Date: 20081212

Docket: A-191-06

Citation: 2008 FCA 399

CORAM: **RICHARD C.J.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

KENT TRADE AND FINANCE INC.

and

PRAXIS ENERGY AGENTS S.A.

and

CP3500 INTERNATIONAL LTD.

Appellants

and

JP MORGAN CHASE BANK

and

JP MORGAN EUROPE LIMITED

Respondents

Heard at Ottawa, Ontario, on October 8, 2008.

Judgment delivered at Ottawa, Ontario, on December 12, 2008.

REASONS FOR JUDGMENT BY: RICHARD C.J.
CONCURRED IN BY: RYER J.A.
DISSENTING REASONS BY: PELLETIER J.A.

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REASONS FOR JUDGMENT

RICHARD C.J.

[1] This is an appeal from the decision of Gauthier J. (the "Priorities Appeal judge") which assessed the entitlement of various claims to the proceeds of the judicial sale of a ship, the "Lanner"

(the “vessel”). This decision was itself an appeal of the Priorities Hearing before Morneau P., who held that the claim of the vessel’s mortgagee prevailed over the claims of various necessaries suppliers.

[2] The issue in this case is whether the appellants, which are suppliers of necessaries to the vessel, should be granted maritime liens which would rank in priority over the mortgage claim held by the respondent mortgagees.

Background

[3] The facts in this appeal are uncontraverted.

[4] At the request of the respondent mortgagees, JPMorgan Chase Bank and J.P. Morgan Europe Ltd., the Liberian-flagged vessel was arrested in Halifax and sold by the Federal Court in an admiralty action *in rem*. At all times relevant to the claims of the appellants, the vessel was owned by a Liberian corporation, Mystras Maritime Corporation and was managed by Arrow Co. Ltd. (“Arrow”) of Greece.

The Four Claims

Kent Trade and Finance Inc. - Cartagena

[5] The appellant, Kent Trade and Finance Inc. (“Kent Trade”), incorporated under the laws of the British Virgin Islands, supplied fuel oil to the vessel at the port of Cartagena, Spain via an unknown supplier. Kent Trade also supplied fuel oil to the vessel while docked in Halifax, Nova

Scotia via a Canadian supplier. The total amount of Kent Trade's claim for fuel provision is CAD $415,688.70. In the terms and conditions of sale, the following provision was included:

> This agreement is subject to the laws of the United States of America.

Praxis Energy Agents S.A.

[6] The second appellant, Praxis Energy Agents S.A. ("Praxis"), is also a British Virgin Islands corporation. Through an English company, Praxis supplied the vessel with bunker fuel at the port of Pointe-à-Pierre, Trinidad. The amount of the claim is CAD $225,599.23. The supply contract included the following clause:

> APPLICABLE LAW The Law governing any and all disputes and all other matters/issues between the Company and the Buyer and/or the Vessel shall be the U.S.A. Law. Such Law shall also govern, but without limitation, all issues concerning the enforcement and the application and status of maritime liens.

CP3500 International Limited

[7] The final claim at issue in this appeal is asserted by CP3500 International Limited ("CP3500"), incorporated under the laws of Cyprus. CP3500 arranged for a Singaporean supplier to provide combustion catalysts to the vessel while in Singapore in the amount of CAD $6,257.25. The terms and conditions of sale included the following arbitration clause:

> ARBITRATION All disputes which may arise between us concerning this transaction of the invoiced goods shall be submitted to binding arbitrators […] all in accordance with Washington State law.

[8] Under Canadian law, a supplier of necessaries to ships is accorded a statutory right *in rem*, (paragraph 25 of *Imperial Oil Ltd. v. Petromar Inc. (C.A.)*, [2002] 3 F.C. 190 (C.A.) [*Imperial Oil*] and see paragraph 22(2)(*m*) and subsection 43(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7).

The ranking of claims to the proceeds of a ship's sale is decided by the law of the forum (*Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] S.C.R. 1248 at 1254 [*Todd Shipyards*]). A statutory right *in rem* ranks below a mortgage, which is itself outranked by any maritime liens asserted against the vessel (*Todd Shipyards* at 1259).

[9] Under U.S. law, a necessaries supplier is afforded a maritime lien, by virtue of the *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. 31342 (1994):

> § 31342. Establishing maritime liens
>
> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
> (2) may bring a civil action in rem to enforce the lien; and
> (3) is not required to allege or prove in the action that credit was given to the vessel.
>
> (b) This section does not apply to a public vessel.

