

'GRAPPLING WITH THE NETTLE': COMMON LAW POSSESSORY LIENS IN ADMIRALTY LAW

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1 Introduction

The maritime lien is not the only type of lien that exists in admiralty. Possessory liens also occasionally arise in the maritime context. In contrast to claims generally encountered in admiralty proceedings, possessory liens are sourced from the common law. One of the most frequent situations where possessory liens arise in the admiralty context is where repair work is undertaken on a ship but payment is not forthcoming. The ship repairer is entitled to retain possession of the ship under a possessory lien until payment is made. Although this scenario appears to be straightforward, contentious disputes have arisen regarding the ability of the lienholder to retain the possessory interest while simultaneously instigating the arrest and sale of the ship by the Admiralty Court to obtain the amount owed.

The conflict between the common law and admiralty jurisdictions has a long history, and has most recently arisen in the New Zealand decision of *Babcock Fitzroy Ltd v The Ship 'The M/V Southern Pasifika'*.¹ The central issue was whether the ship repairer (Babcock) could actively enforce its possessory lien through *in rem* proceedings and receive its dues from the subsequent sale of the ship, or whether the actions taken by Babcock to enforce the lien resulted in the loss of the possessory lien. This question has remained unresolved, despite being considered in several cases across multiple jurisdictions,² as judges have found it unnecessary to 'grapple with the nettle' of possessory liens in admiralty.³ *Babcock* advances the law on this issue by allowing possessory lienholders to enforce their claims through admiralty proceedings. Although this conclusion is desirable, the reasoning is unclear and is at risk of being questioned in future proceedings. This article aims to provide an explanation of the *Babcock* developments that is more defensible and brings greater clarity to this area of the law.

The article first examines the long-standing conflict between admiralty and other competing jurisdictions, revealing the conflict in *Babcock* to be a manifestation of a broader problem. The fundamental principles of possessory liens are also discussed in Part 2 of the article to provide background to the situation in *Babcock*. Part 3 of this article addresses the opportunity provided in *Babcock* by describing the extent to which the issue is addressed by Priestley J, while also identifying what was left unresolved. A rationalisation of the decision is explained in Part 4 of the article by systematically analysing the obstacles to a resolution between possessory liens and admiralty. Part 5 explores the difficulty that, although a better understanding of *Babcock* resolves the relatively simple conflict between possessory liens and lower-ranked maritime claims, elegant solutions for more complicated factual scenarios are difficult to provide at the fringes.

2 Admiralty and Common Law Possessory Liens

2.1 Admiralty and Competing Regimes

Babcock demonstrates the difficulty of accommodating common law possessory liens in the admiralty context. But it is just one example of the much broader historical conflict between the admiralty jurisdiction and the common law. The origins of the admiralty jurisdiction lie in the King's vesting of 'broad and vague' powers to the Admiral to exercise disciplinary powers over maritime actions.⁴ These powers 'carved away some of the

* LLB (Hons), BSc. The author would like to thank Associate Professor Paul Myburgh for his invaluable supervision and guidance, as well as the anonymous journal referees for their helpful comments on the final draft of this paper. Thanks also to Olga Ostrovsky for her support and comments on earlier draft versions.

¹ [2012] NZHC 1007.

² Ireland in *The Acacia* (1880) 4 Asp MLC 254; and Singapore in *The Dwima I* [1996] SGHC 83, [1996] 2 SLR 670; and *The Honey I* [1987] 2 MLJ 427.

³ Adopting the language of Lai J in *The Honey I*, above n 2, 428. See also Sian, D, 'Some Aspects of the Possessory Lien in Actions *in Rem*' (1988) 30 *Malaya L Rev* 312.

⁴ Ryan, E, 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 *West Ont L Rev* 173.

jurisdiction claimed by the courts of the common law'.⁵ Centuries of arm-wrestling followed,⁶ until the Admiralty Court was merged with the Common Law and Equity Courts in the English Judicature Acts of the nineteenth century.⁷ New Zealand has 'never been subject to [this] sweeping unification' due to the relatively recent conception of New Zealand admiralty jurisdiction.⁸ However, the New Zealand Court of Appeal has controversially held that the admiralty and civil jurisdictions are always exercised concurrently, in line with the English approach.⁹ Irrespective of the extent of this unification,¹⁰ issues remain due to the lingering competition between claims sourced in different jurisdictions. These issues are manifested by the clashes between admiralty and other areas of law such as statutory rights of forfeiture, insolvency proceedings and possessory claims arising from the common law.

There is general understanding of the priority rankings of various maritime claims such as maritime liens, mortgages and statutory rights of action *in rem*. Difficulty ensues when claims from other jurisdictions attempt to compete with maritime claims over the same security, which is usually a single ship. It must first be established whether, despite the existence of competing claims, the sale of a vessel by the Court Registrar confers clean title on the purchaser.¹¹ The second consideration is whether one jurisdiction has exclusive access to the security at the loss of the competing jurisdiction, or whether the claims may co-exist and both have effect against the one item of security.¹² The clashes between maritime law and statutory rights of detention,¹³ forfeiture¹⁴ or insolvency¹⁵ claims provide guidance on the confrontation with the common law possessory lien.

A fundamental principle of maritime law is that the judicial sale of a ship should result in clean title, with the ship free of any encumbrances.¹⁶ Only judicial sale allows the determination of all claims against the ship, as a private sale may only satisfy specific claims.¹⁷ A private sale could therefore result in a ship that continues to be subject to various claims, thereby drastically reducing the value and price of a ship sold by private sale.¹⁸ Judicial sale provides unencumbered title and therefore maximises the value of the vessel. It is in all the claimants' interests to maximise the value of the ship at judicial sale as it provides increased chances of satisfying their claims from the proceeds of sale.¹⁹

Port authorities are an example of a claimant that in some circumstances may have a statutory power of detention and the right to sell the vessel.²⁰ However, such a sale does not result in clean title, leaving the purchaser with a ship that is still subject to admiralty claims.²¹ In cases where this statutory right of sale clashes with admiralty claims that seek to arrest and sell the ship, the best solution is suggested to be that the Admiralty Court may effect judicial sale, but transfer the statutory claim of the port authority 'with equivalent priority to the proceeds of sale in court'.²² As a result, both the statutory claim of the port authority and the maritime claims can be solved in one proceeding as well as encouraging 'the maritime interests of the World'.²³

The argument in favour of the Admiralty Court resolving all competing claims against a ship in one proceeding²⁴ has been extended to the clash of maritime claims and forfeiture provisions. In *Readhead v The Admiralty Marshal*, a ship was subject to both forfeiture and maritime claims. It was suggested that an order of

⁵ *Ibid.*, 173.

⁶ See generally Ryan, above n 4; see also Myburgh, P, 'Richard Cooper Memorial Lecture: Admiralty Law — What is it Good For?' (2009) 28 *UQLJ* 19, 22-25.

⁷ *Judicature Act 1873* (UK); *Judicature Act 1875* (UK). See also Myburgh, P, 'Admiralty in Wonderland' [2005] *LMCLQ* 302, 305.

⁸ See Myburgh, above n 7, 305; see also *Admiralty Act 1973*(NZ), s 3(2).

⁹ See Myburgh, above n 7, 305; and *Danzas AG v Hally Press Ltd* (2004) 17 PRNZ 181, 188-189.

¹⁰ For criticism of the *Danzas* decision, see generally Myburgh, above n 7.

¹¹ Derrington, S, 'My Ship, My Castle: The Forfeiture of Property Rights in the Admiralty Law Context' (2007) 26 *UQLJ* 341.

¹² *Debis Financial Services (NZ) Ltd v The Cray Fishing Vessel 'Stryker'* [2005] NZAR 385, [1], [2] and [11]; see Derrington, above n 11, 342.

¹³ See *Corps v Owners of the Paddle Steamer Queen of the South (The Queen of the South)* [1968] P 449; adopted in New Zealand in *Hill v The Ship James Cook* [1997] 3 NZLR 752.

¹⁴ *Readhead v The Admiralty Marshal (the Aliza Glacial)* (1998) 87 FCR 229; and Stryker, above n 12.

¹⁵ For discussion of the clash between admiralty law and insolvency claims, see Devlin, J, 'The UNCITRAL Model Law on Cross-Border Insolvency and its Impact on Maritime Creditors' (2010) 21 *JBFLP* 95. See also Myburgh, above n 6, 33.

¹⁶ *The Acrux* [1962] 1 Lloyd's Rep 405; and *The Sierra Nevada* [1932] 42 Lloyd's Rep 309.

