

5 Stone Buildings

Art cases: Trust or bailment

Luke Harris

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Creation of trusts of artwork

- Trusts of artwork and other chattels generally created in the usual ways
- Express trusts by DoT or by transfer to trustee (by deed or delivery)
- Rules on RTs and CT generally apply in the same way but there are likely to be some differences:
 - E.g., the P of RT may not have much of a role to play in transfers by delivery:
 - Textbooks say P of RT applies to personalty
 - Easier to see operation for intangibles (e.g. shares) which must be vested in the right holder
 - But with chattels, if a legal transfer is not proved there is only delivery. As Bridge says:
“... As far as chattels go, the physical delivery alone of a thing does not appear to be quite so suggestive of an intention to give as to require the obstacle of a presumption of resulting trust to inhibit intemperate benevolence. It is difficult to see what purpose a resulting trust presumption serves here: the recipient will have to prove an intention to give and this will not lightly be established just because delivery has occurred. Delivery after all, is quite consistent with a short term loan; the transfer of shares in a company is not.”
 - E.g., no CT of goods generated by specifically enforceable contracts of sale: Re Waite

Introduction

- Underhill states:

“A trust is an equitable fiduciary obligation, binding a person (called a trustee) to deal with property (called trust property) owned and controlled by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation.”
- Trust involves the division of property and beneficial ownership
- Trust is an equitable structure
- Bailment involves the division of a legal reversionary interest (usually ownership) from possession
- Bailment is a common law institution

Regulation of trust interests (1)

- It is possible to create trusts of concurrent ownership (see above) and successive interests
- Generally, it is possible to replicate all such interests in land under a trust - But:
 - There was a historical exception for entailed interests
 - True 'heirlooms' vested with the heir on death
 - Chattels were settled to be enjoyed or held with, or upon trusts corresponding with the trusts affecting, the settled estate
 - Before 1926:
 - It was impossible to create an estate tail in personalty, so
 - A bequest of chattels by way of such a trust gave life interests in the chattels to those who took life interests in the realty; but the chattels vested absolutely at birth in the first person who became entitled to the real estate for a vested estate of inheritance such as a fee tail
 - 31 December 1925 to 31 December 1996, entailed interests in personal property could be created by way of trust. Interests so created devolved according to the rules applicable to entailed interests in real property

Regulation of trust interests (2)

- TLATA 1996 does not apply to trusts of personalty alone
- A trust of land may include personalty but most powers of the Act applicable to land only
- But the court's jurisdiction under s. 14 to review the Trustees' discretion is applicable to functions relating to all forms of assets
- In trusts of pure personalty the beneficiaries can control the trustees' powers in the usual ways
- Trustees' powers to dispose of or acquire chattels must be identified carefully? E.g:
 - Settled Land Act 1925, s. 67: If chattels are settled to devolve with settled land, the tenant for life may sell them with the leave of the court. The purchase-money is payable to the trustees as capital money arising under the Settled Land Act 1925, and must be dealt with as such, or by purchasing other chattels.
 - If the chattels are not settled for an entailed interest, but, e.g. on A for life with remainder to B, the trustees have no power to sell them unless:
 - they are authorised to apply capital money for some specific purpose, when they may raise the money by selling any part of the trust estate, e.g. the chattels (Trustee Act s.16(1)), or
 - they are authorised by the court under the Trustee Act 1925 s.57, to sell the chattels.

What is a bailment?

- A bailment exists whenever one person (**'the bailee'**) is voluntarily in possession of a chattel to which another person (**'the bailor'**) has a superior right of possession
- Bailment is:
 - A system of personal rights
 - Bailee in possession has possessory title:
 - Possession is a physical fact which generates proprietary consequences
 - A bailee has limited proprietary interest (cf beneficiary's interest) or 'special property'
 - But note, others who are not bailees may have a possessory title (e.g. thief or adverse possessor)
- The bailor is not necessarily the owner
- The bailee does not necessarily have possession
- There is an analogy to be drawn between:
 - Bailment and lease
 - Bailee's interest and beneficiary's interest (bailment as the 'common law trust')

Common types of bailment?

