Fraser Shipyard and Industrial Centre Ltd. v. Atlantis Two (The), 1999 CanLII 8369 (FC)

Date: 19990611

Docket: T-111-98

ACTION *IN REM* AGAINST THE DEFENDANT SHIP "*ATLANTIS TWO*"

BETWEEN:

FRASER SHIPYARD AND INDUSTRIAL CENTRE LTD.,

Plaintiff,

- and -

EXPEDIENT MARITIME COMPANY LIMITED,

EXPEDIENT MARITIME CO. (CYPRESS) LTD.

INTERNATIONAL COFFEE AND FERTILIZER

TRADING CO. (INCOFE), MERMAID SHIPPING

CO. LTD., and the owners and others

interested in the ship "*ATLANTIS TWO*",

Defendants,

- and -

THE OFFICERS AND CREW OF THE SHIP

"ATLANTIS TWO",

Intervenors.

Heard at Vancouver, British Columbia on November 24 and 25, 1998

Order delivered at Vancouver, British Columbia on June 11, 1999

REASONS FOR ORDER BY: MR. JOHN A. HARGRAVE, PROTHONOTARY

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- and -

THE OFFICERS AND CREW OF THE SHIP

"ATLANTIS TWO",

Intervenors,

- and -

LLOYD'S REGISTER OF SHIPPING,

Intervenor.

REASONS FOR ORDER

JOHN A. HARGRAVE,

PROTHONOTARY

[1] These reasons deal with the priorities of *in rem* claimants to the sale proceeds of the *Atlantis Two* and also touch upon the assignment of the claim of the crew for repatriation costs to the Crown. Some of the issues as to priorities are fairly standard. Other issues, such as the alteration of usual priorities, the nature of various American claims of lien, including for breach of head charter and of sub-charter and the enforcement, by way of Canadian sister ship procedure, of a substantive American maritime lien, have either been less well canvassed or are novel.

BACKGROUND

[2] By way of pertinent background, this action was begun in January of 1998 as a ship-repairer's necessaries claim, being for work done at Vancouver in December 1997 and January 1998, to fulfil Coastguard enforced Port State Control requirements, the ship then being detained. The *Atlantis Two* was arrested in another necessaries action on 5 January 1998 and in this action on 30 January 1998, while at anchor in Vancouver Harbour. Subsequently, the owners having abandoned the *Atlantis Two*, the officers and crew of the ship intervened, obtaining an order for sale *pendente lite*, 27 May 1998, the ship then laden with a cargo of potash for Guatemala and Costa Rica.

[3] As various interested entities learned of the proceedings they took active parts. Particularly, International Coffee & Fertilizer Trading Co. ("INCOFE"), the cargo owners and Mermaid Shipping Co. Ltd., ("Mermaid"), a bunker supplier, had themselves joined as Defendants. In the result the ship was sold with an obligation to deliver the cargo. The diesel and bunkers aboard, while going with the ship, were valued and the proceeds kept in a notionally segregated fund, for Mermaid claims as an owner of the fuel.

[4] The sale of the ship, at $1,100,000 was accomplished by Court Order 11 August 1998. At the same time the bunkers were sold, with the ship, at $58,393.49. All dollar figures throughout these reasons are in American currency, unless otherwise noted. The price was below appraised value of $1,450,000, but that was not surprising given the condition of the ship, the fact that she was laden with cargo, thus precluding an inspection of holds and tank tops, and the falling state of the market.

[5] In the interim, before the sale order, officers and crew, being without funds, obtained a repatriation order to the effect that repatriation expenses paid by the government of Canada would form a part of any maritime lien for wages. The Order allowed the assignment of the lien to the Department of Citizenship and Immigration, who underwrote the cost of returning crew members to India.

[6] A large number of lien claimants made their appearance. Those who stayed the course are:

1. James Peebles	Supply of diesel fuel, at Vancouver, with a priority equivalent to that of the marshal for expenses as per the 13 May 1998 Order of Mr. Justice Pinard in the amount of $13,250
2. Master, Officers and Crew, including repatriation costs assigned to Citizenship and Immigration Canada	Crew wages in the amount of $354,357.37 and repatriation costs in the amount of $31,356.41 (Cdn)
3. Mermaid Shipping Co. Ltd.	As owner of $114,752.38 of intermediate fuel oil and marine diesel oil and against the shipowner for breach of Charter party including for bunkers consumed, overpaid hire and loss of income of $635,699.01
4. Strachan Shipping Co.	Necessaries supplied by an American firm at Savanna, Georgia 13 April 1997 in the amount of $3,429.37.
5. Hellenic Ship Supply Inc.	American necessaries supplier claiming for necessaries delivered to the *Atlantis Two* at Tampa, FL, in February of 1997 with a balance owing of $6,425.75.
6. Atlantic Steamers Supply Co. (DE) Inc.	American necessaries suppliers of goods in 1996 and 1997 at Phillidelphia, Tampa, FL and Baltimore, MD in the amount of $25,456.08.
7. Atlantic Steamers Supply Co. (NLN) Inc.	American necessaries suppliers of goods supplied in 1993 and in 1996 at New Orleans, with a balance owing of $23,421.54.
8. Nautilus Australia Limited	Necessaries supplied in October 1997 in Australia for a balance of its account Aust. Dollars $13,938.65
9. Mega Marine Services Ltd.	American necessaries supplier who shipped goods f.o.b. Houston to the *Atlantis Two* then at Australia and at Vancouver in the amount of $41,577
10. Unitor ASA	Necessaries supplied during 1997 and 1998 by a Norwegian firm through its American agent to the *Atlantis Two* at Vancouver and to sister-ships at ports in the United States, Mexico, China and Norway, totalling $27,636.58.
11. International Coffee and Fertilizer Trading Co.	As Charterer for breach of charter party, said to constitute an American maritime lien, in the amount of $435,851.10
12. ABN-AMRO Bank N.V.	Mortgage-secured overdraft of $2,090,895.28 as of 30 June 1998 with interest at 8.5%; and a mortgage standing at $9,283,973.97 as of 30 June 1998, with interest at $1,940.24 per day, the mortgages registered as first and second charges, 31 December 1995 and 24 January 1996.

13. Fraser Shipyard and Industrial Centre Ltd.	Repair work done at Vancouver December 1997 and January 1998 in the amount of $460,839.37 (Cdn.) largely as required by coast-guard detention of ship.

[7] A number of those who initially filed claims chose not to pursue them and did not appear at the hearing to determine priorities. Those claimants, necessary suppliers, through mere accident of location, had only rights *in rem*, as opposed to the maritime liens claimed by those necessaries suppliers fortunate enough to be operating out of or through the United States.[1] I now turn to the conventional ranking of *in rem* claims and to some applicable principles.

RANKING OF *IN REM* CLAIMS AND SOME APPLICABLE PRINCIPLES

Canadian Ranking of In Rem Claims:

[8] The priority given to maritime claims in Canada generally follows the ranking of claims in the United Kingdom but, as there are some minor differences, one is best off to follow Canadian cases unless cognizant of the differences. The leading Canadian cases are *Comeau's Seafoods Ltd. v. The Frank and Troy*, [1971] F.C. 556, *The Ioannis Daskalelis*, [1974] 1 Lloyd's 174 (S.C.C.), *Osborne Refrigeration Sales & Service Inc. v. The Atlantean I*, [1979] 2 F.C. 661 and *Llido v. The Lowell Thomas Explorer*, [1980] 1 F.C. 339. Also pertinent in any general survey is *The Monica S.*, [1967] 2 Lloyd's 113, a decision of Mr. Justice Brandon, which deals extensively with the position of a necessaries supplier.

[9] The usual ranking of *in rem* claims in Canada are as follows:

1. Disbursements of the Admiralty Marshal;
2. The costs of the sale, including those of the Plaintiff in an action for arrest, appraisal and sale, or alternatively, the claim of a party, other than the Plaintiff, who has been the instrument by which the ship has been brought to sale;
3. Possessory liens predating other liens;
4. Maritime liens;
5. Possessory liens arising after a maritime lien;
6. The claim of a mortgage holder; and
7. Statutory rights *in rem*, including for the supply of necessaries, which rank *pari passu* among themselves.

American Ranking of some In Rem Claims:

[10] In that there are a number of lien holders who claim American maritime liens, I should also touch upon the ranking, *inter se*, of some American maritime claims. While ranking of American maritime liens for necessaries is, in Canada, governed by the Canadian scheme of priorities, the American ranking may be relevant.

[11] Under the American system of priorities a preferred maritime lien, for goods supplied before registration of a preferred mortgage, takes priority over the mortgage. Also pertinent is a sub-category of American maritime lien, a lien arising out of a breach of charter. If such a

lien predates the mortgage on a ship it is, by 46 U.S.C. " 31301(5)(A), a preferred maritime lien taking priority over the mortgage. If such a lien post-dates an American mortgage it is, by definition, not a preferred maritime lien. Of course, as I have already indicated, and still dealing with the American system of ranking, this is not an isolated instance of loss of priority: a necessaries claimant, who supplies goods to a ship after the registration of a preferred American mortgage, does not have a preferred maritime lien, but only a contract maritime lien, subsidiary to the lien of a preferred mortgagee. Some of these concepts become relevant in considering the claim of INCOFE, as sub-charterer, for breach of charter.

[12] As to ranking *inter se* of American maritime liens for necessaries, the rule that they rank in inverse order of accrual is procedural. However, because the valid portions of the American maritime liens and the portion of one Canadian necessaries claim which I have raised to be equivalent to an American maritime lien do not exhaust the available fund, I do not need to consider ranking, *inter se,* of these claims under Canadian law.

Delay in Prosecuting American Necessaries Claims

[13] Not all of the American necessaries claims in this matter are fresh. Therefore I raised the questions of laches as a possible bar. None of counsel were inclined to make submissions. However, reasonable diligence is an important aspect of successful enforcement of an American necessaries claim, a point which I will touch upon later.

The Ioannis Daskalelis

[14] As there are a number of American necessaries claims, which give rise to substantive statutory maritime liens, *The Ioannis Daskalelis* (*supra*) is pertinent. There the Supreme Court of Canada decided that the holder of a substantive American maritime lien might bring the lien into Canada and then use our procedural legislation, the *Federal Court Act and Rules*, to enforce it. In effect the right is American and the remedy Canadian. The right considered by the Supreme Court in *The Ioannis Daskalelis* was that granted under section 971 of the *United States Code* which provided, in part, that a person furnishing necessaries "... shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel.". The current provision, section 31342, dealing with establishment of maritime liens, provides in part that:

> ... a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner -
>
> 1. has a maritime lien on the vessel;
> 2. may bring a civil action *in rem* to enforce the lien; and
> 3. is not required to allege or prove in the action that credit was given to the vessel.

Section 971 and the present section, 31342, are similar.

[15] Mr. Justice Ritchie, who wrote the judgment in *The Ioannis Daskalelis*, referred to *The Strandhill*, [1926] S.C.R. 680 and particularly touched on a comment of Mr. Justice Newcombe as to the nature of the American maritime lien which was enforced in *The Strandhill*. Mr. Justice Newcombe pointed out that the Exchequer Court was empowered to enforce a maritime lien for necessaries notwithstanding that the right may have been acquired

under foreign law and particularly, and here I refer to Mr. Justice Ritchie's comment at page 177:

> Mr. Justice Newcombe, however, had been careful to point out that "it must ... be remembered that it is the right and not the remedy which is regulated by the *lex-loci*."

Mr. Justice Ritchie then went on to say:

> I do not find it necessary to go further than the decision in *The Strandhill* to find authority for holding that the necessary repairs furnished by Todd Shipyards Corporation in New York gave rise to a maritime lien against the defendant ship which is enforceable in this country, but the further question to be determined in this case is whether that lien takes precedence over the respondent's mortgage claim, and in my view this question must be determined according to the law of Canada (ie. the *lex fori*).

Mr. Justice Ritchie considered this point briefly but thoroughly and concluded that the maritime lien of the ship repairer, a necessaries lien under American law, took priority over a ship's mortgage. Pertinent here is not only this priority, but also that the ranking, as between the lien and the mortgage, is to be determined according to the law of Canada.

[16] The *Ioannis Daskalelis* also contains a further pertinent statement. The *Ioannis Daskalelis* was a Greek ship. The contest was between the registered mortgagee of the ship and an American necessaries claimant, which had furnished ship repairs. The mortgage of the *Ioannis Daskalelis* was registered in December of 1961. The necessaries repair work was performed in March of 1963.

[17] Mr. Justice Ritchie notes, at page 176, that:

> It is not questioned that by virtue of 46 U.S.C. pars. 971 and 972, the appellant's claim for necessary repairs gave rise to a maritime lien in the United States of America which in that country would have taken precedence over the mortgage claim...

At first blush one might question this statement, for the mortgage predates the necessaries claim and thus, one might think, fall within the general rule that a preferred mortgage takes priority over all subsequent necessaries claims, including repair services.

[18] This apparent priority is not the case for, when 46 U.S.C. was amended in 1954, to give preferred status to validly registered foreign mortgages, American necessaries suppliers managed to lobby a proviso that foreign mortgages be subservient to maritime liens for necessaries: this provision is presently found in 46 U.S.C. " 31326(B)(2).[2] The effect of this subsection, combined with the relevant part of the definition of a preferred maritime lien, requiring that a necessaries claim arise before the registration of the mortgage against the ship, is that such a necessaries claim is not preferred, yet it comes ahead of a foreign mortgage which is a preferred mortgage under the American system.

[19] The conclusion which must arise out of all of this is that the Supreme Court of Canada was cognizant that it was enforcing a garden variety maritime lien, a lien that was not a preferred maritime lien, by placing it in the Canadian priorities framework under the general

rubric of maritime liens. This concept is useful in analyzing the claim of INCOFE, to which I will come in due course.

[20] The list of priorities set out above and the comments are not exhaustive, but rather are a framework showing the relative positions of various types of relevant *in rem* claims and some of the special considerations which are relevant in this instance. I now turn to a consideration of the various claims.

BUNKERS SUPPLIED BY ORDER OF THE COURT

[21] In May of 1998 the Master of the *Atlantis Two*, the vessel then at anchor in Vancouver Harbour, advised the harbour master that, despite efforts to reduce fuel consumption, the ship would run out of diesel fuel to run generators and to manoeuvre with the main engine by about the 15th of May. At that point the vessel, unable to maintain its systems, including fire suppression systems and unable to move on immediate notice, would not only be in breach of port by-laws, but would also be a danger to the crew and to the port.

[22] An arrangement was made, approved in advance by the Court, to have a fuel supplier, James Peebles, put diesel fuel aboard up to a value of $16,250, with a priority equivalent to that of an Admiralty Marshal for expenses.

[23] The cost of the diesel fuel and delivery was $13,250. Mr. Peebles shall have, paid out of the sale proceeds with a priority as if a Marshal's expense, $13,250 for fuel and delivery, $7.50 in bank charges and simple interest at 7% from 14 May 1998, being the date of the bank transfer. As the Sheriff's account has been satisfied Mr. Peebles' claim is now the first charge on the sale proceeds.

[24] Here I note that where appropriate interest on claims is not governed by invoice conditions or other argeement, I have awarded interest at 7%. This is not an arbitrary figure, but rather one based on an estimate by inspection of the Bank of Montreal commercial lending rates for the relevant period.

CLAIM OF CREW, OFFICERS AND MASTER

[25] The expense of repatriating the crew was dealt with at an earlier stage. Those repatriation orders were to the effect that repatriation costs formed a part of any maritime lien for wages and that the proceeds of the lien might be assigned to the federal government. I will shortly touch upon the reasons for that order.

[26] I shall refer to the crew, officers and master collectively as the "Crew", for there is now no longer any distinction between the rights of masters, officers and seamen, as to the quality of the lien of each holder, as there once was.[3] The Crew brought a separate motion to establish a priority for payment out of their wages, including the repatriation costs which are assigned to the Crown. On the hearing of the Crew's initial motion for payment at least one counsel urged that the Crew might well have an inferior priority under some applicable off-shore law. Thus I ordered that all priorities be determined at the same time.