¹⁷ *The Tremont* (1841) 1 Wm Rob 163, 164; *All-Weather Investments Ltd v Sealord Charters Ltd* CA24/97, 19 February 1997; and Browne, J, 'The Extinction of Maritime Liens' [2003] *LMCLQ* 361.

¹⁸ *The Acrux*, above n 16, 409.

¹⁹ *The Queen of the South*, above n 13, 465.

²⁰ See *The Queen of the South*, above n 13.

²¹ See *The Sierra Nevada*, above n 16, 310.

²² *The Queen of the South*, above n 13, 461; see *The Freightline One* [1986] 1 Lloyd's Rep 266.

²³ *The Acrux*, above n 16, 409.

²⁴ Derrington, above n 11, 350.

forfeiture could continue to provide a 'defect in title' in the ship even after a judicial sale. The Federal Court of Australia held that the Admiralty Court should be able to accommodate the competing rights of the forfeiture claim and the maritime claim against the proceeds of a judicial sale, thereby preserving the principle that judicial sale resulted in clean title.²⁵ This ruling was subsequently overturned by legislation specifying that forfeiture provisions were to prevail over the *Admiralty Act 1988* (Cth).²⁶ The competition between forfeiture provisions and admiralty claims also arose in New Zealand in *Debis Financial Services (NZ) Ltd v The Cray Fishing Vessel 'Stryker'*.²⁷ The issue related to competing attempts to arrest the ship but did not concern the sale of the vessel as in *Readhead*. However, Neazor J held that in respect of claims for the arrest of the vessel, the competing claims did not 'interfere with each other [so] there [was] no need to declare that only one can assert its right' to arrest the ship.²⁸ He noted that the alleged difficulties of the competing claims would be avoided upon sale following admiralty proceedings if the approach in *Readhead* was heeded to protect the interest of the forfeiture claim as well as the maritime claims.²⁹

The treatment of these competing regimes is significant to the conflict in *Babcock* as it illustrates that, where possible, all claims should be accommodated within admiralty proceedings to provide one determinative consideration of the priorities of all claims in relation to the particular ship. The pre-existing law before *Babcock* on the intersection of possessory liens and admiralty also follows this approach.³⁰ Although the initialisation of maritime proceedings by the possessory lienholder itself is novel, the interaction between maritime law and possessory liens is well-established where the admiralty proceedings are instigated by a third party.³¹

When a maritime claimant applies for arrest and judgment against a vessel that is in the possession of a possessory lienholder, the interests of the Court Registrar and the possessory lienholder clash. The lienholder must maintain possession of the vessel or lose its lien. The Court Registrar is obliged to follow admiralty procedure which will result in the sale of the ship, making the lienholder's loss of possession inevitable. The oft-cited passage from *The Tergeste* provides:³²

[I]t is the duty of the material man not to contend with the Admiralty marshal; to surrender the ship to the officer of the Court, and let the officer of the Court, under the order of the Court, remove and sell her; but when he has done that, the Court undertakes that he shall be protected, and that he shall be put exactly in the same position as if he had not surrendered the ship to the marshal.

The general approach when other areas of law clash with admiralty is that all claims should be considered in an admiralty proceeding to determine the rankings of the respective claims. All claims against the ship may be satisfied, allowing unencumbered title to pass to prospective purchasers. Given this approach, it is unsurprising for *Babcock* to attempt to reconcile common law possessory liens and admiralty by continuing the approach of *The Tergeste* and extending it to the situation where the lienholder initiates admiralty proceedings. Before the *Babcock* decision can be analysed in detail, it is necessary to explore the law of possessory liens to reveal the challenges to be overcome.

2.2 Background on Possessory Liens

The oft-cited definition provided by Grose J in *Hammonds v Barclay* describes the possessory lien as 'a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied'.³³ The ship repairer's possessory lien is only one manifestation of the possessory lien in the admiralty context,³⁴ but it is the most common.³⁵ The ship repairer can claim a possessory lien over a ship for charges for completed repair work. The amount charged may include the costs of materials supplied, work done and incidental costs, but does not include the expenses of keeping the property.³⁶ The lien is particular, as

²⁵ *Readhead*, above n 14, 246 and 247.

²⁶ *Fisheries Management Act 1991* (Cth), s 108A explicitly provides that forfeiture provisions are to prevail over the *Admiralty Act 1988* (Cth). See Derrington, above n 11.

²⁷ *Stryker*, above n 12.

²⁸ *Ibid*, [20].

²⁹ *Ibid*, [28].

³⁰ *The Tergeste* [1903] P 26 (CA); adopted in New Zealand in *Hill v The Ship 'James Cook'*, above n 13, 757.

³¹ *Ibid*, 32.

³² *Ibid*, 32 and 33.

³³ *Hammonds v Barclay* (1802) 2 East 227, 235; for a similar recent definition in New Zealand see *Stockco v Walker*, HC Napier, CIV 2011-441-110, 11 May 2011, [14].

³⁴ Toh Kian Sing, 'The Possessory Lien in Actions *in rem*: a Common Law Security in Admiralty' [1997] *Sing JLS* 291.

³⁵ Jackson, D, *Enforcement of Maritime Claims* (4th Ed, 2005), [20.31]-[20.32].

³⁶ *Ibid*, [20.32]. The property must be improved rather than merely stored and maintained.

it relates only to the debt incurred on the particular ship, in contrast to general statutory rights of action *in rem*, which can be enforced against any ship of the same owner.³⁷

The common law possessory lien applies in any setting that satisfies its requirements and is not limited to the admiralty jurisdiction. This point is stressed by Jackson, who warns in his *Enforcement of Maritime Claims* that ‘there is a danger’ that a possessory lien arising in the maritime context is ‘considered apart from the basic common law framework of which it is part’.³⁸ This warning must be challenged, as it appears Jackson prefers the purity of the concept of a common law possessory lien above pragmatism. The traditional function of possessory liens relies on the assumption that the owner of the possessed *res* has the desire to repossess its property. In reality, many situations arise where owners make no attempt to reclaim the *res*, for example because of bankruptcy or because the outstanding debt outweighs any benefit in retrieving the *res*. If the self-help principle is strictly enforced, the lienholder has little choice but to maintain possession in the hope of future payment.

This shortcoming of the common law possessory lien has been recognised, and many statutes now provide a limited power of sale in order that the lienholder can recoup the debt from the proceeds of sale. In New Zealand, s 3 of the *Wages Protection and Contractors’ Lien Act Repeal Act 1987* confers a right of sale to possessory lienholders to sell a possessed chattel by auction if payment remains outstanding for at least two months. The section includes advertising and notice requirements and is limited to possessory liens created as a result of work completed upon the chattel.³⁹ As a ship fits within the meaning of chattel, this section is applicable to ship repairers who maintain possessory liens over vessels. However, as with the statutory power of sale for port authorities in the English cases mentioned earlier, auction by s 3 of the *Wages Protection and Contractors’ Lien Act Repeal Act* would not provide unencumbered title, and therefore crucially differs from a judicial sale by the Admiralty Court. The strict self-help character of common law possessory liens has therefore already been abrogated by statute, rendering strict adherence to the self-help character to be needless. Regardless, it is preferable to apply pragmatic solutions that provide workable laws instead of holding onto outdated and obsolete historical concepts.

The most fundamental requirement of possessory liens is that the lienholder must retain continued possession of the chattel that is subject to the lien.⁴⁰ The possession must be lawfully acquired,⁴¹ and possession must already exist at the point of creation of the lien interest: ‘there is no ability to acquire possession to create the lien’.⁴² The question whether possession is transferred to the lienholder is a matter of ‘fact and degree in each case’.⁴³ In the case of a ship repairer, the query will ‘depend on the extent and character of the repairs which are done’ and whether the repairers have ‘overall or effective possession of the ship’.⁴⁴ Therefore, a ship repairer may have possession of a ship despite the master and crew remaining on board.⁴⁵ Continued possession is also the method of enforcing possessory liens;⁴⁶ the lien is ‘a self-help remedy in the form of a passive right of detention until the debt is discharged’.⁴⁷ The common law provides no right of sale,⁴⁸ but ‘affords a defence to an action for the recovery of the goods by its owner or anyone otherwise entitled to its possession’.⁴⁹ The possessory lien has therefore traditionally been used as a shield but not as a sword.

