

THE SHIPOWNER'S LIEN ON SUB-FREIGHTS AND PERSONAL PROPERTY SECURITIES REGIMES

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In the event of default by a head charterer, a shipowner may advance a direct claim under the bill of lading against the shipper for freight, with an alternative claim against the charterer to enforce the charterparty lien on sub-freights. With maritime-related insolvencies increasingly common these claims are important to shipowners as they provide another method of debt recovery. This article explores the contentious shipowner's lien on sub-freights payable to the charterer. Clear guidance on the nature of the lien has particular importance in New Zealand, Australia and other countries where statutory personal property securities regimes are operated. Finally, the article considers the nature of the lien in the light of the policy rationale underlying personal property securities regimes.

1 Introduction

Two recent international decisions have seen appellate courts allow a shipowner to skip a chain of charterers and demand payment of freight directly from the shipper.¹ Unsurprisingly, shipowners have welcomed these decisions as they provide additional protection where a charterer is in default.² Given the prevalence of vessel chartering these decisions will have a far-reaching effect. The 20 leading container ship operators account for over 80% of international container shipping capacity.³ Around half of the ships operated by these shipping lines are chartered-in.⁴

In the event of an intermediate charterer becoming insolvent and defaulting, a shipowner may bring a claim for bill of lading freight and a claim to a lien over sub-freights payable to the charterer. A claim for bill of lading freight is likely to be the primary claim where goods are shipped on an 'owner's bill of lading'. This article examines what has often been advanced as an alternate basis of claim, the lien over sub-freights payable to the charterer. The article will argue that the true nature of the lien over sub-freights payable is that of an equitable charge. The author concludes that the introduction of personal property securities regimes in countries including Australia and New Zealand will demand shipowners register financing statements in respect of the lien on sub-freights if this avenue of debt recovery is to remain effective.

2 Background

The true nature of the lien on sub-freights included in the terms of many charterparties is the subject of differing judicial and scholarly views.⁵ To a vessel owner, a lien on sub-freights clause is important as it purports to give the owner the right to attach to sub-freights payable under sub-charterparties for payments in respect of the headcharter.

Two recent decisions by appellate courts, *Dry Bulk Handy Holding* in the United Kingdom and *Byatt International* in Canada represent a significant development in the law concerning charterparty chains where there is a default by an intermediate charterer.⁶ In both decisions the dispute arose because of the insolvency and subsequent default of Korea Line Corporation (KLC), an intermediate charterer to whom the respective shipowners had chartered vessels.

In *Dry Bulk Handy Holding*, Smith J did not uphold a claim to enforce the lien on sub-freights. Smith J concluded the lien clause was effective 'with regard to the sub-freights that fell due after the cargo was loaded'.⁷

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¹ *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd; The Bulk Chile* [2013] EWCA Civ 184 (14 March 2013) ('*Dry Bulk Handy Holding*'); *Byatt International SA v Canworld Shipping Company Limited; MV Loyalty* 2013 BCCA 427 ('*Byatt International*').

² Eric Stamford, 'Canadian ruling allows owners to knock on shippers' door for hire' *TradeWinds* (Norway), 25 October 2013, 32.

³ *Confidence on Trade and Development Review of Maritime Transport 2013* UNCTAD/RMT/2013 (2013) 51.

⁴ *Ibid.*

⁵ See Fidelis Oditah, 'The juridical nature of a lien on sub-freights' [1989] *Lloyd's Maritime & Commercial Law Quarterly* 191; Graeme Bowtle, 'Liens on Sub-freights *Re Brumark*' [2002] *Lloyd's Maritime & Commercial Law Quarterly* 289; Michael Wilford, 'Liens on Sub-freights and Priorities' [1988] *Lloyd's Maritime & Commercial Law Quarterly* 148.

⁶ *Dry Bulk Handy Holding* [2013] EWCA Civ 184 (14 March 2013); *Byatt International* 2013 BCCA 427.

⁷ *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd* [2012] EWHC 2107 (Comm) (24 July 2012) [66] (Smith J).

but did not 'provide for a lien over hire payable ... under the trip charterparty'.⁸ On appeal the lien on sub-freight issue was not expressly considered.⁹

In *Byatt International*, Byatt argued it had a valid lien against KLC, as per clause 18 of the NYPE 1946 form. At first instance the Court concluded that equitable principles prohibited the Court from enforcing the terms of the lien.¹⁰ Although Byatt successfully appealed the first instance decision, the Court of Appeal reasoned the lien on sub-freight issue did not require decision. Subsequently the Supreme Court of Canada denied an application for leave to appeal.

The relevance of these cases is they illustrate reluctance by the courts to grapple with the complex lien on sub-freights issue.¹¹ With appellate courts in the United Kingdom and Canada called upon to consider similar issues, the decisions highlight the importance of certainty in this little-considered area of the law. At the opening of the 20th century it appears there was no authority on the point.¹²

3 Lien on Sub-freights

Many standard form charterparties include a lien over 'all sub-freights' payable to the charterer. Clause 23 of the NYPE 1993 standard form charter stipulates:¹³

The Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire for any amounts due under this Charter Party, including general average contributions, and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.

Clause 8 of the Gencon 1994 in slightly different language stipulates:

The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering the same.

3.1 The Legal Nature of a Lien on Sub-freights

In considering the legal nature of a lien on sub-freights included in a charterparty, the question is not simply one of contract construction. A similar approach to that taken in *Re Brumark Investments* should be adopted.¹⁴ *Re Brumark Investments* concerned the distinction between a floating and fixed charge, a distinction that has since been abrogated for jurisdictions with personal property securities regimes. Nevertheless, in this instance, *Re Brumark Investments* provides a useful framework. In *Re Brumark Investments* the Privy Council drew a distinction between characterisation and interpretation. Lord Millet, in delivering the advice of their Lordships, stated:

... the court is engaged in a two stage process. At the first stage it must construe the instrument ... to gather the intentions of the parties from the language they have used. But the object at this stage of the process ... is to ascertain the nature of the rights and obligations which the parties intended to grant each other¹⁵ Once these have been ascertained, the court can then embark on the second stage of the process which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties.

