F.S. Dethridge Memorial Address

The Hon. Mr Justice William Waung
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The Dethridge Memorial Address

The Honourable Mr. Justice Waung

Adelaide – 30th September 2004

MARITIME LAW OF PRIORITIES

EQUITY, JUSTICE & CERTAINTY

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1. I am deeply honoured to be invited to give this F.S. Dethridge Memorial Address to the 2004 Conference of the Maritime Association of Australia and New Zealand. When I was shown the formidable list of the past distinguished speakers of the Dethridge Memorial Address, it was too late to back out of my commitment. I was not confident that I will be able to meet the high standard established for this Memorial Address.

2. I hope you will forgive me if in this Address, I do not attempt to lay down any new principle of maritime law or shed any new light on the admiralty law of the common law world. I have chosen my topic for this Address not because there is any new learning I can impart to this specialist audience but because I hope that it might be possible, with this Address, to generate some interest on this subject which is normally regarded as the backwater of maritime law.

3. Maritime Law of Priorities is surprisingly, not a fashionable subject of maritime law. Law students hardly study it, with the sole exception

possibly, of students of Dr. Michael White. There are very few cases of real importance on the subject. And yet Priority together with Jurisdiction are the two most important aspects of Admiralty Actions in Rem.

4. Jurisdiction to proceed in Rem (which is generally speaking governed by statute) is of fundamental importance because it provides what particular maritime claim can be made by way of an action in Rem. Jurisdiction is the big hurdle to overcome in Admiralty proceedings and this hurdle is right at the beginning of the Admiralty process. A failure to establish Jurisdiction in Admiralty action in Rem brings the whole maritime claim crashing down right at the beginning.

5. But what happens, at the end of the admiralty proceedings, namely the establishment of Priorities or the ranking in Admiralty actions in Rem is equally important. Ranking is of course the process whereby proceeds of sale of a ship sold by the Admiralty Court is distributed to the various claimants in an Admiralty queue with those at the top of the queue usually scooping up most of the proceeds of sale and those at the end of the queue hoping that some crumb might still be left. A low ranking in most cases will mean that the maritime claimant walks away empty handed.

6. It is interesting to note the contrast between these two important aspects of Admiralty law. The Jurisdiction to proceed in action in Rem is generally governed and limited by statute in most common law jurisdictions such as (a) the United Kingdom (b) Hong Kong (c) Singapore (d) Malaysia (e) Australia (f) New Zealand and (g) Canada.

7. The maritime law of Priorities is however, generally speaking not governed by statute. Priority in most common law jurisdictions, is largely judged-made law. This seems to be the case in the British based Priorities system which includes United Kingdom, Hong Kong, Australia, New Zealand, Singapore, Malaysia and Canada. South Africa and USA have their own elaborate statutes providing for their Admiralty law of Priorities. There is however no uniform principle of Priorities in any of these common law jurisdictions.

8. Cases on Maritime Priorities in these common law jurisdictions are decided by reference to various factors such as:-

(a) legal precedent;

(b) equity and justice[1];

(c) public policy (namely the public policy for advancing safety of navigation, thereby giving high priority to damage lien [2], public policy for the encouragement of saving of life and property, thereby giving high priority to salvage and public policy for the protection of mariner, thereby giving high priority to wages of seamen.)[3];

(d) Ranking Rule (or what is sometimes called the Lien Class Rule) providing for ranking dependant on the class of the claim: whether maritime lien class, mortgage class or statutory lien class;

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[1] advocated by Thomas on *Maritime Liens*, para 418 and see Tetley on *Maritime Liens and Claims*, 2nd ed. Page 878 note 141

[2] see *The Veritas* [1901] P 304 but now see *The Ruta* [2000] 1 Lloyd's Rep 359 at page 364 with Steel, J. referring to that public policy as "somewhat quaintly".

[3] The difficulty is which public policy should prevail when there is a conflict between various strands of public policy.

(e) Ranking Rule whereby ex delicto (damage) lien is ranked ahead of ex contractu (e.g. wages) lien [4]

(f) Ranking Rule (or what is sometimes called the Inverse Order Rule) whereby lien of the same class is ranked inversely according to the timing of the accrual of the claim;

(g) Ranking Rule (or what is sometimes called the Equality Rule) whereby lien of the same class and/or of the same nature enjoy equality of lien, or pari passu (e.g. damage lien);

(i) Ranking rule (or what is sometimes called the Preservation of Res Rule) whereby higher priority is given to claim which effects a preservation of prior lien or ship (e.g. salvage high priority.)[5];

(j) particular circumstances of the case which in equity justifies a departure from the usual Ranking order (for example *The Ruta* where the crew was given higher priority than the damage lien)

(k) the ranking of maritime claims provided in the various International Conventions on Maritime Liens.

9. The lack of certainty due to these conflicting considerations and conflicting Ranking Rules produces the following results:-

(1) There is often (or at least from time to time) no predictable principle of Priorities being applied;

(2) There is no uniformity on the Law of Priorities or even on all the applicable Ranking Rules and;

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[4] see The Aline (1839) 1 W. Ro. 111 and *The Veritas* [1901]P 304

[5] See also *The Veritas* where it was said "they are liens in respect of claims for services rendered, and it is reasonable that services which operate for the protection of prior interests should be privileged above those interests" and see also *The Inna* [1938] P 148

(3) There had been in the past and continue to be extreme difficulty in achieving success with agreeing or implementing International Conventions on Priorities. Despite all the work put in by the various national Maritime Law Associations and the CMI, the international maritime community had not accepted the three Conventions on the Maritime Law of Priorities, namely the Brussels Convention on Maritime Liens and Mortgages of 1926 (adopted by most of the Continental European countries but not by any of the common law countries), the Brussels Convention on Maritime Liens and Mortgages of 1967 (not in force as not sufficient ratifications) and the Geneva Convention on Maritime Liens and Mortgages of 1993 (not in force).

