

Bailment

Personal Property and Bailment

- ▶ At the heart of Bailment is Personal Property. Personal Property is distinguished from real property by two important characteristics:
 - ▶ It is not subject to, or affected by, the rules of tenure that govern real property;
 - ▶ Personal property can (generally) be alienated by much less formal methods than those applicable to real estate.

Carter, Lane, Tolhurst, Peden, Helmore Commercial Law and Personal Property in New South Wales, p.3

Definition of Bailment

- ▶ *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220 (at 238) per Windeyer J:
 - ▶ A bailment comes into existence upon the delivery of goods of one person, the bailor, into the possession of another person, the bailee, upon a promise, express or implied, that they will be redelivered to the bailor or dealt with in a stipulated way.

Definition of Bailment

- ▶ *Re S Davies & Co Ltd* [1945] 1 Ch 402 at 405: A bailment, properly so called, is a delivery of personal chattels in trust, on a contract, expressed or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed, shall have elapsed or been performed.
 - ▶ *Chattels*
 - ▶ *Trust*
 - ▶ *Contract*
 - ▶ *Possession*
 - ▶ *Transfer of possession.*

A Modern Definition of Bailment

- Emphasis of modern law is on the taking of possession. 'Possession' here requires the bailee to know they have possession and expressly or impliedly consent to take possession. In addition, the bailee must know that they are taking possession of goods on behalf of the bailor and consent to taking possession on this basis.

Bailment

- ▶ A bailment involves the taking of possession of a tangible chattel by someone other than the owner.
- ▶ It is the separation of ownership and possession which is critical: *Australian Guarantee Corp Ltd v Ross* [1983] 2 VR 319

Bailment and other transactions and relationships

- ▶ Attornment
- ▶ Bailment and license
 - ▶ *Duty to return the goods*
 - ▶ *Equivalent sum not sufficient*
- ▶ Money

Categories of bailments

► Gratuitous bailment

- ‘deposit’
- ‘mandate’
- Loan of chattel for bailee to use.

► Bailment for reward

- any benefit or advantage (not synonymous with consideration)
- ACL, s 60: services must be rendered with due care and skill
- ACL, s 63: s 60 does not apply to services supplied under a contract for transportation or storage of goods for the purposes of a business, trade, profession or an occupation carried on by the person for whom the goods are transported or stored.

Classification of Bailments

Bailments for reward

- ▶ *Custody and safekeeping*
- ▶ Duties of bailor are governed by the contract. In addition, bailor has a duty to pay and to exercise reasonable care in respect to the safety of the goods.
- ▶ The bailee's duty, subject to the terms of contract, is one of reasonable care, that is, to exercise that degree of care a reasonable prudent and competent custodian would in the circumstances and to make the goods available for collection by the bailor in due course.

Classification of Bailments

- ▶ *Hire of skill and labour*
- ▶ Most cases here will also be a bailment by way of custody and safekeeping.
- ▶ In addition to the common law duty (which is to do the work within a reasonable time and with reasonable care and skill - this relates both to the workmanship and the materials used), the bailee has a strict duty to actually perform the work to a standard equating with the reasonably competent practitioner in the field.

Bailment

Duties common to all bailments

- ▶ Duty of care of bailee
- ▶ Duty to deliver goods bailed
- ▶ Duty not to deviate from the terms of the bailment and not to convert
- ▶ Obligations on bailor in respect of the quality of the goods bailed

Gratuitous bailment or bailment for reward?

- ▶ The duty of care owed by the bailee is not determined by whether or not the bailment is gratuitous or for reward.
- ▶ What is 'reasonable care' will depend on all the circumstances of the case, including but not limited to whether or not the bailment was for reward.

Standard of Care and Deviation

- ▶ The standard of reasonable care
- ▶ *Duties of the bailee*
- ▶ 1. In a gratuitous bailment made for the benefit of the bailor, the bailee is liable only for gross negligence.
- ▶ 2. In a bailment for reward, the bailee must take reasonable care.
- ▶ 3. In a gratuitous bailment made for the benefit of the bailee, the bailee is liable for the slightest negligence: *Coggs v Barnard* (1703) 2 Lord Raym 909, 92 ER 107.