As the existence of the lien is dependent on uninterrupted possession, the lien may be lost if possession is lost.⁵⁰ In general, subsequent repossession does not revive the lien, unless the chattel was surrendered by reason of fraud or unlawfully taken from the lienholder.⁵¹ However, the application of the principle that loss of possession results in termination of the lien has been relaxed. Temporary loss of possession for a limited purpose no longer results in loss of the lien.⁵² In *Ablemarle Supply Co Ltd v Hind*, it was held that the lien was not lost where

³⁷ *Ibid*, [20.6].

³⁸ *Ibid*, [20.40].

³⁹ *Wages Protection and Contractors’ Liens Act Repeal Act 1987* (NZ), s 3.

⁴⁰ *Bay Flight 2012 Ltd v Flight Care Ltd* [2012] NZHC 484, [23].

⁴¹ *Tappenden v Artus* [1964] 2 QB 185 (CA); *Bowmaker Ltd v Wycombe Motors Ltd* [1946] KB 505.

⁴² Jackson, above n 35, [20.2].

⁴³ *The Narada* [1977] 1 Lloyd’s Rep 256.

⁴⁴ *Ibid*, 256.

⁴⁵ *Ibid*, 257; *The Tergeste*, above n 30.

⁴⁶ Jackson, above n 35, [20.9] and [20.14].

⁴⁷ Toh Kian Sing, above n 34, 292. See *Bay Flight*, above n 40, [23]; and *Tappenden v Artus*, above n 41.

⁴⁸ *Bay Flight*, above n 40, [23].

⁴⁹ Toh Kian Sing, above n 34, 292.

⁵⁰ *Bay Flight*, above n 40, [24].

⁵¹ Jackson, above n 35 [20.19]; Meeson, N, *Admiralty Jurisdiction And Practice* (4th Ed, 2011), [6.24]; *Bay Flight*, above n 40, [24]; and *Stockco*, above n 33, [15].

⁵² *Ablemarle Supply Co Ltd v Hind* [1928] 1 KB 307 (CA); and Jackson, above n 35, [20.1] n 1.

possession of the chattel was temporarily interrupted for a limited and specific purpose, with an agreement before possession was lost that the lien interest would not be lost.⁵³ The lien was also not lost in *Rose v CMS Operations Ltd* where the lienholder permitted the owners to regain possession in limited circumstances.⁵⁴

The lien may also be terminated when an action is taken that is inconsistent with the possessory lien.⁵⁵ The possession of the chattel serves as security for the outstanding debt, and loss of possession is tantamount to loss of the security. The possessory lien is terminated upon payment or tender of the outstanding amount, accepting security for payment at a later date, or by waiver.⁵⁶ A possessory lien may therefore be terminated despite continuous possession being maintained by the lienholder. However, waiver of the lien by taking alternative security ‘only occurs ... if it is clear that the alternative security is inconsistent with the continuance of the possessory lien’.⁵⁷ In *Angus v McLachlan* Kay J held that there must be something in the nature of the security taken that is inconsistent with the possessory lien for the lien to be terminated.⁵⁸

The exception that temporary loss of possession does not result in loss of a possessory lien has been developed further in New Zealand by two recent decisions. The Court in *Stockco v Walker* acknowledged that a possessory lien is created in respect of the improvement or repair of a chattel but not mere maintenance.⁵⁹ The rule from *Rose* was applied, allowing temporary loss of possession ‘on terms that [the chattel] is to be returned after use and the lien should continue’.⁶⁰ In *Bay Flight v Flight Care Ltd*, Kós J applied the *Ablemarle* exception that redelivery of the *res* for a limited and specific purpose, with the chattel to be returned on completion, does not result in loss of possession where it is agreed or acknowledged that the lien will not be lost.⁶¹ Kós J held that possession could be temporarily lost yet the lien maintained as long as there was a clear agreement that provided.⁶²

- (1) Restriction of permitted use of the *res*;
- (2) Acknowledgement of the lien’s existence;
- (3) That repossession is not to diminish the lien, so that it will continue despite the lienholder temporarily relinquishing the *res*; and
- (4) Requirement that the *res* be returned instead of a mere expectation that the *res* would be returned.

Both cases continue the general trend away from requiring strictly uninterrupted possession. However, the application of the resulting principle is unlikely to be applicable to the situation in *Babcock*, as will be explained in Part 4 below.

3 Babcock: A Missed Opportunity

The question whether a possessory lienholder can seek the arrest and sale of the possessed *res* while simultaneously retaining the benefit of the possessory lien was raised in *Babcock*.⁶³ The parties to the dispute were the ship repairer, Babcock, and the intervening mortgagee.⁶⁴ Babcock carried out repairs on the vessel but the owner failed to pay for the work, leaving Babcock with a significant monetary loss.⁶⁵ Babcock instigated *in rem* proceedings against the vessel⁶⁶ and sought judgment in default and a warrant for the vessel’s arrest,⁶⁷ while maintaining possession of the vessel. Babcock successfully obtained judgment in default and the vessel was arrested a day later. The Court also directed that the arrest of the vessel would not affect Babcock’s possessory lien, and upon sale of the vessel, Babcock would be ‘entitled to a lien attaching to the proceeds of sale ...

⁵³ *Ibid*, 314, 315 and 318.

⁵⁴ *Rose v CMS Operations Ltd* [2002] EWHC 59 (Ch).

⁵⁵ Jackson, above n 35, [20.20]; and Meeson, above n 51, [6.25].

⁵⁶ Meeson, above n 51, [6.25]; and Jackson, above n 35, [20.20].

⁵⁷ Meeson, above n 51, [6.28].

⁵⁸ *Angus v McLachlan* (1883) 23 Ch D 330.

⁵⁹ *Stockco*, above n 33, [14] and [22], where it was held that determining whether work amounts to an improvement or maintenance is a matter of fact and degree.

⁶⁰ *Ibid*, [15].

⁶¹ *Bay Flight*, above n 40.

⁶² *Bay Flight*, above n 40, [33].

⁶³ *Babcock*, above n 1, [33].

⁶⁴ *Ibid*, [1].

⁶⁵ *Babcock*, above n 1, [4].

⁶⁶ *Ibid*, [24].

⁶⁷ *Ibid*, [26].

conferring priority rights equivalent ... to the possessory lien maintained by [Babcock]'.⁶⁸ The vessel was sold by the Court Registrar at a later date.

The case determined the respective priorities of the parties' claims against the proceeds of sale of the vessel. It is settled that a possessory lien interest would usually prevail over the mortgagee's interest.⁶⁹ However, if Babcock lost its possessory lien interest, for example by invoking admiralty remedies, Babcock's only remedy would be as an unsecured creditor with a statutory right of action *in rem*, which would rank below the mortgagee's interest. Such a loss of priority would in most cases provide the possessory lienholder with, at best, a fraction of what was owed.

Priestley J focused his attention on the concept of possession, confronting the possibility that Babcock had parted with possession of the vessel and had thereby lost the possessory lien when it initiated the court proceedings. The detailed chronology of the events emphasised certain aspects of possession, such as whether possession was maintained despite the movements of the vessel⁷⁰ and the presence or absence of its telegraph box.⁷¹ He held that Babcock maintained possession of the ship until at least 3 May 2011, when the Registrar took control of the vessel.⁷² Despite the Registrar taking control of the vessel, its berthage arrangements and the responsibility for its on-going berthage fees, the Court held that the Registrar only had custody and not possession of the vessel while it was under arrest.⁷³ It became clear that, although Babcock maintained possession beyond arrest of the vessel and judgment,⁷⁴ the Registrar must have possession to sell the vessel.⁷⁵ Despite dedicating much of the judgment to possession, Priestley J failed to reach a determinative conclusion on the topic. Instead, having vaguely noted that possession must have passed to the Registrar at some point between the arrest and sale of the vessel,⁷⁶ Priestley J turned to policy reasons and the actions of the parties to decide the case.

Regarding the parties' actions, it was acknowledged that Babcock had appropriately followed standard procedure in seeking judgment in default and arrest of the vessel.⁷⁷ Significantly, the mortgagee chose not to contest the judgment *in rem* obtained by Babcock and the concurrent court order that its possessory lien interest would be maintained against the proceeds of sale.⁷⁸ Priestley J noted that, had Babcock chosen to maintain its possessory lien without seeking judgment against the vessel, and waited for the mortgagee or another third party to begin an *in rem* action, Babcock's possessory lien would have been enforced against the proceeds of sale and it would have retained superior priority to the mortgagee's interest.⁷⁹ The pragmatic solution of *The Tergeste* would apply, preventing conflict between a possessory lienholder and the Court Registrar.⁸⁰ However, Babcock instead opted not to rely on a third party to seek judgment against the vessel, and pursued its own admiralty remedies.⁸¹ The inference was that it would be unfair for Babcock to lose its possessory lien and thereby its priority over the mortgagee's claim due to its timely actions and diligent adherence to procedure. Moreover, the mortgagee would benefit from its inaction.