As noted by Justice Binnie in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907 [*Holt Cargo*], foreign maritime liens, including those arising under the U.S. statute, "will be recognized and given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law 'unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right'" (at paragraph 41, citing *The Strandhill v. Walter W. Hodder Co.*, [1926] S.C.R. 680 at 685 [*The Strandhill*]).

[10] The appellants, all necessaries suppliers, claim that they enjoy maritime liens by virtue of the U.S. choice-of-law provisions in the supply contracts and thus, their claims to the vessel's judicial sale proceeds should be satisfied ahead of the respondents' mortgage. The respondent

mortgagees, contend that American law is not the proper law to apply and, even if it did govern, U.S. law does not provide for a maritime lien in the circumstances at bar.

Judicial History

Priorities Hearing, 2005 FC 864

[11] Morneau P. did not accord maritime lien status to the claims of the suppliers and ranked these claims behind that of the mortgagees. He decided that, because the mortgagees were not parties to the supply contracts, the choice of law clauses did not dictate which jurisdiction's substantive law applied (at paragraph 59).

[12] Morneau P. then applied a conflict of laws analysis to each supply transaction in order to determine if the United States was the jurisdiction to which it had the closest and most substantial connection. Looking at various factors including the vessel's flag state, the location of supply, and the base of operations of the vessel, he concluded that U.S. law was not applicable to these transactions (at paragraph 61). Since no other law had been proved, he applied the law of the forum, i.e. Canadian law. Consequently, he found that each supply transaction only gave rise to a statutory right *in rem*, which was below the mortgage in priority.

Priorities Appeal, 2006 FC 409

[13] Justice Gauthier also found that the appellants only had statutory rights *in rem*, rather than maritime liens. She held that the choice of law clauses in the supply contracts would only be determinative of the applicable law if the vessel's owner was personally liable under the contract.

She found that there was insufficient evidence to prove that the vessel's manager had the authority to bind the vessel's owner since the contract between the two parties was not before the court. Therefore, she applied the closest and most substantial connection test to the transactions and agreed with Morneau P. that U.S. law did not apply to the transactions.

[14] Although it was unnecessary to decide whether maritime liens would arise under American law, Justice Gauthier decided that they would not. She found that the respondent mortgagees' expert witness was able to provide more specific evidence that U.S. law would not provide a lien where the necessaries were supplied by a foreign supplier to a foreign ship in a foreign country (at paragraph 94).

Analysis

[15] Whenever a Canadian court is asked to apply the substantive law of a foreign jurisdiction, it must apply a 'choice of law' analysis, using Canadian conflict of laws rules (*Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at paragraph 29; *Ontario Bus Industries Ltd. v. Federal Calumet (The)*, [1992] 1 F.C. 245 at 252 (T.D.) [*The Federal Calumet*], aff'd (1992), 150 N.R. 149 (F.C.A.)).

General Approach to 'Conflict of Laws' Analysis

[16] Absent a statutory and/or treaty provision that directs the forum to apply a particular choice of law rule, Canadian common law conflict of laws rules will apply in a proceeding where the court is asked to apply foreign law. The first step in such an analysis is the determination of the legal

nature of the questions or issues to be adjudicated (Castel & Walker, *Canadian Conflict of Laws*, 6th ed., loose-leaf, vol. 1 (Markham: LexisNexis, 2005) at § 3.1-3.2; Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed., vol. 1 (London: Sweet & Maxwell, 2006) at 2-001 to 2-045). This characterization must be performed since different choice of law rules have been developed for different legal categories. For example, characterization of the issue as tortious versus contractual will result in the application of a different conflicts rule and may result in a different outcome as to which jurisdiction's substantive law governs.

[17] Once the issue is characterized as belonging to a particular legal category, the court must then determine what choice of law rule applies to that particular category (Castel & Walker at § 3.1). Application of the choice of law rule should indicate which jurisdiction's law should apply to this particular matter.

[18] After the appropriate law is selected using Canadian choice of law rules, the court will then apply that law to the issue. In general, foreign law must be specifically pleaded and proved to the satisfaction of the court (Castel & Walker at § 7.1; Dicey, Morris & Collins at Rule 18(1)). If the foreign law is not pleaded or is insufficiently proved, the court will apply the law of the forum (Castel & Walker at § 7.4).

