Frank Stuart Dethridge Memorial Address 2004
Maritime Law of Priorities: Equity, Justice and Certainty

The Honourable Mr Justice Waung [*]

Admiralty Judge, High Court of Hong Kong

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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 would be able to meet the high standard established for this Memorial Address.

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 in this subject, which is normally regarded as a backwater of maritime law.

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*.

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 an Admiralty action *in rem* brings the whole maritime claim crashing down right at the beginning.

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

[*] The Hon Mr Justice Waung has been a Judge of the High Court of Hong Kong since 1994 and Admiralty Judge since 1995. He is a Barrister of Lincoln's Inn and Hong Kong.

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.

It is interesting to note the contrast between these two important aspects of Admiralty Law. The jurisdiction to proceed in an action *in rem* is generally governed and limited by statute in most common law jurisdictions, such as the United Kingdom, Hong Kong, Singapore, Malaysia, Australia, New Zealand and Canada.

The maritime law of priorities is, however, British-based. Priority in most common law jurisdictions is largely judge-made law. This seems to be the case in the British based priorities system, which includes the United Kingdom, Hong Kong, Australia, New Zealand, Singapore, Malaysia and Canada. South Africa and the 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.

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 of advancing safety of navigation, thereby giving high priority to the damage lien, [2] the public policy of encouragement of saving of life and property, thereby giving high priority to salvage, and the public policy of the protection of mariners, 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 a maritime lien class, mortgage class or statutory lien class,
(e) Ranking Rule whereby an *ex delicto* (damage) lien is ranked ahead of an *ex contractu* (for example, wages) lien, [4]
(f) Ranking Rule (or what is sometimes called the Inverse Order Rule) whereby a 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 liens of the same class and/or of the same nature enjoy equality of lien, or rank *pari passu* (for example, a damage lien),
(h) Ranking Rule (or what is sometimes called the Preservation of *Res* Rule) whereby higher priority is given to a claim which effects the preservation of a prior lien or the ship (for example, salvage), [5]
(i) 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), and
(j) the ranking of maritime claims provided in the various International Conventions on Maritime Liens.

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[1] Advocated by DR Thomas, *Maritime Liens* (1980), para 418. See also William Tetley, *Maritime Liens and Claims*, 2nd ed. (1998), p. 878 n 141.

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

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

[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". Also *The Inna* [1938] P 148.

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

(a) there is often (or, at least from time to time) no predictable principle of priorities being applied,

(b) there is no uniformity in the law of priorities or even about all the applicable Ranking Rules, and

(c) there has been in the past and continues to be extreme difficulty in achieving success on 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 has 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 there have not been sufficient ratifications) and the Geneva Convention on Maritime Liens and Mortgages of 1993 (not in force).

There are only two countries with substantive statutory law on the maritime law of priorities, namely the USA and South Africa. South Africa is particularly noteworthy for the extensive coverage of its 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.

Modern commerce and shipping have now reached a stage where a ship in a short space of time might find herself in any port in any foreign country and therefore be subject to the maritime law jurisdiction of that country with results which could vary greatly in terms of priority of ranking for those maritime claimants who might make *in rem* claims (whether by choice or through force of circumstances).

Against this background of wide differences in the priority laws of many countries (contrast the British based system with the US system and with the continental European 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 of Professor Berlingieri[6], Professor Tetley[7] and Professor Jackson[8] shed light on the underlying difficulties of achieving uniformity.

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.

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 the present state of our law on priorities.

The problem of priorities and the necessity for their determination, only arises when a vessel has been sold by the Admiralty Court and the proceeds of sale are not sufficient to meet all the maritime judgments *in rem*. Admiralty *in rem* claimants who are

[6] Francesco Berlingieri, "Lien holders and mortgages: who should prevail*"* [1998] LMCLQ 156 and "The 1993 Convention on Maritime Liens and Mortgages" [1995] LMCLQ 57.

[7] Tetly, *Maritime Liens and Claims*, 2nd ed., n 1 above, pp. 910-2.

[8] DC Jackson, *Enforcement of Maritime Claims*, 3rd ed., Chapter 18, especially paras. 18.121 to 18.124.

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 from insufficient proceeds of sale to meet all the *in rem* judgments.

In the everyday life of an Admiralty Court in 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 do not feature in the priorities competition.

