the Singapore Admiralty statute, and its claim was therefore postponed to the registered mortgagee. The law of Singapore, as the law of England, does not give a repairer a maritime lien as such, but simply a right to proceed in rem.

The minority decision

2.8 Turning to the minority decision, Lord Salmon and Lord Scarman agreed with the Singapore Court of Appeal that the American repairers should have their American maritime lien recognised, and that they should take priority over the English mortgagee. Still, at this point, there is no question that it was English law that should determine the priority of the claims. However, where the minority judges in the Privy Council differed from the majority, was that they considered that when applying the English rules of priority, the Court was entitled to recognise an American maritime lien as equivalent to an English maritime lien and, having done this, the English court should then apply its own rules as to priority which, in this case, would prefer the lien holder to the mortgagee.

2.9 Their view was that it was not just the events that gave rise to the claim that should be looked at when determining where the foreign claim should fit into the English priority scheme. They agreed that the English Court should first look at the events in the foreign jurisdiction that gave rise to the claim to see what sort of claim it was. However, they also considered that the Court was then bound to look further and that it should also look at the rights that the law of that foreign jurisdiction attached to events of that kind. So here, the repairer was able to establish that it had carried out repairs to the vessel in its Brooklyn ship yard and that, under American law, this gave it a right in rem against the vessel. Further, and most importantly, American law gave it a right to enforce its claim against the vessel regardless of whether the ownership of the vessel had changed. Its right against the vessel, under American law, travelled with the vessel into whoever's hands she came.

2.10 Having determined what right the American repairer achieved under American law for its claim, it was clear to the minority judges that if these rights were then translated into the English jurisdiction, they would fit in with the types of claim

recognised by English law as maritime liens. Therefore, the repairer's claim was, by analogy, a maritime lien and should therefore be given priority over the registered mortgage, as would an English maritime lien.

Majority v Minority

2.11 It can therefore be seen that, in simple terms, the difference between the majority and minority decisions in the *Halcyon Isle* was that the majority would only look to the foreign jurisdiction to see what **events** occurred to give rise to the maritime claim in question, whereas the minority were prepared to look into the foreign jurisdiction, and its law, to determine what **rights** the claimant would have had at home. Those rights would then be recognised as if they had arisen under English law, and the claimant would be given the appropriate priority.

2.12 There has been much debate since the *Halcyon Isle* was decided as to whether the majority judgment or the minority judgment should be preferred. In Singapore, of course, the majority judgment must prevail and it must also be seen as highly persuasive as representing the law of England. With this in mind, I turn to the New Zealand position.

3. THE NEW ZEALAND POSITION

3.1 I have indicated that I will outline the New Zealand position on this issue as well. Many of you will also be aware of decisions in other jurisdictions, notably Canada, and South Africa, where this issue has been considered. I do not intend to look into the decisions in those jurisdictions in much detail at all, and I leave this for John Farquharson who is providing the commentary to this paper. But, this is an Australian and New Zealand Maritime Law Association and so I think it appropriate that we take a quick look at the 1991 New Zealand Court of Appeal case of the *Betty Ott* which, as far as I am aware, is the highest, if not only, authority in the Australasian jurisdiction on this subject.

The *Betty Ott* - High Court

3.2 The *Betty Ott* was an Australian registered fishing vessel that was sold by the New Zealand High Court after its mortgagee, General Bills, had obtained a default

judgment against it in May 1986. General Bills were holders of a registered mortgage that had been entered against the ship's registry in Fremantle in October 1985.

3.3 The vessel was also subject to a debenture held by Westpac that was entered into just over one year before General Bills registered their mortgage against the vessel. Westpac also obtained judgment against the vessel by default and, not surprisingly, the sale proceeds which amounted to approximately NZ$225,500 were insufficient to meet the claim of both General Bills and Westpac, whose combined claims amounted to over NZ$1.3 million. Accordingly, the contest between the parties was to determine who would have the benefit of the sale proceeds, winner take all.

