

The owners of cargo lately laden on
board the ship or vessel
"K.H. Enterprise"

Appellants

v.

The owners of the ship or vessel
"Pioneer Container"

Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
21ST MARCH 1994

Present at the hearing:-

LORD GOFF OF CHIEVELEY
LORD LOWRY
LORD SLYNN OF HADLEY
LORD LLOYD OF BERWICK
SIR THOMAS EICHELBAUM

[Delivered by Lord Goff of Chieveley]

The appellants (whom their Lordships will refer to as "the plaintiffs") were the owners of goods laden on board the respondents' Taiwanese container ship "K.H. Enterprise" (which their Lordships will refer to as "the vessel"), which sank with all her cargo off the coast of Taiwan on 11th March 1987, following a collision in fog with another larger ship, "Oriental Faith". The plaintiffs commenced the present proceedings in Hong Kong by the issue of a writ in rem dated 10th March 1988 against the respondents' ship "Pioneer Container", a sister ship of the vessel, claiming damages in respect of the loss of their cargo. "Pioneer Container" was arrested in Hong Kong on 29th October 1988, but was released on 5th December 1988 against a Protection and Indemnity Club guarantee in the sum of U.S.\$1.6 million. On 8th September 1989 the respondents (whom their Lordships will refer to as "the shipowners") issued a notice of motion in the High Court of Hong Kong, asking that the proceedings be stayed on the grounds (1) that the plaintiffs had, by clause 26 of the relevant bills of lading, agreed that any claim or other dispute thereunder should be determined at Taipei in Taiwan, or alternatively (2) that in all the circumstances

the courts of Taipei were the natural and appropriate forum for the trial of the action. Clause 26 provided as follows:-

"This Bill of Lading contract shall be governed by Chinese Law. Any claim or other dispute arising thereunder shall be determined at Taipei in Taiwan unless the carrier otherwise agrees in writing."

The matter came before Sears J. in September 1990. On 26th September he made a preliminary ruling under which he held first, that the exclusive jurisdiction clause (clause 26) on which the shipowners relied was a valid and effective clause under Taiwanese law, and second, that the agreement contained in the clause was binding on all the plaintiffs. Subsequently however, on 14th May 1991, he dismissed the shipowners' motion, holding that the plaintiffs had shown strong cause why their claims should not proceed in Taipei, since their claims had become time-barred there and, in the opinion of the judge, the plaintiffs had not acted unreasonably in failing to commence proceedings there before the expiry of the time bar. However, on 10th April 1992, the Court of Appeal of Hong Kong allowed the shipowners' appeal from that decision. They agreed with Sears J. that all the plaintiffs were bound by the exclusive jurisdiction clause; but they held that he had erred in the exercise of his discretion in declining to grant a stay of the proceedings, which they, exercising their own discretion afresh, held should be granted. It is from that decision that the plaintiffs now appeal to the Privy Council.

The plaintiffs fall into three groups, which have become known as "the Kien Hung plaintiffs", "the Hanjin plaintiffs" and "the Scandutch plaintiffs".

(1) The Kien Hung plaintiffs shipped goods on board the vessel at Taiwanese ports for carriage to Hong Kong under bills of lading issued in Taiwan and signed on behalf of the shipowners. There was therefore a direct contractual relationship between the Kien Hung plaintiffs and the shipowners, and there is no doubt that the exclusive jurisdiction clause contained in the bills of lading is binding upon these plaintiffs. There are 213 claims under the bills of lading in this category. In virtually all cases, the shippers were in Taiwan, and the receivers in Hong Kong.

(2) The Hanjin plaintiffs shipped goods on board another vessel in the United States under bills of lading issued by Hanjin Container Lines ("Hanjin"), a Korean company, in respect of the carriage of the goods from the United States to Hong Kong. Each bill of lading contained the following provision:-

"6. The Carrier shall be entitled to sub-contract on any terms the whole or any part of the handling, storage or carriage of the Goods and any and all duties whatsoever undertaken by the Carrier in relation to the Goods. ..."

Hanjin in turn sub-contracted to the shipowners the carriage of the goods over the last stage of the voyage, from Taiwan to Hong Kong. The goods were transshipped onto the vessel in Taiwan, and in respect of all the goods of the Hanjin plaintiffs the shipowners issued a single feeder bill of lading (Feeder 103) in the same form as those issued to the Kien Hung plaintiffs (and so incorporating clause 26) acknowledging receipt of 41 containers for shipment from Keelung in Taiwan to Hong Kong. There are 15 claims in this category, of which 1 has a Taiwanese connection and 14 have a Hong Kong connection.

(3) The goods of the Scandutch plaintiffs were shipped on board the vessel in Taiwanese ports. Each plaintiff was issued with a bill of lading issued on behalf of Scandutch I/S ("Scandutch") covering the carriage of the goods from a Taiwanese port to an ultimate destination in Europe or the Middle East. Each bill of lading contained the following provision:-

"4(1) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by the Carrier in relation to the Goods. . . ."

For the carriage of the goods from Taiwan to Hong Kong, which was sub-contracted by Scandutch to the shipowners, the latter issued a single feeder bill of lading (Feeder 104), again in the same form (including clause 26), acknowledging receipt of 140 containers for shipment from Taiwan to Hong Kong, with a view to the containers being transshipped in Hong Kong. There are 214 claims in this category, of which 5 have a Hong Kong connection.

