SOME ASPECTS OF THE POSSESSORY LIEN IN ACTIONS IN REM

This article provides an insight into some aspects of the possessory lien in admiralty actions *in rem.* In particular, the article discusses the authority of a demise charterer to subject the chartered vessel to a ship-repairer's lien and to what extent, if at all, this authority is affected by the presence of "non-lien" clauses in demise charterparties. The matter of what constitutes the *res* subject to the possessory lien of the ship-repairer is also examined.

AS every law student knows, the old adage that possession is nine points of the law[1] does not state a universal truth. That the adage does not reflect the state of the law is demonstrated by the point that possession of a chattel without more, does not give the possessor the right to withhold delivery of the chattel to its rightful owner. It is only when the possessor has "the fact of control... coupled with a legal claim and right to exercise it in [his] own name against the world at large"[2] that he is entitled to withhold delivery of the possessed chattel to its rightful owner. At common law, a person in possession of a chattel on which he has bestowed labour for its improvement at the behest of the chattel owner has both control of the chattel and a legal claim and right to exercise that claim in his own name against the chattel owner and the rest of the world.[3] In the terminology of the common law, such a person has a possessory lien over the chattel on which he has expended labour for its improvement. And a possessory lien is, in the felicitous language of Grose J. in *Hammonds* v *Barclay*[4], "a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied."[5]

The possessory lien is as much a phenomenon of maritime law as it is of the general mercantile law and indeed, writing in 1868, Williams and Bruce[6] observed that the possessory lien "simply confers upon [the shipwright] the naked privilege of retaining possession of the ship until he is paid the money due to him for the work he has done to [the ship]; when he parts with the possession of the ship, the lien is extinguished."[7] In more recent times, Staughton J. (as he then was) has

[1] The adage has a rich history, see B. Stevenson, *The Macmillan Book of Proverbs, Maxims and Famous Phrases,* (1968), at pp. 1832 to 1833.
[2] Pollock & Wright, *Possession in the Common Law,* (1888), Part I at p. 16.
[3] Such a right is described by Pollock & Wright as a possessory title as contrasted with the proprietary title of the chattel owner.
[4] (1802) 2 East 227.
[5] *Ibid*., at p. 235.
[6] In a *Treatise on the Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals* (3rd Edition, 1868).
[7] *Ibid*., Chapter VIII, at p. 190.

observed that "… shiprepairers … enjoy, by English law and probably in most other countries[8], two valuable rights. First, they have a possessory lien; they may retain in their yard a ship which they have repaired until their bill is paid. Secondly, they have a right to bring an action *in rem* against the ship at a later date, provided that the person who contracted for the repairs is still the owner … of the ship."[9] It is obvious from the foregoing that in the context of maritime law, the possessory lien arises in favour of *inter alia,*[10] ship-repair yards as repairs done to ships are certainly considered as improvements to the ships.[11] In fact, litigation in Singapore relating to possessory liens in admiralty actions *in rem* has invariably involved ship-repair yards. As such, this article will focus on the possessory lien that arises in favour of the ship-repair yard and the difficulties that are associated with the exercise of the possessory lien by the ship-repair yard. With this focus in mind, we will examine some aspects of the possessory lien in admiralty actions *in rem.*

THE CREATION OF THE POSSESSORY LIEN

As mentioned earlier, as long as the ship-repair yard retains possession of the repaired ship, it is entitled to assert a possessory lien over the ship. However, in as much as the lien is founded on the ship-repair yard having lawful possession[12] of the repaired ship, the lien does not arise unless the possession of the ship had been lawfully transferred to the ship-repair yard. Thus a thief may not steal a ship and encumber her with a ship-repairer's lien for repairs done to the ship as the ship, at the time when possession of it was transferred to the ship-repairer, was not in the lawful possession of the thief and hence the ship-repairer's possession of the ship is also unlawful *vis-a-vis* the rightful owner[13] of the ship.

It is also the position that a person to whom possession of a chattel has been given is not, without more, entitled to subject the possessed chattel to a repairer's lien for the cost of repairs. If authority be needed for this proposition, it may be found in *Buxton* v. *Baughan*[14] where Baron Alderson declared, "If you trust your goods into a man's possession, and he makes a bargain about them without your authority you are not bound by that bargain and may reclaim the goods."[15] Thus a person who is *merely entrusted with possession*[16] of a ship is not authorised to subject the ship to a repairer's lien.

8 By the law of Singapore, a ship-repairer has a possessory lien over the repaired vessel in respect of the costs of repairs done to that vessel. See *"The Safe Neptunia"* [1988] 3 M.L.J. 78.

9 *"The Cape Hatteras"* [1982] 1 Lloyd's Rep. 518 at 519.

10 Marine engineers and shipbuilders have also been held to have a posessory lien over the vessel on which they have bestowed work, see *inter alia, Woods* v. *Russell* (1822) 5 B. & Ald. 942 and *"The Ijaola"* [1979] 1 Lloyd's Rep. 103.

11 See *inter alia, Franklin* v. *Hosier* (1821) 4 B. & Ald. 341 and "*The Narada"* [1977] 1 Lloyd's Rep. 256.

12 See *Bowmaker Ltd.* v. *Wycombe Motors Ltd.* [1916] K.B. 505.

13 See *Tappenden* v. *Artus* [1964] 2 Q.B. 185.

14 (1834) 6 C. & P. 674.

15 *Ibid.*, at pp. 675 to 676.

16 It is imperative to note that the bare fact of bailment of a chattel does not of itself give to the bailee any authority to give actual possession of the chattel to anybody else — be he an artificer or otherwise. See *Tappenden* v. *Artus* [1964] 2 Q.B. 185, 196 and 197.

