30/89

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeals of:

TRANSOL BUNKER B.V..... Appellant

and

MOTOR VESSEL "ANDRICO UNITY"
HER OWNERS AND ANY PARTIES
INTERESTED IN HER..... Respondent

and

GRECIAN-MAR S R L ..... Appellant

and

MOTOR VESSEL "ANDRICO UNITY"
HER OWNERS AND ANY PARTIES
INTERESTED IN HER ..... Respondent

CORAM: CORBETT, HOEXTER, E M GROSSKOPF, MILNE JJA, et NICHOLAS AJA.

DATES OF HEARING: 7 and 8 November 1988

DATE OF JUDGMENT: 29 March 1989

J U D G M E N T

CORBETT JA:

On 5 April 1984 the motor vessel Andrico Unity ("the vessel"), while in Table Bay Harbour, was arrested in an action in rem in pursuance of an order granted in the Cape of Good Hope Provincial Division, in the exercise of that Court's admiralty jurisdiction in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act"). The order of arrest was made at the instance of Grecian-Mar SRL ("Grecian-Mar"), of Buenos Aires, Argentina, which claimed in the action payment of US $22 071,10 in respect of necessaries, being stores and provisions, supplied to the vessel by Grecian-Mar at the ports of Villa Constitucion and Buenos Aires in Argentina during November 1983. On 13 April 1984 the vessel was also arrested in rem by order of the same Court at the instance of Transol Bunker BV ("Transol") of Ridderkerk, Holland, which

claimed in its action payment of US $73 554,35 in respect of bunkers (fuel oil and gas oil) supplied to the vessel during November 1983, also at Villa Constitucion and Buenos Aires.

The vessel was released from arrest after security had been furnished. Thereafter the owners of the vessel, a Panamanian company known as Geranium Maritime SA, made separate applications for the discharge of the orders of arrest. The applications were heard simultaneously by Marais J, inasmuch as the issues arising were the same in both applications. The learned Judge granted the applications with costs. His careful and comprehensive judgment has been reported: see Transol Bunker BV v MV Andrico Unity and Others: Grecian-Mar SRL v MV Andrico Unity and Others 1987 (3) SA 794 (C). I shall call this "the reported judgment". With leave of the Court a quo Grecian-Mar and Transol now each appeals to this Court against the

whole of the judgment and order of Marais J.

By agreement between the parties the issues which the Court a quo was asked to decide were limited to two (see reported judgment at p 789 F-H). The appeal relates only to the second of these issues. Before stating this issue it is necessary to refer to certain provisions of the Act and some of the background facts.

The object of the Act, according to its long title, is to provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court, and for the extension of these powers; for the law to be applied by, and the procedure applicable in, these divisions; for the repeal of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, in so far as it applies to the Republic; and for incidental matters. Prior

to the commencement of the Act on 1 November 1983 the position was as set out in Malilang and Others v MV Houda Pearl 1986 (2) SA 714 (A), at pp 722 J - 723 C. That is, the jurisdiction of the South African courts of admiralty was governed by the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, which conferred upon them the same admiralty jurisdiction as that enjoyed by the English High Court as it existed in 1890. And the law to be applied was English admiralty law as administered by the English High Court exercising admiralty jurisdiction in 1890.

The vesting of the powers of the old South African admiralty courts in the provincial and local divisions of the Supreme Court of South Africa is effected by sec 2 of the Act, which decrees that they -

> "...shall have jurisdiction... to hear and determine any maritime claim...."

The definition of "maritime claim" in sec 1(1) of the Act contains, in sub-paras (a) to (z) inclusive, a long list of such claims. In terms of sec 3 a maritime claim may be enforced by either an action in personam or an action in rem. Sec 3(4) and (5), dealing with actions in rem, provides as follows:

> "(4) Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action, a maritime claim may be enforced by an action in rem -
>
> (a) if the claimant has a maritime lien over the property to be arrested; or
>
> (b) if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned.
>
> (5) An action in rem shall be instituted by the arrest within the area of

jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

(a) The ship, with or without its equipment, furniture, stores or bunkers;

(b) the whole or any part of the equipment, furniture, stores or bunkers;

(c) the whole or any part of the cargo;

(d) the freight."

Both Grecian-Mar and Transol rely, at this stage at any rate (see the reported judgment at pp 796 I - 797 B), on the provisions of sec 3(4)(a) in order to sustain the actions in rem brought by them. This requires the claimant to have a maritime lien over the property to be arrested, in this case the vessel.

The term "maritime lien" is not defined in the Act. Apart from sec 3(4)(a), it occurs in two other provisions of the Act. Firstly, among the

maritime claims listed in sec 1(1) - under the definition of "maritime claim" - is:

> "(v) any claim relating to any maritime lien, whether or not falling under any of the preceding paragraphs;."

And, secondly, sec 11 (which deals with the ranking of claims in regard to a "fund in a court" resulting from the sale of arrested property in terms of sec 9 or in regard to security given in respect of property in connection with a maritime claim or in regard to the proceeds of property sold pursuant to an order or in the execution of a judgment of a court in terms of the Act) lists in subsec (1)(e) -

> "claims in respect of any maritime lien not falling under any category mentioned in any of the preceding paragraphs".

Thus the maritime lien is by definition a type of maritime claim and its importance lies in the facts that -

(a) it constitutes one of the bases upon which a claimant may found an action in rem (sec 3(4)(a)); and

(b) it confers a certain preference in the ranking of claims in terms of sec 11.

I shall later examine more closely the nature of the maritime lien. At this stage, and in order to delineate the problem which arises in this appeal, it suffices to say that in maritime law the term "maritime lien" denotes a legal concept which appears to have originated in the 19th century and which is to be found, sometimes in a slightly different guise or under a different name, in the legal systems of many maritime countries. Different municipal systems of law (I use the word "municipal" here in the conflicts sense: see Cheshire & North's Private International Law, 11 ed, p 3) accord the status of a

maritime lien to different groups of maritime claims. Thus, for example, English admiralty law has limited the maritime lien to claims relating to (1) salvage, (2) collision damage, (3) seaman's wages, (4) bottomry, (5) master's wages and (6) master's disbursements. Of these bottomry is now obsolete. (See Bankers Trust International Ltd v Todd Shipyards Corporation, The Halcyon Isle 1981 AC 221 (PC), at p 232 H - 233 A.) According to United States law, on the other hand, maritime liens arise from a far wider range of maritime claims, both in contract and in tort (see 70 American Jurisprudence 2nd, § 559; Gilmore and Black, The Law of Admiralty, 2 ed, pp 627-33). The essential effect of a maritime lien, in English admiralty law at any rate, is that it attaches ex lege to the ship or other property (for convenience I shall merely refer to the ship) in respect of which the maritime claim arose and it follows the ship, irrespective of changes

in ownership or possession, and irrespective of the state of knowledge of the new owner or possessor. The lien does not depend on the lienee (the holder of the lien) acquiring or retaining possession of the ship. As I have indicated, it enables the lienee to bring an action in rem, even though no claim in personam lies against the owner of the ship, and it confers upon the lienee a certain preference when the ship is sold and there is a limited fund for the satisfaction of creditors' claims. The lien is asserted by the arrest of the ship in a proceeding in rem and it then relates back to the time when it first attached.

As regards the law to be applied by a South African court exercising admiralty jurisdiction since 1 November 1983, sec 6(1) of the Act provides as follows:

> „(1) Notwithstanding anything to the contrary in any law or the common law contained

a court in the exercise of its admiralty juridiction shall -

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman Dutch law applicable in the Republic."

I shall discuss these provisions later.

In the present case Grecian-Mar and Transol instituted their respective actions in rem by causing the Andrico Unity to be arrested by order of the Court

a quo on the basis of their respective claims for the price of stores and provisions and bunkers supplied to the vessel in Argentina. Their claims for the price of the goods supplied undoubtedly constituted maritime claims within the definition in sec 1(1) of the Act. This is not in dispute. The question, however, is whether these claims gave rise to maritime liens, thus grounding the claim by each of the appellants to be entitled to institute an action in rem against the vessel in terms of sec 3(4)(a) of the Act.

A country's municipal system of law comprises what may be conveniently termed its "domestic" rules of law, which apply when there is no foreign element, and the rules of its private international law (or conflict of laws), which come into play where there is a foreign element and which determine the system of law to be chosen to govern the position where the domestic rules of the forum and the relevant rules of the

foreign country involved conflict. In the instant case it is conceded by the appellants that by the domestic rules of law to be applied by a South African court, in the exercise of its admiralty jurisdiction, the claims in respect of stores and provisions furnished and bunkers supplied do not give rise to maritime liens. Appellants' case is, however:

(1) That, in accordance with the applicable principles of private international law, the question as to whether these claims give rise to maritime liens must be determined by reference to the lex loci contractus, (perhaps, more correctly, the proper law of the contracts), ie the law of Argentina.