The difficulty which has arisen with respect to the Hanjin plaintiffs and the Scandutch plaintiffs is that, on ordinary principles of law, there was no contractual relationship between them and the shipowners; and accordingly these two classes of plaintiff have claimed that the exclusive jurisdiction clause, clause 26, is not binding upon them. However that contention was rejected, both by Sears J. and by the Court of Appeal, on the ground that there was a bailment to the shipowners on terms (including clause 26) which these plaintiffs had expressly or impliedly authorised; and that, on the principles stated by Lord Denning M.R. in *Morris v. C.W. Martin & Son* [1966] Q.B. 716, these plaintiffs were bound by clause 26. Whether the courts below were correct in so holding is the principal issue which falls for consideration on this appeal; but the further question arises whether, if the plaintiffs were bound by the exclusive jurisdiction clause, the Court of Appeal were justified in interfering with the exercise by the judge of his discretion to refuse a stay of proceedings and, if so, whether the Court of Appeal were entitled, exercising their discretion afresh, to order a stay.

The central problem.

Their Lordships turn immediately to the central problem in the case, which is whether the shipowners can rely, as against the Scandutch and Hanjin plaintiffs, on the exclusive jurisdiction clause (clause 26) in the feeder bills of lading to which these plaintiffs were not parties. They think it right to observe, at the outset, that in commercial terms it would be most inconvenient if these two groups of plaintiffs were not so bound. Here is a ship, upon which goods are loaded in a large number of containers; indeed, one container may contain goods belonging to a number of cargo owners. One incident may affect goods owned by several cargo owners, or even (as here) all the cargo owners with goods on board. Common sense and practical convenience combine to demand that all of these claims should be dealt with in one jurisdiction, in accordance with one system of law. If this cannot be achieved, there may be chaos. Much expense may be wasted on litigation in a number of different jurisdictions, as indeed happened in the present case, where there was litigation in eight other countries as well as Hong Kong and Taiwan. There is however no international regime designed to produce a uniformity of jurisdiction and governing law in the case of a multiplicity of claims of this kind. It is scarcely surprising therefore that shipowners seek to achieve uniformity of treatment in respect of all such claims, by clauses designed to impose an exclusive jurisdiction and an agreed governing law, as in the present clause 26 in the shipowners' standard form of bill of lading. Within reason, such an attempt must be regarded with a considerable degree of sympathy and understanding.

However, so far as English law and the law of Hong Kong are concerned, a technical problem faces shipowners who carry goods, for example under the feeder bills of lading in the present case, where there is no contractual relationship between the shipowners and certain cargo owners. This is because English law still maintains, though subject to increasing criticism, a strict principle of privity of contract, under which as a matter of general principle only a person who is a party to a contract may sue upon it. The force of this principle is supported and enhanced by the doctrine of consideration, under which as a general rule only a promise supported by consideration will be enforceable at common law. How long these principles will continue to be maintained in all their strictness is now open to question. But, in the middle of this century, judges of great authority and distinction were in no doubt that they should be so maintained. Their Lordships refer in particular to the speech of Viscount Simonds in *Midland Silicones Ltd. v. Scruttons Ltd.* [1962] A.C. 446, 467-8. The present case is concerned with the question whether the law of bailment can here be invoked by the shipowners to circumvent this difficulty.

Bailment and sub-bailment.

Their Lordships are here concerned with a case where there has been a sub-bailment - a bailment by the owner of goods to a bailee, followed by a sub-bailment by the bailee to a sub-bailee - and the question has arisen whether, in an action by the owner against the sub-bailee for loss of the goods, the sub-bailee can rely as against the owner upon one of the terms upon which the goods have been sub-bailed to him by the bailee. In the case of the Hanjin plaintiffs, the goods were received for shipment by Hanjin Container Lines from the shippers, for through carriage from a North American port to Hong Kong, and then sub-bailed to the shipowners for the last leg of the voyage, viz. from Taiwan to Hong Kong. In the case of the Scandutch plaintiffs, the goods were received for shipment by Scandutch for through carriage from Taiwan to the Middle East or Europe, and sub-bailed to the shipowners for the first leg of the voyage, again from Taiwan to Hong Kong. The question is whether the shipowners can in these circumstances rely upon the exclusive jurisdiction clause in the feeder bills of lading as against both groups of plaintiffs, notwithstanding that the plaintiffs in neither group were parties to the contract with the shipowners contained in or evidenced by such a bill of lading, having regard to the fact that the plaintiffs are seeking to hold the shipowners liable for failing to care for the goods so entrusted to them or failing to deliver them to the plaintiffs - in other words, for committing a breach of duty which is characteristic of a bailee.

The question whether a sub-bailee can in circumstances such as these rely upon such a term, and if so upon what principle he is entitled to do so, is one which has been considered in cases in the past, but so far neither by the House of Lords nor by the Privy Council. It has been much discussed by academic writers. Their Lordships are grateful to counsel for the citation to them of academic writings, especially Professor N.E. Palmer's book on Bailment, and Mr. A.P. Bell's *Modern Law of Personal Property in England and Ireland*, to which they have repeatedly referred while considering the problems which have arisen for decision in the present case.

In approaching the central problem in the present case, their Lordships wish to observe that they are here concerned with two related questions. The first question relates to the identification of the relationship between the owner and the sub-bailee. Once that question is answered, it is possible to address the second question, which is whether, given that relationship, it is open to the sub-bailee to invoke as against the owner the terms upon which he received the goods from the bailee.

The relationship between the owner and the sub-bailee.