Characterisation of the issue and choice of law in the "Lanner" transactions

[19] Since there is no statutory or treaty rule mandating a particular choice of law rule, I first must characterise the issue at bar. Prior to doing this, it is helpful to review the nature of maritime liens.

[20] The maritime lien is "a true, substantive right in the property of another […], a subtraction from the ship owner's absolute ownership" (W. Tetley, *International Maritime and Admiralty Law* (Montreal: Blais, 2002) at 482). It is an ancient creature of the *lex maritima* and has no equivalent in the common law (W. Tetley, *Maritime Liens and Claims*, 2nd ed. (Montreal: Blais, 1998) at 60). This secured, *in rem* right against the vessel:

> arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages" (*The Tolten*, [1946] P. 135 (C.A.), *per* Scott L.J., at p. 150). It may be described, in that sense, as a "secret lien".
>
> *Holt Cargo* at paragraph 26.

Furthermore, a maritime lien arises by operation of law, rather than from tort or contract (*Imperial Oil* at paragraph 26; see also *Ventura Packers, Inc. v. FN Jeanine Kathleen*, 305 F.3d 913 (9th Cir. 2002)).

[21] As noted by Justice Binnie in *Holt Cargo*, the reason for the privileged status of maritime liens is practical (at paragraph 27):

> The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships […]. Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to

> provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence.

[22] While Canadian law does not afford a maritime lien for the supply of necessaries, other jurisdictions do, including the United States and France (Tetley, *Maritime Liens and Claims* at 551). 'Necessaries' include repairs, supplies, towage, and the use of dry docks and marine railways (Tetley, *International Maritime and Admiralty Law* at 483).

[23] The United States has statutorily recognized a general maritime lien for necessaries since the adoption of the *Ship Mortgage Act* in 1920 (Tetley, *Maritime Liens and Claims* at 77). As mentioned above, the current legislation governing necessaries liens is the U.S. *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. § 31301-31343 (1994). These liens arise at the moment of supply to the vessel (Tetley, *Maritime Liens and Claims* at 596).

[24] One need only look at the facts of this case to see that maritime transactions may involve a multitude of jurisdictions. As acknowledged by Justice Stone in *Imperial Oil*, "it is not unusual in the marine shipping industry for fuel to be supplied to a vessel under a contract between parties located in several countries, negotiated in one country and performed in another sometimes by a person who was not a party to the original contract" (at paragraph 22). While I recognize that maritime liens are *in rem* rights, which arise by operation of law and not from contract, I believe that the choice of law clause in the supply contracts should generally govern maritime transactions, including the rights which may arise from these transactions. The Supreme Court of Canada has suggested that the principles of comity, order, and fairness should guide the determination of

conflict of laws issues (*Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205 at paragraph 21). While the principles of comity and fairness will often be equivocal in the case of maritime transactions, giving greater weight to proper law of the supply contract would pay respect to the notion of 'order.' This would encourage certainty and predictability in maritime transactions of a jurisdictionally diverse character.

[25] The common law contractual choice of law rules provide that where there is an express or implied choice of law by the parties to the contract, this law will normally govern the contract and legal rights and obligations generated by the contract (*Drew Brown Ltd. v. Orient Trader (The)*, [1974] S.C.R. 1286 at 1288, 1314 & 1318; *The Federal Calumet* at 253; *Richardson* at paragraph 28). Absent an express or implied choice of law by the parties, the proper law of the contract is determined by assessing which jurisdiction has the closest and most substantial connection (*The Federal Calumet* at 253; *Imperial Life Assurance Co. of Canada v. Colemenares*, [1967] S.C.R. 443 at 448 [*Imperial Life*]).

[26] While the contractual choice of law clause in the contract should dictate the proper law of the maritime transaction, I acknowledge that maritime liens are extra-contractual rights. Therefore, I do not foreclose the possibility that, where a maritime transaction is so strongly connected to a jurisdiction, this jurisdiction's substantive law, rather than the choice of law clause in the contract, should govern the transaction. In *Imperial Oil*, Justice Stone held that the U.S. choice of law clause in the supply contract did not govern the transaction since the place of vessel registration, the residences of the ship owner and charterer, and the place of supply delivery were all in Canada.