Personal property securities regimes in New Zealand and Australia have removed many common law security distinctions with the focus now on establishing the economic substance of the transaction.¹⁶ That said, both the New Zealand and Australian legislation continue to recognise all forms of security interest that existed prior to

⁸ Ibid [49].

⁹ *Dry Bulk Handy Holding* [2013] EWCA Civ 184 (14 March 2013) [1].

¹⁰ *Byatt International* 2013 BCCA 427, 8 [18].

¹¹ Nonetheless a discussion of the issues raised in these decisions is important given the current work being undertaken to develop an updated NYPE standard form charter. A final draft of a new NYPE form is expected to be submitted to Baltic and International Maritime Council's (BIMCO) Documentary Committee in November 2014. See BIMCO, *Light at end of tunnel for NYPE update* (20 February 2014) <https://www.bimco.org/news/2014/02/20_light_at_end_of_tunnel_for_nype_update.aspx>.

¹² *Tagart, Beaton & Co v James Fisher & Sons* [1903] 1 KB 391, 394 (CA) ('*Tagart, Beaton & Co*').

¹³ The equivalent provision in the 1943 version is clause 18. The unamended clause 18 provides 'the Owners shall have a lien upon ... all sub-freights for any amounts due under this Charter [...].'

¹⁴ *Agnew v Commissioners of Inland Revenue* [2001] 2 AC 710 ('*Re Brumark Investments*').

¹⁵ Ibid 725 [32].

¹⁶ *Personal Property Securities Act 1999* (NZ) s 17(1)(a); *Personal Property Securities Act 2009* (Cth) s 12(1).

commencement. However, there is no immediate need to fit post personal property securities interests into the old forms.¹⁷ The effect of the personal property securities regimes is considered in the final part of this article.

3.2 Construction

Using the approach in *Re Brumark Investments*, the first stage in determining the lien's legal nature involves construing the instrument and gathering the intentions of the parties from the language they have used. Rules of construction developed for contracts in general 'are equally applicable to charterparties and bills of lading.'¹⁸ For simplicity, this analysis is restricted to a valid contract where one of the aforementioned standard form charterparties that includes a lien on sub-freights clause evidences in full the agreement as between the parties.

The starting point must be the general principles of contract construction. Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* articulated the modern approach to interpreting contracts.¹⁹ This approach was adopted by the New Zealand Court of Appeal in *Boat Park Ltd v Hutchinson*.²⁰ In both England and New Zealand almost every subsequent case has cited Lord Hoffmann's formulation.²¹

Nonetheless, contract interpretation is described as 'one of the most contentious areas of the law of contract' attracting 'fundamental divisions among commentators, practitioners and judges'.²² The guiding principle from *West Bromwich Building Society*, although widely applied, is not always widely understood. The divergence between the guiding principle that 'interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract' and the idea that words must be given their plain meaning in the absence of inter alia manifest absurdity, or a proven technical usage is emphasised by David McLauchlan.²³

McLauchlan highlights that 'the great majority of interpretation disputes that come before the courts have the common feature that the parties did not, at the time of formation, contemplate the situation that has arisen'.²⁴ If parties to a charterparty did not form an actual intention as to the meaning to be assigned to a lien on a sub-freight clause 'the court can only seek to resolve the dispute by reference to the parties' presumed intention'.²⁵

A vessel owner presumably would only agree to charter their vessel on the basis the charterer will make all payments as agreed. Even where a charterer has a good credit rating a prudent shipowner will turn their mind to protecting themselves should payments not be made as they fall due. To a shipowner, a lien on sub-freights clause is important as it purports to give the owner the right to attach to sub-freights payable under sub-charterparties for payments in respect of the headcharter. In effect, this provides a shipowner with another method of debt recovery. If all goes well the shipowner avoids any involvement in the potentially messy collection of freight. Charterparties are often negotiated by shipbrokers and other industry players rather than lawyers. These shipbrokers and other industry players may not have considered the legal form of this method of debt recovery.

To illustrate the effect of the lien take a simple tripartite situation comprised of an owner, charterer and sub-charterer. Where both the charterer and sub-charterer fall into arrears the lien purports to provide the owner another method of debt recovery through the right to attach to sub-freights payable under the sub-charterparty for payments due in respect of the headcharter. This neat scenario explains the effect but fails to address the more realistic scenario where a dispute arises in a chain of four or more charterparties. Neither does the scenario explain what should happen if only some of the parties in the chain are in arrears.

Lord Alverstone CJ in *Tagart, Beaton & Co v James Fisher & Sons* summarised the effect of a lien on sub-freights:

¹⁷ Section 17(3) of the *Personal Property Securities Act 1999* (NZ) expressly confirms the continued existence of, *inter alia*, the floating charge. Section 12(1) of the *Personal Property Securities Act 2009* (Cth) also expressly confirms the continued existence of, *inter alia*, the floating charge.

¹⁸ Bernard Eder and Thomas Scrutton, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 22nd ed, 2011), 20 [1-054].

¹⁹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 (HL) ('*West Bromwich*').

²⁰ *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).

²¹ Susan Glazebrook (ed), LexisNexis, *Commercial Law in New Zealand* (at Service 43) [4.1.3].

²² David McLauchlan, 'Contract Interpretation: What is it about?' (2012) *Victoria University of Wellington Legal Research Papers* 1, 5.

²³ *Ibid.*

²⁴ *Ibid.* 10.

²⁵ *Ibid.* 10.

A lien such as this on a subfreight means a right to receive it as freight and to stop that freight at any time before it has been paid to the time charterer or his agent; but such a lien does not confer the right to follow the money paid for freight into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight.²⁶

Clarke J in *Western Bulk Shipping III* cited and agreed with Lord Alverstone's formulation of the lien's effect.²⁷ In *The Spiros C Rix* LJ stated:

It is well established that a lien over sub-freights gives to the shipowner a right, where his time-charterer has defaulted, to step in and claim payment of such sub-freights to himself, provided that they have not already been paid.²⁸

Although the overall *effect* of the lien on sub-freights is widely accepted, the *characterisation* of the 'lien' does not enjoy such common understanding.