Fortunately, authoritative guidance on the answer to the first question is to be found in the decision of the Privy Council in *Gilchrist Watt and Sanderson Pty. Ltd. v. York Products Pty. Ltd.* [1970] 1 W.L.R. 1262, an appeal from the Court of Appeal of New South Wales. There two cases of clocks were shipped from Hamburg to Sydney. On arrival of the ship at Sydney the goods were unloaded, sorted and stacked on the wharf by the defendants, who were ship's agents and stevedores. The plaintiffs were the holders of the relevant bills of lading. When their agents sought delivery of the two cases from the defendants, one was missing and was never found. The plaintiffs sought to hold the defendants responsible as bailees of the goods. The Privy Council proceeded on the basis that there was a bailment to the shipowners, and a sub-bailment by the shipowners to the defendants; and that the defendants as sub-bailees received possession of the goods for the purpose of looking after them and delivering them to the holders of the bills of lading, who were the plaintiffs. Accordingly, the defendants "took upon themselves an obligation to the plaintiffs to exercise due care for the safety of the goods, although there was no contractual relation or attornment between the defendants and the plaintiffs" (see page 1267C, per Lord Pearson). In support of that conclusion, the Privy Council relied in particular on *Morris v. C.W. Martin & Sons Ltd.* [1966] 1 Q.B. 716, and on the statements of principle by Lord Denning M.R., Diplock L.J. and Salmon L.J. in that case (at pages 729, 731 and 738 respectively). There a mink stole, sent by the plaintiff to a furrier for cleaning, was sub-bailed by the furrier to the defendants, who were cleaning specialists, under a contract between them and the furrier. The stole was stolen by a servant of the defendants, and the plaintiff claimed damages from them. Both Diplock and Salmon L.J.J. held that the defendants, by voluntarily receiving into their possession goods which were the property of another, became responsible to the plaintiff as bailees of the goods. Lord Denning M.R. invoked an authoritative statement of the law in Pollock and Wright on Possession, (1888) at page 169, where it is stated as follows:-

"If the bailee of a thing sub-bails it by authority, there may be a difference according as it is intended that the bailee's bailment is to determine and the third person is to hold as the immediate bailee of the owner, in which case the third person really becomes a first bailee directly from the owner and the case passes back into a simple case of bailment, or that the first bailee is to retain (so to speak) a reversionary interest and there is no direct privity of contract between the third person and the owner, in which case it would seem that both the owner and the first bailee have concurrently the rights of a bailor against the third person according to the nature of the sub-bailment."

In addition, Lord Pearson invoked two nineteenth century cases concerned with the liability of railway companies where the plaintiff buys a ticket from one railway company, and claims liability from another which has undertaken responsibility for part of the services to be rendered to the plaintiff under the contract evidenced by the ticket: see *Foulkes v. Metropolitan District Railway Co.* (1880) 5 C.P.D. 157, and *Hooper v. London & North Western Railway Co.* (1881) 50 L.J.Q.B. 103. He also relied on the duty imposed by law on the finder of goods who takes them into his possession. He concluded as follows at page 127OE):-

"Both on principle and on old as well as recent authority it is clear 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 (as found by the trial judge). The obligation is at any rate the same as that of a bailee, whether or not it can with strict accuracy be described as being the obligation of a bailee. In a case such as this the obligation is created by the delivery and assumption of possession under a sub-bailment."

In this passage, Lord Pearson was cautious about describing the obligation of the defendants as bailees vis-à-vis the plaintiffs. Even so, both Diplock and Salmon L.JJ. described the relationship between the owner of the goods and the sub-bailee in *Morris v. Martin* as that of bailor and bailee, and their Lordships are generally in agreement with this approach. However, Diplock L.J. restricted his statement of the law to those circumstances where the sub-bailee is aware that the goods are the property of a person other than the bailee (see [1966] 1 Q.B. 716, 731). This is a point to which their Lordships will return at a later stage. However, the point does not directly arise in the present case, in which their Lordships understand the shipowners to have had sufficient notice that persons other than Hanjin or Scandutch were the owners of the goods. It was doubtless for this reason that no argument on the point was addressed to their Lordships.

Their Lordships pause to observe that the statement of the law by Pollock and Wright is restricted to those circumstances in which the bailee has sub-bailed the goods with the authority of the owner. As will appear, such is the position in the present case. Their Lordships are not therefore concerned with the position where the bailee sub-bails the goods to another without the authority of the owner, and so they do not think it appropriate to consider that situation, about which they heard no argument.

The terms of the collateral bailment between the owner and the sub-bailee.

On the authority of the case of *Gilchrist Watt*, their Lordships have no difficulty in concluding that, in the present case, the shipowners became on receipt of the relevant goods the bailees of the goods of both the Hanjin plaintiffs and the Scandutch plaintiffs. Furthermore, they are of the opinion that the shipowners became the bailees of the goods for reward. In *Pollock and Wright on Possession*, it is stated that both the owner of the goods and the bailee have concurrently the rights of a bailor against the sub-bailee according to the nature of the sub-bailment. Their Lordships, like Lord Denning M.R. in *Morris v. Martin* at page 729, consider that, if the sub-bailment is for reward, the obligation owed by the sub-bailee to the owner must likewise be that of a bailee for reward, notwithstanding that the reward is payable not by the owner but by the bailee. It would, they consider, be inconsistent in these circumstances to impose on the sub-bailee two different standards of care in respect of goods so entrusted to him.