Priestley J ultimately found the policy arguments in favour of Babcock to be decisive.⁸² In summarising the policy reasons, Priestley J opined:⁸³

[I]t would be absurd if a possessory lienholder maintained priority when Admiralty jurisdiction was invoked by another claimant, but lost priority when the repairer itself invoked the jurisdiction. Such a result, in respect of any vessel being repaired, could lead to a stalemate which would inevitably disadvantage claimants and creditors. In a situation where a lienholder and a mortgagee both waited in the hope that the other claimant would be the first to arrest a ship, the resulting delay would lead to the vessel losing value whilst berthage costs rose.

⁶⁸ *Ibid*, [7], citing Woolford J in *Babcock Fitzroy Ltd v The Ship 'The M/V Southern Pasifika'*, HC Auckland, CIV-2011-404-001906, 2 May 2011, [12] and [19].

⁶⁹ *The Gustaf* (1862) Lush 506, 167 ER 230; Jackson, above n 35, [23.112]-[23.113] and [23.121]-[23.123]; and *Williams v Allsup* 10 CB (NS) 417.

⁷⁰ *Babcock*, above n 1, [41].

⁷¹ *Ibid*, [42].

⁷² *Ibid*, [31].

⁷³ *Ibid*, [45].

⁷⁴ *Ibid*, [31]-[33].

⁷⁵ *Ibid*, [47].

⁷⁶ *Ibid*, [42] and [45].

⁷⁷ *Ibid*, [43]-[45].

⁷⁸ *Ibid*, [36] and [55].

⁷⁹ *Ibid*, [36].

⁸⁰ *The Tergeste*, above n 30.

⁸¹ *Babcock*, above n 1, [37].

⁸² *Ibid*, [50] and [67].

⁸³ *Ibid*, [50].

This absurdity could arise by a strict application of the self-help character of possessory liens. However, Priestley J made only brief mention of the common law requirements of possessory liens and instead preferred to rely on policy arguments. Although he noted that the possessory lien is ‘essentially a self-help’ remedy and that the lien is lost ‘if the lienholder voluntarily parts with possession’,⁸⁴ he made no mention of the fact that the lien is lost if the lienholder acts or takes security that is inconsistent with the lien.⁸⁵ The only other aspect of the common law he acknowledged was that it provides no power of sale.⁸⁶

It is unclear what effect *Babcock* has on the application of the statutory right of sale in s 3 of the *Wages Protection and Contractors’ Lien Act Repeal Act 1987* for possessory lienholders in admiralty. Priestley J appeared to suggest that the practicalities of exercising the statutory power of sale over a significant ship, beyond merely small recreational vessels, would limit its usefulness in admiralty.⁸⁷ However, practical difficulties do not negate the extension of the power of sale to ships; repairers still theoretically retain the statutory power of sale even if the practicalities render the use of the provision ambitious. Despite the doubts expressed by Priestley J, it is suggested that possessory lienholders still have a statutory right of sale, but this sale would not result in clean title. Instead of providing a thorough explanation of the law surrounding the clash of possessory liens and admiralty claims, Priestley J relied on the convincing policy arguments in favour of *Babcock*.

However, even this discussion of policy was insufficient to dispose of the case, since *Babcock*’s possessory lien interest still needed to be transferred to the proceeds of sale. To overcome this final hurdle, Priestley J resurrected the fictional concept of a notional lien.⁸⁸ The term ‘notional lien’ has not been properly defined by the courts and the only two prior mentions of the concept were dismissive of the fiction.⁸⁹ In both *The Ally* and *The Gaupen*, ship repairers maintained possessory liens over vessels but wished to free workspace by relocating the ships from dry-dock to wet-dock, which would result in the loss of possession.⁹⁰ In *The Gaupen*, Lord Merrivale noted that ‘what was sought was that the Court should exercise its powers to turn a genuine lien on the property into a notional lien’.⁹¹ If an application that the Court should ‘create a possessory lien where there was no possession’ was granted,⁹² ‘some kind of notional lien’ would be produced ‘over a chattel no longer in [the ship repairer’s] possession’.⁹³ In both cases the notional lien concept was dismissed.⁹⁴

The notional lien became Priestley J’s explanation of prior cases such as *The Tergeste*,⁹⁵ multiple Singaporean cases,⁹⁶ and the initial *Babcock* proceeding,⁹⁷ despite the absence of this terminology in the judgments.⁹⁸ The justification given was that although a repairer ‘inevitably [parts] with possession of the vessel to the Registrar, it cannot be said the *in rem* right should be rendered nugatory because possession has been lost’.⁹⁹ The Court effectively recreated the possessory lien interest held by the ship repairer and attached it to the proceeds of sale.¹⁰⁰ To allow the application of the notional lien concept, Priestley J not only extended the term to cases that made no mention of notional liens, but also sought to distinguish the criticism made in the only two cases where notional liens were actually mentioned.

Priestley J distinguished these cases on three bases. The first reason was that ‘The Court in those cases refused to declare possessory liens attaching to the vessels once they were no longer in possession of the repairer’.¹⁰¹ With respect, this appears to be incorrect. In both cases the repairers were still in possession of the vessel in

⁸⁴ *Ibid*, [38].

⁸⁵ This requirement was noted in the Singaporean decisions quoted by Priestley J such as *The Dwima I*, above n 2, but no primary consideration was given to this issue in *Babcock*.

⁸⁶ *Babcock*, above n 1, [39], also noting that a statutory power of sale was provided by s 3 of the *Wages Protection and Contractors’ Liens Act Repeal Act 1987* (NZ).

⁸⁷ *Ibid*, [39].

⁸⁸ *Ibid*, [47], [59], [67] and [71].

⁸⁹ *The Ally* [1952] 2 Lloyd’s Rep 427; and *The Gaupen* (1925) 22 Ll LR 57.

⁹⁰ *The Ally*, above n 89, 427; and *The Gaupen*, above n 89, 57.

⁹¹ *The Gaupen*, above n 89, 58.

⁹² *The Gaupen*, above n 89, 58.

⁹³ *The Ally*, above n 89, 428.

⁹⁴ *The Gaupen*, above n 89, 58; and *The Ally*, above n 89, 428.

⁹⁵ *Babcock*, above n 1, [47].

⁹⁶ For example *The Dwima I*, above n 2; and *The Honey I*, above n 2.

⁹⁷ *Babcock*, above n 68.

⁹⁸ See *Babcock*, above n 1, [51]–[57] and [65]. Instead of creating a ‘notional lien’, the Singaporean Courts granted orders for the appraisal and sale of the relevant vessel without prejudice to the possessory lien.

⁹⁹ *Ibid*, [59].

¹⁰⁰ *Ibid*, [59].

¹⁰¹ *Ibid*, [64].

question, and were applying to the Court to sanction their proposed actions.¹⁰² The repairers sought to move the vessel from dry-dock to wet-dock, which would be likely to result in loss of possession, without losing their possessory lien interest. It is difficult to distinguish this from Priestley J's earlier statement that Babcock's actions would inevitably result in loss of possession, yet the Court could create a notional lien in Babcock's favour. The second and third reasons were that, unlike the English cases, *Babcock* was concerned with the sale of vessels by court order and the transferral of the possessory lien interest to the proceeds of sale.¹⁰³ Priestley J's conclusion suggests that the policy arguments in favour of Babcock justify the creation of a notional lien and that such policy arguments did not apply in the English cases.

The notional lien fiction is both unhelpful and unnecessary. In *The Indian Grace*, Lord Steyn noted:¹⁰⁴

The role of fictions in the development of the law has been likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected scaffolding serves only to obscure the building.