10. There are only two countries with substantive statutory law on the Maritime Law of Priorities, namely USA and South Africa. South Africa is particularly noteworthy for its extensive coverage of statutory provisions on priorities. The Priorities systems in these two countries and that of continental Europe (France for example) are very different from the British based system of Priorities.

11. Modern commerce and shipping has now reached a stage where a ship in a short space of time, might find herself in any port in any foreign country and thereby be subject to the maritime law jurisdiction of that country with result which can vary greatly in terms of priority of ranking for those maritime claimants who make in Rem claims (whether by choice or by forced circumstances).

12. Against the aforesaid background of the wide differences of Priority laws of many countries (contrast the British based system with the US system and with Continental Europe system), an attempt to find a uniform internationally accepted system of Law of Priorities will require not only a proper understanding of the different Priorities systems and the reason for such different systems but an extremely difficult and possibly step by step effort to search for a system of Law of Priorities which is acceptable to the general international maritime community. The learned writings by Professor Berlingieri[6], Professor Tetley[7] and Professor Jackson[8] shed light on the underlying difficulties of achieving uniformity.

13. It is not the objective of this Address to tackle this large subject and I will leave it to some young and ambitious academic who has the energy and the ability to give to the Maritime world a proper treatise on the Maritime law of Priorities, a work which is crying out to be written.

14. My modest aim in this Address is merely to discuss some of the features of the British based system of the Maritime Law of Priorities and with your help, ponder on the implication of our present state of the law on Priorities.

15. The problem of Priorities and the necessity for its determination, only arise when a vessel has been sold by the Admiralty Court and the proceeds

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[6] Professor Francesco Berlingieri on *"Lien holders and mortgages: who should prevail"* 1998 Lloyd's Maritime Law Quarterly page 156; on *"The 1993 Convention on Maritime Liens and Mortgages"* 1995 Lloyd's Maritime Law Quarterly page 57.

[7] William Tetly on *Maritime Liens and Claims*, 2nd edition, page 910-2

[8] Jackson on *Enforcement of Maritime Claims*, 3rd edition Chapter 18 and in particular para. 18.121 to 18.124

of sale are not sufficient to meet all the maritime judgments in Rem. Admiralty in Rem claimants who are fortunate enough to obtain adequate security in the form of P & I Club undertakings or Bank guarantees of course do not participate in this Priorities process as these claimants look to their securities for payment of their in Rem Judgments. The determination of Priorities assumes critical importance when many in Rem judgment creditors compete for payment against an insufficient proceeds of sale to meet all the in Rem judgments.

16. In the every day life of an Admiralty Court of the British based system, the most common competition is between the wages, the mortgage, the cargo/charterparty interests and the necessaries. It is comparatively rare to encounter priorities arising out of claims by harbour and dock authorities under statutory rights or by possessory lien holders such as repairers. Collision damage claims usually result in the vessel sunk or club guarantee being furnished and they do not generally compete in the priority contest. Salvage claims again are generally secured and dealt with in London by arbitration and therefore again do not feature in the Priorities competition.

17. The usual and established ranking in the British based system of Law of Priorities (ignoring special rights provided by specific statute such as harbour authorities or wreck removal, and the infrequent occurrence of bottomry and possessory liens) is as follows:-

(1) Court costs, cost of arrest and costs of sale of the vessel;

(2) Maritime liens:-

(a) Damage for collision (pari passu and not by inverse order see *The Stream Fisher* [1927] P 73 but ahead of earlier

salvage and ahead of earlier wages, see *The Linda Flor* (1857) Swab. 309 but probably behind later wages, see *The Ruta*);

(b) Salvage (inverse order inter se, see *The Veritas* [1901] P. 301) but behind later damage, see *The Inna* [1938] P 148 and ahead of wages, see *The Lyrma (No. 2)* [1978] 2 Lloyds 30);

(c) Wages and master's disbursements (pari passu see *The Leoborg (No. 2)* [1964] 1 Lloyd 380 and *The Royal Wells* [1985] Q.B. 86 but behind salvage whether earlier or later, see *The Lyrma (No 2)*);

(3) Registered mortgages (earlier date mortgage with priority);

(4) Statutory liens such as claims in respect of cargo, charterparty, necessaries, etc. (pari passu see *The Africano* [1894] P 141)

18. The top priority given to costs of arrest and costs of realizing the Res by court sale and costs of the Marshall or Bailiff is universally accepted in all systems. Court sale is the means of converting the arrested Res into proceeds of sale. It is only right that all charges and costs relating to such arrest and sale should be given the first and paramount priority.

19. What receives less universal acceptance is:-

Firstly, the relative ranking amongst the other three classes of claimants:-

(a) the maritime lien;

(b) the mortgage and;

(c) the necessaries and;

Secondly, the ranking within the same class but between claims of different nature, for example salvage and wages, collision and wages; and
Thirdly, the ranking within the same class but between claims of the same nature, for example necessaries.