Master's Disbursements

[27] A portion of the claim of the Master is for disbursements, mainly for food for the crew, out of his own pocket. The disbursement became essential because the ship had been abandoned by owners, who would or could not pay for food and essential supplies. The expenditure by the Master, as a result of all of this, clearly falls within the definition and satisfies the tests for a Master's disbursement lien, thus securing the Master's claim by a maritime lien: see for example *Doris v. The Ferdinand*, now reported 1998 CanLII 8451 (FC), (1999), 155 F.T.R. 236 (T.D.), at page 239. Master's disbursements are not only secured by a maritime lien, but also, pursuant to section 212(2) of the *Canada Shipping Act*, R.S.C. 1985, c. S-9, have the same priority as does the Master's claim for wages:

> (2) The master of a ship, and every person lawfully acting as master of a ship by reason of the decease or incapacity from illness of the master of the ship, in so far as the case permits, has the same rights, liens and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages.

By reason of the *Canada Shipping Act* I do not have to consider Master's disbursements separately. In the absence of any substantial challenge I accept the figures for the Master's disbursements as presented.

Crew Wages

[28] No substantial challenge to the priority of the Crew for wages and repatriation costs arose. The Crew thus has a first priority to the sale proceeds that remain after the Sheriff's costs of the sale and reimbursement to Mr. Peebles for diesel fuel. The sum awarded for wages (including Master's disbursements) is $354,357.37. This first priority extends to the repatriation costs in the amount of $31,356.41 (Cdn.). The Crew shall have interest at 7% on wages and on Master's disbursements running, and here I shall be arbitrary, from the date of the arrest, for no Crew member has been paid past that date and indeed, perhaps no payments were made of wages earned after 30 December 1997. Interest at 7% shall run on repatriation costs from the date of the sale, 11 August 1998.

Costs

[29] The Crew also seeks taxed costs. In the present instance I have not awarded costs to other parties or to successful claimants, except as to costs of arrest to the Plaintiff and a lump sum to the crew for organizing the sale. This is so even though many of the claimants and parties assisted in the co-operative effort of bringing the ship to sale. Were there ample funds to satisfy all of the claims and mortgages, that might be an additional factor governing the award of costs. Given that the mortgages registered against the ship will not be fully satisfied I do not see the justification for a substantial or even any award of costs to all of the parties and claimants. Nor do I see the point of forcing those parties and claimants to whom costs are awarded to tax them. Rather a lump sum is more appropriate. The Crew shall have a lump sum for costs and disbursements of $6,000. The lump sum in this instance is not likely an indemnity and is not intended as such. Rather it is in recognition of the efforts put into bringing the ship to a successful sale.

REPATRIATION

Cost of Repatriating Crew

[30] On two occasions, following the arrest of the ship, I dealt with motions by intervening Crew members who wished to be repatriated. Normally such expenses would be borne by the owners, however the owners had abandoned both the ship and Crew. In the first instance the Crew, having been on short rations and without pay, wished that a number of their group, who were in excess of the manning required by the ship in port, be repatriated on terms which would allow Citizenship and Immigration to pay the cost and then recoup that expense through an assignment of repatriation costs, those costs to form part of the Crew's wage claim with a similar priority. The Order provided:

> The cost of repatriating the seventeen officers and crew members, referred to above, shall form part of any maritime lien for their wages. The officers and crew may assign the proceeds of this lien, to the extent of repatriation costs, to Citizenship and Immigration, a Department of the Federal Government of Canada. Reasons to follow. (Order of 13 July 1998)

[31] Subsequently I made a second and similar Order to deal with repatriation of the balance of the Crew on the sale of the ship. As I say, usually repatriation costs are for the owner's account. However repatriation costs, borne by seamen themselves, can rank with wage claims. Here I would refer to *The Tergeste*, [1903] P. 26 at 34, a decision of Mr. Justice Phillimore, the essence of which is captured in a part of the headnote:

> *Held*, by Phillimore J., that the victualling allowance was equivalent to wages, carrying a maritime lien, and, therefore, the total claim of the master and crew for wages and disbursements up to the date of the vessel entering the dry dock, together with the cost of subsistence from the time of leaving the vessel until leaving the country, and the cost of repatriation ranked first, with costs, including in such costs such sum as the registrar should allow by way of subsistence money from the date of the writ to the time of leaving the vessel;
>
> [emphasis added]

The Immacolata Concezione, (1883) 9 P.D. 34, referred to in *The Tergeste*, is also pertinent. There repatriation costs were ranked in priority with the wages of the seamen.

Assignment of Repatriation Costs

[32] The second issue is whether a maritime lien for repatriation may be assigned where, as here, repatriation expenses are paid by someone else. Certainly this Court has ordered such an assignment as referred to in *The Lowell Thomas Explorer* (*supra*). There were submissions that the motion granting the assignment referred to in *The Lowell Thomas Explorer* was wrongly decided. I do not believe so. As I said in *The Edmonton Queen* (indexed as *Scott Steel Ltd. v. The Alarissa*), 1996 CanLII 4035 (FC), [1996] 2 F.C. 883 at 925, "[s]ubject to the leave of the Court anyone who pays off a seamen's lien for wages acquires no lien on the ship.".

[33] The concept suggested in *The Edmonton Queen* is, here, particularly apt, for otherwise the crew members would have remained aboard not only both under employed and under provisioned, but also accruing wages, probably in excess of repatriation costs, which would form a maritime lien for wages to be satisfied out of the sale price. Moreover, at the point of

the sale, any crew members who elected to return home would be entitled to repatriation costs along with their wages.

[34] The view of assignability of wage and like claims, by the authority of the Court, is consistent with English authorities, for example *The Vasilia*, [1972] 1 Lloyd's 51, *The Berostar*, [1970] 2 Lloyd's 403 and *The James W. Elwell*, [1921] P. 351 at 357, together with a number of earlier authorities referred to in Tetley on Maritime Liens and Claim, Second Edition (1998), Blais International Shipping Publications, Montreal, at page 1231. Indeed, Mr. Tetley deals with assignment of maritime liens, by Court authority, fairly briefly:

> It would appear clear in virtue of "Canadian maritime law", which, amongst other things, is an expression of English maritime law as of 1934, that a lien may be assigned by order of a court. This is the British practice and was the view of the Court, albeit *obiter*, in *Ross v. The Aragon*, [1943] Ex.C.R. 41, at page 43.
>
> [page 1230 - 1231]

[35] I also considered submissions to the effect that Customs and Immigration had a duty not to let anyone overstay their welcome in Canada and, for that reason, ought to fund repatriation. In rejecting that argument I note that the relevant provisions in the *Immigration Act*, are permissive and here I would refer, for example, section 87(2) and section 120, dealing with assistance on leaving Canada. Leaving aside the permissive nature of this sort of provision in the *Immigration Act*, there is a difference between the forced expulsion of an undesirable alien, at the Crown's expense, and the repatriation of a seaman who is properly within the Canadian jurisdiction. There is no reason why the cost of repatriating crew members ought to fall upon taxpayers when there is a fund readily available to satisfy *in rem* claims, including those of the crew members, against *The Atlantis Two*.

BUNKERS CLAIM OF MERMAID SHIPPING CO LTD.

[36] Before dealing with the separate issues of the priorities of each of the claimants I will consider part of the claim of Mermaid Shipping Co. Ltd. ("Mermaid"), head charterers under a charter party of 11 July 1997, as owner of bunkers aboard the ship. Mermaid sub-chartered the *Atlantis Two* to International Coffee and Fertilizer Trading Co. (INCOFE) Ltd. ("INCOFE") pursuant to a voyage charter of 18 November 1997.

Claim as Owner of Fuel

[37] In part Mermaid claims $114,752.38, being the value of bunkers on the vessel at the time of her arrival in Vancouver and subsequently put aboard the vessel by Mermaid. This claim is based on various sections of the head time charter, however only two of those sections are relevant:

> 2. That whilst on hire the Charterers shall provide and pay for all the fuel except as otherwise agreed, Port Charges, *customary* Pilotages, Agencies Commissions, Consular Charges (except those pertaining to the Crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the Owners.
>
> 3 That the Charterers, *upon* delivery, and the Owners, *upon* re-delivery, shall take over and pay for all fuel remaining on board the vessel *as per Clause 40*.

Clause 40, referred to in clause 3 of the time charter, refers to the amount of bunkers and diesel fuel aboard ship on delivery by the owners. I have no reason to doubt the affidavit evidence that Mermaid was the owner of all bunkers and diesel fuel aboard the *Atlantis Two* on arrival at Vancouver and that it put aboard and paid for additional fuel at Vancouver.

[38] When the *Atlantis Two* was sold the Sheriff certified that the bunker fuel and diesel oil aboard sold for $58,393.49, a figure which includes the delivery costs of that fuel.

[39] Mermaid's claim is, as I say, for all of the fuel that was aboard the *Atlantis Two* on arrival at Vancouver, together with the fuel that Mermaid subsequently paid for and put aboard the *Atlantis Two*. Mermaid's estimate is that, at one point, it owned about 680 tonnes of bunkers and about 160 tonnes of diesel oil. However, during the time the *Atlantis Two* was held at the port of Vancouver a good portion of that diesel oil was used to run the ship's generators.

[40] When the *Atlantis Two* was sold the bunker fuel aboard total 729.32 metric tonnes, valued at $52,875.70 and a minimal amount of diesel oil, 16.27 metric tonnes valued at $2,684.55. However Mermaid's claim is not just for the residual fuel aboard at the time of the sale, but also for diesel oil consumed while the *Atlantis Two* was at Vancouver. Moreover, those claims are based on higher fuel prices of an earlier date.

Mermaid's Fuel Used at Vancouver

[41] Mermaid submits that it ought to be paid for the diesel oil consumed at Vancouver, for that fuel was required in order to keep the ship operating, just as was the fuel supplied by Mr. James Peebles which, by Court Order, had a priority as if a Marshal's disbursement. Certainly Mermaid, in addition to owning fuel aboard when the ship arrived at Vancouver, also put aboard diesel fuel at Vancouver.

[42] Short of a Court Order and perhaps some limited exceptions, I do not accept the argument that fuel supplied and owned by charterers, but burned by owners, during the time the vessel was detained and under arrest at Vancouver, ought to have any substantial priority. It is not as if the value of the fuel used is in any way secured by a lien. Rather it was Mermaid's fuel, used by owners and therefore that portion of the fuel claim is purely an *in personam* claim against the owners.

[43] Even if one looks upon Mermaid's actions not as supply of diesel fuel for its own use as charterer, but rather as supply of fuel to the ship, that supply of fuel does not, under Canadian law, constitute more than a mere right *in rem* against the ship with a low and unhelpful priority.

[44] In special circumstances one may justify a departure from the Canadian scheme of priorities, either raising or lowering a usual priority. I dealt with this at length in *The Edmonton Queen*, (*supra*) at 896 and following. This was upheld on appeal 1997 CanLII 4792 (FC), (1997), 125 F.T.R. 284, Mr. Justice Richard, as he then was, paraphrasing my conclusion at page 288:

> The Prothonotary stated that any change in the usual ranking of maritime priorities must be accomplished by the application of equitable principles. On his analysis of **Atlantean I, Re**, [1979] 2 F.C. 661, at 668 (T.D.), and **Metaxas et al. v. Ship Galaxias et al. (No. 2)**, [1989]

1 F.C. 368; 19 F.T.R. 108, at 423 [F.C.] (T.D.), he concluded that the usual priorities ought not to be departed from except in very special circumstances and that the powers in equity to upset the long established orders of priority should be exercised only where necessary to prevent an obvious injustice. He also considered the judgment of Mr. Justice Brandon in **Ship Lyrana (No. 2), Re**, [1978] 2 Lloyd's Rep. 30 (Q.B.D. Admiralty Ct.), where the test used was that of a plainly unjust result. He was of the view that the phrasing of the test pointed to a heavy onus on the part of Treasury Branches to upset the usual long-established priorities.

[45] In this instance there is, arguably, some injustice in that American necessaries suppliers succeeded on their maritime lien backed claims, in at least one instance for somewhat mundane, although useful items for domestic shipboard use. In contrast, Mermaid's fuel was used to keep the ship operating, while at Vancouver, as was the diesel fuel supplied by Mr. Peebles and for which the Court agreed, in advance, to grant a priority.

[46] In considering Mermaid's claim for its fuel consumed, at least some of it while the *Atlantis Two* was under arrest, I have revisited the *Atlantean I*, [1979] 2 F.C. 661, both generally and particularly at page 688 and following. There the marshal was in possession. Claimants made various disbursements on the marshal's behalf, some authorized and others not, in order to assure the safety and protection of the ship. The expenses included fuel and lubricating oil, supplied in the order of $2,250, by the RCMP and by the Canadian Coast Guard, after the *Atlantean I* tried to break her arrest, but was brought back by the authorities. Mr. Justice Walsh was of the view that the expenses were of the sort that the marshal, in other circumstances, would have incurred, or which he would have authorized. Therein lies the difference. In the *Atlantean I* the marshal was in a position to control supplies to the ship, could claim such as marshal's disbursements and indeed did so. Here, while Mermaid rendered a valuable service to the *Atlantis Two*, it was outside of either the framework of a marshal's supervision or of any court order.

[47] I have considered various other cases on this issue, referred to me by Mr. Buchan, including *The Dora* [1977] 2 F.C. 513, a decision of Mr. Justice Collier. In *The Dora* a fuel supplier succeeded on its claim for fuel supplied to the vessel, but only on the basis that the marshal had charge of the *Dora* and would undoubtedly have authorized the use of and paid for the fuel consumed while he had charge of the ship. It did not concern Mr. Justice Collier, to the point of departing from the usual priorities, that fuel consumed before the intervention of the marshal, which was for the benefit of all interested in the *Dora*, was not paid for as a marshal's expense or, indeed, at all.

[48] All of this, as ably put by Mr. Buchan, on behalf of Mermaid, points to a Canadian dilemma: American necessaries suppliers, even those supplying necessaries in Vancouver are, for the most part in the present instance, able to recover their accounts, while Canadian necessaries suppliers cannot.

[49] The British solved this dilemma with *The Halcyon Isle*, [1980] 2 Lloyd's 325 (P.C.), essentially by rejecting the idea of the substantive nature of an American maritime lien and thus levelling the playing field by holding that all necessaries suppliers had the same right, that is the same right that a local necessaries supplier would have had under English law.

[50] In the present instance and in others there are many examples of the inequity unfortunately brought about by the Supreme Court of Canada's recognition of the substantive

nature of American maritime lien in *The Ioannis Daskalelis* (*supra*). However I do not think that the circumstances, in the case of Mermaid, constitute very special circumstances, an obvious injustice, or a plainly unjust result. Moreover, to allow Mermaid's claim, short of these tests, with the ship neither under a Sheriff's nor a Marshal's control, nor with the benefit of a Court Order, such as that which Mr. Peebles obtained, would result in wholesale disregard for the Canadian priorities structure. This is not to say that the structure ought not to be changed. Rather, it may be that necessaries suppliers in Canada, in the broadest sense, including shipyards, ought to press for legislative change as has happened and is happening in other maritime jurisdictions.

[51] In summary, and this is unfortunate, but overall not unjust, the Mermaid claim for bunkers consumed is, at best, at statutory right *in rem*. Unfortunately there are not sufficient funds to satisfy this aspect of Mermaid's claim.

[52] Subject to dealing with a possible interest of the mortgagee in the bunker and diesel fuel and leaving aside any argument as to mixing of the Mermaid diesel oil with the Peebles diesel oil, which involves a very small amount of money, Mermaid is entitled to the value of the bunker and diesel fuel aboard, less a share of the costs of the sale, a point which I will deal with in due course, and appropriate interest.

Mortgagee's Interest in Fuel Aboard

[53] The mortgagees are not now claiming an interest in the fuel aboard the *Atlantis Two*. This is appropriate. However, this aspect was dealt with in argument. The topic therefore deserves a brief consideration. Moreover, the case law leads to a pertinent subject, the cost of the sale of the bunkers.

