

POSSESSORY LIEN

Possessory liens are usually asserted by shipyards who have not been paid for repairs to vessels. This is a self-help remedy long recognised by the courts. Shipyards exercising possessory lien are entitled to detain the vessel without having to arrest the vessel. On occasions, parties exercising possessory lien may need to arrest the vessel in order to obtain the assistance of the court to sell the vessel, as a right to exercise possessory lien does not carry the right to sell the vessel. The arrest of vessels by parties exercising possessory lien has created some uncertainty as to whether in arresting the vessel, the party exercising the possessory lien is deemed to have lost possession of the vessel and consequently their lien. After some uncertainty, the position is now clear, both in the UK and in Singapore, that in arresting the vessel, the possessory lienholder retains his lien over the vessel - *The Dwina* [1996] 2 SLR 670.

As possessory liens are recognised as self-help remedies, the courts in England have consistently held that they would not interfere to assess the value of the lien in the absence of fraud - *Gebruder Naf -v- Ploton* (1890) 25 QBD 13 (CA) and *Segbedzi -v- Glah* (1989) New LJ 1303 (CA). This English principle was tested in Singapore in *The Solitaire*. The shipyard asserted a possessory lien against the vessel in the sum of S\$300m. The shipowner applied to court to reduce the security demand and invited the court to depart from established English principles. The judge at first instance refused to do so and allowed the shipyard to retain their lien for the full amount of their security demand since there was no evidence of fraud on the part of the shipyard. In the Court of Appeal, the lien was reduced to S\$125m. Unfortunately, there are no written grounds for the decision, but it is clear that in doing so, the Court of Appeal departed from English principles to assess the value of the possessory lien despite the absence of fraud on the part of the shipyard.

Possessory Liens are subdivided into particular liens and general liens.

Possessory Liens (Particular)

A particular lien is the right of a person in possession of goods to retain possession of them until payment has been made by their real owner of any sum due in respect of those goods. Such a lien arises (i) when the person in possession has bestowed labour, skill or expense in altering or improving the goods, (ii) where the person in possession has been obliged to receive the goods or render the service which has given rise to the lien, (iii) where the person in possession has saved the goods from loss at sea or capture by an enemy.

Such lien cannot arise until the work contracted for has actually been performed; but if the owner of the goods prevents the work from being completed, the lien attaches for the work actually done.

At common law, a person enforcing a particular lien has no right to sell the goods. He may retain them until his charges are settled, and once he parts with either actual or constructive possession of the goods his right of lien is lost. In certain circumstances, however, the possessor may have a statutory right to sell the goods.

The most common cases of particular liens are:

1. the common law lien of a carrier on the goods he carries for his charge for carriage (e.g., shipowner's lien on cargo for freight);
2. tradesmen's liens in respect of labour expended for reward on goods;
3. the lien of an unpaid seller of goods
4. warehousemen's liens on goods for their services for reward in connection with the goods.

Shipowners' Possessory Liens

At common law, a shipowner has a lien on the cargo carried on board his ship for:-

1. Freight
2. Cargo's contribution in general average
3. Salvage expenditure

Possessory liens on cargo for charges other than the above must be specifically contracted for.

Freight. The common law lien on cargo for freight only arises when the freight is due on delivery of the cargo. Obviously no lien can arise in connection with freight that is payable in advance, or where a contract provides for freight to be payable after delivery. In the latter case delivery must be made before the freight can be demanded, and in the event of such freight remaining unpaid when due the carrier would have to seek some other remedy for its recovery.

In exercising his lien for freight the shipowner may lawfully retain all the goods for which freight is payable, and that is so even though the value of the goods exceeds the freight due. He may, however, if he wishes, merely retain sufficient of the goods to give adequate security for the freight due on them all. Where a number of bills of lading have been issued in respect of one shipment and the various bills have been endorsed to different consignees, the shipowner has a separate lien under each B/L extending only to the freight due under each particular bill. The shipowner cannot exercise his lien on goods carried under one B/L in respect of freight due from the holder of another B/L. Nevertheless, if several B's/L issued in pursuance of the same

agreement between shipper and carrier are all endorsed to the same person, the carrier may retain goods shipped under one of those bills in exercise of his lien for the freight due under them all. Further, the lien for freight applies only to the freight due on the particular goods carried; it cannot be exercised in respect of a payment due from the owner of the goods under some other transaction.

General Average. The lien on cargo for general average charges can be exercised only by the shipowner in possession of the goods and, where necessary, it is his duty to other cargo owners to protect their interests by retaining possession of any goods in respect of which a contribution in G/A is outstanding. However, owing to the difficulty of assessing the amount of such contributions and the time required for general average adjustment, it is not usual for shipowners to avail themselves of the right of lien in these circumstances. The customary procedure is for the goods to be delivered in exchange for the security afforded by a general average bond, a general average deposit, or both.

