***Sub-bailment on terms and anti-anti-arbitration injunction: Euronav Shipping NV v Black Swan Petroleum DMCC* [2024] EWHC 896 (Comm)**

The case involved ongoing proceedings in the Malaysian High Court and arbitration under the London Maritime Arbitrators Association (LMAA). An application for an anti-anti-arbitration injunction was subsequently made before the English Commercial Court. The court refused to grant anti-anti-arbitration injunction against Malaysian proceedings primarily based upon comity in international disputes. This comment focuses on the question of whether arbitration clauses are binding on third parties by virtue of sub-bailment on terms.

The facts

Euronav, the claimants, sought an anti-anti-arbitration injunction against the defendants, Black Swan Petroleum (BSP). Euronav claimed their dispute with BSP was subject to a London Maritime Arbitrators Association (LMAA) arbitration and was not to be resolved, as BSP claimed, at the High Court of Malaysia. Euronav argued that BSP were bound to observe an arbitration agreement by virtue of sub-bailment on terms of the consignment of oil bailed to Euronav by BSP, via sub-bailor Silk Straits.

The cargo was stored on the Motor Tanker "Oceania", owned by Euronav. Euronav was party to a storage agreement made with Silk Straits. The contract contained a sanctions clause that prevented Silk Straits storing sanctioned cargo on the Oceania. The contract obtained Euronav's consent for Silk Straits to assign the agreement, and any dispute would be "subject to English law and any disputes arising from or in connection to it shall be resolved by reference to the High Court of England & Wales." The second addendum to the contract contained a term that the governing law was England & Wales and any disputes "shall be referred exclusively to arbitration in London" and the LMAA.

In a separate agreement between BSP and Silk Straits, BSP were permitted to store fuel or crude oil on the Oceania in tanks Silk Straits had the use of by virtue of their agreement with Euronav. This agreement, too, contained a sanctions clause. BSP provided no express consent to Silk Straits to contract on terms containing the arbitration clause. Nonetheless, BSP were informed that Silk Straits were only the "head charterer" rather than shipowners. BSP had also been provided a letter from Euronav which stated that Silk Straits were authorised to assign its rights under their storage agreement.

BSP subsequently stored a cargo of crude oil on the Oceania. It transpired that the cargo was a consignment of Iranian oil sanctioned by the United States of America. A US District Court ordered seizure of the cargo and served a Warrant on Euronav. Euronav subsequently surrendered possession of the cargo to the US Department of Justice.

There were several hearings regarding whether the Malaysian courts could hear the dispute arising from the seizure or whether it was subject to arbitration in London. The defendant (BSP) brought a claim against Euronav before the Malaysian High Court. Euronav subsequently commenced LMAA arbitration proceedings against BSP. BSP was then successful in obtaining an anti-arbitration injunction (AAI) from the Malaysian High Court, preventing Euronav from continuing its LMAA arbitration proceedings. In this case, Euronav sought an order from the English court requiring BSP to take steps to set aside and to not enforce that AAI from the Malaysian High Court, contending that BSP had failed to abide by the arbitration agreement between the parties. The Commercial Court decided that even though there is a high degree of probability that the arbitration agreement is valid and binding, it would exercise discretion and not interfere in the proceedings which were already underway in the Malaysian High Court primarily due to the principle of comity between the two countries.

The law

For Euronav to obtain the anti-anti-arbitration injunction, they had to prove there is "a high degree of probability" that there was a binding arbitration agreement with BSP. If so, the court will exercise its discretion to restrain the pursuit of proceedings which were brought in breach of that arbitration agreement, unless there are strong reasons put forward by the defendant to refuse.[1] Euronav submitted that there was a high probability of proving a binding arbitration agreement with BSP by virtue of "sub-bailment on terms".