(2) That in terms of the law of Argentina these claims afford each creditor what is termed "a privileged credit" in respect of his claim and that a privileged credit under the law

of Argentina is the equivalent of a maritime lien.

Although proposition (2) was put in issue by the affidavits filed, it was agreed by the parties at the hearing in the Court a quo that the Court should decide the correctness of proposition (1) only; and that, in the event of the Court holding in favour of the appellants, the question as to the existence and nature of a maritime lien in the law of Argentina would be investigated at the trial action, if not previously settled by agreement (see reported judgment at p 798 F-H).

As regards proposition (1), Marais J held that the matter before him was one in respect of which a court of admiralty of the Republic, such as is referred to in the Colonial Courts of Admiralty Act 1890 of the United Kingdom, had jurisdiction immediately prior to the commencement of the Act on 1

November 1983; and that consequently he was required by sec 6(1) - quoted above - to apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied on 1 November 1983, in so far as that law can be applied (see reported judgment at p 801 I - J). After a full review of the English admiralty law and relying principally on the majority judgment in The Halcyon Isle, supra, he further decided -

(a) that the question as to whether the appellants enjoyed maritime liens over the vessel in respect of their claims had to be decided by applying the whole of English admiralty law, including its conflicts rules in regard to choice of law (see reported judgment at p 822 D - 823 D); and

(b) that according to English admiralty law (including its rules as to conflict of laws) the question as to whether a claim arising from a contract entered into in a foreign country had the status of a maritime lien had to be decided by reference not to the lex loci contractus but to the lex fori, English domestic law (see reported judgment at p 821 I-J).

It followed that the Court a quo was obliged to decline to recognize the Argentine liens as maritime liens within the meaning of the Act and that, the sole basis for the arrests in rem having fallen away, the orders of arrest had to be set aside (see reported judgment at p 823 D).

At this point I would mention that the same issues arose in a case heard in the Durban and Coast

Local Division by Leon J. The learned Judge in that matter gave judgment a few days after the judgment of Marais J had been delivered and came to the same conclusion as Marais J, though for slightly different reasons. Leon J's judgment has also been reported: see Brady-Hamilton Stevedore Co and Others v MV Kalantiao 1987 (4) SA 250 (D). Leave to appeal having been granted by the Court of first instance, an appeal was noted against the judgment of Leon J and the appeal was set down for hearing on the day after the date of hearing for the present appeals in the Andrico Unity case. In view of the identity of issues and because of an overlapping of counsel in both matters, it was agreed between the parties that the two cases be heard simultaneously over the two allotted days.

A separate judgment will be delivered in the Kalantiao matter, merely referring to the conclusions reached by this Court in the appeals concerning the Andrico Unity.

I shall also give certain directions designed to assist the taxing master in separating the costs of the two matters. For the sake of convenience, however, I shall when dealing with the merits of the appeals concerning the Andrico Unity in this judgment refer to arguments raised by counsel in both matters.

Counsel for the appellants in both matters, Mr Hofmeyr and with him Mr Scott for the appellants in the Andrico Unity appeals and Mr Scott alone in the Kolantiao appeal, concentrated mainly on seeking to persuade us that the minority judgment in The Halcyon Isle, supra, and not the majority judgment, correctly represented the English admiralty law on the point as at 1 November 1983. On the other hand, counsel for the various respondents, Mr Wallis in the appeals concerning the Andrico Unity and Mr Gordon in the appeal relating to the Kolantiao, argued the converse. Before considering the respective merits of the

majority and minority judgments in The Halcyon Isle it is necessary to deal with certain preliminary matters and the arguments raised in relation thereto.

As I have indicated, sec 3(4)(a) provides for the enforcement of a maritime claim by an action in rem if the claimant has a maritime lien over the property to be arrested. Although it was common cause in the Courts a quo, in both the Andrico Unity matter and the Kolantiao matter, that in deciding what was meant by the term "maritime lien" in sec 3(4)(a) the Judge was required by sec 6(1)(a) to look at English admiralty law (including its conflicts rules), on appeal Mr Wallis argued that this approach was incorrect. He submitted -

(a) that this approach reversed the proper stages of the enquiry by seeking to answer the question of the meaning to be attached to the

relevant words in the Act (viz. "maritime lien"), which determined the jurisdiction of the court to entertain an action in rem under sec 3(4)(a), by reference to the legal system which, in terms of sec 6(1), is to be applied in the event of the court having such jurisdiction;

(b) that the meaning of "maritime lien" in sec 3(4)(a) could, and should, be determined merely by a process of statutory interpretation, and in this connection it was of importance that prior to the enactment of the Act our courts exercising an admiralty juridiction had recognized only those six maritime liens accorded such status by English admiralty law (referred to above); and

(c) that there is no indication in the Act that

it was intended to depart from this well-established acceptance by our courts as to what was comprehended by the term "maritime lien" and that, therefore, Parliament must have intended "maritime lien" to be limited to the six categories aforementioned.

Submission (a) above is, in my opinion, fallacious. Sec 6(1) deals not with jurisdiction, but with the system of law to be applied. In terms thereof a provincial or local division of the Supreme Court is required in the exercise of its admiralty jurisdiction to apply English admiralty law, as it was on 1 November 1983, with regard to "any matter" (Afrikaans: "enige aangeleentheid") in respect of which a pre-1983 South African court of admiralty, established under the Colonial Courts of Admiralty Act 1890, had jurisdiction immediately prior to 1 November

1983; and with regard to any other matter to apply Roman-Dutch law. The "matter" in issue in the present case is whether the orders of arrest made by the court of first instance in terms of sec 3(4)(a) to enable the claimant to institute an action in rem should be set aside on the ground that the claimant did not have a maritime lien over the property arrested, ie the vessel. In my view, this is eminently a matter over which such a pre-1983 South African court would have had jurisdiction. Such a court administered English admiralty law as it was in 1890 and this comprehended actions in rem founded upon the existence of a maritime lien. Consequently, the issue as to whether a particular claim gave rise to a maritime lien and, therefore, entitled the claimant on that ground to bring an action in rem would clearly have been a matter cognisable by such a court. The issue relates to the right of the claimant to pursue a certain remedy, viz.

an action in rem, rather than the jurisdiction of the Court to entertain the suit. And even if the result of the Court deciding that no maritime lien exists can be regarded in effect as a denial of jurisdiction, a court always has jurisdiction to decide on its own jurisdiction. It is to be noted that, in addition to the present case and the case concerning the Kalantiao, where it was accepted that the issue as to whether recognition should be given to a foreign maritime lien was, in terms of sec 6(1)(a), to be determined in accordance with English admiralty law as at 1 November 1983 (see reported judgment at p 801 F-I and the Kalantiao judgment at p 253 F-H), there is also the judgment of Nienaber J in Oriental Commercial and Shipping Co Ltd v M V Fidias 1986 (1) SA 714 (D), in which a similar approach was adopted (see pp 716 C-E, 718 G-H).

As to submissions (b) and (c) above, what

they amount to is the proposition that prior to the commencement of the Act South African courts of admiralty, administering English admiralty law, perforce recognized only the six aforementioned categories of maritime lien; and that, accordingly, it is this numerus clausus that the Legislature intended when it used the term "maritime lien" in clause 3(4)(a). There is, in my view, no substance in this line of argument. It is true that where no foreign element was involved such a South African court of admiralty would have been confined to this numerus clausus, but where a foreign element was involved such an interpretation would amount, in my view, to attributing to the Legislature an intention to exclude the possible recognition of foreign maritime liens by way of the application of the principles of private international law relating to choice of law. This appears to me to be a very improbable state of

affairs. Prior to the Act the South African courts of admiralty applied English admiralty law and this included the relevant principles of English private international law (cf Malilang and Others v MV Houda Pearl, supra, at p 723 E-H). This would have covered a question such as whether a foreign maritime lien should receive recognition for the purposes of an action in rem or the ranking of claims. The interpretation suggested by Mr Wallis would mean that the Act brought about a radical alteration of this pre-Act position by excluding in this sphere the application of the principles of private international law. Had this been the intention I would have expected a clearer indication of this in the Act.

