

# THE PROTECTION OF SEAFARERS' WAGES IN ADMIRALTY: A CRITICAL ANALYSIS IN THE CONTEXT OF MODERN SHIPPING

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*There is a well established line of authority in Admiralty that seafarers are entitled to unique legal rights that are not available to land-based employees. The most important maritime law right for seafarers is the maritime lien for wages. The admiralty courts have used colourful rhetoric to justify the special rights afforded to seafarers: the wages lien has been called a "sacred lien"; and seamen have been dubbed "favourites of the law". This paper predominantly focuses on the modern application of the wages lien, with a view to question just how closely the law has followed the rhetoric in reality.*

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## 1. Introduction

Modern lawyers dealing with the claims of seafarers often look back at the judicial treatment of seamen<sup>1</sup> from the nineteenth century with almost a sense of bemusement. Inevitably, writers and judges will cite famous cases such as *The Minerva* with memorable descriptions of seamen as:<sup>2</sup>

[A] set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.

Similar remarks can be found in US cases:<sup>3</sup>

Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached.

Such quotes will generally be qualified by an observation that these descriptions of seafarers may not be entirely accurate today, followed by the assertion that the courts should nevertheless still offer special protection to seamen.<sup>4</sup>

The seaman's maritime lien for wages was the admiralty courts' answer to the common mariner's woes. Sir William Scott said '[t]hese are sacred liens, and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages.'<sup>5</sup> In essence, there were three crucial ways in which the admiralty courts protected seafarers' wages: (1) the acceptance of such claims as being within the courts' jurisdiction even though foreign ships and persons would often be involved; (2) the categorisation of the claims

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<sup>1</sup> In this paper I will use the term 'seaman' interchangeably with 'seafarer', 'crew member' and 'mariner'. Of course 'seaman' lacks the gender-neutrality of the other terms, but its recurring appearance in landmark Admiralty decisions and modern legislation makes it difficult to traverse this area of law without referring to it. Therefore, when I use the term 'seaman' I intend to include both male and female mariners. For a striking example of 19<sup>th</sup> Century sexism, see *The Jane and Matilda* (1823) 1 Hag Adm 187, 188; 166 ER 67, where Lord Stowell feared for the 'moral disorder' that would ensue from women working on ships.

<sup>2</sup> *The Minerva* (1825) 1 Hag 347, 355; 166 ER 123, 126.

<sup>3</sup> *Harden v Gordon*, 11 F Cas 480, 485 (1823).

<sup>4</sup> See eg *Doby Navigation Company Ltd v The Ship 'ANL Progress'* [20 Feb 2002] HC, Auckland, AD1/02 [28]; *Mobil Oil New Zealand Ltd v The ship 'Rangiora' (No 2)* [2000] 1 NZLR 82, 86.

<sup>5</sup> *The Madonna D'Idra* (1811) 1 Dods 37, 40; 165 ER 1224, 1225.

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as being within the ambit of the wages lien; and (3) providing the wages lien with a high priority over claims from competing creditors. These three elements are of equal import to the seafarers of the twenty-first century as they were to the seamen of Sir William Scott's time.

This paper will examine the seaman's legal remedies for unpaid wages, with special regard to the wages lien. I will question whether modern, intelligent, unionised seamen are still regarded as 'favourites of the law' in admiralty proceedings.<sup>6</sup> Are seafarers well looked after as 'wards of admiralty',<sup>7</sup> or are they just sidelined by an anachronistic jurisdiction that has failed to keep up with its surrounding developments?

As Fisher J observed in *The Margaret Z*, when applying an existing area of maritime law to a novel fact scenario, one must consider two things: the rationale or policy reasons for the area of law; and the relevant legal precedents.<sup>8</sup> To this, I would add a third factor: the desirability of achieving some degree of international consistency, because of the transnational nature of shipping. Thus this paper will adopt a three-pronged analysis of how modern maritime law should treat the recovery of wages by seafarers. First of all, the overarching theme will be whether the courts/legislators have given sufficient mind to the long-standing rationale in Admiralty to protect seafarers' wages. The second, and perhaps the most substantial, aspect of the analysis will be a discussion of the applicable legal precedents in each topic. Finally, I will attempt to provide comparisons of how different countries have responded to each area of law.

## 2. Admiralty Jurisdiction

There are two rights in Admiralty for wages: the maritime lien for wages and the statutory right for wages. These rights can give rise to two different remedies: actions *in rem* and actions *in personam*. Before a seafarer can make a claim for wages under maritime law, he or she must first establish that the ship (for a claim *in rem*) or the legal person employer (for a claim *in personam*) is within the court's admiralty jurisdiction.

### 2.1 *In Personam* Jurisdiction

In general, the *in personam* jurisdiction of the Court is established by service.<sup>9</sup> If the employer is located in the same country as where the *in personam* action is commenced, service of the claim and the subsequent enforcement of the judgment over the employer's assets should be unproblematic. Where the employer defendant is located overseas, however, personal service must comply with both the procedure in the *lex fori* and the rules in the defendant's country of residence.<sup>10</sup>

In the absence of service, traditionally, a foreign defendant can also incur personal liability if he or she appears unconditionally to defend an *in rem* action against the ship.<sup>11</sup> In that event, both the defendant ship personified and the owner personally will be liable.<sup>12</sup> This position was challenged in *The India Grace* where Lord Steyn held that for a statutory right of action *in rem* (but not for maritime liens), the shipowner will automatically be a party to the proceedings as well.<sup>13</sup> The ramifications of *The Indian Grace* for seafarers will be discussed in Part 5 below.

### 2.2 *In Rem* Jurisdiction

The *in rem* jurisdiction in Admiralty is a unique and invaluable method of proceeding for seafarers as well as other creditors. Ships are, as described in one text, an extremely 'elusive sort of property'.<sup>14</sup> In practice, an action *in rem* allows a maritime claimant to arrest the ship as the defendant and to proceed against her, where the only connection the ship has with the forum is her presence in one of the country's ports.<sup>15</sup> In theory, a country's admiralty jurisdiction *in rem* extends even further to any ship that is within its territorial sea.<sup>16</sup> Service

<sup>6</sup> *The Minerva* (1825) 1 Hag 347, 358; 166 ER 123, 127.

<sup>7</sup> *Harden v Gordon*, 11 F Cas 480, 485 (1823).

<sup>8</sup> *Fournier v The ship 'Margaret Z'* [1999] 3 NZLR 111, 121.

<sup>9</sup> The relevant provisions in New Zealand are sections 387-390 of the *Companies Act 1993* (NZ) and rules 219 and 220 of the *High Court Rules* (NZ).

<sup>10</sup> *Metropolitan Glass & Glazing Ltd v The Ship 'Lydia Oldendorf'* [2000] 8 NZCLC 262.

<sup>11</sup> Admiralty Rules (Part 14 of the High Court Rules), rule 773(6) and (7).

<sup>12</sup> *The Dictator* [1892] P 304.

<sup>13</sup> *The Indian Endurance (No 2); Republic of India v India Steamship Co Ltd* [1998] AC 878, 913.

<sup>14</sup> Gaskell, Debattista and Swatton *Chorley & Giles' Shipping Law* (8th Ed, Pittman Publishing, London, 1988) 69.

<sup>15</sup> *The Lorena* [1973] 1 NZLR 507.

<sup>16</sup> *Territorial Sea and Exclusive Economic Zone Act 1977* (NZ), section 3.

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of a ship involves attaching a copy of the notice of proceeding to a conspicuous part of the ship or showing a sealed copy of the notice to the person in charge (ie the master).<sup>17</sup>

### 2.3 Exercise of Jurisdiction

Having established the existence of jurisdiction, the Court can still use its discretion to decline to exercise jurisdiction. Shipowners will often apply to the Court to utilise its discretion to stay the proceedings, and this is one of the first legal hurdles that a seafarer must pass if his or her claim for wages is to succeed. The exercise of jurisdiction in English admiralty law was traditionally governed by the 'vexatious or oppressive' test.<sup>18</sup> The view was that plaintiffs should be entitled to choose the forum for the dispute, unless that choice is unduly vexatious or oppressive. Lord Denning MR (as he was then) was proud to declare: 'You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.'<sup>19</sup>

The House of Lords retreated from this approach in *The Atlantic Star*, where Lord Reid observed that the doctrine stemmed from a time when the English courts felt an innate sense of superiority over other courts.<sup>20</sup> *The Atlantic Star*, nevertheless, maintained the 'vexatious or oppressive' test, though with the qualification that it was to be read with a 'more liberal and less nationalistic' attitude.<sup>21</sup> The doctrine of *forum non conveniens* was finally adopted from Scottish and US law in *The Spiliada*, which essentially means that the court will grant a stay if another forum is clearly more appropriate for the claim.<sup>22</sup> The burden of proof lies on the person arguing *forum non conveniens*. In this respect, it can be said that it is now easier for foreign shipowners to obtain a stay from the courts.

It was held in *Longbeach Holdings Ltd v Bhanabhai & Co Ltd* that the New Zealand courts should have regard for the plaintiff's 'legitimate or personal judicial advantage' in proceeding in the chosen forum.<sup>23</sup> A major advantage of pursuing an *in rem* action in Admiralty is that it makes it much more difficult for the defendant to argue *forum non conveniens*. As was noted in *The Amami Taiki Go*, the arrested ship (or security in place of the ship) represents full security for the *in rem* claimant and no other forum can provide the claimant with equal security, which entails that the forum of arrest will usually be the most appropriate forum.<sup>24</sup> Obviously, this consideration is of much less significance if the defendant shipowner is prepared to provide alternative security in another forum (ie the purported *forum conveniens*).<sup>25</sup>

The acceptance of the *forum non conveniens* doctrine can be contrasted with the jurisdictional liberalisation of claims relating specifically to seamen's wages. In *The Octavie* Dr Lushington noted: 'The ancient practice was that, without the express consent of the foreign consul, the Court would not exercise jurisdiction.'<sup>26</sup> This was because: 'suits by foreign seamen were not formerly encouraged in this Court; they are now allowed upon a principle of comity, and with a view to prevent injustice to seamen.'<sup>27</sup> The practice then evolved to where the foreign consul had to be notified, and the consul could object to the Court's exercise of jurisdiction over a foreign seaman's claim for wages. The consul's objection was not a veto against the Court's discretion and the consul must provide reasons for objecting.<sup>28</sup> This practice persisted for over a century. Friedman J suggested in *The MV Houda Pearl* 'actions for wages against a foreign ship fall into something of a different category from the point of view of the assumption of or refusal to assume jurisdiction.'<sup>29</sup> The question is whether the exercise of jurisdiction for wages claims still falls into a different category with the advent of the *forum non conveniens* doctrine.

Section 7 of the *Admiralty Act 1973* (NZ) provides:

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<sup>17</sup> Admiralty Rules, rule 772.

<sup>18</sup> *The Atlantic Star* [1972] 2 Lloyd's Rep 446 (CA).

<sup>19</sup> Ibid 451.

<sup>20</sup> *The Atlantic Star* [1973] 2 Lloyd's Rep 197, 200 (HL).

<sup>21</sup> *The Makefjell* [1976] 2 Lloyd's Rep 29.

<sup>22</sup> *Spiliada Maritime Corporation Appellants v Cansulex Ltd Respondents* [1987] AC 460.

<sup>23</sup> *Longbeach Holdings Ltd v Bhanabhai & Co Ltd* [1994] 2 NZLR 28, 35 (CA).

<sup>24</sup> *Yoshinari Tomita v The Unnamed Vessel Formerly Known as 'Amami Taiki Go' and Also Known as 'Intrepid'* [8 Dec 2000] HC, Auckland, AD36/00 [19].

<sup>25</sup> See eg: *Marine Expeditions Inc v The Ship 'Akademik Shokalskiy'* [1995] 2 NZLR 743; *The Derwent Enterprise* [8 October 1996] HC, Wellington, AD397.

<sup>26</sup> *The Octavie* (1863) Brown & Lush 215, 217; 167 ER 341, 342.

<sup>27</sup> *The Herzogin Marie* (1861) Lush 292, 293; 167 ER 126, 127.

<sup>28</sup> *The Nina* (1867) 5 Moo N section 51; 16 ER 434.

<sup>29</sup> *Magat v The MV Houda Pearl* 1982 (2) SA 37, 42 (N).

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Nothing in this Act shall be construed as limiting the jurisdiction of the Court to refuse to entertain an action for wages by the master or a member of the crew of a ship, not being a New Zealand ship.

This section was based on section 5(2) of the *Administration of Justice Act 1956* (UK), which is now section 24(2)(a) of the *Supreme Court Act 1981* (UK). The modern utility of this statutory provision is dubious. The current New Zealand Admiralty Rules no longer require that the consul be notified of a wages claim by a foreign seafarer.<sup>30</sup> The whole basis of section 7 of the *Admiralty Act 1973* (NZ) has been removed. Yet, the *Admiralty Act 1973* (NZ) having only fourteen sections, section 7 sticks out like the proverbial sore thumb when one is dealing with claims for wages by foreign seamen. The intervener in *The Margaret Z* argued section 7 as a basis for having the crew's action against the ship stayed in favour of the bankruptcy proceedings in USA.<sup>31</sup> Salmon J suggested that the Court's discretion to exercise jurisdiction is 'emphasised' in section 7.<sup>32</sup> However, his Honour provided a complete *forum non conveniens* analysis and reached a conclusion which seems to ignore section 7 altogether:<sup>33</sup>

[I]t would be my view that special considerations relating to an in rem claim by crew against the ship on which they sailed would require that these proceedings be dealt with in the forum of the plaintiffs' choice.

Likewise, Williams J held that 'the usual rule should be that the ship is available to meet the seamen's wages wherever she may be'.<sup>34</sup> Even though Williams J did grant a stay of proceedings in *The Cornelis Verolme*, his Honour did so under a *forum non conveniens* analysis.<sup>35</sup>

It would appear that section 7 has been outmoded by the doctrine of *forum non conveniens*. The section is said to 'emphasise' or 'recognise' the courts' discretion in exercising jurisdiction, but it is a discretion that requires no emphasis. There is no suggestion that the courts have some kind of 'limited discretion' to decline to exercise jurisdiction over a foreign damage lien claim, for example. Furthermore, the genesis of section 7 had long been abandoned. Notification or consent of the foreign consul is no longer a prerequisite to the exercise of jurisdiction, nor is there any recent judicial pronouncement to the effect that wage claims by foreign seafarers are discouraged. Indeed, there is no equivalent to section 7 in the *Canada Shipping Act 2001* (Canada) or the *Admiralty Act 1988* (Cth) (Australia). Section 7(1)(a) of the *Admiralty Jurisdiction Regulation Act 1983* (South Africa) simply imports the *forum non conveniens* concept into the legislation itself.

Section 7 of the *Admiralty Act 1973* (NZ) should be removed in its entirety. It tends to create the misapprehension that seafarers' wages claims in Admiralty are still governed by another set of jurisdictional rules. This was once the case because the ancient practice of obtaining the foreign consul's consent did not fit with the English Courts' perception of itself as the Admiralty Law oracle for unfortunate foreigners and their inferior judicial systems. Neither of these considerations applies in the modern setting and seafarers' wage claims should be governed by the same jurisdictional rules as other claims in Admiralty. As can be seen in *The Margaret Z*<sup>36</sup> and *The Cornelis Verolme*,<sup>37</sup> courts have in recent years tended to gloss over section 7 in preference for a *forum non conveniens* approach.

The doctrine of *forum non conveniens* adequately protects the interests of foreign mariners by recognising the valuable security that the action *in rem* provides. The starting point for seafarers' wages claims is that the ship should be available to meet the plaintiffs' claims. As Sir John Nicholl observed in *The Prince George*, 'in suits for wages the Court is anxious that seamen should not be harassed with litigation'.<sup>38</sup> Therefore, even though it is no longer diplomatic for the courts to insinuate that foreign claimants will not obtain justice in other judicial systems,<sup>39</sup> the potential burdens that mariners may face in having to reinitiate proceedings abroad should be a significant factor in the *forum non conveniens* analysis.<sup>40</sup> It is submitted that the posting of alternative security

<sup>30</sup> Paul Myburgh *International encyclopaedia of laws— Transport law: New Zealand* (Kluwer Law International, The Hague, 2002) 49.

<sup>31</sup> *Fournier v The ship 'Margaret Z'* [1997] 1 NZLR 629.

<sup>32</sup> *Ibid* 639.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Turners & Growers Exporters Ltd v The ship 'Cornelis Verolme'* [1997] 2 NZLR 110, 119.

<sup>35</sup> *Ibid*. The reason was that the ship would supposedly fetch a higher price if sold in Belgium via the Belgian bankruptcy proceedings. Compare *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* (1997) 146 DLR (4th) 136, which involved the same shipowner in insolvency. The Canadian Court in *Holt Cargo* dismissed the suggestion that the ship could be sold for a better price in Belgium as 'speculation' and the Court refused to stay the maritime lien claim.

<sup>36</sup> *Fournier v The ship 'Margaret Z'* [1997] 1 NZLR 629.

<sup>37</sup> *Turners & Growers Exporters Ltd v The ship 'Cornelis Verolme'* [1997] 2 NZLR 110.

<sup>38</sup> *The Prince George* (1837) 3 Hagg 376, 377; 166 ER 445.

<sup>39</sup> See eg *The Lakhta* [1992] 2 Lloyd's Rep 269.

<sup>40</sup> *Fournier v The ship 'Margaret Z'* [1997] 1 NZLR 629, 633 and 638 where Salmon J recognised that while the seafarers' substantial claim will be no worse off under US bankruptcy law, it would nevertheless be inconvenient for them to plead their case again in USA.

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in another forum alone should not be enough for the shipowner to obtain a stay against an action *in rem* — something more should be required.

Another factor warranting a stay may be in the form of a choice of foreign jurisdiction clause in the mariner's contract. Brandon J held in *The Eleftheria* that foreign jurisdiction clauses do not deprive the court of its discretion to grant a stay.<sup>41</sup> The clause has the effect of shifting the burden to the plaintiff to show 'strong cause' as to why a stay should not be granted.<sup>42</sup> In *The Makefjell* Brandon J appeared to have raised the standard of proof to 'exceptional' reasons against a stay, and this was upheld by the English Court of Appeal.<sup>43</sup> Neither *The Eleftheria* nor *The Makefjell* involved claims by seafarers for wages. It is submitted that the 'exceptional' standard in *The Makefjell* is perhaps too onerous for seafarers. The exercise of jurisdiction is the first essential step that the courts have to take in protecting seafarers' wages. It would make it too easy for shipowners to hinder the action *in rem* through the use of foreign jurisdiction clauses if the standard of proof against a stay is raised too high. The 'strong cause' standard as adopted in *The Eleftheria* is more appropriate considering the disparity of power that tends to exist between seafarers and shipowners.

### 3. Historical Development of the Wages Lien

The nature of the wages lien has changed greatly over the years. Therefore, it is necessary to examine its development in order to understand and determine its current scope.

#### 3.1 Freight as the Mother of all Wages

At one time, all those involved in a sea adventure were regarded as co-adventurers, and as such, the crew could only get paid if the ship earned freight. Hence 'freight is the mother of all wages'.<sup>44</sup> This changed as seafarers offered their services strictly as employees and not as part-owners or co-adventurers of the maritime venture. Staniland writes:<sup>45</sup>

The maxim worked some hardship because where the ship perished, or for some other reason no freight was earned, the seamen lost their wages through no fault of their own. By the nineteenth century the maxim began to incur the repugnance of the Admiralty Court.

The concept was abandoned in section 183 of the *Merchant Shipping Act 1854* (UK). Therefore seafarers are now allowed to claim a lien for wages even where the ship has earned no freight.

Yet it must be borne in mind that maritime liens can still attach to the freight earned by a vessel (as distinct from attaching to the vessel itself). For a wages lien to attach to freight, the claimant must also have a lien over the ship on which the freight was earned.<sup>46</sup> Put another way, the lien over the freight must stem from a lien over the ship. Therefore, freight is no longer the mother of all wages, but, as Thomas explains, the wages lien can attach to freight as a sort of 'consequential charge', with the 'first charge' being on the ship herself.<sup>47</sup> This consequential charge may prove to be useful for seafarers where the value of the ship itself is insufficient to meet the claims against her. The lien can also attach to cargo if the freight for the cargo is still due. However, once the freight has been paid and there is no freight due on the cargo, no lien can attach to the cargo anymore.<sup>48</sup>

It was held in *The Cape Sounion* that money recovered by a shipowner from a charterer through an arbitral award constituted 'damages' and was not 'freight' to which the wages lien can attach.<sup>49</sup> That is not to say that the wages lien can never attach to damages recovered by the shipowner. Hobhouse J (as he then was) added:<sup>50</sup>

It may be correct that various substitutes for freight can be treated as the subject-matter of the lien. It may be also that various damages claims which are damages claims properly so called for loss of freight can be included in the lien...

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<sup>41</sup> *Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v The Eleftheria* [1970] P 94, 99.

<sup>42</sup> *Ibid* 100.

<sup>43</sup> *The Makefjell* [1976] 2 Lloyd's Rep 29, 35.

<sup>44</sup> *The Minerva* (1825) 1 Hag 347, 357; 166 ER 123, 127. See also *The Juliana* (1822) 2 Dods 501, 510; 165 ER 1560, 1563.

<sup>45</sup> Hilton Staniland 'Should a Seaman Sue for his Wages as a Favoured Litigant?' (1986) 7 *Industrial Law Journal* 451, 458.

<sup>46</sup> *The Castlegate* [1893] AC 38.

<sup>47</sup> D R Thomas *British Shipping Laws Volume 14: Maritime Liens* (Stevens & Sons, London, 1980) 182.

<sup>48</sup> *Hansen v The Ship 'Guy C Goss'* [1926] NZLR 445, 448.

<sup>49</sup> *The Cape Sounion* [1990] 2 Lloyd's Rep 329, 333.

<sup>50</sup> *Ibid*.

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The problem faced by the claimants in *The Cape Sounion* was that they had earned their wages after the expiration of the charter party which gave rise to the arbitral award.<sup>51</sup> Therefore, it would seem that the crew must demonstrate some kind of relationship between the freight claimed and their services to the ship. This is consistent with *The Beldis*, in which it was held that the lien only attaches to freight which the ship is in the course of earning through the services of the crew.<sup>52</sup>

It may be tempting for seafarers with unsatisfied claims to argue that the wages lien attaches to all freight, regardless of temporal restrictions, and to all financial benefits that the shipowner has derived from the ship. But such an argument would be contrary to the very foundation of the wages lien. The wages lien attaches to the ship for service that is referable to the ship.<sup>53</sup> If the 'freight' was earned by service that is not referable to the ship, or by service rendered by someone other than the seafarer claimants, logic dictates that the sum of money cannot be subject to the wages lien. To hold otherwise would be to blur the line between the liability of the ship *in rem* and the shipowner *in personam*. *The Indian Grace*, which did question the distinction between actions *in rem* and *in personam*, cannot bolster this line of argument because Lord Steyn specifically excluded maritime liens from the ambit of the judgment.<sup>54</sup> This leaves the statutory right of action *in rem* (SROAIR) for wages. But as Thomas observes, the admiralty statutes clearly state that SROAIRs can only be against 'ships' — freight can never be subject to SROAIRs for wages.<sup>55</sup>

### 3.2 Ordinary and Special Contracts

Another noteworthy relic of the wages lien was the early distinction between 'special' contracts and 'ordinary' mariners' contracts. Originally, the admiralty courts were only given jurisdiction over ordinary contracts which were usually simple voyage-based articles. That being the case, the wages lien was naturally restricted to these ordinary contracts.

It was said that ordinary contracts should only contain two things:<sup>56</sup>

One of them to be stipulated on the part of the shipowner — a description of the intended voyage; and the other, on the part of the seaman — engaging for the rate of wages which he was content to accept for his services on that voyage.

