The "*Sam Hawk*": outlier, or the new orthodoxy on foreign maritime liens?♣

A. Introduction

1. In September this year Justice McKerracher in the Federal Court delivered a judgment which broke with the long-standing position that the validity and enforceability of a maritime lien in an Australian court is to be determined by the law of the forum – that is, the law of Australia – and not a system of foreign law as the *lex causae*. His Honour's judgment is in the case *Reiter Petroleum Inc v The Ship Sam Hawk.*[1]

2. The earlier position had been established by a 3-2 majority of the Privy Council in *The Halcyon Isle* in 1980 in an appeal from the Singapore Court of Appeal.[2] I shall return to that case. For present purposes, it is sufficient to note that the majority judgment of Lord Diplock held that maritime liens are enforceable only if the events on which the claim is founded would have given rise to a maritime lien in the law of the forum.[3]

3. The minority judgment of Lords Salmon and Scarman would have held that a maritime lien valid by the *lex loci* should be recognised and enforced even if the claim would not give rise to a maritime lien under the *lex fori*.[4]

4. McKerracher J preferred the minority view.[5]

5. Although *The Halcyon Isle* position has been long-standing in England and it received endorsement in Australia by Sheppard J in the Federal Court in *The*

♣ By Angus Stewart SC, barrister, New Chambers, Sydney. Discussion paper presented to an Australian Maritime and Transport Arbitration Commission (AMTAC) seminar in Sydney, 26 November 2015.

1 [2015] FCA 1005.

2 *Bankers Trust International Ltd v Todd Shipyards Corporation (Halcyon Isle)* [1981] AC 221.

3 At 238H-239A.

4 At 250C-E.

5 At [119].

Skulptor Vuchetich[6] in 1997, growing doubt has been cast upon it over the years. It was not followed by:

- the Cape Provincial Division of the then Supreme Court of South Africa in 1984 in *The Khalij Sky*,[7] although the then Appellate Division in 1989 in *The Andrico Unity*[8] reversed and followed *The Halcyon Isle* as the contemporary statement of English law following the introduction of the Admiralty Jurisdiction Regulation Act of 1983[9] which enjoined South African courts exercising their Admiralty jurisdiction to apply the law which the High Court of Justice of England and Wales would have applied;[10] and

- the Supreme Court of Canada in 1987 in *The Har Rai*[11] which instead followed its 1972 decision in *The Ioannis Daskalelis.*[12]

6. Perhaps more significantly, there has been considerable academic criticism of *The Halcyon Isle* over the years,[13] including by influential Australian academics following the shift in the substance/procedure divide brought about by *John Pfeiffer*.[14] Here, I refer to Professors Martin Davies and Kate Lewins.[15] And tellingly, Justice Rares of the Federal Court in his Frank Stuart Dethridge Memorial Address at the 40th Annual MLAANZ Conference in Sydney in 2013 assembled the doubts about and criticisms of *The Halcyon Isle* and, if I can put it like this, hinted that the time was right for *The Halcyon Isle* to be departed

---

6 *Morlines Maritime Agency Ltd v Ship "Skulptor Vuchetich"* [1997] FCA 432.

7 *Southern Steamship Agency Inc v MV Khalij Sky* 1986 (1) SA 485 (C).

8 *Transol Bunker BV v MV Andrico Unity* 1989 (4) SA 325 (A).

9 Act 105 of 1983.

10 Admiralty Jurisdiction Regulation Act 105 of 1983, s 6(1)(a).

11 *Marlex Petroleum Inc v Ship Har Rai* [1987] 1 SCR 57.

12 *Todd Shipyards Corporation v Altema Compania Maritima SA and The Ship "Ioannis Daskalelis"* [1974] SCR 1248; [1974] 1 Lloyd's Rep 174.

13 For example, Mukherjee PK "The law of maritime liens and conflict of laws and customs" (2003) 9(6) *JIML* 545; Tetley W, "Maritime Liens in the Conflict of Laws" in Nafziger JAR and Symeonides SC (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* (Transnational Publishers Inc, 2002).

14 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

15 Davies M and Lewin K, "Foreign maritime liens: should they be recognised in Australian Courts?" (2002) 76 *ALJ* 775.

from in Australia.[16] Certainly, his Honour's paper was an invitation for a challenge to be made at the next available opportunity. Those acting for the owners of the Sam Hawk took that opportunity and levelled the challenge in the case by that name.