Moreover, the whole argument seems to me to beg the question. If prior to 1 November 1983 English admiralty law (including its rules of private international law) required South African courts of

admiralty to give recognition to foreign maritime liens, then on counsel's argument the words "maritime lien" in sec 3(4)(a) would have to be construed as including such liens. The whole question is whether South African courts of admiralty then, and now, are so required to give recognition to foreign maritime liens.

I, therefore, conclude that the Court a quo and the Court in the Kalantiao case correctly approached the issue on the basis that, in terms of sec 6(1)(a), it had to be resolved by reference to the law applied by the English High Court exercising admiralty jurisdiction as at 1 November 1983 and that this reference comprehended both domestic rules of law and the relevant principles of private international law.

It was submitted, on the other hand, by appellant's counsel that there were indications in the

Act itself (see para. (v) of the definition of "maritime claim" in sec 1 and sec 11(1)(e), quoted above) that it was intended that recognition be given to categories of maritime lien outside the numerus clausus laid down by English admiralty law. Initially I understood appellant's counsel to use these alleged indications positively in support of the recognition of foreign maritime liens, but in the course of argument he conceded that they merely showed that the Act had "left the door open" in this regard.

I do not find it necessary to discuss the arguments adduced in support of this submission, or the counter-arguments raised by counsel for the respondents. If at its highest the submission amounts to no more than that there was an intention on the part of the Legislature to leave the door open, then it really takes the matter no further. The question remains: what does the English law as applied by the

English courts exercising admiralty jurisdiction prescribe? To this question I now turn.

The logical starting point in an endeavour to answer this question is the decision of the Judicial Committee of the Privy Council in The Halcyon Isle, supra. This was an appeal from the Court of Appeal in Singapore. The vessel in question, a British ship called the Halcyon Isle, had been arrested in Singapore in an action in rem instituted in the High Court of Singapore by the appellant, an English bank, which held a mortgage on the vessel. Subsequently, the vessel was sold by order of court for a sum insufficient to satisfy in full the claims of all the creditors of her owners. The respondent, a ship repairer, had executed certain repairs to the vessel in its shipyard in New York. Under United States law the respondent was entitled to a maritime lien for the price of the

repairs and it applied to the High Court for a declaration that it was so entitled in terms of the law of Singapore. The appellant intervened and applied for a determination of the priority of payments from the proceeds of the sale of the vessel. The High Court decided that the respondent was not entitled to a maritime lien under Singapore law, with the result that the appellant's (mortgagee's) claim took priority over respondent's. The Court of Appeal in Singapore reversed this decision. On appeal the Privy Council by a majority of three (Lord Diplock, Lord Elwyn-Jones and Lord Lane) to two (Lord Salmon and Lord Scarman) allowed the appeal and restored the judgment of the High Court.

As regards the point in issue there was no relevant difference between the law of Singapore and the law of England. Indeed, in his judgment Lord Diplock used the expression "English law" as embracing

the law of Singapore (see p 229 H). That was also the view of the minority (see p 242 F). The case may, therefore, be regarded as a decision by the Privy Council on English admiralty law.

Early in his judgment Lord Diplock identified the problem and the possible solutions of it. While priorities 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, in the case of a ship the classification of claims against its former owner for the purpose of determining priorities in the proceeds of its sale may raise a further problem of conflict of laws, since certain claims may have arisen within the territorial jurisdiction of foreign countries, which may assign legal consequences to the claims different from those under English law. So far an English distributing court, faced with the problem

of classifying foreign claims in order to determine priorities under the lex fori, the choice, said Lord Diplock (at p 230 E-G) -

> "..... would appear to lie between (1) on the one hand classifying by reference to the events on which each claim was founded and giving to it the priority to which it would be entitled under the lex fori if those events had occurred within the territorial jurisdiction of the distributing court; or (2) on the other hand applying 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 a 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 claim the priority accorded under the lex fori to claims arising from events, however dissimilar, which would have given rise to the same or analogous legal consequences if they had occurred within the territorial jurisdiction of the distributing court. To omit the dissection of the lex causae of the claim that the second choice prescribes and to say instead that if under the lex causae the relevant events would give rise to a maritime lien, the

> English court must give to those courts (sic: "claims"?) all the legal consequences of a maritime lien under English law, would, in their Lordships' view, be too simplistic an approach to the questions of conflicts of law that are involved."

For reasons which I shall summarize later Lord Diplock and his two colleagues preferred the first of these alternative choices.

In their dissenting judgment Lord Salmon and Lord Scarman identified the issue as follows (at p 242 F) -

> "The issue is: when a ship is sold by order of the court in a creditor's action in rem against the ship and the proceeds of sale are insufficient to pay all creditors in full does a ship-repairer, who has provided his services and materials abroad and has by the lex loci the benefit of a maritime lien, enjoy priority over a mortgagee? Or is his foreign lien to be disregarded in determining his priority?"

Having considered the issue on principle and by

reference to authority, their Lordships concluded as follows (at p 250 D):

> "A maritime lien is a right of property given by way of security for a maritime claim. If the Admiralty court has, as in the present case, jurisdiction to entertain the claim, it will not disregard the lien. A maritime lien validly conferred by the lex loci is as much part of the claim as is a mortgage similarly valid by the lex loci. Each is a limited right of property securing the claim. The lien travels with the claim, as does the mortgage: and the claim travels with the ship. It would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law.
>
> For these reasons, we think that the Court of Appeal reached the correct conclusion and would dismiss the appeal."

I would just add that the minority were agreed that the actual order of priority of rights which exist against a ship was, according to English law, to be decided by the lex fori (see p 246 F). This is

nowhere in dispute.

As the aforegoing synopsis of the case indicates, The Halcyon Isle, supra, was concerned primarily with the ranking (or priority) of claims in the distribution of a fund created by the sale of a vessel arrested in an action in rem and not, as is the present case, with the right or locus standi of a claimant to bring an action in rem. Common to both these enquiries, however, is the basic question as to whether the court hearing the matter should, in accordance with the rules of private international law, give recognition to a foreign maritime lien arising in accordance with the lex loci contractus, but not having that status according to the domestic rules of the lex fori. And in dealing in his judgment with the issue of priorities, Lord Diplock emphasized the dual characteristics of a maritime lien: namely, its enforceability by an action in rem against the ship,

notwithstanding the subsequent sale of the ship to a third party and the ignorance of such third party; and, secondly, its status in the order of priorities in the distribution of a limited fund (see p 234 B-E). His Lordship further warned (at p 235 B-C) that the recognition of any new class of claim arising under foreign law as giving rise to a maritime lien in English law because it does so under its own lex causae would not only affect the question of priorities but also extend the classes of persons entitled to bring an action in rem against a particular ship. He concluded that, in principle (at p 235 E) -

> "..... the question as to the right to proceed in rem against a ship as well as priorities in the distribution between competing claimants of the proceeds of her sale in an action in rem in the High Court of Singapore falls to be determined by the lex fori, as if the events that gave rise to the claim had occurred in Singapore."

Having thereafter considered the English

authorities on the point, Lord Diplock stated (at pp 238 H - 239 A):

> "In their Lordships' view the English authorities upon close examination support the principle that, in the application of English rules of conflict 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 events had occurred within the territorial jurisdiction of the English court."

It is thus clear that in the view of the majority in The Halcyon Isle, supra, these two characteristics of a maritime lien go hand in hand; and that if legal effect be given to a foreign maritime lien (not recognized by the domestic rules of English law) because it enjoys status as such according to the lex loci contractus, this will be so for the purpose of both priorities and the right to bring an action in rem; and vice versa. There is no possibility of

recognition or non-recognition of a foreign lien for one of these purposes and not for the other. Indeed, it seems most unlikely that English law, or any other cognate system of law, would have one rule for priorities and another (different) rule for *locus standi* to bring the *action in rem*. Consequently, although the actual decision in *The Halcyon Isle*, *supra*, may be confined to priorities and Lord Diplock's findings in regard to the right to bring an action *in rem* may, strictly speaking, be *obiter* (a point upon which I do not find it necessary to express an opinion), it is clear that *The Halcyon Isle*, *supra*, is nevertheless an authority of prime importance in regard to the issue in the instant case, and in the *Kalantiao* case.

Of course, as correctly pointed out by Marais J in the Court *a quo* (see reported judgment at p 803 G-H) and Leon J in the *Kalantiao* case (*supra*, at p 253 G-I), what a South African court exercising admiralty jurisdiction is required by sec 6(1) to do is to apply -

> "....the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied...."