20. Of the various Ranking Rules adopted or applied by the British courts in the past, 4 Ranking Rules seem to stand out as of Fundamental Importance and they are what I may call as:-

Firstly, the Lien Class Rule;
Secondly, the Inverse Order Rule;
Thirdly, the Preservation of Res Rule; and
Fourthly, the Equality Rule.

21. The Lien Class Rule ranks the maritime lien higher than the mortgage (which of course is neither a maritime lien nor what is commonly called statutory lien) and ranks mortgage higher than the statutory lien (such as cargo claim or necessaries). The case law seems to suggest that largely, this Lien Class Rule is applied by all maritime courts under the British system of Priorities.

22. The Inverse Order Rule ranks claims of the same nature within the same class in the inverse order of the accrual of the claim. The Inverse Order Rule can also apply to claims of different class. Salvage claims are subject to the Inverse Order Rule namely that later salvage is given higher priority than the earlier salvage, even though they are of the same class (maritime lien) and of the same nature (salvage). It is possible that the Inverse Order Rule is in reality an application of the Preservation of Res

Rule. The Inverse Order Rule does not apply to Collision Damage claims, as by definition, a subsequent collision damage cannot preserve the Res or the earlier collision lien. Collision claims are governed by the Equality Rule.

23. The Preservation of Res Rule ranks a claim higher if such claim has effected the preservation of the ship and as a consequence also the preservation of other liens which are in the Priority competition. A salvage subsequent to earlier wages or earlier collision damage preserves the Res and enables the wages lien and damage lien to be preserved so that they can then be exerted against the proceeds of sale. Obviously such later salvage deserves to rank higher than those earlier liens as without the salvage there would be no Res to be realized.

24. The Equality Rule simply seeks to rank claims of the same nature or of the same class pari passu, namely pro rata or equally. Examples of this would be the equality of damage claims, the equality of wages and the equality of statutory liens.

25. In the past, these four Ranking Rules have been given weighty considerations in the determination of Priorities. In fact one can go futher and say that they are regularly applied. These 4 Ranking Rules largely form the basis of most of the decisions on Priorities of the Admiralty courts.

26. There is however one other Factor which is not regarded as a Ranking Rule but which has played a substantial part (or havoc as some people might call it), namely equity or justice. In many reported cases on Priorities it will be observed that the Court in order to depart from accepted Ranking Rules

will call in aid "equity or justice" as reason or justification for departing from the established Ranking Rules and to give a particular claimant a higher ranking.

27. The recent case of *The Ruta* [2000] 1 Lloyd's Rep. 359 is an excellent example of the role played by "equity or justice" in the determination of the priority of a claim for wages competing against the claims of damage by collision. The vessel Ruta was involved in collision with 3 anchored yachts and after these collisions new crew was taken on but not paid. The competition on priorities is between the crew for wages and the 3 yachts for collision damage. The proceeds of sale could not meet all 4 claims. Steel, J. held that the later wages deserved a higher priority than the three earlier collision damage claims and did not therefore follow the usual Ranking Rule in relation to maritime lien, putting tort claim ahead of contract claim, namely ranking damage ahead of wages.

28. The learned Judge said at page 361 under paragraph 11 the following:-

> "…. It was their case that there was no hard and fast rule in respect of this (or indeed any other) priority issue. The Admiralty Court, it was argued, approached the question of priority in a broad discretionary way, having regard to considerations of equity and public policy."

Then at page 364 of the Judgment under paragraph 21, in his conclusion he said:-

> "I spoke at the beginning of this section of my judgment of the suggestion in some of the text books that there is a rule whereby a damage lien has priority over a wages' lien. It is clear even from the restricted citation of authority set out above that questions of priority are not capable of being compartmentalized in the form of strict rules of ranking. The general approach is accurately summarized in Thomas, Maritime Lien, B.S.L. vol. 14 at par. 418:

> The Admiralty and Appellate Courts have adopted a broad discretionary approach with rival claims ranked by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstances of each case."

29. What is of particular importance is the Judge's endorsement of the summary in *Thomas on Maritime Liens,* of a broad discretionary approach of the Court based on four factors of (1) equity (2) public policy and (3) commercial expediency with the aim of doing (4) what is just in the particular circumstances. In some ways it could be said that Steel, J. was not endorsing any heresy but merely stating what was long known in Admiralty as to the role played by equity.[9] The late Admiralty Registrar of England, Mr. G.H. Main Thompson said in his article in the old Halsbury Laws of England, 2nd. Edition, Volume 30 at page 955 that Priorities in Admiralty rested on "no rigid application of any rules but on the principle that equity shall be done to the parties in the circumstances of each particular case."