The more problematic situation arises when a ship which has been demise chartered is sent, during the currency of the charterparty, by the demise charterer to be repaired at a ship-repair yard. In such a situation, there are essentially two issues. The first issue relates to the question as to when, if at all, the ship-repair yard is entitled to assert a possessory lien against the *shipowner.* The second issue is related to the first as it deals with the effect of clauses in the demise charterparty prohibiting the charterer from subjecting the chartered ship to any lien or encumbrance. An example of this "Non-Lien" clause is as follows:

> "Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the vessel."[17]

Dealing with the first issue, the question of the ability of the ship-repair yard to assert a possessory lien against the shipowner is resolved by a consideration of the relevant principles in the law of agency or more precisely quasi-agency. The oft-cited case is *Williams* v. *Allsup*[18] where the Court of Common Pleas held that a mortgagee of a ship is subject to the possessory lien of a ship-repairer who has repaired the ship at the behest of the mortgagor who was left in possession of the mortgaged ship. Although *Williams* v. *Allsup* is a case concerning the right of a ship-repairer to assert a possessory lien against the mortgagee of a ship, the broad principle that is to be extracted from the case is that stated succinctly by Erie C.J., who declared "that the mortgagee having allowed the morgagor to continue in the apparent ownership[19] of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage-debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose."[20] Thus stated, the principle is that when an owner[21] of a chattel permits another to be in possession of the chattel for the purpose of using the chattel, the person in possession of the chattel is entitled to do all that is reasonably necessary for and incidental to the purpose underlying the contractual relations between him and the true owner of the chattel.

This broad principle was in fact applied by the English Court of Appeal in *Tappenden* v. *Artus*[22]. The judgement of Diplock L.J. (as he then was) in *Tappenden* v. *Artus* contains a wealth of learning on the subject of a repairer's possessory lien and its creation by non-owners of the chattel that was repaired. His Lordship distilled the governing principle to be thus:

[17] Clause 14 of the Baltic and International Maritime Conference Standard Bareboat Charter Code Name "BARECON 'A' ".

[18] (1861) 10 C.B.N.S. 417.

[19] When Erle C.J. spoke of 'apparent ownership', it is submitted that his Lordship was referring to the physical appearance of ownership and not the doctrine of apparent ownership. In fact, under the mortgage instrument adopted by the mortgagor in *Williams* v. *Allsup,* there was no transfer of legal ownership in the mortgaged ship to the mortgagee. As to the doctrine of apparent ownership, see generally Bowstead, *Agency,* (15th Edition, 1985), Chapter 7, Article 88.

[20] (1861) 10 C.B.N.S. 417, 426.

[21] Although as stated above, under the mortgage executed in *Williams* v. *Allsup,* there was no transfer of ownership to the mortgagee, nonetheless the courts have consistently taken the view that the principle to be derived from *Williams* v. *Allsup* is that stated in the text. See *inter alia, Tappenden v. Artus* [1964] 2 Q.B. 185 and *Green* v. *All Motors Ltd.* [1917] 1K.B. 625.

[22] [1964] 2 Q.B. 185.

> "[T]he correct test for determining what authority is conferred by the owner of goods upon the bailee to part with possession of the goods when the purpose of the bailment is the use of the goods by the bailee [is that he] is entitled to make reasonable use of the goods, and if it is reasonably incidental to such use for the bailee to give possession of them to a third person in circumstances which may result in such person acquiring the common law remedy of lien against the goods, the bailee has the authority of the owner to give lawful possession of the goods to the third person."[23]

Admittedly, *Tappenden* v. *Artus* is a case concerning the right of an artificer to assert a possessory lien against the owner of a vehicle whose bailee has handed over possession of the vehicle to the artificer for the purpose of effecting repairs necessary to render the vehicle roadworthy. But in so far as *Tappenden* v. *Artus* deals with the authority conferred (by legal implication) on the bailee of a chattel by the chattel owner where the purpose of the bailment is the use of the chattel, it is of direct relevance[24] to the issue of whether or not a demise charterer may lawfully, during the currency of the charterparty, subject the chartered ship to the possessory lien of a ship-repair yard. After all, it is axiomatic that a demise charterparty is but a species of bailment known in Roman law as a *locatio-conductio rei.*[25] A demise charter of a ship is in effect a contract for the hire of a chattel and is governed by the general principles of the common law relating to contracts of hire. Apart from being a bailee of the chartered ship, the demise charterer is *pro hac vice* the owner[26] of the chartered ship.

Thus a straightforward application of the principle as distilled by Diplock L.J., in *Tappenden* v. *Artus* will furnish us with the answer that a shipowner whose ship has been repaired at the behest of a demise charterer will only be able to obtain possession of the chartered ship which has been repaired from the ship-repair yard if the shipowner satisfies the demands of the latter for the costs of repair.

At this juncture, it is pertinent to point out that the ship-repair yard should assert its possessory lien against the shipowner[27] and not take the risky course of instituting an *in rem* action against the repaired ship. That this latter course is fraught with risks is graphically illustrated by the decision of the Singapore Court of Appeal in *"The Thorlina"*.[28]

[23] *Ibid*., at p. 198.

[24] In fact, in *Tappenden* v. *Artus,* Diplock L.J. gave short shrift to the argument that the principle established in *Williams* v. *Allsup* should be restricted to the particular facts of that case and not extended to all cases of bailments where it is intended that the bailed chattel will be used by the bailee. His Lordship said, at [1964] 2 Q.B. 201, '[A]t any rate if there is consideration for the bailment, the principle applies to all cases where the purpose of the bailment of goods is their use by the bailee.'