3.3 Characterisation

In the United Kingdom a clear binding statement has not yet been made by an appellate court as to the characterisation of the lien. This was noted in *Western Bulk Shipowning III* by Clarke J who went on to highlight that decisions as to the lien on sub-freights nature 'have been reached by judges at first instance of great distinction.'²⁹ Briggs J in *Cosco Bulk Carrier Co Ltd v Armada Shipping SA*³⁰ considered that the juridical nature of the lien is 'plainly ripe for consideration at least by the Court of Appeal.'³¹ That decision concerned a cross-border insolvency dispute over whether the lien could be considered the enforcement of security by a secured creditor. Briggs J was unprepared to rule on the nature of the lien as he considered it would 'expose the parties to a possibly lengthy stay of the underlying dispute while a single issue in it was litigated up to, and possibly beyond, the Court of Appeal'.³² Similarly, in Australia, Carruthers J avoided deciding the nature of lien as he reasoned the dispute before him did not concern an amount due under the charter to which the lien could be exercised.³³

Fidelis Oditah surveyed six theories in categorising the lien on sub-freight. These were the mandate theory, the subrogation theory, the maritime lien theory, the equitable assignment theory, the equitable charge theory and the right of interception theory.³⁴ After a brief explanation of each of these theories Oditah concluded the lien is 'a personal contractual right of interception analogous to an unpaid seller's right of stoppage in transit'.³⁵ Over a decade later and prompted by the Privy Council decision in *Re Brumark Investments*, Graeme Bowtle considered the issue.³⁶ Bowtle concluded the lien on sub-freights has the characteristics of a floating charge and therefore 'logically it would seem that the lien is a floating charge'.³⁷

In considering clause 18 of the NYPE 1946³⁸ form Goff J, as he then was, recognised the clause provides for at least three liens and that the owners have a lien on '(1) all cargoes, and (2) all sub-freights, for any amounts due under the charter including general average contributions; and [3] the charterers have a lien on the ship for all moneys paid in advance and not earned.'³⁹ Goff J went on to state 'it is obvious that neither the owners' lien for sub-freights, nor the charterers' lien on the ship, can be a possessory lien.'⁴⁰ This article only concerns the second of these 'liens': the lien on sub-freights for amounts due under the charterparty.

²⁶ *Tagart, Beaton & Co* [1903] 1 KB 391, 395 (CA).

²⁷ *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS & Ors* [2012] EWHC 1224 (11 May 2012) [34] ('*Western Bulk Ship Owing III*')

²⁸ *Tradigrain SA & Ors v King Diamond Marine Ltd* [2000] 2 Lloyd's Rep 319, 323 [11].

²⁹ *Western Bulk Shipowning III* [2012] EWHC 1224 (11 May 2012) [32]

³⁰ *Cosco Bulk Carrier Co Ltd v Armada Shipping SA & Ors* [2011] EWHC 216 (Ch) (11 February 2011).

³¹ *Ibid* [51].

³² *Ibid* [52].

³³ *Mutual Export Corporation & Ors v Asia Australia Express Ltd & Ors; The Lakatoi Express* (1990) 103 FLR 32, 49 (NSWSC); see also *Daabo Shipping Company Ltd v The Ship Go Star* (2012) 207 FCR 220, 241 [95].

³⁴ Fidelis Oditah, 'The juridical nature of a lien on sub-freights' [1989] *Lloyd's Maritime & Commercial Law Quarterly* 191, 192.

³⁵ *Ibid* 192.

³⁶ Bowtle, above n 5.

³⁷ *Ibid*.

³⁸ The language of clause 18 of the standard form NYPE 1946 is the same as clause 23 of the NYPE 1993 except NYPE 1946 omits 'sub-hire'. NYPE 1946 clause 18 stipulates that 'the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter.'

³⁹ *Ellerman Lines Ltd v Lancaster Maritime Co Ltd & Ors; The Lancaster* [1980] 2 Lloyd's LR 497, 501 (QB).

⁴⁰ *Ibid* 501.

The parties cannot have intended for the lien to be a common law lien. This is explained in *Western Bulk Shipping III*: '[t]he problem arises because of the use of the word 'lien' which ordinarily refers to a right to retain possession of a chattel until payment of a sum due from its owner.'⁴¹ Sub-freight is money due that cannot be possessed so it is impossible to characterise the lien in the traditional legal sense.

This article considers in detail the realistic possibilities for the lien: namely whether it is an equitable lien, equitable charge, equitable assignment or a sui generis contractual right. None of these options appears to be an absolute fit. It is possible the lien on sub-freights is simply a legal mirage although three reasons compel the author to dismiss this possibility. First, the lien is a common charterparty term. Second, shipowners have relied on the lien for at least a century to recover amounts owing under the head charter. Third, there is no judicial consideration of this possibility.

3.3.1 Equitable lien

A lien may be legal or equitable. Although both share the common name, unlike a lien that arises at common law, an equitable lien is not dependent on possession.⁴² Deane J in *Hewett v Court* described an equitable lien as 'a right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness'.⁴³ Deane J observed:

The word 'lien' is used somewhat imprecisely in the phrase 'equitable lien' to describe not a negative right of retention of some legal or equitable interest but what is essentially a positive right to obtain, in certain circumstances, an order for the sale of the subject property or for actual payment from the subject fund.⁴⁴

Snell's Equity describes an equitable lien by analogy to a charge stating 'an equitable lien gives the lienee rights in the nature of a charge upon property until certain claims are satisfied.'⁴⁵ In *Snell's Equity* an equitable lien and an equitable charge are distinguished: 'the equitable lien differs from an equitable charge only in that it arises by operation of equity, from the relationship between the parties, rather than by any act of theirs.'⁴⁶ In *Waitomo Wools* Richmond J cited Nicholls CJ's comment in *Re Price* that 'the words 'charge' and 'lien' are often interchangeable'.⁴⁷

In *Re Welsh Irish Ferries*, a decision concerning the lien on sub-freights Nourse J conceptualised an equitable lien as 'something which exists independently of possession and gives rise to a charge, but it arises by operation of law out of the relationship between the parties and not out of an express contract'.⁴⁸ Deane J in *Hewett v Court* addressed the lien and charge distinction stating:

Though called a lien, it is, in truth a form of equitable charge over the subject property in that it does not depend upon possession and may, in general, be enforced in the same way as any other equitable charge ...⁴⁹

Fiona Burns argues the equitable lien and the equitable charge are confused.⁵⁰ Burns suggests the distinction is simple, 'the equitable charge is the creation of mutual intention of the chargor and the chargee, an equitable lien arises by implication of law.'⁵¹ In the situation discussed here the shipowner and charterer relationship is merely contractual, the parties have consented to the 'lien' and it is not necessary for it to arise by operation of law.