Contracts were 'special' if they contained terms that were anything beyond the basic wages for a voyage; these contracts were deemed to be the sole concern of the Common Law Courts. This struggle over jurisdiction ended with the passage of the *Admiralty Courts Act 1861* (UK). Section 10 of that Act extended admiralty jurisdiction to special contracts. However, the wages lien was not automatically extended to special contracts. For many years, the courts maintained that the 1861 Act merely created a statutory right of action *in rem* for wages arising from special contracts, and that the wages lien was still limited to ordinary contracts. In *The Sara* Lord Watson stated:<sup>57</sup>

[S]o far as I am aware, there is no authority for the proposition that there must be a proper maritime lien for every claim which the legislature has made enforceable against the ship.

In the same case, Lord Halsbury LC suggested that, where the Court already has admiralty jurisdiction over a subject-matter, and Parliament extends the jurisdiction within that subject-matter through statute, then: '[in such cases] with regard to the same subject-matter, the legislature must be taken (notwithstanding the absence of any express words) to have intended to create a maritime lien.'<sup>58</sup> That statement was obiter, however, because the claim at issue concerned a master's claim for disbursements under a special contract, which was not a subject-matter over which the admiralty courts enjoyed existing jurisdiction.<sup>59</sup>

In *The British Trade*,<sup>60</sup> it was held that the plaintiff seamen who were employed under special contracts did not have wages liens for their claims of wrongful dismissal. The anomaly in *The British Trade* was that the

<sup>51</sup> Ibid.

<sup>52</sup> *The Beldis* [1936] P 51.

<sup>53</sup> *The Ever Success* [1999] 1 Lloyd's Rep 824, 832.

<sup>54</sup> *The Indian Endurance (No 2); Republic of India v India Steamship Co Ltd* [1998] AC 878, 908.

<sup>55</sup> D R Thomas *British Shipping Laws Volume 14: Maritime Liens* (Stevens & Sons, London, 1980) 182.

<sup>56</sup> *The Minerva* (1825) 1 Hag 347, 353; 166 ER 123, 126.

<sup>57</sup> *The Sara* (1889) LR 14 App Cas 209, 218.

<sup>58</sup> Ibid 215.

<sup>59</sup> Thomas appears to support Lord Halsbury's view. See D R Thomas *British Shipping Laws Volume 14: Maritime Liens* (Stevens & Sons, London, 1980) 31.

<sup>60</sup> *The British Trade* [1924] P 104.

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intervening mortgagee and debenture holder conceded that the crew had liens for their unpaid wages, expenses and disbursements, and the interveners offered to pay off those parts of the claims in return for subrogated priority — even though those aspects of the claim arose from the same 'special' contract.

*The Arosa Star* made the important observation that the courts must keep up to date with the changing conditions of seamen's employment.<sup>61</sup> The Court also recognised that the 'ordinary' mariner's contract of the past had lost its popularity; most seafarers in modern shipping are employed under special contracts which provide for things such as termination periods, paid leave, sick leave and bonuses.<sup>62</sup>

It took over a century for the courts to overturn *The British Trade* and finally to extend the wages lien to special contracts. In *The Halcyon Skies* Brandon J stated:<sup>63</sup>

I would hold that the effect of section 10 of the Admiralty Court Act 1861 was, first, to give the court all the same jurisdiction over wages claims arising out of special contracts as it had previously had over wages claims arising out of ordinary mariners' contracts, including claims in damages for wrongful dismissal; and, secondly, to extend the maritime lien which had been recognised as existing in respect of the latter claims to the former claims.

It should be noted that his Honour was careful to limit the scope of the extension only to wages claims that relate to damages for wrongful dismissal. This tentative step to clear up the position of special contracts was long overdue, but *The Halcyon Skies* did little to settle whether other rights that employees may have under special employment contracts are 'wages' that attract the seamen's lien.

Due to a paucity of cases since the relatively recent extension of the wages lien in *The Halcyon Skies*, there is still considerable confusion surrounding the eligibility of other 'special' contract claims for lien status.<sup>64</sup> Therefore, even though the distinction between the two types of contracts has lost its significance, its legacy still lingers on in the current law.

### 3.3 Wages Earned 'On Board'

Section 10 of the *Admiralty Act 1861* (UK) required that the wages claimed in Admiralty be earned 'on board the ship'. As should be immediately obvious, this restriction was extremely narrow, and even when the phrase was still on the statute books, the Courts had always taken liberties with its interpretation so as to avoid 'artificial distinctions' about wages earned on board or on land.<sup>65</sup> Brandon J noted in *The Halcyon Skies* 'in practice... such limitation was never interpreted strictly and did not prevent [the] court... from exercising jurisdiction, under the head of wages.'<sup>66</sup>

The phrase 'earned on board the ship' is nowhere to be found in any of the modern statutes conferring admiralty jurisdiction to claims for seamen's wages. The phrase may be regarded as an early, but inelegant, attempt by Parliament to confine the wages lien to true 'seamen'.

## 4. The Wages Lien

The wages lien is not defined in any statute. Section 2 of the *Admiralty Act 1973* (NZ) simply states:

Maritime lien, without derogating from the generality of the term, includes a lien in respect of bottomry, respondentia, salvage of property, seamen's wages, and damage.

Section 5(1) provides:

In any case in which there is a maritime lien or other charge on any ship, aircraft, or other property for the amount claimed, the admiralty jurisdiction of the [High Court] may be invoked by an action in rem against that ship, aircraft, or property.

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<sup>61</sup> *The Arosa Star* [1959] 2 Lloyd's Rep 396, 402.

<sup>62</sup> *Ibid* 403.

<sup>63</sup> *The Halcyon Skies* [1977] QB 14, 31.

<sup>64</sup> See Part 4.2 below.

<sup>65</sup> See eg: *The Chieftain* (1863) Brown & Lush 104; *The Arosa Star* [1959] 2 Lloyd's Rep 396; Gaskell, Debattista and Swatton *Chorley & Giles' Shipping Law* (8<sup>th</sup> Ed, Pittman Publishing, London, 1988) 72; D R Thomas *British Shipping Laws Volume 14: Maritime Liens* (Stevens & Sons, London, 1980) 174.

<sup>66</sup> *The Halcyon Skies* [1977] QB 14, 31.



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One must not confuse the wages lien with the SROAIR for wages, even though both can be enforced by an action *in rem*. While the latter is defined in section 4(1)(o) of the *Admiralty Act 1973* (NZ) under the heading 'extent of admiralty jurisdiction', that definition only directly applies to *in rem* actions under section 5(2)(b). As was seen in the above discussion concerning section 10 of the *Admiralty Court Act 1861* (UK) and *The Halcyon Skies*, the courts have been unwilling to accept the notion that statutory terms dealing with the SROAIR for wages automatically extend the ambit of the wages lien. At first glance, this seems to be a fair assumption to make considering the fact that many of the other SROAIRs listed in section 4 of the *Admiralty Act 1973* (NZ) do not have corresponding maritime liens.

The starting point is, where a statute makes a claim enforceable *in rem*, and the claim does not have a corresponding maritime lien, then, in the absence of express language to the contrary, it is assumed that the statute does not create a new maritime lien. This is a fairly uncontroversial position to adopt, given the clear distinction between maritime liens and SROAIRs in the *Admiralty Act 1973* (NZ).<sup>67</sup> However, the argument that an expansion of a SROAIR has no effect whatsoever on the ambit of the corresponding maritime lien is more problematic. As was noted above, Lord Halsbury was of the view that the opposite is true.<sup>68</sup> Cases that have resisted the parallel expansion of maritime liens have tended to be more complicated than a direct 'cross pollination' from a SROAIR to a maritime lien. For example, the plea of the master in *The Sara* was not for the direct application of statutory abolishment of special and ordinary contracts to the seaman's wages lien. Instead, the master sought to have the statutory expansion applied to the seaman's wages lien, and then further extended to his claim for disbursements (which in itself was a statutorily-created maritime lien under the then novel *Admiralty Court Act 1861*(UK)).<sup>69</sup> More recently, Fisher J stated in *The Margaret Z* '[j]urisdiction is not to be confused with lien status', but that was within the context of an argument that the SROAIR for personal injury under section 4(1)(f) can be used as a basis for expanding the maritime lien for damage.<sup>70</sup> The true corresponding SROAIR for the damage lien is in fact section 4(1)(d) 'damage done by a ship'. That is in effect no different from saying that, 'the SROAIR for personal injury has no corresponding maritime lien, therefore section 4(1)(f) did not create a new maritime lien'.

The statutory expansions relating directly to the SROAIR for wages have all been unequivocally assimilated with the wages lien: the abolishment of the limitation to freight; the distinction between special and ordinary contracts; and the requirement that wages be earned on board.<sup>71</sup> As such, there is no room for the argument that Parliament intended to create two separate maritime laws. Despite initial judicial reluctance,<sup>72</sup> the courts have recognised that, just as all maritime liens are 'supported by considerations of public policy,'<sup>73</sup> so too are the statutory expansions to the corresponding SROAIRs.

The drafters of the Admiralty statutes seem to assume that the wages lien is understood by the courts.<sup>74</sup> I have argued that statutory enlargements to Admiralty jurisdiction *in rem* should be applicable to the wages lien, but that takes the matter no further than that it includes any claim by a 'master or member of the crew of a ship for wages' and 'money or property' recoverable under the provisions of the *Maritime Transport Act 1994* (NZ).<sup>75</sup> Thus in order to truly comprehend the wages lien, one must inspect each aspect of the lien carefully with reference to the existing case law.

### 4.1 Who is a 'Seaman'?

Since section 2 of the *Admiralty Act 1973* (NZ) states that the lien is for 'seamen's wages', one must obviously qualify as a seaman to claim the lien. Unfortunately, the term 'seaman' is not defined in the *Admiralty Act 1973* (NZ). The *Maritime Transport Act 1994* (NZ), however, does appear to provide some guidance on the matter. Section 2 defines 'crew' as:

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<sup>67</sup> See sections 5(1) and (2), respectively.

<sup>68</sup> *The Sara* (1889) LR 14 App Cas 209, 215.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Fournier v The ship 'Margaret Z'* [1999] 3 NZLR 111, 119.

<sup>71</sup> See Part 3 above.

<sup>72</sup> See eg *The British Trade* [1924] P 104.

<sup>73</sup> D R Thomas *British Shipping Laws Volume 14: Maritime Liens* (Stevens & Sons, London, 1980) 5.

<sup>74</sup> For similar treatment of the wages lien in other jurisdictions, see: section 15(2)(c) of the *Admiralty Act 1988* (Australia); sections 39 and 41 of the *Merchant Shipping Act 1995* (UK). Section 86 of the *Canada Shipping Act 2001* (Canada) goes further to provide that crew members and masters have liens for 'claims that arise in respect of their employment on the vessel, including in respect of wages and costs of repatriation that are payable to the master or crew member under any law or custom', but even this is not a complete definition of the wages lien.

<sup>75</sup> *Admiralty Act 1973* (NZ), section 4(1)(o).

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[T]he persons employed or engaged in any capacity on board a ship (except a master, a pilot, or a person temporarily employed on the ship while it is in port).

In the same section, the *Maritime Transport Act 1994* (NZ) goes on to provide:

**Seafarer—**

(a) Means any person who—

(i) Is employed or engaged on any ship in any capacity for hire or reward; or

(ii) Works on any ship for gain or reward otherwise than under a contract of employment; but

(b) Does not include a pilot or any person temporarily employed on a ship while it is in port:

Given that the terms 'seaman', 'seafarer' and 'crew' are often used interchangeably, the question is whether the definitions in the *Maritime Transport Act 1994* (NZ) affect a person's 'seaman' status for the purpose of claiming a wages lien. First of all, it seems somewhat odd to apply a definition from the *Maritime Transport Act 1994* (NZ) to the *Admiralty Act 1973* (NZ), especially when the latter predates the former by two decades. However, section 4(1)(o) of the *Admiralty Act 1973* (NZ) was subsequently amended so that it specifically refers to the 'Maritime Act 1994'.<sup>76</sup> Therefore, it can be safely said that the admiralty jurisdiction *in rem* for wages covers the entitlements that the *Maritime Transport Act 1994* (NZ) makes available to 'seafarers' and 'crew' — as they are defined therein. But it is another thing entirely to say that the Admiralty courts are bound by the definitions of 'seafarer' and 'crew' in the *Maritime Transport Act 1994* (NZ) for the purposes of the seaman's lien for wages.

In the preceding discussion I have argued that a statutory alteration to *in rem* jurisdiction of a SROAIR should have the effect of enlarging the scope of the corresponding maritime lien, where there is one. There are two 'heads' of wages claims in section 4(1)(o) of the *Admiralty Act 1973* (NZ): there are 'wages'; and then there are 'money or property' that are 'recoverable as wages' under the *Maritime Transport Act 1994* (NZ). The definitions of 'crew' and 'seafarer' in the *Maritime Transport Act* undoubtedly apply to the second category of money or property recoverable as wages. However, a closer analysis of the claims that are recoverable as wages under the *Maritime Transport Act 1994* (NZ) will reveal that they have very little to do with the wages lien.

A seafarer can claim repatriation expenses from the employer or any agent of the employer under section 22(3) of the *Maritime Transport Act 1994* (NZ). Therefore, the seafarer has the option of pursuing either the employer or the employer's agent *in personam* for repatriation costs. But this provision does not extend the scope of the maritime lien for wages, because repatriation costs had always been awarded as part of the lien against the ship *in rem*.<sup>77</sup>

Section 23(1)(c) of the *Maritime Transport Act 1994* (NZ) allows a seafarer to claim a minimum of two months' wages upon the loss or foundering of the ship on which he or she worked. There can be no corresponding maritime lien for wages in such a case because all maritime liens would be destroyed along with the *res*.<sup>78</sup>

Section 28(1) of the *Maritime Transport Act 1994* (NZ) states that 'a member of the crew of a ship shall not by any agreement forfeit his or her lien on the ship'. This is simply a prohibitive provision. Section 28(1) does not allow a crew member, as defined in the *Maritime Transport Act 1994* (NZ), to *claim* any wages under the *Admiralty Act 1973* (NZ).

There are other problems with directly applying the *Maritime Transport Act 1994* (NZ) definitions to the *Admiralty Act 1973* (NZ) for the purpose of the wages lien. The definitions of 'seafarer' and 'crew' in the *Maritime Transport Act* are very broad in the sense that they cover both employees and contractors on ships. This raises a point of concern. In a classic decision setting out the distinction between employees and contractors, MacKenna J observed in *Ready Mixed Concrete v Minister of Pensions* that contractors are in charge of their own affairs and are more akin to small businessmen, whereas employees are servants who are subject to their master or employer's control.<sup>79</sup> It seems that the independent contractor is quite far removed from the weak and overreached seaman employee that the admiralty courts have deemed worthy of special protection. It is hard to imagine why independent contractors should have wages liens when they are deemed not

<sup>76</sup> The words 'Shipping and Seamen Act 1952' were replaced by 'Maritime Transport Act 1994' via section 203 of the *Maritime Transport Act 1994* (NZ). For information regarding the political developments which led to the *Maritime Transport Act 1994* (NZ) replacing the *Shipping and Seamen Act 1952* (NZ), see Paul Myburgh *International encyclopaedia of laws— Transport law: New Zealand* (Kluwer Law International, The Hague, 2002) 130.

<sup>77</sup> See Part 4.2.4 below.

<sup>78</sup> See Part 4.7 below.

<sup>79</sup> *Ready Mixed Concrete v Minister of Pensions* [1968] 1 All ER 433, 447.

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even to be protected by regular land-based employment law.<sup>80</sup> In *The Northern Challenger*, Williams J held that the actions of an independent contractor were not referable to the ship in the context of the damage lien.<sup>81</sup> By analogy, it is logical to conclude that services provided by an independent contractor are not referable to the ship for the purpose of the wages lien.

It is true that the special protection offered to seamen was extended to masters via statute, but that alone is not sufficient to grant analogous protection to contractors. The master's liens for wages and disbursements had no corresponding maritime liens at common law; they were created through the express language of section 29(1) and (2) of the *Maritime Transport Act 1994* (NZ) (and its predecessors). If Parliament truly intended to broaden the scope of the wages lien to cover contractors, then it could have done so by enacting a provision expressly stating that 'contractors shall have the same rights, liens and remedies as members of crew.' Another possibility would be to insert a new definition of 'seaman' into the *Admiralty Act 1973* (NZ) directly. Parliament did neither. It takes tremendously convoluted reasoning to define 'crew' in the *Maritime Transport Act*, relate the definition to one of two heads of jurisdiction for wages claims *in rem* through a reference to the *Maritime Transport Act* in the *Admiralty Act*, and expand the *in rem* jurisdiction to the wages lien.

Conversely, the *Maritime Transport Act 1994* (NZ) definitions are in a way narrower than the common law definition of 'seaman'. The exclusion of persons 'temporarily employed on a ship while it is in port' is contrary to the existing case law. In *R v The Judge of the City of London Court and the Owners of the SS Michigan*<sup>82</sup> the plaintiff worked on the ship as a mate. Once the ship was docked and the terms of his article had expired, the plaintiff was paid off. However, under the direction of the owner, the plaintiff remained on board the ship and continued to work without signing a new agreement or article. The shipowner became bankrupt and the plaintiff sued the ship *in rem* for a wages lien over the period when the ship stayed in port. Wills J held:<sup>83</sup>

The right to proceed *in rem* for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a sea-going instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea.'

The conclusion from the above discussion is that the *Maritime Transport Act 1994* (NZ) definitions of 'seafarer' and 'crew' are of little assistance to the determination of who qualifies as a 'seaman' for the wages lien. It is submitted that the *Maritime Transport Act* definitions should be restricted to the second head of wages claims under section 4(1)(o) of the *Admiralty Act 1973* (NZ). In the absence of clear legislative intent to the contrary, the definitions in the *Maritime Transport Act 1994* (NZ) should not be applicable to the wages lien. The definition of 'seaman' should be left to the admiralty courts.

Overall, the courts have taken a liberal view of the definition of 'seaman'. The position appears to be that, even when one is employed on a ship in a role that has nothing to do with navigational seafaring whatsoever, one can still qualify as a 'seaman'. This is a logical conclusion, given that in many scenarios a voyage cannot succeed with crewmembers who are solely concerned with the navigation of the ship alone. Schoenbaum comments on the US position:<sup>84</sup>

The term seaman is intended to be broadly construed as including all marine workers whose work on a vessel on navigable waters contributes to the functioning of the vessel, to the accomplishment of its mission, or to its operation or welfare.

English case law reflects a similar approach. For example, medical practitioners who work on ships are no less worthy of a maritime lien than the crew in charge of the running of the vessel.<sup>85</sup> Nor can the crew sail on empty stomachs.<sup>86</sup>

In *The Galaxias*<sup>87</sup> members of a Mexican band employed on the vessel were owed a quarter of a million Canadian dollars for their musical services. The Court held that the musicians were an 'integral part' of the cruise ship's crew and that they were entitled to the wages lien just as the rest of the navigational crew were.<sup>88</sup>

<sup>80</sup> See eg *Cunningham v TNT Express* [1993] 1 ERNZ 695.

<sup>81</sup> *Ultimate Lady Ltd v The ship 'Northern Challenger'* [17th September 2001] HC, Auckland, AD7-SW2000 [171].

<sup>82</sup> (1890) LR 25 QBD 339.

<sup>83</sup> *Ibid* 342-343, emphasis added.

<sup>84</sup> Thomas Schoenbaum *Admiralty and Maritime Law* (4<sup>th</sup> Ed, Thomson West, USA, 2004) 200.

<sup>85</sup> See eg *The Prince George* (1837) 3 Hag Adm 376; 166 ER 445.

<sup>86</sup> See eg *The Jane & Matilda* (1823) 1 Hag Adm 187; 166 ER 67 where a cook was held to be a seaman.

<sup>87</sup> [1989] 1 FC 386.

<sup>88</sup> *Ibid* 415.

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The other creditors then objected on the basis that over a substantial period of the band's employment the ship was docked and ran as a floating hotel (flotel). The Court came to the conclusion that musicians engaged on a flotel do not lose their status as seamen, because if the contrary were true, the absurd conclusion would be that a shipowner can halt the wages liens of *all* crew members from attaching by transforming the ship into a flotel.<sup>89</sup>

One should be mindful of the attempts to unify maritime liens through international conventions: the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1926;<sup>90</sup> the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1967;<sup>91</sup> and the International Convention on Maritime Liens and Mortgages 1993.<sup>92</sup> All three Conventions enlarge the coverage of the wages lien. Article 4(1)(i) of the 1967 Convention allows 'the master, officers and other members of the vessel's complement in respect of their *employment* on the vessel' to claim the wages lien. This is also found in article 4(1)(a) of the 1993 Convention. Therefore the unmistakable message is that all personnel employed on vessels should enjoy the wages lien and that the lien is not restricted to 'seamen' in the narrow sense. The Conventions do, however, restrict the wages lien to employees, which is consistent with the discussion relating to contractors above.

Unfortunately, the Liens and Mortgages Conventions have been met with very little support from the international community. The ratification rates of the Conventions are depressingly low. The 1993 Convention did not have enough ratifications to come into force until a decade after it was created. This is probably due to the disagreement between States in relation to the recognition and priority ranking of non-traditional maritime liens, such as the US lien for necessaries. Therefore, it would not be accurate to regard the low ratification rates of the Conventions as an indication of international reluctance to enlarge the group of employees entitled the wages lien. To the contrary, the wages lien is widely recognised as a traditional maritime lien and the Conventions rank the wages lien first in priority.<sup>93</sup> In light of this international trend, it is submitted that the definition of 'seaman', as it relates to the Common Law wages lien, should be read with the same breadth if possible.

### 4.2 What are 'Wages'?

The definition of 'wages' determines the types of claims covered by the wages lien. As a starting point, the simple recovery of a contractual debt for regular wages is no doubt covered by the wages lien. The categorisation of other forms of money that a seaman can claim from the employer is much less straightforward. The wages lien, as the most sought after relief that the admiralty courts can offer seamen, has been stretched to cover many things that would very much surprise a person not familiar with maritime law. The consistency of the coverage, however, has been somewhat haphazard. Therefore, the different heads of claims under the wages lien will be explored below. The overall theme from the judgments is that courts will take a generous view of what constitutes 'wages'. In *The Nonpareil* Dr Lushington was of the view that seafarers are 'entitled to the benefit of the doubt' where there is uncertainty as to the construction of a mariner's contract.<sup>94</sup> Following Dr Lushington, Worley CJ noted in *The Arosa Star*: 'In doubtful cases, the Admiralty Court seems generally to have adopted a rather benevolent attitude to seamen's claims when these have been contested by a mortgagee.' Likewise, Brandon J remarked: 'In the Admiralty jurisdiction the concept of a wage was always broadly interpreted.'<sup>95</sup> The question that remains is just how closely the admiralty courts have adhered to this sweeping rhetoric about the definition of 'wages' in practice.

#### 4.2.1 Damages for breach of contract

One of the earliest cases allowing a seaman to claim damages for breach of contract is also one of the most colourful ones. The plaintiff seamen in *The Justitia* were engaged in a voyage from London to Trinidad.<sup>96</sup>

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<sup>89</sup> Ibid 416.

<sup>90</sup> International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1926, opened for signature 10<sup>th</sup> April 1926, 2765 UNTS 120 (entered into force on 2<sup>nd</sup> June 1931) ('Maritime Liens Convention 1926').

<sup>91</sup> International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1967, opened for signature 27<sup>th</sup> May 1967, reprinted in 6E BENEDICT document number 15-5 (not yet in force) ('Maritime Liens Convention 1967').