Duty of Care

- ▶ Compare *Houghland v RR Low (Luxury Coaches) :Ltd* [1962] 1 QB 694 at 698 per Ormerod LJ:
- ▶ For my part, I have always found some difficulty in understanding just what was “gross negligence”, because it appears to me that the standard of care required in a case of bailment or any other type of case, is the standard demanded by the circumstances of that particular case. It seems to me that to try and put a bailment, for instance, into a watertight compartment - such as gratuitous bailment on the one hand, and bailment for reward on the other - is to overlook the fact that there might well be an infinite variety of cases, which might come into one or the other category. The question that we have to consider in a case of this kind, if it is necessary to consider negligence, is whether in the circumstances of this particular case a sufficient standard of care has been observed by the defendants or their servants.

Deviation from the Bailment

- ▶ A bailee is under a duty not to convert the bailor's goods nor to behave in a way that is inconsistent with the bailor's right to property in the goods: *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1929] AC 178 at 202.
- ▶ This duty is independent of and additional to the duty to take reasonable care of the goods: *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 732 per Lord Diplock

Duties of Bailor

- ▶ In every bailment, the bailor owes a duty of care to the bailee and to persons the bailor might reasonably foresee might be injured by the goods.
- ▶ Where goods are supplied for value for use for a stated or agreed purpose, or for a purpose indicated by the nature of the goods, the bailor implicitly promises that the goods are fit for that particular use or purpose.
- ▶ Duties of the bailor will usually be determined by the terms of a contract if one exists between the bailor and bailee.

Guarantee as to skill and care: ss.60 - 61, Australian Consumer Law (Schedule 2 of *Competition and Consumer Act 2010* (Cth)) *(This slide is not 'best practice' but it does contain relevant information)*

60 Guarantee as to due care and skill

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

61 Guarantees as to fitness for a particular purpose etc.

(1) If:

(a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

(2) If:

(a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and

(b) the consumer makes known, expressly or by implication, to:

(i) the supplier; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;

the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

(3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.

(4) This section does not apply to a supply of services of a professional nature by a qualified architect or engineer.

Hire of Skill and Labour

The matters now dealt with in ss.60 - 61 of the ACL were found previously in s.74(1) of the *Trade Practices Act 1974* (Cth) which provides:

- ▶ In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.
- ▶ Where a bailee is chosen for individual skill, competence or personal qualifications, the bailee may not delegate the work without the consent of the bailor

Hire

- ▶ Subject to the terms of the contract the bailor is under an obligation to allow the bailee to have quiet possession of the goods. In some cases there will also be an implied term to the effect that the bailor has a right to hire the goods and the goods are free from encumbrances.
- ▶ If the goods are hired out in the bailor's course of business then at common law there is an implied term that the goods will be reasonably fit for the purpose for which they are hired so long as the bailee makes known to the bailor the purpose to which the goods will be put and relies on the bailor's skill.

Hire

- ▶ The bailee's main duty is to pay or perform the hire at the agreed time. The bailee must also only use the goods for the purpose for which they are hired and return them at the end of the hire period. The bailee must also take reasonable care of the goods and exercise reasonable skill in the use and management of the goods.

Other Types of Bailments

- ▶ Bailment by a bailee (sub-bailment): *Morris v C.W. Martin & Sons. Ltd* [1966] 1 Q.B. 716
- ▶ Finding: *Newman v Bourne and Hollingsworth* (1915) 31 TLR 209
- ▶ Involuntary Bailee: *Elvin and Powell Ltd v Plummer Roddis Ltd* (1933) 50 TLR 158 (see now also *Fair Trading Act 1987* (NSW) s. 59, s.30, *Fair Trading Act 1992*, (ACT)).

Bailment

- ▶ Marina Boat Manufacturers Pty Ltd (MBM) was in the business of boat building. It had just finished a racing yacht for its customer, Max Middleton. Max was keen to have the yacht delivered to him in time for the Sydney to Hobart yacht race.
- ▶ MBM contacted a transport business, Jones & Sons Pty Ltd to transport the yacht from their shed to a freighter which was scheduled to arrive in the Port of Botany one week before the start of the Sydney - Hobart yacht race.
- ▶ MBM had used Jones & Sons before. MBM would transport the vessels by its own semi-trailer to a parking area where a mobile crane operator arranged by Jones & Sons would lift the yacht onto a low-loader. The low-loader would then transport the yacht onto the wharf alongside the freighter.

