1-1995

Sub-bailments and consent

Andrew B.L. PHANG
Singapore Management University, andrewphang@smu.edu.sg

Sub-Bailments and Consent

Andrew Phang*

Introduction and facts

Of the two major strands existing in the increasingly important topic of sub-bailment on terms, one has become well settled, the other has been shrouded in ambiguity for close to two decades. The recent Hong Kong Privy Council decision of *The Pioneer Container*[1] reaffirms the first strand and, more importantly, delivers a definitive pronouncement on the second.

Briefly stated, the facts of *The Pioneer Container* were as follows. The plaintiffs shipped goods on board the defendants' vessel, which goods were lost when the vessel sank after a collision. The plaintiffs commenced the present action, issuing a writ *in rem* against the defendants' sister ship, claiming damages for loss of the said goods. The defendants applied for a stay of proceedings on two grounds: first, that by virtue of an exclusive jurisdiction clause in the relevant bills of lading, the plaintiffs had agreed that any dispute would be governed by Chinese law and determined at Taipei in Taiwan; secondly, that taking the circumstances as a whole, Taipei was the natural and appropriate forum for the trial of the action. The Board held in favour of the defendants, holding that the exclusive jurisdiction clause was binding on the plaintiffs and that, on the facts, a stay of proceedings ought to be granted. The present comment, focusing as it does on the bailment context, will only consider the Board's reasoning on the first issue.

Problems arose with regard to the first issue (*viz*, that centring on the effect of the exclusive jurisdiction clause) because two groups of plaintiffs did not in fact have a direct contractual relationship with the defendant shipowners; each group had initially shipped the goods concerned on board vessels owned by different companies which then (in effect) subcontracted the carriage of the goods to the defendants. This raised the question as to whether the clause could in fact bind these plaintiffs in the absence of a contractual nexus. It should be noted at this juncture that although the instant case concerned the issue as to whether or not the burden of an exclusive jurisdiction clause could be placed on a third party (here, the plaintiffs), the reasoning of the Board would undoubtedly apply equally to the effect of exception clauses in similar circumstances.[2] Another (more specific) point should also be noted: in so far as each group of plaintiffs was concerned, the bills of lading issued by the *initial* carriers each contained a similar clause as follows: 'The Carrier shall be *entitled to sub-contract* on *any* terms the whole or any part of [the carriage].'[3]

*Associate Professor, Faculty of Law, National University of Singapore.

1 [1994] 3 WLR 1, [1994] 2 All ER 250. For a note on the Court of Appeal decision (which was unreported; though see the digested judgment in [1992] HKLY 73), see Swadling, 'Sub-Bailment on Terms' [1993] LMCLO 9.

2 And see eg Phang, 'Exception Clauses and Negligence: The Influence of Contract on Bailment and Tort' (1989) 9 OJLS 418.

3 Emphasis added.

The principle in *Morris* v *CW Martin & Sons Ltd*

As mentioned at the outset of the present comment, there were two possible strands of argument. The more orthodox and accepted strand finds its source in the statement of principle by Lord Denning MR in *Morris* v *CW Martin & Sons Ltd*[4] (hereafter the '*Morris* doctrine') to the effect that the bailor (here, the plaintiffs) would be bound by the terms of the sub-bailment (here, the exclusive jurisdiction clause) if it had either expressly or impliedly consented to the head-bailee making a sub-bailment on those terms with the sub-bailee (here, the defendants). Whilst the original authority for this proposition was by no means clear,[5] there has been established a steady stream of judicial authority since *Morris* that has endorsed this proposition.[6] The present decision is yet another endorsement; indeed, Lord Goff of Chieveley, who delivered the judgment of the Board, acknowledged that the proposition 'has proved to be attractive to a number of judges.'[7] Of interest is his observation to the effect that it was not, contrary to dicta in at least one case,[8] necessary to premise the proposition on the doctrine of estoppel, although he acknowledged that estoppel might be relevant if there were recourse to the doctrine of ostensible authority under the law of agency.[9] This, however, still leaves open the question as to what the precise basis of the '*Morris* doctrine' is. Clearly, it could be agency, although the tenor of the judgment, as just briefly alluded to, suggests that agency is by no means the only possible rationale.[10] On the other hand, the explanation centring on estoppel appears now to be a discredited one and, one ought to point out, has almost invariably been the subject of at least academic criticism in any event.[11] Lord Goff appears to suggest that the rationale is really to be found in the specific development in the law of bailment itself[12] — an explanation which, whilst unsatisfactory to persons who prefer the development of the law to be rooted in the prior law, is entirely logical if viewed from the perspective that different categories of the law can, and perhaps even ought to, evolve their own principles.