<sup>92</sup> International Convention on Maritime Liens and Mortgages 1993, opened for signature 6<sup>th</sup> May 1993, 33 ILM 353 (entered into force on 5<sup>th</sup> of September 2004) ('Maritime Liens Convention 1993').

<sup>93</sup> See Part 7 below.

<sup>94</sup> *The Nonpareil* (1864) Brown & Lush 355, 357; 167 ER 399, 400.

<sup>95</sup> *The Halcyon Skies* [1977] QB 14, 18.

<sup>96</sup> *The Justitia* (1887) LR 12 PD 145.

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Somewhere along the way armed insurgents were brought on board the vessel and she was transformed into a battle cruiser. There was even a fight with an enemy gunboat at one point. The Judge held:<sup>97</sup>

I am glad to have been informed that there are some old authorities in which the jurisdiction of this Court to give damages to seamen is recognised, for I am of the opinion that if seamen are subjected to wrongs of the kind here proved, they should on principle have a remedy in this Court.

Yet it is unclear what exactly the damages were for in *The Justitia*. There was mention of bad food and 'wrongs' against the plaintiffs, which strikes one as markedly tortious. Since this case predates the advent of the tort of negligence, it is fair to assume that the learned Judge in *The Justitia* meant damages for breach of implied terms in the contract of employment (ie that the seamen should not be unwittingly taken into the midst of an armed conflict). The rationale behind *The Justitia* seems to be that damages, like wages, should be recoverable from the ship *in rem* so long as there is a factual connection between the damages claimed and the seafarer's employment on the ship.

Does this mean that wages are equated with damages in Admiralty? The Canadian case of *Fraser v North Shipping & Transportation* indicates that they are not.<sup>98</sup> *Fraser* is a peculiar case due to the fact that the crew tried to argue that their claim for wages and overtime pay should be characterised as 'damages' and not 'wages'. They did this because they brought their claim in the Quebec Court of Queen's Bench which had no jurisdiction over seamen's claims for 'wages' worth over \$250.<sup>99</sup> The Court rejected the argument and held that the claim was for wages, not damages. This tends to suggest that wages and damages are not one in the same. The better view is that, in Admiralty, damages arising from employment at sea are a subset of wages. Therefore, in *Fraser* the claims for wages and overtime pay fit within the broader class of wages, but they were not part of the subset of damages.

### 4.2.2 Damages for wrongful dismissal

Damages for wrongful dismissal have long been recognised as being recoverable in actions *in rem*.<sup>100</sup> However, Tetley suggests that the question of whether such damages attract the wages lien has been unclear.<sup>101</sup> As the learned author points out, while damages for wrongful dismissal were awarded *in rem* in *The Norsland*, the Court specifically left open the question of whether such a claim would be covered as 'wages' for the purposes of a maritime lien.<sup>102</sup> In *The British Trade*,<sup>103</sup> the Court held that there should be a maritime lien for damages for wrongful dismissal—but only if it arises out of an 'ordinary' contract. As was discussed above, the distinction between ordinary and special contracts no longer exists.<sup>104</sup> The suggestion in *The British Trade* is confusing because it was impossible to have an ordinary contract with a wrongful dismissal clause. The very existence of a wrongful dismissal clause in a contract would presumably have rendered it a special contract.

It is submitted that, despite the cases above, damages for wrongful dismissal are now clearly 'wages' protected by maritime liens. Dillon LJ held in *The Tacoma City*:<sup>105</sup>

The judgment [in *Parry v Cleaver* [1970] AC 1] confirms that the lien for 'wages' covers damage[s] for wrongful dismissal as had been held earlier in *The Blessing*, (1878) 3 PD 35 and had been recognized in *The Ferret*, (1883) 8 App. Cas. 329. The basis of that is that, as shown in *The Blessing*, the damage[s] for wrongful dismissal are founded on the wages and other emoluments which the claimant would have earned on the ship, but for the wrongful act of the shipowner, or of the master on behalf of the owner.

Similar findings can be found in several other recent cases: *Udovenko v Karelrybflot AO*,<sup>106</sup> confirmed in *The Rangiora*;<sup>107</sup> and in *Le Chene*.<sup>108</sup> Therefore seafarers should be able to claim a lien and recover wages for the

<sup>97</sup> Ibid 146.

<sup>98</sup> *Fraser v North Shipping & Transportation* (1968) 69 DLR (2d) 596.

<sup>99</sup> *Canada Shipping Act RSC 1952*, section 214.

<sup>100</sup> *The Elizabeth* (1819) 2 Dods 403; 165 ER 1527.

<sup>101</sup> William Tetley *Maritime Liens and Claims* (2nd Ed, BLAIS, Canada, 1998) 278.

<sup>102</sup> *Karamanlis v The Norsland* [1971] FC 487, 493.

<sup>103</sup> *The British Trade* [1924] P 104.

<sup>104</sup> See Part 3.2 above.

<sup>105</sup> *The Tacoma City* [1991] 1 Lloyd's Rep 330, 347.

<sup>106</sup> *Udovenko v Karelrybflot AO* [24 May 1999] HC, Christchurch, AD 90/98.

<sup>107</sup> *Mobil Oil New Zealand v The ship 'Rangiora' (No 2)* [2000] 1 NZLR 82.

<sup>108</sup> *Canadian Imperial Bank of Commerce v The Owners and All other Interested Parties in the Ships Le Chene No 1, L'Orme No 1, Le Saule No 1 and WM Vacy Ash* [2003] FC 873 [18] (TD).

contract's notice period upon being wrongfully dismissed. Where there is no notice period specified in the contract, a reasonable period should be implied into the contract.<sup>109</sup>

### 4.2.3 Damages for non-payment of wages

There is still some doubt as to whether 'wages' includes damages for the non-payment of wages. While Young J found that a claim for 'wages' covers such damages in *Udovenko v Karelrybflot AO*,<sup>110</sup> the Court of Appeal noted the fact that His Honour did so with reference to section 4(1)(o) of the *Admiralty Act 1973* (NZ) and that: 'He does not appear to have considered a common law claim as recognised by section 5(1).'<sup>111</sup> Nevertheless, in light of the previous argument in favour of applying statutory expansions to the jurisdiction *in rem* to corresponding maritime liens, it would not matter if Young J only referred to section 4(1)(o). In *Udovenko*, there was a dispute regarding the accuracy of the logbook recording the working hours of the seamen. The plaintiffs had arrested the defendant's ships in New Zealand and refused an offer to be repatriated. The Court of Appeal then held that because the employer had offered to pay the plaintiff seamen (in accordance with the hours recorded in the logbook) if they returned to Russia, it was not open to Young J to hold that they were entitled to damages for non-payment of wages.<sup>112</sup> Since the plaintiffs were not entitled to damages in any event, the Court of Appeal found it unnecessary to reach a conclusion as to whether such a claim would have attracted a maritime lien. However, in obiter dicta, the Court of Appeal went on to characterise the claim as one for 'special damages' and that it was unsupported by any of the previous wages liens cases for general damages.<sup>113</sup>

At first glance, the approach of the Court of Appeal in *Udovenko* is perhaps not as benevolent to seafarers as some would believe that the Admiralty Courts ought to be. Yet given the circumstances, it is admittedly a fair and reasonable outcome. To refuse the employer's offer to pay and repatriate them and then to seek damages for non-payment of the whole amount, the seafarers in *Udovenko* were probably pushing the definition of 'non-payment' too far. However, it is submitted that the obiter dicta restricting the scope of 'wages' was not strictly necessary and the Court of Appeal had gone some way to make things difficult for future claimants, who may actually be victims of non-payment.

The claimants in *Udovenko* simply were not entitled to damages because of the facts of the case; the obiter dicta that damages for non-payment do not qualify as wages should be disregarded. There is no policy reason for excluding damages for non-payment; in fact, to do so fundamentally offends the principle of protecting seafarers in Admiralty. The Court of Appeal's distinction between special and general damages is also inconsistent with the existing legal precedent. The most obvious example of special damages being awarded as part of the wages lien is the award of damages for wrongful dismissal.<sup>114</sup> Wrongful dismissal awards are special damages because they are always easily quantifiable in the form of X days/weeks of regular pay in lieu of notice. Finally, as an interesting international comparison, seafarers are entitled to *double* pay if the employer fails to pay them without sufficient cause under US law.<sup>115</sup> This suggests that the non-payment of the crew is an international problem in the shipping industry and maritime law should offer a reliable form of recompense to victims of non-payment through the wages lien.

### 4.2.4 Repatriation costs/viaticum

The recovery of repatriation costs had always been treated as part of the seamen's lien for wages, but there is very little judicial reasoning as to why such costs should be regarded as wages.<sup>116</sup> *The World Star* simply stated that repatriation of the crew is a 'necessary ingredient in the process of selling the ship'.<sup>117</sup> In *MV Kingston v Creditcorp Ltd* Bristowe J espoused the view that repatriation is the 'last instalment of wages actually earned'.<sup>118</sup> Yet the overwhelming impression is that repatriation is extremely difficult to label as 'wages'; it is simply something that the courts have always awarded as a matter of practice. The real reason is simply that repatriating the crew is sensible. It stops the crew's wages from accumulating and diminishing the value of the

<sup>109</sup> Ibid [15].

<sup>110</sup> *Udovenko v Karelrybflot AO* [24 May 1999] HC, Christchurch, AD 90/98.

<sup>111</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 [21].

<sup>112</sup> Ibid [68].

<sup>113</sup> Ibid.

<sup>114</sup> See Part 4.2.2 above.

<sup>115</sup> See Thomas Schoenbaum *Admiralty and Maritime Law* (4<sup>th</sup> Ed, Thomson West, USA, 2004) 205.

<sup>116</sup> See eg *The Westport (No 4)* [1968] 2 Lloyd's Rep 559, 562 where Karminski J awarded repatriation costs to the master without even referring to any authority. See also: *The Fairport* [1965] 2 Lloyd's Rep 183, 186; *Hobbs, Savill & Co Ltd v The 'Vasilina' (Owners) Albaran Bay Corporation* [1972] 1 Lloyd's Rep 51.

<sup>117</sup> *The World Star* [1987] 1 Lloyd's Rep 452, 455.

<sup>118</sup> *The MV Kingston v Creditcorp Ltd* (1993) 14 Industrial LJ 627, 633.

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vessel any further, especially when there are no worthwhile duties for the crew to perform on the arrested ship. It also saves the port state from having to provide 'charity'<sup>119</sup> to the foreign seamen. Indeed, this concern could well have been the basis for the admiralty courts' initial reluctance to entertain wages claims from foreign seafarers.<sup>120</sup> In the beginning, the English admiralty courts created the sacred wages lien for the protection of *English* seamen. Only when this xenophobic attitude abated, did the wages lien become available to foreign seafarers. The inclusion of repatriation expenses as wages served two core purposes. Firstly, it helped maintain the Admiralty Court's reputation as guardian of hapless seafarers — even if they happened to be foreigners. Sir William Scott held in *The Madonna D'Idra*:<sup>121</sup>

The number of Greek vessels which arrive in this country is very small; and the mariners, from the peculiarity of their language and habits, if discharged in England, could not, without extreme difficulty, find an opportunity of returning to their own country.

The second reason can be found in the *The Constanzia*:<sup>122</sup>

If viaticum be not paid, the crew become outcasts and the expenses of their maintenance would fall on this country.

Thus repatriation expenses were not included as wages solely because of the courts' altruistic love for foreign seafarers. There was a practical need to return foreign claimants to their countries of origin to ensure that they would not become a burden on the forum state.

Some foreign seafarers seem to be well aware of their drain on the local economy and the value of the ship: they would refuse repatriation in order use it as a sort of bargaining chip for other aspects of their claims.<sup>123</sup> The courts have generally been unmoved by such attempts. For example, the Court of Appeal observed in *Karelrybflot AO v Udovenko*:<sup>124</sup>

It seems to us that [the crew] elected to remain in New Zealand, where they knew they could not enter into employment, instead of accepting repatriation (at no cost to them), after which they might well have been able to obtain alternative employment...

Following on from this observation, the Court of Appeal declined the claim for damages.<sup>125</sup> The courts can hardly be faulted for such an approach. Each aspect of the wages lien claim must stand on its own merits and foreign claimants should not be allowed to hold the courts ransom by rejecting repatriation. If the courts are to give in to such pressures, it would lead to the unsatisfactory result of a fragmented wages lien where different standards apply to the claims of foreign and local seafarers.<sup>126</sup>

It is clear that repatriating the crew is expedient for both the forum state and the ship's other (lower ranking) creditors. As such, it is common for other creditors to pay to have the crew repatriated. These creditors (usually the bank mortgagees) will then find themselves having to argue that the seamen's wages liens had somehow been transferred to them for the purposes of maintaining priority over the other creditors. The transferability of the wages lien will be considered later.<sup>127</sup>

In a recent decision, Williams J found that a creditor against a defendant ship cannot force the crew to be repatriated solely on the basis that the security will be eroded by the presence of the crew.<sup>128</sup> The repairmen in *The Aleksandr Ksenofontov* wanted the Court to sell the ship even though the shipowner had appeared to defend the ship unconditionally. The shipowner also decided to keep 18 crew members on the ship to maintain her seaworthiness. The repairers argued that the fact that the shipowner had not provided security in place of the ship indicated that the owner was impecunious.<sup>129</sup> The defendant offered evidence that it was still paying the

<sup>119</sup> *Udovenko v Karelrybflot AO* [24 May 1999] HC, Christchurch, AD 90/98, 9.

<sup>120</sup> *The Herzogin Marie* (1861) Lush 292, 293; 167 ER 126, 127.

<sup>121</sup> *The Madonna D'Idra* (1811) 1 Dods 37, 40; 165 ER 1224, 1225.

<sup>122</sup> (1866) 15 WR 183.

<sup>123</sup> See eg: *Doby Navigation Company Ltd v The Ship 'ANL Progress'* [20 February 2002] HC, Auckland (AD1/02) [21]; *The World Star* [1987] 1 Lloyd's Rep 452, 455.

<sup>124</sup> [2000] 2 NZLR 24 [66].

<sup>125</sup> *Ibid* [68].

<sup>126</sup> For a more extreme example of aggressive wage claimants, see *Metaxas v The Galaxias* [1989] 1 FC 386, where the Greek Seamen's Pension Fund threatened that it would prevent the ship from being struck off the Greek ship register (thus interfering with the court's power of sale) unless the Canadian court gave them a favourable judgment.

<sup>127</sup> See Part 4.9 below.

<sup>128</sup> *UAB Grant v The Ship 'Aleksandr Ksenofontov'* [21 Dec 2007] HC, Auckland, CIV-2006-404-4167.

<sup>129</sup> *Ibid* [24].

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crew and that they had cut down the workforce to a quarter of what it was before the repairers arrested the ship. Furthermore, the owner had a genuine reason for keeping crew members on the ship and that was so that the fishing vessel would be ready to fish when the squid season came. In these circumstances, Williams J held:<sup>130</sup>

There is no admissible evidence to the contrary and accordingly it must be taken that the value of the vessel is not being eroded by priority claims for crew wages.

Repatriation is not always a welcome remedy for seafarers. Where the crew is working with the owner's consent, and there is no evidence that the owner is only keeping the crew on board to 'erode' the ship's value for others, other creditors cannot force repatriation upon the crew. This is a beneficial approach for seafarers who want to stay on the ship and earn wages.

*The Aleksandr Ksenofontov* can be contrasted with the Australian case of *The MV Turakina*.<sup>131</sup> The seamen in the latter case refused to leave the ship unless the Admiralty Marshal paid their post-arrest wages and repatriation costs. It is not entirely clear from the judgment why the seamen decided to pursue the sum from the Marshal rather than claim a wages lien against the ship. The Court hinted that a possible reason would be to get priority over other maritime lien claimants since the expenses of the Marshal rank ahead of all maritime liens.<sup>132</sup> While there were no other maritime liens against the *MV Turakina*, the crew had no way of knowing this for certain. Another material benefit in pursuing the claim from the Marshal would be that with the state's backing, the Marshal can never become insolvent, whereas the proceeds of sale from a ship can run dry.<sup>133</sup> The Court did not allow the crew to claim their post-arrest wages as part of the Marshal's expenses in the absence of any agreement between them and the Marshal to work on the vessel.<sup>134</sup> However, the Court had the crew repatriated at the Marshal's expense.<sup>135</sup>

Repatriation expenses, in my view, in the present circumstances, are an appropriate expense of the Marshal in relation to the arrest because it is in the interest of all parties concerned to minimise the payment of daily expenses pending a determination of the dispute and where appropriate the sale of the vessels.

This once again demonstrates the judicial resistance to seafarers' attempts to make their success in claiming wages a condition precedent to their acceptance of repatriation. In *The MV Turakina* the crew were not performing any useful duties on the ship. That being the case, the conclusion is that a foreign crew, performing no worthwhile service to the ship upon arrest, can be repatriated in three ways: of their own volition to claim repatriation expenses as part of their wages lien; at the instigation of another creditor; or as an appropriate expense of the Admiralty Marshal or Registrar. Therefore, repatriation is a remedy that can be forced upon foreign seafarers against their will in certain situations. On the one hand, this seems to be a reasonable outcome because, even though the admiralty courts should protect seamen's wages, they should only do so where they actually *earn* their wages. On the other hand, this line of argument loses much of its potency where some other party arrests the ship, which deprives the crew of their ability to earn wages through no doing of their own. One must recall that the crew members in *The MV Turakina* were not claiming a lien for their post-arrest wages. As will be discussed below, the arrest of the ship, whether by the crew or some other party, does not automatically terminate or frustrate the contracts of employment between the crew and the shipowner.<sup>136</sup> The claimants in *The MV Turakina* could well have recovered their post-arrest wages through the lien because the act of arrest does not end the employment relationship with the shipowner.<sup>137</sup> Instead, they pursued wages from the Marshal where no employment relationship existed. Why, then, did the Court hold that repatriation costs are an appropriate expense for the Marshal? It was not because the Marshal owed the crew any 'wages' of which repatriation costs were a part. The answer relates to the second purpose of awarding repatriation costs — it was simply to ensure that the foreign crew did not become a burden on the forum state.

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<sup>130</sup> Ibid [41]. The Court of Appeal dismissed the shipowner's appeal but reinstated its notice of opposition to the sale of the ship in *OOO DV Ryboprodukt v UAB Garant* (CA) [2008] NZCA 136 [82]. The Court of Appeal judgment will probably not affect the question of whether the crew is deteriorating the ship's value because Williams J had already determined that part of the notice of opposition in the shipowner's favour.

<sup>131</sup> *Patrick Stevedores No 2 Pty Ltd v Ship MV Turakina (No 1)* (1998) 84 FCR 493.

<sup>132</sup> Ibid 499.

<sup>133</sup> There was also an old practice in Admiralty for the Marshal/Registrar to pay the crew's post-arrest wages as part their costs. But this practice had been out of use for over three decades by the time of *The Turakina*. See Part 4.7.2 below.

<sup>134</sup> *Patrick Stevedores No 2 Pty Ltd v Ship MV Turakina (No 1)* (1998) 84 FCR 493, 502.

<sup>135</sup> Ibid 504.

<sup>136</sup> See Part 4.7 below.

<sup>137</sup> See eg *The Fairport (No 2)* [1966] 2 Lloyd's Rep 7.



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In sum, seafarers in foreign ports can almost always claim repatriation under the wages lien.<sup>138</sup> Failing that, the Marshal or Registrar will repatriate them at no cost to them. But this presumes that they manage to arrest the ship in the first place, which is sadly not always possible.<sup>139</sup> This suggests that the wages lien alone cannot resolve the issue of abandonment. The International Transport Workers' Federation commented on the issue of abandoned seafarers thus:<sup>140</sup>

They suffer the indignity of relying on the charity of local people and welfare organisations. At home their families go hungry, and their children's school fees remain unpaid.

Short of enlarging the scope of admiralty jurisdiction (both *in rem* and *in personam*), there really is not much more that the courts can do to aid abandoned seafarers; there must be some degree of dependency on the port state's charity in the end.

The Repatriation of Seafarers Convention 1987 (RSC 1987) was an attempt by the International Labour Organisation (ILO) to address the issue of abandonment. The RSC 1987 imposes obligations on member states to repatriate abandoned seafarers.<sup>141</sup> Article 4 of the RSC 1987 places the first duty of repatriation on the shipowner. Where the shipowner fails to provide viaticum, the duty to repatriate falls on the flag state (country where the ship is registered), the port state (country where the abandoned seafarers are) and the crew-supply state (the crew's country of residence).<sup>142</sup> Though the initial support for the RSC 1987 was weak, the Convention has experienced a recent wave of ratifications.<sup>143</sup> Article 5(b) of the Convention permits states to recover their expenses from the shipowner through the flag state. Therefore, the economic burden of the Convention on a member state should be limited. It is, however, inevitable that a member state would have to bear the costs of repatriation at times (eg where the ship is destroyed and the shipowner is insolvent). Nevertheless, considering the recent international support for the Convention, it is submitted that perhaps New Zealand should consider ratifying the RSC 1987.

### 4.2.5 Severance/redundancy compensation

The UK courts have been unenthusiastic about including severance pay as 'wages'. In *The Tacoma City* Ralph Gibson LJ affirmed the judgment of Sheen J below that severance pay is outside the concept of 'wages' and thus provide no basis for maritime liens.<sup>144</sup>

*The Tacoma City* has been widely criticised. Jackson argues:<sup>145</sup>

However, it is with respect too general to classify 'severance pay' as such as outside a concept which includes damages for unfair dismissal and breach of contract claims. It may form part of the contract payments as a whole and, it is suggested, the critical element is the connection with a particular ship— to exclude this as such risks bringing back the requirement of 'earned on board'.

Staniland points out that even though Ralph Gibson LJ enunciated a 'fair and just' test, he did not apply it to the facts before him.<sup>146</sup> Instead, His Honour held that wages can only include consideration given in return for 'current service' to the ship.<sup>147</sup> Pension and severance pay were categorised as consideration for 'past service' and held to be not recoverable as wages.<sup>148</sup>

Bristowe J in *The MV Kingston*<sup>149</sup> struggled to make sense of *The Tacoma City*. His Honour commented: 'It is not so easy, however, to say convincingly why severance pay is different from repatriation expenses.'<sup>150</sup> Indeed,

<sup>138</sup> See also article 4(1)(a) of the International Convention on Maritime Liens and Mortgages 1993, which specifically includes costs of repatriation as wages.

<sup>139</sup> See generally International Labour Office, *Database on Reported Incidents of Abandonment of Seafarers*, International Labour Organization <<http://www.ilo.org/dyn/seafarers/>> (at 28 May 2008).

<sup>140</sup> ITF Publications *Out of sight, out of mind— A Report by the International Transport Workers' Federation— Seafarers, Fishers and Human Rights* (2006) International Transport Workers' Federation <<http://www.itfglobal.org/infocentre/pubs.cfm/detail/2259>> (at 27 May 2008).

<sup>141</sup> International Labour Organisation Convention Concerning the Repatriation of Seafarers (Revised) 1987 (opened for signature 9 October 1987) 27 ILM 661 (entered into force 3 July 1991) ('Repatriation of Seafarers Convention').

<sup>142</sup> *Ibid* article 5(a).

<sup>143</sup> Australia ratified the RSC 1987 in 1995, Brazil in 1997, France in 2004, Germany in 2006, and Turkey in 2005.

<sup>144</sup> *The Tacoma City* [1991] 1 Lloyd's Rep 330, 345.

<sup>145</sup> DC Jackson *Enforcement of Maritime Claims* (3<sup>rd</sup> Ed, LLP, London, 2000) 39.

<sup>146</sup> Hilton Staniland 'Severance Pay for Seamen' (1992) 13 *Industrial Law Journal* 1107, 1108.

<sup>147</sup> *The Tacoma City* [1991] 1 Lloyd's Rep 330, 345.

