

An aerial photograph of a large container ship sailing on the ocean, viewed from an elevated angle. The ship is heavily loaded with colorful shipping containers in shades of red, blue, and yellow. The ship's superstructure is visible at the rear.

Owner's Intervention & Liens on Freights - Practical and Legal Problems and Challenges following *The MV SMART* (2021)

Chirag Karia QC

What is a Lien on Sub-Freights?

- ❖ “...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.”
- ❖ “But if the shipowner’s notice to pay comes too late, and the sub-freight has already been paid, then the lien fails to bite on anything.”

Per Rix LJ in *The Spiros C* [2000] 2 Lloyd’s Rep 319 at [11].

- ❖ Juridically, probably an equitable assignment by the time charterer to the shipowner by way of security: *The Uglund Trailer* [1985] 2 Lloyd’s Rep 372, per Nourse J; *The Western Moscow* [2012] 2 Lloyd’s Rep. 163, per Christopher Clarke J; cf. *Agnew v Commissioners of Inland Revenue* [2001] 2 AC 710 (PC), per Lord Millett (*obiter* – purely personal right).

Lien on Sub-Freights & Sub-Hires



- ❖ Covers freight due to charterers under sub-charters or charterers' bills of lading.
- ❖ Conflicting authority as to whether a lien on “sub-freights” covers sub-hire:
 - ✦ Covers sub-hires: *The Cebu* [1983] 1 Lloyd's Rep. 302, per Lloyd J.
 - ✦ Does not cover sub-hires: *The Cebu (No. 2)* [1990] 2 Lloyd's Rep. 316, per Steyn J; *The Bulk Chile* [2012] 2 Lloyd's Rep. 594, per Andrew Smith J.
- ❖ Latter better view, at least to first instance level.

NYPE 1946:

- ❖ “18. That the Owners shall have a lien upon all cargoes, and **all sub-freights** for any amount due under this Charter, including General Average contributions...”

NYPE 1993:

- ❖ “23. 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...”

BALTIME 1939:

- ❖ “17. The Owners shall have a lien upon all cargoes and **sub-freights** belonging to the Time-Charterers and any **Bill of Lading freight** for all claims under this Charter...”

Owner's Bill & Interception by Owner



- ❖ An owner can only have a lien on freights or hires due to the charterer or some third party.
- ❖ The obligation to pay freight under an *owner's bill* is owed to the owner; and an owner cannot have a lien over his own property: *Molthes Rederi v. Ellerman's Wilson Line* (1926) 26 Ll.L.Rep. 259, per Greer J.
- ❖ Instead, where a vessel has been chartered, the bill of lading will often provide "*freight payable as per charterparty*".
- ❖ The owner thereby delegates the collection of freight to his charterer: *The Spiros C*, per Rix LJ; *The Bulk Chile* [2013] 2 Lloyds Rep. 38, per Tomlinson LJ.
- ❖ But it reserves the right to intervene to require payment to itself.

Alpha Marine Corp v Minmetals Logistics Zhejiang Co Ltd (“The MV Smart”) [2021] EWHC 1157 (Comm)



- ❖ NYPE 1946 form time charter of MV “SMART”.
- ❖ Owners’ bills issued, providing for freight payable “*as per charter party*”. Common ground that the sub-voyage charter referred to.
- ❖ Voyage charter provided, “*freight deemed to be earned whatever vsl/cargo lost or not*”.
- ❖ Vessel broke her back and was a total loss upon sailing from the loadport of Richards Bay.
- ❖ Owners invoiced shippers demanding payment of bill of lading freight directly to them as security for unsafe port claim vs. charterers.
- ❖ No substantial sums outstanding from charterers at that time.

Arbitral Tribunal's Decision



- ❖ Charterers disputed owners' right to intercept bill of lading freight.
- ❖ Shippers wound up during up during 3-year stand-off between owners and charterer, paying US\$500k out of US\$1.86 million freight due.
- ❖ Charterers claimed damages for owners' intervention, arguing that it caused the shipper's failure to pay freight during the stand-off.
- ❖ Tribunal of Simon Gault, Sir David Steel and Lionel Persey QC accepted charterers' argument, finding an implied term that Owners would not revoke charterers' right to bill of lading freight unless hire and/or other sums were due under the charterparty, and no such sums were due, following suggestion in *Time Charters*, 7th ed, para 30.69.