As already mentioned, the Board held that the '*Morris* doctrine' did indeed apply on the facts of the present case so that the plaintiffs were bound by the exclusive jurisdiction clause. This result is not surprising in view of the wide ambit of the relevant clauses in the bills of lading concerned.[13] It is, however, also interesting to note that perceptions of commercial practicality weighed heavily in favour of the Board's finding in the instant case.[14] This aspect of the Board's approach is very similar to that adopted by the same court in a not unrelated area (pertaining to a third party's reliance on the benefit of an exception clause) in *The Eurymedon*[15]

4 [1966] 1 QB 716, at pp 729–730.
5 See eg Bell, 'Sub-Bailment on Terms' in Palmer and McKendrick (eds), *Interests in Goods* (London: Lloyd's of London Press Ltd, 1993) ch 6, at pp 161–164.
6 See eg *ibid* at pp 164–165.
7 [1994] 3 WLR 1, at p 9; [1994] 2 All ER 250, at p 259. See also *ibid* at pp 12 and 261, respectively.
8 *The Kapetan Markos (No 2)* [1987] 2 Lloyd's Rep 321, at pp 336 and 340.
9 See [1994] 3 WLR 1, at pp 12 and 13; [1994] 2 All ER 250, at pp 261 and 262.
10 cf Bell, n 5 above, at pp 165–167.
11 See eg *ibid* at pp 167–170, and Palmer, 'Sub-Bailment on Terms' [1988] LMCLO 466, at pp 471–472.
12 [1994] 3 WLR 1, at p 10; [1994] 2 All ER 250, at p 259. See also Palmer, n 11 above, at p 472; cf Bell, n 5 above, at pp 170–171.
13 See n 3 above — there was, in other words, *express* consent by the bailors (see [1994] 3 WLR 1, [1994] 2 All ER 250, esp at pp 16 and 265 respectively).
14 See generally [1994] 3 WLR 1, at pp 6 and 17; [1994] 2 All ER 250, at pp 255 and 266.
15 [1975] AC 154.

and *The New York Star*.[16] Indeed, this leads to yet another point. But, before proceeding to consider it (in the next paragraph), it should be observed, from a practical perspective that, after the present decision, one is likely to see, wherever possible, clauses being drafted in as broad a language as that to be found in the instant case. In any event, the same result can be arrived at by simply adopting a broad and flexible approach towards the implication of consent. Admittedly, implication of consent will not necessarily be found automatically: there must be some evidence in the factual matrix that supports such an implication[17]; but flexibility can conceivably be achieved within these very broad limits.[18] And if such flexibility is in fact present, the possible inconsistency with the '*Johnson Matthey* doctrine'[19] (considered in the next section) might well become virtually irrelevant or of academic interest only because there would be no real need to invoke that doctrine if the courts were more inclined towards implying consent on the part of the bailor, provided that there was some evidence in support. Indeed, an automatic implication (which, however, has already been submitted is undesirable) would render the '*Johnson Matthey* doctrine' wholly otiose.

It was also argued by counsel for the plaintiffs that the doctrine contained in the two cases cited in the preceding paragraph, in so far as it afforded the defendant sub-bailees the opportunity to take advantage of exceptions in the bill of lading to which they were not a party, precluded the '*Morris* doctrine' from applying. The Board quite correctly rejected this argument[20]; it did not see anything inconsistent in allowing the sub-bailee the possible invocation of two alternative doctrines and, indeed, pointed out that even if there was an inconsistency between two doctrines, the sub-bailee should nevertheless be allowed to choose which doctrine he intends to rely upon.[21] This approach makes eminently good sense and, in fact, will figure again in the discussion below.

The principle in *Johnson Matthey & Co Ltd* v *Constantine Terminals Ltd and International Express Co Ltd*

The less orthodox strand of argument centres on the doctrine to be found in the judgment of Donaldson J (as he then was) in *Johnson Matthey & Co Ltd* v *Constantine Terminals Ltd and International Express Co Ltd*[22] (hereafter the '*Johnson Matthey* doctrine'). Briefly stated, this particular doctrine goes far beyond the '*Morris* doctrine' in as much as it holds that the bailor is bound by the terms of the sub-bailment *regardless* of consent, as he cannot prove the bailment (upon which the duty and consequent breach as well as action in negligence are premised) without reference to the very terms of the sub-bailment itself.[23] However, the '*Johnson Matthey* doctrine,' perhaps because of its radical cast and