30. What is the implication of *The Ruta* judgment and the clear endorsement by the Admiralty Court of the broad discretionary approach with the aforesaid 4 factors of (1) equity (2) public policy (3) commercial expediency and (4) justice. Does it mean that Ranking Rules (including the 4 Fundamental Ranking Rules stated earlier) are no longer of significance or

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[9] **Thomas on *Maritime Lien* in the passage quoted in The Ruta continued at page 234 as follows:- "This is not to suggest that the law is capricious, erratic or unpredictable. Arising from the "value" framework within which the Courts operate there have emerged various principles which are capable of providing reliable signposts to the likely attitude of the Courts. Such indeed, on occasions, is the degree of predictability that many commentators have tempted to represent the operative principles as firm "rules of ranking". Whilst this approach is understandable it would appear not to be strictly accurate, for such "rules of ranking" are no more than visible manifestations of an underlying equity, policy or other consideration. Upon the underlying equity, policy or other consideration being displaced, either for want of substantiation or from the competitiveness of a greater equity or policy, so also the "rule" becomes inoperative or inapplicable. In the realm of priorities there would appear to be no immutable rules of equity, but only a number of guiding principles, some of which are categorized .... "**

applicable? Are Ranking Rules going to be displaced by the four factors of equity, public policy, commercial expediency and justice?

31. Are we entering into a new age of Priority Law? Speaking for myself, I cannot say that I will disapprove of a new age. There are in fact, strong and powerful arguments in favour of the Law of Priorities finally coming of age, so that it can shake off the shackles of antique decisions, conflicting judgments based often on, no consistent principle and with resolution of conflict of principles lacking in transparency or sound reasoning.

32. But if we are entering into a new age, then it might be difficult to forecast what will be the future course of our British system of Priorities and to what extent the various Admiralty Courts of the British system will take up the invitation of the broad discretionary approach given to us by *The Ruta*.[10]

33. What will be of great interest to the general Admiralty community and to the various Maritime Law Associations of the common law world, including your Maritime Law Association of Australia and New Zealand is whether what had been a reasonably stable ship flying under the flag of the British system of Priorities will be sailing into a stormy sea of uncertainty and that there will be difficulty in predicting what will be the outcome of future Priority contests.

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[10] **Alternatively, if we are not entering into a new age, but the law on Priorities is now no different from what it has always been namely, wholly flexible (with no fixed rules) as suggested by Thomas, and based on equity, public policy and other considerations under the umbrella of broad discretion, then it will be important to study the implication of this apparent uncertainty and unpredictability.**

34. Let me give a few examples of what might be argued if we are indeed entering a new age and that the maritime law of Priorities is loosely governed by broad discretion with no fixed Rules of Ranking.

Voyage Rule and Time Rule

35. It is curious that the British based system does not provide or even take into account the Voyage Rule which is a predominant feature of the French maritime law (based on the Brussels 1926 Convention) and which also features in American maritime law.

36. The Brussels 1926 Convention provides by Article 6 that maritime claims secured by a lien and attaching to the last voyage have priority over those attaching to previous voyage. Article 5 provides that claims relating to the same voyage rank in the order set out in Article 2, namely in the ranking order of crew, then salvage, then collision, then disbursement and necessaries essential for the voyage from foreign port. By Article 3, mortgage ranks behind claims in Article 2. By Article 9, maritime liens expire after one year and for necessaries, the life of the lien is only 6 months. The one year period is of course also repeated in the Brussels 1967 Convention and in the Geneva 1993 Convention.

37. France ratified the Brussels 1926 Convention. (Britain was signatory but did not ratify. Australia was not signatory.) The French law of Priorities therefore followed the Brussels 1926 Convention and the Voyage Rule applies, namely later voyage ranks before earlier voyage and claims within same voyage rank in the order of crew, salvage, collision, foreign

necessaries and mortgage. The One Year period (6 months for foreign necessaries) provided in the 1926 Convention also applies under French law.[11]

38. The French concept of Voyage period was based on a round trip of foreign voyage of certain duration in the old days. This was also the theory behind the 19th century American Voyage Rule. In America, the Voyage Rule was apparently displaced by season rule (for vessels on the Great Lakes) and calendar rule (e.g. 40 days for tugs in New York Harbour, based on 30 days credit to settle monthly bill and 10 days grace) and the one year rule. [12]

39. The emphasis under the French law and under the Brussels 1926 Convention is therefore on the Voyage and with the value of each maritime privilege of short duration related to the voyage (in any event of one year) and with privileges under later voyage taking precedence over privileges under earlier voyage.

40. The expiry of the maritime lien after one year and the priority given to later voyage under both the 1926 Convention and the French law puts the onus and pressure on the maritime claimant to exercise the maritime privilege by arresting the vessel within the period or even immediately after the Voyage as subsequent Voyage will gain priority. The pressure on the maritime claimant is therefore double-fold in the sense both of pursuing the Vessel immediately after the Voyage (for fear of higher priority given to

[11] see Tetley on *Maritime Liens and Claims*, 2nd ed. Page 903-5
[12] see Tetley on *Maritime Liens and Claims*, 2nd ed. Page 871 and *"Priorities on Maritime Lien"*, 69 Harvard Law Review 525 and Benedict on *Admiralty*, 7th ed. Volume 2, Section 51

later voyage claimants) and in any event within one year (for fear of losing the status of maritime lien).[13] This is in strong contrast to the British system of allowing the credit on the vessel to be built up and for subsequent liens to be created while earlier lien-holders can sit on their hands and still retain their high priority. A shorter life of the maritime privilege concentrates the mind and therefore wipes the liens of the vessel regularly clean.