3.4 In a nutshell, the issue in the case is whether an Australian registered mortgage should take priority in a New Zealand Court over an earlier, but unregistered, debenture. It was recognised in both the High Court and in the Court of Appeal, that the New Zealand and Australian ship and ship's mortgage registration systems are virtually identical, both stemming, as they do, from the UK Merchant Shipping Act 1894. At first instance, the High Court held that the registered mortgage should take priority on the basis that it would fly in the face of the overall international system of registration and registered mortgages if a mortgage registered in one Commonwealth country should be treated differently in another Commonwealth country on a question of priority. Ellis J considered that he was not restricted by the majority judgment in the *Halcyon Isle*, as in the *Betty Ott* there was no question that the two jurisdictions, New Zealand and Australia, treated the legal consequences of registration in the same way. This was not the case in the *Halcyon Isle* where England and America were far apart on the recognition of maritime liens. Ellis J therefore distinguished the *Halcyon Isle* as a case that applied where the foreign claim was not of a kind recognised by the local jurisdiction. In the Judge's view, there was no reason why an Australian registered mortgage should not be treated in New Zealand as if it were a New Zealand registered mortgage, given that the registration systems of the two countries were virtually identical. Thus, treating General Bill's mortgage as a New Zealand registered mortgage, Ellis J gave it priority over the unregistered debenture.

The *Betty Ott* - on appeal

3.5 However, on appeal, the New Zealand Court of Appeal came to the opposite view, and ruled that the unregistered debenture should have priority over the registered mortgage. The Court in this instance felt that it could, and did, rely on the majority judgment in the *Halcyon Isle* and, in particular, on a passage where Lord Diplock takes the opportunity to set out the priority relationships between ship's mortgages.

3.6 In this passage, Lord Diplock stated that for the purposes of priority of ranking, mortgages fell into two classes. First, there are British registered mortgages and second, other mortgages, British or foreign. The first class, British registered mortgages (which can only relate to British ships) rank in priority to all other unregistered mortgages. The second class, unregistered British mortgages or registered foreign mortgages, rank according to the date of their creation.

3.7 The New Zealand Court of Appeal considered that this obiter statement of Lord Diplock's provided sufficient authority for their decision that the Australian registered mortgage could not be recognised by the New Zealand Court as if it were a New Zealand registered mortgage and, more specifically, that it could only take priority over later mortgages or charges. Accordingly, the earlier Westpac debenture took priority.

3.8 There can be little doubt that the Court of Appeal properly applied Lord Diplock's statement as to mortgage priorities as Lord Diplock seems to have clearly contemplated that the order of priorities as he stated them should prevail, even for a foreign ship over which there could not be any British registered mortgage. In short, Lord Diplock considered that English law would only ever accord priority to a registered mortgage according to its date of registration, rather than its date of creation, if that mortgage was registered in England over an English ship. This somewhat chauvinistic statement has unhappy consequences, as does the Court of Appeal's decision in the *Betty Ott*. It means that English, and now New Zealand law will never give a registered mortgage on a foreign ship the priority, and security, that underlies the whole concept of registration. Unsatisfactory as this result is from the point of view of the international recognition of ship's registered mortgages, it must be noted that a similar chauvinism is enshrined in American law by virtue of their applicable statutory law. Under the American system of

priorities, registered mortgages over American vessels take priority over subsequently created contractual maritime liens, whereas, foreign registered mortgages, that is, any registered mortgage on a foreign ship, are postponed to these liens. In the *Betty Ott* there can be no doubt that the New Zealand Court of Appeal was free to go its own way on the issue and it is therefore, perhaps, unfortunate that our Court did not elect to disregard Lord Diplock's obiter comments and to take the commercially preferable view adopted by the judge at first instance.

4. OTHER DECISIONS

4.1 We have so far looked at two decisions dealing with this issue of priorities. There are a number of other relevant authorities on this question and, as would be expected, the facts in each case are quite different. It is therefore, perhaps, helpful to set out in brief, the types of competing claim that various courts have considered, and the results they have reached.

4.2 The first case is the 1923 English Court of Appeal decision of the *Colorado*. This case involved a French ship subject to competing claims by a holder of a French hypothèque and an English repairman. The English court gave the holder of the hypothèque priority.

4.3 Next, is the *Halcyon Isle* which, as we have seen, involved a British ship subject to claims by an English mortgagee and an American repairer. The Court, applying English law, preferred the English mortgagee.

