

1989 July 29

(A. LOIZOU, P)

KAMAL HASSANEIN,

Plaintiff,

v.

THE SHIP «HELLENIC ISLAND» NOW LYING IN THE PORT OF LIMASSOL AND ANOTHER,

Defendants.

(Admiralty Action No. 369/83)

Admiralty — Conflict of laws — Proper law of contract — Supply of bunkers to defendant ship carrying the Singapore flag at the port of Alexandria, Egypt, by plaintiff, who was carrying on business in Egypt — The proper law of the contract is the Egyptian Law, but procedural questions, such as the creation of a maritime lien or not and the order of priorities among various claims are governed by *lex fori* i.e. Cyprus Law. 5

Admiralty — Conflict of laws — Maritime liens — They are considered as means for enforcing a substantive right — They are governed by the *lex fori*. 10

Admiralty — Conflict of laws — Order of priorities among various claims against a ship — A procedural question governed by the *lex fori*.

Admiralty — Maritime liens — Nature of.

Admiralty — Necessaries — Bunkers supplied to ship — It is a supply for necessaries — The supply does not create a maritime lien and the ship is not chargeable until a suit is instituted — A statutory lien for necessaries ranks lower in priority to a mortgage. 15

The action is for the price of bunkers delivered to the defendant ship at the port of Alexandria by the plaintiff, who was carrying business in Egypt. The ship flies the Singapore Flag. The interveners are mortgagees of the ship under a mortgage duly registered in Singapore. The issues raised for consideration by the Court appear in 20

the note that follows. The principles applied by the Court in resolving them appear in the hereinabove headnote.

*Order accordingly.*  
*No order as to costs.*

5 *Cases referred to:*

*The Ioannis Daskalelis* [1974] Lloyd's Rep. 174;

*The Halcyon Isle* [1980] 3 All E.R. 197;

*The Milford* (1858) Swab. 362;

*The Tagus* [1903] P. 44

10 *The Zigurds* [1932] P. 113;

*The Tolten*, [1946] P. 135

*The Acrux* [1965] P. 391;

*Commercial Bank of the Near East Ltd. v. The Ship «PEGASOS III»*  
(1978) 1 C.L.R. 597;

15 *The D'Vora* [1952] 2 All E.R. 1127;

*Pilefs Ltd. and others v. The Commercial Bank of the Near-East Ltd.*  
(1983) 1 C.L.R. 376.

**Preliminary points.**

20 Preliminary points of law (a) as to which is the proper law of the contract, (b) whether under the Cyprus Law the supply of fuel gives rise to a maritime lien (c) whether under the Egyptian Law the supply of fuel gives rise to a maritime lien and (d) if the proper law is other than the Cyprus law which of the two laws will the Court apply in determining whether lien exists for the claim in this action.

25 *Chr. Pourgourides*, for the plaintiffs.

*G. Cacoyannis*, for defendants 1.

*T. Papadopoulos*, for defendants 2.

*St. Mc Bride*, for the interveners.

*Cur. adv. vult.*

30 A. LOIZOU P. read the following judgment. In this Admiralty action the plaintiff claims the amount of U.S. \$ 98,460.31 being the balance of the costs of materials and services supplied by him to

the defendants on the 7th October 1983 and the 19th November 1983

The plaintiff is a supplier of bunker carrying on business at the port of Alexandria, Egypt and on the aforesaid dates supplied bunker to the defendant ship at that port

5

The defendant ship flies the Singapore flag

The interveners, the Development Bank of Singapore are the mortgagees of the defendant ship under a first preferred mortgage duly registered against the ship in the Ship's Register in Singapore. It further appears, that the ship during these proceedings was sold but the proceeds of sale were insufficient to meet the claim of the mortgagees

10

For the purpose of the present proceedings I need not go into all the various applications filed in this case

As it was submitted on behalf of the defendants that the claims in this action were not valid claims to invoke the Admiralty jurisdiction of this Court by an action in rem against the defendant ship, it was decided by counsel of all parties concerned that prior to the hearing of the case certain questions of law were to be determined by this Court as preliminary points of law which may thus dispose of the issues in this case

15

20

The relevant application to this effect was filed by the applicant on the 23rd September 1986, written addresses were filed in respect thereof by order of the Court, made with the consent of the parties

25

As regards the first question of law to be decided that is which is the proper law of the contract giving rise to this claim it is common ground to both the plaintiff and the interveners that the proper law of the contract is Egyptian Law

Nonetheless the interveners further submitted that the proper law of the contract, whatever it might be, has no bearing upon the question of priority in the payment out to the various claimants of the proceeds of sale of the ship in question.

30

As regards the second question that is whether under Cyprus Law the supply of fuel gives rise to a maritime lien, it is also common ground that it does not do so.

35

The third question is also common ground that is that under the proper law of the contract, which is Egyptian Law, the supply of fuel does give rise to a maritime lien.