Two key questions pertaining to bailment were first whether Euronav had voluntary possession of BSP's property to enable Euronav to proceed directly against BSP as bailor. If so, the terms it is bailed on will be binding between the bailor BSP and [sub]-bailee Euronav, where either BSP consented to or authorised Silk Straits to contract on those terms, or to the extent BSP and Silk Straits agreed that the terms of the contract was intended to benefit Euronav. This rule is known as "[sub-]bailment on terms."[2]

Pelling KC agreed, without citing authority, that there was bailment between the parties enabling them to pursue a claim in bailment. Pelling KC reasoned that despite the absence of "express consent" to bail the goods on terms, BSP made no attempt as to enquire into the relationship between Silk Straits and Euronav and by agreeing to Euronav taking possession, BSP "took the risk" that the terms they agreed with Silk Straits would be different from those Silk Straits agreed with Euronav.[3]

Comment

The focus of this comment is to argue that it should not have been held there was a high probability that there was a binding arbitration agreement "in bailment".[4] The argument here is sub-bailment on terms offers no independent reason for there to be an arbitration agreement between the parties. Sub-bailment on terms should not create a right independent of contract. The rule is contrary to the rule of law as it is a duplication of the law of contract and is based on a discretion as to how it applies. Therefore, the rule is not a rationally defensible reason to conclude it is "highly probable" BSP were bound to the arbitration clause in a contract they were not party to. It is doubtful that Tribunal subsequently will find there is an arbitration agreement between BSP and Euronav by virtue of bailment.

Pelling's KC reasoning for holding there is a high probability of a binding arbitration agreement was that Euronav's possession via Silk Straits amounted to bailment. "In bailment" the terms on which the cargo is sub-bailed would be binding on BSP, as third-party bailor, if they consented to the sub-bailment on those terms.[5]

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[1] [26] of the judgment.
[2] [43], also see D Gibbs-Kneller, '"A Rule Adumbrated": Bailment on Terms and the Rule of Law' (2023) 139 *Law Quarterly Review* 592, p 594.
[3] [47]
[4] [48]
[5] [48]

Pelling KC cited *The Pioneer Container* as authority for the rule,[6] but followed sub-bailment on terms without discussion.[7] The reasons for the rule are sketched by Lord Denning in *Morris v CW Martin & Sons Ltd*[8] and Lord Goff in *The Pioneer Container*.[9] This author has argued in full elsewhere the reasoning for the rule in these two cases is not rationally defensible.[10] The reasoning is based on the language spoken, "bailment", and this is not a rationally defensible reason for recognising rights in bailment independent of contract. It is a duplication contrary to the rule of law.

Lord Goff held that the consenting third party was bound to a jurisdiction clause because bailment was independent of contract.[11] The consent from the bailor authorised the bailee to regulate their relationship with the sub-bailee[12] and holding the bailor and sub-bailee bound was a "principled and just" conclusion.[13] Such reasoning does not rationally distinguish sub-bailment on terms from the law of contract. Formal categorisation of bailment as independent from contract does not alter the substantive basis for the cause of action, namely consent. This makes Lord Goff's reasoning circular: A consenting third party is bound in bailment because there is bailment. Lord Goff's language that the third party is bound because their consent authorises the bailee to regulate the bailor's relationship with the sub-bailee obfuscates the duplication. The justificatory principle remains consent, and the tool that regulates relationships is contract.[14] Principle and justice offer no rationally defensible reasons for why a consenting third party would be bound to contractual terms in bailment but not contract or other third-party, non-bailment relationships. Bailment and contract cases are distinguished by the language spoken, contrary to the rule of law.[15]

Turning now to how Pelling's reasoning is discretionary, for terms of a sub-bailment to be binding on the third party it required consent to be either express or implied[16] or authorisation for the terms to be binding.[17] Pelling's KC conclusion was that it is highly probable that consent in bailment would extend to knowing, or ought reasonably to know, that there would be a sub-bailment on terms.[18] Pelling KC reasoned that BSP's failure to investigate Euronav's status meant they "took the risk" the terms Silk Straits had agreed with Euronav would be different.[19]

This extension appears to be an exercise of discretion by moving lightly the boundaries of what constitutes "consent" in bailment, treating knowledge of a sub-contract as equivalent to