In *Snell's Equity* the equitable lien is distinguished from other types of security stating 'they arise by operation of law rather than because the parties consensually created a security interest'.⁵² An early edition of *Ashburner's Principles of Equity* states:

⁴¹ *Western Bulk Shipowning III* [2012] EWHC 1224 (11 May 2012) [37].

⁴² LexisNexis, *Laws of New Zealand* (at 25 March 2014) 'Liens' [19].

⁴³ *Hewett v Court* (1983) 149 CLR 639, 663 ('*Hewett*').

⁴⁴ *Ibid* 664.

⁴⁵ John McGhee, *Snell's Equity* (Thomson Reuters, 32nd ed, 2010) 1002.

⁴⁶ *Ibid*.

⁴⁷ *Waitomo Wools Ltd v Nelson Ltd* [1974] 1 NZLR 484, 493 (CA).

⁴⁸ *In re Welsh Irish Ferries Ltd; The Uglad Trailer* [1985] 1 Ch 471(QB) 478 ('*The Uglad Trailer*').

⁴⁹ *Hewett* (1983) 149 CLR 639, 663.

⁵⁰ Fiona Burns 'The Equitable Lien Rediscovered: A Remedy for the 21st Century' (2002) 25 *University of New South Wales Law Journal* 1,

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⁵¹ *Ibid* 4.

⁵² McGhee, above n 45, [44-004].

There is no distinction between an equitable charge and an equitable lien, so far as regards their effect; but the word 'lien' is generally used to denote an equitable security which does not arise under an express contract.⁵³

Neither *Snell's Equity* or *Ashburner's Principles of Equity* provides any direct authority for this proposition. Nonetheless the author agrees that the 'lien' on sub-freights cannot be an equitable lien as it arises under an express contract. Simply sharing the same terminology is not enough to claim the lien over sub-freights owing to the charterer is an equitable lien.

3.3.2 Equitable charge

Lord Russell in *The Nanfri* considered, although only as a passing remark, that the lien on sub-freights operated 'as an equitable charge upon what is due from the shipper to the charterer.'⁵⁴ Although not directly on point, support is also found in the decision of *Citibank NA v Hobbs Savill & Co Ltd*.⁵⁵ Nourse J in *Re Welsh Irish Ferries Ltd* was critical of the position taken by the parties in that decision for treating the lien as taking effect as an equitable assignment, as he considered it actually created an equitable charge.⁵⁶

It has been suggested there is a fundamental problem with the equitable charge analysis. Although the 'lien' may be described as operating like a charge it confers no proprietary interest in the sub-freight. This concerned the Privy Council in *Re Brumark Investments* where Lord Millett, delivering the judgment of their Lordships commented:

Apart from the obiter dictum of Lord Russell in the *Federal Commerce* case, the cases in which the lien has been characterised as an equitable charge are all decisions at first instance and none of them contains any analysis of the requirements of a proprietary interest.⁵⁷

A lien on sub-freight clause serves only to provide the shipowner the ability to intercept sub-freight. It is argued that to be a true equitable charge there would be some form of rights of tracing to follow moneys into the hands of a third party. Nourse J in *Re Welsh Irish Ferries* found this criticism unsatisfactory stating it confuses the nature of the right and the event which defeats it.⁵⁸ Nourse J went on to state:

If, for example, the shipper were to make payment not to the charterer but to some third party who had notice of the lien, it could not be doubted that the shipowner could follow the money into the hands of the third party. The reason why he cannot follow it into the hands of the charterer is because it is the very event of payment to him which defeats the right.⁵⁹

The view of Nourse J is to be preferred over that of Lord Millett in this context. No principle exists that requires a charge over property such as a book debt to 'carry with it the equivalent tracing rights to the destination of its realisation proceeds.'⁶⁰ As this article is focused on the treatment of this right under personal property securities regimes it is not necessary to further consider the common law difficulties of whether a security in book debts extends to any proceeds.⁶¹

3.3.3 Equitable Assignment

If the charge theory is correct it can provide only a restrictive right in respect of sub-freights directly owing to the charterer and would not extend to sub-sub-freights owing to a sub-charterer. The analysis may be more expansive if the nature of the lien takes effect as an equitable assignment rather than an equitable charge. This was considered in *The Cebu (No 1)* but Lloyd J did not consider the distinction further as the parties agreed 'that in an ordinary three-party case the lien takes effect as an equitable assignment.'⁶²

⁵³ Walter Ashburner and Denis Browne, *Principles of Equity* (Butterworth, 2nd ed, 1933) 249.

⁵⁴ *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc & Ors; The Nanfri* [1979] AC 757, 784 (HL).

⁵⁵ *Citibank N.A. v Hobbs Savill & Co Ltd; The Panglobal Friendship* [1978] 1 Lloyd's Rep 368, 371 (CA). Lord Denning was not considering the lien on sub-freights but he was considering a similar scenario and he believed it gave something in the nature of an equitable charge.

⁵⁶ *The Uglund Trailer* [1985] 1 Ch 471, 479-80 (QB).

⁵⁷ *Re Brumark Investments* [2001] 2 AC 710, [41].

⁵⁸ *The Uglund Trailer* [1985] 1 Ch 471, 478 (QB).