This means that the South African court must ascertain and apply the authoritative statements of the English law on the subject by the Courts comprising the High Court of Justice of the United Kingdom. Although strictly the High Court of Justice is separate from the Court of Appeal (see sec 1(1) of the English Supreme Court Act 1981, Chap 54), obviously an authoritative statement of the relevant law by the Court of Appeal or, a fortiori the House of Lords, which would be binding on the High Court, would be wholly pertinent. The Judicial Committee of the Privy Council, on the other hand, is not part of the appellate hierarchy of the English Supreme Court: it is the final court of appeal for certain Commonwealth countries, British colonies and dependencies, the Channel Islands and the

Isle of Man. Consequently its decisions, though of great persuasive force, are not binding on the High Court, the Court of Appeal or the House of Lords. (See generally the Kalantiao case, supra, at p 254 J - 255 H and the authorities there cited.)

In the case of Van der Linde v Calitz, 1967 (2) SA 239 (A), this Court was, in effect, required by statute to apply, in regard to a matter which related to the law of evidence, the law applied by the English Supreme Court of Judicature. There were two relevant authorities, one a decision of the House of Lords in 1942 and one a decision of the Privy Council in 1931, which conflicted with one another on a vital point. This Court preferred to follow the decision of the Privy Council. In delivering the judgment of the Court, Steyn CJ accepted (at pp 250 F - 251 D) that what was held in the House of Lords case would be binding on the English courts comprising the Supreme

Court of Judicature, but emphasized that by reason of the statutory provisions which made the Privy Council until 1950 (when the appeal to the Privy Council from the Appellate Division was abolished by Act 16 of 1950) the final court of appeal for South Africa, it (ie the Privy Council) had the final say, as far as our law was concerned, as to what the English law of evidence on the point was. Had the point arisen prior to 1950 (reasoned Steyn CJ), then this Court would have been obliged to follow the Privy Council decision rather than that of the House of Lords. The lapse of the appeal to the Privy Council in 1950 did not result in the former decisions of that Court being deprived of their authority. They remained decisions of a former highest Court and they carried no less weight than the decisions of the Appellate Division itself. Steyn CJ continued (at p 251 E):

"Genoemde Wet het na my mening nie die

> uitwerking dat vorige uitsprake van die 'House of Lords' vir ons Howe meer bindend geword het as wat hulle was toe die Geheime Raad nog ons hoogste Hof was nie. Die eintlike vraag is dus nie of hierdie Hof die Duncan-uitspraak as 'n juiste weergawe van die Engelse bewysleer moet aanvaar nie, maar of hy die weergawe daarvan in die Robinson-saak as 'n duidelike mistasting moet verwerp ten gunste van eersgenoemde weergawe."

I agree with the following view expressed by Leon J in the Kalantiao case (at p 257 J):

> "Whatever justifiable criticisms may be made of the decision in Van der Linde v Calitz, I do not understand the case to go further than to hold that the pre-1950 Privy Council decisions will be regarded by the Appellate Division as being on a par with its own decisions. I do not read the judgment as conferring any status on later Privy Council decisions beyond their persuasive force...."

The majority judgment in The Halcyon Isle, supra, is consequently not binding on this Court, in the sense that it has the status of one of this Court's own decisions and can only be departed from if shown to be

palpably wrong: it merely has persuasive force.

The degree of persuasive force of a judgment normally depends upon the standing of the Court from which it emanates and upon the intrinsic cogency of its reasoning. As I have already remarked, although the Privy Council is not part of the English Supreme Court hierarchy and its decisions are not binding on the English courts, such decisions are nevertheless accorded "the greatest attention and respect" by the English courts (see Stephenson v Thompson [1924] 2 KB 240, at p 246).

In the result The Halcyon Isle, supra, though not a binding precedent, is an authority to which the greatest attention and respect must be paid when seeking to determine what rule of law would be applied in this case by an English court exercising admiralty jurisdiction. This, of course, is no easy task for a

South African court; and it is a task made even more difficult by the facts (i) that the Privy Council was in this case so crucially and narrowly divided on the basic issue confronting it; and (ii) that there has been widespread criticism of the judgment of the majority, particularly by academic writers. I must nevertheless do the best I can under the circumstances.

I proceed now to examine more closely the reasons which led Lord Diplock and the two Law Lords who concurred in his judgment to conclude that according to English admiralty law the question as to whether a claim based upon a foreign contract should be classified as a maritime lien was to be determined by the lex fori, ie by the domestic rules of English admiralty law.

As I have indicated, Lord Diplock approached the matter firstly on principle and secondly by

reference to English authority. After remarking that the first alternative, ie classification by reference to the lex fori, had the merit of simplicity, his Lordship proceeded to advance what appear to be basically three reasons for concluding that what I shall, for the sake of brevity, call "the lex fori approach" was the correct one in principle.

The first of these reasons (which appears at pp 230 H- 231 G) has reference to the general choice of law rule in English private international law, viz that a foreign contract is given the same legal consequences as would be accorded to it under its proper law (see Dicey and Morris The Conflict of Laws, 11 ed, Rule 186(1), p 1236); and the rationale of the rule, viz. that by its application the legitimate expectations of the parties to the contract as to their rights inter se will not be defeated by any change of the forum in which such rights have to be enforced.

In this connection Lord Diplock makes the point that where the court is dealing with the distribution of a limited fund, insufficient to pay in full all creditors, it is no longer concerned with merely enforcing the individual creditors' contractual rights against the debtor: it is primarily concerned with "doing even-handed justice" between competing creditors. In the circumstances rights of priority accorded to creditors inter se are not the rights of parties to a contract against one another, but rather the rights as between a party to a contract and strangers to the contract, viz other creditors.

This point appears to be a valid one in that the rationale given for the principle expressed by Dicey and Morris in Rule 186(1) does not appear to apply in such a situation. This reasoning would not, of course, apply to a foreign maritime lien, based upon tort or quasi-contract, which did not fall within the

numerus clausus recognized by the domestic rules of English laws. Moreover, in the minority judgment in The Halcyon Isle, supra, the following counter-argument is raised: that if English law failed to recognize a maritime lien created by the lex loci contractus, where no such lien existed by internal English law, "injustice would prevail". In the instant case the respondent (the New York ship-repairer) would be deprived of its maritime lien -

> "...valid as it appeared to be throughout the world, and without which they would obviously never have allowed the ship to sail away without paying a dollar for the important repairs upon which the ship-repairers had spent a great deal of time and money and from which the mortgagees obtained substantial advantages." (See pp 246 H - 247 A.)

In regard to this latter point, their Lordships are at odds with one another on the facts. Lord Diplock, describing the respondent as "experienced litigants in

courts of admiralty", suggests that respondent was well aware, when it allowed the Halcyon Isle to leave its repairyard and thereby relinquished its possessory lien for unpaid work, that that part of the lex causae which accorded rights of priority over other classes of creditors in the distribution of a limited fund resulting from an action in rem against the vessel would be compelled to yield to the lex fori of any foreign court in which the action in rem might be brought. Respondent, or its lawyers, would also know that the priorities as between various kinds of maritime claims accorded by the lex fori were subject to considerable variation as between one country and another (see p 231 D-G). This general suggestion is controverted in the minority judgment, which places emphasis, inter alia upon a non-waiver clause in the ship repair contract as indicating the importance which the respondent attached to their maritime lien (see p

247 B-D).

It seems to me, with respect, that the state of mind of a particular claimant should not be allowed to influence a question of principle, except perhaps in so far as that might be indicative of a general state of affairs. Generally speaking, I would imagine that persons who have commercial dealings with ships, such as mortgagees and necessaries men, would be aware of the attitude adopted by the courts of the major trading nations, including the English courts, to the recognition of foreign maritime liens and would realise that they could not necessarily rely upon a maritime lien granted by the lex loci contractus being recognized as such in a foreign forum. In any event, it does not seem to me that this is a factor of prime importance in determining this question of principle.

More important it seems to me is the point that the recognition of a foreign maritime lien (not accorded that status by the law of the forum) affects the right of strangers to the contract giving rise to the lien, where the court is dealing with the distribution of a limited fund. Bearing in mind that the proper law of the contract may be one chosen by the parties, the anomaly of thus subjecting a stranger to the proper law so selected becomes all the more apparent.

