BAILMENTS & THE CARRIAGE OF GOODS BY SEA: A PROPRIETARY AND CONTRACTUAL EXAMINATION

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I. INTRODUCTION

The basic aim of this essay is to demonstrate that bailment can—and should—occupy a continuing role in the resolution of cargo disputes by (*i*) identifying the foundational theories governing the bailment of cargo; and (*ii*) examining how some aspects of current bailment doctrine should be modified in keeping with those principles.

This essay proceeds in three parts following this introduction. Part II focuses on the *creation* of bailment relationships—specifically, it focuses on developing a case for recognising the essentially proprietary nature of bailor-bailee relationships. Part III proceeds to consider the *content* of a bailment obligations. The argument advanced is that although bailor-bailee relationships are essentially proprietary, its constituent obligations are essentially consensual (if not contractual) in nature. Concluding remarks on the subject are offered in Part IV.

II. THE FORMATION OF A BAILMENT RELATIONSHIP

In determining if bailment law should continue to supply the basis for cargo claims, the starting point is a consideration of *how* bailment relationships arise. In this regard, there are two dominant theories, the first—which will be referred to in this essay as the 'contractual/consensual view'—holding that a bailment requires some element of consent *apart from* the bailee's voluntary assumption of possession. Different ideas have been articulated as to what that additional element of consent is, examples including: the bailor's consent to the bailee's assumption of possession;[1] the bailee's assumption of responsibility to a particular bailor;[2] a contract—or agreement short of a contract—

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[1] Thomas Atkin Street, *The Foundations of Legal Liability, Vol. 2: A Presentation of the Theory and Development of the Common Law* (Northport, NY: Edward Thompson Co, 1906) at 252.

[2] Alice Erh-Soon Tay, "The Essence of a Bailment: Contract, Agreement or Possession?" (1965-1967) 5 Sydney L. Rev. 239 at 249 [Tay, "The Essence of a Bailment"].

between the bailor and bailee.[3] These conceptions are, nevertheless, unified in holding that the voluntary assumption of possession is a necessary but insufficient step towards the bailment of chattels.

The second—which will be referred to in this essay as the 'proprietary view'—regards the bailee's voluntary possession of another's goods as all that is needed for a bailment to arise. On this view, "[it] is by entering into a relationship with *a thing*, and not by entering into a relationship with *a person*, that the defendant becomes subject to duties".[4] It is this view that has judicial currency at present. As Mance LJ explains it, "[w]hat is fundamental is not contract, but the bailee's consent. The duties of a bailee arise out of the voluntary assumption of possession of another's goods".[5]

A. *Rights of suit against a bailee*

A recognised corollary of the proprietary view is that a bailee may owe duties not only to the bailor, but to third parties having a sufficient interest in the goods irrespective of whether contractual relations exist between the bailee and that third party.[6] This makes eminent sense: if a bailee comes under legal obligations because s/he has voluntarily entered into a relationship with some *res*, the corresponding rights *in personam* must reside in those persons interested in the *res*. The question of what constitutes a sufficient interest is more vexed, but it generally includes an immediate right to possession—which may not coincide with a contractual right to delivery under a bill of lading—or any other reversionary interest that may be injured by damage to or loss of the bailed goods.[7]

It is against this theoretical backdrop that the doctrine of attornment becomes anomalous. Bailment orthodoxy holds that a bailee only owes duties to someone other than the original bailor if the bailee attorns to that other party, *viz.*, the bailee "[acknowledges] that someone other than the original bailor now has title to the goods and is entitled to delivery of them".[8] In the context of the carriage of goods by sea, the carrier will only owe duties to a consignee who is not also the original

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[3] *Ibid* at 239.
[4] *Ibid* at 244.
[5] *East West Corpn v DKBS AF 1912 A/S* [2003] QB 1509 (CA) at para 24 [*DKBS*].
[6] *Ibid* at para 25.
[7] *Ibid* at paras 36-48.
[8] *Mitsui & Co. Ltd. v Novorossiysk Shipping Co. (The "Gudermes")* [1993] 1 Lloyd's Rep. 311 at 324 [*The Gudermes*]

bailor *if* there is an attornment in favour of the consignee.[9] In *The Berge Sisar*, Lord Hobhouse observed that "[t]he contribution of the law merchant had been to recognise the attornment as transferable and therefore the indorsement and delivery of the bill of lading as capable of transferring the endorser's right to the possession of the goods to the endorsee".[10] This feature of bills of lading was regarded as a 'contribution' presumably because it explains how a carrier may be attorned to parties not within its contemplation at the time the bills of lading were issued.

The emphasis on attornment cuts across the proprietary character of a bailment relationship as described earlier. If a carrier owes duties in bailment to a consignee by virtue of the consignee's interest in the goods—and because of any agreement between them—then parity of reasoning dictates that the carrier's obligation to any subsequent bill of lading holder depends entirely on whether that holder has a sufficient proprietary interest in the goods. Whether the carrier recognises the holder's interest must be irrelevant.