⁵⁹ *Ibid.*

⁶⁰ Mark Armstrong, 'Return to first principles' in New Zealand: charges over book debts are fixed – but the future's not! (2000) 3 *Insolvency Lawyer* 102, 107.

⁶¹ See Fidelis Oditah, *Legal aspects of Receivables Financing* (Sweet & Maxwell, 1991) 25; Armstrong, above n 60, 104.

⁶² *Care Shipping v Latin American Shipping* [1982] 1 QB 1005, 1016 (QB) ('*The Cebu (No 1)*').

Typically an equitable assignment occurs when an assignment does not fulfil the statutory formalities for a legal assignment.⁶³ Support for an equitable assignment theory can be found by: Steyn J in *The Attika Hope*,⁶⁴ Nourse J in *The Uglund Trailer*,⁶⁵ Lloyd J in *The Cebu (No 1)*,⁶⁶ Saville J in *The Annangel Glory*,⁶⁷ and by Lord Steyn in *The Cebu (No 2)*.⁶⁸ In *The Cebu (No 1)* Lloyd J stated in reference to the NYPE form:

On the true construction of clause 18 I would hold that [the charterer] has assigned to the owners by way of equitable assignment, not only sub-freights due to it as charterers, but also any sub-freight due under any sub-sub-subcharter of which it is equitable assignee. In my view that is the clear intention of the parties to be derived from the language they have used in clause 18.⁶⁹

Lloyd J, in support of the equitable assignment theory, warned that other theories could be defeated by an unscrupulous charterer who arranged an in-house charter at the same rate.⁷⁰ An unscrupulous charterer wanting to charter the vessel would own two companies; the first company would charter the vessel from the shipowner and then sub-charter the same vessel to the second company. This in-house charter would be at the same rate as the charter with the shipowner. If the first company defaults then according to the equitable charge analysis the shipowner can only recover any sub-freights owing from the second company to the first company. In a chain of charterers that goes beyond the tripartite situation the equitable assignment theory would prove effective in ensuring the shipowner can reach further down the chain to recover amounts owing under the head charter.⁷¹

The assignment theory is more plausible when considered in the light of a charterer having a chose in action against the shipper. This limited right can only be acquired 'by the shipowner by virtue of some assignment, necessarily equitable, made by the charterer.'⁷² Such an equitable assignment would have to be conditional upon possible defeasance in the event of the shippers making payment to the charterer before receiving notice that payment should be made to the shipowner.

Traditionally the common law only allowed an equitable assignment where the property sought to be assigned was future or after-acquired.⁷³ Where a charter contract is evidenced by one of the standard form charterparties considered, no services will have been performed by the charterer upon which sub-freights would be owing. Any assignment of sub-freights must be of future property meaning the assignment can only be equitable.

In New Zealand some of the difficulties with the common law approach to assigning future property have been overcome by virtue of s 53 of the *Property Law Act 2007* (NZ). This section provides an assignment 'of an amount that will or may be payable under a right already possessed by the assignor ... is to be treated as an assignment of a thing in action'.

The author views the equitable assignment theory as difficult to reconcile with what the parties could have intended. If the 'lien' takes effect as an equitable assignment then the shipowner has rights in all sub-freights owing. A charterer would not want to assign sub-freights owing to the shipowner when they are also paying hire. If all sub-freights owing are assigned then the charterparty doesn't include an immediate right for the charterer to re-claim the residual that exceeds the hire. Such an assignment plainly assigns the sub-freights owing to the charterer to the shipowner.

As Michael Wilford points out:

An owner will not normally even consider the exercise of his lien on sub-freights until hire or other amounts due from the time charterer are overdue, and often it takes time to find out the identity of sub-charterers.⁷⁴

The equitable assignment analysis presents difficulty with regards to when a shipowner should give notice to the sub-charterers of the assignment as to effect the assignment. Wilford recognises this, posing the question:

⁶³ See *Property Law Act 2007* (NZ), pt 2, sub-pt 5; Roger Fenton, *Garrow and Fenton's Law of Personal Property in New Zealand* (LexisNexis NZ, 7th ed, 2010) vol 1 [9.50].

⁶⁴ *G & N Angelakis Shipping Co SA v Compagnie Nationale Algerienne de Navigation; The Attika Hope* [1988] 1 Lloyd's LR 439, 442 (QB).

⁶⁵ *The Uglund Trailer* [1985] 1 Ch 471 (QB).

⁶⁶ *The Cebu (No 1)* [1982] 1 QB 1005 (QB).

⁶⁷ *Annangel Glory Compania Naviera SA v M Golodetz Ltd & Ors; The Annangel Glory* [1988] 1 Lloyd's Rep 45 (QB).

⁶⁸ *Itex Itagrani Exports SA v Care Shipping Corp & Ors; The Cebu (No 2)* [1990] 2 Lloyd's Rep 316 (QB).

⁶⁹ *The Cebu (No 1)* [1982] 1 QB 1005, 1016 (QB).

⁷⁰ *Ibid* 1018.

⁷¹ Fenton, above n 63, vol 1 [9.2].

⁷² *The Uglund Trailer* [1985] 1 Ch 471, 478 (QB).

⁷³ *Lunn v Thornton* (1845) 1 CB 379.

⁷⁴ Wilford, above n 5, 148.