4.4 Third, is the *Betty Ott*, which we have also seen, involved an Australian registered ship that was subject to claims by the holder of an Australian registered mortgage on the one hand and an earlier, but unregistered, New Zealand debenture on the other. The New Zealand Court of Appeal preferred the debenture holder.

4.5 Fourth, is the *Ioannis Daskalelis*, a 1972 decision of the Supreme Court of Canada, which involved a Greek ship that was arrested and sold by the Court in Canada. In this case the American repairers, Todd Shipyards (who were also the claimants in the *Halcyon Isle*), were successful in obtaining priority over the Greek registered mortgage.

4.6 Lastly, is a 1987 South African Court decision, in the Cape Provincial Division, the *Andrico Unity*. In this case, a Panama flag vessel was arrested in South Africa by Argentinean bunker suppliers. The case did not involve a competition on priorities between two creditors but, instead, it revolved around whether the South African Court would recognise the bunker suppliers claim as one that gave rise to a maritime claim in rem that could be enforced in the South African Court. For the purposes of this case, South African law was deemed to be the same as English law as at 1 November 1983. In the event, the Court refused the Argentinean bunker supplier's lien recognition as a maritime claim under South African law.

5. THE JUDGMENTS IN THE *HALCYON ISLE* - CRITICISM

5.1 As I have pointed out, there has been much debate as to which of the two judgments in the *Halcyon Isle* should be preferred. Each has been criticised on various grounds and I now move to look at one of the major criticisms of the majority judgment, that is, that this judgment encourages forum shopping.

Forum shopping

5.2 It is indeed one of the major criticisms of the majority decision in the *Halcyon Isle* is that it is said that it promotes forum shopping. Those who criticise the majority decision on this basis argue that this judgment provides the opportunity for a claimant to select a jurisdiction that recognises the kind of claim that it has against the vessel or, as importantly, a jurisdiction that does not recognise a competing claim. For example, a mortgagee is able to, and will try to, bring its action in, say, the Singapore, English or New Zealand courts, or in any other common law country where the majority decision in the *Halcyon Isle* has been followed. Mortgagees, aware of a competing claim for repair costs will avoid, for example, Canada and the United States where the repairer might take priority. On the other hand, the repairer whose local law provides it with a maritime lien over the vessel, will want to wait until the vessel sails into a "friendly" jurisdiction that will recognise its claim to a lien, before it takes arrest proceedings.

5.3 It is generally accepted that for non-maritime claims, forum shopping is undesirable and that it should be limited as far as possible. There is no reason this should not also be so for maritime claims. This criticism has some appeal as

there appears to be an inherent injustice in the owner of a vessel, or some other person with the control of the vessel such as a mortgagee, taking steps to defeat a legitimate claimant by selecting the jurisdiction into whose waters the vessel can sail. This is particularly relevant in cases such as the *Halcyon Isle* and the *Ioannis Daskalelis* where the mortgagee had control of the vessel and was able to select the jurisdiction where the vessel was to be arrested. In both cases it is clear that the mortgagee would not have allowed the vessel to sail back into American waters. Unfortunately for the mortgagee in the *Ioannis Daskalelis*, when it ordered the vessel to a Canadian port, its selection of jurisdiction did not pay the dividends that the more fortunate mortgagee in the *Halcyon Isle* achieved when it directed that vessel to call at Singapore.

5.4 The discouragement of forum shopping has a strong attraction as a policy argument against the majority judgment in the *Halcyon Isle*. In particular, it has been used by those who support the minority view. These commentators say that if you look to a foreign legal system to determine the legal nature of a particular claim, and then give full recognition to that claim, then the opportunity for a claimant to gain an advantage by choosing its forum is diminished. In my view, however, this neglects to take into account the principle of law that was unquestioned, and properly so, by both the majority and the minority in the *Halcyon Isle*. That principle is the conflict of laws rule that the local court will use its own law to determine the priority of a maritime claim in rem. The disagreement in the *Halcyon Isle* was not as to what priority an American maritime lien should be given, instead, the difference between the two judgments related to the question of whether such a lien should be recognised at all as, if it was recognised, then the local law, that is English law, required that it would take priority over a registered mortgage. There was no question whatsoever that the local order of priorities should be overturned. Indeed, if the setting of priorities had been an acceptable option for the Privy Council, then this might well have provided a more acceptable resolution to the problem. There would not have been the need to determine the issue on the basis of the nature of the repairer's claim. With the power to freely determine priorities, the majority could have recognised the claim as a maritime lien, but then relegated it behind the mortgagee as a matter of priorities. However, as I have said, this option was not open to the court.