Bailment

- ▶ The low-loader and its driver was provided by Truck Hire Pty Ltd, who acted as 'carrier' for Jones & Sons under the terms of "Conditions of Carriage" dated 30 November 2018. Under that contract, Jones & Sons agreed to pay Truck Hire \$5 000. Jones & Sons (the consignor) agreed by cl 21 to indemnify Truck Hire (the carrier) against all claims for loss, damage, injury to any property or person arising from the carriage of the cruiser. Clause 3 provided:
 - ▶ The carrier shall not be under any liability whether in tort or in contract for any loss of or damage to or misdelivery, delay in delivery, concealed damage, deterioration, contamination, evaporation, non-delivery of goods held in its care, custody or control, or any consequential loss arising therefrom howsoever caused including but not limited to any negligence or breach of contract by the carrier.

Bailment

- ▶ Jones & Sons booked the yacht to be shipped upon a freighter due to depart on 30 November 2019. On that day the yacht was lifted onto Truck Hire's low-loader but their driver then drove negligently beneath an archway causing significant damage to the yacht. As a result MBM are unable to meet its contractual obligations to Max and have brought a claim for damages against Jones & Sons and Truck Hire for \$110 000 which represents the cost of repairing the yacht plus interest.



Bailment

Jones & Sons are trying to escape liability in a number of ways, by arguing:

1. MBM was not the owner at the time of the accident and therefore lacked standing to sue.
2. Jones & Co was never a bailee because it never had possession of the yacht.
3. Jones & Co was a bailee and Truck Hire a sub-bailee, and that MBM was bound by cl 3 of the Conditions of Carriage operating in the contract between Jones & Sons and Truck Hire.
4. MBM was bound by cl 3 because Jones & Co has entered the contract with Truck Hire as agent for MBM.

Advise generally.

Bailment

The Pioneer Container:

a delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed

Bailment

- ▶ Big Top Hereford Pty Ltd v Thomas [2006] NSWSC 1159



Bailment

- ▶ Aerolink Air Services Pty Ltd v Bankstown Airport Ltd [2019] NSWSC 1283



Bailment, not insurance

What is insurance?

Insured **transfers** to an insurer the **risk of loss** the insured might suffer if a defined event occurs.

The defined event might be:

- ▶ An event which unexpectedly occurs during the insurance period (occurrence policy); or
- ▶ A claim made by a third party against the insured during the insurance period (claims made liability insurance).

Sub-bailment

BAILOR



HEAD BAILEE



SUB BAILEE

Sub-Bailment

- ▶ Sub-bailment: sub-bailee receives possession from the head bailee rather than the owner.
- ▶ To be seen to have voluntarily taken goods into their possession the sub bailee must have sufficient **notice that a person other than the bailee is interested in the goods** so that, in addition to their duties to bailee, they have, by taking the goods into their custody, assumed also towards the bailor the responsibility for the goods which is characteristic of a bailee: The Pioneer Container.
- ▶ However, the sub-bailee may in an action against them by the bailor, rely on **clauses in the sub-bailee's contract with the bailee** which exempt them from liability for damage to the goods if the **bailor has expressly or impliedly consented to the terms** or has ostensibly authorised them: The Pioneer Container.

Sub-Bailment

Sub-bailment (cont'd)

- ▶ Sub-bailee assumes an obligation to the owner to exercise due care for the safety of the goods, although there is no contractual relationship between them: *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262
- ▶ The bailor may bring an action for negligence directly against the sub-bailee and is not required to rely on the contract between the bailee and the sub-bailee: *The Pioneer Container*.
- ▶ Despite sub-bailment, bailee remains liable to the bailor for any default of the sub-bailee: *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220.

Bailment

Enforcement

1. Action based on contract between the bailor and bailee
2. Action in detinue for delivery up of the goods
3. Action in damages for conversion
4. Action for damages for trespass to goods
5. Action for damages for breach of the obligation to take due care of the goods where the goods are damaged, stolen or otherwise lost.