[25] See Story, *Bailments,* (8th Edition, 1870), Chapter VI, paragraph 383.

[26] See *inter alia, Baumwoll Manufactur Von Carl Scheibler* v. *Furness* [1893] A.C. 8,14 to 15, and 18to 19 *per* Lord Herschell L.C. and *"The Hopper No.* 66"[1908] A.C. 126, 136 *per* Lord Atkinson.

[27] This may be done by issuance of a writ of summons or by an originating summons to seek a declaration that the plaintiff has a possessory lien over the subject matter of the action and an order for sale under Order 15 rule 16 and Order 29 rule 4 respectively of the Rules of the Supreme Court, 1970 (hereafter R.S.C.).

[28] [1986] 2 M.L.J. 7.

In *"The Thorlina",* Keppel Shipyard Ltd., instituted an action *in rem* against the 'Thorlina' for the balance of the costs of repairs done to the vessel and caused the vessel to be arrested. As events unfolded, it transpired that at the time that the contract for the repairs to the 'Thorlina' was made, the vessel was under a bare boat charter[29] to Denimar Shipping N.V. of Willemstad, Curacao, Netherlands Antilles (hereinafter Denimar). The managers of the 'Thorlina' had, as agents of Denimar, contracted with the ship-repair yard for the repairs to the vessel. And a few days after repairs to the vessel had commenced, a sum of S$50,000 was paid to the ship-repair yard to the account of the amount then outstanding for the repairs to the 'Thorlina'. Although the statements of account of the ship-repair yard were addressed to the managers of the vessel, the receipt for the part payment of the S$ 50,000 was made out to Denimar. Subsequently, representatives from both the ship-repair yard and Denimar met and agreed on the quantum to be paid for the repairs done to the 'Thorlina'. However, since no payment in respect of the repairs to the vessel was made, the ship-repair yard commenced *in rem* proceedings which led to the arrest of the 'Thorlina'. In these circumstances, the Court of Appeal held that the admiralty jurisdiction of the Singapore High Court could not be invoked by the ship-repair yard against the 'Thorlina' as the contract for the repairs to the vessel had been concluded between the ship-repair yard and Denimar. The point being that one of the jurisdictional links required by section 4 of the High Court (Admiralty Jurisdiction) Act[30] had not been fulfilled, namely that the person who would be liable on the claim in an action *in personam*[31] — here it was clearly Denimar — did not beneficially own the 'Thorlina' as respect all the shares therein at the time when the action was brought. In fact, at the time when the action *in rem* was brought, that is at the time when the writ *in rem* was issued[32], all the shares in the 'Thorlina' were beneficially owned by Abaris Carriers Ltd., of Nicocia, Cyprus. Since there was no contract between Abaris Carriers Ltd., and Keppel Shipyard Ltd., in respect of the repairs done to the 'Thorlina', there was no liability on the part of the former for any part of the latter's claim for the costs of repairs to the vessel. In holding thus, the Court of Appeal was applying the English case of *"The St. Merriel"*[33] where Hewson J. held on somewhat similar facts that since there was no contract, either express or implied, between the ship-repair yard and the true owners of the repaired vessel for repairs done to the vessel, the arrest of the repaired vessel by the former was misconceived.

It is evident that *"The Thorlina"* illustrates the difficulties that may befall the ship-repair yard should it opt to arrest the repaired ship for the costs of repairs done to the ship. Having said that, it must be pointed out that a ship-repair yard which asserts its possessory lien over the repaired ship is not entitled to claim for the costs of preserving and maintaining the subject matter of its possessory lien,

29 Another description for the demise charter ot a ship.
30 Statutes of the Republic of Singapore, Chapter 123, 1985 Revised Edition.
31 "… *i.e.*, the person who would be liable if the action succeeded" per Willmer J. in *"The St. Elefterio"* [1957] P. 179, 185.
32 *ReAro Co. Ltd.* [1980] Ch. 196 This case was recently applied by Lai Kew Chai J. in Lim *Bock Lai v. Selco (Singapore) Pte. Ltd.* [1987] 2 M.L.J. 688.
33 [1963] P. 247.

namely the repaired ship. This was established some 25 years ago in the celebrated case *of Somes* v. *British Empire Shipping Co.*,[34] where the Appellate Committee of the House of Lords held that a person who, having a possessory lien on a chattel, seeks to enforce the lien by retaining possession of the chattel is not entitled to make any claim against the chattel owner for the expenses of detention of the chattel which is subject to the lien.[35]

However, a ship-repair yard which is able to successfully invoke the admiralty jurisdiction of the High Court and effect arrest of the repaired ship will be entitled to the costs of effecting the arrest and of the action.[36] Thus it appears that the institution of an action *in rem* and an arrest of the repaired ship, may in appropriate circumstances, yield practical advantages to the ship-repair yard. On the other hand, once a ship-repair yard effects an arrest of a ship, the arrest serves like an invitation to other maritime claimants to intervene[37] and assert their claims against the arrested ship — reminiscent of vultures descending on a carcass that is ripe for the picking. Of course, the intervention of other maritime claimants particularly prior maritime lienees[38] will result in the depletion of the funds available to satisfy the ship-repair yard's claim for the costs of repairs as the ship-repair yard's claim ranks, in the scheme of priorities, after the claims of prior maritime lienees.[39] Thus it is often said that a ship-repair yard asserting a possessory lien over a repaired ship takes the *res cum onere.*[40] Apart from the claims of prior maritime lienees, the ship-repair yard which has caused the arrest of the ship over which a possessory lien is asserted will have to contend with the argument that the arrest of the repaired ship leads necessarily to the loss of possession of the repaired ship and therefore a loss of the possessory lien.[41] It is sufficient to say that this argument was raised before Lai Kew Chai J. in the recent case of *"The 'Honey I' Ex 'Cassio'"*[42] but his Lordship found it unnecessary to 'grapple with the nettle'[43] as on the facts of that case, the ship-repair yard which was asserting a possessory lien over the repaired ship did not cause the vessel to be arrested in the admiralty ac-