Secondly, Lord Diplock, having traced briefly the history of the maritime lien and its relation to the ranking of claims for the purpose of priority in

/ the .....

the distribution of a limited fund (a "complicated" matter), emphasizes that these priorities bear no relation to, and cannot be explained by, the general rule applicable to other charges on property as security for a debt, viz qui prior est tempore potior est jure. Thus the owner of a ship which has become the subject of a maritime lien can create a charge on the whole property in the ship which will rank in priority to the existing lien; it is accordingly inaccurate to speak of a maritime lien - as did Gorrell Barnes P in The Ripon City [1897] P 226 at 242 - as being "a subtraction from the absolute property of the owner in the thing". Lord Diplock further refers to the fact that under English admiralty law and practice the six recognized classes of maritime lien take priority over claims under mortgages in the distribution of a limited fund by the court, and mortgages

themselves rank in priority to all classes of claims not giving rise to maritime liens. (See generally pp 231 H - 233 H.) His Lordship concludes (at p 234 A-B):

> "The pattern of priorities, which has been applied by the English Admiralty Court in the distribution of the fund representing the proceeds of sale of a ship in an action in rem, thus affords no logical basis for concluding that, if a new class of claim additional to the six that have hitherto been recognised were treated under its own lex causae as having given rise to a maritime lien, this should have any effect on its ranking for the purpose of priority under the lex fori in the distribution of the fund by the court and, in particular, no logical basis for concluding that this should entitle it to priority over mortgages."

In this connection there are certain observations to be made. The first of these relates to nomenclature. In the passage just quoted and elsewhere in his judgment Lord Diplock refers to the

lex causae. This must be taken to denote the lex loci contractus, the term used in the minority judgment. The lex causae is normally understood to mean the system of law (usually but not necessarily foreign) which governs the question (see Dicey and Morris, op cit, p 29). This is, of course, the very question to be determined in a conflicts matter. It would perhaps be more accurate in this context to speak of the proper law of the contract, rather than the lex loci contractus, since it is generally the proper law which determines the legal effect of a contract in a conflicts situation and since the proper law and the lex loci contractus need not necessarily coincide (see Dicey and Morris, op cit, p 1166). In the case of the repairs to the Halcyon Isle American law was clearly both the proper law and the lex loci contractus: consequently the use of the latter term is not inappropriate.

The second observation is that a rejection

of the lex fori approach and an acceptance of the views of the minority in The Halcyon Isle, supra, (which I shall call for the sake of simplicity "the lex loci approach") will usually lead to British creditors being placed at a disadvantage vis-à-vis some of their counterparts in foreign countries. Take, for example, a ship mortgaged in England to an English creditor, which is furnished with necessaries successively by an English supplier at an English port and an American supplier at a port in the United States of America. In the event of the ship being arrested and sold in pursuance of an action in rem instituted in an English court, the application of the lex loci approach (postulating that under United States law a necessaries man enjoys a maritime lien - see Gilmore and Black, op cit, at pp 630, 652-3) will result in the American necessaries man enjoying priority in regard to the proceeds of the ship not only over the British

necessaries man, but also over the British mortgagee, who in terms of the lex fori would himself have priority over a necessaries man (see The Halcyon Isle, supra, at p 233 G). This emphasizes the close correlation between priorities and according a particular kind of maritime claim the status of a maritime lien. And it fortifies the contention that, since priorities are governed by the lex fori, recognition of a claim as giving rise to a maritime lien should likewise be governed by the lex fori. I shall revert to this point later.

The third observation to be made is that the British claimant who would thus be forced to concede priority to his American counterpart by the adoption of the lex loci approach, would gain no correlative advantage were the situation to be reversed and the suit to come before a United States court. Assuming the latter were also to apply the lex loci approach,

as would seem to be the position (see Tetley, Maritime Liens and Claims, pp 532 and 622), it would accordingly hold that in terms of the lex loci contractus (English law) the British necessaries man held no maritime lien over the vessel, whereas his American counterpart did. And the British mortgagee would likewise be at a disadvantage.

In the judgment of the minority in The Halcyon Isle, supra, it is stated that, inter alia, comity of nations, private international law and natural justice require the adoption of the lex loci approach (see p 246 G). It seems to me, however, with respect, that as long as there continue to be major differences between the domestic rules of the legal systems of countries as to what classes of maritime claims should be recognized as giving rise to maritime liens, the lex loci approach is no more likely to produce uniformity of treatment, equity or natural

justice than the lex fori approach.

In the reported judgment (at pp 811 H - 812 A) Marais J makes the following point:

> "If a Court does recognise a foreign maritime lien which arose in circumstances which would not give rise to a maritime lien under the lex fori and there are other competing maritime liens which arose under the lex fori, by what principle does the Court decide what ranking should be assigned to the foreign lien within the class of maritime liens? There is as little logical justification for assigning it first place within the class as there is for assigning it last place within the class. It is here, I think, that the approach favoured by the minority in The Halcyon Isle, namely assigning priority by reference to the legal consequences of the foreign law rather than by reference to the events giving rise to those consequences, breaks down and becomes quite unworkable. In other words, while the classification by reference to legal consequences may enable one to say that the foreign rights are similar to those which a domestic maritime lien gives, and may therefore provide superficial justification for assigning it to that class of claim, it will not enable one

> to say that the foreign rights are similar to those which a domestic maritime lien gives, and may therefore provide superficial justification for assigning it to that class of claim, it will not enable one to say what ranking within the class of maritime liens the foreign claim should enjoy."

I am not sure that the problem of assigning a ranking to a foreign lien (not recognised by English domestic law) within the class of maritime liens would be quite as difficult as Marais J suggests. It would seem that in regard to ranking the English admiralty courts have adopted -

> "a broad discretionary approach with rival claims ranked by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstance of each case. This is not however to suggest that the law is capricious, erratic or unpredictable. Arising from the 'value' framework within which the Courts operate there have emerged various principles which are capable of providing reliable signposts to the likely attitude of the Courts. Such indeed, on occasions is the degree of predictability that many commentators have been tempted to represent the operative principles as firm 'rules of ranking'. Whilst this approach

> is understandable it would appear not to be strictly accurate, for such 'rules of ranking' are no more than visible manifestations of an underlying equity, policy or other consideration."
> (See Thomas, Maritime Liens, p 234).

It is true that in particular instances the application of these principles has resulted in the formulation of certain rules or guidelines (see Thomas, op cit, pp 244-50), but they would not appear to be immutable. The assignment of a foreign lien (not recognized by English domestic law) to a place in the order of ranking, would present problems were the lex loci approach to be adopted, but I do not think that the problems would be insurmountable. Naturally the vast range of claims recognized by the legal systems of some countries as giving rise to a maritime lien or the legal equivalent thereof (as to which see the summary in Tetley, op cit, at pp 556 ff) would tend to multiply these problems.

The third reason given by Lord Diplock for preferring, in principle, the lex fori approach appears from pages 234-5 of the judgment. After referring to the peculiar characteristic of a maritime lien that it continues to be enforceable by an action in rem against the ship, notwithstanding the sale of the ship to a third party and notwithstanding that the purchaser had no notice of the lien and no personal liability on the claim, his Lordship remarks that this characteristic

> "... points in the direction of a maritime lien partaking of the nature of a proprietary right in the ship"

and states further that the characteristic should not be overlooked in any consideration of how a claim, which under its own lex causae would be treated as having the same legal consequences as those of a maritime lien in English law, is to be classified under English rules of conflict of laws for the purpose of

distribution of a fund under Singapore (ie English) law as the lex fori. Lord Diplock then proceeds (at p 234 F-H):

> "As explained in the passage from The Bold Buccleugh, 7 Moo. P.C.C. 267, 284 that has already been cited, any charge that a maritime lien creates on a ship is initially inchoate only; unlike a mortgage it creates no immediate right of property; it is, and will continue to be, devoid of any legal consequences unless and until it is 'carried into effect by legal process, by a proceeding in rem'. Any proprietary right to which it may give rise is thus dependent upon the lienee being recognised as entitled to proceed in rem against the ship in the court in which he is seeking to enforce his maritime lien. Under the domestic law of a number of civil law countries even the inchoate charge to which some classes of maritime claims give rise is evanescent. Unless enforced by legal process within a limited time, for instance, within one year or before the commencement of the next voyage, it never comes to life. In English law, while there is no specific time limit to a maritime lien the right to enforce it may be lost by laches.
>
> If and when a maritime lien is

> carried into effect by legal process, however, the charge dates back to the time that the claim on which it is founded arose."