<sup>148</sup> *Ibid*.

<sup>149</sup> (1993) 14 *Industrial Law Journal* 627.

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neither repatriation nor severance pay can convincingly be said to be payment in return for 'current service'. Bristowe J suggested that severance payments are different from repatriation expenses because the former are more like liquidated damages for breach of contract.<sup>151</sup> However, as was seen in the preceding discussion, damages for breach of contract have long been recognised as 'wages' for the seamen's lien.<sup>152</sup> In the end it seems that Bristowe J just threw his hands up in submission and concluded:<sup>153</sup>

*Whatever the reason, I am of the view, I repeat, that Sheen J was correct in holding that severance pay does not fall within the maritime lien for wages.*

In contrast with the position in the UK and South Africa, there have been clear judicial pronouncements in Canada and New Zealand that severance/redundancy pay should give rise to wages liens. In *The Rangiora* Fisher J held that 'wages' should include 'any form of payment which had been promised in return for the seafarer's agreement to work on the ship...' and that '[i]n principle, therefore, one would expect redundancy compensation to fall within the lien'.<sup>154</sup> Fisher J dismissed the ratio from *The Tacoma City* as mere obiter dicta.<sup>155</sup>

Snider J reached a similar conclusion in *Le Chene*.<sup>156</sup> Snider J suggested that *The Tacoma City* 'dealt with the nature of a contractual entitlement to severance payments and concluded that such payments were not, on those facts, 'wages'', and that, accordingly, the case should be confined to its own special facts.<sup>157</sup>

It is submitted that there is no reason why severance pay should not be treated as 'wages'. With respect to Ralph Gibson LJ, the 'current service' requirement in *The Tacoma City* is difficult to reconcile with the existing precedent on the definition of 'wages'. Most of the forms of payment that are covered by the wages liens are not for current service. For example, damages for breach of contract are awarded for the past acts/omissions of the employer, not for the current service of the seaman. Repatriation is always awarded after the current service of the seafarer has ended. Fisher J is no doubt correct in holding:<sup>158</sup>

Basic wage claims themselves always relate to past service. Sick leave, wages in lieu of notice, and damages for wrongful dismissal, might well be described as substitutes for 'current' or 'future' service. But temporal distinctions of that sort have never been regarded as significant.

The distinction between current and past service in *The Tacoma City* has no place in the definition of wages. If one is to take *The Tacoma City* at face value, it would have the absurd effect of overturning all the previous case law where courts have included payment for past service as wages. There was no mention of any such drastic intention in the judgment. Since the very foundation of *The Tacoma City* is problematic, it is submitted that the UK courts should reconsider the exclusion of severance pay as wages.

### 4.2.6 Union fees, deductions and contributions

Where there is a contractual term requiring an employer to make deductions from wages or to pay contributions towards a fund set up for the benefit of seamen, the courts have found little difficulty in classifying such payments as 'wages'. Willmer J held in *The Gee-Whiz*:<sup>159</sup>

I accept the contention... that the arrears of insurance contributions are really, in effect, part of the man's wages, and that therefore he has the same maritime lien in respect of them as he has in respect of the rest of his wages.

Likewise, in *The Arosa Kulm* contributions towards a national health insurance fund were held to be part of the seafarers' wages.<sup>160</sup>

It is also possible for the administrators of a fund to sue *in rem* on behalf of the seamen. The Greek Seamen's Pension Fund (NAT) and the Pan Hellenic Seamen's Federation (PNO) were allowed to sue directly for the

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<sup>150</sup> Ibid 633.

<sup>151</sup> Ibid.

<sup>152</sup> See Part 4.2.1 above.

<sup>153</sup> Ibid, emphasis added.

<sup>154</sup> *The Rangiora* [2000] 1 NZLR 82, 85.

<sup>155</sup> Ibid 89.

<sup>156</sup> *Le Chene* [2003] FC 873 (TD).

<sup>157</sup> Ibid [26].

<sup>158</sup> *The Rangiora* [2000] 1 NZLR 82, 89.

<sup>159</sup> *The Gee-Whiz* [1951] 1 Lloyd's Rep 145.

<sup>160</sup> *The Arosa Kulm (No 2)* [1960] 1 Lloyd's Rep 97.

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unpaid contributions as 'wages' in *The Fairport*.<sup>161</sup> In this case, each crew member had signed an agreement allowing the employer to make deductions from their wages to pass on to NAT and PNO. They had also agreed to allow the bodies to institute legal proceedings against the employer either in their own name or together with the crew.<sup>162</sup> Even where the contributions/deductions are made by the master (bypassing the employer completely) and paid straight to the union under quasi-compulsory Greek law, the master and seamen can nevertheless recover the amount from the employer as 'wages'.<sup>163</sup>

The US case of *The MV Resolute*<sup>164</sup> came to a completely different conclusion, which is surprising, considering the country's reputation as an attractive forum for seafarers.<sup>165</sup> Judge Reinhardt reached the startling finding that contributions are not 'wages' because they usually just accumulate in a fund and are not readily convertible to market value.<sup>166</sup> The Judge also found that there is a 'distinction between contributions that merely serve to fund benefits and the benefits themselves.'<sup>167</sup> This reasoning is problematic. As Rix J held in *The Turiddu*:<sup>168</sup>

It does not seem to me to matter what a crew member seeks to do with his wage: he may intend to give it to his wife, his parents, his friends, or lose it in gambling, or spend it as he wishes... . But the claim remains one for his wages, unless the claim has already been paid, or he has put it out of his power to make the claim.

If a seaman wishes to contribute his wages into a fund and let it accumulate with no immediate quantifiable benefit to him, there is really no logical basis to disallow the seaman from claiming such unpaid contributions as part of his wages lien. As Force points out:<sup>169</sup>

Demands for contributions to trust funds providing benefits to employees increasingly serve as a substitute for wage demands in collective bargaining negotiations.

It is necessary to keep in mind that these contributions and benefits are offered during employment negotiations where the overall climate is the seamen demanding for better pay and conversely, employers seeking to keep crew costs low. If the seamen and their unions manage to bargain for such contributions and benefits as part of their pay package, it only makes sense to regard them as part of the seamen's wages. Even though the benefits of such contributions may not be immediately calculable, such funds are undeniably set up for the good of seafarers. Given the rhetoric in admiralty law about protecting seafarers, it would lead to a strange sort of irony if the courts are to deny the recovery of contributions to funds that are designed to protect mariners.

### 4.2.7 Interest and costs

Costs and interest are unquestionably recoverable as part of the seamen's wages lien. Gault J awarded costs to the seamen in *Karelrybflot AO v Udovenko* with their wages lien without discussion of the underlying reason for doing so.<sup>170</sup> While Williams J found that there was a 'surprising dearth of authority' on the matter, His Honour held that interest and costs should be considered part of the seaman's wages and enjoyed the same priority.<sup>171</sup> Similarly, Chilwell J stated in *The Otago*: 'I have no doubt that if interest is awarded it becomes part of the judgment in rem of the holder of the maritime lien.'<sup>172</sup> Once again, it would seem that interest and costs are difficult to conceptualise as part of a seaman's wages for service to the ship. It is simply fair and practical for the courts to award them as 'wages' because the lien is the only legal method through which the courts can award interest and costs to successful claimants and maintain their high priority at the same time.

It is interesting to note that some countries have legislation specifically providing for the recovery of interest and costs in maritime claims.<sup>173</sup> It would be desirable to add a similar provision to the *Admiralty Act 1973* (NZ). Codifying costs and interest would not disturb the existing substantive law relating to maritime liens in any way.

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<sup>161</sup> *The Fairport* [1965] 2 Lloyd's Rep 183.

<sup>162</sup> *Ibid* 187.

<sup>163</sup> See eg: *The Fairport* (No 3) [1966] 2 Lloyd's Rep 253, 254; *The Westport* (No 4) [1968] 2 Lloyd's Rep 559, 562.

<sup>164</sup> *West Winds Inc v The MV Resolute*, 720 F2d 1097 (1983).

<sup>165</sup> D Fitzpatrick and M Anderson *Seafarers' Rights* (Oxford University Press, Oxford, 2005) 536.

<sup>166</sup> *The MV Resolute*, above n 164, 1098.

<sup>167</sup> *Ibid*.

<sup>168</sup> *The Turiddu* [1998] 2 Lloyd's Rep 278, 285.

<sup>169</sup> Force, Yiannopoulos and Davies *Admiralty and Maritime Law Practitioner's Edition* (Beard Books, Washington DC, 2005) 287.

<sup>170</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 [75].

<sup>171</sup> *Northland Port Corporation (NZ) Ltd v The ship 'Big Z'* [21 April 1998] HC, Whangarei, M79/96, 6.

<sup>172</sup> *Wallace v Proceeds of the ship 'Otago'* [1981] 2 NZLR 740, 752.

<sup>173</sup> See eg: the *Admiralty Act 1988* (Cth) (Australia), sections 4(2)(d) and 4(3)(w); the *Admiralty Jurisdiction Regulation Act 1983* (SA), sections 3(11)(d) and 11(10).

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With clear statutory words for the award of interest and costs, the courts will be spared the trouble of engaging in strained reasoning as to why such sums should be called 'wages'.

### 4.3 Foreign Wages Liens/Privileges

We have seen that the courts have allowed unions and bodies like the Greek Seamen's Pension Fund to claim a traditional wages lien on behalf of the crew.<sup>174</sup> However, where such bodies attempt to claim, not an orthodox seamen's wages lien for the contributions, but that they themselves have a privilege under a foreign law that is *analogous* to a wages lien, the courts have been less enthusiastic.

In *The Acrux* the Court refused to recognise an Italian statutory body's claim that they had a privileged action for seamen's insurance contributions under Italian law:<sup>175</sup>

No case has been quoted to show, much as I desire to do it, that I may enlarge the jurisdiction to benefit the foreign claimants when English claimants have no similar benefits conferred upon them.

*The Acrux* has the effect of treating all claimants who come to the forum the same, without regard for what rights they may be entitled to under foreign law. In contrast, the Canadian courts have held that foreign privileges for seamen's wages should be recognised. Rouleau J held in *The Galaxias* that foreign claims of this nature should be characterised with reference to the *lex causae*, which was Greek law.<sup>176</sup> The Greek Seamen's Pension Fund (NAT) produced a Greek lawyer to testify to the Canadian Court that Greek statute gave them a privilege much like a maritime lien.<sup>177</sup> Furthermore, Rouleau J found that the NAT scheme was implemented to protect Greek seafarers working on ships flying flags of convenience, and that such a social goal was entirely consistent with Canadian public policy.<sup>178</sup>

The conflicting viewpoints of *The Galaxias* and *The Acrux* correspond with the two countries' differing attitudes toward foreign privileged claims in general.<sup>179</sup> *The Galaxias* has since been enshrined in Canadian statute. Section 86(2) of the *Canada Shipping Act 2001* (Canada) provides:

The master and each crew member of a vessel on whom a maritime lien against the vessel is conferred by a jurisdiction other than Canada in respect of employment on the vessel has a maritime lien against the vessel.

Australian statute allows for wages claims arising from the operation of law of a foreign country,<sup>180</sup> but these claims are expressly restricted to SROAIRs, so they cannot be claimed as part of the wages lien.<sup>181</sup> This reflects the country's judicial stance in the sense that the Australian courts have generally cited the majority approach of *The Halcyon Isle* approvingly.<sup>182</sup> New Zealand statute has nothing to say on the matter, but it is widely recognised that *The Halcyon Isle*'s pure *lex fori* line of argument is applicable here.<sup>183</sup>

For shipowners, one of the main advantages of using flags of convenience (FOC) is that they require less 'security contributions, pension benefits and other indirect wage elements'.<sup>184</sup> The statutory privileges enacted in large crew-supply states such as Greece were intended to protect seafarers from such practices. It would seem that the Canadian standpoint on the matter of foreign seamen's privileges is much more agreeable with the Admiralty Court's position as protector of seafarers.

<sup>174</sup> *The Fairport* [1965] 2 Lloyd's Rep 183.

<sup>175</sup> *The Acrux* [1965] 1 Lloyd's Rep 565, 572.

<sup>176</sup> *The Galaxias* [1989] 1 FC 386, 398.

<sup>177</sup> *Ibid* 399.

<sup>178</sup> *Ibid* 407.

<sup>179</sup> For the Canadian position, see: *Todd Shipyards Corp v Altama Compania Maritima SA, The Ship 'Ioannis Daskalelis'* [1974] SCR 1248; *Marlex Petroleum Inc v The Har Rai* [1987] 1 SCR 57; *Holt Cargo Systems Inc v ABC Containerline NV* [2001] SCC 90. For the UK position, see the majority decision in *Bankers Trust International Ltd v Todd Shipyards Corporation, The Halcyon Isle* [1981] AC 221.

<sup>180</sup> *Admiralty Act 1988* (Cth) (Aus), section 4(3)(t)(ii).

<sup>181</sup> See: *Admiralty Act 1988* (Cth) (Aus), section 6; *United States Trust Company of New York v Master and Crew of Ship Ionian Mariner* (1997) 77 FCR 563, 583.

<sup>182</sup> See eg: *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [112]; *Empire Shipping Company Inc v Owners of the Ship Shin Kobe Maru* (1991) 32 FCR 78, 86, 103; *Morlines Maritime Agency Ltd v Proceeds of the Skulptor Vucetich* [1998] AMC 1727. But see Davies and Lewins 'Foreign Maritime Liens: Should They be Recognised in Australian Courts?' (2002) 76 ALJ 775.

<sup>183</sup> See eg: *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37; *ABC Shipbrokers v The ship "Offi Gloria"* [1993] 3 NZLR 576 (HC); *Fournier v The ship "Margaret Z"* [1999] 3 NZLR 111.

<sup>184</sup> Maritime Transport Committee of the Organisations for Economic Co-operation and Development 'OECD Study of Flags of Convenience' (1972-1973) 4 Journal of Maritime Law and Commerce 231.

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Fisher J suggested in *The Margaret Z*:<sup>185</sup>

The *Halcyon* principle has the advantage of consistency in the priority treatment of all claims under the same system of law as well as pragmatic advantages in simplicity, speed and cost.

This suggestion seems to ignore the fact that both the Canadian courts and the minority in *The Halcyon Isle* agree that, the issue priority should indeed be determined by the *lex fori*.<sup>186</sup> The majority decision in *The Halcyon Isle* conflates two separate questions: whether the nature of a foreign maritime lien should be recognised; and what priority should be assigned to the foreign claim. It is not difficult at all to characterise the nature of a claim in accordance with the *lex loci*. As was seen in *The Galaxias*, such foreign wages privileges are usually well-defined in the relevant country's statute, and all it takes is for a foreign lawyer to translate the provisions.<sup>187</sup> With modern technology, this can easily be done by video-link testimony. Therefore, the impact on simplicity, efficiency and cost of proceedings would be minimal if New Zealand is to depart from *The Halcyon Isle*. Of course, the *lex fori* would not provide a definitive answer to the priority ranking of a newly recognised foreign maritime lien. But the significance of separating the two questions is that, once the nature of the foreign right is established via the *lex loci*, one can simply rank the foreign right behind other rights of the same nature that are recognised by the *lex fori*.

Realistically, the majority decision of *The Halcyon Isle* is probably too well established in New Zealand for the courts to abandon it all of a sudden. At the very least, it is submitted that the *Admiralty Act 1973* (NZ) should be amended to recognise foreign wages privileges as part of the SROAIR for wages (explicitly excluding the wages lien), as the Australian statute does. As the current legislation stands, it would seem that foreign wages privileges are not enforceable *in rem* at all in New Zealand.

### 4.4 Creation of the Wages Lien — Contract or Operation of Law?

The exact manner in which the wages lien is created is somewhat of a mystery. Writers such as Chorley and Giles<sup>188</sup> and Hodges and Hill<sup>189</sup> say that the wages lien is a 'contractual lien' or that it arises *ex contractu*. This conceptualisation of the wages lien has some important consequences for the determination of priorities, as well as to situations where there are multiple contracts and service on several different ships by one claimant.

The other theory is that the wages lien attaches to the ship independently of any contract. The idea is that the service is to the ship and the ship will be liable *in rem* regardless of whether the seafarer claimants have signed any contracts. In other words, the wages lien arises automatically by operation of law, just like the damage lien.<sup>190</sup> Davies and Dickey believe that all maritime liens 'arise independently of the will of the owner, and also independently of the will of the ship's master.'<sup>191</sup> In a similar vein, Jackson traces the theory back to the removal of the phrase allowing seamen to recover wages 'from the owner of any ship' from the newer admiralty statutes. The phrase last appeared in section 16 of the *Merchant Shipping Act 1844* (UK).<sup>192</sup>

The US courts have stated the matter much more boldly, probably because of the pure personification theory that holds sway in that country. In *The MT Oilbird* it was held that 'the right to wages is founded on service, not on articles'.<sup>193</sup> In *The Edward Peirce* Leibell J found two distinct grounds giving rise to a seaman's claim for wages:<sup>194</sup>

(1) the contractual relationship between the seaman and the operator of the vessel who hires him, whether the operator be the owner or a charterer, and (2) the *personal indenture between the seaman and the vessel*. Regardless of who the operator of the vessel may be, or on what terms, the personal indenture exists between the seaman and the vessel, and that would seem to be a basis for his right to libel the vessel herself...

<sup>185</sup> *Fournier v The Ship 'Margaret Z'* [1999] 3 NZLR 111, 115.

<sup>186</sup> See: *Todd Shipyards Corp v Altema Compania Maritima SA, The ship 'Ioannis Daskalelis'* [1974] SCR 1248 [23]; *Bankers Trust International Ltd v Todd Shipyards Corporation, The Halcyon Isle* [1981] AC 221, 246, 249, per Lords Scarman and Salmon.

<sup>187</sup> *The Galaxias* [1989] 1 FC 386, 399.

<sup>188</sup> Gaskell, Debattista and Swatton *Chorley & Giles' Shipping Law* (1988, Pittman Publishing, London, 8th Ed.) 80.

<sup>189</sup> Hodges and Hill *Principles of Maritime Law* (LLP, London, 2001) 482.

<sup>190</sup> See *The Bold Buccleugh* 13 ER 884.

<sup>191</sup> Martin Davies & Anthony Dickey *QC Shipping Law* (3<sup>rd</sup> Ed, Lawbook Co, NSW, 2004) 95.

<sup>192</sup> DC Jackson *Enforcement of Maritime Claims* (3<sup>rd</sup> Ed, LLP, London, 2000) 467.

<sup>193</sup> Cited in William Tetley, *Maritime Liens and Claims*, (2<sup>nd</sup> Ed, BLAIS, Canada, 1998) 297: *Scoulikarakis v MT Oilbird* 1978 AMC 706, 714 (SDNY 1977).

<sup>194</sup> *The Edward Peirce* 28 F Supp 637, 639 (1939) emphasis added.

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An example of the wages lien arising without the contractual liability of the owner is the case of *The Ever Success*.<sup>195</sup> In *The Ever Success* the company Azov (owner) sold the vessel to another company, Everfast. In anticipation of the transfer of ownership, the crew hired by Azov handed their duties over to a new crew engaged by Everfast. The Everfast crew only signed contracts of employment with Everfast. However, due to Everfast's failure to pay the purchase price, the sale fell through and the transfer never took place. The Everfast crew then sued for wages liens over the vessel, which belonged to Azov at all material times. Azov argued that the new crew worked on the vessel without its consent and that it had no personal liability to pay their wages. Clarke J cited Thomas, who wrote:<sup>196</sup>

Despite the judicial tendency on occasions to associate the wages lien loosely with the contract it is not the case that the maritime lien arises out of the contract. The lien is established by reference solely to the maritime law and its existence is not wholly dependent upon an express or implied contractual term.

Clarke J found that the only requirement is that the service must be 'referable to the ship'.<sup>197</sup> The fact of the matter, however, is that seamen sometimes claim contractual entitlements as part of their wages lien. It is often the case that these entitlements are what have been traditionally called 'special' contract terms which are not easily deduced by solely looking at service that is referable to the ship. It is very difficult to divorce the wages lien from the contract of employment in practice. Courts always instinctively look to the contract when a seaman claims a wages lien, though if there is no contract or if certain terms are missing, the courts have nevertheless found that it is not fatal to the seaman's claim. In *The Jean Joyce* it was noted that even though 'the articles did not specify his wages... he would be entitled to a reasonable amount.'<sup>198</sup> As has already been discussed, *R v The Judge of the City of London and the Owners of the SS Michigan*<sup>199</sup> decided that a deckhand who continues to work after the expiration of his article is nonetheless a 'seaman' and entitled to recover wages in the absence of any contractual foundation.

Jackson proposes that there is a way to make sense of the ambivalent treatment of the contract of employment in relation to the wages lien. The author accepts that the lien arises by operation of law independently of contract:<sup>200</sup>

Nevertheless, the right to the wages is normally dependent on the contract of employment and in the context of the lien, the amount of wages for which it will lie will normally be quantified by the contract if connected with the service on a ship.

In other words, the lien coexists with the contract (where there is one), and the courts will not normally go behind the contract to evaluate the value of the service to the ship. Black CJ noted in the *Ionian Mariner*: 'The seafarer's contract of employment, although not the source of the lien itself, lies at the heart of the matter.'<sup>201</sup>

The notion that the wages lien arises independently of contract has appeared in admiralty cases since the dawn of the wages lien. In *The Minerva*, Lord Stowell commented that beyond the wage and voyage stipulations in the basic ship's articles, all other mutual duties are 'not created by contract, but are obligations created by the general law'.<sup>202</sup> The modern practice to place such mutual obligations in contracts should not change the non-contractual basis of the wages lien.

*The Edwin*, much like *The Ever Success*, involved a wages lien claim by a master who was hired by a person who had fraudulently acquired possession of the ship.<sup>203</sup> Dr Lushington stated: 'independent of contract, the plaintiff acquired a lien upon the ship by the performance of the services.'<sup>204</sup> In a similar vein, Sir John Nicholl was of the view that '[a]n agreement for wages may be made by word of mouth or in writing: the mariner incurs no forfeiture or penalty by not signing articles'.<sup>205</sup>

The cases above indicate that, though not as forthright as the bold personification statements of the US courts, the English admiralty courts have consistently recognised the non-contractual nature of the wages lien. It is

<sup>195</sup> *The Ever Success* [1999] 1 Lloyd's Rep 824.

<sup>196</sup> *Ibid* 829, from D R Thomas *British Shipping Laws Volume 14: Maritime Liens* (Stevens & Sons, London, 1980) 177.

<sup>197</sup> *The Ever Success* [1999] 1 Lloyd's Rep 824, 832.

<sup>198</sup> *The Jean Joyce* [1941] 3 DLR 440, 443.

<sup>199</sup> *R v The Judge of the City of London Court and the Owners of the SS Michigan* (1890) LR 25 QBD 339.

<sup>200</sup> DC Jackson *Enforcement of Maritime Claims* (3<sup>rd</sup> Ed, LLP, London, 2000) 37.

<sup>201</sup> *United States Trust Company of New York v Master and Crew of Ship Ionian Mariner* (1997) 77 FCR 563, 582.

<sup>202</sup> *The Minerva* (1825) 1 Hag 347, 354; 166 ER 123, 126.

<sup>203</sup> *The Edwin* (1864) Brown & Lush 281; 167 ER 365.

<sup>204</sup> *Ibid* (1864) Brown & Lush 281, 285; 167 ER 365, 367.