[34] (1860)8H.L. Cas. 338.
[35] This principle was recently affirmed by the late Lord Diplock in *"The Winson"*[1982]A.C. 939.
[36] See *"The Falcon"*[1981] 1 Lloyd'sRep. Band *"The Eastern Lotus"*[1980] 1 M.L.J. 137.
[37] See R.S.C., Order 70 rule 16 for the procedure when seeking to intervene in an admiralty action *in rem.*
[38] Persons who have maritime liens against the repaired ship. Maritime liens arise in respect of *inter alia,* collision damage, claims for crew wages, disbursements made by the master of the ship and salvage remuneration.
[39] See *inter alia, "The Tergeste"* [1903] P. 26 and *"The Russland"* [1924] P. 55.
[40] See D. R. Thomas, *Maritime Liens* (1980), Chapter 9 at p. 257 and *"The Gustaf"* (1862) Lush. 506. However, in relation to a mortgage of the repaired ship, the ship-repair yard does not take the *res cum onere,* see *inter alia, Williams* v. *Allsup* (1861) 10 C.B.N.S. 417 and *"The Scio"* (1867) 1 A. & E. 353.
[41] As a prerequisite of the possessory lien is the retention of possession of the repaired ship by the ship-repair yard. However, there are circumstances where, despite the loss of *de facto* possession, the possessory lien remains extant. See *Albemarle Supply Co. Ltd.* v. *Hind& Co.* [1928] 1 K.B. 307.
[42] [1987]2M.L.J. 427.
[43] Adopting the language of Lai J. in *"The 'Honey I'Ex 'Cassia'"* [1987] 2 M.L.J. 427 at 428.

tion *in* rem.[44] Be it as it may, this is not the place to debate the wisdom or unwisdom of the ship-repair yard effecting an admiralty arrest of a repaired ship where the claim is in respect of the costs of repairs done to the ship. In any event, the decision of the ship-repair yard to effect arrest of the repaired ship must perforce be dictated by considerations which are founded in legal principles *and* the practicalities of the moment.

Turning to the second issue, this issue addresses the question of the impact of clauses in demise charterparties prohibiting the demise charterer from creating[45] liens on the chartered ship or subjecting the chartered ship to liens. These "non-lien" clauses are really attempts to give the go-by to the broad principle distilled by Diplock L.J. in *Tappenden* v. *Artus.* Again, there is no direct authority in English maritime law[46] and one must turn to cases dealing with hire-purchase law for guidance.

The *terminus a quo* for any discussion on the impact of such "non-lien" clauses or prohibitory clauses in hire-purchase agreements on the creation of a repairer's possessory lien is the English Court of Appeal decision in *Albemarle Supply Company Ltd.* v. *Hind and Company.*[47] In this case, there was a term in the hire-purchase agreement which expressly excluded the hirer's right to create a lien on the hired vehicles in respect of repairs. The artificer to whom the possession of the hired vehicles was delivered for the purpose of repair was aware that the vehicles were bailed to the hirer under a hire-purchase agreement, but was unaware of the express exclusion of the hirer's right to subject the vehicles to any lien for repairs. It was held that *vis-a-vis* the artificer, the owner of the hired vehicles had given the hirer ostensible authority to give possession of the vehicles to the artificer for the purpose of effecting repairs, and could not rely upon a secret limitation upon the terms on which the hirer was authorised to do so, that is upon terms excluding the artificer's common law remedy of

[44] In fact, the repaired ship was arrested by a sister company of the ship-repair yard which was asserting a possessory lien over the ship. Although it was argued by the mortgagee of the repaired ship that both the ship-repair yard and its sister company had acted in concert so as not to prejudice the possessory lien of the ship-repair yard, Lai J. held that that argument was 'completely unwarranted by the evidence' and his Lordship refused to pierce the corporate veil of the sister company. It suffices to say that if a case had been made out that the evidence warranted the unveiling of the sister company's corporate veil, then the court would have had to 'grapple with the nettle' of whether or not the arrest of the repaired ship by the person asserting a possessory lien over the repaired ship results in the loss of the possessory lien of that person. In fact, there is Irish authority in *"TheAcacia"* (1880) 4 Asp. M.C. 254 which comes firmly down in favour of the ship-repair yard, *i.e.,* that a ship-repair yard which causes an arrest of the repaired ship over which it is asserting a possessory lien for the cost of repairs does not lose its possessory lien over the arrested repaired ship.

[45] Strictly speaking, the possessory lien of a repairer of chattels including the ship-repairer's lien is not created by the bailee, owner or his agent as the case may be but arises from the operation of the law. Like a right of action for damages, it is a remedy for breach of contract which the common law confers upon the repairer to whom the possession of chattels is lawfully given for the purpose of his doing work upon them in consideration of a money payment. See *inter alia, Tappenden* v. *Artus* [1964] 2 Q.B. 185 and *Chase* v. *Westmore* (1816) 5 M. & S. 180.

[46] There is a plethora of American authorities on the effect of such 'non-lien" clauses, see generally Gilmore and Black, *The Law of Admiralty,* (2nd Edition, 1975).