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:

(a) Court costs, cost of arrest and costs of sale of the vessel,
(b) Maritime liens:
    (i) damage for collision (*pari passu* and not in 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*),
    (ii) 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 Lloyd's Rep 30),
    (iii) Wages and master's disbursements (*pari passu* – see *The Leoborg (No. 2)* [1964] 1 Lloyd's Rep 380 and *The Royal Wells* [1985] Q.B. 86 – but behind salvage whether earlier or later – see *The Lyrma (No 2)*,
(c) Registered mortgages (earlier date mortgage with priority), and
(d) Statutory liens such as claims in respect of cargo, charterparty, necessaries, and so forth (*pari passu* – see *The Africano* [1894] P 141).

The top priority given to costs of arrest and costs of realising 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.

What receives less universal acceptance is:

(a) Firstly, the relative ranking amongst the other three classes of claimants:
    (i) the maritime lien,
    (ii) the mortgage, and
    (iii) the necessaries.
(b) Secondly, the ranking within the same class but between claims of a different nature, for example, salvage and wages, collision and wages, and
(c) Thirdly, the ranking within the same class but between claims of the same nature, for example, necessaries.

Of the various ranking rules adopted or applied by the British courts in the past, four ranking rules seem to stand out as of fundamental importance and they are what I might term (a) the lien class rule, (b) the inverse order rule, (c) the preservation of *res* rule, and (d) the equality rule.

The lien class rule ranks the maritime lien higher than the mortgage (which is, of course, neither a maritime lien nor what is commonly called a statutory lien) and ranks mortgage higher than a statutory lien (such as a 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.

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 a different class. Salvage claims are subject to the inverse order rule, namely, that a later salvage is given higher priority than an 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, since by definition subsequent collision damage cannot preserve the *res* or an earlier collision lien. Collision claims are governed by the equality rule.

The preservation of *res* rule ranks a claim higher if such a claim has effected the preservation of the ship and as a consequence also the preservation of other liens which are in the priority competition. 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 made 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 realised.

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.

In the past, these four ranking rules have been given weighty consideration in the determination of priorities. In fact, one can go further and say that they are regularly applied. These four ranking rules largely form the basis of most of the decisions on priorities of the Admiralty courts.

There is, however, one other factor which is not regarded as a ranking rule but which has played a substantial role (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 a reason or justification for departing from the established ranking rules and to give a particular claimant a higher ranking.

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 three anchored yachts and after these collisions a new crew was taken on but not paid. The competition for priority was between the crew for wages and the three yachts for collision damage. The proceeds of sale could not meet all four 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 liens, which puts the tort claim ahead of a contract claim, namely ranking damage ahead of wages.

The learned Judge said at para 11 on page 361:

> ... 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 para 21 on page 364 of the judgment, he said in his conclusion:

> 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:
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> > "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."

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 GH Main Thompson said in his article in the old *Halsbury Laws of England*, 2nd ed., Vol. 30 at p. 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."

What is the implication of *The Ruta* judgment and the clear endorsement by the Admiralty Court of the broad discretionary approach with these four factors of (1) equity, (2) public policy, (3) commercial expediency and (4) justice? Does it mean that ranking rules (including the four fundamental ranking rules set out earlier) are no longer of significance or applicable? Are ranking rules going to be displaced by the four factors of equity, public policy, commercial expediency and justice?

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.

But, if we are entering into a new age, it may be difficult to forecast what will be the future course of our British system of priorities and to what extent the various

[9] Thomas, *Maritime Liens* n 1 above in the passage quoted in *The Ruta* continued at p. 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 … "

Admiralty Courts of the British system will take up the invitation of the broad discretionary approach given to us by *The Ruta*.[10]

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 has been a reasonably stable ship flying under the flag of the British system of priorities will be sailing into a stormy sea of uncertainty with a consequent difficulty in predicting what will be the outcome of future priority contests.

Let me give a few examples of what might be argued if we are indeed entering a new age with the maritime law of priorities loosely governed by broad discretion with no fixed rules of ranking.

Voyage Rule and Time Rule

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

The 1926 Brussels Convention provides in Article 6 that maritime claims secured by a lien and attaching to the last voyage have priority over those attaching to a 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 a foreign port. Under Article 3, mortgage ranks behind claims in Article 2. Article 9 provides that maritime liens expire after one year and for necessaries the life of the lien is only six months. The one year period is, of course, also repeated in the 1967 Brussels Convention and in the 1993 Geneva Convention.

