

Boatyard and Marina Guidance

November 2008

Liens, payments & abandoned boats

Broad Overview

In broad terms, where goods are bailed (e.g given for repair or other treatment) by a customer to a trader, the trader has a duty to exercise 'reasonable' care in safekeeping and managing the goods. The trader must return the goods when requested by the customer, unless there are unpaid bills or expenses. In such circumstances the trader has the right to exercise a lien and, subject to compliance with certain conditions, has a limited right to sell the goods.

Liens & Rights of Sale: general

A 'lien' is the right of one person to retain lawful possession of the property of another until a claim by the person in possession (usually the trader) against (usually) the owner is met. The source of the lien may be statutory or at 'common law', and both types are discussed in this note. Any physical property can be the subject of a lien, and for the purpose of this note references to 'goods' and 'property' include boats and marine equipment.

The rights given by a lien are, however, limited to the right to retain possession and a lien does not give a person in possession a right to sell goods which are in his possession, without one or more of the following:

- compliance with The Torts (Interference with Goods) Act 1977 (the 'Act') which allows holders of other people's goods to sell them if certain conditions are complied with;
- an Order obtained from the Court giving permission to sell;
- an express agreement between the parties permitting sale (for example a written contract), or
- where the person claiming the lien has a 'statutory power' to sell the goods.

Possessory Lien

The significant point about a possessory lien is that the right to claim it only arises where a person is in physical possession of a vessel belonging to another and only lasts as long as possession is maintained; once surrendered it can't be claimed back. A possessory lien holder has priority over all other claims except for maritime or statutory liens that are already in existence when the possessory lien is exercised. More on maritime and statutory liens below.

Any person with a possessory lien is a secured creditor, and will rank in priority according to the date the lien came into existence.

Possessory liens are classed as "general" or "particular". A general possessory lien gives a wide right to detain property which is owned by the debtor even if it is not the property that the debt relates to. An example of this would be the detention of a berthholder's car pending payment of outstanding berthing fees. The Courts are

reluctant to infer a general possessory lien without clear evidence of informed consent, and the Office of Fair Trading suggests that they have no place in a consumer contract. A particular possessory lien on the other hand confers the right to detain the specific goods to which the debt relates. In this case there must be a legal obligation to perform services, such as providing a berth, and the right to the lien does not normally arise until the work or the services have been completed or supplied.

Marina Terms and Conditions of Business should include an express term reserving the right to retain possession of a vessel until mooring and storage fees have been paid.

Perhaps the most common possessory lien is that exercised by a repairer who has carried out work on goods upon the instruction of the owner. A repairer has a possessory lien in respect of the cost of materials supplied and work done under the agreement to repair, together with any costs or expenses that can fairly be said to be incidental to the job. In relation to a boat, this is also likely to include charges for storage/ occupation of a marina so long as they are connected with the agreement to repair and were incurred during the period when the repairs were ongoing. However, the lien does not extend to other charges, for example keeping the boat after the repairs have been completed or for damages for breach of contract. It is arguable whether boats placed in the marina or stored ashore following repairs continue to be subject to the lien, and the right to exercise a lien for storage or berthing charges should therefore be reserved by an express term in a written agreement.

The Need to Maintain Possession

So long as the trader retains physical possession of the boat he cannot be deprived of the right of detention even by a change in ownership of the boat. However, physical possession must be retained and if the boat is redelivered to the Owner or passed to another person the lien will terminate.

Once possession has been lost any change in ownership will sever the claim against the vessel and leave the trader with a personal claim against the Owner. For that reason it is important that full private address and other contact information is obtained about owners for possible later use in the case of debt enforcement.