[47] [1928] 1 K..B. 307.

lien.[48] In the succinct words of Scrutton L.J., "… mere knowledge by the repairer that there is a hire-purchase agreement without knowledge of its exact terms relating to the car which he repairs does not deprive him of his lien. The owner leaving the cab in the hands of a man who is *entitled to use*[49] it gives him an implied authority to have it repaired with the resulting lien for repairs…; if a man is put in a position which holds him out as having a certain authority, people who act on that holding out are not affected by a secret limitation, of which they are ignorant, of the apparent authority. The owners can easily protect themselves by requiring information as to the garage where the cab is kept, and notifying the garage owner that the hirer has no power to create a lien for repairs."[50]

The width of the principle as stated by Scrutton L.J., in *Albemarle Supply Co. Ltd* v. *Hind & Co.,* is however, a matter of some controversy.[51] The controversy relates to whether or not the English Court of Appeal in the *Albemarle* case intended to lay down the general rule that possession of goods under a hire-purchase agreement suffices by itself to confer ostensible authority on the hirer to deliver goods to an artificer for repair.[52] However, it is submitted that such an inquiry is beside the mark as it is clear that in the *Albemarle* case the hirer had actual (implied) authority to deliver the hired vehicles to an artificer for repairs. Indeed on a proper construction of the hire-purchase agreement, the hirer had *express*[53] authority to deliver the hired vehicles to an artificer for repairs for otherwise the hirer will be in breach of the covenant to keep the hired vehicles in a state of repair.[54] The proper inquiry is, it is respectfully submitted, whether or not the "non-lien" clause in the hire-purchase agreement prohibiting the hirer from creating a lien on the hired vehicles in respect of repairs

[48] This is Diplock L.J.'s analysis of the *Albemarle* case, see *Tappenden* v. *Artus* [1964] 2 Q.B. 185 at 199.

[49] The emphasis is the writer's. The emphasis underscores the point that the principle as stated in the text applies only to situations where there is a bailment for use. In this connection, see *Tappenden* v. *Artus* [1964] 2 Q.B. 185.

[50] [1928] 1 K.B. 307 at pp. 317 to 318.

[51] See the classic work of R.M. Goode on *Hire Purchase Law and Practice,* (2nd Edition, 1970), at pp. 698 to 699.

[52] This was the inquiry that exercised the High Court of Australia in *Fisher* v. *Automobile Finance Co. of Australia Ltd.* (1928) 41 C.L.R. 167 where it was held that the *Albemarle* case did not establish any such general principle of law and that the decision in the *Albemarle* case was based on the particular facts of the case — indeed, the High Court pointed out that Swift J. had at first instance, as reported in [1927] 43 T.L.R. 652 at 653, observed that the hired vehicles had been kept at the artificer's garage 'with the knowledge and consent of the [owner of the hired vehicles] for a considerable time.'

[53] Although the hirer in the *Albemarle* case had express authority to keep the hired vehicles in repair, this is not critical to an artificer who seeks to assert a possessory lien on the hired vehicles for the cost of repairs. The artificer relies on the actual implied authority of the hirer to do all things reasonably necessary for and incidental to the hirer's use of the hired vehicles which will include the delivery of the hired vehicles to an artificer to execute repairs. Indeed it will not be consistent for an artificer to rely on the express authority of the hirer as found in the hire-purchase agreement to keep the hired vehicles in good repair and yet deny knowledge of the "non-lien" clause that is to be found in the very same hire-purchase agreement.

[54] See [1928] 1 K..B. 307 at p. 308 where it is stated that the hire-purchase agreement contained clauses that the 'hirer (a) would not sell, assign, pledge, mortgage, underlet or part with the possession of the vehicle without the consent of the plaintiff company, (b) would keep the taxicab and its fittings and equipments (sic) in good repair, and (c) would not create a lien upon it in respect of such repairs.'

operates to negative the actual implied authority of the hirer to deliver the hired vehicles to an artificer for repairs on the ordinary terms including the right of the artificer to assert a possessory lien on the hired vehicles for the cost of the repairs.

The answer to this inquiry is to be found in the judgement of Lord Goddard C.J. in *Bowmaker Ltd.* v. *Wycombe Motors Ltd.*[55] where his Lordship observed with his usual percipience that "an arrangement between an owner [of the chattel] and the hirer that the hirer shall not be entitled to create a lien, does not affect the repairer. A repairer has a lien although the owner has purported to limit the hirer's authority to create a lien...."[56] To this observation, we must add the rider that in cases where the artificer has express notice of the limit upon the authority of the person[57] to whom the chattel owner has given possession of the chattel, he may not rely on the actual implied authority of that person to deliver the chattel to him on terms that will permit the exercise of the artificer's lien for repairs.[58] In fact, this statement of principle by Lord Goddard C.J. was endorsed by the Court of Appeal in *Tappenden* v. *Artus* where Diplock L.J. referred to it as dealing with the ostensible authority of a person who has been entrusted with the possession and use of the chattel which was repaired by the artificer.[59] The ostensible authority arises from the fact that in a bailment for use, the chattel owner has permitted the hirer to use the chattel which necessarily carries with it the right to arrange for the chattel to be repaired on the ordinary terms including the exercise of a possessory lien over the repaired chattel. Thus the actual implied authority of the hirer to deliver possession of the hired chattel to a third party for repairs carries with it a holding out on the part of the chattel owner that the hirer is authorised to order repairs. And it is this holding out of the chattel owner which leads the artificer to justifiably assume, in the absence of notice to the contrary,[60] that if the repairs are executed on the chattel he will have all the remedies which the law allows for the recovery of the artificer's charges including that of a possessory lien over the repaired chattel.[61]