- Broadly, 7 classes of bailment can be identified:
 - Gratuitous custody (bailee looks after chattel for free)
 - Gratuitous work and labour (bailee works on chattel for free)
 - Gratuitous loan (bailor lends chattel for free)
 - Custody for reward (bailor pays for safekeeping)
 - Work and labour for reward (bailor pays for work on chattel)
 - Hire of goods (bailee pays to use chattel)
 - Pledge or pawn (bailor uses chattel as security)

Bailment, contract & tort - similarities

- Many bailments rooted in contract: general principles of contract law apply
- Standard aspects may be seen to take effect in contract (e.g. bailee's estoppel)
- However, many bailments in the art world are non-contractual:
 - True loans of works of art
 - Gratuitous safekeeping
 - Some borderline cases ('art loans')
- Many wrongs actionable for negligence/contract will be breach of bailment
- But what of the differences...? Certain aspects of bailment inexplicable in tort or contract

The bailee's duty of care

- Duties of a bailee include a duty to take reasonable care of the goods entrusted to him
- The bailee is also liable:
 - For the negligence of his agents or employees in the course of their employment; and
 - For any deliberate wrong (including malicious damage, theft and complicity in theft) committed by an agent or employee to whom the bailee has entrusted the goods and delegated any part of his duty of care
- If the bailor proves the bailment and that the goods were lost, stolen, destroyed or damaged while in the bailee's possession, the burden then is on the bailee to prove that the loss was not caused by any negligence on his part, or any act or omission of an agent or employee for whom he is liable under the above rules
- Note:
 - Liability beyond normal principles of vicarious liability?
 - Reversal of burden of proof

Deviation

- The bailee is under a duty not to deviate from the terms of the bailment
- If bailee contravenes a fundamental restriction on his possession (e.g. keeping the goods in a place other than that agreed, or delegating custody of the goods to a third party without specific authority to do so) he will have committed a deviation
- If the bailee commits an act of deviation he is strictly liable for the goods as an ‘insurer’ (i.e. *without proof of any fault on his part*).
- The bailee can only avoid liability for loss or damage by showing that the injury was either (a) the bailor’s fault; or (b) that it would have happened even if the deviation had not occurred
- The bailee’s duty of care and duty not to deviate from the terms of the bailment may be varied by special agreement between the parties
- If the bailment is contractual, it is necessary to consider the express or implied terms of the contract. If non-contractual, similar principles will presumably apply

Gratuitous promises (2)

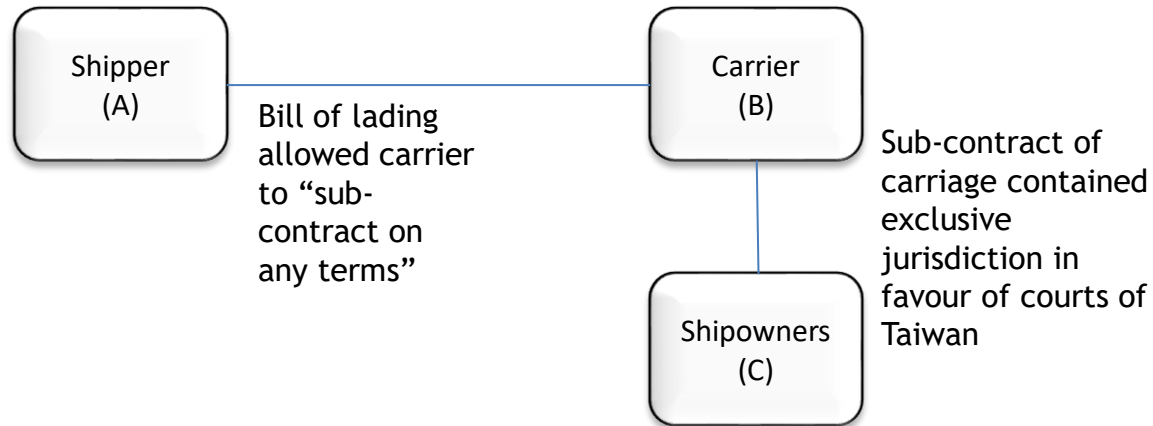
“In *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, Lord Judge:

“Indeed it may be that, where the gratuitous bailee has extended, and broken, a particular promise to his bailor, for example that the chattel will be stored in a particular place or in a particular way, the measure of damages may be more akin to that referable to breach of contract rather than to tort.”