France ratified the 1926 Brussels Convention (Britain was a signatory but did not ratify and Australia was not a signatory). The French law of priorities therefore follows the 1926 Brussels Convention and the voyage rule applies, namely, a later voyage ranks before an earlier voyage and claims within the same voyage rank in the order of crew, salvage, collision, foreign necessaries and mortgage. The one year period (six months for foreign necessaries) provided for in the 1926 Convention also applies under French law.[11]

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

The emphasis under French law and under the 1926 Brussels Convention is therefore on the voyage and with the value of each maritime priority of short duration relating to the voyage (in any event, of one year) and with priorities under a later voyage taking precedence over priorities under an earlier voyage.

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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 a broad discretion, then it will be important to study the implication of this apparent uncertainty and unpredictability.

[11] See Tetley, *Maritime Liens and Claims*, n 1 above, pp. 903-5.

[12] See Tetley, *Maritime Liens and Claims*, n 1 above, p. 871 and "Priorities on Maritime Lien", 69 Harvard Law Review 525, and *Benedict on Admiralty*, 7th ed. (1993) vol. 2, section 51.

The expiry of the maritime lien after one year and the priority given to a later voyage under both the 1926 Convention and 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 a 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 a higher priority being given to later voyage claimants) and in any event within one year (for fear of losing the status of a 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 for the maritime priority concentrates the mind and therefore regularly wipes the liens of the vessel clean.

One consequence of the voyage rule is that it often has the effect of reducing the creation of subsequent liens. By forcing an early realisation 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]

In *The Ruta*, Steel J took into account the crew's high priority or ranking under 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 today's world, it may well be possible to argue that the voyage rule (if not the time rule, which would require legislation to be effective) can be applied, so that claims relating to the last voyage would outrank claims relating to earlier voyages, with the old ranking still prevailing in relation to claims arising in connection with the same voyage.

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 for the final voyage leading to the arrest and to the production of the proceeds of sale is more deserving of a higher ranking than say even wages going back four voyages or some two years old. Wages as a maritime lien under our present system outranks necessaries, which is merely a statutory lien, and yet in terms of who 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.

[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*, n 12 above, vol. 2, section 51).

[14] By way of an aside, I wish that we Judges could also operate under a voyage or season sitting term rule with all judgments outstanding (treated as a lien on the Judge's health) to be cleared before a new season sitting term could start. If this were the rule for Judges, our court diary would be much more civilised and not the listing of killing back-to-back cases.

Preservation of Ship and Liens

In the reported cases, the ranking rule of preservation of the *res* seems to have been mainly applied to claims of a later salvage being given higher priority than an 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 pp.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.

In *The Lyrma* (No.2) [1978] 2 Lloyd's Rep 30, 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). Brandon J said the following at p. 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.

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 who supplied bunker in a remote port in Indonesia and without which the ship could not have proceeded on her last voyage to Singapore, where she was arrested by the mortgagee. The vessel was sold in Singapore and there were 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 would get nothing or might have to share what was 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 have either reached Singapore or have been realised 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 realised for the proceeds of sale (in the remote port of Indonesia the value realised would have been 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.

Another example of this principle of preservation of *res* being applied could be a situation where a 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 in order 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 payment of the freight the cargo owner helped to preserve the liens of the other claimants, including those who normally would enjoy higher priority.

In the United States this principle of preservation of *res* is applied and given great weight. In Benedict on Admiralty, 7th ed. vol. 2 at section 51 it is stated:

> … 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 *The William Leishear* (1927) AMC 1770, where Coleman DJ said at p. 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.

My general impression is that 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

What is the priority of a statutory lien which is a sister ship claim? How does that sister ship statutory lien claim 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 to whether to give the statutory lien of the engineer against the sister ship the same high priority as a maritime lien. But, what the Court seems to have done, by concession (and inadvertently), was to treat the claim of the engineer (by way of a sister ship claim) as a statutory lien with equal priority status as the necessaries claim by way of a statutory lien against the offending ship (see p. 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.

To my knowledge, no case has directly decided this question of priority of claims against a sister ship. The question is whether a statutory lien against the offending ship and a competing statutory lien against a sister ship should be treated in the same way or whether a statutory lien based on the 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 arrests *Adelaide II* in a sister ship arrest. Oil Company B also makes a 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.

Considered from the point of view of the lien class rule, it might be argued that if a maritime lien as a class ranks higher than mortgage and mortgage as a class ranks higher than a statutory lien then a sister ship statutory lien should be considered an inferior sub-class of statutory lien and therefore should rank 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 have conferred a more substantial benefit on *Adelaide II* while Company A conferred no benefit on *Adelaide II* (only on *Adelaide I*, the offending ship) and that therefore Company B is more deserving than Company A of a higher priority.