[54] To begin, the terms of the mortgage do not extend to the fuel and here I would refer to *The Eurostar* [1993] 1 Lloyd's 106, in which Mr. Justice Sheen considered the position of charterers, who claimed ownership of bunkers and so intervened in proceedings between mortgagee and mortgagor. Mr. Justice Sheen held that, even assuming that the bunkers were the property of the ship owner, the term "appurtenance" in the mortgage deed did not cover fuel and thus the fuel was not the property of the mortgagee.

[55] Second, by the terms of the head charter, property in the fuel did not pass to owners in any event, but remained in Mermaid, as charterer. For this second proposition I would also refer to *The Saint Anna* [1980] 1 Lloyd's 180 (Q.B.) and *The Span Terza* [1984] 1 Lloyd's 119 (H.L.), in addition to *The Eurostar* (*supra*).

[56] In *The Saint Anna* the charter provisions were analogous to those in the present instance. There the bunkers were held to be the property of the charterer, not the owner. The charterer had paid for and taken over all of the fuel aboard the ship when it took the vessel on hire and subsequently purchased fuel for the vessel. At the end of the charter period it was for the owner to buy the fuel aboard from the charterer. Mr. Justice Sheen held that the charterer was clearly the owner of the fuel.

[57] In *The Span Terza (supra)* the terms of the charter party were similar to those in the present instance. There the House of Lords held that on the commencement of the charter, with the payment for and taking over of the fuel, the property in the fuel vested in the charterer. The owner was no more than a bailee of the fuel aboard. In reaching this

conclusion the House of Lords specifically approved *The Saint Anna*. Even when the charter terminated the bunkers remained the property of the charterer, with the owner still in the position of bailee, of course subject to the owner purchasing the fuel from the charterer.

[58] Finally, in *The Eurostar* (*supra*) Mr. Justice Sheen came to the conclusion that, under a similarly worded charter party, bunkers aboard were the property of the charterer. The vessel was laid up, much as in the present instance, with owners being unable to pay for repairs. The *Eurostar* was then sold. Mr. Justice Sheen concluded that the ship owner had no right to use the bunkers after the charter terminated, but rather the bunkers remained the property of the charterers until they were sold by the Admiralty Marshall and thus the net proceeds of the sale of the bunkers were paid out to the charterers.

Cost of Sale of Fuel

[59] The reference to net proceeds, at page 111 of *The Eurostar*, brings up a final point, whether it is proper for Mermaid to receive the gross proceeds of the sale of the fuel aboard the *Atlantis Two*, given that there were costs of sale, costs which would otherwise all detract from the amount available to those claiming against the proceeds of the sale of the ship. It is only equitable that a *pro rata* portion of the cost of the sale of the ship and of the fuel aboard be absorbed by Mermaid.

[60] The Sheriff's costs of the sale were, in round figure, $102,000 (Cdn), or in American funds roughly $65,000. The value of the fuel aboard at the time of sale, $58,393.49, amounts to about 5.3% of the sale price. Five point three percent of the cost of the sale is, again in round figures, $3,450. The recovery of Mermaid, on the basis of a fuel sale value of $58,393.49 less costs of sale, of $3,450, is $54,943.49.

Award to Mermaid

[61] In summary, Mermaid is entitled to the net value of the fuel, being the sale price of the fuel, kept in a notionally separate fund, less an equitable portion of costs of sale As to interest, Mermaid shall be entitled to whatever interest accrued on the value of the fuel sold while it was held in trust and on deposit.

SUPPLY OF NECESSARIES IN THE UNITED STATES

[62] There are four claims of maritime lien by American necessaries suppliers who supplied goods to the ship in the United States. These claimants are Strachan Shipping Company ("Strachan"), Hellenic Ship Supply Inc. ("Hellenic"), Atlantic Steamers Supply Co. (DE) Inc. ("Atlantic DE") and Atlantic Steamers Supply Co. (NLN) Inc. ("Atlantic NLN"). Except for part of the claim of Atlantic DE, whose supply of goods in 1993 predates the mortgages on the *Atlantis Two*, these claims are not secured by preferred maritime liens. Rather, they are maritime liens which, by reason of the 1954 proviso added to 46 U.S.C. " 31326, touched upon earlier, would, in the United States, rank above the mortgages of the *Atlantis Two* . Of course, within the Canadian framework and applying *The Ioannis Daskalelis*, these claims are ranked above the claim of ABN-Amro, as mortgagee. Because no one made submissions as to laches, or ay other special rule, the claims of maritime lien, as allowed, and given the funds available, rank *pari passu*.

Claim of Strachan

[63] Strachan is a Savanna, Georgia, company engaged in stevedoring and general ship supply. It supplied necessaries to the *Atlantis Two* at Savanna between 6 April 1997 and 13 April 1997, together with a cash advance to the Master. The balance owing to Strachan is $3,429.37. Strachan claims interest at Bank of Canada commercial lending rate plus 2% from 13 April 1997 together with costs.

[64] Strachan shall have its claim as presented, at $3,429.37 together with interest at 7% from 13 April 1997 to date. Strachan has been successful as a lien claimant, but took no more active a role in bringing the ship to sale than did many of the other claimants, all of whom cooperated with the intervening crew members, who had the major role in bringing the ship to sale. There will be no award of costs to Strachan.

Claim of Hellenic

[65] The claim of Hellenic is for various necessaries, ranging from laundry soap through small parts, tools and fittings supplied in February of 1997 at Tampa, Florida. The outstanding balance is $6,425.75.

[66] Hellenic's invoice terms provide for interest at 1.5% per month and also for the costs of collection "... such costs to include reasonable attorney's fees if collection through an attorney is necessary.".

[67] Dealing first with the claim for attorney's fees, my understanding is that in the United States there is no maritime lien for attorney's fees. This is touched upon in Parks on the Law of Tug and Tow, Third Edition (1994), Cornell Maritime Press, at page 792. As well, Tetley on Maritime Liens and Claims (*supra*) makes the statement that "The basic principle is to refuse a lien for attorney's fees because usually no service has been rendered to the ship or for the common benefit of all the creditors." (page 241). Mr. Tetley goes on to refer to *The Wahcondah* [1964] A.M.C. 2425 at 2427:

> The nature of maritime liens, even those firmly established by statute and time, required a service to the ship if premised on contract ... This court can find no reasonable hypothesis to support a finding that these attorney fees were expended as a service to the ship. Moreover the claim does not relate to any established lien which would allow an extension to cover this unusual situation. There is simply no basis in law or equity for the recognition of privileged payment of this claim.

[68] Hellenic will have its claim in the amount of $6,425.75 together with interest at 1.5% per month from 13 February 1997. No costs are awarded.

Claim of Atlantic DE

[69] The total claim of Atlantic DE is for $25,456.08, together with interest at 2% per month for necessaries supplied in Phillidelphia, Tampa and Baltimore.

[70] The necessaries delivered in Tampa and Baltimore were supplied in July of 1997. The amount owing on those three invoices is $5,114.84. The larger invoice upon which Atlantic DE claims is one in the amount of $20,341.24 dated 19 December 1996, for necessaries delivered in Phillidelphia on 13 November 1996. These claims are allowed in full. There will be no award of costs.

[71] The invoices clearly set out that interest is at 2% per month, by some measures excessive, but not out of the ordinary in the trade. Interest is allowed on the 1997 portion of the claim from 10 August 1997 to date and on the 1996 portion of the claim from 1 January 1997.

Claim of Atlantic NLN

[72] The claim of Atlantic NLN, $23,421.54, is for necessaries supplied at New Orleans, Louisiana.

[73] Two of the invoices under which Atlantic NLN claims are for goods delivered in November of 1993. As I say, neither laches nor limitation were argued. The total amount owing on those two invoices is $5,756.75. By reason of the date on those invoices, a date before that of the registration of the mortgages against the *Atlantis Two*, the substantive right which Atlantic NLN brings into Canada is that of a preferred maritime lien.

[74] The balance of the Atlantic NLN claim is for goods supplied in December and in June of 1996, in the amount of $17,664.79. Atlantic NLN shall have its claims as presented with interest at 2% per month from 1 December 1993 in the case of the first two claims. In the case of the second two claims, interest shall run on $3,018.73 from 15 December 1996 and on $14,646.06 from 22 June 1996. No costs are awarded.

CLAIM OF NAUTILUS AUSTRALIA LIMITED

[75] The claim of Nautilus Australia Limited ("Nautilus"), with a place of business in Port Adelaide, Australia, is for goods and services supplied in 1997 at Port Lincoln, Australia, in the amount of $13,938.65 (AUS), say just over $13,000.

[76] While the goods and services supplied are clearly necessaries, a necessaries supplier in Australia is not accorded a maritime lien, for generally the Australian 1988 Admiralty Act added no new liens to augment those recognized under the former colonial legislation.

[77] Regrettably Nautilus stands in the same position as a usual supplier of necessaries in Canada, that is it holds some form of *in rem* right, coming below both maritime liens and mortgages.

CLAIM OF MEGA MARINE SERVICES LTD.

[78] The claim of Mega Marine Services Ltd. ("Mega Marine") is for the price of two engine cylinder heads, invoices as supplied to the *Atlantis Two*, F.O.B. Houston, Texas, in September and December of 1997. The invoices, of roughly equal size, total $41,577. Each contains a substantial item for freight. It appears that one cylinder head went to Australia and the other to Vancouver. From the reference to freight and from the shipping directions on the invoice, F.O.B. Houston, it is clear that neither cylinder head was supplied directly to a ship.

[79] Counsel for Mega Marine characterizes the transaction as one in which goods were delivered in the United States, ie. F.O.B. Houston. The difficulty is in determining whether an American maritime lien arises at all. In this instance the invoices are addressed to "Master of M/V Atlantis Two and or Owners c/o Off-Shore Oil Services (UK) Ltd.", of London, England. There is nothing in the material to show the cylinder heads were in fact delivered to

the *Atlantis Two*, but rather merely the F.O.B. Houston direction: the *Atlantis Two* was not at Houston.

[80] There is a requirement, under American law, that necessaries must be furnished to a ship. The requirement does not mean, for example, that putting bunkers aboard a third party's barge and then delivering them to a ship in an American port insulates a ship from a maritime lien merely because a middleman was involved. Rather, this American rule, of having to actually furnish the necessary to the ship, is based upon the wording of section 971 of the United States Code, requiring necessaries to be furnished to a vessel, wording which has not changed appreciably in its current version. This is summed up in Tetley on Maritime Liens and Claims (*supra*) at page 595:

> Section 971 used the phrase "furnishing ... to any vessel", which meant that the goods or services must have actually been furnished to a vessel, if not a specific vessel. In the leading case of *Piedmont Coal v. Seaboard Fisheries*, (1920), 254 U.S. 1 at page 8, the U.S. Supreme Court ruled that coal, delivered to bins on shore owned by the owner of several ships, was not "necessaries". The coal was to be distributed to those ships and in fact some or all of it was eventually loaded on board. Yet this did not comply with the term "furnishing to any vessel", because the necessariesmen were furnishing coal to the shipowner, and not directly to the ships.

Piedmont Coal, referred to by Mr. Tetley, is still good law: see for example *Foss Launch & Tug v. Char Ching Shipping USA*, [1987] A.M.C. 913.

[81] In the present instance there is no evidence that the cylinder heads were furnished to the *Atlantis Two*. The matter falls outside of those cases involving a middleman, such as a bunker barge operator, delivering the bunker supplier's fuel in which case the supplier of the fuel does in fact have a maritime lien against the ship receiving the fuel. Rather the situation is closer to that described in *Piedmont Coal*. Mega Marine, by selling F.O.B. Houston, did not itself, or by an agent, furnish the cylinder heads directly to the *Atlantis Two*. Mega Marine may have some *in personam* right, but has not proven a maritime lien against the *Atlantis Two*. Mega Marine will not share in the sale proceeds.

[82] Having determined that there is no maritime lien I do not have to consider, in the context of Mega Marine, whether necessaries delivered by an American supplier to a ship which is in an off-shore port gives rise to a maritime lien, however that is one of the issues which arises in the claim of Unitor ASA, to which I will now turn.

CLAIM OF UNITOR ASA

[83] Unitor ASA ("Unitor") of Oslo, Norway, delivered marine supplies, through an agent, Unitor Ships Service Inc., of Jersey City, New Jersey, USA, to the *Atlantis Two* in Mexico in November of 1997 and in Vancouver in December of 1997 and January of 1998, for which Unitor claims a maritime lien in the amount of $7,413.64.

[84] The matter does not end there for Unitor also claims for the price of goods delivered to the *Epta* and the *Atlas*, said to be sister ships to the *Atlantis Two*. For the purpose of the present consideration I am prepared to assume that the *Epta* and the *Atlas* are sister ships.

[85] In the case of the *Epta* the claims total $15,729.14. The necessaries were delivered at ports in China, Norway and the United States. Some of the necessaries were delivered as long as four months after the arrest of the *Atlantis Two* at Vancouver. In the case of the *Atlas* all of the necessaries involved, valued at $4,493.80 and delivered at American ports, were provided in March and April of 1998, several months after the arrest of the *Atlantis Two*.

[86] I am tempted to comment on the propriety of trying to claim for necessaries against a vessel which has already been arrested, for one of the requirements of successful enforcement of a maritime lien for necessaries is diligence and here I refer to the "*Atlas*" necessaries. The maritime community is a small one. Anyone being diligent would or ought to have been aware of the arrest of the *Atlantis Two* and thus of the fact that owners were in difficulty. From this it might well follow that the necessaries supplier, not having been diligent, ought not to be able to enforce maritime liens for goods supplied well after an arrest. However, this point was not argued. The claims of Unitor may thus be dealt with by determining two issues: first, whether goods provided to the *Atlantis Two*, by a Norwegian ships supplier, acting through an American agent, may claim a maritime lien when goods are delivered to a ship which is not at an American port; and second, whether an American maritime lien which is not against the *Atlantis Two*, may be enforced against ships in the same ownership using Canadian sister ship procedure.

Offshore Necessaries Supplier Using an American Agent

[87] Dealing first with whether an off-shore necessaries supplier, using an American agent, may claim a maritime lien for goods supplied either in an American port, or in yet another off-shore port, I have considered and accepting the expert evidence of Charles S. Donovan of the Walsh Donovan firm in San Francisco. Mr. Donovan is well known in the international admiralty bar. His credentials are solid. His opinion is that "... under the laws of the United States, having sold and delivered goods and services to those three vessels[4], Unitor obtained maritime liens against the vessels to the extent of its claims against them.". Now the reasoning by which Mr. Donovan reaches this conclusion is interesting, concise and shows a grasp of the subject. It is worth while setting out a portion of his affidavit sworn 30 October 1998:

> 5. Under U.S. law, a maritime lien may arise by statute. Prior to 1989, the relevant statute, The Federal Maritime Lien Act ("FMLA"), 46 U.S.C. "" 971-974, in pertinent part, provided as follows:
>
> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by a suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.
>
> 46 U.S.C. " 971.
>
> Other necessaries include such things as vessel stores and supplies of the type Unitor furnished. Findley v. Robert C. Herd & Co., 250 F. 2d 77, 80 (5th Cir. 1957); Gounares Bros. & Co. v. United States, 292 F. 2d 79, 84 n. 12 (5th Cir. 1961).
>
> 6. The FMLA legislative history makes it clear that the purpose of the act is to protect terminal operators, ship chandlers, ship repairers, stevedores and other suppliers who furnish necessaries to vessels. See, e.g., H.R. Rep. No. 340, 92 Cong. 1st Sess. (1971)

reprinted in 1971 U.S.C.C.A.N. 1363, 1971 W.L. 11348 (Leg. Hist.).