Fictions are problematic and should only exist where they are useful or necessary.¹⁰⁵ The usefulness of the personification fiction in admiralty is much debated,¹⁰⁶ and the benefits of the notional lien fiction should be properly considered before it is revived. Priestley J clearly felt that the notional lien fiction was necessary to allow Babcock's possessory lien interest to be transferred to the proceeds of sale of the ship. However, this article argues that the transferral of the lien interest can be better understood to occur upon judgment *in rem*. The ship repairer retains both a possessory lien and an underlying cause of action for the debt it is owed. The possessory lien has the effect of bestowing the higher priority of a common law lien on what would otherwise be a low-ranking statutory right of action *in rem*. This elevated status of the lienholder's cause of action continues to exist until a judgment *in rem* is delivered by the Court, whereupon the various causes of action that apply against the particular ship are substituted by, and merge into, the judgment *in rem*. It is then this judgment *in rem* that is enforced against the proceeds of sale. If this theoretical explanation is correct, the notional lien fiction is superfluous and should be discarded. This argument is presented in greater detail in the next part of this article.

While the *Babcock* decision correctly identifies the public policy reasons in favour of Babcock and takes account of the actions of the parties, the judgment fails to elucidate the interaction of the common law and the admiralty jurisdiction. *Babcock* suggests that notional liens may be used to transfer a possessory lien interest where policy arguments are strong, yet this vehicle may not be used in all other cases.¹⁰⁷ The fiction of the notional lien is neither helpful nor necessary. Decisions about priority rankings such as *Babcock* have significant financial consequences for the parties and it is preferable that such cases are not decided on the strength of policy arguments alone.¹⁰⁸ Commercial certainty is not fostered by reliance on policy arguments. While the correct result was achieved in *Babcock*, the reasoning fails to provide a defensible and clear understanding of how the law functions upon the clash of possessory liens and admiralty. The following part of this article aims to bring clarity to this area of the law by providing a more rational explanation of the result in *Babcock*.

4 Reconciling Admiralty and Possessory Liens: Grasping the Nettle

As explained earlier, Priestley J invoked policy arguments and the equities of the parties' actions, and revived the previously dismissed concept of the notional lien to justify Babcock's continued possessory lien interest. It is suggested that a more structured methodology would result in a clearer resolution of the conflict in future cases.

For possessory liens to be reconciled with the admiralty jurisdiction it is first necessary to deduce whether the lienholder has lost its lien. The key requirements to be satisfied are that possession was not lost and that there were no actions inconsistent with the possessory lien itself. The second issue is to explain how the possessory lien interest may be transferred from the ship to the proceeds of sale. These matters are addressed below before a more rational explanation of the *Babcock* decision is suggested. The contrast between this explanation and the

¹⁰² *The Ally*, above n 89, 427, and *The Gaupen*, above n 89, 57.

¹⁰³ *Babcock*, above n 1, [64].

¹⁰⁴ *Republic of India v India Steamship Co Ltd (No 2) (The Indian Grace)* [1998] AC 878, 913 (HL).

¹⁰⁵ See Davies, M 'In Defense of Unpopular Virtues: Personification and Ratification' (2000) 75 Tul L Rev 337.

¹⁰⁶ For example, see Myburgh, above n 6.

¹⁰⁷ Compare *Babcock*, above n 1, to *The Ally*, above n 89 and *The Gaupen*, above n 89.

¹⁰⁸ For example, if Babcock's possessory lien interest was not maintained, Babcock would receive only approximately NZ\$130,000 instead of being paid over NZ\$1.5 million.

traditional understanding of common law liens is discussed before finally considering the ramifications of the suggested approach.

4.1 Loss of Possession

A possessory lien is lost by a failure to maintain possession over the *res*. This general principle is subject to the exception allowing temporary losses of possession.¹⁰⁹ However, this exception does not apply to *Babcock*. While the application for orders of the Court without prejudice to Babcock's possessory lien may arguably be equated with an agreement that satisfies the first three requirements set out in *Bay Flight*, the fourth remains problematic. Babcock does not seek the vessel to be returned; instead it seeks the monetary value of its possessory lien in place of the *res* itself. Alternatively, it could be suggested that, in place of the fourth provision, Babcock seeks the transferral of its possessory lien interest from the *res* to the proceeds of sale. Both understandings result in an agreement that differs crucially from *Ablemarle*, *Rose*, *Stockco* and *Bay Flight*, in that the agreement no longer provides for temporary loss of possession; Babcock permanently parts with possession of the *res* and asks for something else in its place. It is submitted that such an extension of the exception allowing for temporary loss of possession would be a step too far.

With the temporary loss of possession exception ruled out, Babcock must show that possession is not lost before its possessory lien interest is transferred from the ship to the proceeds of sale. It is not disputed that Babcock held a valid possessory lien to the point where it initiated admiralty proceedings for the arrest and subsequent sale of the ship. But it is also clear that possession was lost eventually; in particular, when the Court Registrar conducted the judicial sale and the ship is transferred to its new owner. It is contentious whether the events occurring between these certain points involve a loss of possession, especially with regard to the court's arrest of the ship.¹¹⁰

The effect of arrest on the lienholder's possession has occasionally been held to result in loss of possession,¹¹¹ yet some cases have held that the arrest merely passed the vessel into the custody of the Court's Registrar.¹¹² The issue may have been confused in *Babcock* with Priestley J's conclusion that the Registrar took effective control over the ship on the same day that it arrested the vessel.¹¹³ However, the correct conclusion is that arrest does not interrupt the lienholder's possession.¹¹⁴ The position was clarified by Atkin LJ in *The Arantzazu Mendi* where he stated:¹¹⁵

A ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Registrar. His right is not possession but custody. Any interference with his custody will be properly punished as contempt of the court which ordered the arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all the remedies based on possession.

The suggestion in *Babcock* that the ship repairers gave up their possession on the same day that the ship was arrested does not alter the rule that arrest itself will not interrupt possession.¹¹⁶

Babcock emphasises that the timing of the loss of possession relative to the transferral of the lien interest is crucial. If possession is relinquished before the possessory lien interest is transferred from the ship to the proceeds of sale, the possessory lien will be lost as possession had been interrupted prior to the transferral. An order transferring the lien interest cannot succeed where the possessory lien has already been lost. Therefore, it is important that the transferral of the possessory lien interest occurs prior to sale of the ship itself. If the transferral occurred subsequent to arrest the ship repairer could maintain possession despite the arrest of the vessel. Babcock's possessory lien interest had been purportedly transferred prior to arrest by the orders of Woolford J the previous day. The method of transferring the possessory lien claim is analysed in greater detail in Part 4.3 below.

¹⁰⁹ See *Ablemarle*, above n 52; and *Bay Flight* above n 40.

¹¹⁰ See *Rumely v The Vera M* [1923] Ex CR 36; *The Arantzazu Mendi* [1939] AC 256 (HL); and *The Acacia*, above n 2.

¹¹¹ *The Vera M*, above n 110.

¹¹² *The Arantzazu Mendi*, above n 110, *The Acacia*, above n 2.

¹¹³ *Babcock*, above n 1, [45].

¹¹⁴ *The Arantzazu Mendi*, above n 110, and *The Acacia*, above n 2.

¹¹⁵ *The Arantzazu Mendi*, above n 110, 257.

¹¹⁶ *Babcock*, above n 1, [45].

4.2 Actions Inconsistent with the Possessory Lien

The second way that a possessory lien may be lost is by taking actions inconsistent with the lien such as giving credit terms, accepting security for payment at a future date,¹¹⁷ and taking actions that constitute waiver of the lien.¹¹⁸ The question therefore becomes whether, by seeking to enforce the possessory lien by initiating admiralty proceedings, the possessory lienholder has lost the lien by taking an action inconsistent with the nature of the lien itself. Unfortunately, parties have avoided this argument and focussed on loss of possession by submitting that a repairer who chooses to exercise its statutory right for an action *in rem* would lose the possessory lien because enforcement of the *in rem* judgment would necessitate loss of possession.¹¹⁹ Certainly, loss of possession would be an action that is inconsistent with maintaining a statutory lien. However, it is possible for the lienholder to lose the lien by taking actions inconsistent with the lien, despite maintaining possession.

In *The Ally*, Willmer J appeared to suggest that the possessory lien and the action *in rem* are separate remedies and the ship repairer must make the decision of which remedy to pursue. He questioned 'how [ship repairers] can expect to have the best of both worlds; they must choose what they want to do'.¹²⁰ However, this passage must be put in its context. The ship repairers hoped to preserve their possessory lien by court order despite moving it out of their possession and into wet-dock.¹²¹ Similar demands were not present in *Babcock*.