Should, then, an owner, against the possibility of future, give notices of the assignment to him of future sub-freights, to any and every sub-charterer of whose existence he becomes aware, even though the time charterer has, from the commencement of the charter, paid hire before the due dates for payment and no other moneys are due under the charter?⁷⁵

3.3.4 Is the lien some kind of sui generis contractual or maritime right?

It is worth considering whether this could be some kind of sui generis contractual right with maritime law origins. The hurdle this analysis must broach is in trying to explain why a contract between A and B should give rights to B to sue C for money C owes to A. The most authoritative support for this is expressed by Lord Millett's obiter comment in *Re Brumark Investments*.⁷⁶ In *Re Brumark Investments* the first instance judge used the shipowner's lien on sub-freights as an example of fixed charges over assets which are defeasible at the will of the charger.⁷⁷ Lord Millett dismissed this stating:

The lien is the creation of neither the common law nor equity. It originates in the maritime law, having been developed from the shipowner's lien on the cargo. It is a contractual non-possessory right of a kind which is sui generis...[t]he lien on sub-freights does not bind third parties. It is merely a personal right to intercept freight before it is paid analogous to right of stoppage in transitu. It is defeasible on payment irrespective of the identity of the recipient.⁷⁸

A Full Court comprised of Keane CJ, Rares JJ and Besanko JJ of the Federal Court of Australia, unanimously observed that weight should be given to Lord Millett's comments as he sat with 'Lords Bingham and Hobhouse, both of whom had extensive Admiralty experience and would have been unlikely to have joined in the opinion delivered by Lord Millett if they disagreed.'⁷⁹

In *The Annangel Glory* the shipowners submitted the nature of the lien was a contractual right 'by way of an authority given to the owners to act as the charterer's agents to collect sub-freights when amounts were due to owners under the head charter' and that no question of assignment arose at all.⁸⁰ Saville J dismissed the shipowner's submission reasoning 'that the parties intended to give the owners a right which the owners could exercise on their own behalf – not on behalf of the charterers – if amounts became due under the charter-party.'⁸¹ An agency type analysis would afford a shipowner little real protection as 'even after notice sub-charterers could not be prevented from paying the principal rather than the agent, nor would the owners (as agents only) have any title or right themselves to sue for the sub-freights.'⁸²

3.3.5 What is the most compelling approach?

It is the author's view that the equitable charge theory provides the most realistic option. Although there is no simple and widely accepted definition of a floating charge, common characteristics include: the charge is over a fund of assets, the chargor has a superior yet limited power to alienate those assets free of the chargee's interest, and the chargee invariably has security in identifiable future assets when acquired by the chargor.⁸³

The lien on sub-freights purports to allow a shipowner to 'claim payment of such sub-freight to himself, provided that they have not already been paid'.⁸⁴ This is analogous to the floating charge as the fund of assets is any sub-freights due, the chargee being the charterer has the ability to alienate those assets free of the shipowner's interest, and the shipowner's interest will continue in any future sub-freights owing.

4 The Effect of Personal Property Securities Regimes

The analysis in this paper specifically applies the New Zealand Personal Property Securities Act 1999 (PPSA). However, the New Zealand legislation is closely modeled after the Saskatchewan Personal Property Security

⁷⁵ Ibid 149.

⁷⁶ *Re Brumark Investments* [2001] 2 AC 710. The judgment of Lord Bingham, Lord Nicholls, Lord Hoffman, Lord Hobhouse was delivered by Lord Millett.

⁷⁷ Ibid 727 [38].

⁷⁸ Ibid 727 [41].

⁷⁹ *Daobo Shipping Company Ltd v The Ship Go Star* (2012) 207 FCR 220, 242 [99].

⁸⁰ *The Annangel Glory* [1988] 1 Lloyd's Rep 45, 47 (QB).

⁸¹ Ibid 47.

⁸² Ibid 47.

⁸³ McGhee, above 45, [40-002].

⁸⁴ *Tradigrain SA & Ors v King Diamond Marine Ltd* [2000] 2 Lloyd's Rep 319, 323 [11].

Act and draws heavily on North American models including the United States Uniform Commercial Code.⁸⁵ The Australian legislation shares the same scheme as the PPSA.⁸⁶

In New Zealand the PPSA introduced 'a new approach to rights in personal property falling within its scope.'⁸⁷ The background to the PPSA is set out in *Waller v New Zealand Bloodstock Ltd*:

The key features of our PPSA ... are the adoption of a unitary concept of security (under which the legal forms by which security is obtained become largely irrelevant) and establishment of priority rules which depend primarily on time of registration save for the super-priority accorded to registered purchase money security interests (that is, in favour of unpaid vendors) over prior general securities.⁸⁸

Critical to determining whether rights in personal property fall within the scope of the personal property securities regimes is the concept of a security interest. Even if a lien on sub-freights constitutes a security interest it may still fall outside the scope of the regime if it fits within one of accepted interests to which the relevant regime does not apply.⁸⁹

4.1 Are 'Sub-freights' due to the Shipowner Personal Property?

The PPSA provides for seven broad classes of collateral; 'chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments.'⁹⁰ These categories are mutually exclusive and comprehensive of all personal property not otherwise excluded from the PPSA.⁹¹ Under the PPSA the categorisation may be important in determining the priority of competing security interests in collateral. An account receivable is not one of the seven categories of collateral but is considered a sub-category of intangibles.⁹² The term 'account receivable' is defined in s 16 of the PPSA as:

[A] monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance.

In New Zealand the Court of Appeal clarified that accounts receivable are broader than merely book debts.⁹³ A monetary obligation in the context of the PPSA means an existing obligation imposed on, or assumed by, one party to apply a certain sum of money to the other party on a specific or ascertainable future date.⁹⁴ It is clear sub-freights owing to the charterer would constitute a monetary obligation and would constitute an account receivable for the purposes of the PPSA.

4.2 Is an Exception Applicable?

The lien exception in section 23(b) of the PPSA is worthy of consideration, if only because of the shared terminology. Section 23(b) provides the PPSA does not apply to a lien except as specified in Part 8. *Garrow and Fenton's Law of Personal Property in New Zealand* states that '[c]ontractual liens, which arise by contract, and can be contrasted with common law and statutory liens, may well come within the [PPSA].'⁹⁵ As has already been discussed, the real nature of the shipowner's lien on sub-freights is likely to be an equitable charge and would not be within the ambit of this exception.

4.3 Is a Lien on Sub-freights a Security Interest?

Central to the PPSA is the concept of 'security interest'. If there is no security interest then the PPSA does not apply. The meaning of security interest in the New Zealand PPSA is in essence the same as that in equivalent Australian legislation.⁹⁶ A security interest is defined in the New Zealand PPSA as:

⁸⁵ Laurie Mayne and Linda Widdup, *Personal Property Securities Act: a conceptual approach* (Lexisnexis Butterworths, 2002) 2.