7. The case law interpreting the FMLA also makes it clear that a maritime lien arises in favor of a supplier even if the goods and services are provided in a foreign port. See, e.g., Exxon Corp. v. Central Gulf Lines, Inc., 780 F. Supp. 191 (S.D.N.Y. 1991) (Exxon held to have maritime liens for bunkers supplied in New York and Saudi Arabia); Mobil Sales and Supply Corporation v. M/V PANAMAX VENUS, 1986 A.M.C. 420 (C.D. Cal. 1985), aff'd, 804 F. 2d 541 (9th Cir. 1986) (Mobil held to have maritime liens for lubrication oil supplied in China and Japan); Gulf Trading & Transportation Co. v. M/V TENTO, 694 F. 2d 1191 (9th Cir. 1982) (Gulf held to have maritime liens for bunkers and canal expenses supplied in Italy and Panama Canal). See also W. Tetley, Maritime Liens and Claims 249 (1985) ("In virtue of 46 U.S.C. " 971, it is now clear that the lien for supplies and services is against U.S. as well as foreign vessels, whether or not the supplies or services were provided in U.S. or foreign waters.").

8. When, as here, the owner's agent, C Ventures of New York, places an order with the supplier's agent, Unitor Ships Services, Inc., in New Jersey, a lien arises under U.S. law, even though physical delivery takes place outside the United States. See M/V TENTO, 694 F. 2d at 1192, 1195 (where transaction was concluded in the United States, lien arose even though fuel delivered to vessel in Italy). The fact that Unitor A.S.A. is incorporated outside the United States doe not defeat its lien claim. A/S Dan-Bunkering, Ltd. v. M/V ZAMET, 945 F. Supp. 1576 (S.D. Ga. 1996) (lien enforced in favor of Danish bunker supplier); Conti-Lines, S.A. v. M/V BARONESS V., 1992 A.M.C. 681 (M.D. Fla. 1991) (lien enforced in favor of Belgian company who advanced money in U.S. for repairs).

9. The FMLA, in 1988, was amended and re-codified as part of the Commercial Instruments and Maritime Liens Act, 46 U.S.C. "" 31301-31343 ("CIMLA"). CIMLA, in pertinent part, provides as follows:

Persons presumed to have authority to procure necessaries

(a) The following persons are presumed to have authority to procure necessaries for a vessel:

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by --

(A) the owner;

(B) a charterer;

(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel.

46 U.S.C. " 31341

Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner --

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel;

(b) This section does not apply to a public vessel.

46 U.S.C. " 31342.

The CIMLA legislative history makes it clear that, in amending and re-codifying the FMLA, the U.S. Congress did not intend to make any substantive change in the law regarding the creation of a maritime lien in favor of a supplier of necessaries to a vessel. See, H.R. Rep. No. 918, 100th Cong., 2nd Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 6104, 1988 W. L. 169925 (Leg. Hist.).

9. Consequently, in view of the cited statutory provisions, legislative history and judicial decisions, and based upon my personal experience, I hold the firm opinion that the claims of Unitor constitute maritime liens under U.S. law with respect to the goods and services sold and delivered to each of the aforementioned three vessels regardless of whether the goods and services were delivered to the vessel at foreign or U.S. ports.

[88] To summarize, to this point, I am satisfied that Unitor, a Norwegian company, acting through Unitor Ships Services Inc., an American agent, has maritime liens against the *Atlantis Two*, the *Epta* and the *Atlas*, whether or not the necessaries were supplied at an American port. I now turn to the issue of enforcement of the substantive maritime liens against the *Epta* and *the Atlas* through Canadian sistership procedure.

Enforcement of Claims through Sister Ship Procedure

[89] I was referred to no case law dealing with the enforcement of substantive American maritime liens, in Canada, against a sister ship, using Federal Court sister ship procedure. I am unaware of any determinative case law on point.[5] Nor would there be any American law that might be of assistance, for there is no American sister ship legislation. I must begin with a basic analysis.

[90] My understanding of an American maritime lien is that it is a privilege in the form of a substantive right in property, a right against a given ship, travelling with the ship, unconditionally, until discharged and which is the foundation of an American *in rem* proceeding. Under the American theory of maritime liens the lien is separate and apart from the action *in personam*. The concepts are considered, at length, together with the underlying theory of the American maritime lien, that it is based upon personification of the ship, as opposed to the English or Canadian procedural theory, in both Price on the Law of Maritime Liens, (1940), Sweet and Maxwell Limited, London, at page 115 and following and in Parks on Tug and Tow (*supra*) at page 784 and following. It is this substantive right, a right against a given ship, which the American maritime lien holder brings into Canada to enforce, procedurally under Canadian law, against the particular ship with which the lien is travelling. The lien is not a substantive right against or attached to any other ship.

[91] The sister ship provision in the *Federal Court Act* (the "*Act*"), section 43(8) is as follows:

(8) *Arrest* - The jurisdiction conferred on the Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action.

Section 22, referred to in section 43(8) of the *Act* set out above, gives the Court a maritime jurisdiction including as to:

> 22(2)(m) Any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

This specific jurisdiction, arising out the supply of goods, materials or services to a ship, may be enforced as a statutory right *in rem*, as set out in section 43(2) of the *Act*. This statutory right *in rem* is in the form of a necessaries claim with a priority coming after maritime liens and after mortgages.

[92] In this framework the substantive American maritime lien does not fit into the sister ship provision, section 43(8) of the *Act*, which merely refers to the jurisdiction conferred on the Court by section 22 of the *Act*, an *in personam* jurisdiction, as being enforceable against a sister ship, not a right or privilege against one ship being enforced against another ship. If American maritime lien holders wished to use the sister ship procedure here in Canada they would need sister ship legislation in the United States to enable them to bring into Canada a full blown maritime lien against the sister ship.

[93] Of course, a lien holder, assuming he or she also had an *in personam* right against a shipowner and assuming that shipowner was the owner of not only the wrongdoing or debtor ship, but also the sister ship or ships at the relevant time, might bring that *in personam* right into Canada and enforce it, procedurally, against one or more of the sister ships. However the priority of such a claim would then only be that of a statutory right *in rem*, of no assistance here, given the limited sale proceeds involved.

[94] In summary, to the extent that the claim of Unitor is against sister ships, it is of no effect. Unitor's claim is limited to $7,413.64, being the maritime liens claimed against the *Atlantis Two*, together with interest at 2% per month, commencing 30 days after the dates of its invoices. There will be no award of costs.

CLAIM OF MERMAID

[95] I have already dealt with and allowed a portion of Mermaid's claim arising out of ownership of fuel aboard the *Atlantis Two*. The second portion of the claim of Mermaid is for breach of charter party by the shipowner and includes claims for overpayment of hire, loss of income and anticipated claims from Mermaid's sub-charterer, INCOFE.

[96] Mermaid chartered the *Atlantis Two* from Expedient Maritime Company Limited, a Cypriot company, utilizing a New York Produce Exchange time charter. Mermaid is a Bahamian company with a place of business in Norway.

[97] Mermaid's claim consists first of anticipated claims from the sub-charter, INCOFE, for additional cargo delivery costs ($160,000), interest on cargo value by reason of delay ($75,000), legal fees and loss of market ($95,000). Second, Mermaid claims direct loss through overpayment of charter hire to owners ($72,884), and loss of income ($132,825). Third, Mermaid anticipates ongoing expenses including those of dealing with claims against the Atlantis Two and legal fees in London, New York and Vancouver ($100,000). These claims total $635,699.01. The affidavit of claim sworn on behalf of Mermaid also seeks other

expense, which might have been costs to Mermaid had the *Atlantis Two* not eventually delivered the cargo. Moreover, it may well be, again by reason of the eventual voyage by the *Atlantis Two* to deliver the cargo aboard, that some of the anticipated claims did not arise.

[98] Under American law a charterer can have a maritime lien, for breach of charter, against an owner. In the present instance I do not see any connection with the American jurisdiction. The breach occurred in Canada. Further, clause 48 of the charter party makes it clear that English law applies. Under English law and also under Canadian law, there is generally only a statutory right *in rem* as a remedy for breach of charter, subject to there being some form of contractual lien. There is no maritime lien in this instance.

[99] Clause 18 of the New York Produce Exchange charter party provides, in part, that "The Charterers shall have a lien on the Ship for all monies paid in advance and not earned, ...". Here *The Lancaster* [1980] 2 Lloyd's 497 applies. In that case, Mr. Justice Goff, as he then was, acknowledges the charterer's lien under clause 18 might be some form of an equitable lien, ranking below the priority of assignments to the bank. Moreover, the lien granted by section 18 of the New York Produce Exchange form was held not to be a possessory lien, for the charter was, as is the case here, a time charter, as opposed to a demise charter: *ibid*., pages 501 through 503.

[100] At best, in this jurisdiction, Mermaid has a statutory *in rem* claim, under the *Federal Court Act*, for breach of contract. In the present instance, given the limited funds available, this statutory *in rem* right is, unfortunately, of no value.

CLAIM OF INCOFE

[101] The sub-charterer INCOFE claims, as secured by an American maritime lien, the sum of $435,851.10 primarily by way of breach of charter party between Mermaid as disponent owner and time charterer, on the one hand, and INCOFE as voyage charter, on the other hand. A portion of this claim may be somewhat speculative in nature, however the initial issue is whether the claim for breach of charter party gives rise to an American maritime lien enforceable in priority to the mortgage against the *Atlantis Two*, a mortgage held by ABN-Amro Bank N.V. ("ABN-Amro"). INCOFE also refers to some minimal loss of cargo said to be established on the eventual out-turn of the bulk cargo of potash on delivery. I do not accept that this has anything to do with the *Atlantis Two* either pre-sale or to the proceeds of the sale. Nor is this loss useful to bootstrap an American contractual maritime lien into an American preferred maritime lien, for the cargo loss, if any, could not have occurred while the ship was at Vancouver, either before or after arrest.

[102] INCOFE's argument, reduced to its essentials, is that the charter party provides for arbitration in New York and therefore American law is the proper law of the contract. The breach relied upon by INCOFE, as giving rise to its claim, is that of the seaworthiness warranty in clause 2 of the charter party. Indeed, the *Atlantis Two* did not become a seaworthy ship, either in the usual sense or in a financial sense, ready and able to proceed, until her sale to new owners. All of this is said to constitute a substantive American maritime lien which may be enforced as such, using Canadian procedure as set out in *The Ioannis Daskalelis*. However, the reasoning by which INCOFE's expert on American law, Peter Gutowski, reaches this conclusion is a little more involved.

[103] Mr. Gutowski, of the Freehill, Hogan and Mahar firm of New York, begins with the general concept that, in the United States, a breach of contract results in a maritime lien. Both Mr. Gutowski and the opposing expert on American law, on behalf of ABN-Amro, Robert G. Shaw, of the Healy and Bailie firm of New York, agree that American law applies to the present breach of sub-charter. The experts diverge in their opinions. While I may, if unable to decide on the basis of expert opinion, look at the case law myself and come to my own conclusion, I believe it is quite possible to reconcile the two sets of opinions without doing violence to either and to come to a conclusion.

[104] Turning to the opinions, Mr. Gutowski builds his opinion carefully, pointing to not only a breach of the warranty of physical seaworthiness in the charter party, but also to a breach of financial seaworthiness, in the sense that the ship was financially incapable of the voyage: he refers to *Morrisey v. The A & J Faith* (1965), 252 F. Supp. 54 at 58 and to *Assoc. Metals and Minerals Co-op v. The Alexander's Unity* (1995), 41 F. 3d 1007 at 1016. In *The A & J Faith* the voyage was interrupted by litigation and the vessel deemed unseaworthy. In *The Alexander's Unity* the breach of contract and resulting maritime lien arose both by reason of physical and financial unseaworthiness. In the present instance there was both physical unseaworthiness and, in the sense used in the American cases, financial unseaworthiness.

[105] Mr. Gutowski's next proposition is that there is a maritime lien enuring to the benefit of INCOFE. Here there is a reference to *Rainbow Line Inc. v. The Tequilla* (1973), 480 F. 2d 1024 at 1027-1028 and specifically that:

> The American law is clear that there is a maritime lien for a breach of a charter party, and because the damages sought to be recovered by Rainbow are all of a maritime nature and flow directly from the breach of the charter, it has a maritime lien.

There then follow some standard propositions to the effect that the lien, arising out of the contract of affreightment, is a means by which the ship is made answerable for non-performance. Mr. Gutowski goes on to define a maritime lien as a privileged claim attaching simultaneously with the cause of action and adhering to maritime property throughout changes of ownership until properly extinguished. He makes the point that the lien attaches when goods are delivered to a ship (or at least when the ship is ready to receive cargo) and notes, in the present case, that INCOFE's cargo was aboard.

[106] Mr. Gutowski's third and concluding point, in his initial opinion, is that the lien created by the breach of a contract between INCOFE and the *Atlantis Two* is a lien for breach of contract recognized under American law, as a true maritime lien and here refers to *Tramp Oil & Marine Ltd. v. The Mermaid One* (1986), 630 F. Supp. 630 at 632, subsequently affirmed 805 F. 2d. 42.

[107] Mr. Shaw's initial answer to all of this, on behalf of ABN-Amro, is that as a sub-charterer INCOFE is denied a lien on a ship, for breach of a sub-charter, because INCOFE failed to show that by reasonable diligence it could not have ascertained the existence of a prohibition of lien clause in the head charter, here citing *Cardinal Shipping Corp. v. The Seisho Maru* (1984), 744 F. 2d 461 at 469, *United States v. The Lucie Schulte* (1965), 343 F. 2d. 897 at 900-01 and *Acme Operating Corporation v. United States* (1922), 283 F. 449. Applying this proposition Mr. Shaw submits that the head charter is on a standard New York Produce Exchange time charter form and that there has been a prohibition of lien clause, clause 18, in that form since it first appeared in the early part of the century. The charter

between INCOFE and Mermaid makes it clear that the latter is a disponent owner and thus, in Mr. Shaw's view, there is notice of the existence of both the head charter and the prohibition of lien clause.

[108] In his supplemental opinion, Mr. Gutowski submits that a prohibition of lien clause does not operate to insulate an owner from its own breach. Mr. Gutowski points out that a plain reading of the New York Produce Exchange clause 18, the lien clause, is that it offers no protection of any sort to an owner against liens arising from the owner's own actions. The applicable portion of clause 18 reads:

> Charterers will not suffer nor permit to be established, any lien... incurred by charterer of their agent...

and on a plain reading it has no application to the discussion whatsoever. This plain reading approach is supported by *Cardinal Shipping Corporation v. The Seisho Maru*, a case referred to by Mr. Shaw and cited above, at page 473: such clauses, by their terms "only bar liens incurred by the charterer (or his agent)." Mr. Gutowski goes on to refer to *International Marine Towing Inc. v. Southern Leasing Partners Ltd.* (1983), 722 F. 2d. 126 to the same effect and to *Roberts v. C.T. Echternach* (1962) 302 F. (2d) 370 for the proposition that:

> The prohibition-of-lien clause ... does not undertake to deal with the power of the owner himself to subject his vessel to maritime liens. Indeed, the circumstances in which the owner could restrict his own power are severely limited and one could safely say, never permit the owner, as such, to obtain any advantage. The (prohibition of lien) clause ... has to do with the power of others - master, agent, charter, etc. - to subject the vessel to liens for work done by third parties at the request of those presuming to speak for the ship. (page 372-373)

[109] The prohibition of lien clause does have a purpose and here Mr. Gutowski returns to the *Cardinal Shipping* case (*supra*) at page 471:

> The Prohibition-of-Lien clause still serves a valid purpose. It encourages freer trade in the chartering and sub-chartering of vessels. Owners will be more likely to permit their charterers to enter freely in contract of affreightment if the owners know that no "secret liens" will arise from obscure provisions in sub-agreements.

Mr. Gutowski concludes:

> Thus, the U.S. policy for enforcing these clauses is the prevention of "secret liens" arising without the Owner's knowledge. However, this is not a relevant concern where, as here, the lien arose due to the Owner [sic] own actions, not the unknown actions of some third party. Consequently, the prohibition of lien clause in the Head Charter has no bearing on the Sub-charterer INCOFE's lien against the ship. INCOFE's lien arose from the acts and/or omissions of the Owner and such actions are simply not covered by the wording of clause 18 in the Head Charter.

