Insolvencies in the Supply Chain: Recourse against the Owner of the Goods

Matthew Reeve, Barrister, Quadrant Chambers, London, UK

Introduction

The collapse of Hanjin Shipping Co. Ltd. at the end of 2016 continues to present a wide range of lingering legal challenges in maritime jurisdictions around the world, many to be resolved applying the principles of English Law. An overview was given in the article in volume 13, issue 6 of International Corporate Rescue; ‘The Collapse of Hanjin Shipping: An English Lawyers Perspective’. In particular, that article drew attention to the potential difficulties for creditors caused by the restriction, often contained in foreign insolvency recognition orders, prohibiting the taking of steps to enforce security over the debtor’s property. The recognition order made by Nugee J in the United Kingdom in respect of Hanjin on 6 September 2016 contained such a restriction. And as the article explained, that represents a potential obstacle to the shipowner’s traditional remedy of a lien over sub-freights owed to the debtor.

The present article focuses on the other remedies (apart from the enforcement of security over the debtor’s property) available to creditor carriers and wharfingers in the logistical supply chain when their contracting counterparty fails but they remain in possession of the goods; so, where A (a carrier or warehouse) contracts with B to carry or look after the goods of C and B (through insolvency) fails to pay A, what recourse will A have against C if he terminates the contract? The answers to this question have been most carefully refined in the area of carriage by sea, but much of the reasoning can be carried over into cases of carriage by air and road and storage contracts. The consequent rights and liabilities must be carefully analysed in the particular case before A attempts to terminate his contract with B.

Contract with the owner of the goods?

The first step is to ask whether there is a direct contract with the owner of the goods. So, in the shipping context, a shipowner (A) may, in addition to his contract by way of a charterparty with the charterer (B), enter into a carriage contract with the cargo owner/shipper (C). The latter contract, if it exists, will typically be contained in or evidenced by the bills of lading issued by B. Much depends on whether the bills of lading are ‘owners’ bills’, in the sense of having been issued on behalf of the shipowner, or ‘charterers’ bills’. Only the former can usually be relied upon as representing a direct contract between the shipowner and cargo owner/shipper.

If a direct contract is identified, there are two main consequences. First, even if the shipowner terminates the charterparty for non-payment, he may remain obliged under the bill of lading contract to carry the cargo to the scheduled destination. The shipowner is not at liberty to abandon the carriage. Second, the good news for shipowners is that they may have a direct claim against the cargo owners for the payment of unpaid freight under the bills of lading together with a lien allowing them to withhold delivery of the cargo until payment is made. The direct claim for freight rests on the analysis that the freight is usually collected from the shippers by the charterers acting as agent for the shipowners, and shipowners can, by giving written notice, terminate that agency (confirmed recently in The Bulk Chile [2013] 2 Ll Rep 38). The basis of the lien is slightly different. It relies on an analogy with wharfingers who, under the common law, have a lien for their storage charges. In explaining the lien in The Lehmann Timber [2013] 2 Ll Rep 541, Sir Bernard Rix stated:

‘Shipping is performed on the basis that time is money and that a ship is a floating and travelling warehouse for which cargo must pay either in the form of agreed freight or by way of damages for breach of contract … A shipowner should not be required to abandon his lien because the only other choices facing him are disastrous ones of turning his ship into a floating warehouse for an indefinite period, or throwing them into the sea, or storing them on land at his own expense.’

This reasoning may apply far beyond the specific context of carriage by sea. The common law lien may well be available to other participants in the international supply chain including road and air carriers, distributors and warehouses.
No direct contract?

In other cases where A terminates its carriage or storage contract with B, there may be no continuing contact between A and C, the owner of the goods.