Furthermore, where there is a sub-bailment of chattels, this theory of the bill of lading as a 'transferable attornment' stumbles in explaining why the sub-bailee owes concurrent duties to the bailor even in the absence of any contractual dealings between them. In this connection, it was decided in *Gilchrist Watts* that "although there was no contract or attornment between the plaintiffs and the defendants, the defendants *by voluntarily taking possession* of the plaintiffs' goods in the circumstances *assumed an obligation* to take due care of them and are liable to the plaintiffs for their failure to do so".[11] It is submitted that the aforementioned passage correctly identifies the voluntary assumption of possession as the basis upon which a sub-bailee's obligations are grounded. There is no defensible reason for treating a bailee's obligations any differently. Indorsement and delivery of a transferable bill of lading will (ordinarily) be sufficient to vest in the indorsee a possessory interest that simultaneously creates rights in bailment against the carrier. However, that is only one method of arriving at such an outcome. More importantly, it is the possessory interest acquired—and not any fictitious attornment—that establishes a legal relationship between bailor and bailee. The time is ripe for a re-examination of attornment, which reflects and reinforces an age-old misunderstanding as to the

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[9] *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL) at 818.

[10] *Borealis AB v Stargas Ltd (The Berge Sisar)* [2002] 2 AC 205 at para 18.

[11] *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262 (PC) at 1270 [*Gilchrist Watt*]; cited in *The Pioneer Container* [1994] 2 AC 324 (PC) at 337 [*The Pioneer Container*].

essentially proprietary character of how bailment relationships are *formed* (as opposed to the *content* of those relationships, which are consensual/contractual in nature).

There is a residual problem arising from *The Pioneer Container*, where their Lordships expressed themselves as:

> [inclined] to the opinion that a sub-bailee can only be said … to have voluntarily taken into his possession the goods of another if he has sufficient notice that a person other than the bailee is interested in the goods so that it can properly be said that (in addition to his duties to the bailee) he has, by taking the goods into his custody, *assumed towards that other person the responsibility* for the goods which is characteristic of a bailee.[12]

In practical terms, it is highly improbable that a sub-bailee of cargoes carried by sea will succeed in pleading ignorance as to third party interests given the nature of the trade. That aside, why should the voluntariness of a sub-bailee's possession be vitiated by such ignorance? Lord Goff's reference to an assumption of responsibility "towards that other person" is, again, inconsistent with the principle that bailment obligations attach by virtue of the sub-bailee's relationship with the *res*. It may be argued that it would be unfair for third parties to hold sub-bailees liable for breach of bailment in circumstances where the sub-bailee, being ignorant as to those third parties' interests, omitted to extract contractual protections against such claims from the head bailee. But this puts the cart before the horse: it would undercut the principle that bailment obligations do not depend on the existence of parallel contractual obligations if the bailment obligations were contingent on a reasonable opportunity to make such parallel arrangements.

B. *Who is the bailee?*

The proprietary view of bailment relationships—specifically, its emphasis on possession—also offers a method for rationalising the configuration of bailment relationships where goods are shipped on board chartered vessels. The conceptual difficulties may be stated in the following way. Where the master of a vessel issues bills of lading on behalf of the charterer (i.e., charterer's bills) so that the contract of carriage evidenced therein is between the consignee and charterer, the view preferred in *The Starsin* is that the charterer will be regarded as a full bailee who sub-bailed the cargo to the

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[12] *The Pioneer Container*, *supra* note 11 at 342.

shipowner despite the charterer not having actual possession of the goods at any point in time.[13] On the other hand, there is also authority for the proposition that the only bailment relationship that arises is one between the shipper and shipowner.[14] Which view is to be preferred? Furthermore, where does the charterer stand in the bailment analysis (if at all) where owner's bills of lading are issued?

It is submitted that the preference articulated in *The Starsin* is defensible if the focus is placed squarely on the charterer's possessory interest in the cargo (or lack thereof). If, taking the arrangements in the round, the charterer has a right to possession of the cargo exigible against the shipowner (e.g, under the terms of the charterparty), it follows that the shipowner is a bailee vis-à-vis the charterer.

If the charterer's possessory title is subordinate to a third party's title—which will ordinarily be the case, leaving aside instances where the charterer is also the owner of the bailed goods—then *prima facie* the charterer is a bailee vis-à-vis that third party. One might object at this juncture that a charterer who never took possession of the goods cannot be regarded as a bailee, even if s/he stands as a bailor in relation to the shipowner. But this objection fades away on grounds that constructive possession is also a form of possession sufficient for the purposes of forming a bailment relationship.[15]

III. THE CONTENT OF A BAILMENT RELATIONSHIP

Notwithstanding the essentially proprietary foundations of a bailment relationship, it is clear that the *content* of the relationship's constituent rights and obligations are bound up with the law of contract. Specifically, the law of bailment only provides a default menu of obligations that parties can modify through contractual means. The obvious attraction to this interface between bailment and contract lies in the fact that contractual terms can be recognised and given effect under the law of bailment shorn of the doctrinal fetters that would otherwise operate if those terms were sought to be enforced in a contractual action. This gives rise to the unsurprising charge that bailment law, by encroaching on the province of contract in that way, is apt to produce uncertainty and inconsistency across the law of obligations as a whole.