But the question then arises whether, as against the owners (here the two groups of plaintiffs), the sub-bailees (here the shipowners) can invoke any of the terms on which the goods were sub-bailed to them, and in particular the exclusive jurisdiction clause (clause 26).

In *Morris v. Martin*, Lord Denning M.R. expressed his opinion on this point in clear terms, though on the facts of the case his opinion was obiter. He said (at page 729):-

"The answer to the problem lies, I think, in this: the owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise."

His expression of opinion on this point has proved to be attractive to a number of judges. In *Morris v. Martin* itself, Salmon L.J. expressed himself (at page 741) to be strongly attracted by it: see also *The Captain Gregos (No. 2)* [1990] 2 Lloyds Rep. 395, 405 per Bingham L.J. (delivering the judgment of the court). Furthermore, on this point Lord Denning's statement of the law was applied by Steyn J. in *Singer Co. (U.K.) Ltd. v. Tees and Hartlepool Port Authority* [1988] 2 Lloyds Rep. 164. It was not however followed by Donaldson J. in *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.* [1976] 2 Lloyds Rep. 215, a decision to which their Lordships will revert at a later stage.

In order to decide whether, like Steyn J., to accept the principle so stated by Lord Denning, it is necessary to consider the relevance of the concept of "consent" in this context. It must be assumed that, on the facts of the case, no direct contractual relationship has been created between the owner and the sub-bailee, the only contract created by the sub-bailment being that between the bailee and the sub-bailee. Even so, 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. (Their Lordships add in parenthesis that for this purpose it is not, in their opinion, necessary to have recourse to the doctrine of estoppel (cf. *The Kapetan Markos (No. 2)* [1987] 2 Lloyd's Rep. 321, 340 per Dillon L.J., and 336 per Nicholls L.J.). Even where there is express or implied consent to the relevant terms by the owner of the goods, there can be no estoppel without some holding out on his part. Estoppel may however be relevant if recourse is to be had to the doctrine of ostensible authority).

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. That this may be so appears from the decision of the House of Lords in *Elder, Dempster & Co. Ltd. v. Paterson, Zochonis & Co. Ltd.* [1924] A.C. 522. In that case, shippers of cargo on a chartered ship brought an action against the shipowners for damage caused to the cargo by bad stowage, for which the shipowners were responsible. It is crucial to observe that the cargo was shipped under charterers' bills of lading, so that the contract of carriage contained in or evidenced by the bills of lading was between the shippers and the charterers. The shipowners nevertheless sought to rely, as against the shippers, upon an exception in the bill of lading which protected the charterers from liability for damage due to bad stowage. It was held that the shipowners were entitled to do so, the preferred reason upon which the House so held (see *Midland Silicones Ltd. v. Scruttons Ltd.* [1962] A.C. 446, 470, per Viscount Simonds, following the opinion of Fullagar J. in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.* (1955) 95 C.L.R. 43, 78) being found in the speech of Lord Sumner where he said (at page 564) that:-

"... in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading."

Of course, there was in that case a bailment by the shippers direct to the shipowners, so that it was not necessary to have recourse to the concept of sub-bailment. Even so, notwithstanding the absence of any contract between the shippers and the shipowners, the shipowners' obligations as bailees were effectively subject to the terms upon which the shipowners implicitly

received the goods into their possession. Their Lordships do not imagine that a different conclusion would have been reached in the *Elder, Dempster* case if the shippers had delivered the goods, not directly to the ship, but into the possession of agents of the charterers who had, in their turn, loaded the goods on board; because in such circumstances, by parity of reasoning, the shippers may be held to have impliedly consented that the sub-bailment to the shipowners should be on terms which included the exemption from liability for bad storage.

The Johnson Matthey case.

At this stage, their Lordships turn to the decision of Donaldson J. in *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.* [1976] 2 Lloyd's Rep. 215. In that case, the plaintiffs sought to hold sub-bailees of their goods liable to them as bailees; and the sub-bailees in their turn sought to rely, as against the plaintiffs, on certain clauses in the contract of sub-bailment. Donaldson J. cited the relevant passage from the judgment of Lord Denning M.R. in *Morris v. Martin* and held that, on the facts of the case, the plaintiffs had consented to a sub-bailment on the conditions of Constantine Terminals, the sub-bailees. It was however his opinion that the consent of the plaintiffs was not relevant in the case before him. He nevertheless held that the sub-bailees were entitled to rely on the clauses in question. He said (at page 222):-

"But the plaintiffs cannot prove the bailment upon which, in my judgment, they must rely, without referring to terms upon which the silver was received by Constantine Terminals from International Express. These terms establish (a) that Constantine Terminals were bailees for reward but also (b) that the implied duties of such a bailee were qualified by exceptions. And, despite Mr. Wadsworth's vigorous argument to the contrary, I really do not see how the plaintiffs can rely upon one part of the contract while ignoring the other.

Consent seems to me to be relevant only between the bailor and head bailee. If the sub-bailment is on terms to which the bailor consented, he has no cause of action against the head bailee. If it was not, the sub-bailee is still protected, but if the bailor is damnified by the terms of the sub-bailment he has a cause of action against the head bailee."