5.5 It is my view that, for as long as it remains the local law, and not a foreign law, that determines priorities, the possibility of forum shopping remains, regardless of whether the majority or minority views in the *Halcyon Isle* are adopted. This is illustrated by the case of the *Colorado* that I have referred to previously. For the Privy Council in the *Halcyon Isle*, the *Colorado* represented the strongest authority as to the English law position and it is the interpretation of the *Colorado* that has caused so many differences between the parties on each side of this debate.

The *Colorado*

5.6 As you will recall, the competing claimants in the *Colorado* were the French holder of a hypothèque and an English repairman. The repairers had seemed to have accepted that, at first glance, the hypothèque, being akin to, at least, a mortgage in English law, could well attract priority over their claim. However, they appealed to the Court on the basis that in France, the home jurisdiction of their rival claimant, the holder of the hypothèque would have been postponed to their claim for the cost of repairs carried out to the vessel and, therefore, if the English Court was to recognise the hypothèque by having reference to French law to determine what it was then, it should also recognise that under French law the hypothèque was inferior to the repairers' claim. Although, again, this argument has an initial attraction as a just resolution of the problem, it was soundly rejected by the Court of Appeal in the *Colorado* on the basis that the English Court was being asked to give English remedies, not French ones, and that the dominance of a repairers' claim over a hypothèque in France was a matter of French remedies which were not relevant for the English court to consider.

5.7 And so, it can be seen that in the *Colorado* the English Court was prepared to recognise the contractually acquired rights of the holder of the hypothèque to trace its claim to the vessel, regardless of whether the vessel's ownership had changed, while at the same time, by applying English rules of priority, it was not prepared to recognise the tacit acceptance by the holder of the hypothèque that, at least in its home jurisdiction, its claim would be ranked behind that of a repairer. This provides a good illustration of the fact that, so long as priorities are left to the local court without regard to the foreign jurisdictions from which the competing claims have arisen, it may benefit one claimant over another to select one particular jurisdiction over another for enforcement of its claim. This difficulty cannot be

eradicated by adoption of either the majority or the minority positions in the *Halcyon Isle*. In fact, for as long as English law requires that English courts decide issues of priorities according to English law, the problem will remain.

5.8 This leads us to the conclusion that the injustice that can arise where a limited fund is being distributed amongst competing claimants is caused by the requirement that the local law of the arresting court determines priorities. Further, under English law, this is not a rule which is readily displaced and therefore, if there is to be a change, it seems it will be a matter for the legislature rather than the courts.

6. SOLUTIONS

6.1 As you will be aware, there have been attempts to achieve a more even-handed approach, internationally, to the ranking of maritime claims, as has been done for many other areas of maritime law. These efforts resulted in the 1926 and the 1967 conventions for the Unification of the Law Relating to Maritime Liens and Mortgages. Regrettably, perhaps, neither of these conventions have obtained widespread acceptance and it may well be that, for example, the approaches taken under English law and American law to the creation of maritime liens are too diverse to be reconciled within an international convention. This is particularly so where the convention requires the local court to enforce what is effectively a foreign system of priorities, even when dealing with maritime claims that have arisen within the local jurisdiction according to the local law. As we have seen, many jurisdictions jealously guard their right to determine priorities under their own law. However, it is a matter that must remain on the international maritime agenda, and it is hoped that at some point greater certainty as to the enforcement of maritime claims may be achieved in an acceptable way under, perhaps, the umbrella of the CMI.