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 p. 107 as "a maverick approach which differs from the current practice of most maritime states." Section 311(5) of the *Admiralty Jurisdiction Regulation Act 1983* provides for a priority ranking of maritime claims in the order: [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
> a number of other categories of claims followed by
> claims against sister ship.

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 a 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.

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 the fact that

[15] See the Priority Table set out in Schedule A at pp. 108-9 of John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (1999).

Article 5(1) of the 1993 Convention[16] provides 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 …" the sister ship statutory lien is intended to rank lower than the offending ship statutory lien.

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

The contrary argument against a lower ranking for a 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 a 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.

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

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 to another statutory lien against the offending ship.

Equality Rule and Inverse Order Rule

To a layman, the way the British system of priorities permits different and variable applications of the inverse order rule and the equality rule seems at times confusing if not capricious. Amongst claims of the same nature or same class, the equality rule is applicable to collision damage, for wages and for statutory liens of different nature. Amongst claims of the same nature, however, salvage is governed by the inverse order rule while mortgage is governed by the opposite, namely, the 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 a different nature but all of the same lien class, for example, all belonging to the maritime lien class, then the 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 the 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.

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[16] See the International Convention on Maritime Liens and Mortgages 1993 reproduced in the Appendix to Jose Maria Alcantara, "A Short Primer on The International Convention on Maritime Liens and Mortgages,1993" (1996) 27 J Mar L & Com 219 at 235.

[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" (ALRC 33, Para. 261).

The British system of priorities with the 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 the 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, later salvage has a higher priority (Article 5 rule 2).
In the light of the greater weight given to the 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

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 in 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.

The struggle by the international community, for the last 80 or so 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 says 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]

Banking interests, however, are 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 maritime claims under the International Conventions. It is not unusual for banks to allow a delinquent mortgage to linger on until they 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 they are generally paid in full, including quite often very large amounts in default interest. 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 placed in a disadvantageous position.[19] But, until the Courts are 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

[18] Jackson, *Enforcement of Maritime Claims*, n 8 above, Paragraph 18.124.

[19] In *Fraser Shipyard and Industrial Centre Ltd v The Atlantis Two* T-111-98 [1999] 4 FCD 14 (reversed in part on 28 July 1999), the Federal Court of Canada in the exercise of its equitable jurisdiction granted to a ship repairer without a possessory lien an enhanced priority against the mortgagee, to the extent that the repairs increased the value of the *res*.

by the ranking rules (even in situations which might be considered unjust to the other claims).

Certainty and Equity

Is there then uncertainty in the law of priorities? The old fashioned view was that much of the law on priorities was settled long ago. This could be gleaned from textbooks such as Edward Stanley Roscoe, *Admiralty Jurisdiction and Practice*, 5th ed. (1931), Chapter XI, G Price, *The Law of Maritime Liens* (1940), Chapter XI and Kenneth C McGuffie, *Admiralty Practice* (1964), Chapter 39.[20] Thomas, in his *Maritime Liens*, 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 was echoing the sentiment of Stewart-Richardson concerning the uncertainty of the law on priorities.[21] Toh, in his *Admiralty Law and Practice*, writing in 1998, believed that Thomas went a little too far. He says: [22]

> It is probably going a little too 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?

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 may have to be revisited and reviewed in the light of changes over the last 80 years, since the 1926 Brussels Convention was signed. The 1952 Arrest Convention, 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 the years so that the high priority or heavy weight given to certain liens may no longer be so deserving of protection by the Court.

It has to be recognised that the price to be paid under the British based system of allowing equity, public policy and broad discretion to enter into the priorities contest discretion consideration is uncertainty. With no statute law on priorities, the Admiralty Court under the British system may 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 resourceful lawyers.

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[20] See, in particular, the Priorities Table summarised 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." ALG Stewart-Richardson, "Liens on Ships and their Priorities" [1960] 44 *Journal of Business Law* 49-50.

[22] Toh Kian Sing, *Admiralty Law & Practice* (1998), p. 300, n 25.

[23] Phillimore, Hannen, Butt, Jeune, Barnes (Lord Gorell), Evans, Hill, Duke (Lord Merrivale), Merriman, Wilmer, Hewson, Simon, Brandon (see FL Wiswall, *The Development of Admiralty Jursidiction and Practice since 1800* (1970), p. ix).

Conclusion

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 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. Possibly, in restating 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.

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.