Having remarked (as I have indicated) that this characteristic of a maritime lien - "unique in English law" - has the result that the recognition of a new class of claim, arising under a foreign law, as giving rise to a maritime lien in English law not only may affect priorities but also may extend the classes of persons entitled to bring an action in rem against a particular ship, Lord Diplock concludes as follows (at p 235 D):

> "But any question as to who is entitled to bring a particular kind of proceeding in an English court, like questions of priorities in distribution of a fund, is a question of jurisdiction. It too under English rules of conflict of laws falls to be decided by English law as the lex fori."

Subsequently, after discussing certain earlier decisions on maritime liens, Lord Diplock states, with reference to the case of The Tervaete [1922] P 259 (CA) and the three judgments delivered therein by Bankes LJ, Scrutton LJ and Atkin LJ (see p 238 B) -

> "The reasoning of all three judgments is consistent only with the characterisation of a maritime lien in English law as involving rights that are procedural or remedial only, and accordingly the question whether a particular class of claim gives rise to a maritime lien or not as being one to be determined by English law as the lex fori."

The Tervaete, supra, was concerned with the right to bring an action in rem.

Lord Diplock thus appears to advance two bases for concluding that the issue as to the recognition of a foreign maritime lien should be determined in accordance with the domestic rules of the lex fori: (i) that it involves a question of jurisdiction, and (ii) that in English law a maritime lien involves rights that are "procedural and remedial only". These propositions require examination.

In essence the conflicts process arises whenever the case contains a foreign element which raises the possibility of the court constituting the forum being directed by its own rules of private international law to the principles of a foreign system of law in order to decide the case. Postulating that the court has jurisdiction, the first step in the

process is one of classification, or characterization, in order to determine the appropriate rule as to choice of law; and, as is pointed out by Cheshire and North, op cit, at pp 43 ff, such classification may take place at two stages. Firstly, there is the classification of the cause of action whereby the court identifies the main legal category into which the case falls. This classification will bring into operation a choice of law rule, which may, through the appropriate connecting factor, render applicable a foreign system of law. At this stage a second process of classification may become necessary in order to determine whether a particular rule of law of the foreign system, raised by a party, falls within the general category to which the choice of law rule relates.

In general it is, I believe, correct to say that by English law questions of jurisdiction fall to

be decided by the lex fori; and also that the lex fori governs matters of procedure and remedies. Critics of the majority judgment in The Halcyon Isle, and counsel for the appellants, take exception, however, to Lord Diplock's classification of the issues arising in relation to the recognition of foreign maritime liens - as to whether the lienee is entitled to bring an action in rem in an English court and as to the lienee's ranking in the order of priority of claims under an English distribution - as bearing on jurisdiction and/or procedure and remedies. It is argued that a maritime lien confers a substantive proprietary right and that, consequently, the issue should be classified as one relating to the validity and effect of the lien. This, so it is argued, is a matter which in terms of English choice of law rules is determined by reference to the lex loci (or proper law) - in that case American law - and that such

reference shows that the respondent (the New York ship repairer) had a maritime lien over the Halcyon Isle. Ergo, the lien should have been recognized by the Singapore court.

It is further argued that it is inappropriate to use the term "inchoate" to describe a maritime lien, as was done in the leading case of Harmer v Bell, The Bold Buccleugh [1843 - 60] All ER Rep 125 (PC), at p 128 C-D by Jervis CJ and also in The Halcyon Isle, supra, at pp 232 B-C, 234 F. One of the critics of the majority judgment, Prof D C Jackson in his Enforcement of Maritime Liens, at p 222, asks whether it is not semantic to draw a distinction between an inchoate right depending for its substance on the taking of legal proceedings and a right of substance which, if necessary, has to be enforced by legal procedings; and concludes that it is.

In this general context it is, I would suggest, of some importance to distinguish between what I shall call "the basic event" which gives rise to a maritime lien - in The Halcyon Isle, supra, the contract entered into and performed in New York between the ship repairer and the owners of the vessel - and the maritime lien itself. Clearly an English court applying private international law would give to the contract itself the contractual consequences which were accorded to it by its proper law, viz. American law. When one comes, however, to the recognition, or non-recognition, of the maritime lien conferred on the ship repairer under American law by reason of the contract one is dealing with something different. It is a right conferred not by the contract, but by operation of law; and it is a right which - whether correctly to be described as "inchoate" or not - assumes significance and acquires content only when the lienee institutes

an action in rem against the ship or when priorities must be determined in regard to a limited fund arising from the sale of the ship. Furthermore, it is a right closely connected with the question of priorities, for whether or not the maritime claim of a creditor is recognized as conferring a maritime lien will vitally affect the priority it enjoys, and, of course, in relation thereto, the ranking of other claims. As the facts of The Halcyon Isle, supra, illustrate, whether a claim is ranked as a maritime lien may determine whether the claimant receives anything at all from the limited fund. And conversely recognition of a claim as having the status of a maritime lien may render worthless other claims.

As previously mentioned, it is a settled rule of English admiralty law that the order of priority in the ranking of claims to a limited fund created by the sale of a ship is that fixed by the lex fori: see The

Colorado [1923] P 102, at pp 106, 109, 111; Cheshire and North, op cit, p 88. In order to explain the reason for the rule Bankes J in The Colorado, supra, quoted with approval the following dictum of Marshall CJ in Harrison v Sterry (1809) 5 Cranch 289, at p 298:

> "The law of the place where a contract is made is, generally speaking, the law of the contract - ie it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the Court sits which is to decide the cause."

This rationale would apply with equal cogency to the maritime lien. When accorded in respect of a contractual claim, the lien forms no part of the contract itself; it is extrinsic thereto. And is it not really a personal privilege dependent on the lex fori? At any rate, it is, as I have shown, closely linked to the matter of priorities. And there thus

seems to be good ground for holding that, like priorities, the existence of a maritime lien is a matter for the law of the place where the court which is to decide the cause sits. (Cf. the remarks of Jackson, Enforcement of Maritime Claims, at p 326 where he criticizes the distinction drawn between questions of substance and issues of priority.)

The argument that a maritime lien constitutes a substantive right and that, therefore, its existence must be determined by reference to the lex loci, or its proper law, raises a number of problems. The first of these is what is meant by the lex loci or proper law of the maritime lien? Here one gathers that the proponents of the argument have in mind the lex loci or proper law of the basic event. The latter may be contract, quasi-contract or tort. As far as contract is concerned, the argument is apparently founded on the general principle, already referred to, that the legal

effect of a foreign contract is to be determined in accordance with the proper law of the contract. It is to be noted, however, that this principle, as formulated by Dicey and Morris, op cit, p 1236, is confined to the rights and obligations under the contract of the parties thereto; and it is at least questionable as to whether the principle would embrace a maritime lien which is really extrinsic to the contract itself and arises by operation of law. Thus, the identical contract may found a maritime lien if the proper law be that of one jurisdiction and not found a maritime lien if the proper law be that of another jurisdiction.

Where the basic event consists of a tort, however, the general principle is not the same and the argument tends to founder. Collision damage is an example of a basic event consisting of a tort, which is recognized as giving rise to a maritime lien under

English law. Other legal systems would appear to extend the status of maritime lien to additional tortious acts. For instance under American law a claim for personal injury gives rise to a maritime lien (see Gilmore and Black, op cit, p 628), but such a claim does not fall within the numerus clausus of English law. Consequently the question could arise as to whether an English admiralty court should recognize as a maritime lien a claim based upon personal injury inflicted in the United States of America. The English conflicts rule in regard to tort is stated by Dicey and Morris, op cit, rule 205, pp 1365-6, as follows:

> "(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both
>
> (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
>
> (b) actionable according to the law of the foreign country where it was done.

(2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."

At pp 1373-8 Dicey and Morris make it clear that para (2) of the Rule, pointing to what is termed "the proper law of the tort", is designed to take account of exceptional and unusual cases. Thus, in contrast to the position in regard to contracts, there is no general rule to the effect that the legal consequences of an alleged tortious act committed in a foreign country, are governed by the "proper law" of the tort. On the contrary, the general rule is that the alleged tort must satisfy the requirements of, inter alia, English law to be actionable in England. Thus there is in the case of a foreign maritime lien based upon a tort no general basis for an argument that since status as a maritime lien is one of the legal

consequences of the tortious act an English court should, when deciding whether to give recognition to the lien, defer to the proper law of the tort and ignore its own domestic rules.