There is some authority against the suggestion that the ship repairer must choose between remedies.¹²² In the Irish case of *The Acacia*, Townsend J held that a possessory lien was not lost where the ship repairer initiated the action *in rem* instead of a third party.¹²³ The admiralty principle that the arrestor's interests should be protected as a reward for securing the fund for other creditors may also have aided the ship repairer. In any case, Townsend J felt unable to decide against the ship repairer.¹²⁴

I am reluctant to decide for the first time that the effect of an Admiralty arrest is to destroy the lien for the active enforcement of which it was sued out, or that a party having a valid claim up to that moment can be deemed to forgo it by asking the statutory aid of the court to make it effectual.

In *Angus v McLachlan*, Kay J noted that possessory liens are waived only where it is clear that the alternative security is inconsistent with the continuance of the possessory lien:¹²⁵

[I]t is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the exercise of the lien, and which is destructive to it.

Further, in his text *Admiralty Jurisdiction and Practice*, Meeson suggests:¹²⁶

There appears no reason why simply by invoking the Admiralty jurisdiction *in rem* and arresting the vessel, thereby enabling it to be sold by the court, the holder of a possessory lien should be held to have waived his right to the security afforded by his possessory lien.

The application of these authorities suggests that the possessory lien remedy may be maintained by satisfying its common law requirements while concurrently pursuing the admiralty remedy of a statutory right of an action *in rem*. The two available remedies are considered separately as they are sourced from different jurisdictions, even though in essence they both represent the same claim against the same *res*.

A closer analysis of the possessory lienholder's claim reveals why pursuing admiralty remedies should not be considered as an action that is inconsistent with the lien itself that results in loss of the lien. The original claim takes the form of a breach of contract, as the ship repairer was not paid for the repairs as agreed. Provided possession of the ship is maintained and the other common law requirements are satisfied, the common law confers a possessory lien to the ship repairer, which acts as a defence to any action of wrongful possession by

¹¹⁷ *Burston Finance v Speirway* [1974] 1 WLR 1648.

¹¹⁸ Jackson, above n 35, [20.20].

¹¹⁹ *Babcock*, above n 1, [46] and *The Dwima I*, above n 2, [9].

¹²⁰ *The Ally*, above n 89, 428.

¹²¹ *Ibid*, 427.

¹²² Meeson, above n 51, [6.28]-[6.29].

¹²³ *The Acacia*, above n 2, 256.

¹²⁴ *Ibid*, 256.

¹²⁵ *Angus v McLachlan*, above n 58.

¹²⁶ Meeson, above n 51, [6.29]. See also *A v B* [1984] 1 All ER 265.

the owner of the ship. If payment is not forthcoming for over two months, the *Wages Protection and Contractors' Liens Act Repeal Act 1987* provides the lienholder with a right to sell the ship by private auction to recoup the outstanding balance.

The admiralty jurisdiction is available to the lienholder because its claim also comes within s 4(1)(m) of the *Admiralty Act 1973* (NZ), which extends admiralty jurisdiction to claims in respect of the construction, repair, or equipment of a ship. Combined with s 5, the lienholder has a statutory right of action *in rem*.¹²⁷ Applying the facts of *Babcock*, this means that Babcock has a statutory right to make a claim for the outstanding balance for the repair of the ship against the ship itself by following the necessary admiralty procedures.

The Admiralty Court may exercise civil jurisdiction as well as the specific admiralty jurisdiction.¹²⁸ As a result, the Court can recognise that Babcock holds a common law possessory lien. Babcock can elect to pursue its statutory right of action *in rem* and also ask the Court to recognise that its claim meets the requirements of a common law possessory lien, and should therefore receive the elevated priority typically granted to such liens. The Court then has the discretion to rank Babcock's claim above the mortgagee. The argument that statutory rights for an action *in rem* usually rank below maritime lienholders and mortgagees does not apply, as Babcock also satisfies the common law requirements to have a possessory lien. Had Babcock parted with possession of the ship, it would not have met the requirements for a possessory lien, its claim would have been based on the simple breach of contract, and it would therefore have enjoyed a lower priority than the mortgagee and maritime lienholders.

Consequently, the possessory lien and the statutory right to an action *in rem* before the Admiralty Court are remedies that become available if the facts of the claim meet the procedural requirements specified by each area of law. The fact that one is provided by admiralty and the other by the common law is no cause for concern as the Admiralty Court may exercise both jurisdictions.¹²⁹

The remaining query is whether, by applying to the Admiralty Court to exercise its statutory right of an action *in rem*, the ship repairer's actions trigger the termination of the lien by means of an action inconsistent with the lien. The lienholder has not taken alternative security in substitute for the res. The only element of the common law possessory lien that could have been breached is the self-help character of the lien.¹³⁰ In *The Ally*, it was suggested that the Court should uphold the self-help character of the possessory lien and refrain from assisting a party with a self-help claim.¹³¹ At most, this suggests that the Court should refuse to hear the lienholder's action, but if this occurred the ship repairer would still retain its possessory lien, provided possession had been maintained. Attempts to breach the self-help nature of the claim should not be considered to be actions sufficiently inconsistent with the lien to result in its loss. Additionally, when seeking judgment from the Admiralty Court, claimants have adopted the practice of applying for a judgment 'without prejudice' to their possessory lien.¹³² This convention is followed in an effort to demonstrate an intention that a judgment *in rem*, which may potentially be seen as inconsistent with their possessory lien, should not be granted by the Court if this will result in the loss of the existing possessory lien. These statements have helped lienholders maintain possessory liens, along with the lack of any challenge by opposing parties against court orders upholding the liens.¹³³

However, as stated earlier, the self-help character has already been abrogated by statute,¹³⁴ and the pursuance of purity of the self-help principle at the expense of pragmatism would result in a remedy devoid of much realistic use. It would seem absurd to allow a possessory lienholder to breach the self-help character of the lien by exercising its statutory right of sale, and yet prevent the same lienholder from seeking judicial sale by the Admiralty Court. Such a conclusion would be contradictory to encouraging the 'maritime interests of the World',¹³⁵ as well as the fundamental maritime policy that maritime claims against ships should be resolved by judicial sale of the Admiralty Court to provide unencumbered title. The action of pursuing a statutory right of action *in rem* in admiralty should therefore neither be considered to be inconsistent with the possessory lien itself, nor result in the loss of the lien.

¹²⁷ *Admiralty Act 1973* (NZ), ss 4(1)(m) and 5.

¹²⁸ Section 3(2).

¹²⁹ Section 3(2).

¹³⁰ Jackson, above n 35, [20.40].

¹³¹ *The Ally*, above n 89, 428.

¹³² For example see *The Dwima 1*, above n 2, [20].

¹³³ *Babcock*, above n 1; and *The Dwima 1*, above n 2.

¹³⁴ *Wages Protection and Contractors' Liens Act Repeal Act 1987* (NZ), s 3.

¹³⁵ *The Acrux*, above n 16, 409.

4.3 Transferring the Possessory Lien Interest to the Proceeds of Sale

The method by which the possessory lien interest may be transferred from the ship to the proceeds of sale is the final matter that requires consideration. As mentioned earlier, it is important that the possessory lien interest is transferred to the proceeds of sale before actual possession is lost. In *Babcock*, Priestley J employed the ‘notional lien’ concept to transfer the lien interest, despite it being dispelled in the only two cases that considered the idea.¹³⁶ The means of transfer employed in *The Tergeste* and *The Dwima I* were less clear; all that was said was that the Court was able to ‘[protect] the lienholder’s interest by transferring that interest from the vessel to the proceeds of sale’.¹³⁷ As the transfer in *Babcock* was effectively identical to these earlier cases (apart from express reference to the notional lien label), Priestley J concluded that these earlier cases had also involved the application of a notional lien.¹³⁸

It is suggested that a better understanding of the mechanism of the transfer of the lien interest does not require the resurrection of the notional lien. As discussed above, the ship repairer’s cause of action for debt enjoys a higher status by virtue of its possessory lien. Although the possessory lien is not a cause of action *per se*, it has the effect on the underlying cause of action of substantially raising its priority from an unsecured statutory right of action *in rem* to that of a possessory lien. The Court’s judgment *in rem* authoritatively determines the status and priority of the claims against the ship, extinguishes those claims against the ship, and merges them into the judgment itself. This merger principle provides the basis for the fundamental civil law concepts of *res judicata* and issue estoppel.¹³⁹ In *The Indian Grace*,¹⁴⁰ for example, the House of Lords held that the Indian Government’s cause of action for loss of cargo had been extinguished by an earlier judgment of the Indian Court on the initial action *in personam*. The Indian Government subsequently sought to advance the same cause of action *in rem* to recoup more damages as their initial claim was relatively small. The defendants successfully argued that issue estoppel prevented the second proceeding *in rem* from progressing, as the plaintiff’s cause of action, and therefore its claim, had merged into the earlier judgment *in personam*. The same cause of action could therefore not be advanced a second time following judgment in the initial proceeding. Although the House of Lord’s findings on the extent of the application of the merger principle to separate subsequent actions *in personam* and *in rem* in the admiralty context is highly controversial, its understanding of the theory of the merger principle itself is orthodox.