Butcher J's Decision

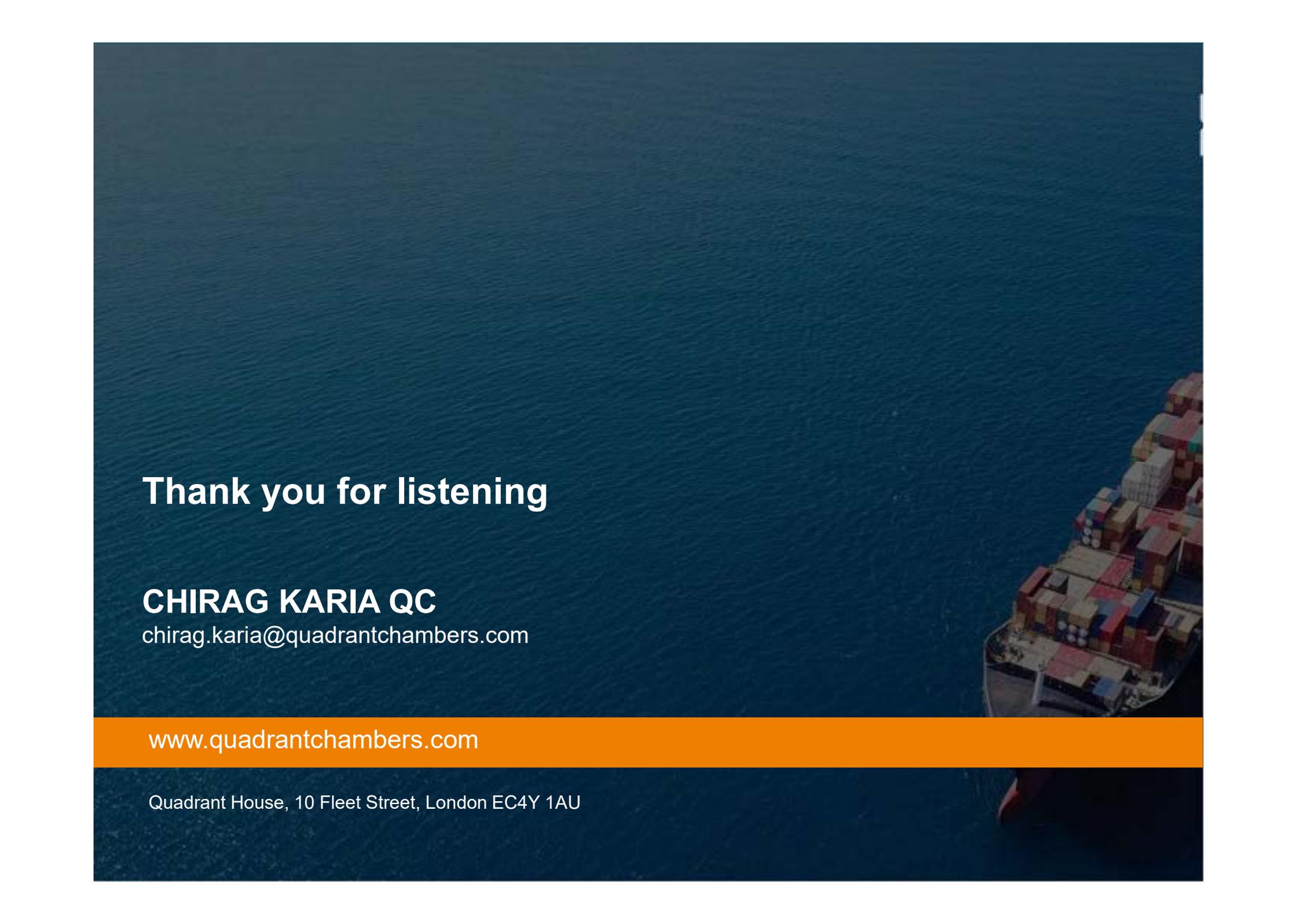


- ❖ Butcher J allowed owners' appeal holding no such term fell to be implied into the time charter.
- ❖ First, no business necessity because owners were already under a common law obligation to account to charterers for any surplus sums received by them (*Wehner v Dene* [1905] 2 KB 92, per Channell J).
- ❖ Second, term not obvious – not clear that both parties would have given the same answer to the officious bystander's question.
- ❖ Third, the precise content of the the implied term was uncertain. That 3 different formulations (All Freight , All Freight (Sum Identified) & Dollar for Dollar) had been suggested indicated that the test for implication was not met.

Unresolved Questions



- ❖ Is there any limit to owners' exercise of their right to intervene to demand payment of bill of lading hire to them?
- ❖ If not, does this not give owners a powerful and potentially oppressive weapon in a dispute with charterers and/or sub-charterers reliant on the difference between bill of lading freight and the freight/hire payable under their charters to run their businesses?
- ❖ Butcher J suggested that owners could intervene if it suspected charterers might not pay next instalment of hire.
- ❖ A potential weapon in a balance of account or off-hire dispute?
- ❖ Effect on chain charters, with all sub-charterers', sub-sub-charterers', etc. businesses affected?

An aerial photograph of a large container ship sailing on a dark blue sea. The ship is heavily loaded with multi-colored shipping containers (red, blue, yellow, white) stacked high on its deck. The ship is moving from the bottom right towards the top left of the frame.

Thank you for listening

CHIRAG KARIA QC

chirag.karia@quadrantchambers.com

www.quadrantchambers.com

Quadrant House, 10 Fleet Street, London EC4Y 1AU