B. *The Sam Hawk*: facts

7. The Sam Hawk was arrested at Albany in Western Australia to enforce a claim for payment of the purchase price for bunkers stemmed by the time-charterer in Istanbul, Turkey. The writ against the vessel in the Federal Court of Australia relied on two alternate bases for the arrest:

    - section 15 of the *Admiralty Act 1988* (Cth) on the basis that there was a maritime lien over the vessel for the supply of the bunkers; and
    - section 17 of the *Admiralty Act* on the basis that the charterer had contracted for the supply of the bunkers for and on behalf of the owner of the vessel as its agent.

8. My principal interest in this paper is in the maritime lien claim. I shall therefore not cover the alternative claim based on section 17.

9. The owner of the vessel sought to set aside the writ for want of jurisdiction and dismiss the action on the basis that the supply of bunkers to a vessel does not give rise to a maritime lien in Australia with the result that section 15 was not available. Alternatively, the owner sought summary judgment dismissing the action on the basis that Reiter Petroleum had no reasonable prospect of successfully establishing the maritime lien on which it relied.

10. It is important to bear in mind the nature of those challenges. They are both preliminary and do not make any final findings of fact. Challenges to jurisdiction with regard to the existence or otherwise of a maritime claim (i.e. subject matter jurisdiction such as the challenge in *The Sam Hawk*) are to be dealt with at the level of characterisation of the asserted claim, whereas challenges with regard to the relationship of the relevant person to the ship can only be met by the

---

16 Rares S, "Maritime liens, renvoi and conflicts of law: the far from Halcyon Isle" [2014] *LMCLQ* 183.

proof of the jurisdictional facts on a balance of probabilities.[17] The challenge to jurisdiction therefore assumed the pleaded facts, and the application for summary judgment depended on showing that there was no reasonable prospect of the action succeeding.[18]

11. The Sam Hawk was owned by a Hong Kong incorporated company, SPV Sam Hawk Inc and was time chartered by Egyptian Bulk Carriers ("EBC"). Clause 13 of the recap to the charterparty required EBC to bunker the vessel during the period of the charterparty and provided that it was EBC, not the owner, who was responsible for arranging and paying for the bunkers. The charterparty did not authorise EBC to contract for necessaries on behalf of the owner or to bind the vessel with a maritime lien for necessaries.

12. EBC contracted with Reiter Petroleum for bunkers for the vessel at Istanbul. EBC sought confirmation of the name of the supplier from Reiter Petroleum and passed this name, Socar, on to the vessel. The master of the vessel issued a 'no liability' or 'no lien' notice to Socar which advised that payment was the responsibility of EBC. The day before the stem a 'no liability' letter was also received and acknowledged by the master of the barge which supplied the bunkers.

13. The terms of the bunker supply contract provided that it was to be subject to Reiter Petroleum's general terms and conditions. By cl 15(a) of those terms and conditions, the contract was to be construed according to the law of Canada. Clause 15, however, was subject to cl 7, which provided that the seller shall be entitled to assert a lien wherever it finds the vessel, and that the law of the United States of America shall apply to determine the existence of any maritime lien, regardless of the court in which proceedings are instituted.

---

17 *Owners of 'Shin Kobe Maru' v Empire Shipping Inc* [1994] HCA 54; 181 CLR 404 at 426; *Owners of the MV Iran Amanat v KMP Coastal Oil Pte Ltd* [1999] HCA 11; 196 CLR 130 at [16]-[20] and [22]; *Ships Hako Endeavour and Others v Programmed Total Marine Services Pty Ltd* [2013] FCAFC 21; 211 FCR 369 at [37]-[42].

18 *Federal Court of Australia Act 1976* (Cth), s 31A(2); *Federal Court Rules 2011*, Rule 26.01(1)(a).

14. The owner was not aware of the involvement of Reiter Petroleum in the sale of bunkers at Istanbul until a notice was received by the operators of the vessel some five months after the vessel took bunkers at Istanbul.