The reasoning of Donaldson J. (if correct) is, of course, highly relevant to the present case, since it leads to the conclusion that, if (as here) the plaintiffs seek to hold the shipowners liable as bailees, they will *ipso facto* be bound by the terms of the sub-bailment under which the shipowners received the goods into their possession, including clause 26 (the exclusive jurisdiction clause). However their Lordships are, with respect, unable to accept this reasoning which (related, as it was, to an authorised

sub-bailment) is, in their opinion, inconsistent with the decision of the Court of Appeal in *Morris v. Martin* (by which Donaldson J. was bound) and also with the decision of the Privy Council in the *Gilchrist Watt* case. Both these decisions proceeded on the basis that the voluntary taking by a sub-bailee of the owner's goods into his custody of itself results in his owing to the owner the duties of a bailee - as Diplock L.J. put it in *Morris v. Martin* at page 731, it brings into existence "the relationship of bailor and bailee by sub-bailment". It is therefore from these facts that the owner can prove the bailment upon which he relies when he proceeds directly against the sub-bailee. He does not for this purpose have to rely upon the contract of sub-bailment as between the bailee and the sub-bailee. Moreover, the reasoning of Donaldson J. leads to the conclusion that the owner who holds an authorised sub-bailee responsible to him as bailee of his goods has to accept all the terms of the contract of sub-bailment, apparently without limit; indeed logically it leads to the further conclusion that a sub-bailee under an unauthorised sub-bailment which he knew to be unauthorised would likewise be able to invoke all such terms against the owner who sought to hold him responsible as bailee. Their Lordships do not find these conclusions attractive. Furthermore, in their opinion, the approach of Donaldson J. cannot be rescued by resort to the doctrine of ratification; for if, as the authorities demonstrate, the owner is able to hold the sub-bailee responsible to him as bailee without reliance on the contract of sub-bailment, it cannot be said that his so doing amounts to ratification of the terms of that contract if unauthorised by him.

In addition, the conclusion of Donaldson J. that consent is relevant only between the owner and the bailee is inconsistent with the reasoning of Lord Denning in *Morris v. Martin* when he expressed the opinion that the bailor is bound by the terms of the sub-bailment to which he has consented but not otherwise. Their Lordships have already expressed their agreement with the approach of Lord Denning on this point. Indeed, as they see it, once it is recognised that the sub-bailee, by voluntarily taking the owner's goods into his custody, *ipso facto* becomes the bailee of those goods vis-a-vis the owner, it must follow that the owner's rights against the sub-bailee will only be subject to terms of the sub-bailment if he has consented to them, i.e., if he has authorised the bailee to entrust the goods to the sub-bailee on those terms. Such consent may, as Lord Denning pointed out, be express or implied; and in this context the sub-bailee may also be able to invoke, where appropriate, the principle of ostensible authority.

In truth, at the root of this question lies a doctrinal dispute of a fundamental nature, which is epitomised in the question - is it a prerequisite of a bailment that the bailor should have consented to the bailee's possession of the goods? An affirmative answer to this question (which

is the answer given by Mr. Bell in his *Modern Law of Personal Property in England and Ireland* at pages 88-89) leads to the conclusion that, if the owner seeks to hold a sub-bailee responsible to him as bailee, he has to accept all the terms of the sub-bailment, warts and all; for either he will have consented to the sub-bailment on those terms or, if not, he will (by holding the sub-bailee liable to him as bailee) be held to have ratified all the terms of the sub-bailment. A negative answer to the question is however supported by other writers, notably by Professor Palmer in his book on *Bailment* at pages 31 et seq., where he cites a number of examples of bailment without the consent of the owner, and by Professor Tay in her *Article on The Essence of Bailment* in (1966) 5 *Sydney Law Review* 239. On this approach, a person who voluntarily takes another person's goods into his custody holds them as bailee of that person (the owner); and he can only invoke, for example, terms of a sub-bailment under which he received the goods from an intermediate bailee as qualifying or otherwise affecting his responsibility to the owner if the owner consented to them. It is the latter approach which, as their Lordships have explained, has been adopted by English law and, with English law, the law of Hong Kong.

Their Lordships wish to add that this conclusion, which flows from the decisions in *Morris v. Martin* and the *Gilchrist Watt* case, produces a result which in their opinion is both principled and just. They incline to the opinion that a sub-bailee can only be said for these purposes 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. This they believe to be the underlying principle. Moreover, their Lordships do not consider this principle to impose obligations on the sub-bailee which are onerous or unfair, once it is recognised that he can invoke against the owner terms of the sub-bailment which the owner has actually (expressly or impliedly) or even ostensibly authorised. In the last resort the sub-bailee may, if necessary and appropriate, be able to invoke against the bailee the principle of warranty of authority.

The facts of the case.

Their Lordships turn to the application of these principles to the facts of the present case. They start with the fact that, under clauses 6 and 4(1) of the Hanjin and Scandutch bills of lading respectively, it was provided that "The Carrier shall be entitled to sub-contract on any terms the whole or any part of the ... carriage of the Goods ...". It is necessary to consider whether the consent of these two groups of plaintiffs contained in this provision is effective to entitle the shipowners to invoke the exclusive jurisdiction clause contained in clause 26 of their form of bill of lading.

However, before addressing this question directly, their Lordships have first to consider certain threshold points raised on behalf of the plaintiffs.

(1) "This bill of lading contract".

First, clause 26 applies to any claim or dispute arising under "This bill of lading contract", and it was submitted on behalf of the plaintiffs that, since none of their claims are contractual in nature, they do not fall within clause 26. Here they rely not only on the fact that there is no contractual relationship between the Hanjin and Scandutch plaintiffs on the one hand, and the shipowners as sub-bailees on the other; but also on the fact that the claims of the Kien Hung plaintiffs (who are parties to bill of lading contracts with the shipowners containing clause 26) have been framed not in contract but in bailment or in tort.