⁸⁶ Michael Arthur, '10 years of Personal Property Securities Act in NZ: Lessons and Trends' (Paper presented at Personal Property Security Law Conference, Adelaide Law School, February 2013) 1.

⁸⁷ *J S Brooksbank v EXFTX* [2009] NZCA 122 (6 April 2009) [44].

⁸⁸ *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 [14] (CA).

⁸⁹ See *Personal Property Securities Act 1999* (NZ) s 23 and *Personal Property Securities Act 2009* (Cth) s 8.

⁹⁰ *Personal Property Securities Act 1999* (NZ) s 16 ('personal property').

⁹¹ *Ibid*.

⁹² Fenton, above n 63, vol 2 [5.2.8].

⁹³ *Strategic Finance Limited v Bridgman & Ors (in rec and in liq)* [2013] NZCA 357 (9 August 2013) [52].

⁹⁴ *Ibid* [54].

⁹⁵ Fenton, above n 63, vol 2 [4.1.2].

⁹⁶ See *Personal Property Securities Act 2009* (Cth) s 12.

17 Meaning of 'security interest'

- (1) In this Act, unless the context otherwise requires, the term security interest—
- (a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—
- (i) The form of the transaction; and
- (ii) The identity of the person who has title to the collateral; and
- ...
- (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

The starting point is the general meaning that a security interest is 'an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation.'⁹⁷ Even if a transaction does not secure payment or performance of an obligation it may still be a deemed security interest where it is a floating charge.⁹⁸ As this article has concluded a lien on sub-freights should be characterised as an equitable charge, it follows that s 17(3) would deem the lien to be a 'security interest'. Even if the lien was not characterised as an equitable charge it is clear that a shipowner is in substance using such a clause to secure payment of hire due under the charter through the right to attach to sub-freights payable to the charterer.

4.4 Priority

A shipowner with a lien over sub-freights has a security interest that is subject to the PPSA regime. In dealing with an insolvent charterer it is unlikely a shipowner will be the only party seeking a security interest in the charterer's accounts receivable. On the liquidation of a charterer the PPSA determines priorities between competing security interests.

To enforce the lien a shipowner must ensure the security interest has attached to the sub-freights owing, and that the security interest has been perfected. The lien will attach to accounts receivable once value has been given by the shipowner and the charterer has rights in the collateral.⁹⁹ Value means 'consideration that is sufficient to support a simple contract.'¹⁰⁰ The charter of a vessel would satisfy the value requirement but rights in the collateral are more difficult in this context. Rights in the collateral are necessary as without rights there is nothing to secure. If no sub-freights are owing to the charterer then there is no collateral and nothing that the shipowner can secure.

This will not preclude any security being provided: 'a security agreement may provide for security interests in after-acquired property.'¹⁰¹ A security interest in after-acquired property 'attaches without specific appropriation by the debtor'.¹⁰² A charterparty that evidences a contract to charter a vessel would constitute a security agreement for the PPSA.¹⁰³ Therefore the security interest will attach automatically each time sub-freights are owing to the charterer.

Perfection requires attachment and either registration of a financing statement or that the secured party has possession of the collateral.¹⁰⁴ Sub-freights owing to the charterer are an account receivable and are not capable of possession and therefore cannot be perfected by possession. Therefore shipowners must register a financing statement to perfect the security interest in sub-freights owing to the charterer.

⁹⁷ *Personal Property Securities Act 1999* (NZ) s 17(1)(a).

⁹⁸ *Ibid* s 17(1)(b).

⁹⁹ *Ibid* s 40(1).

¹⁰⁰ *Ibid* s 16 ('value').

¹⁰¹ *Ibid* s 43.

¹⁰² *Ibid* s 44.

¹⁰³ *Ibid* s 16 ('security agreement').

¹⁰⁴ *Ibid* s 41(1).

A shipowner with a purchase money security interest (PMSI) in an account receivable has priority over non-PMSI in the same account receivable given by the same charterer if the PMSI is perfected no later than 10 working days after attachment.¹⁰⁵ A shipowner cannot claim to have a PMSI over sub-freights owing as the shipowner is not selling the vessel and the lien does not enable the charterer to acquire rights in the sub-freights owing.¹⁰⁶

If sub-freights owing are paid to the charterer the collateral will have disappeared. In this respect the PPSA remedies common law tracing problems as a security interest in collateral automatically extends to the proceeds.¹⁰⁷ The definition of proceeds expressly includes 'a payment made in total or partial discharge of ... an intangible'.¹⁰⁸ Sub-freights owing are an account receivable and an account receivable is a sub-category of intangibles for the purposes of the PPSA. If a shipowner has a perfected security interest then the shipowner will also have a perfected security interest in any payments made against the sub-freight owing. This is a sensible result and addresses the concern that an unscrupulous charterer could arrange an in-house charter at the same rate to defeat the effect of the lien.¹⁰⁹

A shipowner that has not perfected their security interest in sub-freights owing will not have priority to those sub-freights as against another party with a perfected security interest in the sub-freights owing.¹¹⁰ If the shipowner had perfected its security interest in sub-freights then in the above scenario priority would be accorded to the party that perfected first.¹¹¹ This means priority will accord to the party that was first to register its interest whether or not attachment had occurred at the point at which that step was taken.¹¹²

A charterer may use the strength of its broader accounts receivable, including any sub-freights owing, as collateral. Large lenders such as banks are likely to have a general security agreement that gives a security interest in all present and after-acquired property. In addition it is 'not uncommon for a party contemplating taking a security interest to register a financing statement in respect of its security interest in advance of the transaction being consummated'.¹¹³ This will make it difficult for a shipowner chartering a vessel to an already established business to be first to register in respect of sub-freights owing.¹¹⁴

Conflict of laws provisions in personal property securities regimes can present a priority trap. For example, a search of the personal property securities register in New Zealand will not return security interests registered in other countries unless they have also been registered in New Zealand. Given the international nature of shipping shipowners should be alert to this issue. However, the issue demands more consideration than the scope of this article can provide.