6.2 In some jurisdictions, without the aid of an international convention, a different approach has been taken that appears to provide a more equitable resolution to the difficulties that arise in reconciling competing priorities. For example, under Greek law the question of priorities is treated as a substantive issue, rather than a procedural one, and so it is not Greek law that will be applied when determining priority when the vessel has been sold after arrest by the Greek Court. Instead,

it is the law of the flag that prevails. On its face, and I must confess to not having any knowledge of how this principle actually works in Greek law, this appears to be a practical approach. Anyone dealing with the vessel will have at least a reasonable expectation that, in the event of the judicial sale, its claim will be dealt with under a law that it could identify at the time the claim arose. I say "reasonable expectation" because, of course, the registration of the vessel could easily be changed between the time that the claim was created and the time it was enforced. This is particularly so for a maritime lien holder whose claim will survive the transfer of ownership which, in many cases, will entail a change of flag. Overall, however, if the objective is to promote certainty internationally, then a conflict of laws rule such as determination of priorities according to the law of the flag of the vessel has much to commend itself.

7. CONCLUSION

7.1 Despite the possibility of what might be more equitable solutions to this problem, whether internationally or domestic, the fact of the matter is that in those jurisdictions that so often look to English law for guidance in admiralty matters, there will be little option but to follow either the majority or minority decisions in the *Halcyon Isle*. As a result, each local court will have to consider whether, at least in respect of maritime liens:

(a) it will only recognise a maritime lien if the events giving rise to it would also result in a maritime lien being conferred on the claimant under its own law; or, alternatively

(b) if the foreign claimants law has bestowed on him rights that equate to a maritime lien as known by the arresting court, then the foreign lien will be recognised.

7.2 As we have seen, this question has already been answered in Canada where the *Halcyon Isle* minority was followed, and in South Africa where the court there chose to adopt Lord Diplock's majority decision. The decision of the New Zealand Court of Appeal in the *Betty Ott* is a good indication that the majority judgment in the *Halcyon Isle* would be followed in New Zealand, if the question of priority of foreign maritime liens was to be in issue. As you will recall, this case was in

fact limited to the issue of competing mortgages, and it did not require our Court of Appeal to adopt Lord Diplock's judgment in its entirety.

7.3 Due to this divergence of opinion, in common law jurisdictions, as to the correct approach to be taken to the question of priorities, it remains a fact of commercial life that if you have a claim against the vessel in one jurisdiction, you let the vessel sail from that jurisdiction at your own peril, accepting the risk that by events out of your control your rights may be lost, or your remedy may become worthless. The risks visited upon creditors of a ship involved in international trade are, of course, not limited to technical legal questions of jurisdiction and priority. Those involved in financing or providing services to trading vessels must accept that their security may be subjected to unfamiliar rules and unfamiliar principles of law. Further, those claimants who have control over the vessel, including control into which jurisdictions the vessel can enter, will continue to have an advantage over those who do not. But, of course, that is precisely why they take steps to gain that control, which they give up at their peril. For example, Todd Shipyards, the ship repairer who lost out in the *Ioannis Daskalelis* but succeeded in the *Halcyon Isle*, gave up their best remedy in both cases when they let the vessel sail from their shipyards. As Lord Diplock inferred in this judgment in the *Halcyon Isle*, they voluntarily gave up their possessory lien and gained a potentially less valuable maritime lien but, in return, they freed the yard for new business.

7.4 Overall, as a matter of policy, I must say that I favour the approach taken by the minority in the *Halcyon Isle*. It seems to me that it is an integral part of international trade that we allow foreign ships to enter our respective jurisdictions, bringing with them along with their cargo and crew the foreign rights and obligations that the vessel has acquired while on its travels. We should recognise those rights as far as possible, unless they are so repugnant to our own system of law that policy reasons would not allow it. If this is seen to cause injustice to, for example, a repairer in one jurisdiction whose claim is postponed to a foreign repairer who obtained a better right under some foreign law, then so be it. Both have expectations as to their rights and one must be disappointed. However, it is more in keeping with the concept that domestic regimes of maritime law have evolved from the once truly international law of the sea, that the key question of who loses out when priorities are determined should be decided by a court taking an international view, rather than a purely domestic one. In this way, the interests

of the maritime community at large, and not just individual claimants in particular jurisdictions, are likely to be best served.

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