Justice Stone also suggested that the flag state of the vessel and the residence of the supplier were significant factors in determining which jurisdiction had the closest and most substantial connection to the transaction.

[27] In assessing the proper law to apply to the transactions at issue, Prothonotary Morneau summarized the relevant connecting factors in a table. I reproduce this table, with some modifications, below. In all cases, the vessel's flag state and the vessel owner's country of residence is Liberia. The vessel's base of operations and the vessel manager's country of residence is Greece.

APPELLANT	APPELLANT'S COUNTRY OF RESIDENCE	SUPPLIER'S COUNTRY OF RESIDENCE	LOCATION OF SUPPLY	CHOICE OF LAW IN SUPPLY CONTRACT
Kent Trade	British Virgin Islands	Canada	Canada	U.S.A.
		Unknown	Spain	U.S.A.
Praxis Energy	British Virgin Islands	England	Pointe-à-Pierre, Trinidad	U.S.A.
CP3500	Cyprus	Singapore	Singapore	Washington State (arbitration agreement)

[28] It is evident that U.S. law has been explicitly chosen to govern the Kent Trade and Praxis Energy supply contracts. However, the Priorities Appeal judge found that the choice of law in the contracts did not dictate that American law applied due to insufficient evidence that the vessel's owner was personally liable under this contract.

[29] Without deciding whether personal liability of the owner is necessary for the choice of law clause to be determinative of the proper law, I find that the Priorities Appeal judge made a palpable and overriding error in holding that a contractual link between the appellants and the vessel's owner was not established by the evidence. It is uncontested by the respondents that the management agreement between the vessel's owner and its manager was part of the record at the Priorities Appeal. This agreement states that the manager, Arrow, had the authority on behalf of the owner to do all things necessary for the management of the vessel, including the arrangement of bunker fuel and lubrication oil contracts. Furthermore, all invoices of the appellants were addressed directly to Arrow, as manager of the vessel. As a result, a contractual link has been established between the owner and the appellants.

[30] Therefore, even if personal liability of the ship owner is a necessary element of the choice of law rule, the proper law of the Kent Trade and Praxis contracts, based on choice of law rules, is American law.

[31] In the CP3500 contract, there is no explicit choice of law clause; however, there is an arbitration clause stating that any arbitration between the parties is to be decided in accordance with the law of the State of Washington. Even where an arbitration clause only selects the forum of the arbitration, British and Canadian courts normally take this clause as indicative of the proper law of the contract (see *e.g. Richardson* at paragraphs 34-35; *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.*, [1970] 2 Lloyd's Rep. (H.L.)). On this basis, I find that the proper law of the CP3500 supply contract is American law.

[32] Since the contractual choice of law clause should normally govern and there are no other factors, or combinations of factors, which indicate that another jurisdiction has a closer or more substantial connection to the maritime transactions at hand, I disagree with the decisions below and conclude that American law is the appropriate law to apply in this case.

Application of American law

[33] While Justice Gauthier did not believe American law governed the transactions at issue, she proceeded on the basis that it did and found that, based on the expert testimony, American law would not grant maritime liens in the circumstances of this case. The appellants and the respondents differ as to the appropriate standard of review to apply where the trial judge has determined the content of foreign law. It is not contested by either party that foreign law is treated as a question of fact (*Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at 306) which must be specifically pleaded by the party relying upon it and proved to the satisfaction of the court (Castel & Walker at § 7.1). However, as noted by the English Divisional Court in *Parkasho v. Singh*, [1967] 1 All E.R. 737 at 746 (approved by the English Court of Appeal in *Bumper Development Corp. v. Commissioner of Police of the Metropolis*, [1991] 4 All E.R. 638 at 645 [*Bumper Development*]), findings of foreign law are "a question of fact of a peculiar kind." The Ontario Court of Appeal has recently recognized the unique position of an appellate court in reviewing these findings of fact and held that they were reviewable on a standard of correctness (*General Motors Acceptance Corp. of Canada v. Town and Country Chrysler Ltd.* (2007), 88 O.R. (3d) 666, 2007 ONCA 904 at paragraphs 35-36).

[34] This issue does not have to be resolved in the present case since fresh evidence has been admitted in the way of supplemental affidavits from the appellants' and respondents' expert witnesses (Order of Décary J, November 6, 2007; Order of Noël J, July 10, 2008). In light of the new evidence submitted prior to this appeal, I must assess whether U.S. law would grant a maritime lien for necessaries in any or all of the four transactions at issue.