The effect of the merger principle is that it is the Court’s judgment *in rem* that is enforced against the proceeds of sale in an admiralty case such as *Babcock*, instead of the parties’ original causes of action. In other words, the validity of the causes of action and the rights and liabilities of the parties are conclusively determined and embodied in the judgment, which is then enforced against the proceeds of sale. The corollary of the merger principle is that the parties’ causes of action continue to exist until a final judgment is given. The Admiralty Court is competent to give a final judgment on both common law and maritime claims, and has judicial discretion to prioritise and rank claims. Furthermore, in policy terms, it would be deeply unsatisfactory to have any causes of action still clinging to the ship or surviving the effect of judgment. If this occurred, the judicial sale would purport to provide clean title, but, as the ship would still be subject to a cause of action, the purchaser could be faced with future proceedings against the ship. This would be contrary to maritime interests and the administration of international maritime law.

Applying this reasoning to *Babcock*, the ship repairer would put forward its underlying cause of action for the debt, along with its argument for a higher priority ranking pursuant to its possessory lien. The cause of action and the possessory lien would continue to exist up until the Court delivers its judgment *in rem*. At this point, the ship repairer’s claim, along with all the other claims recognised against the ship, merges into the judgment of the Court. As was the case in *Babcock*, the Court may include in its judgment an order that the ship repairer’s claim is to retain the same priority as its existing possessory lien. Following the Court’s judgment on the claims, and its determination of their priority, the ship repairer can safely relinquish possession to the Court Registrar to effect judicial sale of the vessel without fearing loss of the common law possessory lien. It is the Court’s judgment *in rem* that is enforced against the proceeds of judicial sale, following the priority rankings as determined by the Court, rather than the ship repairer’s possessory lien itself. This reasoning provides a coherent explanation of both the situation where judgment *in rem* is instigated by a possessory lienholder as well as where proceedings are initiated by a third party.

¹³⁶ *Babcock*, above n 1, [47], [59], [67] and [71]; *The Ally*, above n 89; and *The Gaupen*, above n 89.

¹³⁷ *The Dwima I*, above n 2, [21]; and *The Tergeste*, above n 30, 32.

¹³⁸ *Babcock*, above n 1, [47].

¹³⁹ *Blair v Curran* (1939) 62 CLR 464, 531; *The Indian Grace*, above n 104.

¹⁴⁰ *The Indian Grace*, above n 104.

This approach mirrors the suggestion from the Scottish case of *The Sierra Nevada*, where Lord Fleming held:¹⁴¹

[I]f a vessel at the date of its judicial sale is subject to an ordinary right of lien or retention, the vessel is freed from such right of lien or retention, which, however, is not extinguished but is converted into a claim against the price.

Although in this case the judicial sale itself was held to have the effect of transferring the claims, it would be preferable to consider judgment *in rem* as having this effect. Each subsequent judgment, for example for intervening parties, would have the effect of registering their claims against the proceeds of sale. If all claims against a ship are not merged upon judgment, some claims may remain attached to the ship instead of the proceeds, which would result in unclear title following judicial sale. This would contradict both the fundamental maritime principle of clean title following judicial sale, and the policy considerations underpinning it.

4.4 Rational Explanation of *Babcock*: Reconciling Common Law and Admiralty

Following consideration of the issues above, it is possible to explain the solution to the problem of the conflict between the common law possessory lien and Admiralty which allows both jurisdictions to intersect effectively. The facts in *Babcock* are used in the following explanation.

A ship repairer, having repaired a ship and subsequently retained it by virtue of a common law possessory lien has a statutory right of action *in rem* for the debt it is owed. The Admiralty Court has jurisdiction due to the application of s 4(1)(m) of the *Admiralty Act 1973*. The Court would be able to use both its civil and admiralty jurisdiction concurrently, thereby allowing the Court to recognise the possessory lien and its associated elevated priority ranking.

The ship is arrested and judgment is subsequently delivered in relation to the lienholder's claim for the outstanding balance of the repairs. As arrest provides only custody to the Registrar, and constructive possession is maintained by the lienholder to the point of judgment, the common law lien is not extinguished by a loss of possession. Furthermore, by initiating the admiralty proceedings the lienholder does not constitute an action that is inconsistent with the possessory lien. Neither potential ground for terminating the common law lien applies.

The retention of the ship repairer's possessory lien means that its cause of action enjoys the status and priority of a common law possessory lien instead of a rank and file statutory action *in rem*. There is no need for the Court to rely on the fictional concept of a notional lien to transfer the status and priority of this claim to the proceeds of sale. It is the Court's judgment *in rem* that determines the status and priority of all claims before it. These claims merge into the Court's judgment *in rem* and are extinguished. The judgment *in rem* is then enforced directly against the proceeds of the judicial sale of the ship, and is satisfied against those proceeds to the extent that is possible.

As a result, the lienholder retains the priority normally afforded to possessory liens. The ship repairer's interest is subject only to the Registrar's costs and any maritime liens that existed before repairs were conducted, and is ranked above subsequent maritime liens, mortgages and all other claims.¹⁴² Consequently, the ship repairer is very likely to receive the full amount of the balance owed.

4.5 Contrast to the 'Traditional' Analysis

The explanation provided above differs from the understanding of common law possessory liens as merely a passive self-help remedy. Authors such as Jackson have preferred what is labelled for the purposes of this article as the 'traditional' view. The traditional approach prefers to keep common law possessory liens completely separate from the ship repairer's cause of action. On this approach, the delivery of an *in rem* judgment for the lienholder's unpaid debt would have no effect on the status or ranking of the common law possessory lien. Furthermore, on this approach, the ship repairer's rights deriving from the possessory lien do not merge into the judgment *in rem* along with the ship repairer's cause of action; both continue to exist independently of each other. Instead of considering that the effect of the possessory lien is to elevate the ranking of the lienholder's underlying cause of action for the debt, the traditional view contends that the Admiralty Court merely allows the ship repairer the indulgence of a higher priority at its discretion. This discretion is apparently always available to the Admiralty Court, even though the lienholder's loss of possession of the ship is fairly inevitable once admiralty proceedings are commenced by any party.

¹⁴¹ *The Sierra Nevada*, above n 16, 311.

¹⁴² *The Gustaf*, above n 69, 231-232.

It is suggested that the traditional view is unhelpful, and that the law should be developed to follow the explanation as outlined above. The traditional approach artificially keeps the possessory lien at arm's length from admiralty proceedings, instead of attempting to accommodate common law liens and claims within one final admiralty decision. In addition, the utility of keeping the possessory lien interest separate from the cause of action in cases such as *Babcock* is very low, as the separate possessory lien right will inevitably be extinguished when possession of the vessel passes to the Court Registrar to effect a judicial sale.

A ship repairer's cause of action is one of debt; the common law possessory lien is not, in itself, a cause of action. However, the possessory lien provides more than merely a right of retention. The possessory lien is better understood as giving the underlying cause of action a particular preferred status over other claims. In this single characteristic the possessory lien strongly resembles the maritime lien. There is a fundamental difference between enforcing a cause of action in admiralty that confers only a rank and file statutory right of action *in rem*, and enforcing a cause of action that confers a lien, whether a possessory lien or a maritime lien. A claimant with a maritime lien always has the choice of enforcing its cause of action in admiralty through its maritime lien, which enjoys a higher priority but is available against the relevant ship only, or through a statutory right of action *in rem*, which enjoys a lower priority, but, for example, can be enforced against sister ships. Why should a ship repairer be denied the analogous freedom of choosing to benefit in the admiralty jurisdiction from the preferred status conferred by a common possessory lien against the relevant ship, or to pursue its underlying cause of action as a mere statutory right of action *in rem* against a sister ship?