[110] At this point Mr. Shaw takes an alternative attack and says that even if, despite the prohibition of lien clause in the head charter, the breach gave rise to an American maritime lien, not all lien rights, *in rem*, against vessels under American law, out-rank the lien of a ship mortgage and indeed, "Only a limited number of rights characterized as maritime liens under

U.S. law outrank a ship mortgage." (para. 11 of 2 November 1998 Affidavit). Now here I must keep in mind not only that, as to precedence of liens and mortgages, I must look to Canadian law, as pointed out by Mr. Justice Ritchie in *The Ioannis Daskalelis* at page 177 (*supra*), but also that I must look closely at the substantive right that INCOFE brings into this jurisdiction for enforcement. In any event, the comment as to different grades to maritime liens is not unique for the usual ranking of American maritime liens, in part, is first, preferred maritime liens, arising before the filing of a preferred mortgage; this is followed by preferred ship mortgage liens; and after such ship's mortgages, come contractual liens including necessaries claims arising after the registration of any preferred mortgage. This is subject to the proviso in 46 U.S.C. " 31326(b)(2) giving non-preferred necessaries liens priority over foreign mortgages. Mr. Shaw also approaches this hierarchy from the point of view of a breach of contract contained in the bills of lading and submits that even if this breach is considered in the context of American law, the resulting lien ranks below a ship's mortgage.

[111] At this point I accept that INCOFE has an American maritime lien arising out of breach of the charter, but the lien, arising after the registration of ABN-Amro's mortgages, is not a preferred maritime lien coming ahead of a preferred mortgage in the American ranking system. This American maritime lien for breach of contract ranks, again referring to the American system, after all previously registered preferred ship's mortgages, a point to which I will return shortly.

[112] ABN-Amro's argument proceeds to the effect that, other than for a possible maritime lien arising by reason of the breach of the charter between Mermaid and INCOFE, INCOFE has no other liens against the ship. Here the expert for ABN-Amro points to his uncontested view that any claim by INCOFE directly against the owner must arise either by way of tort, or by breach of contract of affreightment under the bill of lading to which INCOFE , as shipper and the vessel owner, through its master, are parties, for there is no other contract between the owner and INCOFE as sub-charterer.

[113] The tort claim, if such exists, is easily disposed of. Mr. Shaw's view, with which I agree, is that any tort, in this instance, would be founded on Canadian law, for the failure to proceed with the voyage occurred in Canada and involved a Cypriot owner, Expedient Maritime Company Ltd. and a cargo owner, INCOFE, with Head Office care of Lloyd's Bank International (Bahamas) Ltd. of Nassau and another office, in Guatemala. It is Mr. Shaw's uncontested view that an American court would not apply American tort law on these facts, but would apply Canadian tort law. An action in Canada based on the tort of failing to proceed with a voyage would not result in a maritime lien. At best there could be a statutory right *in rem*. And this right, according to Mr. Shaw, would be the right an American court would grant. I accept this view that, on a tort basis, INCOFE's claim against the ship would be, at best, a statutory right *in rem*.

[114] There is also, as I have already noted, the argument that there is a maritime contractual lien for breach of the contract of carriage under the bill of lading issued by the master to INCOFE. The parties to the bills of lading are neither American entities nor is the voyage from or to any American port. The vessel is not an American vessel. Now, under Canadian law, which one would expect to apply in this sort of instance, where no one has any connection with the United States, there would be merely a right *in rem* for breach of the contract to carry. However, Mr. Shaw, in his opinion, gives the benefit of the doubt to the possibility of American law applying because the "terms, conditions, exceptions, liberties and arbitration clause", contained in the charter, are incorporated into the bills of lading. By this

means American law could be incorporated into the bills of lading. Again, without contradiction, Mr. Shaw concludes that this incorporation of American law would give a maritime lien, for breach of charter "... at least in the case of a shipper who is not also a sub-charterer.". Now I do not see that this distinction is necessary in the present instance. I will accept Mr. Shaw's comment that the resulting lien, and this is a qualified view, would not be a preferred maritime lien, but a lien ranking beneath a preferred ship's mortgage. This requires some definition of a preferred mortgage.

[115] A preferred mortgage, under the American system, includes, for the purpose of enforcement, a mortgage on a foreign ship properly executed and registered under the law of the country where the ship is documented: see U.S.C. " 31301(6). In the present instance the two mortgages held by ABN-Amro were registered in the relevant shipping registry, against the *Atlantis Two* , 31 December 1995 and 24 January 1996. Those mortgages stand as the first and second charges in the registry. Both of these mortgages predate any lien of INCOFE and thus, under the American system, INCOFE's maritime lien, arising out of breach of charter or breach of carriage, follows after the ABN-Amro mortgages.

[116] Counsel for ABN-Amro submits that I ought to look upon an ordinary American maritime lien, as opposed to a preferred American maritime lien, as being analogous to our Canadian statutory *in rem* right and thus place INCOFE's claim with other statutory *in rem* claims in this proceeding which have a relatively low priority. This analysis does not stand up, for the basis of *in rem* actions are very different in the United States and in Canada. In the United States, in addition to any number of types of claims which are subordinate to maritime liens, including unregistered mortgages, perfected non-maritime liens, State liens and mortgages and liens for marine attachment (see Tetley (supra) at page 876), there are also *in personam* claims of a maritime nature. In the United States those *in personam* claims or causes of action are just that: they cannot be enforced *in rem* because it is not the *in personam* claim that is the basis for an *in rem* claim. Rather, in the United States, an *in rem* right is the basis for a claim against a ship. This is in contrast to the Canadian approach which requires an *in personam* cause of action on which to found a statutory *in rem* action. On this analysis an ordinary American maritime lien, as opposed to a preferred American maritime lien, is not analogous to our statutory right *in rem*. The approach that I should take has been indicated by the Supreme Court of Canada in both *The Strandhill* and *The Ioannis Daskalelis* (*supra*).

[117] What the Canadian Courts have done with American *in rem* claims is to determine the substantive right that is being brought into this jurisdiction and then place that right into a position in the Canadian framework of priorities. Relying upon *The Ioannis Daskalelis* and upon *The Strandhill*, that is generally a simple enough mechanical process. In order to place the ordinary American maritime lien of INCOFE, into this framework, I must look closely at what INCOFE brings into this jurisdiction.

[118] The lien which INCOFE brings to this jurisdiction might, but for timing, have been a preferred maritime lien, pursuant to 46 U.S.C. "" 31301(5)(A): see for example *Rainbow Line Inc. v. The Tequilla* (*supra*), a decision of the U.S. Court of Appeals, second circuit, referred to by the parties and particularly see pages 1027 and 1028. There the court held that a maritime lien arose from breach of a charter party and that such a lien would take priority over a mortgage, presumably as a preferred maritime lien, if the lien attached to the ship before the registration of the mortgage (see also Tetley (*supra*) at page 875).

[119] Here, the lien of INCOFE is not a preferred maritime lien, but might have been had the sequence of mortgage registration and lien attachment been different. Yet this was precisely the situation in *The Ioannis Daskalelis* (*supra*). There the *Ioannis Daskalelis* was encumbered by a prior mortgage. Thus the lien of Todd Shipyards Corporation was not a preferred maritime lien. Certainly the Supreme Court of Canada recognized, presumably because of the necessaries suppliers lobbied proviso of 1954 (to which I referred earlier), that the maritime lien did take priority over a mortgage in the United States, yet the American priority was not a part of the decision. The Court merely recognized the right as a maritime lien and then placed it in the Canadian priorities framework.

[120] Similarly, in the present instance, I recognize the right of INCOFE for breach of sub-charter as a maritime lien, travelling with the ship. In the Canadian scheme, even though it is not a preferred maritime lien, it ranks ahead of the ABN-Amro mortgages. I now turn to damages.

INCOFE's Damages

[121] The experts giving evidence, by affidavit as to American law, for an against INCOFE, go on to consider the appropriate way in which to measure damages claimed by INCOFE. It may be that damages in American and in Canadian law are based on similar theory. However, the damages claimed are not in the nature of a substantive American right, the nature of which is to be explained by American experts in order to determine the manner of enforcement in Canada, but a Canadian remedy to be determined by this Court without expert help.

[122] In classical terms I must measure damages in terms of:

> "That sum of money which will put the party who has been injured, or has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."
>
> [*Livingston v. Rawyards Coal Company* (1880), 5 App. Cas. 25 at 39 (H.L.)]

Broadly, having determined that INCOFE has a proper claim I must quantify the claim so that, to the extent the sale proceeds are sufficient, INCOFE is awarded a sum to put it, as nearly as possible, in the same position it would have been in had the breach of charter party not occurred.

[123] This is the concept expressed and footnoted by Mr. Justice Stone in his dissenting reasons in *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority* (1995), 179 N.R. 17 at 43-44:

> The aim of an award in damages in contract is to put a plaintiff (in this case the respondent) in the same position he would have been in if the breach had not occurred.

and here Mr. Justice Stone refers to *Baud Corporation N.V. v. Brook*, 1978 CanLII 16 (SCC), [1979] 1 S.C.R. 633 and to *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528 (C.A.)

[124] One difficulty in setting damages in contract is that contract damages are forward-looking damages, based on a plaintiff's expectations, expectations which may well be different, depending upon where one stands, or how one assesses contradictory evidence. However, as Mr. Justice of Appeal Hugessen pointed out in *Public Service Alliance of Canada v. Staff of Non-Public Funds* (1996), 199 N.R. 81 at 97:

> In my view, it is well settled law that once it is know that a plaintiff has suffered damage, a court cannot refuse to make an award simply because the proof of the precise amount thereof is difficult or impossible. A judge must do the best he can with what he has.

I recognize that some of the material is challenged and some of it is contradictory, but I must do the best that I can with the affidavit material and answers to interrogatories presented to me.

[125] In November of 1997 INCOFE purchased a total of 16,524 M.T. of different grades of potash at a cost of $1,786,368, as set out on a Campotex invoice of 28 November 1997, the cargo being loaded aboard the *Atlantis Two* for discharge in Guatemala and in Costa Rico. This purchase and shipment by INCOFE was in response to the need of a firm buyer who was prepared to pay $1,849,409.39, to result in an expected profit of $3.81 per tonne. INCOFE was to pay freight at $16.50 per M.T. and insurance, however the documentation indicates these costs were essentially passed through to customers, so I need not concern myself with freight and insurance. As it turned out, by reason of the delay, INCOFE's customers, or at least one of them, had to obtain potash elsewhere at a greater price.

[126] Returning to the cargo which had been loaded aboard the *Atlantis Two* at Vancouver at the end of November, 1997, INCOFE was able to sell that potash, once the *Atlantis Two* finally got under way, in September of 1998, for $1,936,439.55. Some of the potash was sold to original customers, including Abonos Del Pacifico S.A. ("ABOPAC").

[127] INCOFE now claims the following:

1. Interest on the value of the cargo detained aboard the *Atlantis Two* by reason of her delay in sailing, at 8.5%, a total of $113,152.95;
2. An extension of insurance coverage by reason of the delay, being $12,992.37;
3. A ship board survey at Vancouver, British Columbia, $2,310.72;
4. Reimbursement of a claim made by ABOPAC, which had to obtain potash from more expensive sources and who, as a result, incurred additional expenses, including transportation expenses totalling $160,780.06
5. Lost 1997 profit on expected sale of *Atlantis Two* cargo in November and December of 1997 at $3.50 per ton, totalling $57,834; and
6. Lost 1998 profit at $3.50 per ton, based on 15,366 M.T. of cargo not shipped, but for which INCOFE had apparently contracted to obtain from Campotex at Vancouver, totalling $53,781.

I will now consider each of these items in turn.

Interest on Cargo Detained Aboard *Atlantis Two*

[128] INCOFE claims interest on the $1,786.368 tied up in the value of the cargo aboard ship between loading, about 28 November 1997 and eventual delivery, about 27 August 1998, at total of 272 days, at 8.5%. The interest rate is said by INCOFE to be its average commercial rate. By this calculation interest claimed is $113,152.95.

[129] There are several comments as to this portion of the INCOFE claim. First, INCOFE did not pay Campotex for the cargo until 18 May 1998, some six months after it was loaded aboard.

[130] Second, INCOFE's cargo would have been aboard the ship for perhaps a month in Order to deliver it some 4,000 miles to Guatemala and Costa Rico and at each port discharge the cargo.

[131] Third, counsel opposing INCOFE point out that, by reason of delay and a rising market, INCOFE realized an additional $87,030.16, about $5.25 per M.T. over an above its expected profit of $3.81 per M.T. However, this additional profit, if it is a factor, should be taken into account when looking at INCOFE's loss of profit claim.

[132] I allow INCOFE's interest claim at 8.5% on the purchase price of the cargo for the period from payment of the cargo, 18 May 1998, to delivery of the cargo, 27 August 1998, a period of 101 days less the thirty days the cargo would have been aboard for delivery in any event. Interest thus runs at 8.5% for 71 days, being $29,536.25.

Extension of Cargo Insurance

[133] This portion of the claim, said to be for extra premium to extend the cargo coverage, paid 22 January 1998, required by reason of the delay, is presented at $12,992.37. Initially the value of insurance to be passed through by INCOFE to its proposed customers, had the *Atlantis Two* departed on schedule, would have been about $10,500. This figure did not include additional insurance. Yet the insurance paid by INCOFE's eventual customers for the *Atlantis Two* cargo amounted only to some $6,500. The insurance premium receipt, sets out an insured value substantially in excess of INCOFE's purchasing price. The receipt refers to the date on which the cargo was loaded. It makes no reference either to the premium being in addition to any premium already paid or to any extension of term.

[134] There may have been additional premium paid. If so, it was likely at a date somewhat later than that indicated on the 22 January 198 receipt. However, there is no convincing evidence of any additional premium. This portion of the claim is denied.

Survey Fees

[135] INCOFE commissioned a survey of the vessel at Vancouver, in the amount of $3,474.25 (Cdn.), for which it claims $2,310.72. I accept Mr. Moreno's evidence, as it appears in his response to interrogatories, that INCOFE had not before faced a situation such as occurred with the *Atlantis Two* and therefore "... felt it was prudent to attempt to verify and determine the condition of the vessel to the extent possible.". It is a reasonable expenditure, allowed in full.

Payment to ABOPAC for Differential on Cost of Replacement Potash

[136] ABOPAC appears to be a substantial and valued potash customer of INCOFE. When INCOFE was unable to deliver potash to ABOPAC, ABOPAC, in turn, had to obtain 1968.45 M.T. of potash from an alternative source in order to meet the demands of its customers. ABOPAC's claim, a differential between the cost of the potash which INCOFE was to have delivered and the cost of replacement potash, is $160,780.06. The claim raises a difficulty in that INCOFE did not contest ABOPAC's expense of mitigation. INCOFE felt the ABOPAC claim reasonable and justified. Moreover, ABOPAC were not prepared to discuss their claim, but merely offset it against amounts owed INCOFE.

[137] One challenge to ABOPAC's claim was that the original shipping arrangements merely required that the *Atlantis Two* proceed with all convenient speed, but neither set a firm delivery date nor contemplated the cost of an alternative supply were the shipping arrangements breached. Here counsel, who challenged this portion of the claim, referred to the rule in *Hadley v. Baxendale* (1854), 9 Ex.Ch. 341, 156 E.R. 145. The rule, set out at page 151 of the English Reports is that:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[138] The rule in *Hadley v. Baxendale* lays down two circumstances in which damages for breach of contract are recoverable. First, when damages arise naturally, in the usual course of things, from the breach and second, when damages have been reasonably contemplated by the parties at the time they made the contract, as a probable result of a breach. This seeming dichotomy has been modified and explained somewhat over the years.