[35] Before discussing the expert testimony as to the content of U.S. law, it is helpful to discuss the role of expert witnesses, both in general and in the context of proving foreign law. As recognized by the English Court of Appeal in *The General Medical Council v. Professor Sir Roy Meadow et al.*, [2006] E.W.C.A. Civ. 1390, the duties and responsibilities of expert witnesses in civil cases include the following (citations omitted):

> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness […] should never assume the role of an advocate.
> 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
> 5. […]
> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

[36] While, in general, both Mr. de Klerk (the expert witness for the appellants) and Mr. Juska (the expert witness for the respondents) provided helpful evidence, I feel it necessary to express my

disapproval at the speculative and argumentative nature of some of the testimony given by Mr. de Klerk. An expert witness is entitled to give his opinion as to whether a judicial decision is inconsistent with binding authority or the general state of the law; however, it will generally be inappropriate for expert witnesses to comment on the likelihood of a decision being upheld or reversed on appeal.

[37] As for the substance of the expert testimony, it appears that there is a divergence in the U.S. District Courts and Circuit Courts of Appeal as to whether a maritime lien would be established where a non-U.S. supplier has provided necessaries to a foreign vessel in a foreign port. The English Court of Appeal has suggested that it is "the duty of the judge when faced with conflicting evidence from witnesses about a foreign law to resolve those differences in the same way as he must in the case of other conflicting evidence as to facts" (*Bumper Development* at 644). This is also the approach taken in *Re Duke of Wellington*, [1947] Ch. 506 and *Breen v. Breen*, [1961] 3 All E.R. 225. Determining the law of a foreign jurisdiction when such law is unsettled presents a difficult task for a court. Therefore, I note that my findings on U.S. law are based only on the affidavits and exhibits presented before the Court, since it is generally inappropriate for a court to conduct its own investigation into the foreign law (see *Bumper Development* at 644; Castel & Walker at § 7.3; Dicey, Morris & Collins at 262).

[38] Very few decisions were presented that addressed similar circumstances to those at issue in this case: namely, would U.S. courts recognize a maritime lien where a foreign supplier provided necessaries to a foreign ship in a foreign port.

[39] For the proposition that the U.S. *Maritime Liens Act* does not apply to foreign suppliers providing necessaries to foreign vessels in a foreign port, Mr. Juska cites the decision from the Court of Appeals for the 11th Circuit in *Trinidad Foundry & Fabricating Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613 (11th Cir. 1992). In this case, a Trinidad corporation had provided a Norwegian-flagged ship with certain necessaries and performed repairs on the foreign-owned vessel while docked at Trinidad. The repair contract provided that English law would govern all aspects of the supply and repair agreement. After the vessel's owners failed to pay the outstanding balance on the repair contract, the supplier brought an action *in rem* against the vessel and *in personam* against the ship's owners. The issue before the district court and at appeal was whether the court had jurisdiction over the matter. U.S. courts have *in rem* jurisdiction to enforce a maritime lien or whenever a U.S. statute provides for a maritime action *in rem* or analogous proceeding. The supplier argued, *inter alia*, that § 31342 of the U.S. *Maritime Liens Act* recognized a maritime lien in the circumstances and thus allowed the court to have *in rem* jurisdiction. The court rejected that argument on two bases: firstly, it held that § 31342 does not provide for a lien for supplies provided by a foreign supplier to foreign flag vessels in foreign ports (at 617); and secondly, that § 31342 is not even applicable to this case since the contract had stipulated that English law governs.

[40] Similar holdings were made in two other cases cited by Mr. Juska. In *Metron Communications, Inc. v. MN Tropicana*, 1993 A.M.C. 1264 (S.D. Fla. 1992), the court declined to recognize the existence of a lien where a Danish corporation provided various services to a

Bahamian-registered vessel docked in a foreign port. Furthermore, in *Swedish Telecom Radio v. M/V Discovery I*, 712 F. Supp. 1542 (S.D. Fla. 1988), the District Court commented that:

> [o]n its face, the statute appears to apply to any person or entity regardless of nationality or the location at which the goods were supplied or the services performed. However, the courts interpreting the statute have provided a narrower scope. *See Tramp Oil and Marine Ltd. v. M/V Mermaid I*, 805 F.2d 42 (1st Cir. 1986); *Gulf Trading*, 658 F.2d at 367. "The primary concern of the Federal Maritime Lien Act is the protection of American suppliers of goods and services." *Tramp Oil*, 805 F.2d at 46 (citing the Congressional reports which accompanied the enactment of 1971 amendments to the Act). (at 1545)

[41] The first supplemental affidavit of Mr. Juska referenced a more recent case that was decided by the District Court of Maryland. In *Triton Marine Fuels Ltd., S.A. et al. v. M/V Pacific Chukotka, et al.*, 504 F. Supp. 2d 68 (D.C. Md. 2007) [*Triton*], a Maltese-registered vessel was owned by a Norwegian corporation, bareboat chartered to a Russian company, and sub-chartered to a U.S.-owned Cayman Islands corporation that had its principal place of business in Seattle. The claimant, a Panamanian corporation, arranged through its Canadian agent to supply the vessel with fuel in the Ukraine. The supply contract contained a clause stating that the law of the United States governed the agreement. The vessel's owner moved for summary judgment on the basis that, even if the choice of law provision was enforceable, the U.S. legislation would not create a maritime lien in the circumstances at issue. The district court agreed that, as a matter of law, no maritime lien for necessaries existed. In coming to its decision, the court found that there were no policy reasons that would justify "the assertion of United States law against the commandments of the laws of other nations that do not recognize maritime liens for necessaries" (at 73).

[42] Following the decision in *Triton*, the Court of Appeals for the Ninth Circuit released its decision in *Trans-Tec Asia v. M/V Harmony Container et al.*, 518 F.3d 1120 (9th Cir. 2008) [*Trans-*

Tec]. The District Court's decision in this case had been cited by Mr. Juska in his first supplemental affidavit for the proposition that, even where the supply contract stipulated the application of American law, a foreign supplier would not obtain a lien for necessaries provided to a foreign vessel in a foreign port. However, following the submission of this affidavit, the Court of Appeals reversed the District Court's decision. This was brought to the attention of this Court in the second supplemental affidavit of Mr. de Klerk.

[43] In *Trans-Tec*, a Malaysian-owned and flagged vessel, which was chartered to a Taiwanese corporation, was provided with fuel bunkers by a Singaporean corporation while docked in Korea. There was a provision in the supply contract that indicated U.S. law was to govern the transaction. After the supplier did not receive full payment for the bunkers, it filed suit in California, asserting a maritime lien against the vessel. The Court of Appeals relied on the plain language of the statute to find that there was no restriction on the nationality of the supplier or vessel, or on the location of the port of supply. The Court also looked at the Congressional history to support that the *Maritime Liens Act* was not restricted to American suppliers.

[44] The respondent in *Trans-Tec* argued that there is a presumption against extraterritoriality in Congressional legislation. The Court of Appeals disagreed, holding that admiralty law is extraterritorial by nature and since the parties to the supply contract had chosen American law, the application of American law would not interfere with the sovereignty of other nations. Addressing the decision in *Trinidad*, the court noted that its analysis of the *Maritime Liens Act* was skeletal, since the Eleventh Circuit had already decided that English law applied to the transaction.

Furthermore, since American law did not apply in this case, the Court's pronouncement that the *Maritime Liens Act* did not grant a lien where the ship, port, and supplier were foreign was mere *dicta*. The Court also found *Swedish Telecom* to be unpersuasive on this basis, since the court had determined that Swedish law applied to the transaction.

[45] It is Mr. Juska's opinion that *Trans-Tec* was wrongly decided and he states that he has been advised by counsel for the vessel owner that the Court of Appeals decision will be appealed to the U.S. Supreme Court.[*] *Trans-Tec* is the only U.S. Court of Appeals case decided on much the same facts as the four transactions at issue; namely, a foreign-flagged vessel, owned and operated by non-American entities, docked at a non-U.S. port, being provided with supplies by a non-U.S. company under a supply contract governed by U.S. law. I acknowledge Mr. Juska's assertion, supported by several U.S. Supreme Court decisions, that *Trans-Tec* contradicts the long-established U.S. legal principle that, absent a contrary intent, Congressional legislation does not apply extraterritorially. However, I also note that the Ninth Circuit dealt with this argument and dismissed it.