<sup>205</sup> *The Prince George* (1837) 3 Hagg 376, 378; 166 ER 445.

beyond contention that the wages lien can arise independently of contract. In a more recent decision, Fisher J cited these older authorities approvingly and stated that seamen: 'have a lien for unpaid wages against the vessel whether or not their contract of employment had been entered into with the owners as distinct from other parties'.<sup>206</sup>

The judicial practice of casually relating the terms of the contract to the wages lien is undeniable, and as noted above, some writers choose to call the wages lien a 'contractual lien'. This view is not really a theory at all — it is more of a misconception. There is no legal precedent for the position that the wages lien cannot exist without a legally enforceable contractual debt. Instead, the categorisation of the wages lien as a 'contractual lien' appears to be derived from cases dealing with the issue of priorities between competing maritime liens.<sup>207</sup> This categorisation was used as a way to contrast the wages lien with the damage lien, because the latter was thought to be *ex delicto* and should therefore enjoy priority over the former.<sup>208</sup> Yet, one must keep in mind that this categorisation was simply used for the proposition that the wages lien claimant *usually* has a contract to sue on, and therefore has a more convenient form of alternative redress *in personam* than the damage lien claimant. Thus, *usually*, the damage lien should rank ahead of the wages lien in priority. It would be a mistake to take this line of reasoning as definitive proof that the wages lien is a 'contractual lien', especially in light of all the cases that have affirmed that the wages lien can attach to the ship in the absence of any contract.

A further problem with relying so heavily on the contract is that in modern shipping seamen usually work under many contracts at a time, each giving them differing, sometimes conflicting rights. If the courts try too hard to find the one definitive contract that creates a nexus between the seaman and the ship for the purposes of calculating entitlements under the wages lien, the seaman may find that some of the benefits that he or she has under the other contracts may be completely overlooked. This issue will be addressed next.

### 4.5 Multiple Contracts and Service on Different Ships

The days of a seaman signing a single ship's article for each individual voyage are long gone.<sup>209</sup> Land-based employment law regimes usually stipulate that an employee must be party to only one employment agreement at a time; either an individual employment contract or a collective employment contract.<sup>210</sup> Seafarers, in contrast, may find themselves employed under multiple co-existing contracts at any particular time, including individual employment contracts, collective agreements, International Transport Workers' Federation (ITF) agreements, manning agency agreements, ship's articles, company service agreements, and ship management company contracts. When they attempt to enforce a wages lien against a ship, seafarers will be faced with the unenviable task of convincing the court that their wages should be calculated with reference to certain terms that are mixed and matched from different contracts.

Fisher J was faced with two forms of contracts in *The Rangiora*.<sup>211</sup> The claimants were employed under a collectively bargained company service agreement or 'umbrella contract'. They were then engaged on specific ships through articles naming the ship on which they were to work. The redundancy payment clause at issue was contained in the umbrella contract. Fisher J observed:<sup>212</sup>

Ascertaining the precise relationship between those two types of agreement in a particular case may not be simple, given that the two can evidently coexist between the same parties.

In essence, Fisher J required that there be some sort of contractual link between the 'wages' claimed and the ship against which the lien will attach. His Honour held:<sup>213</sup>

It appears to follow that if the true source of the redundancy compensation is not a contract specific to the arrested ship (which necessarily includes a single-voyage agreement) but a company service agreement, the required link between redundancy and the arrested ship is lacking.

Fisher J also took issue with the fact that the redundancy clause was drafted to say 'surplus to the needs of the employer', as opposed to 'surplus to the needs of the ship'.<sup>214</sup> With respect to his Honour, the latter is not a

<sup>206</sup> *McKay v The Ship 'Jackson Bay'* [17 September 1992] HC, Auckland, AD 608/92, 5.

<sup>207</sup> See eg *The Veritas* [1901] P 304, 313.

<sup>208</sup> See Part 7.2.2 below.

<sup>209</sup> *The Arosa Star* [1959] 2 Lloyd's Rep 396, 403.

<sup>210</sup> See eg the *Employment Relations Act 2000* (NZ), sections 62-65.

<sup>211</sup> *Mobil Oil New Zealand v The ship 'Rangiora' (No 2)* [2000] 1 NZLR 82.

<sup>212</sup> *Ibid* 93.

<sup>213</sup> *Ibid*.

particularly natural phrase. Moreover, the phrase 'surplus to the needs of the employer' was clearly copied verbatim from the land-based employment law jurisprudence on redundancy dismissals and no special subliminal meaning should be attributed to the phrase in the context of employment at sea.<sup>215</sup> Later on in the judgment, Fisher J considered that it could not have been the parties' intention for the redundancy clause to take effect where the seafarer becomes surplus to the needs of Ship A, but the employer arranges for the seafarer to work on its other vessel, Ship B.<sup>216</sup> In such a situation, the seafarer would be happy with the continuity of employment and would probably not be at all aggrieved at having been made redundant to the needs of Ship A. His Honour thought that this supports the view that the right to redundancy 'stemmed from the company service agreement', because it would be the failure of the employer itself that would trigger the redundancy clause.<sup>217</sup> However, the hypothetical scenario that his Honour posited contradicts the aforementioned distinction between 'surplus to the needs of the employer' and 'surplus to the needs of the ship.' It makes no sense to use the phrase 'surplus to the needs of the ship' where there is a company service agreement and the employer owns/charters several vessels. In such a case, the seafarer can only ever be truly 'redundant' if he or she is surplus to the needs of the employer — so long as the employer has a need for the seafarer to work in any capacity, the seafarer cannot be considered 'redundant'. Furthermore, his Honour does not suggest that this distinction is limited to redundancy clauses only. The logical extension of this finding would in effect mean that the wages lien will only attach to the ship if the contractual terms refer to the ship personified. So, for example, the contractual term 'South Pacific Shipping Ltd the employer hereby promises to pay Jill the Sailor 14 dollars an hour for her seafaring services' will not attract a wages lien. Instead, under Fisher J's finding, the term must read 'The ship 'Rangiora' hereby promises to pay Jill the Sailor 14 dollars an hour for her seafaring services'. Fisher J's approach appears to be completely contrary to the admiralty courts' declarations — let alone the general principle of *contra proferentem* — that ambiguities and uncertainties in seafarers' contracts should be read in their favour.

In the Australian case of *The Ionian Mariner*<sup>218</sup> there were even more contracts. Here the Court also refused to allow the seamen's claim for wages in accordance with the terms of the more attractive contract, although for slightly different reasons. There was a collective agreement, an ITF 'special' agreement, a crew management company contract, and individual employment contracts. The crew sued for the more generous terms of the collective agreement as opposed to the crew management contract which only gave them 'basic' wages.<sup>219</sup> The problem was that the seamen did not ratify the collective agreement itself; nor were they members of the union that bargained for the collective agreement. However, their individual agreements did state that they were to be employed under the terms of the collective agreement.

The Court referred to Ryan J's finding at first instance that, because of the Admiralty Court's general benevolence towards seafarers, the Court should recognise the obligations under the collective agreement as an operation of law, 'notwithstanding that each seafarer might not be able to make out a cause of action at law or in equity by way of enforcing that obligation'.<sup>220</sup>

Black CJ rejected this view and overturned Ryan J. Black CJ thought that an obligation that 'is not ... enforceable by the employees and is not derived from, or associated with, any contract of employment or any law relating to the relationship of employer and employee',<sup>221</sup> cannot be claimed as part of a wages lien. This finding is clearly inconsistent with the aforementioned cases of *The Minerva* and *The Edwin*, which held that there does not have to be any contractual relationship whatsoever for the wages lien to arise.

It appears that in both *The Rangiora* and *The Ionian Mariner* the courts became so caught up in the plethora of contracts that they neglected to address the underlying foundation for the creation of the wages lien. As has been seen already, the starting point is that the wages lien arises by operation of law. This is true of the salvage, damage and wages liens.<sup>222</sup> Thomas comments on maritime liens in general.<sup>223</sup>

A maritime lien arises solely by operation of law and independently of agreement *inter partes*. No maritime lien can be created by agreement which is not already recognised as a maritime lien under the maritime law. Moreover,

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<sup>214</sup> Ibid 98.

<sup>215</sup> See eg *Hale and Son Ltd v Wellington, Caretakers IUW* [1991] 1 NZLR 151.

<sup>216</sup> *Mobil Oil New Zealand v The ship 'Rangiora' (No 2)* [2000] 1 NZLR 82, 99-100.

<sup>217</sup> Ibid.

<sup>218</sup> *United States Trust Company of New York v Master and Crew of Ship Ionian Mariner* (1997) 77 FCR 563.

<sup>219</sup> Ibid 567.

<sup>220</sup> Ibid 580.

<sup>221</sup> Ibid 583.

<sup>222</sup> See eg *JP Morgan Chase Bank v Mystras Maritime Corp* [2005] FC 864 [70].

<sup>223</sup> D R Thomas *British Shipping Laws Volume 14: Maritime Liens* (Stevens & Sons, London 1980) 24.



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to the extent that a recognised maritime lien is expressly provided for by agreement, the agreement itself is not the legal source of the maritime lien but only endorses that which exists at law and independently of the agreement.

While it is true that the calculation of the wages would often involve close inspection of the contract of employment, the absence of a contractual right to enforce the wages claimed has never been enough to exclude the wages lien. The difficulty faced by the courts in *The Rangiora* and *The Ionian Mariner* was that there were multiple contracts. The dilemma in *The Rangiora* was that the plaintiffs could not relate the contractual term sued for to any particular ship, because they worked on several different ships. In *The Ionian Mariner* it was the fact that the plaintiffs could not enforce the contractual terms sued for against any ship or person, because they were not privy to the collective agreement. Yet, if the underlying foundation of the wages lien is that it arises by operation of law and is triggered by the fact of service referable to a ship, no amount of contractual confusion or unenforceability can actually stop the lien from attaching to the ship.

If the courts are to take the position of seamen as favoured litigants seriously they should place less emphasis on contractual enforceability when dealing with the wages lien. It is common ground that in the shipping industry, seamen are usually the inferior bargaining party. It is conceded that it is possible to question whether this is still the case with the advent of workers' unions and the ITF. For instance, the shipowner in *The Oriental Victory* argued that the ITF had forced it to sign the collective agreement under duress.<sup>224</sup> Yet, the fact of the matter is that shipowners tend to be much more commercially savvy than their employees. The use of FOC registered ships and crew from developing countries show that shipowners know how to protect their commercial interests.<sup>225</sup> In a recent article, the ITF estimates that around 45 per cent of the world fleet are registered under FOCs.<sup>226</sup> FOC ships have no true nationality and they are almost always beyond the reach of the established seamen's unions from traditional maritime nations.<sup>227</sup> Christodoulou states in relation to crew from developing countries:<sup>228</sup>

[T]hey are less expensive than their colleagues from the developed world. The desire and need for work and the supply of work force in those countries will usually reduce the crew's bargaining power to negotiate and dictate terms and conditions protecting them from the risks they undertake, and their ability to inquire as to the financial status of the shipowner.

Following on from these observations, the admiralty courts should protect whatever terms that seafarers manage to negotiate during bargaining. The wages lien should cover such rights regardless of whether the contracts are enforceable against specific ships or whether they are directly enforceable at all by the seamen. The Canadian courts appear to have adopted this approach.

In *Le Chene*, under similar facts to *The Rangiora*, Snider J gave the plaintiff a wages lien for wrongful dismissal even though the clause was located in an umbrella contract which did not name any specific ship.<sup>229</sup> His Honour held: 'the right to a maritime lien is not contingent on the nature of the seaman's contractual arrangements.'<sup>230</sup> For the purposes of the wages lien claim, the only role played by the contractual term was to show firstly, that the term existed and secondly, for the calculation of the quantum of damages.<sup>231</sup> Then there was, of course, the question of which ship(s) the wages lien was to attach to, because the plaintiff had worked on three different ships over the years. Snider J simply resolved the issue by attaching the entire lien to the vessel that the plaintiff would have worked on but for the wrongful dismissal, which happened to be the *Chene*.<sup>232</sup> This method of determining attachment may be criticized as being somewhat unprincipled in that it disregards the fact that the wages claimed were not earned exclusively on the *Chene*. The wages liens, including the 'wages' for wrongful dismissal, automatically attached to each of the three ships by operation of law as the plaintiff worked on them, which entails that the plaintiff had three different wages liens against three different ships. It is problematic to

<sup>224</sup> *The Oriental Victory* [1978] 1 CF 440, 446. The Court rejected the defence of duress because such negotiations are often entered into under considerable pressure with threats of strikes and lockouts from each side. It would not be proper to set aside such employment contracts on the ground of duress so easily.

<sup>225</sup> See eg *Competitive advantages obtained by some shipowners as a result of non-observance of applicable international rules and standards* OCDE/GD(96)4 (1996) 11-12. The OECD estimated that shipowners could save around 13 to 15 per cent in annual costs in flying FOCs and engaging in substandard practices on their vessels.

<sup>226</sup> International Transport Workers' Federation 'Against flags of convenience and substandard shipping' *Seafarers' Bulletin* Issue 21 (London, England, 12 April 2007) 27.

<sup>227</sup> ITF Publications *Campaign against flags of convenience and substandard shipping: annual report 2004* (2005) International Transport Workers' Federation < <http://www.itfglobal.org/infocentre/pubs.cfm/detail/1324>> (at 28 May 2008).

<sup>228</sup> Dimitrios Ph Christodoulou *The Single Ship Company: The legal consequences from its use and the protection of its creditors* (Ant N Sakkoulas, Athens, 2000) 56.

<sup>229</sup> *Le Chene* [2003] FC 873 (TD).

<sup>230</sup> *Ibid* 30.

<sup>231</sup> *Ibid* 32.

<sup>232</sup> *Ibid* 31.

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combine all three of these liens and attach them all to the *Chene* simply because of the common ownership between the vessels. For instance, if the three ships were subject to claims from different creditors, then the creditors of the *Chene* would have to bear the effect of the plaintiff's wages lien — for services rendered by the plaintiff to other ships, in which the creditors of the *Chene* had no interest whatsoever. Perhaps a better approach would have been to divide the portions of the wages lien with reference to the relative amount of services rendered to each ship. Notwithstanding this criticism of achieving fairness between creditors in a multi-ship wages lien scenario, it must be acknowledged that Snider J never lost sight of the overarching policy in Admiralty to protect seafarers.

*The Oriental Victory*<sup>233</sup> provides useful comparison with *The Ionian Mariner*. In the former case, the shipowner signed individual agreements with the crew. Then under pressure from the ITF, it also signed a collective agreement with the ITF. The shipowner had a dual payment system in place where it would only pay the higher ITF contract wage when the ship was in a port with ITF presence. The plaintiff seamen were not even consulted about joining the ITF at the time, but they sought to sue for the difference in pay between the two contracts nonetheless. Walsh J held that the shipowner had voluntarily entered into the ITF contract, and since the terms of the contract were 'for the benefit of the individual crew members,' the crew could accordingly recover their wages *in personam*.<sup>234</sup> Under this line of reasoning there is no doubt that Walsh J would have awarded the crew a wages lien if it had been an action *in rem* and the employer was either unable or unwilling to pay the higher wage.

Rix J was also faced with a complex web of contractual arrangements in *The Turiddu*.<sup>235</sup> The Cuban seamen were engaged through Guincho (crewing agency) to work on ships owned by Pius (shipowner). Due to the internal regulation of the Cuban foreign exchange system, Cuban citizens were not allowed to hold US currency. Through a string of contracts, the crew were only to get 30 per cent of their pay from Pius directly. The other 70 per cent of the money was contractually owed to Guincho, who would in turn pass the money to Agemarca (a Cuban 'employment company' of sorts). Finally the money would be converted to pesos and given to the crew's families (at a rather dubious exchange rate).<sup>236</sup> The issue was whether the 70 per cent that was owed from Pius to Guincho were recoverable by the seamen as part of their wages liens. Rix J did not let the multiple contracts or the involvement of third parties get in the way of the wages lien.<sup>237</sup> His Honour held that the money was for the crew's service on board the ship and as such, they had a debt against the ship.<sup>238</sup>

*The Turiddu*, *Le Chene* and *The Oriental Victory* decisions fit into the case law surrounding the wages lien seamlessly in that they confirm the long established rule that the wages lien does not depend on any contractual nexus between the seafarer and the ship, or the seafarer and the shipowner. These three cases also indicate that there is no international trend to restrain the wages lien in preference for a more contractually-focused approach in Admiralty. The wages lien is often called a lien *ex contractu* indiscriminately because the contracts of employment are no doubt important for the calculation of wages. The point to remember is that the wages lien arises automatically on service referable to the ship via the operation of law. *The Rangiora* and *The Ionian Mariner* make it too easy for well-advised shipowners to pull the wages lien out of the reach of seamen through the use of multi-layered contractual arrangements. As was noted in *The Arosa Star*, the courts must keep up-to-date with the changing conditions of seamen's employment.<sup>239</sup> Indeed, it is rather strange that the courts should place such heavy emphasis on contractual niceties when dealing with claims from a group of men who have historically been treated as ignorant and *illiterate*.<sup>240</sup> While I am mindful of the famous ratio in *L'Estrange v Graucob*,<sup>241</sup> I hasten to reiterate that the special treatment of seamen by the Admiralty Courts is not merely an unhappy historical artefact from the 19<sup>th</sup> Century. Fisher J himself remarked: 'The desirability of protecting seafarers' emoluments through wages liens is as strong now as it ever was.'<sup>242</sup> In another recent decision Salmon J held: 'There is obviously a disparity of power between them and the owners of the ship. It is appropriate to continue to adopt a benevolent and protective attitude.'<sup>243</sup>

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<sup>233</sup> *The Oriental Victory* [1978] 1 CF 440.

<sup>234</sup> *Ibid* 448.

<sup>235</sup> *The Turiddu* [1998] 2 Lloyd's Rep 278.

<sup>236</sup> *Ibid* 282.

<sup>237</sup> *Ibid* 285.

<sup>238</sup> *Ibid* 286.

<sup>239</sup> *The Arosa Star* [1959] 2 Lloyd's Rep 396, 402.

<sup>240</sup> *The Juliana* (1822) 2 Dods 501, 509; 165 ER 1560, 1562.

<sup>241</sup> [1934] 2 KB 394.

<sup>242</sup> *The Rangiora* [2000] 1 NZLR 82, 87.

<sup>243</sup> *The ANL Progress* [20 Feb 2002] HC, Auckland, AD1/02 [28].

## The Protection of Seafarers' Wages in Admiralty

It is conceded that *The Rangiora* and *The Ionian Mariner* may be correct from the standpoint of pure contract law. But there is a significant gap between Fisher J's benevolent remarks about protecting seafarers and the actual result of the decision. Furthermore, the formalistic requirement of a strict *contractual* nexus represents a steep regression in the established scope of the wages lien. It is difficult to come to terms with the discrepancy between the fraudulent/mistaken possession wages lien cases, and *The Rangiora* and *The Ionian Mariner*. In *The Edwin* and *The Ever Success* it was held that there need not be any enforceable contract for the wages lien to arise. *The Ionian Mariner* requires the crew to show that the wages claimed are derived or associated with some enforceable contract of employment. *The Rangiora* decision goes even further and requires the crew to show a special type of ship-specific contractual term.<sup>244</sup> This retrograde development is not supported in policy, maritime law precedent or international trend and it is submitted that the New Zealand and Australian courts should re-evaluate their approach when the opportunity arises.

### 4.6 When does a Seaman Stop Earning Wages?

Seamen stand in a very different position from ordinary employees in that, if their place of work is closed down or in the case of ships, arrested, they cannot just go home. They will normally have to remain on board the ship even though they cannot necessarily perform their full services to the ship. Therefore the issue of whether the arrest of the ship stops the seamen from earning wages often becomes a point of contention.

#### 4.6.1 Frustration

Sometimes it is argued that upon arrest of the ship by a third party (ie not by the seamen themselves), the contracts of employment between the seamen and the employer are frustrated. The New Zealand Court of Appeal has vehemently rejected this line of argument. The shipowner in *Karelrybflot AO v Udovenko* unsuccessfully argued that, because the ships were forfeited to the Crown for fisheries offences committed by the charterer, the contracts of employment with the crew were frustrated.<sup>245</sup> Blanchard J, for the majority, accepted that the doctrine of frustration was applicable to contracts of employment.<sup>246</sup> However, His Honour held:<sup>247</sup>

[I]n view of the nature of a contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees...

This seems to be a paraphrase of the widely accepted principle that frustration will not be lightly invoked.<sup>248</sup> But as will be addressed below, it appears that the Court of Appeal took the principle even further so as to make the doctrine of frustration almost impossible to invoke in relation to contracts of employment. It is not clear from the judgment whether this reluctance to invoke the doctrine of frustration applies to all employment contracts, 'vulnerable employees', or seafarers only.

The majority suggested that frustration only occurs when the contract becomes impossible or commercially impractical to perform.<sup>249</sup> This is consistent with the classic authority for the doctrine of frustration, *Davis Contractors Ltd v Fareham Urban District Council*,<sup>250</sup> where Lord Radcliffe held:<sup>251</sup>

[F]rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

Thus the Court of Appeal ostensibly applied the doctrine of frustration in its regular form to the facts. But then Blanchard J added that the Court would have held that there was no frustration even had forfeiture come upon

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<sup>244</sup> Interestingly, Fisher J appears to have contradicted his own finding in *McKay v The Ship 'Jackson Bay'* [17 September 1992] HC, Auckland, AD 608/92. See Paul Myburgh *International encyclopaedia of laws— Transport law: New Zealand* (Kluwer Law International, The Hague, 2002) 87.

<sup>245</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24.

<sup>246</sup> *Ibid* [36].

<sup>247</sup> *Ibid* [37].

<sup>248</sup> See eg *J Lauritzen AS v Wijsmuller BV; The Super Servant Two* [1990] 1 Lloyd's Rep 1, 8.

<sup>249</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 [39].

<sup>250</sup> *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696.

<sup>251</sup> *Ibid* 729.

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Karelrybflot 'like a bolt from the blue'!<sup>252</sup> This rather extreme declaration seems to be very generous to seamen employees — almost generous to a fault.

As Gault J argued in his dissent in *Karelrybflot AO v Udovenko*, the shipowner hired the crew to catch and process fish for the charterer.<sup>253</sup> The charterer and the fishing quota were both gone through no fault of the shipowner or the crew. Blanchard J's severe rejection of frustration under these circumstances is perplexing. Surely having to employ a fishing crew on a forfeited vessel with no fishing quota was something radically different from what the shipowner had contracted to do? Gault J also indicated that Young J below was in error in finding that frustration of the contracts would have disentitled the crew from being repatriated, in effect marooning them in New Zealand.<sup>254</sup> His Honour (rightly) argued that the right to repatriation under the wages lien does not depend on an existing contract of employment.<sup>255</sup> Robertson comments:<sup>256</sup>

It is difficult to fault the reasoning of Gault J, save by reference to the general dissatisfaction current with the doctrine of frustration.

Yet, Blanchard J did not voice any such dissatisfaction with the doctrine of frustration, nor did his Honour purport to depart from the established law.

