

Lien on Sub Freight

THE BULK CHILE

November 2012

Introduction

A 'multi lien' clause such as clause 18 of the NYPE form allows Owners faced with an insolvent Charterer to recover the sum they are owed by exercising a lien on sub-freights or sub-hires. This clause entitles the Owner to demand the payment of freight from the sub-charterers of the chartered vessel.

The recent case of *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd* (The "Bulk Chile") [2012] EWHC 2107 (Comm) determined the formalities of serving an effective notice of lien on the sub-charterers down the chain of the charterparty, considered whether the Owners can exercise lien on future sums due and if the term 'sub-freight' can be interpreted to also cover sub-hires.

The Facts of the Case

The disponent Owners of the vessel 'Bulk Chile' were Dry Bulk Handy Holding Inc (DBHH). Compania Sud Americana de Vapores SA (CSAV) chartered the vessel from DBHH. The vessel was then chartered to the intermediate Charterers Korea Line Corporation (KLC), sub-chartered to Fayette on a trip charter and then sub-sub-chartered to Metinvest (voyage charter).

Metinvest were the Shippers under the bills of lading contract. The freight was payable "as per charterparty" and the bills of lading were marked as freight pre paid but in fact freight would not be paid until 12 April 2011. During the charter of the vessel in January 2011 KLC became insolvent with there being a large amount of hire still owed to the Owners.

On 1 February the Owners' lawyers sent a notice of lien to Fayette and Metinvest. The notice notified the parties of the charterparty chain that the Charterers were in breach for failure to pay hire with a sum of USD 742,875 being outstanding and thus Owners had the right of lien under the charterparty.

The notice stated that under the charterparty Owners have the right to lien for the amounts due to them for the balance of freights and/or hires due under any contracts covered by the bills of lading. The parties were asked to confirm the amount of freight/hire due under the relevant contracts covered by the bills of lading and arrange for the payment of these sums to the Owners' account.

A second notice with the heading 'notice of lien on cargo' was sent to the two parties on 5 February 2011. Subsequently, on 18 February the Owners sent the Charterers notice that the vessel would be withdrawn unless the Charterers made payment of the hire owed within four banking days of the receipt of the notice. On 19 February 2011 Owners sent a further message to Fayette and Metinvest informing them that the anti-technicality clause had been served on Charterers and the vessel would be withdrawn if the Charterers failed to make payment of the hire. The Owners informed the sub-charterers that they would cooperate by continuing with the voyage in order to discharge the cargo on board as long as the sub-charterers cooperated with Owners in return by complying with the notice of lien served on to them. Again, Owners requested that the hire due from sub-charterers be paid directly to head Owners.

On 23 February Fayette responded to Owners' message stating that they did not accept Owners' request to make payment of the hire directly and questioned the validity of the lien notices. They did, however, confirm that they would not make payment of hire to the Charterers while this dispute was ongoing between Owners and Charterers. Instead they suggested setting up an escrow account for the hire to be paid into until the dispute was resolved.

On 26 February 2011 the vessel was withdrawn from KLC's service. On 1 March 2011 Fayette sent a five days' redelivery notice to the Owners but despite the vessel having been withdrawn Fayette continued with the voyage.

The claims brought before Mr Justice Andrew Smith at the Commercial Court by the parties were as follows:

- (i) Bills of Lading claims
- (ii) Lien Claims
- (iii) Post-withdrawal claims

The Bills of Lading Claims

Fayette and Metinvest argued that under the bills of lading freight could only be paid to Fayette and so Metinvest could not adhere to Owners' request to make direct payment to Owners. The court stated that although it had been agreed under the bills of lading that payment would be made to Fayette, the bills of lading were Owners' bills and therefore the contractual liability ceased when the Owners demanded payment be made to them.

Fayette and Metinvest also argued that the bills of lading were marked as pre-paid and therefore freight was to be treated as paid. Furthermore, the court held that it was not relevant that the bills of lading stated freight was pre paid as it was actually unpaid. The court held that despite Metinvest having made payment of the freight they were liable to make payment of the freight again directly to the Owners. The court upheld the Owners' Bs/L claims.

The Lien Claims

The court agreed with the Charterers that the interpretation of clause 18 of the NYPE only applied to a lien on sub freight and could not be extended to include the right to lien sub-hire. If Owners wished to include sub-hire they would need to amend clause 18 to expressly include sub-hires.

Fayette also argued that the notice was not valid as the amount the Owners referred to as being owed in the notice was incorrect and they had failed to include a calculation of how the figure was reached. They argued that the Owners had also included the future sums due which questioned its validity.

The court held that a calculation of the sum owed will only need to be included in a notice which is in respect of a possessory lien. The court went on to

explain that there is no particular formality to satisfy when sending a notice to the debtor as long as the meaning of the notice is clear. The only requirements are for the Owners to make a claim against the debtor and demand payment of the sum be made directly to them, they must inform the debtors that Owners are assignees of the debts owed, the debts that are assigned, the amount due to Owners under head charter and that Owners require payment of the assigned to be made directly to them.

Furthermore, the court held that it did not matter that the sub freight included in the notice was not yet due as the purpose of the clause was to cover future payments whether or not due at the time of the notice. The court explained that the nature of a right of lien over sub freights was an equitable assignment by Charterers in favour of Owners of sums owed to them in the future and payable by a third party debtor, in this case the sub charterer. In light of the above, the court held the notice to be valid.

The Post-Withdrawal Claims

The Owners claimed against Fayette and Metinvest for payment of the use of the vessel during the period the vessel had been withdrawn from KLC. By requesting the use of the vessel and serving the re-delivery notice, Fayette had in effect accepted the performance of the vessel. The court held that after a valid withdrawal was made and as the Owners had performed a service upon the request of the Charterers, they were entitled to remuneration.

Conclusion

The court allowed the bills of lading claims and the lien claims against Metinvest, as well as the contractual post-withdrawal claim against Fayette for remuneration.

Observations

This case highlights the beneficial use of a multi lien clause for Owners in order to collect hire and freight from sub-charterers of their vessel where a Charterer has defaulted and hire/freight payment remains due to the Owners. Owners must bear in

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mind that the un-amended clause 18 of the NYPE form will not extend to sub hire. If Owners wish to exercise a lien on the sub hire they will need to amend the clause accordingly.

A scenario such as the present case demonstrates how complex contractual relations among Owners, Charterers and sub-charterers can become. Clients are advised to be mindful of such scenarios. Should they wish to protect their position down the chain of the charterparties vis-a-vis the sub-charterers/shippers, the clause 18 of the NYPE needs to be appropriately amended.