Secondly, if substantive right be the touchstone, it is difficult to understand the rule that priorities are always governed by the lex fori, for the right attaching to a maritime claim to be ranked in a certain order of priority by its proper law seems to be just as "substantive" as the right to be recognized as having the status of a maritime lien. Certainly a right to a priority seems more substantive than procedural. This suggests that mere classification as a substantive right does not necesarily provide the answer. And incidentally one can readily see why the English court of admiralty has set its face against the recognition of foreign priority rules. With maritime claims emanating from a number of foreign sources, the

settling of a plan of distribution could become a matter of nightmarish complexity were such recognition to be granted. To a lesser degree the recognition of foreign maritime liens, not falling within the numerus clausus of English law, would also pose problems for an English court, as I have to some extent indicated.

Thirdly the primary object behind the distinction between substance and procedure and the rule that procedural matters are governed by the lex fori is to avoid imposing upon a court foreign legal machinery with which it is unfamiliar (see Thomas, Maritime Liens, at pp 321-2). Thus a party to litigation in England must take the law of procedure as he finds it. He cannot by virtue of some rule in his own (foreign) country enjoy greater advantages than an English litigant; nor must he be deprived of any advantages that English law may confer upon a litigant

in the particular form of action (see Cheshire and North, op cit, p 74). Nevertheless, as Dicey and Morris point out, the distinction between rules of procedure and rules of substance is "by no means clear cut" (op cit, p 174); in fact Thomas, op cit, at p 321, describes it as one "of notorious difficulty".

Cheshire and North, op cit, at p 77 state

> "The truth is that substance and procedure cannot be relegated to clear-cut categories. There is no preordained dividing line between the two, having some kind of objective existence discoverable by logic. What is procedural, what is substantive, cannot be determined in vacuo. A line between the two must, of course, be drawn, but in deciding where to draw it we must have regard to the relativity of legal terms and must realize the exact purpose for which we are making the distinction."

Later (at p 78) the learned authors continue -

> "'If we admit' says Cook, 'that the "substantive" shades off by imperceptible degrees into the "procedural", and that the "line"

> between them does not "exist", to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?' "

(The reference is to Cook Logical and Legal Bases of the Conflicts of Laws, p 166.) The differing views expressed in the House of Lords, in the case of Boys v Chaplin [1971] AC 356, as to whether the right to claim damages for pain and suffering sustained by reason of a tortious act was a substantive or procedural issue, are illustrative of these difficulties. And the general approach of the English courts is exemplified by the decision that in maritime matters priorities are governed by the lex fori. In short, it would seem that considerations of legal policy may enter into the decision as to what is

substance and what procedure

It is against this background that the decision of the majority in The Halcyon Isle, supra, to classify a maritime lien as appertaining to remedies and procedure (rather than substance) must be viewed. In earlier English cases, notably The Ripon City, supra, The Two Ellens (1872) LR 4 (PC) 161, and The Tolten [1946] P 135 (CA), a maritime lien had undoubtedly been described in language indicating that it constituted a substantive proprietary right, a charge upon the ship, and so on. In none of these cases, however, was the Court concerned with drawing the distinction between substance and procedure (including remedies) in the conflicts sense. In fact some of the language used is somewhat equivocal from the point of view of this distinction. Thus, Scott LJ, in The Tolten, supra, at p 145/6, speaks of a maritime lien as consisting in -

> "....the substantive right of putting into operation the admiralty court's executive function of arresting and selling the ship, so as to give a clear title to the purchaser, and thereby enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities...."

This dictum stresses the procedural (or remedial) nature of the lienee's right. And, as pointed out in The Tervaete, supra, at p 274, a maritime lien is -

> "...not a right to take possession or hold possession of the ship. It is confined to a right to take proceedings in a Court of law to have the ship seized, and, if necessary, sold.....The right of maritime lien appears, therefore, to be essentially different from a right of property by hypothec or pledge....." (per Atkin LJ).

Taking all these factors into account - the unique nature of a maritime lien and of the rights which it confers (as elaborated in this judgment), the difficulty of distinguishing substance and procedure

in conflicts cases, the object underlying this distinction, the general approach of the English courts to the application of this distinction in practice and the general policy considerations to which I have alluded earlier in this judgment -I am not persuaded that the majority in The Halcyon Isle, supra, erred in principle in holding that a maritime lien should be classified as a matter of procedure rather than substance. It is no doubt a borderline situation - hence the controversy surrounding the issue - but I incline to the view that the rights arising from a maritime lien are more closely allied to remedies and procedures than substantive rights. As appears from the concluding passage of their judgment (at p 250 D), which is quoted above, the minority relied upon the analogy of a mortgage and held that a maritime lien validly conferred by the lex loci was as much part of the claim as was a mortgage similarly valid by the lex

loci. This was critically considered by Marais J at pp 812 D - 813 E of the reported judgment. I agree, with respect, with the views of Marais J on this aspect of the matter and with his conclusion that the analogy is unsound.

The other ground mentioned by Lord Diplock for the conclusion that the issue as to the recognition of a foreign maritime lien should be determined in accordance with the domestic rules of the lex fori was that -

> "...any question as to who is entitled to bring a particular kind of proceeding in an English court.... is a question of jurisdiction."

This statement is regarded by Dicey and Morris as obiter and they state that it cannot be supported and must be confined to the special context of maritime liens (op cit, p 177, note 31). I do not find it necessary to express a view on this point.

Appellants' counsel also criticized Lord Diplock's finding (quoted above) that the English authorities supported the principle that, in the application of English rules of conflict 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 events had occurred within the territorial jurisdiction of the English court. Counsel submitted that the cases relied upon provided scant support for the principle.

This aspect of the matter was very fully canvassed in the judgment of the Court a quo and I do not find it necessary to cover all the same ground again. I shall simply state my conclusions in regard to the various cases referred to. Lord Diplock stated that The Milford (1858) Swabey 362, The Tagus [1903]

P 44, The Zigurds [1932] P 113 and The Acrux [1965] P 391 were all supporting authorities, spanning a century, in which the court had applied English rules as to the existence and extent of maritime liens and not the differing rules which would have been applicable under the lex causae. I shall take these cases in turn.

The Milford (1858)

This was the converse of the present case: the claim by the master of the Milford, an American ship, for wages was said by the owners not to give rise to a maritime lien by the law of America, the lex loci contractus, and therefore not to entitle the master to arrest the freight in an action in rem, whereas the master claimed that by the lex fori (including the Merchant Shipping Act of 1854) he did have such a maritime lien. In the High Court of Admiralty Dr Lushington held for the master. In rejecting the

contention based upon the lex loci contractus, he said, inter alia, that it was "a question of remedy, not of contract at all" and that the remedy must be according to the law of the forum in which it is sought" (p 366). Earlier in his judgment Dr Lushington had emphasized the inconveniences which might ensue if the Court was "to be governed by the lex loci contractus" (p 365). In the next year Dr Lushington followed this decision in The Jonathan Goodhue (1859) Swabey 524.

The Tagus (1903)

This was also, in a sense, a converse case. The master of the Tagus an Argentinian vessel, claimed in an action in rem, inter alia, wages and disbursements as master in respect of several voyages. On a question of priority as against an intervening mortgagee of the vessel it was contended on behalf of the mortgagee that by the lex loci contractus, the law of Argentina, the master had a "privileged debt", in

priority to the mortgagee, only for the last voyage of the vessel. Phillmore J, following The Milford, supra, held that the lex fori, and not the lex loci contractus, applied and that the master had a maritime lien, "as good a maritime lien as the master of an English ship", for his wages and disbursements.

The Zigurds (1932)

This case dealt with priorities in regard to a fund resulting from the sale of The Zigurds and certain freight. Competing claimants included a German necessaries man (a company) which had supplied bunker coals to The Zigurds in Germany, English necessaries men and an English mortgagee. It was contended on behalf of the German necessaries man that by German law, which was the lex loci contractus, its claim gave it the status of a "ship's creditor", whioh entitled it to priority over mortgagees and gave it the right to follow its claim against subsequent owners;

that the claim enjoyed the status of a maritime lien; and that accordingly it should be given priority over the English necessaries men and mortgagee. The Court rejected the contention. The Court expressed doubts as to the correctness of the claimant's assertions as to the legal consequences attaching to its claim by German law, but relied mainly on the rule that priorities are determined in accordance with the lex fori only.

The Acrux (1965)

The Acrux, an Italian vessel, was sold under an order of the English court of admiralty. The plaintiff, an Italian corporation providing social insurance benefits to seamen employed on Italian vessels, brought an action in rem in an English Court claiming insurance contributions owed by the owner of the Acrux. The plaintiff claimed that by Italian law it enjoyed the equivalent of a maritime lien in respect

of its claim. One of the grounds upon which it was claimed that the English Court had jurisdiction was the status which the claim had under Italian law as a maritime lien. Hewson J, after extensive reference to what had been stated by Scott LJ in The Tolten, supra, held (in effect) that the court had jurisdiction to entertain an action in rem for the enforcement of any maritime lien if the case was one in which, according to English law, a maritime lien existed; that the court could not recognize as a maritime lien a claim for unpaid insurance, even though such a lien might exist in Italian law; and that in the circumstances the Court had no jurisdiction to entertain the claim.