15. The first question to be answered on the maritime lien is with reference to what system of law must it be determined whether the plaintiff's claim is a maritime lien claim? That is to say, when in section 15 of the *Admiralty Act* it says that "a proceeding on a maritime lien or other charge" may be commenced as an action in rem, with reference to what system of law must it be determined that the proceeding in question is a proceeding "on a maritime lien"? The answer to that question was explicitly left open by the Australian Law Reform Commission in its report *The Civil Admiralty Jurisdiction*[19] that preceded the *Admiralty Act*. By using the word "includes" in s 15(2) prior to listing the liens that are to be regarded as being referred to, the Commission may be seen to have left open the possibility of there being others, including possibly those that are created by foreign law and which would not otherwise be maritime liens under Australian domestic law.

16. Reiter Petroleum asserted that the proper law of the contract was the law of Canada, and/or the law of the USA and the State of Florida was the proper law governing the existence and enforcement of a maritime lien. It was further asserted that under the laws of the USA and the State of Florida, Reiter Petroleum had a maritime lien against the vessel for necessaries, which includes for bunkers supplied to a vessel in a port outside the United States.

17. In that regard reference was made to the following provisions of the *United States Commercial Instruments and Maritime Lien Act* (US) (**CIMLA**):

    - USC §31341 which creates a rebuttable presumption that, amongst others, an officer or agent appointed by a charterer of a vessel has authority to procure necessaries for the vessel; and

[19] Report No. 33 (1986), at [123].

- USC §31342 which provides that a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel.

18. There was a conflict on the expert evidence on United States law. The expert for the plaintiff said that the 'no lien' clause in the charter party and the 'no lien' notices to Socar, the supplier, and the bunker barge would not displace the presumption of authority in the absence of proof of knowledge of that clause or those notices by the plaintiff. She said that the supply of bunkers in Istanbul therefore created, under US law, a maritime lien on the vessel.

19. The expert for the owner drew attention to the fact that it was, in particular, the law of the State of Florida that applied and it was therefore the law of the Eleventh Circuit as a body of Federal Law that would govern the validity of the claimed maritime lien. He concluded that the 'no lien' notice to Socar would be sufficient to rebut the statutory presumption that EBC, as charterer, had the authority to incur a lien. He pointed to a division of authority between different US Circuit Courts of Appeal, with the Eleventh Circuit having held that CIMLA does not apply to wholly foreign transactions such as the present one.

C. *The Sam Hawk*: the decision

20. In view of the nature of the proceedings, his Honour did not attempt to reconcile the differences between the experts. Having summarised the parties' contentions, his Honour identified that the jurisdictional issue required determination of the question of whether a foreign maritime lien is enforceable, even though it was common ground that the supply of bunkers would not give rise to a maritime lien under Australian substantive law.[20]

21. Central to his Honour's conclusion that the judgment of the minority in *The Halcyon Isle* was to be preferred was the High Court decision in *John Pfeiffer v Rogerson*.[21] That case concerned a domestic conflict of laws, being between New South Wales where the plaintiff was injured and the ACT where he had been employed, lived and where he commenced proceedings arising from his

---

20 *Shell Oil Company v Ship "Lastrigoni"* (1974) 131 CLR 1.

21 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

injury. The question was whether the determination of the quantum of damages was a matter of procedure to be determined by the *lex fori* or a matter of substance to be determined by the *lex causae*. The High Court held that "*all* questions about the kinds of damage, or amount of damages that may be recovered, would … be treated as substantive issues governed by the *lex loci delicti*."[22]

22. In discussing the substance/procedure distinction in general, the majority of the High Court in *John Pfeiffer* stated that the "guiding principles" to be applied were that:

> matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure.[23]

23. This statement is seen as having reorganised the distinction between substance and procedure in Australia. It is relevant because the position of the majority in *The Halcyon Isle* was seen by McKerracher J to have depended on the traditional bifurcation of matters that are substantive and those that are procedural, with the former being governed by the *lex causae* and the latter being governed by the *lex fori*;[24] and the analysis that regarded the security aspect of a maritime lien as a procedural matter.