Indeed, the foregoing analysis is supported by the view of Diplock L.J. in *Tappenden* v. *Artus* where his Lordship clearly described the *Albemarle* case as decided on ostensible authority created by the owner of the chattel allowing the hirer to use and be in possession of the hired chattel.[62] In the felicitous language of Diplock L.J., "It [the *Albemarle* case] was a case where the owner was estopped from denying that he had conferred on his bailee authority to give up

[55] [1946] K.B. 505
[56] *Ibid*., at p. 509.
[57] In most cases, the artificer will be unaware that the person who has left the vehicle with him is the hirer of the vehicle. See *inter alia, Tappenden* v. *Artus* [1964] 2 Q.B. 185 *and Bowmaker Ltd.* v. *Wycombe Motors Ltd.* [1964] 1 K.B. 505.
[58] See *Tappenden* v. *Artus* [1964] 2 Q.B. 185 at 201.
[59] *Ibid.*
[60] Of course, if the artificer is aware of the hirer's lack of authority to arrange for repairs to be effected on the hired chattel on terms that will allow for the exercise of the artificer's possessory lien, then the artificer will not be able to successfully assert a possessory lien over the repaired chattel.
[61] See R.M. Goode on *Hire Purchase Law and Practice,* (2nd Edition 1970), at pp. 697 to 699.
[62] [1964] 2 Q.B. 185, 199.

possession of the vehicles to the artificer on the ordinary terms, and thus subject to the ordinary remedy of lien."[63]

The foregoing analysis of the impact of the "non-lien" clause in a hire-purchase agreement on the ability of the artificer to assert a possessory lien over the hired chattel for the cost of repairs applies *mutatis mutandis* to the exercise of a ship-repair yard's possessory lien for the cost of repairs to a demise chartered ship where the demise charterparty contains a "non-lien" clause. That is to say, the presence of the "non-lien" clause in the demise charterparty does not affect the ship-repair yard's possessory lien over the demise chartered ship for the costs of repairs unless the "non-lien" clause is brought home to the attention of the ship-repair yard before any repair work is done to the chartered ship.[64]

The Subject Matter of the Possessory Lien

It is trite law that a ship-repair yard is entitled to assert a possessory lien over the repaired vessel for the cost of repairs. While it is not often that the courts have been asked to decide on the subject matter of a ship-repairer's possessory lien for the cost of repairs, the question of what constitutes the *res* subject to a possessory lien remains an all important question. That this question may be of vital importance is demonstrated by the recent case *of "The Safe Neptunia"*.[65]

The facts of *"The Safe Neptunia"* fall within a narrow compass. The barge, 'Safe Neptunia' was at the material time owned by Consafe Jersey Ltd., and Wallenius Safe Neptunia AB. The barge was demise chartered to Consafe Offshore AB. The managing agent of the barge, Consafe Far East Pte. Ltd., as agents of Consafe Offshore AB entered into a ship-repair agreement with Bethlehem (S) Pte. Ltd., for repairs and conversion work to the 'Safe Neptunia'. Repairs were effected on the barge and on a mobile crawler crane which was at all material times on board the barge. The issue which fell for Thean J. to decide was whether the ship-repair yard had a possessory lien on the barge including the mobile crawler crane for the full amount of the cost of repairs done to the barge and the mobile crawler crane. The mobile crawler crane belonged to Consafe Far East Pte. Ltd. and was mortgaged to Skandinaviska Enskilda Banker (South East Asia) Ltd., who had financed the acquisition of the crawler crane. It is worth mentioning that the crawler crane which was not in any way affixed or attached to the barge was placed on board the barge sometime during

[63] *Ibid.*

[64] Of course, the shipowner of the demised chartered vessel may, as may the chattel owner of a hired chattel, by the use of apt language in the demise charterparty or the hire-purchase agreement as the case may be, provide that the hiring of the vessel or chattel is to terminate and that the charterer or hirer is no longer in possession of the chartered vessel or hired chattel under the charterparty or the hire-purchase agreement as the case may be the moment the chartered vessel or hired chattel is handed over to an artificer for the purpose of effecting repairs. See *Bowmaker Ltd.* v. *Wycombe Motors Ltd.* [1946] 1 K.B. 505, *Union Transport Finance Ltd.* v. *British Car Auctions Ltd.* [1978] 2 All E.R. 385 and *Fenn* v. *Bittleston* (1851) 7 Exch 152. However, it does not take an astute observer to note that whether or not the suggested course of action to be taken by the shipowner or the chattel owner as the case may be proves to be commercially viable is a different matter altogether.

[65] [1988] 3 M.L.J. 78.

the currency of the demise charterparty but before the ship-repair agreement was entered into. In fact, the crawler crane was hired by Consafe Offshore AB from Consafe Far East Pte Ltd., and was placed on the 'Safe Neptunia' some six months before the ship-repair agreement was entered into. As events transpired, Consafe Far East Pte. Ltd., defaulted on their payments to Skandinaviska Enskilda Banker (South East Asia) Ltd., in respect of its repayment obligations under the financing agreement for the purchase of the crawler crane. When the 'Safe Neptunia' was arrested by the shipowners of the 'Straits Hope' with which the former had collided, it became necessary for the mortgagee of the crawler crane namely, Skandinaviska Enskilda Banker (South East Asia) Ltd., to *inter alia,* contend that the crawler crane was not part of the 'Safe Neptunia' and that the ship-repair yard had no possessory lien on the crawler crane. It is sufficient to say that the ship-repair yard had, in order to sustain its allegation that it had a possessory lien over the crawler crane for the full amount of the cost of repairs — which came up to S$4,577,232.32[66] — to both the barge and the crawler crane, to prove that the crawler crane had become — by the law of accession — part of the principal chattel namely, the barge.