41. One consequence of the Voyage Rule is that it often has the effect of reducing the creation of subsequent liens. By forcing an early realization of the lien after one voyage, the insolvent shipowner is often liquidated by early arrest followed by sale of vessel by the court, before the ship is able to create any new lien under a new voyage. The lien slate, so to speak, is wiped clean after one voyage or at most two and a lien free ship then can start another new voyage.[14]

42. In *The Ruta*, Steel, J. took into account crew's high priority or ranking given by the 1926 Convention in deciding that the crew should be given higher priority than the collision damage claim of the yachts. If equity, public policy, commercial expediency and justice give to the modern Admiralty Court the broad discretion to consider what should be the proper ranking in the modern world, it may well be possible to argue that the Voyage Rule (if not the Time Rule which will require legislation to be effective) can be applied, so that claims relating to the last voyage should

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13 "An established period has the virtue of placing parties on notice of their rights in advance of judicial decision or in permitting the court to reach a determination with less question .... "(see Benedict on *Admiralty*, 7th edition, Volume 2, Section 51)

[14] By way of a side note, I wish that we Judges can operate also on a Voyage or Season Sitting Term Rule whereby all judgments outstanding (treated as lien on Judge's health) must be cleared before a new Season Sitting Term can start. If this is the Rule for Judges, our court diary will be much more civilized and not the listing of killing back-to-back cases.

out rank the claims relating to earlier voyage and that in relation to the same voyage the old ranking can still prevail.

43. If the Voyage Rule is introduced into the British system of Priorities, it might immediately transform Admiralty litigation and put a premium on immediate arrests (after a voyage) and on furnishing securities to avoid such arrests. But what is perhaps even more significant is that with such a Voyage Rule, the stale claims (but not time-barred) will be outclassed and become extinct as they should be. A bunker supplier who supplied bunker to the final voyage which led to the arrest and to the production of the proceeds of sale is more deserving of a higher ranking than say even wages which went back 4 voyages of some 2 years old. Wages as maritime lien under our present system outranks necessaries, which is merely a statutory lien and yet in terms of who had contributed more to the preservation of the vessel (Preservation of Res Rule/Inverse Order Rule), the later bunker supplier can be said to merit a higher ranking. If the Voyage Rule applies, then claims under the last Voyage outclass claims of earlier Voyages.

Preservation of Ship and Liens

44. In the reported cases, the Ranking Rule of Preservation of the Res seemed to have been mainly applied to claims of later salvage being given higher priority than the earlier Damage Lien. *The Veritas* [1901] P. 304 is the leading case applying that principle. The proceeds of sale of the Veritas was insufficient to meet the claims of both the first salvor and the second salvor. In awarding the second salvor the higher priority, Gorell Barnes, J. said at pages 312-3:-

"It would seem clear that maritime liens may be divided into classes-first, liens arising ex delicto; and secondly liens arising ex contractu or quasi ex contractu. It is almost obvious that liens of the latter class must in general rank against the fund in the inverse order of their attachment on the res. They are liens in respect of claim for services rendered, and it is reasonable that services which operate for the protection of prior interests should be privileged above those interests. Thus in the present case .... the second set of salvors are preferred to the first because the first share in the later benefit conferred on the common subject of the liens."

45. In *The Lyrma (No.2)* [1978] 2 Lloyd's Rep. 30, the Admiralty Judge Brandon applied this Preservation of Res Rule to a salvor and granted the salvor a higher priority than the crew (for wages both earned before and after the salvage). This was said by Brandon, J. at page 33:-

"It has long been an established principle that a maritime lien on a ship for salvage has priority over all other liens which have attached before the salvage services were rendered. The basis for the principle is an equitable one, namely that the salvage services concerned have preserved the property to which the earlier liens have attached, and out of which alone, apart from personal remedies against the ship owners, the claim to which such liens relate can be justified. The principle has been applied in relation to earlier salvage services in The Veritas [1901] P. 304; in relation to earlier wages in The Mons [1932] P 109; in relation to earlier damage in The Inna [1938] P. 148."

46. The case law however suggests that this Preservation of Res Rule has been applied only to salvage claims. But I see no reason why the reasoning underlying this Principle of Preservation of Res is not equally applicable to many other claims deserving a higher ranking. Take for example a bunker supplier which had supplied bunker in a remote port in Indonesia and without which the ship could not proceed on her last voyage to Singapore, where she was arrested by the mortgagee. The vessel was sold in Singapore and there was insufficient proceeds of sale to meet the claims of the mortgagee, the wages and a variety of statutory lien claimants including the bunker supplier. Applying the ordinary Ranking Rules under the British system of Priorities it would probably mean that either the bunker supplier will get nothing or might have to share what is left (after the wages and

mortgagee) with other statutory lien holders on a pari passu basis. The reality is that without the essential bunker supplied in the remote port of Indonesia, the Res could never either reach Singapore or be realized for a high price by the Singapore court. In many ways, it could therefore be said that not only has the bunker supplier preserved the Res for all lien-holders (including those of the wages and mortgagee) but has preserved or provided the means to produce the high value realized for the proceeds of sale (in the remote port of Indonesia the value realized would be far less) and that as preserver of the Res, the bunker supplier deserved in equity or, more accurately pursuant to the Preservation of Res Rule, to rank ahead of everyone including the mortgagee and the wages.