[46] Although I recognize that a decision of one Circuit's Court of Appeals is not considered binding precedent on the decisions of other Circuits, *Trans-Tec* is the latest expression of the law from a U.S. appellate court. Therefore, based on the expert evidence before us, I am satisfied that

[*] The petition for a writ of certiorari was denied by the U.S. Supreme Court on December 1, 2008 (*Splendid Shipping Sendirian Berhard, Petitioner v. Trans-Tec Asia*, 2008 U.S. LEXIS 8640).

U.S. law would recognize a maritime lien for necessaries where, under a supply contract governed by U.S. law, a foreign supplier provides goods or services to foreign vessels in a foreign port.

[47] There is no aspect relating to any of the four transactions that would serve to distinguish the circumstances at issue from those related in *Trans-Tec*. Consequently, I conclude that the three appellants have proven to my satisfaction that they each have a maritime lien against the "Lanner."

Disposition

[48] The appeal will be allowed and the following amounts will be ordered to be paid from the balance of the proceeds of the judicial sale of the vessel:

1) the sum of $415,688.70 in capital to Kent Trade and Finance Inc. with interest to be calculated at the rate stipulated in the supply contract;
2) the sum of $225,599.23 in capital to Praxis Energies Agents S.A. with interest to be calculated at the rate stipulated in the supply contract; and
3) the sum of $6,257.25 in capital to CP3500 International Limited with interest to be calculated at the rate stipulated in the supply contract.

[49] Costs will be granted to the appellants both in the Federal Court and in this Court.

"J. Richard"
Chief Justice

"I agree
C. Michael Ryer J.A."

PELLETIER J.A. (Dissenting)

[50] I have read the decision of the Chief Justice, and for the reasons which follow, I find that I am unable to agree.

[51] In my view, there are two issues in this appeal. First, what is the effect to be given to the choice of law clause which appears in a different form in each of the contracts in question? Second, what is the effect to be given to *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. §31342 (1994) (the Act)?

[52] Assuming for the purposes of argument that the interpretation of the contracts in question is subject to United States law, and that the proper construction of the contracts brings the Act into play, one is then left with the fact that the application of the Act is a function of the U.S. Court of Appeals circuit in which a vessel is arrested and sold. If the vessel is arrested and sold within the jurisdiction of the Ninth Circuit, then the effect of the Act is to confer a maritime lien on a foreign supplier of necessaries to a foreign ship in a foreign port: see *Trans-Tec Asia v. M/V Harmony Container*, 518 F.3d 1120 (9th Cir. Mar. 11, 2008) [*Trans-Tec*]; paragraph 4 of Mr. Juska's Second Supplemental Affidavit at page 441 of the Supplemental Appeal Book. If, on the other hand, a vessel is seized and sold in a port falling within the jurisdiction of the Eleventh Circuit, a maritime lien will not be found to exist as a result of supply to a foreign ship in a foreign port by a foreign supplier by virtue of that Court's decision in *Trinidad Foundry and Fabricating Ltd. v. M/V K.A.S. Camilla*, 966 F. 2d 613 (11th Cir. 1992) (*Trinidad Foundry*). Since the decision of one circuit of the U.S. Federal Court of Appeals does not overrule the decision of another circuit of the same court,

both decisions are good law within the geographical limits of the circuit in which they were decided. Both experts agreed that the U. S. Supreme Court has not yet considered this question so that there is no decision binding on all U.S. courts on this question.

[53] The present case involves a ship which was arrested and sold outside the United States, so that the transaction is not one which falls within the geographical jurisdiction of any of the circuits of the U.S. Federal Court of Appeals. Consequently, insofar as Kent Trade and Finance Inc. and Praxis Energy Agents S.A are concerned, there is no basis for preferring the jurisprudence of one circuit of the U.S. Federal Court of Appeals over another.