So where cargo is shipped aboard a vessel under charterers’ bills of lading and, before the completion of the voyage, the shipowner withdraws the vessel from the charterer for non-payment of hire, the shipowner has no continuing contract with any party on which it can rely. It has no contractual basis for charging for carrying the cargo any further or for storing it before its collection by the true owners. But the vacuum is filled by a number of overlapping liability regimes to which the shipowner and its advisers can turn:

- Agency of necessity
- Bailment/sub-bailment
- Unjust enrichment
- Quantum meruit/contract implied from cargo owners’ post-termination conduct

The applicable principles are less precise than the provisions of the standard charter and carriage contracts they replace, but they are in some respects favourable to the shipowner. Some aspects remain to be fully worked out, such as the precise basis upon which a shipowner can charge for its services after termination.

The principal way in which English law mediates between the shipowner/carer and the owner of the cargo is by treating them as having a non-contractual bailment (or sub-bailment) relationship.

In *The Kos* [2012] LJ Rep 292, there were claims in bailment and unjust enrichment, but the focus was on the former. After the withdrawal of the vessel, it was detained for 2.64 days in port whilst the charterers arranged for the discharge of their cargo. The Supreme Court allowed the shipowner’s claims for the cost at the market rate of the fuel consumed and of the detention of the vessel during the period after the withdrawal of the vessel and before the discharge was completed. Critical was the conclusion that, following the termination of the contractual relationship, the shipowner was a *non-contractual bailee* with the consent of the cargo owners, impliedly given at the time the cargo was originally shipped. As such, the shipowner owed a duty to cargo owners to take care of the cargo and had a ‘correlative right’ to charge the cargo owners for the cost incurred in doing so. The right undoubtedly includes expenses paid by the shipowner, but there was an important question as to whether the shipowners can charge for their own services in caring or carrying the goods and, in particular, whether they can charge the market rate (including a profit element). In *The Kos*, Lord Sumption ventured the view that the claim for detention at the market rate could be characterised as an ‘opportunity cost’ and a ‘true cost’; but the distinction between expenses and remuneration was, ultimately, not argued.

He also recognised that the unjust enrichment claim might result in a different measure of recovery but left the ‘larger issues’ raised by such a claim to be decided in another case ‘possibly in a less specialised context than a dispute about carriage by sea’.

The Court did not have to wait long for such a case.

In *Benedetti v Sarawis* [2014] A.C. 938, the claimant acted as broker in introducing the defendant to the purchase of the equity in a large Asian mobile network supplier. His claim for a share of the business based on an alleged contract failed. His alternative (non-contractual) claim in unjust enrichment for a commission at the market rate for his services in introducing the deal succeeded. The Supreme Court accepted that the defendant was liable to pay remuneration on the grounds that he had accepted the claimant’s services in introducing the transaction and had been enriched by them at the expense of the claimant in circumstances in which it would be unjust if he did not pay. Although the case could have been fitted within the established category of ‘free acceptance’ as a basis for restitution, Lord Clarke expressed the principles more expansively:

‘It is now well established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant’s expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?’

The measure of recovery was stated to be the value of what the defendant received, not the cost to the claimant, and the starting point is the market price for the services rendered. In that case the market value of the services was EUR 36.3 million.

It remains to be seen whether *Benedetti* opens the door to carriers or wharfingers to charge a market rate for their services in carrying or caring for goods after the termination of the relevant contract, on the basis of unjust enrichment. Much may depend upon a deeper analysis of the *implied consent* given by the goods owners, at beginning of the commercial adventure, to the bailment/sub-bailment of the goods. But there is a considerable incentive for them to take the point, particularly if the market rate has risen since the price for their services was originally fixed.

The last question is whether the non-contractual claims for post-termination carriage and care of goods can be enforced by way of a lien over the goods themselves. The point has not been squarely addressed but, in *The Lehmann Timber*, Sir Bernard Rix expressed the view that the logical conclusion of his analysis in that case was that such a lien does exist.

**Conclusion**

There is a relentless search by creditors in international insolvencies for remedies other than enforcement of
security against the property of the debtor. Where that insolvency occurs in the logistical supply chain, carriers and wharfingers have a choice of alternative potential remedies, including claims against the original goods owners for freight and for post-termination services, often secured by a possessory lien over the goods. The shipping cases have led the way but some of the principles expressed in them have a much wider application.
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