5 As regards the fourth question which is that «if the proper law of the contract is other than Cyprus law (lex fori) and there is a conflict between such law and the Cyprus Law as to the existence of a maritime lien, which of the two laws will the Court apply in determining whether lien exists for the claim in the present action?», it was contended on behalf of the plaintiff that despite the  
10 general approach of Cyprus Law, which follows English Maritime Law, to treat the existence of maritime liens as governed by the lex fori, as in effect they are not considered as substantive rights but only procedural, nevertheless it would be a denial of justice to refuse the Egyptian supplier, who knew before supplying the ship  
15 with fuel that he had a maritime lien, to recognize such a lien and to give it the priority which a right of this nature should be given. He relied in support of this contention on the case of «*The Ioannis Daskalelis*» [1974] 1 Lloyd's Rep. 174 of the Supreme Court of Canada and the dissenting judgments in the Privy Council case of  
20 «*The Halcyon Isle*» [1980] 3 All E.R. 197, and submitted that since the Court is not bound to follow English precedent, it may therefore follow the above two judgments.

On the other hand it was contended on behalf of the interveners that since there can be no extension of the recognized maritime  
25 liens except by law and that since the law to be applied by the Admiralty Court in Cyprus is, as is provided by the Courts of Justice Law 1960 (Law No. 14 of 1960) and in particular sections 19(a) and 29(2)(a) thereof, the same as English Admiralty Law as at the 15th August 1960, consequently, maritime liens are  
30 determined exclusively by the lex fori and are enforceable in actions in rem where the events upon which the claim is founded would have given rise to a maritime lien under Cyprus Law, if these events had occurred within the territorial jurisdiction of the Court.

35 Clearly under English law and by extension under Cyprus Law, the existence of maritime liens is governed by the lex fori, in the result the only maritime liens recognised by the Admiralty Court are those which accrue under English Law (See: *The Milford* (1858) Swab. 362, *The Tagus* [1903] P. 44; *The Zigurds* [1932] P.  
40 113; *The Tolten* [1946] P. 135 at 161; *The Acrux* [1965] P. 391.

The fundamental principle behind the choice of the *lex fori* as the law to be applied is the fact that maritime liens are considered not as a substantive right but only as a means by which a fundamental right may be enforced.

The final question to be determined is that, «if the Court in determining the existence of a maritime lien will apply a law other than Cyprus Law (*lex fori*) and under such law a maritime lien does exist whereas none exists under the *lex fori* (Cyprus Law): 5

(a) What law will the Court apply in determining the rank of priority of such lien in the distribution of the proceeds of sale of the defendant vessel? 10

(b) Will such lien rank prior to a claim under a mortgage even if under the *lex fori* it is not recognised as a maritime lien and ranks lower than a claim on a mortgage?»

It was contended by the plaintiff that though the *lex fori* decides the priority of the rights which exist against a ship, it nonetheless must recognise their priority under foreign law on the authority of the dissenting judgment in «*The Halcyon Isle*» (*supra*). 15

It was submitted on the other hand on behalf of the interveners that the question of priorities, being a purely jurisdictional issue, is a matter to be determined exclusively by the *lex fori*, which, if it does not recognise a claim as creating a maritime lien, even if foreign law might do so, it can give no priority to any claim in precedence to those having a recognised priority under the *lex fori*. 20 25

As already stated above, procedural matters are governed by the *lex fori*. Questions of priorities as between competing claims together with such other matters appertaining to the enforcement of a claim are considered purely procedural and are thus exclusively governed by the *lex fori*. (See: Thomas, Maritime Liens, British Shipping Laws, Vol. 14), consequently the order of priorities of the two claims must be decided in accordance with Cyprus Law (See *Commercial Bank of the Near East Ltd., v. The Ship «PEGASOS III»* (1978) 1 C.L.R. 597 at p. 607.) 30

Under English Law and by extension Cyprus Law, the supply of fuel provided it is elsewhere than at the port to which the ship belongs is considered as a supply of necessaries (See *The D'Vora* [1952] 2 All E.R. 1127). The supply of necessaries does not give 35

rise to a maritime lien and the ship does not become chargeable until suit is actually instituted. (See Roscoe: Admiralty Practice (5th Ed.) p. 206). In any event as it has been held by the Supreme Court in the case of *Pilefs Ltd and Others v. The Commercial Bank of the Near-East Ltd.* (1983) 1 C.L.R. 376 a lien for necessities is considered a statutory lien which ranks lower in priority to a mortgage.

10 Consequently, the legal position being as it is, it is not possible for this Court to give the claim of the plaintiff a priority higher to that which it normally has under Cyprus Law, namely lower than first preferred mortgages duly registered.

In the circumstances there will be no order as to costs.

*Order as above.*

*No order as to costs.*