47. Another example of this Principle of Preservation of Res being applied could be a situation with cargo owner whose cargo was not carried and who was claiming for the return of the freight which had been pre-paid to the owners of the ship but which was channeled by the owners to purchase essential supplies for the engine to undertake the last voyage. Between that particular cargo owner who was claiming as a statutory lien-holder and say the mortgagee or crew, the normal Ranking Rules would rank that cargo owner behind the mortgagee and crew. But the particular preservation of the Res with the freight money of the cargo-owner may well call for the Court to exercise its broad discretionary power and apply the Preservation of Res Rule because by the payment of the freight, the cargo owner helped to preserve the liens of the other claimants including those who normally would enjoy higher priority.

48. In America this Principle of Preservation of Res is applied and given great weight. This was said in Benedict on *Admiralty*, 7th ed. Volume 2 at Section 51:-

"... in cases of benefit to the ship, the theory is that the earlier lienors, having a proprietary interest in the ship, have been benefited by the services rendered to all interests in her by the later lienors." The case cited by Benedict in support of that proposition is what was said in *The William Leishear* (1927) A.M.C. 1770 by Coleman, D.J. at page 1771:-

> "..... in this country, two theories exist as the basis of admiralty doctrine. They are first, that each person acquires a jus in re, and becomes a sort of coproprietor in the res, and therefore subject his claim to the next similar lien which attaches; and second, that the last beneficial service is the one that continues the activity of the ship as long as possible, and therefore should be preferred, provided that what is produced or contributed to by the service is a voyage.... Under the second theory, there is the consideration that beneficial additions subsequent to earlier liens add to the value of the ship, and that, therefore, to prefer such additions will not deprive the earlier lienors of any interest which they would have had, if no such services had been rendered."

49. My general impression is that the admiralty practitioners under the British system of Priorities accept too readily the traditional Ranking Rules and in particular the Ranking Rules putting the wages and the mortgage above the statutory liens and that therefore very often the Priority contests are lost by default, without argument or resistance and sometimes even by agreement. When properly understood, the Ranking Rule of Preservation of Res can alter the traditional ranking order and may give a statutory lien-holder a chance to gain priority over even the maritime liens or mortgage.

Sister Ship Priority

50. What is the Priority of a statutory lien which is a sister ship claim. How does that sister-ship claim statutory lien compete with a

straightforward statutory lien against the offending ship. In *The Leoborg (No.2)* [1964] 1 Lloyd's Rep. 380, one of the claims was against the sister ship in respect of wages earned on the offending ship. The claim would of course be a maritime lien against the offending ship but it was only a statutory lien against the sister ship. Hewson, J. left the point open for future discussion as whether to give the sister ship statutory lien of the engineer the same high priority of a maritime lien. But what the Court seemed to have done, by concession (and inadvertently), was to treat the claim of the engineer (by way of sister ship claim) as a statutory lien with equal Priority status as the necessaries claim by way of statutory lien against the offending ship (see page 384). Unwittingly or inadvertently, the Court equated a sister ship statutory lien as enjoying the same priority as that of statutory lien against the vessel itself.

51. To my knowledge, no case has directly decided this question of Priority of claims against the sister ship. The question is whether a statutory lien against the offending ship and a competing statutory lien against the sister ship should be treated in the same way or whether statutory lien based on sister-ship should be accorded a lower ranking. An example of say a claim for necessaries will explain the problem. Bunker is supplied by Oil Company A to the ship Adelaide I and diesel is supplied by Oil Company B to the ship Adelaide II. Both ships are owned by the same company and therefore are sister-ships. Oil company A arrested Adelaide II in a sister-ship arrest. Oil Company B also made claim in rem against Adelaide II. Should both claims be treated equally on Priorities, so that they rank pari passu or should Oil Company A (being a sister-ship claim) rank behind Oil Company B.

52. Considered from the point of view of Lien Class Rule, it might be argued that if maritime lien as a class ranks higher than mortgage and mortgage as a class ranks higher than statutory lien then sister ship statutory lien should be considered as an inferior sub-class of statutory lien and therefore should be ranked lower than a normal offending ship type of statuory lien. Considered further from the point of view of service towards the vessel Adelaide II, Company B could be said to confer more substantial benefit to Adelaide II while Company A conferred no benefit on Adelaide II (only to Adelaide I, the offending ship) and that therefore Company B is more deserving than Company A of a higher priority.

53. South Africa is unique amongst the maritime countries of the world in having enacted an elaborate statute law governing Priorities, which was described by Professor Hare in *Shipping Law & Admiralty Jurisdiction in South Africa* at page 107 as "a maverick approach which differs from the current practice of most maritime states." Section 311(5) of the Admiralty Jurisdiction Regulation Act of 1983 provides for a priority ranking of maritime claims in the order of [15]:-

possession followed by
salvage (1 year limit) followed by
equal ranking of wages, personal injury, collision damage,
repairs/necessaries, insurance premium/Club contribution
claims (all 1 year limit) followed by
mortgage followed by

[15] **see the Priority Table set out in Schedule A at page 108-9 of Hare on *Shipping Law & Admiralty Jurisdiction in South Africa.***

a number of other categories of claims followed by claims against sister ship.

54. The South African law on Priority therefore expressly provides for the sister ship claim to have a very low Priority. It is to be noted that in South Africa, even what we consider to be maritime liens enjoy only one year privilege and that except with salvage ranking high, all regular claims such as wages, collision and necessaries rank equally but ahead of the mortgage. The sister ship claims ranks behind mortgage.