*The Otago* stands for the view that there can be no frustration where the event was brought upon by the shipowner itself.<sup>257</sup> Since the *Otago* was arrested by the mortgagee due to the default of the shipowner on the mortgage, it was held that the crew's employment agreements were not frustrated by the arrest.<sup>258</sup> Thus the general proposition can be made that where the ship is arrested by a third party for the shipowner's wrongdoing or default, there can be no frustration between the shipowner and the crew. Yet, in *Karelrybflot AO v Udovenko* the vessels were forfeited because of the charterer's wrongdoing; the alleged frustrating event was not in any way self-induced by the shipowner. The majority was of the view that the shipowner had actual knowledge that the charterer was being investigated for fisheries offences at the time they engaged the plaintiff seamen. As such, it was inferred that the shipowner must have anticipated the possibility of forfeiture at the time the contracts with the crew were formed.<sup>259</sup> This seems to suggest that there was no frustration because the shipowner took a commercial risk. There are several problems with this. Firstly, there is no authority for the proposition that one who takes a commercial risk cannot later rely on the doctrine of frustration. Secondly, it tends to confuse the issue of self-induced frustration with the issue of taking commercial risks. Of course, there is always the risk that the charterer of a fishing vessel might commit fisheries offences leading to the forfeiture of vessel. But the act of entering into a charter-party alone should not amount to self-inducement on the part of the shipowner. Thirdly, it ignores the very crucial fact that the shipowner had tried its best to keep its struggling maritime venture afloat. At the time the seafarers were engaged, it would have been wholly impractical for the shipowner just to withdraw all personnel and abandon the ships, simply because the charterer was being investigated for fisheries offences. The majority also said that the fixed-term contracts would expire in five weeks in any event and that frustration would make little difference.<sup>260</sup> But, as Gault J observed, the fixed term contracts should not be viewed as a premeditated exit-plan for the forfeiture of the vessels on the part of the shipowners.<sup>261</sup> After all, the vessels were in fact forfeited before the fixed term contracts expired. One would imagine that, since the frustration of the contracts would only cause the crew to lose a few weeks' wages, this would mitigate the very 'drastic effect... on the rights of vulnerable employees' that the majority mentioned.<sup>262</sup>

The majority's reluctance to find frustration, especially with regard to the 'bolt from the blue' comment, only makes sense if we are to assume that there is a different and much higher threshold for the frustration of seamen's employment contracts. The protection of seafarers' wages is a worthy goal, but there should be clear and convincing judicial reasoning for any departure from the established doctrine of frustration. The majority in *Karelrybflot AO v Udovenko* reached its conclusion without enunciating the necessary reasons. The Court

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<sup>252</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 [40].

<sup>253</sup> *Ibid* [95].

<sup>254</sup> *Ibid* [93].

<sup>255</sup> *Ibid*.

<sup>256</sup> Bernard Robertson 'Case Commentary: *Karelrybflot v Udovenko*' [2000] ELB 33, 34. Robertson describes a hypothetical scenario where casinos are outlawed (frustrating event), and the employees of a casino have no contractual right to redundancy payment. Robertson is of the view that it would be unfair to other creditors if a statutory award for redundancy payment is then made to the employees.

<sup>257</sup> *Wallace v Proceeds of the ship 'Otago'* [1981] 2 NZLR 740.

<sup>258</sup> *Ibid* 744.

<sup>259</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 [38].

<sup>260</sup> *Ibid*.

<sup>261</sup> *Ibid* [91].

<sup>262</sup> *Ibid* [37].

significantly read down the doctrine of frustration while proclaiming to be merely applying it. As a result, the decision, and its benevolence to seafarers, is left open to criticism.

### 4.6.2 Repudiation

Sometimes it is argued that the non-payment of wages by the employer is an act of repudiation and that when seamen sue for unpaid wages they accept repudiation, terminating the employment relationship and disentitling them from earning any subsequent wages. *The Carolina* was the original case in which Sir Robert Phillimore held that the issue of writ *in rem* by seamen ended the employment relationship, which meant that they could not earn any wages post-arrest.<sup>263</sup> As Tetley observes, the original rationale for this is that a ship under arrest cannot earn freight, therefore the seamen on the ship could not earn any wages either, pursuant to the old maxim of 'freight is the mother of all wages'.<sup>264</sup>

Cairns J cautiously overturned *The Carolina* in *The Fairport (No 2)*.<sup>265</sup> After *The Carolina*, the practice for almost a century was that the Registrar of the Court would pay the seamen's post-arrest wages as part of their costs. Cairns J noted:<sup>266</sup>

[N]obody has been able to explain to me how any remuneration to which a seaman might become entitled to could properly be regarded as part of his costs of action.

It was held that the issue of writ by seamen for wages does not terminate the contract and that 'wages continue to accrue after proceedings are commenced.'<sup>267</sup> As discussed above, the costs of the seaman are part of his lien for 'wages' anyway, therefore this distinction would prima facie make little difference in practice.<sup>268</sup> However, Cairns J's finding will be of significance in certain scenarios. For example, if the crew arrests the ship for wages, but for whatever reason, the ship is not judicially sold (eg if the owner provides alternative security, or if the crew's action ultimately fails), under *The Carolina*, the seafarers would be left without jobs. *The Fairport (No 2)* has the added benefit of ensuring the seafarers post-arrest job security if the shipowner maintains ownership of the ship.

In *The ANL Progress*<sup>269</sup> the owner took the unusual step of arresting its own ship and claiming that the seamen onboard her were wrongly 'in possession' of her under sections 4(1)(a) and (b) of the *Admiralty Act 1973* (NZ). Pending their *in personam* action against the employer in Australia, the seamen refused to sign the necessary immigration papers to return home and remained on board the ship. The owner wanted the Court to declare that the seamen were entitled to a wages lien over the ship for their unpaid wages and repatriation, and that the lien should be discharged because the owner had posted sufficient security in the Australian Court to cover the claim. The reason the owner wanted to do this was to stop the crew's wages from accumulating (though in light of *The Fairport (No 2)*, the enforcement of the wages lien would not have the effect of terminating employment in any event). Salmon J rejected the owner's application, holding that the lien cannot be discharged for the simple reason that no lien had been claimed by the seamen.<sup>270</sup> Therefore, it is clear that seafarers have the final say on when and where they want to exercise and enforce their wages lien. Shipowners cannot enforce the lien claim for the crew, effectively to remove them from the ship and to stop them from earning wages.

Does this mean that seamen are in essence permitted to stay on board and have a paid holiday at the expense of the ship/owner whenever they arrest the ship on which they work? This issue was raised in the cross-appeal by the master in *The Ionian Mariner*.<sup>271</sup> Black CJ was of the view that '[t]he guiding principle seems to me to have been what was fair and reasonable between owner and crew in all of the circumstances.'<sup>272</sup> Therefore, seamen cannot just entrench themselves on board the ship and demand to be paid for the entire duration of the court

<sup>263</sup> *The Carolina* (1857) 3 Asp Mar Law Cas 141.

<sup>264</sup> William Tetley *Maritime Liens and Claims* (2nd Ed, BLAIS, Canada, 1998) 278.

<sup>265</sup> *The Fairport (No 2)* [1966] 2 Lloyd's Rep 7.

<sup>266</sup> *Ibid* 12.

<sup>267</sup> *Ibid* 14.

<sup>268</sup> See Part 4.2.7 above.

<sup>269</sup> *The ANL Progress* [20 Feb 2002] HC, Auckland, AD1/02.

<sup>270</sup> *Ibid* [26].

<sup>271</sup> *The Ionian Mariner* (1997) 77 FCR 563.

<sup>272</sup> *Ibid* 592.

proceedings. The crew can only stay for a 'reasonable period'.<sup>273</sup> Furthermore, there must be some legitimate reason for the crew to remain on the ship and refuse repatriation.<sup>274</sup>

### 4.7 Loss or Foundering of the Ship

This is perhaps the main weakness of all maritime liens. Staniland compares liens to molluscs that attach to each ship, 'but they do not swim from ship to ship'.<sup>275</sup> If the *res* is completely destroyed, then any liens that may have been attached to it will also be extinguished.<sup>276</sup> *The Beldis* provided that a lien can only be enforced against the property to which it attaches.<sup>277</sup>

There have been statutory attempts to provide relief for seamen in such situations. Section 23(1)(c) of the *Maritime Transport Act 1994* (NZ) makes the employer personally liable for paying the seaman's wages either (i) until the seafarer finds other employment, or (ii) for 2 months after the loss or foundering. So, if the ship is destroyed, it no longer means that the crew will stop earning wages, it just means the end of their wages liens.

### 4.8 Contracting Out of the Lien

The law's patronisation of seafarers is the most obvious in its regulation of the seaman's ability to contract out of his or her wages lien. Most countries prohibit a seafarer by statute from contracting out of his or her right to the wages and salvage liens.<sup>278</sup> Cynics would regard this absolute legislative protection as evidence of the stereotypical seaman's reckless and thoughtless character. The more charitable might argue that no such unflattering inference need be drawn when one considers the fact that the wages lien arises independently from any contract. It is possible to say that the legislative prohibition merely confirms that the wages lien attaches to the ship by operation of law, and no contract can prevent this from occurring. However, the statutory wording does not seem to support this view. The statutes do not say that attempts to contract out of the wages lien shall be ineffective for want of proper legal ground; instead, the statutes say that a seaman shall 'forfeit', 'abandon' or 'be deprived' of the wages lien. Therefore, it appears that in the absence of such statutory prohibition, it would be possible for a seaman to forfeit his wages lien by agreement. Problems may arise if, for example, a New Zealand Court finds that the proper law of a seaman's contract is that of a foreign jurisdiction, that foreign jurisdiction has no equivalent statutory prohibition against seamen contracting out of the wages lien, and the seaman does in fact forfeit his wages lien by contract. In such scenarios, despite the statutory insinuation to the contrary, it is submitted that the wages lien is inherently incapable of being contracted out of because it arises independently of contract.<sup>279</sup> It would harm the maritime lien's reputation as a form of universal jurisdiction if national legislation is the only thing preventing seamen from contracting out of the lien. Such an approach would also be consistent with the rationale of the wages lien, in particular, the view that sometimes seafarers need protection from their own 'ignorance and simplicity' (or perhaps 'desperation' would be more politically correct in the modern context).<sup>280</sup>

The question of whether the statutory prohibition extends to the master is debatable. In *The Wilhelm Tell* Gorell Barnes J thought that since the definition of 'seaman' in the *Merchant Shipping Act 1854* (UK) specifically excluded masters, the statutory prohibition against contracting out of the wages and salvage liens, likewise, excluded masters.<sup>281</sup> Fisher J came to an entirely different conclusion. In *The Jackson Bay* it was held that section 100(1) of the *Shipping and Seamen Act 1952* (NZ), which is now section 29(1) of the *Maritime Transport Act 1994* (NZ), 'equate[s] the position of a master with that of a seaman so far as unpaid wages are concerned'.<sup>282</sup> *The Jackson Bay* has been criticised because section 29(1) does not in fact equate the master with a seaman in absolute terms. Furthermore, the definition of 'seaman' in the *Maritime Transport Act 1994* (NZ), as did *Merchant Shipping Act 1854* (UK), excludes masters.<sup>283</sup> It is accepted that Fisher J probably went too far in suggesting that masters are to be equated with seamen for all matters concerning unpaid wages. But the

<sup>273</sup> Ibid.

<sup>274</sup> See *UAB Grant v The Ship 'Aleksandr Ksenofontov'* [21 Dec 2007] HC, Auckland, CIV-2006-404-4167 [40]. The shipowner's appeal was dismissed in *OOO DV Ryboproduct v UAB Garant* (CA) [2008] NZCA 136, though the point was not explicitly considered by the Court of Appeal.

<sup>275</sup> Hilton Staniland 'Severance Pay for Seamen' (1992) 13 *Industrial Law Journal* 1107, 1112.

<sup>276</sup> The wages lien will be enforceable 'as long as a plank remains': *The Madonna D'Idra* (1811) 1 Dods 37, 39; 165 ER 1224, 1225.

<sup>277</sup> *The Beldis* [1936] P 51.

<sup>278</sup> See eg: *Merchant Shipping Act 1995* (UK), section 39(1); *Maritime Transport Act 1994* (NZ), section 28(1).

<sup>279</sup> See *McKay v The Ship 'Jackson Bay'* [17 September 1992] HC, Auckland, AD 608/92, 5.

<sup>280</sup> *The Minerva* (1825) 1 Hag 347, 358; 166 ER 123, 127.

<sup>281</sup> *The Wilhelm Tell* [1892] P 337, 347.

<sup>282</sup> See *McKay v The Ship 'Jackson Bay'* [17 September 1992] HC, Auckland, AD 608/92, 3.

<sup>283</sup> Paul Myburgh *International encyclopaedia of laws—Transport law: New Zealand* (Kluwer Law International, The Hague, 2002) 88.

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narrower ratio of *The Jackson Bay* can still stand on a more restrictive interpretation of section 29(1). The section provides:

The master of a ship shall, so far as the case permits, have the same *rights*, liens, and remedies for the recovery of his or her wages as a member of the crew of the ship has under this Act or by any law or custom.

One can argue that the section 28(1) prohibition against contracting out of the liens (and, as suggested above, possibly the law or custom that a lien inherently cannot be contracted out of) is a collateral 'right' for seamen to recover their wages. Of course, it would be more natural to cast the section as a prohibition against employers rather than as a 'right' for seamen, for that is the section's practical effect. But the words of section 28(1) suggest that the prohibition is more in the nature of a right for the benefit of seamen. Section 28(1) states that '[a] member of the crew of a ship' shall not forfeit his or her lien. This tends to indicate that the provision is a right that safeguards the seaman's remedy for the recovery of his or her wages. The principle of *generalia specialibus non derogant* should apply to give section 29(1) precedence over the general exclusion of masters from the definition of 'seamen' in section 2. As such, the section 28(1) 'right' should extend to masters by virtue of section 29(1) and there is good ground to depart from *The Wilhelm Tell*.

### 4.9 Transferability of the Lien

'Transferability' can be used loosely to refer to two different situations. The first type of transfer is a contractual agreement by a seaman to assign his wages lien claim to a person in return for whatever contractual consideration that is stipulated. The second type of transfer is subrogation which occurs when a third party pays off the seaman's wages in full and that third party purports to be the holder of the lien. Tetley characterises subrogation as a type of fictional or notional assignment.<sup>284</sup> Both contractual assignments and subrogation of wages liens have been widely rejected in Commonwealth jurisdictions.

*The MT Argun*<sup>285</sup> is a recent South African case highlighting the plight of modern seamen and the obstacles they may be faced with when trying to recover their wages. In *The MT Argun*, the seafarers' own lawyers had threatened them with criminal charges because of their inability to pay their legal fees.<sup>286</sup> The seamen, who had difficulties communicating with their legal representatives due to language barriers, signed an agreement with their lawyers which purported to cede their wages liens in return for legal advice and representation.<sup>287</sup> The defendant seized the opportunity and made the bizarre submission that since the wages lien is non-assignable, and the seamen tried to assign their liens to their lawyers, the *in rem* action was somehow destroyed. Foxcroft J made it clear that the crew members did not in fact intend to assign their liens, but confirmed that wages liens cannot be assigned in any event.<sup>288</sup> His Honour observed that, unlike a subrogation scenario, in a contractual assignment situation the seaman does not even have to be completely paid off.<sup>289</sup> This means that in essence, an attempt to assign a wages lien by contract without full consideration for all of the seaman's wages is tantamount to the seaman contracting out of or being deprived of the wages lien — at least partially. As was discussed above, clauses depriving a seaman of his wages lien are specifically prohibited by statute. Therefore, assignment of the wages lien in exchange for anything less than the complete payment of all wages owed to the seaman will be null and void.

Even when the crew is completely paid off the courts have staunchly maintained that the wages lien cannot be assigned or subrogated without prior leave from the court. The charterer who paid off the crew in *The SS Aragon* was held to have no lien, even though the crew had signed a document accepting the payment in return for appointment of the charterer to 'prosecute my claim against the Steamship *Aragon* for seamen's wages owing to me'.<sup>290</sup> Similarly, Hewson J held in *The Leoborg (No 2)*.<sup>291</sup>

<sup>284</sup> William Tetley 'Assignment and Transfer of Maritime Liens: Is There Subrogation of the Privilege?' (1984) 15 *Journal of Maritime Law and Commerce* 393, 402.

<sup>285</sup> *Master & Crew of The MT Argun v The MT Argun* [12 September 2002] Cape Provincial Division, AC 4/02; (2003) 24 *Industrial Law Journal* 1104.

<sup>286</sup> Therefore the common use of contingency legal fees in the USA may be a feature that makes it an attractive forum for seamen to pursue their wage claims.

<sup>287</sup> *The MT Argun*, above n 285, 1112.

<sup>288</sup> *Ibid* 1113.

<sup>289</sup> *Ibid* 1117.

<sup>290</sup> *The SS Aragon* [1943] 3 DLR 178, 180.

<sup>291</sup> *The Leoborg (No 2)* [1964] 1 Lloyd's Rep 380, 383.

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In my view the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and has his lien, whether it be regarded as applied to wages only.

The self-proclaimed assignees in *The Leoborg (No 2)* had paid the seamen's wages voluntarily and the wages liens were extinguished when the seamen's debts were satisfied.<sup>292</sup> Subrogation and assignment of the wages lien have only been allowed where a party is directly ordered or permitted by the Court to pay the seamen.<sup>293</sup>

The judicial motivation for this strict stance over the transferability of liens is unclear. On the face of it, there is no reason to believe that the courts are protecting seafarers if the party arguing for the assignment or subrogation of the lien has paid off all of the crew's wages. Nevertheless, this judicial reluctance to allow for free transferability of the wages lien does offer an indirect form of protection to seamen. This is because, as we have seen above, the courts will generally not force repatriation upon seamen when a ship is arrested and there are genuine reasons for them to stay on board and keep earning wages. In contrast, third parties who pay off the crew's wages are usually lower ranking creditors whose only interest is to shoo the seafarers off the ship to stop them from 'eroding' its value. Such lower ranking creditors are trying to protect their own commercial interests, and sometimes this may be at the expense of the seafarers. In disallowing the free transferability of wages liens, the courts effectively dispel any motivation for such lower ranking creditors to have the crew paid off and sent home. The prior consent of the court essentially acts as a balance between the commercial interests of other creditors and the protection of seafarers' wages.

Tetley observes that the US courts have been much more liberal with its treatment of the assignments and advances<sup>294</sup> of seamen's wages liens.<sup>295</sup> He goes on to suggest that perhaps the UK and Canada, too, should consider allowing lien assignments.<sup>296</sup> Jackson also supports this view:<sup>297</sup>

It is suggested that, insofar as the claim to which the lien is attached is assignable, policy is in favour of assignability of the lien on the basis that it is for the holder of the lien to decide how best to take advantage of it.

With respect to the learned authors, the US approach may not actually be as commercially expedient as it may appear at first glance. As Tetley notes, the person who pays the seamen is not automatically assigned the wages lien: for an advancement the payer must show that the debtor actually used the money for the purpose it was intended for (ie paying off the seafarers' wages);<sup>298</sup> and for an assignment the payer must show that it is 'genuinely independent' from the debtor (so as to ensure that debtor is not just paying the seamen under a different guise and securing a lien in the process).<sup>299</sup> These requirements will not always be easy for the payer to prove. With the UK approach, the payer who obtains the court's prior consent to pay off the crew is in effect guaranteed a transfer of the wages lien. There is no suggestion that it is particularly difficult to obtain the court's consent for an assignment/subrogation.<sup>300</sup> As was already noted above, the UK approach offers better protection to seamen in the sense that it provides a judicial check on the wage payer's goal to protect its commercial interest in the value of the ship. Thus it is submitted that the prior consent of the court is a better safeguard for the seamen's interests than allowing for free transferability of the wages lien.

## 5. The Statutory Right of Action *In Rem* (SROAIR)

Except for bottomry and *respondentia* (which are both now obsolete), all the recognised maritime liens have corresponding SROAIRs. The SROAIR for wages can be found in section 4(1)(o) of the *Admiralty Jurisdiction Act 1973* (NZ). I have argued that the SROAIR provisions do not create fresh maritime liens where none existed before. The statutory alterations to admiralty jurisdiction *in rem* should affect the meaning of existing maritime

<sup>292</sup> See also *The Sparti* [2000] 2 Lloyd's LR 618, 620 where Waung J described the wages lien as a 'personal right'.

<sup>293</sup> See eg: *The World Star* [1987] 1 Lloyd's Rep 452; *The Berostar* [1970] 2 Lloyd's Rep 403; *Hobbs, Savill & Co Ltd v The Vasilias (Owners) Albaran Bay Corporation* [1972] 1 Lloyd's Rep 51.

<sup>294</sup> An 'advance' in USA law is where a third party pays the debtor, who in turn pays the creditor.

<sup>295</sup> William Tetley 'Assignment and Transfer of Maritime Liens: Is There Subrogation of the Privilege?' (1984) 15 *Journal of Maritime Law and Commerce* 393, 410.

<sup>296</sup> *Ibid* 417.

<sup>297</sup> DC Jackson *Enforcement of Maritime Claims* (3<sup>rd</sup> Ed, LLP, London, 2000) 470.

<sup>298</sup> William Tetley 'Assignment and Transfer of Maritime Liens: Is There Subrogation of the Privilege?' (1984) 15 *Journal of Maritime Law and Commerce* 393, 413.

<sup>299</sup> *Ibid* 415.

<sup>300</sup> The contractual assignment may be the preferable method because the assignment is more in the nature of a bilateral agreement between the wage payer and the seafarer, whereas subrogation is based on the unilateral action of the wage payer. Therefore, the court is more likely to grant permission to transfer the lien in the case of a contractual assignment. The wage payer can simply draft the contract of assignment so as to make the court's approval a conditional precedent to the parties' contractual obligations to pay the wages/assign the lien.



liens. I have also contended that section 4(1)(o) does not redefine the wages lien with the provisions of the *Maritime Transport Act 1994* (NZ).<sup>301</sup> The recurring theme from the discussion about the wages lien is that the courts have interpreted it quite widely. Therefore, it may not be immediately clear what section 4(1)(o) and the SROAIR for wages are directed at if the wages lien is usually the legal weapon of choice for seafarers. Yet, there are situations where the SROAIR may prove to be useful to seafarers. For example, the seamen's wages liens sink with the ship if she founders or is otherwise inaccessible. Thus wages due from the employer under section 23(1)(c) of the *Maritime Transport Act 1994* (NZ) can never be recovered *in rem* via the wages lien; they can only be enforced *in rem* against a sister or surrogate ship via the SROAIR for wages.

### 5.1 Application of the SROAIR for Wages

The SROAIR, unlike the maritime lien, does not attach to a ship automatically as an inchoate right upon the occurrence of the event giving rise to the cause of action. Instead it is a procedural right — a chose of action — against a *res* which only comes into being when the claimant commences an action against it.<sup>302</sup> The *res* in a SROAIR claim for wages need not necessarily be the ship on which the seaman earned his or her wages. In short, the first requirement for a SROAIR is that at the time the cause of action arose, the person who would be liable on one of the claims listed in section 4 of the *Admiralty Act 1973* (NZ), either chartered, owned, possessed, managed or controlled the ship. Section 5 of the *Admiralty Act 1973* (NZ) states that the SROAIR can be brought either against 'that ship' or 'any other ship', provided the second requirement is satisfied: when the action is brought, the person who would be personally liable must be the beneficial owner or demise charterer of the ship against which the action is brought.

As far as actions *in rem* against the ship on which the seafarer earned his or her wages are concerned, the coverage of the wages lien and the SROAIR for wages should be almost identical. This is because of the statutory 'canon of construction' that changes to the SROAIR will directly affect the scope of the corresponding maritime lien, unless there are explicit words to the contrary.<sup>303</sup> There really is no conceivable reason why a seaman would want to pursue a SROAIR for wages against 'that ship' under section 5(2)(b)(i) because he would inevitably enjoy a wages lien, which has higher priority and is generally easier to prove than the SROAIR.<sup>304</sup> The main aspect in which the SROAIR has a broader coverage than the wages lien is its application to 'any other ship'. Therefore this discussion will focus on the surrogate ship jurisdiction under section 5(2)(b)(ii).

### 5.2 'Sham' Transactions and the *In Personam* Link

The *in personam* link requirement for SROAIRs can be thwarted by shipowners in two ways: by transferring ownership of the surrogate ship to another legal entity after the liability has arisen; or by utilising the one-ship company structure from the outset. These two methods are really one in the same in that they are both techniques to sever the tie between the legal person who would be liable and the potential surrogate ship. However, as Christodoulou notes, the *timing* of incorporation is often a crucial element for the determination of whether the one-ship company or the transfer is considered to be a genuine business arrangement or a sham.<sup>305</sup> If it is a sham, the courts will most likely pierce the corporate veil and find that the person who would be liable is also the beneficial owner of the ship, thus providing the necessary *in personam* link for a SROAIR claim.