The traditional view does not avoid the problem of the ship repairer's inevitable loss of possession of the ship. If the possessory lien does not have any effect on the ship repairer's underlying cause of action and remains separate to it, and is therefore not merged into the Admiralty Court's judgment *in rem*, the method by which the ship repairer's cause of action is prioritised is at the Court's unbridled equitable discretion. In effect, the Court would be perfectly entitled to deny the ship repairer's claim the priority of a possessory lien, on the basis that this is a separate issue outside the admiralty jurisdiction. Such granting of priority by judicial indulgence or whim is deeply unsatisfactory, and would be prone to strong attacks in future cases. What dictates when the Court may exercise its discretion in this manner? How can claimants, either possessory lienholders or those with competing interests, assess whether or not the Court will indulge the possessory lienholder? It appears the only indicator would be the strength of policy arguments for and against the lienholder. Relying on policy alone undermines commercial certainty. Litigation is likely to increase where neither category of parties understands exactly where they stand.

If the traditional approach is followed, the reasoning behind allowing lienholders such as *Babcock* to initiate admiralty proceedings to claim their unpaid repair costs is just as fragile as that in Priestley J's judgment. The only clear difference would be that the Court would upgrade the lienholder's cause of action and transfer it to the sale proceeds on the basis of an indeterminate judicial discretion, instead of recognition of a notional lien. The understanding that the possessory lien has the effect of directly granting the underlying cause of action a fixed, certain and predictable preferred status, instead of affording simply a right of retention, is a significantly more logical and coherent proposition.

4.6 Ramifications of *Babcock*

The key implication of *Babcock* is that parties with common law possessory liens may enforce their liens in admiralty by electing to pursue their statutory rights of action *in rem*. The result confirms that possessory lienholders in admiralty do not have to rely merely on the self-help character of the lien. As a consequence, potential stalemate situations between possessory lienholders and other parties with claims against the same ship are avoided. It had been suggested that, in order to retain a possessory lien and its elevated priority ranking, the lienholder would be forced to wait for a third party to initiate proceedings against the ship. Third party claimants, knowing that the lienholder had to wait or risk losing its lien interest, might not seek judgment against the ship in the hope that the lienholder would lose patience and act in a way that resulted in the loss of the possessory lien. *Babcock* effectively provides possessory lienholders with the ability to actively enforce their liens through the combined effect of admiralty enforcement *in rem* and the preferred status afforded such claims at common law.

This ability appears to clash with the self-help character that Jackson argues ought to be consistently preserved across all areas of law.¹⁴³ The result in *Babcock* demonstrates a judicial preference for pragmatism over purity of traditional legal concepts. The possessory lien is no longer enforced only by the continued possession of the res

¹⁴³ Jackson, above n 35, [20.40].

against the interests of the owner. The lienholder can elect to use its statutory right to an action *in rem* to arrest and seek judgment against a ship, resulting in its sale, while maintaining the elevated priority ranking given to possessory liens. Consequently, possessory lienholders have increased power to demand payment from debtors. The shift to this position from merely a self-help remedy should not be controversial, as the self-help character had already been removed by the provision of statutory power of sale. To prevent possessory lienholders in the maritime context from applying for the judicial sale of a ship would be inconsistent with the powers provided by statute.

It is unclear how reasonable a possessory lienholder would have to be in enforcing its rights in admiralty. The statutory power of sale under the *Wages Protection and Contractors' Liens Act Repeal Act 1987* is subject to certain requirements: the debt must have been unpaid for no less than two months and the lienholder must give no less than a week's written notice of sale.¹⁴⁴ A possessory lienholder might be wise to follow all these requirements scrupulously even if enforcing its claim in admiralty, as the Admiralty Court retains the discretion to lower the priority of the lienholder's claim if it has acted inequitably. In any event, the public process of a judicial sale in admiralty is likely to meet or surpass the fairness requirements of the statutory power of sale.

From a broader perspective, *Babcock* is consistent with the approach to clashes between the admiralty jurisdiction and claims based on other areas of law; namely, that it is best to accommodate all of the claims against a vessel into one comprehensive and determinative consideration. The claims may be ranked and satisfied as far as possible by the proceeds of judicial sale, allowing the preservation of the fundamental maritime principle that judicial sale provides unencumbered title. This approach is preferable as other methods do not finalise all claims against a ship and thereby provide much less commercial certainty to all relevant parties.

The reasoning in *Babcock* is likely to be challenged in the future as the decision was based to a large extent upon policy considerations and the equities of the parties' actions, as well as the dubious invocation of the fiction of a notional lien. The argument that the possessory lienholder took actions inconsistent with the possessory lien could also be raised in future cases. When such a case arises again in future, it should be decided on different reasoning. It is hoped that this article's explanation of the issue in *Babcock* could be applied to provide a more compelling solution to this area of law.

5 Difficulties at the Fringes

The issue of reconciling common law possessory liens with admiralty law is relatively straightforward when considered on the facts of *Babcock*. However, difficulties continue to exist when the conflict between the two areas of law occurs in more complex factual scenarios.

An example of such a situation is where the possessory lienholder competes with a party who has a maritime lien that arose before the possessory lien was created. This position is not farfetched; its occurrence is easily foreseeable. A pre-existing maritime lien can be created in relation to the salvage or collision of a ship. The ship is sent to a ship repairer for repairs, and final payment is not made. The ship repairer maintains possession of the ship and eventually commences admiralty proceedings to enforce its claim. The maritime lienholder intervenes and applies for its maritime lien to also be recognised by the Court. When it comes to ranking the claims, the pre-existing maritime lien would have priority over the possessory lien,¹⁴⁵ unlike in *Babcock*, where the ship repairer's possessory lien trumped the competing ship mortgage. As the maritime lien would be paid out first, it is possible that the possessory lien interest would not be fully covered by the remaining proceeds of the judicial sale.

The possessory lienholder in such a scenario might prefer to attempt a private auction of the vessel pursuant to the *Wages Protection and Contractors' Liens Act Repeal Act 1987* to satisfy its claim, instead of initiating admiralty proceedings that would result in the maritime lien outranking its possessory lien. If a private sale was achieved before the maritime lienholder became aware of this and initiated admiralty proceedings, the maritime lien would continue to attach to the ship post-sale. The maritime lienholder could instigate admiralty proceedings at a later date and the purchaser would be faced with satisfying the maritime lien claim or losing the ship by judicial sale.

¹⁴⁴ *Wages Protection and Contractors' Liens Act Repeal Act 1987* (NZ), s 3.

¹⁴⁵ *The Gustaf*, above n 69.

In contrast to *Babcock*, there is no elegant solution to this problem. One potential solution would be to amend the statutory power of sale to preclude private sale of ships. As a result the statutory power of sale would not apply to admiralty scenarios and any attempt to satisfy a claim through sale would have to be administered by the Admiralty Court. In any event, statutory reform would be desirable to conclusively resolve such a head-on collision between the admiralty jurisdiction and the common law possessory lien. Such reform should provide much greater clarity on how the specialist admiralty jurisdiction intersects with the general jurisdiction. Although the resolution of the clash in *Babcock* can be explained, the issues that remain at the fringes still require statutory intervention.

6 Conclusion

Babcock required the handling of a potentially thorny conflict between common law possessory liens and admiralty law. The result, that possessory lienholders may initiate admiralty proceedings to obtain payment of outstanding debts from a judicial sale, is welcome. However, the reasoning in *Babcock*, like the Singaporean cases on which it relies, does not provide a defensible and clear understanding of the result. Priestley J grapples with the nettle, but fails to grasp it decisively. *Babcock* revives the unhelpful fiction of the notional lien and relies overly on policy arguments and the equities of the parties' behaviour. Although the policy reasons against stalemate situations remain persuasive, the notional lien concept unnecessarily clouds the key issue of how the possessory lien interest may be transferred from the ship to the proceeds of sale while avoiding loss of possession arguments. This article has advanced a more cogent theoretical basis for the result in *Babcock*, which should, if adopted, allow future Admiralty Courts to seize the nettle safely.

Babcock merely represents one manifestation of a broader problem. Admiralty claims against vessels may encounter conflicting claims from other areas of the law that compete for the one security that is the ship at stake. The common law possessory lien is joined by other competitors such as port authorities, forfeiture provisions and insolvency proceedings. It is suggested that the preferable approach to any struggle over the same ship is that an Admiralty Court should be able to subsume all claims into one final determination. This approach preserves the fundamental principle that judicial sale provides unencumbered title, and provides commercial certainty to all relevant parties.

While this approach serves to rationalise the facts of *Babcock*, several difficult scenarios on the fringes remain more problematic. It is possible that possessory lienholders could strategically exploit statutory powers of private sale to circumvent the admiralty process and disadvantage other maritime creditors. It is difficult to envisage elegant solutions to such clashes, which require legislative intervention to clarify and articulate the intersection between admiralty and other areas of law.