55. Further it might be contended that under the later International Conventions relating to Priority of liens (the 1967 and 1993 Conventions came after the Arrest Convention of 1952), not only is there nothing said expressly about equality of the Priority of sister ship liens with the offending ship liens, but by implication, by reason of Article 5(1) of the 1993 Convention[16] providing that "no other claim shall take priority over such maritime lien" [set out in Article 4, namely wages, personal injury, salvage, pilotage, operational tort of vessel except for loss of or damage to cargo] "or over such mortgage ..." that the sister ship statutory lien is intended to be ranked lower than offending ship statutory lien.

56. There seem to be therefore substantial and considerable scope for the Court to conclude that sister ship statutory lien claim ought to enjoy a lower Priority than offending ship statutory lien.

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[16] **See International Convention on Maritime Liens and Mortgages 1993 reproduced in Appendix to Alcantara on *"A Short Primer on The International Convention on Maritime Liens and Mortgages 1993"* 1996 Journal of Maritime Law and Commerce, page 235.**

57. The contrary argument against a lower ranking for sister ship statutory lien would seem to be somewhat less compelling. It might be argued that what the statute has seen fit to confer, by way of admiralty in rem jurisdiction, on sister ship statutory lien should not be taken away at the Priority stage by the Court devaluing the sister ship statutory lien vis-à-vis the offending ship statutory lien. However, it has to be admitted that the two considerations might be somewhat different, one being Jurisdiction and the other being Priority.

58. In the learned discussion on this issue in the Australian Law Reform Commission Report on "Civil Admiralty Jurisdiction", the view was expressed that sister ship statutory claim should not have a lower Priority and the Report recommended that the matter should be left to the Court.[17]

59. But until this question comes up directly for decision by an Admiralty Court, it is difficult to predict whether under the British system of Priorities, a statutory lien against a sister ship will enjoy equal Priority as another statutory lien against the offending ship.

Equality Rule and Inverse Order Rule

[17] **"Finally, from an Australian point of view the subordination of transferred claims to wrongdoing ship claims would adversely affect the usefulness of surrogate ship arrest, which would be pointless from a security aspect wherever the ship in question was (having regard only to claims against it as a wrongdoing ship) insolvent. Consistently with the conclusion in para. 258, the question of the ranking of (transferred or non-transferred) statutory rights in rem should be left to the courts. But it should be specifically provided that a transferred claim is not to be given a lower priority than a statutory right of action in rem against the ship in question merely because it is a transferred claim." Para. 261 of ALRC 33.**

60. To a layman it seems at times, confusing if not capricious as to the way the British system of Priorities permits different and variable applications of The Inverse Order Rule and the Equality Rule. Amongst claims of the same nature or same class, Equality Rule is applicable for Collision Damage, for Wages and for Statutory Liens of different nature. Amongst claims of the same nature, salvage is however governed by the Inverse Order Rule while mortgage is governed by the opposite namely first registered mortgage gets first priority. But it gets even more complicated when claims are not of the same nature. So when the competition is between say claims of different nature but all of the same lien class, for example all belonging to the maritime lien class, then Inverse Order Rule very often governs what claims get higher priority. Later salvage for example outranks previous damage and previous wages. Later wages, can outrank earlier damage, as happened in *The Ruta*. Although *The Lyrma (No. 2)* held that later wages ranked behind earlier salvage, the decision turned on its particular facts. If it can be established that later wages did contribute to the preservation of the Res, then the Preservation of Res Rule would apply and later wages could be given higher Priority.

61. The British system of Priorities with Equality Rule and Inverse Order Rule applying to different situations is to be contrasted with for example the clear rules set out in the 1926 Convention and the 1993 Convention. Under the 1993 Convention, there is first a clear ranking rule, not affected by time (Article 5 rule 2) so that the ranking order is wages, injury, salvage, pilotage, collision tort. Time only affects the salvage claims inter se and with Inverse Order Rule applying (Article 5 rule 4). Otherwise amongst each claim of the same nature, equality applies, irrespective of time (Article 5 rule 3) and that

is true for wages, injury, pilotage and collision tort. Time is only relevant in respect of salvage rendered subsequent to wages, injury, pilotage and collision and in such event, then later salvage has a higher priority (Article 5 rule 2).

62. In the light of the greater weight given to broad discretion of the Court, it might be possible in future for a different application of the Equality Rule or the Inverse Order Rule.

Relative Priority of Mortgage vis-a-vis other Claims

63. Lying at the heart of many substantial Priorities contests is the relative ranking position of the Mortgage. Mortgage by its nature is substantial in amount and certainly large by reference to the proceeds of sale. Generally speaking, mortgage will take up if not the whole of the proceeds of sale, at least a lion's share of the proceeds. Who therefore ranks before or after the mortgage or even pari passu with mortgage makes all the difference to the recovery of a claim. The South African system puts mortgage practically at the bottom of the queue and South Africa is therefore most unpopular with banks. The British system puts the mortgage very high on the Priorities ranking and therefore banks look favourably towards jurisdictions such as Hong Kong and Australia. The International Conventions put the mortgage lower than under the British system.