Lord Donaldson found that there are legitimate reasons for running a fleet as a group of one-ship companies in *The Evpo Agnic*.<sup>306</sup> If the structure is adopted from the outset, then it is difficult to cast the whole enterprise as a 'sham'. The separate legal personality of each corporation and the limited personal liability (or more accurately, the zero personal liability of a company's shareholders as it relates to the company's creditors) of its shareholders are the most important protections offered by incorporation.<sup>307</sup> It would be doing too much violence to this cornerstone of company law to treat all single-ship company structures as 'shams'.

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<sup>301</sup> See Part 4.1 above.

<sup>302</sup> See *The Monica S* [1968] P 741, 768. An action is 'commenced' upon the issue of the writ *in rem*, or, in modern parlance, the notice of proceeding *in rem*.

<sup>303</sup> D R Thomas *British Shipping Laws Volume 14: Maritime Liens* (Stevens & Sons, London, 1980) 31.

<sup>304</sup> The only exception to this is in the case of forfeiture and release of the vessel, which would probably extinguish maritime liens but not SROAIRs. See Part 6 below.

<sup>305</sup> Dimitrios Ph Christodoulou *The Single Ship Company: The legal consequences from its use and the protection of its creditors* (Ant N Sakkoulas, Athens, 2000) 97.

<sup>306</sup> *The Evpo Agnic* [1988] 1 WLR 1090.

<sup>307</sup> See eg: *Salomon v Salomon* [1897] AC 22, 47-54; the *Companies Act 1993* (NZ), sections 15 and 97(1).

## The Protection of Seafarers' Wages in Admiralty

In contrast, where the shipowner adopts the single-ship company structure and transfers the ship(s) *after* the liability has arisen, the courts have been more ready to label such transfers as shams.<sup>308</sup> Also, if the transfer is at an undervalue, the incentive to pierce the corporate veil will be stronger.<sup>309</sup>

There, however, should be a word of caution about the consistency of this area of law. Under the outline above, one would expect that the sale in *Kareltrust v Wallace & Cooper Engineering* to be a sham.<sup>310</sup> The plaintiffs in *Kareltrust v Wallace & Cooper Engineering* were repairers who sued for SROAIRs. The ships in question were owned by Karelrybflot, but, due to fisheries offences committed by the charterer, the ships were seized and forfeited to the Crown. The ships were then released, not to Karelrybflot, but to Kareltrust who paid the redemption fee. Young J in the High Court was of the view that the transfer was an attempt to defraud creditors under section 60 of the *Property Law Act 1952* (NZ) (*PLA 1952*), which made Kareltrust the beneficial owner of the ships when the plaintiffs brought the action, thus completing the *in personam* link.<sup>311</sup> The Court of Appeal overturned Young J. Blanchard J, delivering the Court of Appeal's judgment, concluded:<sup>312</sup>

For these reasons we are satisfied that even if even if, as Young J found, the agreement between Karelrybflot and Kareltrust was entered into to defraud creditors, on which we do not find it necessary to express a view, for the purposes of section 5(2)(b) it has not been established that at the time of the commencement of the proceedings Karelrybflot was the beneficial owner of the vessels.

This conclusion is somewhat puzzling. Surely, it *was* necessary for the Court to express a view on whether the agreement between Karelrybflot and Kareltrust was entered into to defraud creditors, if the only reason that the plaintiffs could not establish Karelrybflot's beneficial ownership when the proceedings were commenced, was because of this agreement? After all, 'sham' and section 60 of the *PLA 1952* would not even have been at issue if the plaintiffs could establish beneficial ownership to start with. In any event, the Court of Appeal's reasons were that a section 60 *PLA 1952* application only makes a transfer voidable, meaning that the transfer is effective up until the time when the application is made, or when the creditor makes an unambiguous act amounting to a manifestation of avoidance, whichever is earlier.<sup>313</sup> The problem for the claimants was that they had no knowledge of the transfer until after they had commenced the action, which meant that it was impossible for them to point to some earlier act amounting to avoidance.<sup>314</sup> Nor had they pleaded or made an application under section 60 in either the High Court or for the appeal.<sup>315</sup> A criticism of this decision would be that it rewards shipowners for concealing underhanded transfers from creditors. In addition, as Myburgh points out, this case also highlighted the inadequacies of the forfeiture and release provisions in the *Fisheries Act 1983* (NZ).<sup>316</sup> Statutory amendments have since been introduced to address this problem with the fisheries legislation.<sup>317</sup> But beyond the fisheries forfeiture and release scenario, this change to the *Fisheries Act 1996* (NZ) does little to assist SROAIR claimants where a dubious transfer of ownership is discovered after the commencement of the action *in rem*.

In light of the *Kareltrust* decision, SROAIR claimants would probably be better off ignoring section 60 of the *PLA 1952*, and arguing the 'sham' and 'facade' line of authority found in *The Saudi Prince* and *The Tjaskemolen* instead.<sup>318</sup> The problem is that Blanchard J appeared to have had these cases in mind when his Honour decided *Kareltrust*.<sup>319</sup> However, it seems that under the new *Property Law Act 2007* (NZ) (*PLA 2007*), it is now possible to depart from the *Kareltrust* decision regarding alienation of property with intent to defraud creditors. Section 347(1)(a) of the *PLA 2007* allows a creditor who claims to be prejudiced by a disposition of property to apply for an order under section 348, which empowers the court to set aside certain dispositions of property. Of particular interest is section 350(2)(b) which provides:

350(2) A direction under this subsection must specify that the property vests in... : ...

<sup>308</sup> See eg *The Saudi Prince* [1982] 2 Lloyd's LR 255.

<sup>309</sup> See *The Tjaskemolen* [1997] 2 Lloyd's LR 465, 474.

<sup>310</sup> [2000] 1 NZLR 401

<sup>311</sup> *Ibid* [67].

<sup>312</sup> *Ibid* [78].

<sup>313</sup> *Ibid* [74].

<sup>314</sup> *Ibid* [67].

<sup>315</sup> *Ibid* [71]. Young J appeared to have raised the point on his Honour's own initiative.

<sup>316</sup> Paul Myburgh 'Shipping Law' [2001] NZLR 105, 117.

<sup>317</sup> Paul Myburgh 'Shipping Law' [2003] NZLR 287, 290. See also section 256 of the *Fisheries Act 1996* (NZ).

<sup>318</sup> *The Saudi Prince* [1982] 2 Lloyd's LR 255; *The Tjaskemolen* [1997] 2 Lloyd's LR 465.

<sup>319</sup> *Kareltrust v Wallace and Cooper Engineering* [2000] 1 NZLR 401 [74], where Blanchard J specifically refers to *The Tjaskemolen*.

(b) the debtor (for the purpose only of enabling the carrying out of any execution or similar process against the debtor or the administration of a future bankruptcy or liquidation of the debtor or arrangement with the debtor's creditors)

Although the statute does not specifically state 'for the purpose only of enforcing an admiralty action *in rem*', it is nevertheless wide enough to encompass such a purpose because of the words 'or similar process'. The word 'voidable' has been left out of sections 348-350 of the *PLA 2007*. It is therefore submitted that the restrictive time requirements in *Kareltrust* can no longer apply. If a SROAIR claimant has been genuinely prejudiced by a disposition of property, by virtue of section 350(2)(b), that disposition should be set aside and ownership of the vessel should be vested back to the original owner for the purpose of enforcing the SROAIR against the ship. There is no need to demonstrate any prior application or manifestation of avoidance before the issuance of the writ *in rem*. This welcome legislative development makes it significantly harder for shipowners to shield their ships from SROAIRs through post-liability arrangements.

### 5.3 The Effect of *The Indian Grace*

In *The Indian Grace*,<sup>320</sup> the House of Lords fundamentally challenged the long established principle that parallel actions *in rem* and *in personam* against the ship and the shipowner are not barred by the concept of *res judicata*.<sup>321</sup> Lord Steyn, who delivered the only speech in the matter, limited the scope of enquiry to SROAIRs only; his Lordship specifically excluded maritime liens from consideration.<sup>322</sup> Lord Steyn found that the personification principle has been outmoded by the procedural theory.<sup>323</sup> As such, the fiction that a ship can be a defendant in legal proceedings ought to be discarded.<sup>324</sup> The effect of this finding is that once an SROAIR is commenced, the shipowner automatically becomes a defendant to the *in rem* proceedings.<sup>325</sup> Thus no separate *in personam* claim can be brought against the owner as it would be equivalent to suing the same defendant twice for the same cause of action.

*The Indian Grace* has been criticised in several jurisdictions. In New Zealand, Young J found the fact that Lord Steyn ignored maritime liens and several relevant SROAIR cases 'puzzling'.<sup>326</sup> The Singaporean courts have limited the effect of *The Indian Grace* to section 34 of the *Civil Jurisdiction and Judgments Act 1982* (UK).<sup>327</sup> The most forceful judicial rejection of *The Indian Grace* came from Australia in the case of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd (Pan Australia)*.<sup>328</sup> The Federal Court of Australia found that maritime liens and SROAIRs give rise to the same kind of action *in rem* and that there was no reason for Lord Steyn to set aside maritime liens.<sup>329</sup> It was also said in *Comandate* that Lord Steyn's decision turns the pursuit of SROAIRs into a 'dangerous lottery' because it effectively makes the SROAIR the one and only chance for a claimant to recover his or her debt.<sup>330</sup>

The implications of *The Indian Grace* are severe for seafarers who want to pursue SROAIRs for wages. SROAIRs do not enjoy high priority.<sup>331</sup> This means that it is possible, if not likely, that a SROAIR wage claimant will fail to recover the whole debt from the ship alone. If Lord Steyn's contention that a SROAIR against the ship is also an *in personam* action against the shipowner is correct, then no subsequent *in personam* action to recover the shortfall would be possible. The problem will be particularly acute for a SROAIR wages claim against a surrogate ship because the seafarer would in all likelihood have little or no information on the number and value of potential claims against the surrogate ship, due to the fact he or she would have never worked on the said ship. In this respect, *The Indian Grace* severely cripples the utility of SROAIR claims against surrogate ships — which as was noted above, is probably the most common scenario for a seafarer to pursue a SROAIR instead of a maritime lien.

A fully-fledged discussion of *The Indian Grace* falls beyond the scope of this paper. For present purposes, it suffices to say that some of the arguments in *The Indian Grace* are disputable. The international division of judicial opinions on this topic has also made the UK a very undesirable forum for SROAIR claims (Lord

<sup>320</sup> *The Indian Endurance (No 2); Republic of India v Indian Steamship Co Ltd* [1998] AC 878.

<sup>321</sup> *The Dictator* [1892] P 304.

<sup>322</sup> *The Indian Endurance (No 2); Republic of India v Indian Steamship Co Ltd* [1998] AC 878, 908.

<sup>323</sup> *Ibid* 909.

<sup>324</sup> *Ibid* 913.

<sup>325</sup> *Ibid*.

<sup>326</sup> *Raukura Moana Fisheries Ltd v The Ship 'Irina Zharkikh'* [2001] 2 NZLR 801, [90].

<sup>327</sup> *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 3 SLR 721.

<sup>328</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

<sup>329</sup> *Ibid* [115]-[116].

<sup>330</sup> *Ibid* [118].

<sup>331</sup> See Part 7 below.

Denning would be most dismayed at the decline of England's shopping standard on the world stage). Lord Steyn's judgment struck at the very theoretical core of the distinction between *in rem* and *in personam* actions in Admiralty. Therefore, it is not possible to devise some kind of exception to the ratio for seafarers who have not been able to recover their wages through a SROAIR. It is respectfully submitted that the House of Lords should re-examine *The Indian Grace* with reference to the cogent criticisms of the case by the Federal Court of Australia in the *Comandate* case. Meanwhile, seafarers will be well advised to refrain from pursuing SROAIRs for wages in the UK, unless they are utterly confident that the ship's value can meet their claims.

### 6. The Effect of the *Fisheries Act 1996* (NZ)

The purpose of the *Fisheries Act 1996* (NZ) is to regulate and maintain the sustainability of fisheries resources.<sup>332</sup> The Act does so by giving fishery officers extensive powers to seize vessels that are believed on reasonable grounds to have been involved with fisheries offences.<sup>333</sup> The seized property will be held by the Crown if it is not released by the fishery officer.<sup>334</sup> The vessel will then be forfeited to the Crown unless it is released under sections 210-211 of the *Fisheries Act 1996* (NZ). Needless to say, the process of forfeiture can be extremely disruptive to seafarers who happen to be working on such vessels. The fisheries jurisdiction can profoundly affect the seafarers' ability to earn future wages, as well as their existing rights *in rem* against the vessel.

Of course, if a seafarer wilfully commits fisheries offences leading to the forfeiture of the vessel, there is no reason for the law to protect his or her wages. The point to remember is that there are varying degrees of culpability for fisheries offences, even though the forfeiture provisions operate on a strict liability basis. Sometimes, the crew members may demonstrate a 'striking degree of dishonesty, furtiveness, disloyalty and avarice' in committing fisheries offences.<sup>335</sup> In other cases, the crew may be completely blameless.<sup>336</sup> It is not the aim of this discussion to advocate some kind of new culpability-based forfeiture provision in the fisheries legislation. Any such attempt would undoubtedly weaken the strong primacy that New Zealand places on the maintenance of its fisheries resources. However, it is the view of the author that there should be a robust and expedient process through which innocent seafarers (and other creditors, for that matter) can apply for relief from forfeiture in order to protect their wages claims *in rem*. This will help balance the conflict between the policy of the fisheries legislation and the goal of protecting seafarers' wages in Admiralty.

In addition, it is worth noting that there are similar forfeiture provisions in the customs legislation. *Collector of Customs v Glavish* confirmed that ships acting as a mode of transport for prohibited imports can be forfeited under section 272 of the *Customs Act 1966* (NZ) (now section 225 of the *Customs and Excise Act 1996* (NZ)).<sup>337</sup> However, the New Zealand Customs Service does not appear to have a habit of seeking the condemnation of ships, even though the statutory power to do so clearly exists. In *Collector of Customs v Glavish*, the Collector of Customs sought the forfeiture of a motorcycle with concealed firearms, rather than the forfeiture of the ship on which the motorcycle was carried. Despite the fact that Customs seldom seeks the forfeiture of ships in practice, the following discussion about the effect of forfeiture on seafarers' wages in the fisheries context, where applicable, should be extended to the customs legislation.

#### 6.1 Does Forfeiture extinguish Maritime Liens and/or SROAIRS?

It was held in *Equal Enterprise Ltd v Attorney-General* under the old *Fisheries Act 1983* (NZ) that upon forfeiture, the Crown takes the vessel free of all prior encumbrances.<sup>338</sup> This seems to have remained the case under section 255E(1) of the *Fisheries Act 1996* (NZ):

If any property, fish, aquatic life, seaweed, or quota is forfeited to the Crown under this Act, such property, fish, aquatic life, seaweed, or quota, despite section 168, vests in the Crown absolutely and free of all encumbrances.

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<sup>332</sup> *Fisheries Act 1996* (NZ), section 8.

<sup>333</sup> *Ibid* section 207.

<sup>334</sup> *Ibid* section 209.

<sup>335</sup> *Ministry of Fisheries v Enterprise Fishing Company Ltd* [4 September 1997] HC, Invercargill, AP6/97.

<sup>336</sup> See eg *Ministry of Agriculture and Fisheries v Lee* [7 March 1994] DC, Invercargill, CRN 2025004820, where the crew had unknowingly taken undersized oysters because the shipowner had equipped the vessel with culching rings that were the wrong size.

<sup>337</sup> *Collector of Customs v Glavish* [1993] 3 NZLR 302, 304.

<sup>338</sup> [1995] 3 NZLR 293.

SROAIRs have an important advantage over liens in this respect because they do not exist as an encumbrance upon the vessel until the issue of writ. As Blanchard J found in *Kareltrust*, for an unexercised SROAIR, there is nothing to extinguish upon forfeiture.<sup>339</sup>

The ability to proceed in rem thus piggybacks upon the proceeding in personam. It is a remedial procedure or enforcement right; it does not arise until invoked, and therefore when the forfeiture happened there was no proprietary interest to be extinguished by it, not even an inchoate right, such as exists immediately when circumstances have occurred giving rise to a seaman's maritime lien.

The inference from the above statement is that the seaman's wages lien, which does exist in an inchoate form, can be extinguished upon forfeiture. Therefore, the position would appear to be that maritime liens are completely destroyed upon forfeiture, and they will not be revived, even after the forfeited vessel leaves the Crown's ownership.<sup>340</sup> Yet, Blanchard J stated in *Karelrybflot v Udovenko*, maritime liens 'survives the process of forfeiture and release' because they do not depend on possession or ownership.<sup>341</sup>

There are two ways to rationalise this statement. The first way is that the lien is extinguished upon forfeiture, but it is 'revived' once the vessel is released. But the Court of Appeal provided no reason why this revival only occurs when forfeiture is followed by a release. Furthermore, in all other contexts, once a maritime lien is extinguished it cannot be resurrected.<sup>342</sup> The other way to rationalise the statement is that the lien 'survives' forfeiture because the Crown takes the vessel subject to the lien, even though it cannot be enforced *in rem* against the vessel so long as it remains forfeited to the Crown because of section 28 of the *Crown Proceedings Act 1950* (NZ). As Myburgh notes, the problem with this argument is that it is inconsistent with the *Equal Enterprise* decision and runs counter to the policy of the fisheries provisions.<sup>343</sup> Certainly, in light of section 255E(1) of the *Fisheries Act 1996* (NZ), it is difficult to argue that the Crown takes the vessels subject to maritime liens.

The Court of Appeal dealt with SROAIRs slightly differently. As discussed above, if the SROAIR action is commenced after the Crown releases the vessel, then it can be brought provided that section 5(2)(b) of the *Admiralty Act 1973* (NZ) is satisfied. The nature of the SROAIR differs from the maritime lien because it is a procedural chose in action against the ship, rather than a substantive proprietary right in the vessel created automatically through an operation of law. Therefore, it is not clear that section 255E(1) of the *Fisheries Act 1996* (NZ) will interrupt or destroy a SROAIR in progress under the *Admiralty Act 1973* (NZ). The Court of Appeal held in *Kareltrust* that where a SROAIR is commenced before the vessel is forfeited, the Crown will take the vessel free of the statutory right, even though it can be enforced after the vessel is released (to the person who would be personally liable, that is).<sup>344</sup> But, as Myburgh observes, unlike in Australia, there is no express statutory direction in New Zealand that gives the fisheries statute precedence over the admiralty statute.<sup>345</sup> Ultimately, given the obiter of the Court of Appeal in *Kareltrust* and the state of the law across the Tasman, it would seem that the Crown will indeed take vessels free from SROAIRs that have been commenced against the vessel before its forfeiture.

## 6.2 Relief from Forfeiture

The outcome from the *Karelrybflot/Kareltrust* cases was that a seaman is effectively left with no *in rem* interest in the event of forfeiture. The bold assertion that maritime liens can survive forfeiture and release is groundless, as it is inconsistent with the *Equal Enterprise* case and section 255E(1) of the *Fisheries Act 1996* (NZ). Even though the SROAIR for wages can be resurrected in theory, the chances of the person who would be liable regaining beneficial ownership or demise chartering the forfeited vessel are extremely unlikely in practice.

The *Fisheries (Foreign Fishing Crew) Amendment Act 2002* (NZ) was passed to address this problem. Section 3(1) of that amendment act redefined section 256 of the principal *Fisheries Act*, thus allowing certain claimants to apply for relief from forfeiture through the courts. 'Interest' in forfeit property is defined as:

S 256(1)(b) **interest:** in the case of a foreign vessel, a foreign owned New Zealand fishing vessel, or a foreign operated fish carrier [...]

<sup>339</sup> *Kareltrust v Wallace and Cooper Engineering* [2000] 1 NZLR 401 [63].

<sup>340</sup> Paul Myburgh 'Shipping Law' [2001] NZLR 105, 123.

<sup>341</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 [2].

<sup>342</sup> Jeremy Browne 'The extinction of maritime liens' [2003] LMCLQ 361, 368.

<sup>343</sup> Paul Myburgh 'Shipping Law' [2001] NZLR 105, 121.

<sup>344</sup> *Kareltrust v Wallace and Cooper Engineering* [2000] 1 NZLR 401 [61].

<sup>345</sup> Paul Myburgh 'Shipping Law' [2001] NZLR 105, 118.

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(ii) an interest, as determined by the Employment Relations Authority or any court, that any fishing crew have in unpaid wages;

(iii) an interest in costs incurred by a third party (other than the employer) to provide for the support and repatriation of foreign crew employed on the vessel

It can be seen that Parliament truly took the ambit of the '*Foreign Fishing Crew*' amendment Act to heart. It is indeed strange that only employees working on foreign vessels can qualify for relief while seamen working on New Zealand-registered vessels have no such 'interest' in the vessels on which they work.<sup>346</sup> Perhaps the idea is that New Zealand-based employers will be easier to serve and have judgments enforced against them *in personam* and no relief from forfeiture is necessary for seamen working on New Zealand-registered ships. A conspicuous problem with this assumption is that it creates a bizarre distinction based on the nationality of registration alone. While New Zealand is by no means recognised internationally as a flag of convenience, it is nevertheless possible for foreign shipowners to register or demise charter their vessels onto the New Zealand Ship Register. It is difficult to imagine how seafarers can rely on *in personam* actions alone when the shipowner is not even in New Zealand. The *Ship Registration Act 1992* (NZ) does little to help creditors pursue foreign shipowners.<sup>347</sup> Therefore, it is contended that the definition of 'interest' in section 256(1)(b) should be amended to apply to all forfeited vessels, regardless of where they are registered.

The practicality of the new section 256 has been questioned, namely because subsection (1)(b)(ii) appears to envisage that the seaman has already obtained prior judgment before applying for relief.<sup>348</sup> The very nature of employment at sea makes it difficult to commence legal proceedings. Furthermore, the request for relief must take place within 35 working days from the time of forfeiture under section 256(3). In essence this would require seamen to find legal representation, obtain judgment for their unpaid wages and apply for relief from forfeiture all within the span of little over a month. If this time requirement is to be read strictly, it could cause severe difficulties for seamen.

Even if the crew member manages to obtain judgment and file an application for relief from forfeiture in time, it seems that the provision of relief is not guaranteed. The court must consider the eleven factors listed in section 256(7). Under (8) relief from forfeiture will only be given if it is 'necessary' to avoid manifest injustice or to satisfy an interest as defined in subsection (1)(b)(ii)&(iii). The only relevant factor for seamen in section 256(7) is:

(f) The social and economic effects on the person who owned the property or quota, and on persons employed by that person, of nonrelease of the property or quota.

The response that seamen are likely to be met with is that it is never 'necessary' to give them relief from forfeiture if the foreign employer is still solvent. It is once again suggested that the courts should read this requirement liberally when deciding whether to grant relief. It should be kept in mind that the use of single-ship companies and crew from developing countries are effective and time-proven methods for shipping entrepreneurs to limit and evade their exposure to *in personam* liability. The courts should have due regard to the importance of *in rem* actions to unpaid seafarers when dealing with relief from forfeiture applications. Even though section 256(7)(f) is but one of eleven relevant factors for the courts to consider when deciding whether to grant relief or not, it is submitted that it should be a weighty factor where the crew is not responsible for the fisheries offence(s). Granting relief to wage claimants who are innocent of any offending would cause no affront to the policy of the fisheries legislation.