[139] In *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528, a decision of the Court of Appeal, the general principle, set out by Lord Justice Asquith, is that the injured party to a contract recovers only the part of the loss which was, when the contract was made, reasonably foreseeable as liable to result from the breach. Foreseeability depends on the knowledge at least by the party who commits the breach, but the knowledge may be actual, or imputed, in the sense that a reasonable person or person of business must be taken to know, in the ordinary course of their dealings or business, what loss is liable to arise for a breach of contract in that ordinary course of business. Thus, the test in *Hadley v. Baxendale* under both branches of the rule, as explained in *Victoria Laundry*, is that recovery is dependent upon foreseeability, tested objectively under the first branch and subjectively under the second branch in the sense that it deals with actual knowledge.

[140] Not long ago, in The *Heron II* (*Czarnikow v. Koufos*), [1967] 2 Lloyd's 457 (H.L.), there was some suggestion that damages in contract ought to be governed by considerations other than remoteness tested by reasonable foreseeability, thus differentiating testing for liability in tort from testing for liability in contract. The obvious problems with this approach have been resolved, at least in Canada, the Supreme Court of Canada holding, in *Asamera Oil Corp. Ltd. v. Sea Oil & General Corporation* 1978 CanLII 16 (SCC), [1979], 1 S.C.R. 633, that

> ... the same principles of remoteness will apply to the claims whether they sound in tort or contract subject only to special knowledge, understanding or relationship of the contracting parties or to any terms expressed or implied of the contractual arrangement relating to damages recoverable on breach; ... (p. 673).

Applying this in the present instance, I should look at the issue as one of remoteness, subject both to special knowledge, understanding or relationship between INCOFE and its carrier, and to express or implied contractual terms relating to recovery of damages in the event of a breach. The reference to "all convenient speed" in the 18 November 1997 charter-party incorporated into the contract with the owner of the *Atlantis Two* by way of bills of lading does not specifically look toward damages, for delay, in the nature of higher cost potash from an alternative source. Thus, in this instance, I may disregard the second set of considerations, contractual terms dealing with recovery of damages in the event of breach, for there is nothing in the contractual arrangements dealing with breach of contract: this is not unusual for business people usually contemplate mutually beneficial performance of an agreement, not its breach.

[141] Turning to the special knowledge, understanding or relationship aspect, I would add another principle which, in a carriage delay situation, I ought to keep in mind. It is that a carrier of goods does not have imputed to it the same knowledge of practices and exigencies of a trade as would business people employed in that trade, being a concept set out in The *Heron II* (*supra*, page 485):

> ... It must be remembered when dealing with the case of a carrier of goods by land, sea or air, he is not carrying on the same trade as the consignor of the goods and his knowledge of the practice and exigencies of the other's trade may be limited and less than between buyer and seller of goods who probably know far more about one another's business.

However, despite this qualification in favour of a carrier, the House of Lords in *The Heron II* went on to find the carrier liable for delay and for loss of market.

[142] While INCOFE was clearly familiar with ABOPAC's fertilizer business and thus did not question the cost of mitigation, brought about by a need to find an alternate source of potash to cover commitments, the same degree of familiarity cannot be credited to the owner of the *Atlantis Two* with whom INCOFE contracted as carrier pursuant to the bills of lading.

[143] Dealing with the foreseeability of the need for replacement cargo, in the context of extraordinary delay for a number of months and in a common sense way, I ought to impute, to an established marine carrier, some of the knowledge of the disruption and resulting cost that excessive delay might entail, looking at the question objectively. There is no evidence, one way or the other, whether the ship owner was familiar with the fertilizer trade into Central America. However, as I say, there are items of knowledge that are to be imputed to the carrier. First, business people usually do not speculate in fertilizer by purchasing bulk shiploads. Speculation can be done more easily and more efficiently in the future's market. Here the carrier, objectively, ought to be taken to know that INCOFE must have had a commitment to supply a large amount of potash within a reasonable time. Second, still from an objective, common sense point of view, given the size of the cargo of potash, the carrier ought to be taken to know that a shortfall of 16,524 metric tonnes of potash, going into a somewhat limited market, would have a noticeable effect on supply and could foreseeably

result in market disruption, giving rise to a need to quickly find replacement potash elsewhere.

[144] Foreseeability being established, in the present instance, I refer to *Asamera Oil* (*supra*) for the proposition that "once a foreseeable or contemplated consequence occurs, in this case the loss of opportunity to sell shares, all of the damages of that kind are recoverable in assessing quantum of damages on proper principles." (p. 655). This principle is not limited just to sale of shares, as in *Asamera*, but is one of general applicability.

[145] I must now put INCOFE, so far as the proper claim of ABOPAC is concerned, into the same position that INCOFE would have enjoyed had there not been a breach of contract of carriage and the necessity of ABOPAC to purchase replacement potash. However this assumes that INCOFE ought to have looked at the ABOPAC damage claim in more than just a cursory manner: INCOFE cannot claim reimbursement for damages it ought not to have paid to ABOPAC.

[146] ABOPAC has produced claim summary material the *Atlantis Two* estimated cost of 16,524 metric tons, delivered to its facility, at $141.46 per metric ton. This contrast was 1,968.45 metric tons of potash purchased in Central America at prices between $177.47 and $229.11 per metric ton, resulting in an actual price differential, for this small parcel, of $148,813.66 together with "2 month interest" at $11,966.40, a total claim of $160,780.06.

[147] I have been referred to no persuasive material by way of effective challenge to the hard costs making up the differential in the value of the *Atlantis Two* cargo as opposed to the cost of replacement cargo, trucking from Guatemala and Nicaragua to Costa Rica and for a parcel of bagged phosphate which came by sea. That portion of the claim will stand.

[148] One of counsel who challenged this portion of the claim took exception to INCOFE paying two months interest at $11,966.40, a rate of 45%, when 8.5%, INCOFE's own interest rate, being an average commercial rate, might be more appropriate. However, taken the ABOPAC claim at face value I do not see interest as a proper or justified item at all. The ABOPAC portion of the claim is allowed at $148,813.66.

Shortage and Freight and Market Differential

[149] INCOFE initially claimed $35,000 for shortage on the out-turn of the *Atlantis Two* cargo, the ship, then under new ownership, becoming the "*World Amber*". INCOFE no longer claims for shortage in these proceedings.

[150] INCOFE arranged for additional potash to go to other cargo receivers in Costa Rica and in Guatemala who would have been supplied with cargo from the *Atlantis Two*, presumably early in 1998. That portion of the claim, which was very substantial, has also now been dropped, however it is relevant to the claim for lost 1997 profits.

Lost 1997 Profits

[151] INCOFE claims as a pure loss of profit item, $3.50 per metric ton on the 16,524 metric tons of potash aboard the *Atlantis Two* in November and December of 1997, a total of $57,834.

[152] INCOFE's argument is that the loss of this sale was a complete loss of opportunity for the market into which the potash was shipped satisfied its needs elsewhere.

[153] The difficulty that I have with this argument evolves about the freight and market differential claim, which INCOFE quite properly dropped. That claim is set out in the 30 July 1998 affidavit of Roberto Dalton with the following explanation:

> INCOFE purchased and transported additional cargos to the receivers in Costa Rica and Guatemala to whom the potash on board the *Atlantis Two* should have been delivered.

From this it is clear that not all of the cargo aboard the *Atlantis Two* represented a lost opportunity. The 16,000 tons of cargo which INCOFE brought in on the *Anemone* in the early spring of 1997 was not for a new account, but was in substitution for the original *Atlantis Two* cargo. It follows that INCOFE lost an opportunity of profit on only 624 tons, initially calculated at $3.50 per ton. INCOFE reworked its loss of profit figures to show that the loss of profit on the voyage which was to have taken place in December of 1997 amounted $3.81 per ton, rather than $3.50 per ton.

[154] The claim for lost 1997 profit would thus be $2,377.44. However, the delay of the 1997 *Atlantis Two* potash, sold into a rising market in 1998, meant that INCOFE suffered no profit loss whatsoever in 1997 on the *Atlantis Two* cargo. The claim for 1997 lost profit is denied.

Loss of 1998 Profit

[155] INCOFE contracted with Campotex for 95,000 metric tons of potash, 10% more or less, for shipment during 1998. INCOFE says 15,366 metric tons were not shipped because of delay in getting *Atlantis Two* working again and further that INCOFE relied upon representations made, from time to time, on behalf of the *Atlantis Two*, as to completion of repairs, clearing of liens and getting the ship underway. INCOFE thus claims a loss of profit of $3.50 per metric ton on 15,336 metric tons of potash, $53,781.

[156] As I understand it, INCOFE did not wish an extra unsold cargo of potash to deal with, which might have been the situation if the *Atlantis Two* had got underway pursuant to various assurances and, concurrently, INCOFE had arranged to pick up the balance of the potash from Campotex to make up the full 95,000 tons which INCOFE had contracted for. As it turned out the *Atlantis Two* cargo of November 1997 was not sold until September of 1998. That the sale of the *Atlantis Two* cargo at an unexpected profit might be a factor except that, clearly, INCOFE makes the point that the 1997 and 1998 years each stand alone.

[157] Returning to the loss of 1998 profit and INCOFE's failure to take up the 15,336 ton balance of the Campotex allocation, this is not a situation to which *The Liesbosch*, [1933] A.C. 449 (H.L.) and the impecunious plaintiff principle apply. INCOFE does not say it lacked funds by which to purchase the balance of the 1998 cargo from Campotex: rather INCOFE did not want an extra unsold shipload of potash on its hands. I accept this view as not only a reasonable business decision, given the representations from time to time as to repairs to and availability of the *Atlantis Two*, but also as evidence from Mr. Moreno, of INCOFE, including through interrogatories.

[158] That the contract that Campotex was for 95,000 metric tons plus or minus 10% is, in itself, no reason to discount the tonnage of phosphate not taken up. Yet there is a reason to discount some loss of opportunity damage awards.

[159] There is a line of cases to the effect that, unless proven to a balance of probabilities standard, it is improper to assess damages for loss of opportunity as though the wished-for outcome would have been a certainty: see for example *Mallett v. McMonagle*, [1970] A.C. 166 at 176 (H.L.) and *Houweling Nurseries v. Fisons Western Corp.* 1988 CanLII 186 (BC CA), (1988), 49 D.L.R. (4th) 205 at 211 (B.C.C.A.). Here INCOFE has not established that, but for the *Atlantis Two* debacle it would, on a balance of probabilities, have sold all of the cargo earmarked for it by Campotex. If I thought that INCOFE had established the ability to sell all of the potash, on a balance of probabilities basis, I would be justified in awarding the full sum claimed for loss of opportunity, as did Madame Justice McLaughlin on one claim in *Houweling Nurseries* at page 217. At that same page she went on to say that where the loss "... can be put no higher than possibilities which would probably have materialized to a significant extent." and that where "... claims represent the loss of an opportunity, which, while it probably would have arisen, must be discounted for the possibility that it might not have fully materialized", she allowed 75%. In the present instance 75% is a reasonable and common sense award. Thus this portion of the claim, present at $53,781, gives rise to an award of $40,335.75.

Summary

[160] INCOFE initially presented its interim claim at $570,916.13. The claim was re-worked, dropping a substantial freight and market differential item, and presented, as set out in the affidavit of Mr. Moreno, of 26 October 1998, at $435,851.10. Subsequently a shortage claim amounting to $35,000 was withdrawn. I have allowed the balance of the claim, presented at $400,851.10 at $220,996.38, with interest at 7% running from when expenditures were made or losses incurred.

CLAIM OF ABN-AMRO BANK N.V.

[161] ABN-Amro, a Dutch Bank, claims as mortgagee pursuant to two mortgages, one registered 31 January 1995 and the other registered 24 January 1996 standing, at the time of the sale, as first and second registered mortgages. The mortgages were given by Expedient Maritime Company Ltd. ("Expedient") the owner at all relevant times.

[162] ABN-Amro's claims, as of 30 June 1998, are $2,090,895.38 under the first mortgage and $9,283,973.97 under the second mortgage, for a total of $11,374.869.35, with interest accruing. Counsel for ABN-Amro points out that the amount claimed under the first mortgage, being in excess of the sale proceeds of the ship, further accrual of interest is not material. By the same token, if I find the first mortgage to be valid I need not, for practical purposes, consider the validity of the second mortgage.

[163] Initially there was discussion of whether ABN-Amro held additional security and might be required to resort to a fund other than the sale proceeds of the *Atlantis Two*. Subsequently counsel agreed that there was no issue as to marshalling. This is evident for a number of reasons, including that the claims which might have attracted the doctrine of marshalling are not against the same debtors. I now turn to some of the pertinent facts surrounding the first mortgage.

First Mortgage

[164] The first mortgage is in a fairly typical form, to secure an account current against the *Atlantis Two* in the Limassol Registry. No amount is specified and that is proper in the case of an account current mortgage. The recording of the mortgage in the Registry is verified by a certificate of mortgage and by a transcript of the register at Limassol, Cypress.

[165] The first mortgage, of 31 January 1995, refers to an overdraft facility agreement and to a deed of covenants of even date. The deed of covenants is also in a fairly standard form. It too refers to the overdraft facility.

[166] The mortgagor of the *Atlantis Two*, Expedient, was also a guarantor of the overdraft facility, that facility being for the benefit of Kassos Maritime Enterprises Ltd., and limited to $1,000,000. The overdraft facility was subsequently increased to $2,000,000: this increase is documented by a letter of 10 August 1995 from ABN-Amro to all interested parties, including Expedient and was accepted by Expedient by letter of the same date.

[167] The overdraft was not serviced by the borrowers or by the guarantors, going into default 30 September 1997. ABN-Amro made demand, in the amount of $2,000,000 principle and $44,833.64 interest, on 24 October 1997. As of 30 June 1998, when affidavits of claim were filed, the interest component had risen to $90,895.38 and continued to accumulate at $519.09 per day. I accept that, as of 30 June 1998, ABN-Amro was owed $2,090,895.38 on the overdraft facility and that amount was secured by a first mortgage against the *Atlantis Two*.

[168] Were there sufficient funds to make it relevant I would consider, in a similar manner and might well accept an outstanding balance owed to ABN-Amro, secured by second mortgage, in the amount of $8,606,345 principle and $677,628.97 interest.

[169] The mortgage security of ABN-Amro ranks, in the usual scheme of priorities, ahead of statutory rights *in rem*, but behind maritime liens. However the issue of priority of the bank's mortgage security does not end here. Various of the creditors submit that ABN-Amro bank ought to have moved against the *Atlantis Two* at an earlier date and that had it done so, then suppliers of goods and services might thereby have been put on notice and not have extended credit. Primarily, this point is made by the Plaintiff, Fraser Shipyard and Industrial Centre Ltd. ("Fraser Shipyard") which contends that ABN-Amro ought, for that reason, to lose its priority, thus enabling Fraser Shipyard, with only a right *in rem*, to move its usual priority ahead of that of ABN-Amro. This contention requires a chronology.

[170] As I say, none of the security held by ABN-Amro was in default until 30 September 1997. ABN-Amro made demand 24 October 1997.

[171] The vessel arrived in Vancouver 25 November 1997 and was ordered detained for Port State Authority deficiencies 27 November. The contract for repair work, between Fraser Shipyard and the owner of the *Atlantis Two*, partly oral and partly written, was agreed on 10 December 1997, actual repair work beginning 17 December 1997, with usual breaks for holidays.

[172] ABN-Amro did not become aware of the repairs until late December: this date is a little vague, but I take it that this was after repairs had commenced. ABN-Amro understood the

work was minor, that is it would cost less than $100,000 and that the ship's main difficulty was an arrest in a crew dispute. Also, at about this time, ABN-Amro learned that the group to which the *Atlantis Two* belonged were negotiating with other bankers to refinance their debt. Owners told ABN-Amro that the *Atlantis Two* would sail, on completion of repairs, in late January 1998. Repairs were completed 22 January 1998.

[173] On 5 January local suppliers, Ward Smith Mechanical Inc., had arrested the *Atlantis Two*. That arrest was followed by an arrest by Fraser Shipyard on 23 January 1998.

[174] On 3 February 1998 ABN-Amro realized the magnitude of the Vancouver repairs: a memo of that date from its customer indicated repairs would cost about $350,000 and that, in addition, owners owed a trade debt of about $2,300,000 relating to the *Atlantis Two* and sister ships *Epta* and *Atlas*.