Maritime & Statutory Liens: the Right to Arrest

"Maritime liens" attach to the particular vessel involved in the claim and take priority, for example over marine mortgages, without any court action or any written evidence or registration. A maritime lien attaches to the vessel itself and is not susceptible to any form of registration; consequently a purchaser cannot easily ascertain their existence. True Maritime Liens only arise in respect of the following four types of claim against a vessel, namely;

- Damage done by a ship to property or people
- Salvage claim;
- Seamen's wages,
- Bottomry and respondentia; both extremely rare types of claim

There is another similar type of lien referred to as a 'statutory lien' which gives rise (like a true Maritime Lien) to a right to claim against the vessel concerned and, if necessary to secure the claim, to have the vessel arrested.

The legal source of the statutory lien in English law is to be found in the Supreme Court Act 1981. Here all the rights and claims which give rise to a right to proceed against the vessel are set out together with the conditions which provide the arrest entitlement. The Act in turn reflects international convention, which tries to harmonise worldwide laws on ship arrest.

Amongst other categories of claim the Supreme Court Act recognises a right to pursue an action against a vessel for unpaid 'dock charges and dues', provided that the Owner of the Vessel at the time that the debt was incurred still remains the Owner when the claim is brought. A change of ownership ends the right to bring the claim against the vessel, but you can still pursue the original owner for the debt in his personal capacity – all that is lost on sale is the right to pursue the claim against the vessel in its new ownership.

Similar statutory lien claims exist in respect of goods and services supplied to a vessel.

Maritime Lien and Statutory Lien cases are dealt with in the Admiralty Court which is itself a section of the High Court. They invariably involve the use of Solicitors and usually Barristers and are consequently expensive undertakings.

If a claim is undefended, then it may be enforced through the judicial sale of the vessel and the proceeds applied to payment of the claim (as well as legal costs, provided that the sale realises sufficient funds to meet the claim with money over).

Judicial sale is an absolute last resort and in very many cases it is in the best interests of all parties that the sale of a small craft is arranged outside the judicial sale process and then sanctioned by the Court.

Arrest for Berthing Charges or Storage ?

For anyone who provides simple storage or berthing, without any element of harbour dues, there is one issue that must be noted; "storage" or pure "berthing charges" do not, on the face of it, fall within the legal definition of 'dock charges and dues'. Equally it is not clear that hard-standing would amount to services supplied to a vessel. There is little legal authority or guidance on this point but while yachts have frequently been arrested for unpaid berthing charges there is some doubt whether this is legitimate in every case; this is a matter of analysing the contractual terms and the nature of the service supplied. For anyone who ploughs ahead to arrest a vessel there is always a theoretical risk of liability for damages for wrongful arrest. Generally such a liability will arise only if the Court finds that there has been bad faith or gross negligence on the part of the Claimant. Wrongly asserting a claim by an ill-conceived arrest would heighten the risk of having to pay damages and legal costs to the boat owner.

Every case must be assessed on its facts and its merits but often, despite the uncertainty, a decision to act is prompted by the obvious insolvency of the vessel Owner. In such circumstances it is important to form a sound view on the relative standing and merit of your claim so as to ensure that you neither overstate it nor lose the prospect of securing it in the best way possible. This may well involve

arrest, or, if some other claimant has arrested the vessel before you, by entering notices of your claim on the Admiralty Court record.

Arrest remains a strong tool in the enforcement of maritime claims in the commercial sphere but it requires technical expertise and in light of the cost implications it should be used thoughtfully and proportionately.

When is a Vessel not “a Ship” ?

In December 2005 the Court of Appeal were asked to review the case of a collision between two jetskis which resulted in a criminal conviction and a 6 month prison term for one of the drivers. The charge was brought under a section of the Merchant Shipping Act which depended on the jetskis being “Ships”. The definition of “ship” in the Merchant Shipping Act is that it “includes every description of vessel used in navigation”. The Court of Appeal’s decision was that the jetskis were not ships and the result of this finding was the quashing of the conviction which was very good news for Mr Goodwin. The way that the Court reached its decision was to consider the characteristics of navigation and it came to the view that “ships” do not include “craft that are simply used for having fun on the water without the object of going anywhere.” Large numbers of marina based boats are put to exactly this use and it is a live and current question as to whether this decision will mean that yachts and pleasure craft will gradually fall outside the legal regime which exists for commercial shipping. The results of their doing so could be far-reaching – including for example the loss of the right to arrest and also the loss of the right to limit liability. On balance we think that the Court of Appeal decision can be viewed on its own terms as relating to jetskis and other small craft not intended for passage making but it will leave a trail of uncertainty which will undoubtedly be exploited by owners trying to evade arrest for unpaid debts. This is likely to make arrest an even less attractive proposition than it has been hitherto and gives that much more reason to ensure that debts are paid before the boat leaves.