A similar point was taken in *Kitchens of Sara Lee (Canada) Ltd. v. A/S Falkefjell (The Makefjell)*; but was rejected by Brandon J. at first instance (see [1975] 1 Lloyds Rep. 528), and his decision on the point was affirmed by the Court of Appeal (see [1976] 2 Lloyds Rep. 29). There the clause in question, which like clause 26 in the present case was concerned with both governing law and jurisdiction (there Norwegian), applied to "any claim ... arising under this bill of lading". It was held, to adopt the words of Cairns L.J. in [1976] 2 Lloyds Rep. at page 33, that there could be no doubt that "the parties intended that any claims in respect of damage to the goods carried under the bill of lading should be decided in Oslo and according to Norwegian law, however they were framed". In so holding Cairns L.J. (like Brandon J.) relied on the statement of Sir Samuel Evans P. in *The Cap Blanco* [1913] P. 131, 136, where he said that "effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties".

In the present case, however, the clause in question refers to any claim or other dispute arising under "This Bill of Lading contract"; and Mr. Kentridge Q.C. for the plaintiffs submitted that this wording compelled the conclusion that the clause applied only to contractual claims. Arguments of this kind can lead to reasoning of some technicality, far removed from the spirit of the dictum of Sir Samuel Evans P.; and Mr. Thomas Q.C. for the shipowners sought to build upon that dictum in order to advance an argument that clause 26 should be read broadly, to embrace not only claims which are contractual in nature, but also claims in bailment or in tort where the liability of the shipowners was governed by the contractual terms set out in a bill of lading in the shipowners' form.

However, Mr. Thomas also referred to the fact that the bills of lading were expressed to be governed by Chinese law, and he complained that the point here relied on by the plaintiffs had not been taken by them below, and as a result the expert witnesses on Chinese law who gave evidence before Sears J. were not, as they should have been, examined on the point, although there were indications (but no more) in the evidence of both experts favourable to his clients on this issue. Their Lordships have come to the conclusion that Mr. Thomas's objection to this point being taken for the first time before the Board was no mere technical point, but one of substance. In their opinion, it would not be right in these circumstances to allow the plaintiffs to pursue the point before the Board, and they so rule.

Even so, their Lordships wish to dwell for a moment upon the extreme technicality of the point here taken on behalf of the plaintiffs. This is a case where goods have been shipped under bills of lading. Bills of lading are documents which operate as receipts for the goods, and which contain or evidence the terms of the contract of carriage. Such terms include provisions relating to the shipowners' obligations in respect of the goods while in their care, and so regulate their responsibility for the goods as bailees. In these circumstances, their Lordships find it difficult to believe that a clause providing for the governing law and for exclusive jurisdiction over claims should be held not to be apt to cover claims by the cargo owners against the shipowners framed in bailment rather than in contract, simply because the clause refers to claims under the bill of lading contract as opposed to claims under the bill of lading. Furthermore, if this view is correct, it must follow that shipowners who are sub-bailees of the goods may similarly be able to invoke such a clause against owners of the goods who are seeking to hold them liable as bailees and who have consented to the inclusion of the clause in the bill of lading. Their Lordships cannot help feeling that any other conclusion would not merely offend against the spirit of the statement of Sir Samuel Evans P. in *The Cap Blanco* [1913] P. 131, 136, but would lead to refinements and inconsistencies which are unacceptable in a commercial context.

Superimposition of Terms.

The next point taken on behalf of the plaintiffs was that the shipowners' form of bill of lading, like many others, contained a "Himalaya" clause which, following the decision of the Privy Council in *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon)* [1975] A.C. 154, may be effective to provide protection for sub-contractors of carriers by enabling them to take advantage of exceptions in the bill of lading on the basis that the carrier has contracted for the exceptions not only on his own behalf but also as agent for the sub-contractors. The submission of the plaintiffs in the present case was that the "Himalaya" clause gives sufficient effect to the commercial

expectations of the parties, and that to allow a sub-bailee to take advantage of the terms of his own contract with the bailee was not only unnecessary but created a potential inconsistency between the two regimes. In their Lordships' opinion, however, this argument is not well-founded. They are satisfied that, on the legal principles previously stated, a sub-bailee may indeed be able to take advantage, as against the owner of goods, of the terms on which the goods have been sub-bailed to him. This may, of course, occur in circumstances where no "Himalaya" clause is applicable; but the mere fact that such a clause is applicable cannot, in their Lordships' opinion, be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner of the goods. If it should transpire that there are in consequence two alternative regimes which the sub-bailee may invoke, it does not necessarily follow that they will be inconsistent; nor does it follow, if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods. (See Mr. A.P. Bell's Paper in *Interests in Goods*, chapter 6, at pages 178-180). Their Lordships are therefore satisfied that the mere fact that a "Himalaya" clause is applicable does not of itself defeat the shipowners' argument on this point.

(3) Quasi-Bailment.