[175] By 4 March 1998 ABN-Amro had discussed the fleet's problems with owners and proposed advancing a new loan, which it believed owners had accepted, a $2,500,000 facility in order to pay off the trade debts. The interest rate on this further facility was reasonable. The owners agreed both to sell the three ships involved in an orderly manner and to immediate payment of all outstanding interest. I take all of this to indicate that ABN-Amro felt the situation was under control. However, in June of 1998 owners walked away from their commitment, abandoning the ships: ABN-Amro concedes that, at this point, it became convinces its customers were insolvent, but until then there was no reason "... to take immediate action (i.e. foreclosure proceedings).": see the 16 November Affidavit of Stephanos Kardamakis of ABN-Amro.

[176] Against this background counsel for Fraser Shipyard submits that equitable considerations as to the ranking of the claim under the mortgage and as to unjust enrichment ought to apply against ABN-Amro.

[177] The issue here is whether ABN-Amro, which had clearly been mislead by its customers, ought to have been more vigilant and, as a result, whether it should have taken steps at an earlier date to enforce its security, or indeed taken some action which might have warned off suppliers. This is particularly the case for Fraser Shipyard, for repair work under the initial 10 December 1997 contract and additional repair work undertaken in early January 1998 continued until about 22 or 23 January 1998. Fraser Shipyard, as Plaintiff in this action, obtained a warrant to arrest the *Atlantis Two* on 23 January 1998

[178] Returning now to the issue of whether the usual priority granted to a mortgagee ought to be set aside in the case of ABN-Amro. Counsel for Fraser Shipyard submits that equitable considerations should come into play. This concept was touched upon by Mr. Justice Rouleau in *The Galaxias* reflex, [1989] 1 F.C. 386 at 422-423:

> I am satisfied that equitable considerations can play an important role in the ranking of claims as was evident in the *Montreal Dry Docks* case (*supra*). These cases appear to be founded on the doctrine of unjust enrichment (*Montreal Dry Docks*) or laches and acquiescence, *Can. Steamship Lines v. The "Rival"*, [1937] 3 D.L.R. 148 (Ex.Ct.)
>
> As Mr. Justice Walsh stated in *Osborn Refrigeration Sales and Service Inc. v. The Atlantean I*, [1979] 2 F.C. 661 (T.D.), at page 686:
>
> While fundamental rules as to priorities should not be ignored there is some authority for

the proposition that equity should be done to the parties in the circumstances of each particular case.

Counsel for the crew has also provided a British textual reference namely British Shipping Laws, (1980) D.R. Thomas, vol. 14, at page 281 on the same topic:

The Court of Admiralty, in harmony with the courts of law and equity, has long recognized the dangers of "stale claims" and therefore insisted that claims be advanced with reasonable expedition. A lienee who sleeps on his claim may well discover the judicial forum to be unsympathetic and unwilling to offer a remedy, particularly if the delay has been coupled with a want of due diligence or proved prejudicial to third parties. Given the nature of a maritime lien it is patently transparent that inactivity on the part of the lienee is capable of working substantial harm on the innocent and unsuspecting. This danger was recognized as early as *The Bold Buccleugh* where the Privy Council combined the cautious restraint of the doctrine of laches with their exposition of the newly coined maritime lien. Sir John Jervis observed:

"It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay, where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced into whosesoever possession the thing may come."

The point here is that a maritime lien holder, who is dilatory in enforcement, may lose both the Court's sympathy and the favourable ranking accorded a maritime lien. (This passage also deals with unjust enrichment, an aspect I touch upon shortly when considering priorities from the viewpoint of Fraser Shipyard.) Now there is no reason why this concept ought not, in an appropriate instance, apply against a mortgage holder if the mortgage holder in fact stood by, knowing full well that repairs to a ship were being undertaken, repairs for which the owner could not pay and the value of which would fall into the pocket of the mortgagee on a forced sale of the ship. This was the situation in *The Pickaninny* [1960] 1 Lloyd's 533, a decision of Mr. Justice Hewson.

[179] In *The Pickaninny* the issue was the priority of the mortgagee over the necessaries supplier who repaired the ship following a collision, the ship then being sold by Court order. Mr. Justice Hewson placed the burden on counsel for the ship repairer to show that the mortgagee knew and was fully informed as to the part being played by the ship repairer. The evidence was to the effect that the London agent for the owners reported to the Dover agent for the owners that it had kept both the owner and the mortgagee apprised throughout of everything it had done for owners as agent. Mr. Justice Hewson was doubtful whether any of this was evidence against the mortgagee at all, but that even if it were, it did not satisfy him that the mortgagee in fact was in possession of full knowledge of the facts. In the result there was no departure from the usual priorities, placing the mortgagee ahead of the repairer, however Mr. Justice Hewson did sum up the law which might apply:

It seems to me that there would have to be very strong reliable evidence before a Court could upset the normal run of priorities established by judgments over many years in the Admiralty Court. I have been referred to several cases, namely, *The Scio*, (1867) L.R. 1 A. & E. 353; also to a passage from *The Zigurds*, [1932] P. 113; (1932) 43 Ll.L.Rep. 387, and to *Bristow v. Whitmore*, (1861) 9 H.L.C. 391. These cases, so far as they assist me in this particular motion, indicate that the Court must be slow to depart from the usual order of priorities. As I have already said, Mr. Barry Sheen stressed upon me that where you adopt

> the benefit of something you also take the burden. Well, that is a statement of natural justice which, of course, is true. He says that it would be wholly inequitable to postpone a claimant who has expended his money directly to the benefit of the mortgagees if, at that time, the mortgagees knew that mortgagor was insolvent and also that at that time the mortgagees had knowledge that the money had been so spent by the claimant. I have already dealt with the latter part of that by saying that in the evidence before me I am not satisfied that the first mortgagees were aware of George Hammond & Co.'s undertaking, and there is certainly no evidence before me from which I can find that at any material time leading up to the events of this motion the mortgagors were insolvent. [page 537]

The elements here, needed to postpone a mortgagee's claim, are strong and reliable evidence of knowledge of money being spent on the ship which would be of direct benefit to the mortgagee and, concurrently, knowledge that the mortgagor was insolvent. But I do not think the law goes so far as either to require a mortgagee to be so intimately involved with the affairs of the mortgagor as to know of its day to say operational matters, or of financial problems the mortgagor keeps hidden in the short run, or to require that a mortgagee owe any independent duty to advise a necessaries supplier in other situations.

[180] *The Pickaninny* was approved by Mr. Justice MacKay in *The Orion Expeditor* reflex, (1991), 43 F.T.R. 284 at 287. The test in *The Orion Expeditor* is that of clear awarness by a bank officer both of a refit in order to "maintain her status" and of the nature of the work done, the ship being in good condition. Mr. Justice MacKay found the bank was not fully aware of arrangements made for repairs and thus the repairer failed to upset the usual priority.

[181] In the present instance, at a point perhaps half way through the time span of the repairs, ABN-Amro, which had made demand under its mortgage, became aware of some repairs, but not the nature of the repairs which it understood were relatively minor, being less than $100,000.

[182] As to knowledge of the insolvency of owners, there is no evidence to show that such knowledge might be attributable to ABN-Amro until sometime in June. Up to that point ABN-Amro, believing it knew the financial situation of its customers, had agreed to a financing package which would have paid out trade creditors, including Fraser Shipyard: that is scarcely the action of a banker with an insolvent customer.

[183] In summary, the evidence of the knowledge of ABN-Amro, as to the work being done by Fraser Shipyard, is not strong. It would need a leap of disbelief, against the evidence, to find that ABN-Amro knew the true financial situation of its customers, the owners of the *Atlantis Two*, the *Epta* and the *Atlas*, earlier than June of 1998. Indeed the knowledge of ABN-Amro was less than that of the bank in *The Orion Expeditor*. On this basis I am not prepared to disturb the priority of ABN-Amro as first mortgage holder. However, there is still an equitable argument, one based on unjust enrichment, to which I now turn in the context of the claim by Fraser Shipyard.

CLAIM OF FRASER SHIPYARD

[184] The Plaintiff, Fraser Shipyard, claims $460,839.37 (Cdn.) for work done between about 17 December 1997 and 22 January 1998, say, at a current conversion rate to American dollars, $313,600. Fraser Shipyard submits the Court should exercise its equitable jurisdiction and, in the special circumstances of the case, grant it an enhanced priority. Fraser Shipyard

would like to see its claim moved from the position of a Canadian necessaries supplier to a position above that of a mortgagee and perhaps above that granted claimants with American maritime liens. The relevant circumstances and some comments are as follows:

1. The cause of the repair work was a detention pursuant to the Canada Shipping Act and to the Memorandum of Understanding on Port State Control, the ship being in unacceptable condition from many safety aspects;

2. The repair work rectified many major deficiencies which had caused the ship to be detained;

3. As a result of the work done to the ship, by Fraser Shipyard, the sale price of the ship was enhanced, although the amount of the enhancement is not clear cut. Fraser Shipyard contends that without the repair work the sale price would have been based on scrap value;

4. If no enhanced priority is granted, the creditors ranking above Fraser Shipyard will benefit from work done and equipment and material supplied by Fraser Shipyard;

5. Fraser Shipyard were unaware that the shipowner was in financial difficulty, as contrasted with other creditors, ranking above Fraser Shipyard, who knew or ought to have known of the owner's difficulty and some of whom sat by while the Plaintiff added value to the ship against which those creditors had either a maritime lien or had security. Here the best that Fraser Shipyard is able to do is to point to the fact that some of the maritime liens, evidence of the shipowner being unable to meet its obligations, are fairly old and that ABN-Amro did have some general knowledge that repairs were taking place;

6. With respect to the maritime lien claimants, it is said that the value of the ship at the time of lien attachment was less than its value after the repairs were done. However, this is not without a good deal of speculation, for not only are earlier values for the ship unknown, but also, when most of those claims of lien attached, the ship was a going concern;

7. The American maritime lien claimants are not true maritime liens, but rather claims which are given the status of a maritime lien by American law, a benefit which Canada does not afford to Canadian claimants providing similar necessaries; and

8. With regard to ABN-Amro, they are said to have been grossly undersecured and that may be, however, in these reasons I have concerned myself only with the first mortgage against the *Atlantis Two*, the current account facility, not with the second mortgage upon which, at the time the present proceedings evolved, ABN-Amro appears to have been undersecured. Fraser Shipyard also notes that none of the money loaned appears to have gone to the owner of the *Atlantis Two*, however one must remember that a mortgage by way of guarantee, as in the present instance, is perfectly valid.

Counsel for Fraser Shipyard raises a number of other points, many specifically directed against the bank, however I have already dealt with those points, to the extent relevant, in dealing with the possibility of ABN-Amro losing its priority. Here the issue is that of raising the priority of Fraser Shipyard.

[185] All of this that is relevant may be reduced to a consideration of when a court will depart from the usual priorities and whether it ought, in the present instance, to enhance the priority of the Fraser Shipyard claim because the repair work enhanced the ship's sale price.

Departure from Usual Ranking of Priorities

[186] If the usual order of priorities is applied in this instance, Fraser Shipyard would rank behind maritime lien holders and the mortgagee: there would be nothing for Fraser Shipyard. However counsel for Fraser Shipyard submits it has always been acknowledged that considerations of equity and public policy can alter the usual order. Counsel refers at length to the analysis in *The Edmonton Queen* (*supra*), affirmed 1997 CanLII 4792 (FC), (1997), 125 F.T.R. 284, a substantial review and summary of the law relating to the use of equitable principles to change the usual ranking of priorities.

[187] In considering the special circumstances which might change ranking, in *The Edmonton Queen*, I began with the proposition, set out in Thomas on Maritime Liens, Stevens and Sons, 1980, at page 234, that maritime priorities have been built on considerations of equity, public policy and commercial expediency in order to produce a just result in the circumstances of each case:

> There has to date been no attempt by the legislature, beyond giving a statutory priority to the maritime lien of the life salvor to lay down a precise scheme of priorities. Nor has the judiciary been attracted by such an approach. On the contrary, 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. This is not however 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 or providing reliable signposts to the likely attitude of the Courts.
>
> [*The Edmonton Queen* (*supra*) page 896]

From this I concluded that a change to the usual ranking of maritime priorities, to do what is just in the circumstances, might be accomplished through the application of equitable principles, at that point observing that even now that the English Admiralty Court and our Court have regained a full equitable jurisdiction, few judges have ventured to upset the normal and expected priorities.

[188] In working toward the modern rule as to upsetting usual priorities, in *The Edmonton Queen*, I touched upon *Montreal Dry Docks Co. v. Halifax Shipyards* (1920), 60 S.C.R. 359:

> Mr. Justice Anglin, writing the majority decision in the *Montreal Dry Docks Co. v. Halifax Shipyards* (1920), 60 S.C.R. 359, picked up the fact that the Exchequer Court did not possess a full equitable jurisdiction, but went on to point out that since the Admiralty Court had jurisdiction over various claims against the *res* it could see that an injustice not be done within that framework: the Court was not about to let other claimants be unjustly enriched when a ship repairer, in possession, did work on a vessel after an arrest, following which it was sold in an action by other creditors. [*The Edmonton Queen* (*supra*) page 898]

In *Montreal Dry Docks* there is the concept of work done before and after an arrest. In the present instance, given the detention of the *Atlantis Two*, I do not believe it is relevant to divide the work done by Fraser Shipyard into pre and post the 5 January 1998 arrest by Ward Smith Mechanical.

[189] I have already referred to *The Pickaninny*, as I did in *The Edmonton Queen*, and here the proposition, at page 537, is that the Court ought to be slow to depart from the usual order of priorities and then do so only when there is very strong reliable evidence.

[190] In *The Edmonton Queen* I also felt that Mr. Justice Brandon's decision in *The Lyrma (No. 2)*, [1978] 2 Lloyd's 30 was relevant, for the proposition, at page 33, that one should not depart from the usual order of priorities "... unless perhaps it could be shown that, on the special facts of a particular case, the application of principle produced a plainly unjust result.".

[191] In order to bring the Canadian position to a current point in *The Edmonton Queen*, I touched upon *The Atlantean I*, [1979] 2 F.C. 661 and took from it the concept that "... priorities ought not to be departed from except in very special circumstances ..." (*Edmonton Queen* at page 899-900). There followed the concept from *Metaxas v. The Galaxias* reflex, [1989] 1 F.C. 386, at 423, that the Court's power to upset long established priorities ought to be exercised only where necessary to prevent an obvious injustice. Here I would note that *The Galaxias* was an extreme case in which a Greek seamen's union, with the backing of Greek authorities, was in a position to put pressure on the Court "tantamount to blackmail" in the event that the Court did not recognize the claim of the seamen's union (*Galaxias*, page 426), yet the test applied was merely that of obvious injustice.

[192] From these cases I synthesize the proposition that the equitable jurisdiction of the Court should only be used to upset longstanding priorities where it was necessary to prevent an obvious injustice, in short, such powers might be used to prevent a plainly unjust result:

> These two views, by Justices Rouleau and Brandon, are not particularly different. In *The Galaxias* it is that equitable powers should only be used to upset priorities long established in Canadian maritime law where it was necessary to prevent an obvious injustice and in *The Lyrma (No. 2)*, that established priorities ought not to be departed from "unless perhaps it could be shown that, on the special facts of the particular case, the application of the principle produced a plainly unjust result." However, both of these phrasings of the test, and particularly that flowing from the facts in *The Galaxias*, point to a heavy onus on the part of Treasury Branches to upset the usual long-established priorities.
>
> [page 901 of *The Edmonton Queen*]

Altered Priorities: The Case of Fraser Shipyard

[193] Fraser Shipyard fixes upon the tests of an obvious injustice and of a plainly unjust result. Fraser Shipyard submits that as a consequence of its repair work, not only was the detention order against the *Atlantis Two* removed, but also the ship fetched perhaps $350,000.00 more because of the repair work. Were Fraser Shipyard not paid for its work the result would be the unjust enriching of other claimants who would otherwise have received less or perhaps nothing.