4.5 Is this the 'Right' Result?

Given the prevalence of vessel chartering, it seems likely a large number of vessels would be sailing the ocean today under charter agreements that include lien on sub-freights type clauses. The *Companies Act 1989* (UK) specifically excluded a shipowner's lien on sub-freights from being a registerable charge, in essence reversing the decision in *Re Welsh Irish Ferries*.¹¹⁵ The relevant provision required a commencement order to be put into effect and no such order was ever made.¹¹⁶ At a legislative level the issue remains unresolved and continues to feature on the United Kingdom law reform agenda. In 2004 the United Kingdom Law Commission proposed that it be made clear 'contractual liens over sub-freights are not charges and therefore are not registerable'.¹¹⁷

¹⁰⁵ Ibid s 75.

¹⁰⁶ Ibid s 16 ('purchase money security interest').

¹⁰⁷ Ibid s 45(1).

¹⁰⁸ Ibid s 16 ('proceeds').

¹⁰⁹ *The Cebu (No 1)* [1982] 1 QB 1005, 1018 (QB).

¹¹⁰ *Personal Property Securities Act 1999* (NZ) s 66(a).

¹¹¹ Ibid s 66(b).

¹¹² Ibid s 66(b).

¹¹³ Mark Yarnell and Richard May, 'New Zealand' in William Johnston (ed), *Security over Receivables: an International Handbook* (Oxford University Press, 2008) 394 [27.14].

¹¹⁴ A shipowner dealing with a charterer in liquidation must be wary of preferential creditor regimes. In New Zealand preferential claims are set out in the *Companies Act 1993* (NZ), schedule 8, clause 1. These claims include liquidator's fee, unpaid PAYE and GST to Inland Revenue, and unpaid wages of employees. These claims have priority over even secured creditors with a security interest in a company's accounts receivable. A secured creditor's interest will not be subordinated to the extent it is a perfected purchase money security interest (PMSI).

¹¹⁵ *Companies Act 1989* (UK) s 93.

¹¹⁶ Part IV, sections 92 – 107 relating to the registration of charges on companies' property has not been brought into effect in accordance with s 215(2).

¹¹⁷ United Kingdom Law Commission, *Registration of Security Interests: company charges and property other than land*, Consultation Paper No 164 (2002) [5.42].

The United Kingdom's desire to exclude a shipowner's lien on sub-freights is premised on the idea that registration is commercially unfeasible.¹¹⁸ Often a charterparty will be short in duration: this may make taking steps toward registration inconvenient. Adding weight to this argument is that to reduce transaction costs charterparties are often negotiated by shipbrokers and other industry players rather than lawyers.

Oditah argued that registration under the United Kingdom companies charges regime would 'defeat the commercial purpose of the lien'.¹¹⁹ However, if the commercial purpose of the lien is to provide a shipowner with another method of debt recover then it is difficult to distinguish the lien from other types of security interests the PPSA regime captures.

Aubrey Diamond in his report on English security interests in property recommended registration of the lien on sub-freights under the English companies charges regime should not be required.¹²⁰ Diamond reasoned:

Although it may be said that avoidance of the lien for non-registration would cause no great hardship, since it is suggested that such liens are rarely relied upon, it must be remembered that it is a criminal offence for the company not to register a charge. Moreover, since the standard forms of charterparty are used throughout the world, by companies from many different countries, it would be inappropriate to delete the clause from the forms in common use merely because British companies might seek not to rely on it.¹²¹

Personal property securities regimes do not seek to criminalise parties that fail to register security interests. Instead these regimes incentivise parties to register their security interests through priority rules. If shipowners rarely rely upon such liens there should be little complaint that they are captured by personal property security regimes.

Re Welsh Irish Ferries concerned the registration of a lien on sub-freights under the United Kingdom companies charges regime. In that decision Nourse J stated:

... there would be no useful purpose in registration, the whole object of which is to warn unsuspecting creditors that the debtor company has charged its assets, whereas anyone who deals with a corporate charterer will know that it must have created liens on sub-freights.¹²²

The author disagrees with the view of Nourse J and considers the rationale behind personal property securities regimes to outweigh any such considerations. A unitary concept of security that disregards the forms by which security is obtained should be the fundamental consideration. This view exposes the perennial tension between maritime lawyers and insolvency practitioners. If there is a policy question here, it is where a shipowner with a lien over sub-freights should rank in priority to other claims. This is consistent with the idea that personal property securities regimes regulate the priority of relative security interests and not the form required to create a security interest.

5 Conclusion

A claim made to enforce a lien on sub-freights clause in a charterparty is likely to be advanced where goods are carried on a sub-charter without any bill of lading. It is well established that a lien over sub-freights gives the shipowner a right to step in and claim payment of sub-freight to himself. The equitable assignment, equitable lien and sui generis contractual right theories on characterising this 'lien' on close inspection are unsatisfactory. It is the author's view that the equitable charge theory is the most realistic characterisation of the lien.

Personal property securities regimes that use a 'substance over form' approach to defining security interests are likely to capture the lien on sub-freights. It is clear that a shipowner is in substance using the lien to secure the payment of hire due under the charter through the right to attach to sub-freights payable to the charterer. To enforce the security interest shipowners should register a financing statement. It may be difficult even after registration for a shipowner to gain priority in respect of sub-freights owing to the charterer, especially where the charterer has previously given security to a third party in all present and after-acquired property.

¹¹⁸ Ibid [5.41].

¹¹⁹ Oditah, above n 61, 86.

¹²⁰ Aubrey Diamond, *A Review of Security Interests in Property* (Her Majesty's Stationery Office, London, 1989) 111 [23.4.16]

¹²¹ Ibid 112 [23.4.15]

¹²² *The Uglad Trailer* [1985] 1 Ch 471, 480 (QB).

Requiring registration of the lien on sub-freights is consistent with the rationale of a unitary concept of security that underlies personal property securities regimes. Given the prevalence of vessel chartering, shipowners should review charterparties in countries such as New Zealand and Australia with a view to registering the lien on sub-freights, or looking to other ways of securing amounts payable under the head charter.