The third point invoked by the plaintiffs affected only the Scandutch plaintiffs. It was based on the proposition that in their case the shipowners were not sub-bailees at all. The submission was that there was no evidence that Scandutch ever obtained actual possession of the goods; if that was the case, it was said, the shipowners were not sub-bailees but quasi-bailees, and there was no authority that the doctrine of sub-bailment on terms extended to quasi-bailments. Their Lordships feel bound to say that they view this point with some concern. There is no trace of it in the judgments in the courts below. Not only that, but Sears J. expressly found that the shipowners were sub-bailees of the goods of the Scandutch plaintiffs, a conclusion which was inconsistent with the proposition that Scandutch never had possession of the goods; and this conclusion of fact appears to have been challenged neither in the plaintiffs' Respondents' Notice, nor in their argument, before the Court of Appeal. If the point had been taken and pursued, the first question to be explored would have been whether it was right that the goods were never in the possession of Scandutch or their agents. As it was, the form of bill of lading issued by Scandutch in respect of these goods represented that Scandutch had received the goods for transportation from the place of receipt; and no evidence was adduced to contradict this statement. In these circumstances, their Lordships do not think it right for the plaintiffs to be allowed to raise the point for the first time before the Board. They wish to add however that, on the limited argument on this point which took place before them, it

is difficult to see why the shipowners should not, when they received the goods of the Scandutch plaintiffs into their possession, have become responsible as bailees to the owners of the goods even if the goods were never in the possession of Scandutch (see Palmer on Bailment, 2nd ed., pages 34 and 1292) and, if so, it is not easy to see why they should not be able to invoke against the owners any terms upon which the intermediary (Scandutch), with the owners' consent, entrusted the goods to them. This point can, however, await decision, after consideration in greater depth, on another occasion.

Having disposed of these three threshold points, their Lordships turn to the basic question which arises on this aspect of the case which is whether, in the case of a sub-bailment, the owners of the goods who seek to hold the sub-bailee liable to them as a bailee will be bound by an exclusive jurisdiction clause which forms part of the contract governing the sub-bailment. Their Lordships start, of course, with the position that, under clauses 6 and 4(1) of the Hanjin and Scandutch bills of lading respectively, there was vested in both Hanjin and Scandutch a very wide authority to sub-contract the whole or any part of the carriage of the goods 'on any terms'. Since the sub-contracting of any part of the carriage to another will ordinarily involve a bailment (or sub-bailment) to that carrier, it must follow that both the Hanjin and Scandutch plaintiffs had expressly consented to the sub-bailment of their goods to another carrier on any terms. It further follows that no question arises in the present case of implied consent, the only question relating to the scope of the express consent so given.

At first sight, the words used are wide enough to authorise consent to the application of an exclusive jurisdiction clause to the sub-bailment. However, it was the submission of the plaintiffs that this was not so. They submitted that the exclusive jurisdiction clause should be excluded from such incorporation because it was not a clause directly germane to the subject matter of the bill of lading, viz. the shipment, carriage and delivery of the relevant goods. In support of this submission, they relied on the well-known line of authority concerned with the incorporation of charterparty terms into bills of lading, of which *Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.* [1912] A.C.1 is perhaps the most familiar. However the present context is by no means identical with that in the *Thomas v. Portsea* line of cases, which have been described as a special corner of the law (see *The Varenna* [1983] 2 Lloyd's Rep. 592, 594 per Sir John Donaldson M.R.). In this line of cases, the question is whether general words incorporating the terms of a charterparty into a bill of lading contract are effective to incorporate, for example, an arbitration clause in the charterparty; and it is readily understandable that, in so transporting terms from one contract of carriage to another, some limit should be placed on the incorporation by relating it to the subject matter of the receiving contract. Here, however, the question is

whether consent given by the owner of goods to his bailee to bail the goods to a sub-bailee on any terms is wide enough to embrace an exclusive jurisdiction clause in the contract governing the sub-bailment; and their Lordships do not perceive a similar need to limit the terms so consented to. Nor do their Lordships consider that the mere fact that the relevant clause may (as here) be regarded as, in a sense, imposing a positive obligation on the owner is of itself sufficient to exclude it from the scope of the consent so given. In such a case, it seems to them, the element of control must be derived from the scope of the owner's consent; and where, as here, the consent is very wide in its terms, only terms which are so unusual or so unreasonable that they could not reasonably be understood to fall within such consent are likely to be held to be excluded. Bearing this in mind, their Lordships perceive a number of considerations which militate in favour of the incorporation of the exclusive jurisdiction clause in the present case. First, by way of introduction, it is common in the present context for an exclusive jurisdiction clause to be coupled with an express choice of law clause, often contained (as here) in the same contractual provision, and usually providing for the law of the chosen forum to be the law governing the contract. Second, a provision in this form is by no means uncommon in shipowners' standard forms of bill of lading; indeed such a provision must, their Lordships imagine, be very common in the case of shipowners engaged in the container trade. Third, their Lordships do not consider that it can possibly be said that the incorporation of such a clause in a bill of lading is *per se* unreasonable. In this connection, they refer again to the difficulties, described earlier, which may arise if bill of lading holders are free to pursue their claims in various jurisdictions throughout the world; and they do not overlook the fact that, in common law countries, a stay of proceedings to enforce an exclusive jurisdiction clause is a matter for the court's discretion.

In support of their argument, the plaintiffs invoked the decision of the Court of Appeal in *The Forum Craftsman* [1985] 1 Lloyd's Rep. 291. But their Lordships are satisfied that that case is not *in pari materia* with the present. There the shippers (the owners of the goods) sought to invoke against the shipowners (the sub-bailees) an exclusive jurisdiction clause in the relevant bills of lading. But the case was concerned with a chartered ship, and the bills of lading, issued by the charterers, contained an exclusive jurisdiction clause (providing for the contract to be governed by Japanese law, and for the exclusive jurisdiction of the Tokyo District Court). It was not therefore a case where sub-bailees were seeking to enforce against the owners of the goods an exclusive jurisdiction clause in the contract governing the sub-bailment which had been consented to by the owners. It was a case in which the owners of the goods were seeking to enforce against the sub-bailees an exclusive jurisdiction clause in their contract (the bill of

lading contract) with the bailees (the charterers), a contract to which the sub-bailees (the shipowners) were not party, and to which they had never consented. It was scarcely surprising that, in these circumstances, the Court of Appeal declined to hold that the shipowners were bound by the clause. In their Lordships' opinion, the case provides no useful guidance in the very different circumstances of the present case.

