

BIFA Article: Goods held under lien

A common dilemma for forwarders or carriers is what can they do with goods held by them under lien? Can storage charges be claimed or can the goods be sold? There may also be a question mark over whether the goods are held under lien at all.

It may be that there is no written contract between the parties, or that the contract is silent on the issue of liens, or that the forwarder/carrier's standard terms have not been incorporated into the contract. In such situations, the parties will have to fall back on the common law position.

Liens under common law

Under English law, the delivery of goods by the seller to the carrier will terminate a seller's lien. Thereafter, the carrier will have a common law right of lien. This common law right will, however, only extend those goods which are the subject of the contract of carriage for which the carrier remains unpaid. It does not, therefore, permit the carrier to retain possession of goods held by it in circumstances where the carrier has been paid for the carriage of that consignment but not an earlier consignment. There is, therefore, no general right of lien in respect of any and all goods held by the carrier pending payment for all contracts of carriage performed by the carrier.

Aside from when the carrier receives payment, its right of lien will also terminate upon the insolvency of the purchaser of the goods. Thus, if the buyer becomes insolvent then the seller's lien will revive.

The drawbacks of the common law position can be remedied through a written contract. The carrier/forwarder can, therefore, by way of an express agreement claim a general lien in respect of any goods held by the carrier from time to time should any of its historic invoices remain unpaid. The BIFA terms provide for such a general lien.

Claiming storage charges

There is no general common law right to claim storage charges for goods held under lien. Accordingly, if storage charges are to be claimed, the carrier/forwarder will need to rely on express contract terms such as those contained within the BIFA terms. However, if the owner of the goods is in financial difficulty it may well be that storage charges will never be recovered. In the long term, therefore, if its charges remain unpaid, the carrier/forwarder will be looking to sell the goods held under lien.

Sale of goods held under lien

Again, there is no general common law right to sell goods held under lien. This right will only arise if (1) there is express provision in the contract, such as the express power of sale contained within the BIFA terms, or (2) one of the statutory exceptions apply. The statutory exceptions permit a sale of goods held under lien by certain categories of persons/traders. These are fairly widely drawn and include carriers, “vendors of chattels” and “bailees in possession of uncollected goods” (see below).

The statutory power of sale only entitles the carrier vendor to retain such sums out of the proceeds of sale as may be required to settle outstanding sums claimed in respect of carriage charges for those particular goods. The balance must be paid over to the previous owner of the goods. To recover charges other than carriage charges from the sale, you must be able to fall back on either an express agreement, a course of dealing or standard industry practice.

Obligations owed by you as “bailee” while goods remain in your care

If goods are held by a carrier, pending payment for carriage charges, then the carrier will be deemed to be a “voluntary bailee” of the goods. As such, the carrier will owe certain legal obligations to the owner of the goods and may be held liable for any loss or damage to goods left in its care.

If goods have simply been left at the carrier’s premises in circumstances where there is no outstanding debt owed to the carrier or where the carrier does not otherwise seek to claim a lien in respect of the goods, then the carrier will be deemed to hold the goods as “involuntary bailee”. As such, the carrier will not owe the same standard of care in respect of the goods. However, if the carrier treats the goods as its own or otherwise seeks to retain possession of the goods, then it may become a voluntary bailee with all the obligations which that entails.

Sale of goods by a bailee

If a carrier wishes to sell goods which are in its possession, then it should be mindful of the statutory protection given to the owner of the goods by the Torts (Interference with Goods) Act 1977 (“the Act”). Under section 12 of the Act, the carrier, as bailee, will have power to sell the good provided it is reasonably satisfied that the bailor owns the goods (and is in breach of an obligation to collect the goods) and the carrier has either:

1. given notice of his intention to sell the goods; or
2. failed to trace the bailor, after having taken reasonable steps.

There is case law to suggest that there is an implied term in bailment contracts that the bailor will collect its goods within a reasonable time frame. In the case of *Jerry Juhan Developments –v- Avon Tyres* [1999] this was held to be 6 months. If the bailor fails to collect the goods within a reasonable time, the bailee will be relieved of its obligations to the bailor and may sell or otherwise dispose of the goods.

The Act sets out procedural requirements which must be met by any bailee wishing to sell goods in its possession. These include the requirement to serve a written notice on the bailor of any intention to sell the goods. If any money is owed by the bailor to the bailee in respect of the goods, the notice period given to the bailee must be at least 3 months.

A bailee may not exercise its right to sell the goods if the bailor has disputed any part of what the bailee has stated is payable in respect of the goods. If you are in any doubt as to your entitlement to sell goods held then the Act does provide a mechanism for applying to court for authorisation of the sale.




If the goods are held under a contractual lien which provides for a power of sale, then the contract may override fall-back provisions set out in the Act. Specifically, the contract may legislate a different procedure and timescale for the sale of goods. The BIFA terms, for example, provide that 28 days notice in writing must be given for the sale of goods held under lien.

Once the sale has taken place, the bailee is liable to account to the bailor for the proceeds of sale, less (1) any costs of sale and (2) any sum owed by the bailor to the bailee which accrued before the bailee gave notice. It is worth bearing in mind that if the bailor did not own the goods, then a sale of them by the bailee cannot give good title to the purchaser.

Summary

The law relating to liens and bailment can be a minefield for carriers and forwarders unless the contract between the carrier and seller makes express provision for a general right of lien, the right to claim storage charges and the right to sell the goods, amongst other things. In this regard, the BIFA terms have been drafted to ensure that the position of the carrier or forwarder is protected. If these terms have not been incorporated into the contract, however, or if there are no other express terms in place, then the carrier/forwarder will need to tread carefully.

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