Statutory Powers

For the sake of completeness one should not overlook Statutory Powers which stem from legislation and give certain bodies the power to detain and sell vessels i.e. ‘distrain’. Competent Harbour Authorities are the best example of those invested with statutory powers. Just what such powers entitle is a matter of examination of the relevant statute, though many incorporate the rights and powers set out in other standard ports and harbours legislation.

Unpaid Marina or Storage Fees

From the legal perspective there are three main options immediately available to stop a yacht leaving with bills unpaid. They can be taken in order of seriousness:

- Exercising a lien;
- Arresting the vessel (if it is a passage making craft);
- Securing a ‘freezing order’ against the owner and hence the vessel.

Translated into practice this means that if there is a risk that the vessel might be sold or removed without payment a trader should immediately consider securing the vessel as best as practicable given the physical layout of the premises; this might be blockading, or chaining or even lifting out.

At this point he might also consider the possibility of commencing an Admiralty claim against the vessel or a securing a freezing order against the owner. The action

which he decides to take at this point is likely to be informed largely by the size of the debt, the size, type and value of the vessel, its condition and the financial position of the owner. If assets are not a problem for the owner a trader might consider taking security on land or other property rather than getting further involved with the vessel. In order to get a freezing order there needs to be credible evidence that the owner is deliberately trying to evade payment and hide or disperse his assets and there are serious consequences for getting the evidence wrong in such a case.

Exercising the Lien

To exercise a lien it is only necessary to inform the owner that this is being done. A trader can either claim the lien for a specific amount (the preferred option) or give the owner sufficient information/ particulars to enable the owner to calculate the amount due. Any estimate of costs should be as accurate as possible. A claim may be later dismissed by a court, however, if it is wrongful, for example the court finds that there is no such debt or the contract does not support the existence of a lien. In the absence of agreement between owner and trader as to amount, the owner must tender a sum which is sufficient to cover the sum claimed. If he does not, then the owner has no answer to the lien and the trader can continue to detain the vessel.

In the interests of certainty, it is advisable to have a written contract expressly reserving a right to claim a possessory lien upon a vessel in respect of any money claim. It is also advisable to ensure that the contract gives the trader an express right to continue charging for berthing or storage during the period in which the lien is being exercised; if this is not clearly reserved then it is likely to be unclaimable.

Duties while in Possession

When a trader has possession he must exercise 'reasonable' care in the safekeeping and management of the vessel or the goods. The question as to whether a course of action or omission was or was not "reasonable" is frequently the subject of litigation. However, a common sense approach is that the trader takes all precautions necessary to redeliver the vessel in the same condition as it was in when it came into his possession and treats the vessel as though it were his own. The vessel should be kept secure and treated as any other vessel entrusted to the trader's care. Insurers should be advised of the situation.

Torts (Interference with Goods) Act 1977; the Recommended Procedure

This Act covers the rights of the owner and the trader when goods remain uncollected and/ or there are unpaid invoices or expenses relating to the goods. The trader may be able to sell the goods and recover some or all of the outstanding debt subject to compliance with the Act.

Section 12 of the Act contains the code for dealing with uncollected goods, and it applies where:

- The owner fails to take delivery of bailed goods, usually leaving outstanding debts; or

- The trader could impose an obligation on the owner to collect goods but cannot trace him; or
- The trader could expect to be relieved of his duty to safeguard the goods on notice to the owner but cannot trace him.