[54] This is not a case of a court being forced to choose between conflicting affidavits as to the state of the law of a foreign jurisdiction. It is clear that, in such a case, the court must reach a conclusion on the state of foreign law in spite of the conflict between the experts:

> It is well settled that a court faced with conflicting opinions as to foreign law is bound to make its own decision as to that law. This is apparent from these passages from two authorities:
>
> > (1) It is therefore incumbent upon him to prove the law of the State of Washington. This he must prove as matter of fact by the evidence of persons who are expert in that law… and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion…
> >
> > *Allen v. Hay* (1922), 64 S.C.R. 76 at 80-81, Duff J.
> >
> > (2) As I understand the law of England… when you come to statute law itself, although it is right that *prima facie* what must be considered is the evidence of the experts and not the text of the law, when the experts differ as to its meaning an English court is entitled and, if it is to perform its function properly, is, indeed, bound, to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks ought to be given to it, to the text itself and to examine it in

> order to make up its mind on the question of interpretation as between the two sets of witnesses.
>
> *Rouyer Guillet & Cie. v. Royer Guillet & Co.*, [1949] All E.R. 244 (C.A.) at 244, Lord Greene M.R.
>
> [*Sarabia v. Oceanic Mindoro* (1996), [1997] 2 W.W.R. 116 at para. 11 (B.C.C.A).]

[55] In this case, while there is a conflict between the opinions of the experts, there is no dispute between them as to the state of the law within the geographical jurisdiction of those circuits of the United States Court of Appeals which have pronounced themselves on the interpretation of the Act. The Ninth Circuit has ruled one way, the Eleventh Circuit has ruled another. Thus, the law to be applied would normally be a function of the circuit in which it is to be applied. As a result, the state of the law depends upon a fact which is absent here, namely the presence of the arrested vessel in a port within the geographical jurisdiction of one or the other of the circuits of the United States Court of Appeals. Given that *Trinidad Foundry*, which ruled against the availability of a maritime lien in the case of foreign suppliers to a foreign ship in a foreign port, was decided in 1992, the parties who wished to take the benefit of the Act could have stipulated the place at which U. S. law was to be determined, and therefore the governing jurisprudence, as CP 3500 International Ltd. did in its contract (see paragraph 14 of Mr. de Klerk's affidavit dated October 28, 2004).

[56] In the result, the proof of foreign law fails, not because of the conflicting opinions of the experts, but because the state of the law with respect to maritime liens is, at present, determined by the circuit in which the arrest and sale of the ship occurs. Had the arrest and sale occurred at a U.S. port, the jurisprudence of the Court of Appeals for that circuit would have been applied and the

matter resolved. Where the arrest and sale occur outside the United States, and no tie to any particular circuit is proven, then the U. S. law applicable to that transaction has not been proven.

[57] Where there is no proof of foreign law, the *lex fori*, the law of Canada, applies: see *Canadian Conflict of Laws*, 6th ed., loose-leaf, vol. 1 (Markham: LexisNexis, 2005) at §7.4, where Castel and Walker write:

> If foreign law is not pleaded or, if pleaded, it is not proved or is insufficiently proved, the court will apply the *lex fori*. It was once said that in the absence of proof the court would presume the foreign law to be the same as the *lex fori*, but it is better to say that in all cases where foreign law is not proved, the *lex fori* prevails as it is the only law available…
>
> [Emphasis added.]

[58] The law of Canada does not recognize a maritime lien for the supply of necessaries to a vessel so that the claims of Kent Trade and Finance Ltd. and Praxis Energy Agents S.A. to priority over the claims of the ship's mortgagees should be dismissed.

[59] The situation of CP3500 International Ltd. is different in that its choice of law clause provides for arbitration under the laws of the State of Washington. At paragraph 14 of his affidavit dated October 28, 2004, Mr. de Klerk states that Washington State Law would include the law of the United States. Since Washington is in the Ninth Circuit, the law to be applied would be the law as stated by the Ninth Circuit of the U.S. Federal Court of Appeals in *Trans-Tec*. Given the connection with the Ninth Circuit, I would apply the interpretation of the Act adopted by the United States Court of Appeals for that circuit and allow CP 3500 International Ltd.'s claim for a maritime lien.

[60] In the result, I would dismiss the appeals of Kent Trade and Finance Inc. and Praxis Energy Agents S.A. with costs and allow the appeal of CP 3500 International Ltd. with costs.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-191-06
STYLE OF CAUSE:	KENT TRADE AND FINANCE INC. et al. v. JP MORGAN CHASE BANK and JP MORGAN EUROPE LIMITED
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 8, 2008
REASONS FOR JUDGMENT BY:	RICHARD C.J.
CONCURRED IN BY:	RYER J.A.
CONCURRING REASONS BY:	
DISSENTING REASONS BY:	PELLETIER J.A.
DATED:	December 12, 2008

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