64. The struggle by the international community, for the last 80 more years, over the contents of the various International Conventions, all turn on the relative position of the mortgage (the banking interests) in the ranking

order of Priorities. As Professor Jackson said in his book "In so far as difficulty in reaching agreement stems from priority on maritime liens over mortgages—the conflict between the operating and financial interests—it is questionable whether national maritime interests are best served by the reluctance to concede that the international list might not entirely match the domestic list."[18]

65. The banking interests however is not only opposed to the lower ranking of the mortgage in the International Conventions but they are also opposed to the shorter shelf life of the maritime claims under the International Conventions. It is not unusual for banks to allow a delinquent mortgage to linger on until the banks are forced to act because of the arrest by cargo interests or wages or necessaries. Under the British system, no price is paid by the banks for the delay in enforcing its mortgage. The high Priority given to the banks under the British system ensures that the banks are generally paid in full including quite often very large default interests. If the Voyage Rule or Time Rule or the Preservation of Res Rule is applied, there will be earlier liquidation of the vessel by other claimants and the banks will be put into disadvantageous position.[19] But until the Court is faced with the problem one day, there must continue to be uncertainty as to whether the banks can confidently expect to enjoy the high priority given to them so far by the Ranking Rules (even in situations which might be considered unjust to the other claims).

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[18] **Paragraph 18.124 of Jackson on *Enforcement of Maritime Claim*, 3rd edition.**

[19] **In Fraser Shipyard v "Atlantis Two" (June 11, 1999) No. T-11-98 (F.C.T.D.) (reversed in part July 28, 1999), the Canadian Court in the exercise of its equitable jurisdiction, granted to a ship-repairer without possessory lien, an enhanced priority against the mortgagee, to the extent that the repairs increased the value of the Res.**

Certainty and Equity

66. Is there then uncertainty in the Law of Priorities. The old fashion view is that much of the law on Priorities was settled long ago. This could be gathered from text books such as Roscoe on *Admiralty Jurisdiction and Practice*, 1931, 5th ed. Chapter XI; Price on *The Law of Maritime Liens*, 1940, Chapter XI and McGuffie on *Admiralty Practice*, 1964, Chapter 39.[20] Thomas on *Maritime Liens* in 1980 by referring to the broad discretion of the Court could be said to cast doubt on the stability of the established Ranking Rules being always applied. In some ways Thomas in his book was echoing the sentiment of Stewart-Richardson of the uncertainty of the law on Priorities.[21] Toh in his book on *Admiralty Law and Practice*, writing in 1998, believed that Thomas went a little too far. He said[22]:-

> "It is probably going a little to far to say, as the commentator Thomas does, that 'in the realm of priorities, there appears to be no immutable rules of law, but only a number of guiding principles' .... Given the regularity with which the courts apply the prima facie order of priority, it may fairly be said of the order that whilst not immutable, it is in fact very stable and is far more established than is suggested by the expression, 'guiding principles.'

Is the law then certain or uncertain.

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[20] **see in particular the Priorities Table summarized at paragraph 1574.**

[21] **"With the court determining the question of priorities on liens on equitable principles and with the innovations of the Administration of Justice Act, 1956, it is impossible to ascertain any definite order of priorities... There is no doubt that those whose business it is to advance money or credit to ship owners would do so more readily if the position as to priorities of liens were more certain. The priority given to liens ex delicto, for salvage services and for wages would hardly seem equitable or justifiable in present circumstances. It may be that the time has come for the legislature to intervene and bring logic and certainty into the question of priority of liens on ship." A.L.G. Stewart-Richardson on *"Liens on Ships and their Priorities"* [1960] Journal of Business Law, 44 at pages 49-50.**

[22] **Toh on *Admiralty Law & Practice*, 1998 at page 300, note 25.**

67. It is clear that the maritime world has changed very much from the time when Dr. Lushington and his successors as Admiralty Judges[23] were deciding cases on Priorities requiring conflicting principles to be resolved. Much of the old law might have to be revisited and reviewed in the light of changes over the last 80 years, since the Brussels 1926 Convention was signed. The Arrest Convention of 1952 introducing sister ship arrests (enacted in law by most jurisdiction operating the British based system) is a prime example of how the world has moved. Public policy considerations have changed over these years so that the high priority or heavy weight given to certain liens might no longer be so deserving of protection by the Court.

68. It has to be recognized that the price to be paid under the British based system of allowing equity, public policy and broad discretion entering into the Priorities contest discretion consideration is Uncertainty. With no statute law on Priorities, the Admiralty Court under the British system might indeed be entering into a new age. Some of you sitting here today might even say that this is the time when in the litigation Sea, the Oyster of high Priority is obtainable by claimants who strive for it, naturally with the assistance of their able and resourable lawyers.

Conclusion

69. What is therefore the future of the Maritime Law of Priorities. For me, it is exciting. I believe the Maritime law of Priorities is entering into a new

[23] **Phillimore, Hannen, Butt, Jeune, Barnes (Lord Gorell), Evans, Hill, Duke (Lord Merrivale), Merriman, Wilmer, Hewson, Simon, Brandon (see page ix of Wiswall on *"The Development of Admiralthy Jursidiction and Practice since 1800"*.**

age capable of great development. If the Admiralty community takes up some of the points which I have discussed in this Address, then there is likely to be fascinating litigation on Priorities which will be of interest to all of us here. In restating possibly the old law, Mr. Justice Steel in *The Ruta* has lit a torch for us. We can now see that changes are possible, that justice in the spirit of the modern age can be achieved, if the Admiralty community wants to reshape the world of Priorities.

70. It has been my privilege to be able to re-think with you, some of the old law. I thank your Association for giving me a chance to explore this new world with you.

William Waung
Admiralty Judge, High Court, Hong Kong

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