24. After reviewing the authorities, and in particular the academic criticism of *The Halcyon Isle*, his Honour concluded as follows:

> In my view, the minority view in *Halcyon Isle* should or indeed must be preferred in Australia as it accords with the substantive nature of a maritime lien as identified by the High Court of Australia in *John Pfeiffer*. The consequence is that a lien will operate independently of the fortuitous choice of venue at which a ship is arrested.[25]

---

22 At [100].

23 Ibid at [99].

24 At [106].

25 At [119].

25. That conclusion requires one to have closer regard to *The Halcyon Isle* to identify just what his Honour concluded.

D. *The Halcyon Isle*: the facts

26. Perhaps not insignificantly, *The Halcyon Isle* was principally not a case about the enforceability of a foreign maritime lien, but about priorities.

27. The Halcyon Isle was a British ship registered in London. She was subject to a registered mortgage in favour of Bankers Trust International and undertook repairs at the Brooklyn yard in New York State of Todd Shipyards. Under United States law a ship-repairer was entitled to a maritime lien for the price of repairs done to the ship.

28. Later the same year the vessel was arrested in Singapore in an action in rem in the High Court of Singapore by the mortgagee. She was sold and a fund was established. The question of law directly involved in the appeal was whether in the distribution of the proceeds of sale the claim of the mortgagee should take priority over the claim of the necessariesman or vice versa. That in turn depended on whether the foreign maritime lien was to be recognised because maritime liens took precedence over mortgages, but mortgagees took precedence over necessariesmen.

E. *The Halcyon Isle*: the majority

29. Lord Diplock, for the majority, identified that the problem facing the court was one of classifying the foreign claims arising under differing foreign systems of law in order to assign each of them to the appropriate class in the order of priorities under the *lex fori* of the distributing court.[26] It was said that the choice appeared 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

---

26 At 230D.

> (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.[27]

30. The majority opted for the first alternative saying that, apart from the merit of simplicity, classification by reference to events is preferable in principle. The reasoning was closely tied to the fact that the case was really about priorities:

> In distributing a limited fund that is insufficient to pay in full all creditors of a debtor whose claims against him have already been quantified and proved, the court is not any longer concerned with enforcing against the debtor himself the individual creditors' original rights against him. It is primarily concerned in doing evenhanded justice between competing creditors whose respective claims to be a creditor may have arisen under a whole variety of different and, it may be, conflicting systems of national law.[28]

31. Lord Diplock also emphasized that a maritime lien is initially inchoate and, unlike a mortgage, is "devoid of any legal consequences unless and until it is 'carried into effect by legal process, by a proceeding in rem.'"[29] That aspect of a maritime lien, for which *The Bold Buccleugh*[30] is authority, was also emphasized by Allsop J (as his Honour then was) in *Elbe Shipping SA v The Ship "Global Peace"*.[31] That ties the maritime lien to the procedures of the court in which it is sought to be enforced or recognised.

32. Lord Diplock concluded as follows:

> 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

---

27 At 230D-F.

28 At 230H-231A.

29 At 234F.

30 7 Moo.P.C.C. 267, 284.

31 [2006] FCA 954; (2006) 154 FCR 439 at [133].

> 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.[32]

F. *The Halcyon Isle*: the dissent

33. Lords Salmon and Scarman also emphasised that the case was about competing priorities. Their Lordships identified the issue as follows: "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?"[33] Their Lordships also said that "the one question is the effect within the jurisdiction of a maritime lien conferred by the *lex loci contractus*".[34]

34. The reference to the *lex loci contractus* is not insignificant.[35] It is not a reference to the proper law of the contract, let alone the putative proper law. The *lex loci contractus* is the law of the place where the contract was concluded, or the law of the place where the contract is or was to be performed.

35. After identifying various matters that were not in dispute, their Lordships identified the narrow question for determination: "does the law of Singapore recognise a foreign maritime lien as a substantive right of property vested in a claimant who can show that he enjoys it under the law of the place where he performed his services?"[36]

36. In reaching a conclusion, their Lordships held as follows:

> The question is – does English law, in circumstances such as these, recognise the maritime lien created by the law of the United States of America, i.e. the *lex loci contractus* where no such lien exists by its own internal law? In our view

---

32 At 238H-239A.

33 At 242F.

34 At 242G.

35 There are other references at 246D, 246G (twice), 247A, 247F (twice), 247G, and 248A.

36 At 244B-C.

> the balance of authorities, the comity of nations, private international law and natural justice all answer this question in the affirmative.[37]

37. Their Lordships further concluded as follows:

> 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.[38]

38. It is therefore quite apparent that the opinion of the minority was that the recognition of a foreign maritime lien is to be judged by the *lex loci contractus*. Their Lordships did not address themselves to the question that arose in *The Sam Hawk*, namely whether the recognition of a foreign maritime lien is to be judged by the putative proper law.