[194] For this enhancement argument Fraser Shipyard relies largely on the expert evidence of Roger Ingoldby, an experienced ship broker. Mr Ingoldby is of the opinion that the *Atlantis Two*, if sold unrepaired, might fetch about $750,000.00, concluding in paragraph 3 of his affidavit that:

In summary, it is my opinion that the work carried out by Fraser Shipyard enhanced the sale price by at least the full extent of the repair cost of $460,839.37 and possibly by US $350,000.00 or more.

[195] There was no rebuttal expert evidence as to unrepaired value, however Mr Ingoldby was crossed examined on his affidavit. Mr Ingoldby, quite properly, acknowledged that there were many factors influencing the amount a ship sold for, but that he assigned great importance to a ship being in class and that if a ship were not in class buyers tended to look at the ship's scrap value, perhaps not generally, but more certainly in the case of a ship of over 15 years old with acknowledged deficiencies, a category which the *Atlantis Two*, vintage 1981, certainly fitted.

[196] Mr Ingoldby's analysis began with a best estimate of scrap value, $850,000.00, before deduction of delivery costs, giving a basic scrap value at Vancouver of $600,000.00 and here Mr Ingoldby had, as well as other unrelated sales to use as comparisons, the fact that the *Epta*, the sister ship to which I have referred, sold at Houston at $500,000.00, there being a longer delivery voyage to breakers in Asia.

[197] Mr. Ingoldby, quite fairly, admits that some ships have an intrinsic value over and above scrap value, even though the buyer, by reason of the possibility of unknown repair problems, might be taking on an open-ended repair commitment in order to get the ship back into class and thus into operation.

[198] Mr Ingoldby was cross examined at length on his affidavit. He answered reasonably and conceded proper points. Yet what is clear, and reasonable, given that judicial notice has been taken of the point, ships under detention, unrepaired, or without class certificates, are not saleable as going concerns, but rather fetch only scrap value with perhaps some intrinsic enhancement factor.

[199] Here I would first refer to *The Parita* [1964] 1 Lloyd's 199 in which the Court accepted that a small elderly vessel would be worth only scrap value unless put back in class and then might be worth about 20% above scrap value. Second, I would refer to *The Honshu Gloria*, [1986] 2 Lloyd's 63, a decision of Mr. Justice Sheen, who commented upon the practice of preferring the claims of classification societies, for their fees, on the understanding that they kept a ship in class, with records open for inspection and that where such a ship sold for more than scrap value it was open for the classification society, which would normally have a very low priority, to ask that its claim be preferred. Mr Justice Sheen was concerned that if that advantage were not available there would be no incentive for classification societies either to produce their records or to keep a ship in class and that the result would be sales at scrap value. This is clear acceptance by the courts of the fact that a value of a ship that is without certification that the ship is in class is based on scrap value. The same may be said in the case of an older run-down ship, such as the *Atlantis Two*, which because of major deficiencies was under detention pursuant to Port State Control requirements.

[200] The argument to the contrary is that ship repairers and necessaries suppliers, in Canada, have always known that they are accorded low priority, that repairs done or necessaries supplied will, in many instances, enhance the value of the vessel for both mortgage holders and maritime lien holders and that this is part of the cost of doing business, notwithstanding that the result may be a certain degree of unfairness: here one of counsel opposing the position of Fraser Shipyard refers to the *Edmonton Queen* at page 930:

> Ship repairers and necessaries suppliers have always, in modern times, had to deal with the fact that their claims ranked low, even below that of a mortgage holder , and yet the repairer or the necessaries supplier has, in many cases, enhanced the value of the vessel for that mortgage holder, or in this case, for the possessory lien holder. Moreover, on the appeal of *The Atlantean I*, reported reflex, (1982), 7 D.L.R. (4th) 395, Mr. Justice Pratte denied that necessaries, as such, ought to have an enhanced priority: he was prepared to allow the expense of fuel oil, a necessary, to take an enhanced priority when the fuel oil was ordered by the admiralty Marshal, but was not prepared to apply enhanced priorities to ordinary necessaries. In the end result, the priorities set out by the Court of Appeal were the usual, notwithstanding that there was perhaps a certain degree of unfairness.

[201] In *The Atlantean I*, touched upon in the preceding quotation, there was "perhaps a certain degree of unfairness". In order to succeed Fraser Shipyard must show an obvious injustice or a plainly unjust result, as opposed to merely an unfortunate result of a business decision, a result to some degree unfair.

[202] Fraser Shipyard had previously done work on sea-going ships, although on a smaller scale. Fraser Shipyard made, at most, limited investigation into the circumstances of the owners, yet I question whether, as a practical matter, it is ever reasonable to expect an in depth credit inquiry into the affairs of lesser known ship owners for it would not be practical by reason of expense, delay and a likelihood of learning nothing of real value. In any event, in order to get the work, Fraser Shipyard had to abandon its early positions as to an advance or as to security by way of a letter of credit: like most repairers, it was required and indeed prepared to extend credit in order to obtain the work, in effect taking the risk that owners might not be credit worthy. Yet this is not necessarily a bar to finding of an obvious injustice or a plainly unjust result.

[203] Overall, in determining the justice of the result, I should be guided by the "... considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstances of the case." (Thomas on Maritime Liens, *(supra)* page 234). This reference to equity immediately brings to mind Mr. Justice Anglin's comment, in the majority decision for the Supreme Court of Canada in *Montreal Dry Docks* (*supra*) at page 359, to the effect that the Court was not about to stand by and let other claimants be unjustly enriched when a ship repairer did work on a vessel, in that instance after an arrest, following which it was sold at auction. That is a principle which clearly finds application in the present circumstances where, if priorities were left in their usual ranking, would result in unjust enrichment, which is the foundation of the principle in the *Montreal Dry Docks* case.

[204] The present unjust result is that, without the Fraser Shipyard work, the ship would, in all likelihood, have sold at scrap value plus an intrinsic value increment. Instead it sold for something more which, were no adjustment made to priorities, would go to the benefit of American necessaries suppliers, some of whom have slept on their claims for months or years and ABN-Amro which, while not displaying a culpable lack of action, might well have been more diligent in protecting itself in its overall dealings with its customers. Here I would refer back to the concept, quoted with approval by Mr. Justice Rouleau in *The Galaxias* (*supra*) at pages 422-423, there referring to a passage from Thomas on Maritime Liens, to the effect that claimants, who sleep on their claims, may well discover the Court to be unsympathetic and that is the case here, not to the extent of dispossessing parties of their priorities, but rather to the extent of moving at least a portion of the Fraser Shipyard claim to rank *pari passu* with

the claims of American necessaries suppliers. Yet the aim here must be to arrive at an application of this principle which does justice to Fraser Shipyard, but which, while it may lessen the return to others, does no injustice to those parties. As pointed out by Mr. Justice Anglin in *Montreal Dry Docks*, at page 369-70:

> On the one hand the shipwright cannot be allowed to improve the plaintiffs out of whatever interest the acquired in the *res* by the arrest. Their right was to have it taken and sold for their benefit as it then stood and that right may not be prejudiced, as it well might be if full effect were given to the contention of Mr. Burchell that because the respondent had a contractual right, as against the owner, to retain the vessel and to complete the repairs to her which it had undertaken to make, the plaintiffs' security acquired by the arrest is subject to that right and the respondent is therefore entitled to priority over the plaintiffs for the full amount of its expenditure regardless of whether the selling value of the vessel was or was not thereby increased.

[205] This concept of not doing legitimate claimants out of money by reimbursing a repairer beyond the value attributed to repairs, in the ultimate selling price, is a thorny issue in the present case. I think, and here I borrow from Madame Justice McLaughlin in *Houweling Nurseries* at page 217, the concept to apply is that only if I am convinced, on a balance of probabilities, that the work done by Fraser Shipyard was fully returned, or indeed returned with a bonus, on the sale of the ship, ought I to allow the Fraser Shipyard claim in full. I can put it no higher than a possibility that the Fraser Shipyard claim reflect dollar for dollar in the sale price and that in itself is a reason to discount the claim. In *Houweling Nurseries*, where possibilities were involved, Madame Justice McLaughlin applied various fairly arbitrary discounts, allowing some claimants as little as 25%.

[206] Here I will return to Mr. Ingoldby's views on value. Now ship valuation is not a science, even though it may be based on current world scraping prices and delivery costs which may be estimated. Mr. Ingoldby refers to unknown intrinsic values which add to the scrap value of a ship. Further Mr. Ingoldby did have difficulty in an earlier estimate as to what the *Atlantis Two* might fetch on the judicial sale.

[207] To accept an as-is price, before repairs and at scrap value at Vancouver of $600,000, is further than I am prepared to go: in effect that would be to also accept that just over $300,000 in repairs raised the value of the ship by $500,000. I must attribute more sense and perspicacity to a bidder at a judicial ship sale. Clearly there is an intrinsic value factor at work, together with the prospect of the bonus of some quarter of a million dollars for freight for the cargo aboard, raising the as-is value above the bare scrap value of $600,000. In *The Parita* (*supra*) the estimate was that a modest expenditure to put the vessel into class might raise as-is value by 20%. However I am not necessarily prepared to accept the 20%, in that case, as a rule of thumb. Doing the best that I can with the material and argument presented, including a consideration both of Mr. Ingoldby's evidence and of his cross-examination, I am prepared to estimate that the value of the *Atlantis Two* might have been increased by say 25% above scrap and intrinsic value by reason of the repair work, say an increase from $880,000 to the $1,100,000 the ship fetched on sale. By that calculation I allow Fraser Shipyard $220,000 (U.S.) of its claim to stand *pari passu* with the American lien claimants, together with interest at 7% from completion of repairs

[208] It is also appropriate that Fraser Shipyard have an allowance toward its costs of beginning this action, arresting the vessel and bringing the ship toward a sale. That will be a lump sum in the amount of $3,000 (Cdn.).

CONCLUSION

[209] The Court ordered sale of the *Atlantis Two* and bunkers realized $1,158,393.49 which, at the time, was converted to $1,767,708.47 (Cdn.). In the interim various costs of sale and the claims of the seamen were paid out. There now remains, principle and interest, $1,112.624.15 (Cdn.). Unfortunately the claims as presented amount to many times this sum.

[210] The choice of who should participate in the fund has been difficult. The facts were often in issue. The American law, as expended upon by the experts, was contradictory. The counsel work was excellent. By obtaining only a slightly different acceptance of factual elements, or a minimally different view of the applicable law, or a small degree of difference in equitable view point, a number of the claimants could well have fallen heir to better or worse results.

[211] This was a complex priorities motion. I thank counsel for their patience and for their effort, not only as to providing volumes of factual, expert and case material and for their submissions on how the facts fitted into established law, but also for their insight into new areas of law, including dealing with the nature of American necessaries claims and with the interplay of Canadian sister ship legislation and American statutory maritime liens.

[212] I have awarded costs only to the seamen and to Fraser Shipyard. Those awards are not indemnities, but rather reflect extra work by counsel in bringing the sale of the *Atlantis Two* to a successful conclusion. That other parties did not receive costs should not be taken in a negative way for all the parties, together with counsel who were reasonable, but gave nothing away, cooperated admirably.

FEDERAL COURT TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

HEARING DATED: November 24 and 25, 1998
COURT NO.: T-111-98
STYLE OF CAUSE: ***Fraser River Shipyard and Industrial Centre Ltd.***
v.
The Ship "Atlantis Two" and others
PLACE OF HEARING: Vancouver, BC
REASONS FOR ORDER OF: JOHN A. HARGRAVE, PROTHONOTARY
dated June 11, 1999

APPEARANCES:

Mr. Christopher Giaschi for the Plaintiff

Mr. Tom Hawkins for Defendants, Expedient Maritime Company Limited,
Expedient Maritime Co. (Cypress) Ltd., Mr. James Peebles

Mr. Jack Buchan for Defendant Mermaid Shipping Co. Ltd.

Mr. Douglas Morrison for the Defendant INCOFE

Mr. James Baugh for the Intervenors

Mr. Greg Blue for Claimant, ABN-Amro Bank N.V.

Ms. Shelley Chapelski for Unitor ASA and as agent for Strachan Shipping
Mr. Brad Caldwell for Claimants, Mega Marine, Atlantic Steamers NLN Inc., Atlantic Steamers DE Inc. and Hellenic Shipping

SOLICITORS OF RECORD:

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McEwen, Schmitt & Co. for Claimant ABN-AMRO Bank N.V.

Vancouver, BC

Bromley, Chapelski for Claimant Unitor ASA

Vancouver, BC

Mr. Brad Caldwell for Claimants, Mega Marine, Atlantic Steamers
Vancouver, BC NLN Inc., Atlantic Steamers DE Inc. and Hellenic Shipping

Russell & DuMoulin for Claimant ICS Petroleum Ltd.

Mr. Michael Bird for the Intervenor Lloyd's Register of Shipping
Owen, Bird

Sproule Castonguay Pollack for Claimant Strachan Shipping Co.

Montreal, PQ

Mr. P. Daniel Le Dressay

Barrister & Solicitor

Vancouver, BC for Claimant Ward Smith Mechanical Inc.

Stikeman, Elliott for Man B & W Diesel AG

Montreal, PQ

A.B. Oland Law Corp. for Monson Agencies Pty. Ltd.

Vancouver, BC

Hara & Company for Governor Control Sales and Services Ltd.

Vancouver, BC

Evans, Goldstein & Eadie for Elander Inspection Ltd.

Vancouver, BC

Mr. J. W. Perrett for Triton Holdings Inc.

Barrister & Solicitor

Vancouver, BC

Morris Rosenburg for Minister of Citizenship and Immigration

Deputy Attorney General

of Canada

(Sgd.) "John A. Hargrave"

Prothonotary

Vancouver, British Columbia

June 11, 1999

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[1] The claimants who did not pursue their claims were ICS Petroleum Ltd., Governor Control Sales & Services Ltd., Ward Smith Mechanical Inc., Elander Inspection Ltd., Lloyd's Register of Shipping, Man B & W Diesel AG, Alatas Limited, Monson Agencies Pty. Ltd. and Triton Holdings Inc. These claims totalled some $295,000.

[2] For discussions of this proviso see Varian on Ranking and Priority of Liens a paper for the Tulane Admiralty Law Institute, published in the April 1973 Tulane Law Review, page 751, at pages 758-759 and Tetley on Maritime Liens and Claims, second edition (1998) Blais International Shipping Publications, Montreal, at pages 496-499. A further amendment, in 1993, which is not relevant to this discussion, may have modified the impact of this proviso: see Tetley at page 498, footnote 158.

[3] At one time the claim of the crew for wages was preferred over that of the master. This is no longer the situation, with the master ranking *pari passu* with the seamen. The historical evolution of this is set out in *The Royal Wells* [1984] 2 Lloyd's 255, a decision of Mr. Justice Sheen.

[4] At one point in his affidavit Mr. Donovan refers to the third vessel, the *Atlas* , as the *Nel*. The affidavit is a reworking of one which appeared in some earlier litigation. It is clear, from the affidavit as a whole, that he is dealing with the *Atlantis Two*, the *Epta* and the *Atlas*.

[5] Jackson on Enforcement of Maritime Claims, Second Edition (1996), Lloyd's, London notes at page 391 that "The statutory lien is more powerful than the maritime lien in that it may be enforced against a 'sister ship'. The maritime lien is confined to the ship involved in the claim..." and here Jackson refers to *The Leoborg (No. 2)*, [1964] 1 Lloyd's 380. In *The Leoborg* Mr. Justice Hewson, there dealing with the English sister ship legislation, touches on the point by way of recounting argument made to him. In the conclusion Mr. Justice Hewson did not award anything for the sister ship claim, but made it clear, at page 382 and 383 that the issue ought to be resolved only after full argument as the matter "... might have very far reaching consequences. With these thing in mind, I find it impossible for me in this motion to decide the point, which must expressly be left open for some future occasion in some other case.".