
In the turbulence in the shipping market and the insolvencies of a number of key players, shipowners are increasingly confronted with the decision as to withdraw their vessel or terminate the charterparty, sometimes in mid-voyage. A factor in making a decision is balanced prospective advice on the shipowners’ rights and duties after the withdrawal or termination. Where (as is common) the cargo has been shipped under charterers’ bills of lading, there is likely to be no continuing contract upon which the shipowners can rely. But the vacuum is filled by a number of overlapping liability regimes to which shipowners and their 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 shipowners.

In *The Kos*, 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 of bunkers consumed and for the detention of the vessel at the market rate. Critical was the conclusion that, following the termination of the contractual relationship, the shipowners were non-contractual bailees with the consent of the cargo owners, impliedly given at the time the cargo was originally shipped. As such, shipowners 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 costs paid by shipowners but there remains 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” which that raised 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*, 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 claim in unjust enrichment for a commission at the market rate 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 be 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 €36.3m.

It remains to be seen whether Bendetti opens the door to shipowners to charge a market rate for their services in carrying and caring cargo after a withdrawal of the vessel, on the basis of unjust enrichment. Much may depend upon a deeper analysis of the implied consent given by the cargo owners at beginning of the marine adventure to the bailment/sub-bailment of the cargo. But there is a considerable incentive for shipowners to take the point, particularly if the market rate has risen since the original charterparty was entered into.

There remain a number of doctrinal questions which remain unanswered, such as whether the claim for remuneration by a non-contractual bailee is a species of unjust enrichment or distinct and separate.

But there is material in the recent cases which can be used in answering some of the practical questions which often trouble shipowners:

- **How long does the non-contractual bailment last?** The argument that the bailment, and the correlative right of the shipowners to recompense, survives only for the life of the “emergency” with which the shipowners may be faced, for the purposes of agency of necessity, was rejected in The KOS. The better view appears to be that the bailment lasts until the shipowners receive and carry out the cargo owners further instructions.

- **What is the standard of the duty?** The duty is to take such care as the claimant would of his own property. As the agency of necessity analogy has been rejected, there would seem to be little room for imposing a higher “fiduciary” duty on shipowners.

- **How far need the shipowners carry the cargo?** The cases suggest considerable latitude. There would appear to be no obligation to carry to original discharge port, unless shipowners are bound by a bill of lading contract of carriage with cargo owners. Where reasonable, owners can even return the cargo to the loading port (The KOS, approving Cargo ex Argos).

- **What can owners charge for their efforts?** There is an increasing openness to a claim for the market value of shipowners’ services, as lost “opportunity cost” in bailment or as the value of the benefit in unjust enrichment (Benedetti). Where cargo owners have given further instructions for carriage, there may be a similar claim in quantum meruit.
• Are Owners exposed to a claim for breach of bailment if they place the cargo in storage attracting a warehouseman’s lien? Probably not, by analogy with The BAO YUE: “I would hold that a goods owner who authorises a bailee to deliver goods into storage must be taken to authorise the creation of a lien where that is a reasonable and foreseeable incident of the storage contract which the bailee is authorised to conclude. It is an example of the principle of sub-bailment on terms, established by cases such as Morris v C W Martin & Sons and The Pioneer Container [1994] 1 Lloyd’s Rep 593; [1994] 2 AC 324, whereby a head bailor is bound by the terms in a contract between his bailee and a sub-bailee if he has expressly or impliedly consented to those terms.”

• Do owners have their own lien for the cost of services provided after termination? No clear answer, although a favourable view was expressed obiter in The LEHMANN TIMBER.

**Conclusion.** The development and the direction of the law governing the cargo after the withdrawal of the vessel largely favours shipowners. They are afforded very considerable latitude in how they handle the cargo - so they can probably place the cargo in storage, attracting a lien, without incurring a liability. Their remuneration right is not limited by reference to the life of any emergency. And the law may well be on the verge of recognising a general right to charge for their services on a basis which includes a profit element.

(This is a summary of a talk given by Matthew Reeve as part of a series put on by Quadrant Chambers at the Piraeus Marine Club on 17 November 2016 for selected guests in the Greek shipping community “From Calm Seas to Rough Waters: New Problems and New Solutions in Shipping Law”.)

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