39. There must therefore be some doubt as to whether it was sufficient for the judge to merely conclude that the judgment of the minority in *The Halcyon Isle* was to be preferred and from that to conclude that the court had jurisdiction to entertain Reiter Petroleum's action under section 15 in reliance on a foreign maritime lien. It was necessary to identify the choice of law rule by which the validity of the foreign maritime lien is to be determined, and then to ask whether under that system of law the plaintiff's claim would amount to a maritime lien. The judgment seems to assume without explicitly deciding that the relevant choice of law rule is the proper law of the lien (i.e. US/Florida law) because that was selected under clause 7 of the bunker supply contract between Reiter Petroleum and EBC.

40. It is one thing, as *The Halcyon Isle* minority did, to recognise a foreign lien which is valid under the law of the place where the events giving rise to the lien

---

37 At 246G.

38 At 250C-E.

occurred. It is quite another, as was done in *The Sam Hawk*, to recognise a foreign maritime lien on the basis of it being valid under a system of law to which the relevant events and transactions had no connection whatsoever save for having been chosen by two parties, not including the owner of the vessel who knew nothing of the choice.

G. The correct choice of law rule?

41. Prior to the identification of a choice of law rule, it is necessary to characterise the issue that requires to be determined and from that to identify the relevant choice of law rule.

42. In recognition of the substantive nature of the maritime lien arising from the security interest that it gives in the ship – which is at the centre of the justification for not applying the *lex fori*, the issue is whether or not the relevant events, including, naturally, the contract itself, give rise to a security interest in the form of a maritime lien in the ship. The relevant choice of law rule with regard to such an issue in respect of chattels is generally regarded to be the *lex situs*, i.e. the system of law where the property was located at the relevant time.[39] In this case, that would be Turkey.

43. There is however a suggestion by the Full Court of the Federal Court in *The Cape Moreton* that in the case of ships, the law of the country of a ship's registration is preferable to that of the *lex situs* in governing proprietary rights.[40] In this case that would be Hong Kong.

44. A third possibility is the law governing the relevant transaction or claim. In my view, considerable difficulty arises from allowing the recognition and enforcement of maritime liens that are created simply with reference to a contractual choice of law. The very nature of a maritime lien is that it gives advantages to the lien holder over third parties, i.e. parties who were not party to the debt that is secured by the lien. That includes not only in the realm of priorities, but also in respect of the new owners of a vessel subject to prior liens.

---

39 See Davies, Bell and Brereton *Nygh's Conflict of Laws in Australia* (9th ed., 2014) para [32.27] p 736.

40 *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (ex Freya)* [2005] FCAFC 68; (2005) 143 FCR 43 at [146]-[148].

There is thus a considerable public interest in the categories of maritime lien recognised by the law; it is not only a matter between debtor and creditor. It would be in conflict with that public interest if the debtor and creditor could by the terms of their contract establish a maritime lien that is not only secret to the owner of the vessel, but also secret to third parties.

45. If the choice of law rule was with reference to the registration of the ship or place of the ship at the time of the supply of the necessaries (or other relevant events), then the owners and third parties would have some basis to assess the likelihood of any liens being in place. But where liens can be created with reference to a system of law with which the parties and the ship otherwise have no connection whatsoever and which is chosen merely for the one-sided convenience of its provisions, artificiality and prejudice easily result.

46. But even if one was to apply the law applying to the claim, further issues arise. Here, the principal issue for determination is whether or not Reiter Petroleum acquired rights in respect of the Sam Hawk for the supply of bunkers to that vessel in Istanbul which are equivalent to what would be recognised in Australia as a maritime lien. Because under the provisions of US law that are relied on it is necessary for there to have been a contract between Reiter Petroleum and the owner for the supply of the bunkers for the lien to arise, the principal issue can be narrowed to the question of whether or not there was such a contract between those two parties.