I think that these four decisions do, as Lord Diplock asserted, support the view that English courts apply English domestic rules to determine the existence and extent of maritime liens and do not refer to the

domestic rules of the lex causae or, perhaps more correctly, the lex loci contractus or the proper law of contract. The criticism of the The Milford and The Tagus decisions voiced by Marais J in the reported judgment (at p 816 C-F) does not detract from this proposition. Appellants' counsel did not dispute that these two cases supported Lord Diplock's proposition: they merely argued that the cases were wrongly decided. As regards The Zigurds, supra, the contention was that it took the matter no further. I think this overlooks the Court's reliance on the rule that priorities are determined by the lex fori (see pp 121-2, 125). As regards The Acrux, supra, counsel's submission that Hewson J merely found that the claim was not a "wage" within sec 1(1)(o) of the Administration of Justice Act and hence not a maritime lien does not, in my view, correctly reflect the decision.

I also cannot agree, with respect, with the

comments in the minority judgment on the relevance of The Milford, supra, and The Tagus, supra, (see p 247 E-H). It is true that these decisions dealt with what I have called the "converse case", ie where the claim gives rise to a maritime lien by the lex fori (English law), but the lex loci contractus either denies the claim the status of a maritime lien or limits its extent as such. Nevertheless, it seems to me that, if the choice of law rule in regard to maritime liens is the lex loci approach, then this rule must apply whether or not the lex loci recognizes that the claim gives rise to a maritime lien. This would mean that in cases such as those exemplified by The Milford, supra, and The Tagus, supra, the claimant's right to a maritime lien should either be denied, or limited, as the case may be. But the actual decisions in those cases are to the contrary: they can, therefore, only be regarded as rejecting the lex loci approach.

The other three cases of importance referred to in the judgment of the majority were The Colorado, supra, The Tervaete, supra, and The Tolten, supra. Of The Colorado, supra, Thomas, op cit, at p 326, says "(there) can be few judicial pronouncements so ambiguous and perplexing". I must confess to a similar reaction. I have read carefully what Marais J said about this decision (see reported judgment at pp 813 F - 819 F) and find myself broadly in agreement therewith. Essentially, as I see it, the Court referred to French law in order to determine what rights were conferred by the French mortgage deed or "hypothèque"; and rejected the argument that the court should apply the rule of French law that a necessaries man ranked ahead of the holder of a hypothèque. The Court did not decide that an English court should recognize a foreign maritime lien, accorded by the lex loci contractus, which did not fall within the numerus

clausus of English law; nor do I think that the reference to French law to determine the legal effect of a French hypothèque can be interpreted as support for the lex loci approach.

The Tervaete, supra, was, as has been repeatedly pointed out, decided by the same three Lord Justices who sat in The Colorado, supra. It dealt with the question as to whether a maritime lien could arise, by reason of a collision, where at the time of the collision the ship in question belonged to a foreign government and was on government service (the ship having subsequently passed into private ownership); or whether this was prevented by the sovereign immunity of the foreign government. It was held that in such circumstances no maritime lien arose. Said Lord Atkin (at p 274) -

> "A right which can only be expressed as a right to take proceedings seems to me

> to be denied where the right to take proceedings is denied."

Lord Diplock's observation that the reasoning of all three judgments in The Tervaete, supra, is consistent only with the characterization of a maritime lien in English law as involving rights that are procedural or remedial only seems, with respect, to be well founded.

The Tolten, supra, related to a claim (brought by way of an action in rem) for damage to a wharf in a foreign port when the Tolten came into collision with it. The owners of the vessel, relying on the rule laid down in British South Africa Company v Companhia de Moçambique [1893] AC 602, contended that the court had no jurisdiction to adjudicate in an action in rem for damage done by a vessel to property attached to foreign soil. This contention was rejected by both the court of first instance and the Court of Appeal. The case is relevant mainly because of Scott LJ's full examination of the history and nature of the maritime

lien. Scott LJ quoted with approval a passage from the 5th edition of Dicey which includes the statement that the court has jurisdiction to entertain an action *in rem* for the enforcement of any maritime lien if the case is one in which, according to English law, a maritime lien exists (see p 161). Lord Diplock says of the judgment of Scott LJ (at p 238 G):

> "Throughout his judgment in The Tolten [1946] P. 135 their Lordships think it clear that Scott L.J. was treating English law as the only proper law to determine what kind of transaction or event gave rise to maritime lien that an English court had jurisdiction to enforce as such."

In his Maritime Liens, published in 1980, prior to the Privy Council decision in The Halcyon Isle, Thomas wrote (at p 321):

> "The general approach of English maritime law is to treat the existence of a maritime lien as governed by the *lex fori*. In the result the only maritime liens recognised by the Admiralty Court

> are those which accrue under English maritime law..... The fundamental premise which underpins the choice of the lex fori as the proper law of maritime liens is the assertion that a maritime lien is a matter of procedure and not substantive. A maritime lien is conceived not as a substantive right in itself but only as a means by which a substantive right may be enforced."

In support of these statements are quoted The Milford, supra; The Jonathan Goodhue, supra; The Tagus, supra; The Zigurds, supra; The Tolten, supra; and The Acrux, supra.

It is true that Thomas, op cit, at p 322, expresses reservations about giving unqualified support to the continuation of the notion that a maritime lien is a question of a remedy and not of contract at all, but the above-quoted remarks confirm the correctness of the view that these authorities sustain the lex fori approach. In the 11th ed of Dicey and Morris, (see pp 185-6) the lex fori approach, as enunciated by the

majority in The Halcyon Isle, supra, appears to be accepted without question. (Cf. however, Cheshire and North, op cit, pp 88-90.)

Lord Diplock also made reference in his judgment to the case of The Ioannis Daskalelis [1974] 1 Ll L Rep 174, a decision of the Canadian Supreme Court and expressed the view that in this case the judgments in The Colorado, supra, were "misunderstood" (see p 238 B). In The Ioannis Daskalelis, supra, Ritchie J stated (at p 178) that The Colorado, supra, was authority -

> "... for the contention that where a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English Courts will recognize it and will accord it the priority which a right of that nature could be given under English procedure."

If this means, as I think it does, that the foreign maritime lien will be recognized and given the priority

accorded to a maritime lien, then I respectfully agree that the Canadian Supreme Court read into The Colorado, supra, more than was warranted. The subsequent Canadian decision in Marlex Petroleum Inc v The Ship "Har Rai" 4 DLR (4th) 739 (thereafter confirmed on appeal to the Supreme Court of Canada) acknowledged that (at p 744) -

> "There is no question that the recognition of maritime liens is an important question of policy in maritime law on which there have been strong differences of view among the maritime nations. It is also clear that the test applied in Canada to the recognition of a foreign maritime lien differs from that which now applies in England: see Bankers Trust Int'l Ltd v Todd Shipyards Corp., [1981] A C 221 (PC) (The "Halcyon Isle")."

For the aforegoing reasons, but not without considerable diffidence and hesitation, I have come to the conclusion that according to English admiralty law, as it was on 1 November 1983, a foreign maritime lien

not falling within one of the categories of lien recognized by the domestic rules of English law is not accorded the status of a maritime lien in an English court, either for the purpose of founding an action in rem or the purpose of ranking priorities. This is the principle that must, therefore, be applied by our courts exercising admiralty jurisdiction. Applying that principle to the facts of the present case, it is clear that the Court a quo acted correctly in declining to recognize the Argentinian "lien" as a maritime lien within the meaning of the Act, and in particular sec 3(4)(a) thereof. It follows that the arrest of the Andrico Unity was properly set aside in terms of both applications and that the appeals must be dismissed with costs. In regard to the costs of the appeals, I record for the benefit of the taxing master that this Court sat for two full court days in the combined hearing of the appeals in the Andrico Unity matter and

the appeal in the Kalantiao matter and that in my estimation half that time should be attributed to the Andrico Unity appeals and half to the Kalantiao appeal.

The appeals are dismissed with costs.

M M CORBETT

HOEXTER JA)
GROSSKOPF JA)
MILNE JA) CONCUR
NICHOLAS AJA)