Traders must understand that the power of sale only applies when they can be "reasonably satisfied" that the 'owner' -the person who left the goods-actually owns the goods. An obvious solution to avoid any difficulty is for traders to incorporate a simple term in their conditions of business allowing them to sell if goods are not collected after a reasonable (and clearly stated) period and they should take careful note of the name and address of the customer.

In the marine trade the most frequent application of the Act is in relation to abandoned boats and persistent non-payers. In such cases the procedure under the Act is as follows:-

1. If the customer has been asked to, but has failed to, remove his vessel, or the trader has tried to contact the customer but cannot trace or communicate with the customer (having taken reasonable steps to do so) the trader should send the customer a Notice by recorded or registered post that:
 - o Terminates the agreement with the customer 28 days after service of the Notice; and
 - o Informs the customer of the sums owed; and
 - o Gives notice that if the customer does not settle his account and remove the vessel within 3 months of the date of the Notice then the vessel will be sold.

Note: A Notice cannot be served if the trader is in dispute with the customer over the condition of the vessel, or the services supplied. Equally the trader should not give notice to sell where, because of a dispute concerning the vessel, the customer is questioning or refusing to pay all or any part of the trader's claim. If this is the case, then an application will have to be made to the Court for authority to sell the vessel.

Note: The Notice should be sent by registered post or recorded delivery to the customer's last known address or, as a precautionary measure, if more than one address is known, to the other addresses as well. Alternatively, a 'process server' can serve it and this is the most reliable method.

2. Whilst not provided for by the Act, it is desirable that between one month and two weeks before the three month notice period expires the trader should write to the customer again enclosing a copy of the original Notice and again warning the customer that the vessel will be sold.
3. Before selling the vessel, the trader must be reasonably sure that the customer owns the vessel. If it subsequently transpires that the customer was not the owner, the true owner may be able to recover the vessel from the Purchaser, who in turn may have a claim against the trader. Checks should be made against all relevant registers and other corroborating sources.
4. In all but the clearest of cases we would recommend that traders should make an application to the Court for authority to sell and to provide a sound basis for the payment out of any surplus. If the "true" owner then appears he may (subject to proof of ownership) claim the balance of the purchase price.
5. The trader is under an obligation to adopt the best method of sale reasonably available in the circumstances. In all cases the trader should obtain and retain a

written valuation prior to sale. The cost of the valuation is one of the costs of the sale and may be recouped from the sale proceeds.

6. The trader is entitled to deduct from the sale proceeds:-
 - 6.1. The costs of sale (for example brokers' commission, cleaning costs, valuation costs etc).
 - 6.2. The sum owed before the date on which the notice was given.

Note: A trader cannot normally make a charge for his own storage/mooring charges for the period between giving notice and sale, but the Court may allow such charges.

7. The balance of the sale proceeds (if any) must be held for the customer and where the sale is by Court Order the proceeds are usually paid into Court

If the trader is in any doubt as to whether he is entitled to sell the vessel, he can apply to the court for an order authorising the sale (and to approve the method of sale proposed) and/or to determine the amount that is due. If this happens, the Court will retain the balance of the purchase price after the deductions have been made. This is the course of action recommended in all cases to minimise the risk of any future disputes.

Finally, the Desktop Review

To give the best chance of having a secure and well-founded cash flow even with difficult customers we recommend the following desktop review, to be repeated at regular intervals

- Check current contract terms to ensure:
 - they reserve an express right to exercise a lien over the vessel or the customer's other goods
 - you can continue to charge for any services you provide while exercising a lien ;
 - they include reference to the Torts (Interference with Goods) Act
- Revise terms if necessary
- Check paperwork systems to ensure that customers receive and sign a copy of the terms every time they contract with you.
- Bear in mind that if you waive strict compliance with your contract terms on a regular basis you may be hard pushed to enforce them later on.

This note is a summary of some of the key principles and issues involved in this specialist area of law. It is not a substitute for full legal advice tailored to the particular facts of any given situation. Dorade Law LLP are specialists in this area and generally in relation to the legal issues affecting the marine and yacht industry.

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