47. Two issues arise in relation to that question. The first is one of agency, namely was EBC authorised by the owner to conclude a contract of supply of bunkers to the vessel? There are three contenders for the relevant choice of law rule for that issue:

- First, there is the proper law of the contract of agency, which will be the proper law of the charterparty. *Dicey, Morris and Collins: The Conflict of Laws* says that where one person, the agent, acts or purports to act on behalf of another person, the principal, their rights and liabilities in relation to each other, in general, are governed by the law applicable to

the contract or other relationship between them.[41] That stands to reason and would be consistent with first principles. In this case there clearly was no actual authority given by the owner; indeed, there was an explicit denial of authority.

- Secondly, there is authority to the effect that questions of formation of contract should be governed by the putative proper law, being the objective putative proper law rather than the subjective putative proper law.[42] That recognises that it is inappropriate to decide whether parties formed an agreement with reference to a choice of law clause in the disputed contract because to do so would assume that agreement on that clause had been reached. Rather, reference should be had to the system of law with which the transaction has its closest and most real connection. In this case that would certainly not be the law of the United States, which would have the result that the rebuttable presumption of authority in US law would not be picked up.

- Thirdly, there is authority for the proposition that issues of formation of contract are to be determined by the *lex fori*. I refer to the judgments of Brennan J and Gaudron J in the High Court in *Oceanic Sunline v Fay.*[43]

48. The second issue on the question of formation of the contract is whether or not EBC, the charterer, had ostensible authority to contract for the bunkers on behalf of the owner – or, to put it differently, whether the owner is estopped from denying the apparent authority of EBC to contract on its behalf. *Dicey, Morris and Collins* say that the relevant choice of law rule for that issue is the proper law of the contract concluded between the putative agent and the third party.[44] In this case that would be Canadian law.

---

41 *Dicey, Morris and Collins: The Conflict of Laws* (15th ed., 2012), vol 2 p 2109 Rule 243(1) and 243(2)(c)(i), and p 2123 Rule 244(2).

42 *Mackender v Feldia AG* [1967] 2 QB 590 per Lord Diplock at 602-3; *Mynott v Barnard* (1939) 62 CLR 68 at 80; and see Mortensen, Garnett and Keyes *Private International Law in Australia* (LexisNexis, 3rd ed., 2015) at para [17.28] p 431.

43 *Oceanic Sun the Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 225 and 261.

44 *Dicey, Morris and Collins: The Conflict of Laws* (15th ed., 2012), vol 2 p 2122 Rule 244(1).

49. The judgment in *The Sam Hawk* does not grapple with these issues. The reasoning moves from a conclusion that the minority in *The Halcyon Isle* is correct to the conclusion that the court has jurisdiction and that the application for summary dismissal fails. It does not go through the steps of characterising the relevant issue, identifying the choice of law rule that should apply to that issue, and then applying that rule to that issue. Characterisation of the issue and identification of the applicable choice of law rule to that issue are legal questions; they are not factual. They therefore can and should be decided in the jurisdictional challenge. The application of the choice of law rule to decide the correctly characterised issue will involve identifying the applicable foreign legal rule. That will involve the proof of foreign law as fact. That could lead to a factual contest that cannot be decided in the jurisdictional challenge or the application for summary dismissal.

H. A final question

50. One of the difficulties with the conclusion with regard to the enforceability of foreign maritime liens in *The Sam Hawk* is that in every case now which relies on a maritime lien the following questions must be asked: what is the system of law with which the validity or enforcement of the lien must be judged, and is the lien valid or enforceable in accordance with that system of law?

51. In most maritime lien cases in Australia, the claim will have a foreign element and, broadly speaking, the claim will have arisen elsewhere. It may arise out of a collision on the high seas, or in foreign territorial waters, or a salvage operation abroad, or service by crew on a ship in many places other than Australia. It will no longer be sufficient to approach the matter as has hitherto been done which is merely to ask whether the underlying events give rise to one or other of the maritime liens identified in section 15(2) of the *Admiralty Act*. That may bring considerable uncertainty, and cost, to the enforcement of maritime liens.

52. It would also seem to have the result that the identification of particular maritime liens in section 15(2) has the limited purpose of identifying those liens that exist under Australian substantive law. That is an odd result for a statute that is concerned with jurisdiction and procedure and not with substantive law. So

might it not then be the case that by its own terms section 15 characterises maritime liens as procedural and not substantive with the result that *The Halcyon Isle* must still apply in Australia?