Dealing first with the contention that the crawler crane was part of the 'Safe Neptunia', Thean J. observed, "The crane was plainly an additional crane required by the charterers for the operation of the vessel. However, it is not clear, and there was no evidence, that the crane was absolutely essential and indispensable for the operation of the vessel."[67] Founding himself on a trilogy of Australian cases[68], Thean J. applied the principles of the law of accession in the resolution of the dispute. His Lordship quoted a passage from the judgement of O'Bryan J. in *Rendell* v. *Associated Finance Pty. Ltd.*[69], a passage which for its succinct statement of the governing principle is set out hereunder:

> "… *Prima facie* the property in the accessory does not pass to the owner of the [principal chattel] if the owner of the accessory did not intend it to pass. It is for the [person alleging that the accessory has become part of the principal chattel] by proper evidence to show that the necessity of the case requires the application of principles whereby the property [in the accessory] is deemed to pass by operation of law. The [accessory] continue to belong to [its] original owner *unless it is shown that as a matter of practicability they cannot be identified*[70], or, *if identified, they have been incorporated to such an extent that they cannot be detached from the [principal chattel].*"[71,72]

66 The amount of S$4,577,232.32 was made up of (a) S$905,800 being the cost of repairs to the vessel and the mobile crawler crane and (b) S$3,671,432.32 being the cost of conversion works done to the 'Safe Neptunia' to convert it to a combination/lay barge.

67 [1988] 3 M.L.J. 78, 79.

68 Namely, *Bergougnan* v. *British Motors Ltd.* (1930) 30 S.R. (NSW) 61, *Lewis* v. *Andrews and Rowley Proprietary Ltd.* (1956) S.R. (NSW) 439 and *Rendell* v. *Associated Finance Proprietary Ltd.* (1957) V.R. 604.

69 (1957) V.R. 604.

70 The emphasis is the writer's.

71 The emphasis is the writer's.

72 (1957) V.R. 604, 610.

Turning to the facts at hand, Thean J. said that as it was never intended by the owner of the crawler crane, Consafe Far East Pte. Ltd., and for that matter by either the demise charterer or the shipowners that the crawler crane should be incorporated into and become part of the principal chattel namely, the 'Safe Neptunia', the property in the crawler crane remained in Consafe Far East Pte. Ltd., subject to a validly created mortgage in favour of Skandinaviska Enskilda Banker (South East Asia) Ltd. And the fact of the matter was, as pointed out by the learned judge, the crawler crane was not affixed or attached to the 'Safe Neptunia' and was at all times identifiable as a mobile crawler crane and was used as such.

It is significant to note that in arriving at the conclusion that the crawler crane was not part of the barge, Thean J. considered the intention of the owner of the crawler crane and the physical characteristics of the crawler crane. Essentially, the test of ascertaining whether an accessory like the mobile crawler crane has become part of the principal chattel resulting in property in the accessory passing to the owner of the principal chattel is a factual one.[73] In this case, it was particularly crucial that the crawler crane was at all times identifiable as a crawler crane and remained at all times unattached to any part of the barge.

To the ship-repair yard's argument that Consafe Far East Pte. Ltd., was estopped against the former from treating the crawler crane as other than a single unit with the 'Safe Neptunia', Thean J. held that the mere invitation by Consafe Far East Pte. Ltd., to the ship-repair yard for quotations on the repair works to both the barge and the crawler crane did not constitute a representation that the barge and the crawler crane belonged to the same owner or was to be treated as one unit. His Lordship added "At any rate, there was [no][74] sufficient evidence before me to found the argument of estoppel advanced on behalf of the second intervener [the ship-repair yard]."[75]

Dealing with the final issue of whether the ship-repair yard had a possessory lien over the crawler crane, Thean J. said that that was really a question of fact[76] and concluded that indeed, the ship-repair yard had a possessory lien over the crawler crane in as much as it had done some repair work to the crawler crane. However, his Lordship held that the possessory lien was limited to a fair and reasonable amount that would have been chargeable for the repair work done to the crawler crane and rejected the ship-repair yard's claim for S$7,000. It is worthy of note that the ship-repair yard's claim for S$7,000 was an amount slightly more than tenfold of the fair and reasonable cost, as adjudged by the court, of the repairs. In the words of Thean J., "… I cannot see how the [ship-repair yard] can reasonably justify inflating a paltry sum of $620 to a huge amount of $7,000. What the [ship-repair

[73] See generally *Crossley Vaines on Personal Property,* (5th Edition, 1973), Chapter 19, and the recent article by Tan Sook Yee entitled "Of Chattels, Fixtures and Retention of Title" in [1988] 3 M.L.J. xvii. For an earlier decision of Thean J., where his Lordship considered the law of accession in relation to the accession of machine parts to a processing plant, see *Gebreuder Beuhler AG* v *Peter Chi Man Kwong* [1987] 1 M.L.J. 356.

[74] There is an inaccuracy in the report of the case in [1988] 3 M.L.J. 78, 81 where the word 'no' was inadvertently omitted.

[75] [1988] 3 M.L.J. 78, 81.