## 7. Priorities

In this final section I will examine the priorities of seamen's claims for wages. A claim is only worth pursuing if the defendant can satisfy the judgment. Often the defendant's liabilities will far exceed its liquidated value. Therefore, the ranking of the claims will be a crucial consideration for seafarers.

### 7.1 *In Personam* Priorities

<sup>346</sup> Paul Myburgh 'Shipping Law' [2003] NZLR 287, 291.

<sup>347</sup> Sections 12-13 of the *Ship Registration Act 1992* (NZ) require that a shipowner lists its name, address and nationality.

<sup>348</sup> Paul Myburgh 'Shipping Law' [2003] NZLR 287, 290.

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A seaman who claims wages *in personam* against a natural person or a corporation will normally do so as a mere unsecured creditor. Therefore, seamen should only sue *in personam* if the defendant is solvent. Unfortunately, seafarers will often have little to no information on the employer's financial status. The *Companies Act 1993* (NZ) offers limited protection for the employees of a corporation (preferential claimants) upon liquidation. Section 312 and Schedule 7 of the *Companies Act 1993* (NZ) require the liquidator to pay the wages of employees directly after the liquidator's costs and the expenses incurred by the person who applied to put the company into liquidation. Payments to preferential claimants are capped off at \$16,420 under clause 3.

It is also worth mentioning that Mareva injunctions or 'freezing orders' are purely *in personam* against the defendant and they do not in any way elevate an unsecured creditor to some sort of preferred creditor over the frozen assets.<sup>349</sup>

### 7.2 *In Rem* Priorities

Generally, priorities *in rem* rank as follows:<sup>350</sup>

- Paramount charges
  - Costs and expenses of the High Court Registrar
  - Costs and expenses of the producer of the fund
- Liens
  - Prior possessory liens
  - Maritime liens
  - Subsequent possessory liens
- SROAIRS
  - Registered mortgages rank by the date of registration
  - Unregistered mortgages rank by the date of creation
  - All other SROAIRs rank *pari passu*

#### 7.2.1 Ranking of maritime liens against other interests

As Jackson observes, the guide above is only a 'strong prima facie framework' based on precedents and the courts maintain an overall discretion to rank claims differently based on the equitable considerations of each individual case.<sup>351</sup>

For instance, in *The Eva* the master and the crew all had wages liens for their wages, subsistence expenses, and repatriation costs.<sup>352</sup> However, the necessities suppliers and repairers argued that their SROAIRs should rank before the master's wages and disbursement liens because the master had personally given the orders for the repairs and he was personally liable to the SROAIR claimants. The master was also a part-owner of the vessel. Hill J found that this puts the master in a 'very unfortunate position'.<sup>353</sup> His Honour concluded that the master's lien would rank behind the necessities suppliers' SROAIRs.<sup>354</sup>

Similarly, in *The Fairport*, the master who took the mortgagee for a cruise against his will had his lien deferred to the mortgage claim.<sup>355</sup> This makes it plain that the equitable clean hands doctrine applies to the determination of priorities in Admiralty. Gorell Barnes J held in *The Veritas* that the damage lien ranks before the salvage lien, but His Honour went even further to suggest that the damage claimants would have ranked first 'even if the damage in this case did not give rise to a maritime lien but only to a right to proceed in rem'.<sup>356</sup>

Therefore, having a maritime lien does not automatically entitle one to higher priority over SROAIR claimants. It was held in *Nicholson Marine Coatings Ltd v The Ship 'Saint Giovanni'* that the ordinary order will be varied

<sup>349</sup> See eg: *The Cretan Harmony* [1978] 1 Lloyd's Rep 425; *United Container Services Ltd v Sami Ltd* [22 September 1997] HC, Auckland, CP 363/97.

<sup>350</sup> Paul Myburgh *International encyclopaedia of laws—Transport law: New Zealand* (Kluwer Law International, The Hague, 2002) 123.

<sup>351</sup> DC Jackson *Enforcement of Maritime Claims* (3<sup>rd</sup> Ed, LLP, London, 2000) 536.

<sup>352</sup> *The Eva* (1921) 8 Lloyd's Law Rep 315.

<sup>353</sup> *Ibid.*

<sup>354</sup> *Ibid* 316.

<sup>355</sup> *The Fairport* (1885) LR 10 PD 13.

<sup>356</sup> *The Veritas* [1901] P 304, 314.

if 'equity demands such a course to be taken'.<sup>357</sup> However, there does not seem to be any recorded instance of seamen themselves being subject to these equitable demotions in priority; it is usually the master or some other lien claimant. It is nevertheless submitted that there must be circumstances where seafarers can be blameworthy enough to have their wages lien downgraded to rank behind SROAIRs. For example, if the crew causes a collision through their gross negligence, which leads to a significant decrease in the ship's value.

### 7.2.2 Ranking of maritime liens *inter se*

The damage lien outranks the wages lien by default.<sup>358</sup> The salvage lien tends to rank before the wages lien.<sup>359</sup> The damage lien usually beats the salvage lien.<sup>360</sup> At this point, seamen may be wondering why it is that their 'sacred lien' ranks last out of the three important maritime liens. The courts have advanced several recurring lines of arguments and each will be addressed below.

The *ex delicto* and *ex contractu* distinction has historically been a crucial element in the determination of the ranking of maritime liens *inter se*. It has been said that the damage lien should rank first because the damage lien claimant has no choice over its relationship with the defendant, whereas the salvage lien and wages lien claimants are voluntary contractual creditors.<sup>361</sup> Steel J rightly pointed out a flaw with this distinction: 'Once engaged the seaman has no option but to continue to volunteer his services.'<sup>362</sup> As was already argued above, it is confusing to simply label the wages lien as a contractual lien generally because there have been numerous instances of courts stating that the wages lien attaches to the ship in the absence of any binding employment contract.<sup>363</sup> Therefore, it is contended that if there is no enforceable employment contract or if there is in fact no real choice for the seafarer's rendering his or her services, then the *ex delicto/contractu* distinction should have little impact on the determination of priorities.

There is the view that the wages lien should rank behind the damage lien, because usually some member of the crew would have been responsible at least in part for the collision, and it would be unfair to prefer the crew's wages lien over the damage claimant's lien.<sup>364</sup> This consideration obviously cannot apply if the wage claimants can show that they were in no way responsible for the collision. For instance, the wage claimants in *The Ruta* were employed after the collision.<sup>365</sup> In *The City of Windsor*<sup>366</sup> the master had dismissed the negligent engineer who was allegedly solely to blame for the collision. The rest of the crew continued with the voyage, earning freight and subsequent wages, and it was held that the subsequent wages lien ranked ahead of the damage lien.<sup>367</sup>

The salvage lien ranks before prior damage liens and all wages liens because the salvors are regarded as 'preservers of the *res*'. It has been argued that the salvors' efforts give the opportunity for the crew to earn any subsequent wages on the ship.<sup>368</sup> But, as should be obvious, this type of bare but-for causation is questionable. If that were the case, the shipbuilding contract would rank ahead of everything else because the ship builder is the 'creator of the *res*' and nothing would be possible but-for the shipbuilder building the ship! Hodges and Hill suggest that sometimes the crew can be regarded as the preservers of the *res* because they were the ones who sailed the ship into the port for the salvors to arrest to begin with.<sup>369</sup> The authors go on to argue that the crew's wages liens should rank ahead if seafarers have done something beyond the call of duty to preserve the ship for the other claimants.<sup>370</sup> Therefore, it is possible for wages liens claimants to cast themselves as preservers of the *res* in order to improve their priority.

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<sup>357</sup> *Nicholson Marine Coatings Ltd v The Ship 'Saint Giovanni'* [25 June 1998] HC, Christchurch, AD 3/97, as cited in Paul Myburgh *International Encyclopaedia of Laws—Transport Law: New Zealand* (Kluwer Law International, The Hague, 2002) 124.

<sup>358</sup> See eg *The Chimera* (1852) 11 LT 113.

<sup>359</sup> See eg *The Lyrma* (No 2) [1978] 2 Lloyd's Rep 30.

<sup>360</sup> See eg *The Veritas* [1901] P 304.

<sup>361</sup> *Ibid* 313, where it was suggested that the *ex contractu* lienors are in effect 'part owners' of the vessel.

<sup>362</sup> *The Ruta* [2000] 1 Lloyd's Rep 359, 364.

<sup>363</sup> See eg: *The Ever Success* [1999] 1 Lloyd's Rep 824, 829; *McKay v The Ship 'Jackson Bay'* [17 September 1992] HC Auckland, AD 608/92, 5; *The Edwin* (1864) Brown & Lush 281, 285; 167 ER 365, 367.

<sup>364</sup> *The Elin* (1883) LR 8 PD 129.

<sup>365</sup> *The Ruta* [2000] 1 Lloyd's Rep 359, 364.

<sup>366</sup> (1896) 5 Ex CR 223.

<sup>367</sup> *Ibid* [15].

<sup>368</sup> *The Lyrma* (No 2) [1978] 2 Lloyd's Rep 30.

<sup>369</sup> Hodges and Hill *Principles of Maritime Law*, (LLP, London, 2001) 490.

<sup>370</sup> *Ibid*.



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Traditionally, seamen were thought to have ample alternative forms of redress. The view was that it would cause them no hardship to rank the damage lien first. *The Duna*<sup>371</sup> held that seamen have a threefold remedy because they can sue the ship, the owner and the master. The historical reason for recovering wages from the master seems to be that masters were usually part owners of the vessel.<sup>372</sup> It was said in *The Salacia*:<sup>373</sup>

It is an established rule, so ancient that I do not know its origin, that the seamen may recover their wages against the master...

This proposition can no longer stand because masters are hardly ever personally liable in modern shipping — they are usually employees just like the rest of the crew.<sup>374</sup> The internationalisation of the shipping industry has also made it difficult to proceed *in personam* against the owner. Even where the owner can be sued, it will often be the case that it is a single-ship company, teetering towards insolvency. Thus the threefold security available to seamen in the time of *The Duna* is now but a distant memory: today, seafarers can often look only to the ship *in rem* for their wages. The fact that the crew had no alternative remedy was recognised in *The Ruta*. This was probably the most potent reason for Steel J to rank the wages liens ahead of the damage lien.<sup>375</sup>

Mention must be made of the fact that the wages lien ranks first under article 4(1)(a) of the International Convention on Maritime Liens and Mortgages 1993.<sup>376</sup> The USA courts have also given the wages lien 'super priority'.<sup>377</sup> This indicates that the traditional English ranking of maritime liens is not universally accepted. It is not argued that the Common Law should always give first priority to the wages lien. The ranking of claims in Admiralty should be flexible and based on equitable considerations. While it is often helpful to have a guideline of priorities to refer to, there is no definitive, or inherently 'correct' order. No one can convincingly say that the protection of seafarers' wages is always more important than encouraging safe navigation at sea, or vice versa. It is submitted that the courts should not feel constrained by the default priority rules where there is sufficient ground to depart from the default rules. As Steel J observed, priorities in admiralty are not set in stone and they should be governed by the equity, public policy and commercial expediency of each case to arrive at a just result.<sup>378</sup> It is hoped that the forgoing discussion has shown that at least some of the reasons in the older authorities for ranking the wages lien last will not always be applicable.

### 7.2.3 Ranking of wages liens *inter se*

*The Salacia*<sup>379</sup> stood for the old view that the lien for the master's wages and disbursements rank after the seamen's wages liens because of the master's personal liability for the crew's wages. *The Salacia* was overturned in *The Royal Wells* where it was held: 'Today a master is not personally liable to the crew for their wages. Accordingly, the whole foundation of the decision in *The Salacia* has been removed.'<sup>380</sup> Therefore the master's lien will rank equally with the crew's liens, unless it can be shown that the master is a part-owner of the vessel or that he or she is in some way personally liable for the crew's wages.

All of the wages liens in a ship will normally rank *pari passu* among themselves.<sup>381</sup> However, it is possible to argue for the application of the 'inverse priority rule' where there is some intervening event to render the subsequent wages as being separable from the earlier wages. Jackson suggests the scenario where the earning of wages is interrupted by an act of salvage, which is followed by the earning of subsequent wages. In such a case the subsequent wage claimants should rank ahead of the earlier wage claimants because they preserved the ship for the earlier claimants.<sup>382</sup> Another example would be *The Ruta* where the pre-collision and post-collision crews were different. In such a case, the wages liens of the crew employed after the collision should rank ahead of those of the pre-collision crew. This approach allows for a measure of fairness between seafarers' claims for wages and avoids the old judicial tendency to lump all seamen's claims together.

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<sup>371</sup> (1861) 5 LT 217.

<sup>372</sup> See eg *The Eva* (1921) 8 Lloyd's Rep 315.

<sup>373</sup> *The Salacia* (1862) Lush 545, as cited in *The Royal Wells* [1984] 2 Lloyd's Rep 255, 257.

<sup>374</sup> *The Royal Wells* [1984] 2 Lloyd's Rep 255, 258.

<sup>375</sup> *The Ruta* [2000] 1 Lloyd's Rep 359, 364.

<sup>376</sup> International Convention on Maritime Liens and Mortgages 1993, opened for signature 6<sup>th</sup> May 1993, 33 ILM 353 (entered into force on the 5<sup>th</sup> of September 2004) ('Maritime Liens Convention 1993').

<sup>377</sup> See eg: *The CJ Saxe* 145 Fed 749 (SDNY 1906); William Tetley *Maritime Liens and Claims* (2<sup>nd</sup> Ed, BLAIS, Canada, 1998) 294; George Varian 'Rank and Priority of Maritime Liens' (1972-1973) 47 Tulane LR 751, 753.

<sup>378</sup> *Ibid.*

<sup>379</sup> (1862) Lush 545, as cited in *The Royal Wells* [1984] 2 Lloyd's Rep 255, 258.

<sup>380</sup> *The Royal Wells* [1984] 2 Lloyd's Rep 255, 258.

<sup>381</sup> See eg *The Leoborg (No 2)* [1964] 1 Lloyd's Rep 380.

<sup>382</sup> DC Jackson *Enforcement of Maritime Claims* (3<sup>rd</sup> Ed, LLP, London, 2000) 565.

## The Protection of Seafarers' Wages in Admiralty

It is not possible to dissect the wages lien and assign different priorities to different components of the wage package. In *The Otago*, it was held that the Court had no power to alter the priority of the interest part of the seaman's wages lien.<sup>383</sup> This is a sensible approach. If a form of payment is determined to be part of the seaman's 'wages', then the entire wage package should enjoy the same ranking. Otherwise the courts would be inundated with arguments about the priority of each and every part of the wage package.

### 8. Conclusion

The wages lien is no doubt the seafarer's most important legal remedy. The overall impression from all of the above discussion is that, throughout the history of the lien, the courts have largely been sympathetic to the seaman's plight. The historical development of the wages lien demonstrates that there is a perpetual need to alter and refine the wages lien, because the shipping industry itself is constantly changing. When special contracts replaced ordinary contracts as the industry standard, the admiralty courts and Parliament responded by abolishing the distinction between the two types of contracts. Harsh restrictions on the application of the lien, such as the requirement that wages be 'earned on board', and the maxim 'freight is the mother of all wages', were also discarded. These developments were consistent with the admiralty courts' rhetoric about the long-suffering seaman. The underlying rationale of protecting seafarers was always the driving force behind the direction of the wages lien's evolution.

The wages lien itself is a simple, elegant and powerful solution to the seaman's woes. Its minimalist definition allows it to cover just about any unpaid sum that a seaman would ever care to recover. The definitions of 'seaman' and 'wages' have been left to the admiralty courts, and the courts have read both terms quite widely. However, there has been extensive judicial disagreement across jurisdictions relating to the scope of 'wages', especially in relation to what have traditionally been 'special' contract claims.

Though damages arising from a seafarer's employment have long been accepted as recoverable through the wages lien, the Court of Appeal in *Karelybflot AO v Udovenko* made the surprising suggestion that damages for non-payment do not attract the wages lien.<sup>384</sup> The exclusion of severance pay in *The Tacoma City*, and the rejection of contributions in *The MV Resolute* are other examples of courts departing from the rationale of protecting seafarers in Admiralty.<sup>385</sup> These cases indicate that, even though the legal coverage of the wages lien is theoretically wide enough to include most forms of payments owed to seafarers, there is nevertheless a degree of judicial reluctance to embrace novel claims as 'wages'. Of course, there would be no reason for seafarers to complain if the courts provide convincing reasons for the exclusion of certain aspects of their pay from the wages lien. However, some of the reasons advanced by the courts have been rather questionable. The distinction between special and general damages in *Karelybflot AO v Udovenko*, for instance, is inconsistent with the established law, which has always allowed special damages as claims for wages. The requirement of payment for 'current service' in *The Tacoma City* ignores the fact that, even payment for regular wages would normally be for past service. It is not helpful to devise some new legal test, for the purpose of determining whether a novel claim should be regarded as a claim for wages, if the new legal test does not account for the plethora of other claims that have already been established as part of the wages lien. Provided that the inclusion of the claim is compatible with existing legal precedents, and if there are no opposing policy considerations outweighing the need to protect seafarers, there is no reason to exclude the claim on the basis of some new and arbitrary distinction. With the widespread increase in the use of contributions and benefits as substitutes for traditional wages, the admiralty courts should keep an open mind about expanding the wages lien to meet the demands of modern times.

The admiralty courts have strived to address the issue of abandonment of seafarers by readily awarding repatriations expenses as part of the wages lien.<sup>386</sup> However, the lien and the *in rem* jurisdiction in Admiralty rely on the plaintiff's ability to arrest the ship. In situations where the ship sails away before the abandoned seafarer can arrest her, the seafarer would be beyond the reach of the court's benevolence.<sup>387</sup>

The divergent international views in regard to the recognition of foreign privileges for wages will be difficult to resolve.<sup>388</sup> Attempts to unify maritime liens and mortgages through international conventions have been largely

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<sup>383</sup> *The Otago* [1981] 2 NZLR 740, 752.

<sup>384</sup> See Part 4.2.3 above.

<sup>385</sup> See Part 4.2.5 and 4.2.6 above.

<sup>386</sup> See Part 4.2.4 above.

<sup>387</sup> If the International Labour Organisation can gather enough support for its Repatriations of Seafarers Convention 1987, the problem of abandonment would be a thing of the past.

<sup>388</sup> See Part 4.3 above.

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unsuccessful. The reality for the foreseeable future is that seamen from certain countries will have more statutory rights and privileges than seamen from other countries, under their respective national laws. It is stressed that these statutory wage privileges are instituted by crew-supply states to protect their workers as a countermeasure to the international trend of flying flags of convenience. It is not an adequate answer to say that, 'all seafarers who come to the forum should be treated the same', because the fact is, their rights are often not the same. The conflict of laws response to the recognition of these foreign rights and privileges should be informed by the ostensible aim in Admiralty to watch over the welfare of seafarers. On a more general level, it is submitted that the majority decision in *The Halcyon Isle* is flawed because foreign rights in the nature of maritime liens, like actual maritime liens themselves, attach to the ship and travel with the ship wherever she goes. It is logical that if a foreign law creates a valid maritime lien, it cannot be 'shaken off' by moving the ship.<sup>389</sup> The nature of such foreign privileges should be determined by the *lex loci*.

There has also been considerable confusion in relation to the situation of multiple contracts of employment. It is evident that the contractual arrangements between seafarers and their employers are now more complex than ever. However, the overwhelming weight of authority supports the view that the wages lien is not a 'contractual' lien.<sup>390</sup> In this regard, the direction of the law in Australia and New Zealand is particularly alarming. In *The Rangiora* and *The Ionian Mariner*, the courts ignored the strong line of authority in Admiralty that the wages lien does not depend on a contractually enforceable debt.<sup>391</sup> Instead of developing the wages lien to keep up with the changing practices of the shipping industry, the Australian and New Zealand courts have retreated to a strict contract law approach. This is perhaps the most astonishing combination of: disregard for the principle of protection; rejection of applicable Admiralty precedents; and bucking the international trend without sufficient cause. Yet again, the theoretical legal basis of the wages lien is broad enough to encompass contractually unenforceable claims by seafarers. But the Australian and New Zealand courts chose to introduce artificial barriers to stifle such claims. It is also disturbing that the Court can reach such a conclusion, while at the same time reciting the view that the desirability of protecting seafarers is 'as strong now as it ever was', like a mechanical mantra.<sup>392</sup>

In other areas of law, however, the admiralty courts have been overly generous to seafarers. The severe refusal by the Court of Appeal to find that the contracts of employment had been frustrated in *Karelybflot AO v Udovenko* is extremely advantageous for seamen.<sup>393</sup> But the Court of Appeal did little to address *why* it was necessary to read down the general doctrine of frustration in the context of employment at sea to such a grave extent. If the protection of seamen would lead to a conclusion that is deprived of all commercial sense, then one can argue that the rationale of protection is outweighed by competing policy reasons. Maritime law should be benevolent to seafarers, but there is no call for benevolence to turn into blind devotion.

The wages lien must remain practical and relevant to sustain its continued development. An overabundance of protection for seamen is likely to lead to a decline in the commercial efficacy of the shipping industry. Shipowners would also find it harder to obtain adequate financing if the growth of seafarers' wage protection becomes too rampant. Therefore, the admiralty courts must maintain a suitable level of protection for seafarers at all times. In the end, it all comes down to a fine balance between policy, precedent and international uniformity.

Because of its blunt and simple constitution, the wages lien has its limitations. There are times when seamen must rely on SROAIRs to pursue their claims for wages against a surrogate ship. The core area of concern for seafarers claiming SROAIRs is the discrepancy in the application of the 'sham' transfer doctrine. Thankfully, the *Property Law Act 2007* (NZ) seems to have rectified the problem. The effect of *The Indian Grace* decision must also be borne in mind for any seaman looking to sue for a SROAIR.<sup>394</sup> In certain circumstances, the SROAIR for wages can be a viable and useful alternative to the wages lien.

It is desirable to reconcile the aim of deterrence in the fisheries legislation with the principle of protecting seamen. One must commend the legislative efforts to ease the adverse effect of forfeiture on foreign seafarers. The coverage of the relief from forfeiture, however, leaves much to be desired.

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<sup>389</sup> *Todd Shipyards Corp v Altema Compania Maritima SA; The Ship 'Ioannis Daskalelis'* [1974] SCR 1248 [8].

<sup>390</sup> See Part 4.4 above.

<sup>391</sup> See Part 4.5 above.

<sup>392</sup> *Mobil Oil New Zealand v The ship 'Rangiora' (No 2)* [2000] 1 NZLR 82, 87.

<sup>393</sup> See Part 4.7.1 above.

<sup>394</sup> *The Indian Endurance (No 2); Republic of India v India Steamship Co Ltd* [1998] AC 878.

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In respect of the priorities of the seamen's wage claims, it would appear that much of the traditional rationalisations for ranking the wages lien last out of the three main maritime liens can no longer be sustained. The equitable nature of admiralty priorities leaves the courts with adequate flexibility to tailor the claims' rankings to the demands of each individual case.

As for seamen's unenviable reputation as being collectively clueless and in need of protection, it seems that it has done nothing but good for them in the courtroom. The perception of the vulnerable seafarer forms the very basis of the rationale for having the wages lien, and throughout the years this ancient rationale manifested itself in a rich pool of legal precedents in favour of protecting seafarers. It was seen in cases like *The MV Turakina*<sup>395</sup> and *Karelrybflot AO v Udovenko*<sup>396</sup> that the courts may experience a sense of trepidation about being so benevolent to seamen when they get too cunning or demanding for their own good. It is also apparent that even in this age of mass unionisation, shipowners can still engage weak and desperate seafarers from developing countries to work on their ships. The admiralty courts must remain vigilant and offer aid to these wards of Admiralty wherever possible.

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<sup>395</sup> *The MV Turakina* (No 1) 84 FCR 493.

<sup>396</sup> *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24, especially on the issue of damages for non-payment of wages in part IV B 3 above.