For these reasons, their Lordships do not feel able to accept the argument of the plaintiffs on this point. On the contrary, they consider that the incorporation of the relevant clause in the sub-bailment would be in accordance with the reasonable commercial expectations of those who engage in this type of trade, and that such incorporation will generally lead to a conclusion which is eminently sensible in the context of the carriage of goods by sea, especially in a container ship, in so far as it is productive of an ordered and sensible resolution of disputes in a single jurisdiction, so avoiding wasted expenditure in legal costs and an undesirable disharmony of differing consequences where claims are resolved in different jurisdictions. On this point, therefore, their Lordships find themselves to be in agreement with the conclusion reached both by Sears J. and the Court of Appeal.

The application for a stay of proceedings.

It is common ground between the parties that, in a case such as the present, the applicable principles are those set out in the judgment of Brandon L.J. in *Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria)* [1981] 2 Lloyd's Rep. 119. According to those principles, the court has a discretion whether to grant a stay of proceedings brought in breach of an agreement to refer disputes to a foreign court; but the discretion should be exercised by granting a stay, unless strong cause for not doing so is shown. One of the matters to be taken into account in the exercise of the discretion is whether the plaintiff would be prejudiced by having to sue in the foreign court because, for example, he would be faced with a time bar not applicable in the domestic jurisdiction, here Hong Kong.

In considering the exercise of his discretion, Sears J. was satisfied that, apart from one matter, i.e. the time bar applicable in Taiwan, the connection with Taiwan was so strong that he would have had no doubt that he should grant a stay. So far as the time bar was concerned, the applicable limitation period in Taiwan was two years with an optional extension of six months. The casualty occurred on 11th March 1987, and the time bar must have expired at latest on 11th September 1989. The writ in rem in the Hong Kong proceedings against 'Pioneer Container' was issued on 10th March 1988, and served on 29th October 1988. On 8th September 1989 the shipowners issued their notice of motion for a stay. The matter did not come before Sears J. until September 1990. After a preliminary ruling on 26th September 1990 on the issue of bailment on terms, Sears J.

decided on 14th May 1991 that the shipowners' application for a stay should be dismissed.

On the question of the time bar, Sears J. approached the matter on the principles set out by Sheen J. in *The Blue Wave* [1982] 1 Lloyd's Rep. 151, 156, and by Lord Goff of Chieveley in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460. In the latter case, Lord Goff said (at pages 483-4):-

"But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with that of Sheen J. in *The Blue Wave* ..."

However, in an earlier passage at page 483, Lord Goff said:-

"... suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction."

Sears J. concluded that the plaintiffs had not acted unreasonably in allowing the time bar to elapse in Taiwan. In so holding, he appears to have been influenced in particular by two factors, viz., that the plaintiffs would have had to put up a percentage of their claim (either 1% or 3%) as advance costs, and that, if an arrest had been made, counter security for the full amount of the claim would have had to be provided. However, as *Cons V.-P.* pointed out in the Court of Appeal, the truth of the matter was (as was indeed conceded before the Court of Appeal) that the plaintiffs had deliberately and advisedly allowed the time limit to expire in Taiwan; and the Court of Appeal did not see that the two matters relied upon by Sears J. provided sufficient justification for so doing. The amount of costs required to be put up in advance

(about HK\$1 million) was by no means large in the context of modern commercial litigation. As to security, there was no evidence that the defendants would not be able to satisfy any judgment given against them in Taiwan. In these circumstances, Godfrey J. described the position as follows:-

"If you find yourself bound to litigate in a forum which is more expensive than the one you would prefer, deliberately to choose the latter rather than the former seems to me (although the judge thought otherwise) to be forum shopping in one of its purest and most undesirable forms. And if in pursuance of your deliberate decision to litigate here instead, you let time run out in the jurisdiction in which you are bound to litigate, without taking the trouble (because of the expense) even to issue a protective writ there, you are not, as I think, acting reasonably at all; you are gambling on the chance of a stay being refused here and you cannot complain if you then lose that gamble. That may seem to you at the time a justifiable commercial risk to take. But that, in the context of the litigation, does not make your decision a reasonable one."

Accordingly, the Court of Appeal concluded that Sears J. had erred in the exercise of his discretion. Their Lordships cannot fault that conclusion.

When the Court of Appeal came to exercise their own discretion in place of that of the judge, they were faced with the simple fact that the plaintiffs had deliberately allowed the time bar to elapse in Taiwan. The Kien Hung plaintiffs were well aware of clause 26. It was true that the other two groups of plaintiffs had their argument that they were not bound by the clause, but there was nothing to indicate that uncertainty in the application of the clause was present to the minds of those representing them at any time before the issue of the motion for a stay - indeed such indications as there were pointed the other way. In these circumstances, the Court of Appeal decided in the exercise of their discretion to order that all proceedings in the action be stayed. Their Lordships are of the opinion that they were fully entitled so to do.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs before their Lordships' Board.