[76] *Ibid.*

yard] did in this respect is manifestly unsustainable; it patently exceeded all bounds of reasonableness."[77] Two points arise from Thean J.'s holding on this final issue. First, his Lordship assumed rightly that the mortgagee of the crawler crane was subject to the ship-repair yard's possessory lien for the repair work done to the crawler crane. As discussed earlier[78], this is undoubtedly correct as it was established in *Williams* v.*Allsup*[79] that the mortgagee of a chattel will be subject to the possessory lien created by the mortgagor of the chattel in as much as the former has permitted the latter to use and be in possession of the mortgaged chattel. The right to use and be in possession of the mortgaged chattel entitles the mortgagor to do that which is reasonably incidental to the use of the chattel which certainly includes the delivery of the chattel to an artificer for repair of the chattel on the ordinary terms — that is on terms which will include the availability of a possessory lien to the artificer should his demand for the cost of repairs be not met. Secondly, on the facts of *"The Safe Neptunia",* Thean J. was, it is respectfully submitted, undoubtedly correct when he held that the possessory lien of the ship-repair yard was limited to a fair and reasonable amount for the cost of repairs to the crawler crane. That a possessory lienee may not, where there is no agreement on the price payable for the work to be done on the chattel, claim for an amount in excess of that which is reasonably chargeable for the work done to the chattel is a proposition that is uncontrovertible and if there be any need for authority for such a proposition, it may be found in *inter alia, Tappenden* v. *Artus*[80] and *Lilley* v. *Barnsley.*[81] The facts of *"The Safe Neptunia"* as reported does not reveal whether there was any agreement between the ship-repair yard and the demise charterers[82] on the price to be paid in respect of the repairs to be done to the mobile crawler crane. Indeed, from the report one gets the impression that any agreement on the cost of repairs related only to the repairs to be done on the vessel.[83] In the absence of an agreement on the cost of repairs payable for the repair to the crawler crane, the law will imply that the ship-repair yard be paid an amount on a *quantum meruit* basis.[84]

The matter of what constitutes the *res* subject to a ship-repair yard's possessory lien has also exercised the Supreme Court of Nova Scotia in the case of *Hutchison* v. *Hawker Siddeley Canada Ltd.*[85] Shorn of details, the issue which fell for Gillis J. to decide was whether two new lifeboats intended to be installed on the vessel, the 'Calgary Catalina', to which repairs had been done was subject to the possessory lien of the ship-repair yard which had executed the said repairs. It is pertinent to note that the ship-repair yard had not done any work on the two new lifeboats. In fact, the two new lifeboats were

77 *Ibid.*
78 See the discussion under the rubric "The Creation of the Possessory Lien".
79 (1861) 10 C.B.N.S. 417. See also *Tappenden* v. *Anus* [1964] 2 Q.B. 185 wherein Diplock L.J. admirably distilled the governing principle.
80 [1964] 2 Q.B. 185, 195.
81 (1844) 1 Car. &K. 344.
82 The agreement for repairs to me 'Safe Neptunia' was entered into between the ship-repair yard and the demise charterer through the agency of Consafe Far East Pte. Ltd., the managing agents of the demise charterer.
83 [1988] 3 M.L.J. 78.
84 [1964] 2 Q.B. 185, 195.
85 [1972] 32 D.L.R. (3d) 759.

delivered by a third party supplier to the ship-repair yard's premises after the repair yard had parted with the possession of the 'Calgary Catalina'. It was held by Gillis J. that the ship-repair yard could not exercise a possessory lien over the two new lifeboats since in the first place, no work had been done on the lifeboats and secondly, the lifeboats were not part of the 'Calgary Catalina'. On the point that the lifeboats were not part of the repaired vessel, the learned judge said "… the lifeboats were things apart from the motor vessel… they were not installed on the vessel;… they were not part of [the vessel] or appurtenances;... they were not in substitution for anything similar there before.…The indication that [the lifeboats] might go upon the vessel and might become part of it or appurtenant to it is not enough. They must actually be so."[86] It is worthy of note that earlier in his judgement, Gillis J. intimated that he "would be prepared to hold, that if the motor vessel had remained in possession [of the ship-repair yard], the lien would attach to it and its appurtenances. Further, if the lifeboats were then aboard they would be included in the liened material."[87] It is respectfully submitted that this intimation is only correct if the lifeboats had become, by the law of accession, part of the principal chattel namely the 'Calgary Catalina'. On the particular facts in *Hutchison* v. *Hawker Siddeley Canada Ltd.,* it cannot be gainsaid that the two new lifeboats although intended by the shipowner of the 'Calgary Catalina' to be installed on the vessel did not, by the law of accession, become part of the vessel in as much as the lifeboats had not, at all material times, been installed on the vessel nor were they, at all material times, ever on board the vessel.

Thus as the two cases of *"The Safe Neptunia"* and *Hutchison* v. *Hawker Siddeley Canada Ltd.,* demonstrate, the question of what constitutes the subject matter of the possessory lien is a matter which ship-repair yards will be well-advised not to take for granted.

CONCLUSION

The object of this article is, as mentioned at the outset, to provide an insight into some aspects of the possessory lien in admiralty actions *in rem* and it is hoped that the foregoing discussion has in some measure clarified some of the mysteries that enshroud this arcane branch of the law. It is sufficient to say that there remain vast stretches of uncharted waters in this branch of the law but any survey of those uncharted waters must perforce be the subject of another discourse. Considering the arcanal waters that run in this branch of the law, perhaps, it is not inappropriate to conclude with the following quotation:

> "Well, there was Mystery," the Mock Turtle replied, counting off the subjects on his flappers — "Mystery, ancient and modern,

[86] *Ibid*., at p. 765.
[87] [1972]32D.L.R. (3d) 759, 763.

with Seaography : then Drawling — the Drawling master was an old conger-eel, that used to come once a week: he taught us Drawling, Stretching and Fainting in Coils."[88]

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[88] From Lewis Carrol, *Alice's Adventures in Wonderland*, (1965 Edition), Chapter 9, at p. 98.

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