Salvage. Whenever salvage expenditure has been incurred by a shipowner for the preservation of ship and cargo, he has a lien on the cargo for its proportion so long as the salvage was not made necessary by neglect or default of the shipowner himself.

Demurrage and Detention. A lien on cargo for demurrage exists only when the contract of affreightment expressly gives one. Where a charter-party does provide one, that lien does not extend to damages for detention at the loading port when a fixed number of demurrage days have been agreed and the ship is detained after the lay days and demurrage days have expired. To give the shipowner full protection, it would be necessary to stipulate in the C/P that the ship is to have a lien on cargo for demurrage and detention. Liens for demurrage and detention expressly given by a charter-party do not hold good against a bill of lading holder, unless they are specifically incorporated in the

B/L. It has been held that the words "all other conditions. . . as per charter-party" are sufficient to incorporate in the B/L all liens expressly provided by the C/P.

Deadfreight. As deadfreight is payable, in respect of space which has been booked but not used, no common law lien for it can arise. There are no goods which the shipowner can retain by way of exercising a lien. All the same, it is quite common for a C/P to give an express lien for deadfreight, and such a lien, evidently, can be exercised only by refusing delivery of goods which have been carried to enforce payment of the deadfreight chargeable in respect of goods which have not been carried. Where an express lien for deadfreight exists, it applies not only where the entire cargo is carried at the same rate of freight but also where different parcels are carried at different rates.

Voyage Chartered Ships. The shipowner's lien for freight and other charges on goods shipped under a B/L on a chartered ship may, according to circumstances, apply to the freight due under the C/P or to the freight due under the B/L. The following appear to be established rulings.

1. If the consignee is the charterer, or charterer's agent, he is bound by the lien for freight due under the C/P and by express liens given by the C/P for other charges. But if it be found that the shipowner and the charterer-cum-consignee intended that the C/P should be varied by the B/L (and such an intention can only be found where the charterer is not only the shipper but also the consignee), then the lien extends only to the B/L freight. The consignee will, in any case, be bound by liens expressly given in the C/P, provided they are clearly incorporated in the B/L.

2. If the consignee is an agent of the shipper who is not the charterer, or if the consignee is an endorsee of the B/L, he is bound only by the lien for freight due under the terms of the B/L. Such consignee is also bound by express liens given in the B/L. Express liens given by the

C/P will not bind such consignee, unless it is incorporated in the B/L by the insertion of an adequate clause.

3. A shipper or endorsee of a B/L, even if he is acquainted with the terms of the C/P, will ordinarily be bound only by the terms which are expressly incorporated in the B/L. But if a person who does not know the C/P terms is also aware that the master chartered ship has no authority to issue a B/L that does incorporate the liens expressed in the C/P, the shipowner will be able to exercise such liens, in spite of the fact that the B/L has not included them.

Time Chartered Ships. A simple time charter usually contains a clause giving the shipowner a lien on all cargoes and all sub-freights for hire and general average contributions, and giving the charterer a lien on the vessel for all moneys paid in advance and not earned. If the vessel is sub-chartered, the lien on the sub-freight can be exercised before the sub-freight has been paid to the charterer, the exercise of such a lien is considered advisable for the shipowner to give a formal notice to the sub-charterer or consignee requiring him to pay the sum to the owner before payment is made to the charterer or his agent.

Demise Chartered Ships. The cargo carried in a ship has been demised or leased to the charterer is in the charterer's possession, not the shipowner's. Accordingly, no shipowner's lien on such cargo can arise.

Effect of Warehousing Goods. To preserve his lien owner must retain actual or constructive possession of goods. If they are warehoused with an independent agent the lien is lost except in the United Kingdom where goods landed to a warehouse because the owner has failed to take delivery remain there subject to lien under the M.S. Act. In all other cases, in order to preserve the lien, goods not retained in the ship must be stored in the shipowner's name or placed in a warehouse over which the shipowner or his agent has exclusive control.

Abandoned Goods. Since at common law freight is not earned until the goods are delivered at their proper destination, it follows that no lien for freight can exist in a case where goods have been abandoned by the shipowner before their arrival at the agreed destination and afterwards carried on to that destination by a salvor or other third party.

Waiver of Lien. A shipowner will be deemed to have waived his lien on goods for freight if he has accepted a bill of exchange for freight in advance which has not matured by the time of delivery, and this is still the case should the acceptor of the bill be bankrupt at the time of delivery.

Possessory Liens (General)

A general lien is the right which arises by custom in certain trades or professions, or by contract, to retain goods not only until any sum due in respect of them is paid; but also in respect of any sum which may be owing by the owner of the goods to the person in possession of them. Examples of general liens are (i) a solicitor's lien over all the papers of his client except his will, (ii) a factor's lien on the goods of his principal.