[6] [43]
[7] [43]
[8] *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, pp 729-730.
[9] *The Pioneer Container* [1994] 2 AC 324, pp 336-342.
[10] D Gibbs-Kneller, '"A Rule Adumbrated": Bailment on Terms and the Rule of Law' (2023) 139 *Law Quarterly Review* 592, pp 595-608.
[11] *The Pioneer Container*, pp 336-342.
[12] Ibid, p 339.
[13] Ibid, pp 338-339, 342.
[14] Consent to contractual terms and consent to bailment on terms are not rationally distinctive. See D Gibbs-Kneller, p 607; citing *Marine Blast Ltd v Targe Towing Ltd* [2004] EWCA Civ 346 at [28]; and *East West Corp v DKBS 1912* [2003] EWCA Civ 83 at [24], [26] and [69] *per* Lord Mance.
[15] D Gibbs-Kneller, pp 604-608.
[16] *Morris v CW Martin & Sons Ltd*, pp 729-730.
[17] *The Pioneer Container*, p 339
[18] *Cf. Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997]2 Lloyd's Rep 48 which held that the rule applied because it was a necessary implication that the bailee could sub-contract storage, not holding that knowledge of a sub-contract is sufficient to consent to bailment on terms.
[19] [47]

consenting to its terms. In the absence of independent, substantive reasons for why sub-bailment on terms can bind consenting parties to terms, the extension is based on the language spoken only, "bailment". The language "bailment" does not explain why the "risk" of a sub-contract on terms means a bailor should be bound in bailment when they would not in contract.[20]

In contract, knowing contractual obligations would be sub-contracted is not an equivalent to consent. The usual inference is that parties who sub-contract do not intend to be bound.[21] The best we can say is BSP knew, or ought reasonably to have known, Silk Straits had contracted with Euronav on terms. By treating knowledge as equivalent to consent in bailment risks undermining the substantive basis for liability in contract. Euronav's consent to Silk Straits to assign the agreement to third parties may be accepting the risk of liability from third-party claims. In giving no consent to Silk Straits to sub-contract, BSP may have been consenting to the risk of having no contractual claim to anyone it is bailed over to.[22] By exercising a discretion to extend consent in bailment to cover knowledge of a sub-contract, Pelling KC may have bound parties to something they did not consent to in contract.

Further evidence of a discretion being exercised in the extension of the meaning of consent is potential inconsistency with prior bailment case law. A sub-bailee subject to conflicting regimes of contract and bailment is said to have an election right to choose between them.[23] It is at least arguable on a principle of mutuality that BSP, as bailor, should have an equivalent right to elect between conflicting regimes their dispute is subject to, and knowing of the sub-bailment does not necessarily mean that they have exercised that right to consent to the bailment regime.

A response to this exercise of discretion to justify the outcome that it is highly probable BSP are bound to the arbitration agreement may be that bailment takes priority over contract because it would be unfair on Euronav, as sub-bailee, who relies on terms agreed with Silk Straits, as bailee. If the parties consented to the contract regime and allocated risk under the agreement accordingly, by speaking the language of bailment Pelling KC risks liability being foisted onto the parties, redistributing the risk they did consent to in contract.[24] Injustice is caused by following the rule rather than prevented. BSP and Euronav should not be bound to the arbitration agreement via sub-bailment on terms. The reasoning for the rule to apply is irrational and consent has been extended by a discretion, not law.

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[20] See D Gibbs-Kneller, pp 608-610.

[21] *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145, pp 195-196; *cf. Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, HL

[22] See, for example, *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd (The "Aliakmon")* [1986] 2 WLR 902 *per* Lord Brandon; J Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Protection' (1995) 111 *Law Quarterly Review* 301.

[23] *Lotus Cars Ltd v Southampton Cargo Handling Plc (The "Rigoletto")* [2000] 2 All ER (Comm) 705 at [49] – an argument of inconsistency would have to hinge on principle that BSP are subject to competing regimes based on consent, irrespective of whether it is one other party, as it was in *The Rigoletto*, or two, as it was here.

[24] D Gibbs-Kneller, pp 611-612.