...

In summary, the breach of bailment here was a breach not just of the duty owed by every gratuitous bailee but of a specific promise extended by the Trust to the men. The law of bailment provides them with a remedy under which, in principle, they are entitled to compensation for any psychiatric injury (or actionable distress) foreseeably consequent upon the breach.”

Sub-bailment on terms (1)



In *The Pioneer Container* [1994] 2 AC 324 Lord Goff said:

"...if the effect of the sub-bailment is that the sub-bailee voluntarily receives into his custody the goods of the owner and so assumes towards the owner the responsibility of a bailee, then to the extent that the terms of the sub-bailment are consented to by the owner, it can properly be said that the owner has authorised the bailee so to regulate the duties of the sub-bailee in respect of the goods entrusted to him, not only towards the bailee but also towards the owner.... Such a conclusion, finding its origin in the law of bailment rather than the law of contract, does not depend for its efficacy either on the doctrine of privity of contract or on the doctrine of consideration..."

Sub-bailment on terms (2)

- Consent and ostensible authority
- Positive obligations: *Sandeman Coprimar v Transitos y Transportes Integrales SL* [2003] QB 1270

Problems of characterisation

- May be hard to distinguish between a transfer, a bailment, or a trust
- For example, what is the effect of a ‘gift’ of artwork:

“UPON condition that the following covenant is observed by the Corporation COVENANT with the Earl his heirs and assigns at all times for ever hereafter to exhibit the same collection freely to the public at all proper and reasonable times according to the way leaves or customs of the Museum in default whereof at any time the said paintings shall revert and be restored to the Earl his heirs assigns or be disposed of as he or they may direct and in default of such restoration the Earl his heirs assigns shall be at liberty peaceably to enter the Museum and remove the same without hindrance from the Corporation.”

Conditional and successive gifts

- Successive legal interests in chattels would appear to be precluded by the following fundamental ideas:
 - Ownership is the only absolute proprietary interest
 - No doctrine of tenure or estates
 - Ownership is indivisible
 - Bailee's interest is the only limited legal interest
- Conditional gifts seem to offend against these doctrines. Consider: a gift of my painting to A unless she fails to perform a condition, in which case the gift is to B - who is the owner of the painting, what is the nature of B's interest etc?
- Most conditional and successive gifts take effect behind a trust
- The law nevertheless allows successive testamentary bequests of chattels
- A gift to A for life, thereafter to B apparently grants ownership to A but an executory gift (chose in action) to B: *Re Tritton* (1889) 61 LT 301 (but note, the law of perpetuities must be considered)

Blurring the boundaries

- Sometimes relationships of bailment morph into relationship of trust
 - Agent who sells his bailor's property
 - What of the thief of artwork (i) before (bailee?, trustee?) and (ii) after sale to third party
- Can a bailee characterise himself as a trustee to use Part 64? Who cares?
 - What does the bailee hold on trust?
 - Equitable possession? Perhaps not:

"It has been argued, by analogy with an equitable mortgage, that there can arise a non-possessory equitable pledge on the basis that, if the contract to pledge is specifically enforceable, this could create an equitable interest. This is not supported by authority, however, and most other commentators, rightly it is suggested, regard the idea as conceptually impossible. Equity does not recognise the interest of "equitable possession", which is what would be needed to create an equitable pledge in this way. If specific enforcement of the unperformed contract to create a pledge were to give the intended pledgee any proprietary rights, they are more likely to be by way of equitable charge, assuming the intended rights and obligations amount to such an interest." (Bridge et al, The Law of Personal Property)
 - If the bailee is a fiduciary, can he argue he is a 'quasi-trustee'?



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