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[13] *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 (HL) at para 133 [*The Starsin*].

[14] *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 552 (HL).

[15] See, e.g., *Forsythe International (UK) Ltd v Silver Shipping Co Ltd (The Saetta)* [1994] 1 WLR 1334, where oil bunkers in the possession of the shipowners were held to be in the charterer's constructive possession.

Nowhere is this contest more apparent than in what Treitel describes as the 'battle over privity'.[16] It is a foundational rule of contract law that a contract cannot confer rights or impose obligations on any person except the parties to it; put another way, only parties privy to a contract can sue (and be sued) on it. Whether the law of bailment should permit divergent outcomes is a hugely involved and contested question. However, if a case is to be made in defence of the law of bailment as it stands, one must *at least* be able to demonstrate that it permits divergent results in a consistent and principled manner.

It was decided in *Morris v C. W. Martin & Sons Ltd* that a bailee or sub-bailee's obligations may be modified by terms in a contract to which the bailor is not privy if the bailor expressly or impliedly consented to the goods being bailed on those terms.[17] It is less clear if those obligations may be modified by an undertaking by the bailor contained in a contract to which the *bailee or sub-bailee* is not privy is less clear.

In the context of a direct bailment, there is authority for the proposition that the bailee may rely on such terms if the bailee took possession of the bailed goods on those terms. In *Elder Dempster*, a shipowner was permitted to rely on a limitation clause in bills of lading it signed *qua* charterer's agent. Various grounds were put forth by their Lordships in that decision, but it is Lord Sumner's theory that has gained subsequent judicial support:

> [In] such a case, the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is unnecessary to consider any such question.[18]

It appears that the touchstone in these situations is whether the bailor's contractual undertaking was a term upon which the bailee voluntarily assumed possession of the goods. Whether this rule obtains in the context of sub-bailments is even more obscure. In *The Makhutai*, the House of Lords dismissed a shipowner's reliance on an exclusive jurisdiction clause contained in bills of lading issued

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[16] G. H . Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford: Clarendon, 2002) at ch 2 [Treitel, "Landmarks of Contract Law"].

[17] *Morris v C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716 at 730 [*Morris*].

[18] *Wilson v Darling Island Stevedoring and Lighterage Co. Ltd.* (1956) 95 CLR 43 at 78; cited with approval in *The Makhutai* [1996] AC 650 at 660 [*The Makhutai*].

by a sub-charterer on grounds that the exclusive jurisdiction clause, being inconsistent with a 'Himalaya' clause conferring specific benefits to the shipowner, could not be regarded as a term of the sub-bailment. The analysis implies, however, that the principles articulated in *Elder Dempster* applies equally to sub-bailees.[19]

What is the golden thread that unifies *Morris* (which looks to the bailor's consent) and *Elder Dempster* (which looks to the bailee/sub-bailee's assumption of possession on terms)? It is submitted that both approaches are consistent insofar as they focus on whether there is a *bilateral* consensus that the bailee/sub-bailee's obligations should be qualified by the term in question. In *Morris*-type situations, the bailee/sub-bailee personally contracted for the term in question and so plainly intended for its obligations to be qualified in that way. The question, therefore, is whether the bailor consented to its rights being qualified to that extent. The reverse is reflected in *Elder Dempster*-type situations. There, the bailor must have intended for his rights to be qualified by contractual undertakings personally made in favour of the bailee/sub-bailee. The only question is whether the bailee/sub-bailee intended for its obligations to be undertaken on those terms at the time it took possession of the goods. In this way, the law of bailment adopts an approach that is akin to—but more flexible than—the formation of a collateral contract. The crux is whether there was a meeting of the minds, even if non-contemporaneous.

IV. CONCLUSION

There are more fundamental questions striking at the heart of bailment law than those considered in this essay. For example, Treitel has questioned why bailment relationships should be treated any differently from relationships that "do not depend on contract but are nevertheless recognized by law as giving rise to a relationship in which there is a duty of care".[20] Indeed, why should persons who voluntarily assume physical custody of chattels (e.g., stevedores or subcontractors in construction projects) not be placed on the same footing as persons who voluntarily assume possession of the same? Such questions must undoubtedly be addressed if one is to undertake a root-and-branch examination of bailment law in general. This essay only reflects a modest attempt at working upwards

[19] *The Makhutai*, *supra* note 18 at 668.
[20] Treitel, "Landmarks of Contract Law", *supra* note 16 at 78.

from uncontroverted principles so that the application of bailment principles to cargo claims is at least defensible on grounds of certainty and consistency.