16 [1981] 1 WLR 138.
17 And see the analysis by Steyn J (as he then was) in *Singer Co (UK) Ltd* v *Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164; noted by Palmer, n 11 above, and Phang, n 2 above.
18 Not to mention the invocation (where the facts permit) of the doctrine of ostensible authority under the law of agency: and see *per* Lord Goff himself, n 9 above.
19 See *Johnson Matthey & Co Ltd* v *Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215.
20 See [1994] 3 WLR 1, at p 15; [1994] 2 All ER 250, at p 264.
21 Citing Bell, n 5 above, at pp 178–180.
22 [1976] 2 Lloyd's Rep 215; noted by Coote, 'Exception Clauses in Sub-Contracts' [1977] CLJ 17.
23 Consent being only relevant between the bailor and head bailee, its presence exonerating the latter from liability to the former and vice versa.

the fact that the '*Morris* doctrine' usually applies in any event,[24] has not been the subject of any definitive pronouncement by a higher court. Indeed, in *Singer Co (UK) Ltd* v *Tees and Hartlepool Port Authority*,[25] for example, Steyn J (as he then was) refused to pronounce on its applicability to the facts of the case at hand, preferring to premise his decision on the '*Morris* doctrine.' All this has, however, now changed with the present case, where a definitive pronouncement on the status of the '*Johnson Matthey* doctrine' has in fact been made. Although the *Johnson Matthey* case could not be expressly overruled as such, it cannot, after *The Pioneer Container*, be considered as good law. Lord Goff gave a number of reasons for the Board's inability to accept the '*Johnson Matthey* doctrine.'

First, Lord Goff noted that the '*Johnson Matthey* doctrine' was inconsistent with both the *Morris* case (by which Donaldson J was bound[26]) as well as the Australian Privy Council decision of *Gilchrist Watt and Sanderson Pty Ltd* v *York Products Pty Ltd*.[27] The substantive reasoning proceeded as follows: since the relationship of bailor and bailee between the bailor and the sub-bailee was established by virtue of the voluntary taking of the former's goods (a point established by the two precedents just cited), the bailor can bring his cause of action against the sub-bailee for the breach of a duty of care based on this relationship and does not, therefore, need to rely on the terms of the *sub*-bailment to premise his cause of action. Secondly, Lord Goff was of the view that if the reasoning in the *Johnson Matthey* case were to prevail, the bailor would be bound to accept all the terms of the sub-bailment 'apparently without limit,'[28] even in a situation where the sub-bailment was unauthorised and where, to take an extreme scenario, the sub-bailee knew it to be unauthorised. Such difficulties would not, of course, arise under the '*Morris* doctrine' since consent would be necessary before the bailor could be held to be bound by the terms of the sub-bailment.

Lord Goff viewed the question in this way:

> 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?[29]

After examining two conflicting strands of academic authorities,[30] he arrived at the conclusion that the question posed in the above quotation should be answered in the negative. He was of the view that a positive answer would entail the bailor being bound to accept all the terms of the sub-bailment, 'warts and all,' or at least be held to have ratified these terms by virtue of bringing his cause of action against the sub-bailee if he were to succeed against the sub-bailee at all.[31] A negative answer, which the Board preferred, would entail the bailor being bound by the terms of the sub-bailment only if he had consented to them.

---

24 On the significance of a broad application of this doctrine, see the preceding section.
25 [1988] 2 Lloyd's Rep 164.
26 [1994] 3 WLR 1, at p 11; [1994] 2 All ER 250, at p 261. But cf the discussion of precedent in the 'Conclusion' below.
27 [1970] 1 WLR 1262.
28 [1994] 3 WLR 1, at p 12; [1994] 2 All ER 250, at p 261.
29 *ibid.*
30 *viz* Bell, *Modern Law of Personal Property in England and Ireland* (London: Butterworths, 1989) pp 88–89, on the one hand and Palmer, *Bailment* (Sydney: The Law Book Co Ltd, 2nd ed, 1991), at p 31ff, as well as Tay, 'The Essence of Bailment' (1966) 5 Sydney L Rev 239, on the other. Basically, the former advocates that consent is necessary whilst the latter postulates the contrary proposition.
31 [1994] 3 WLR 1, at p 12; [1994] 2 All ER 250, at p 262. But in so far as ratification is concerned, see now n 32 below.

Several comments may be made on the reasoning of the Board as briefly set out above. First (though less important), whilst it is true that the '*Johnson Matthey* doctrine' goes (as already mentioned) far beyond the '*Morris* doctrine,' it is by no means clear that the two doctrines are wholly irreconcilable — although this appears to be the 'popular' view adopted.[32] It is suggested that both doctrines can, in fact, be viewed as consistent in as much as they can be and have indeed been used as alternative arguments.[33] It should be further noted that the Board saw nothing untoward in the raising of two inconsistent doctrines when meeting plaintiff counsel's argument to the effect that the device embodied in *The Eurymedon* precluded the application of the '*Morris* doctrine' — a point discussed in the preceding section. It is true, of course, that on a more theoretical level the doctrines are quite different, although it has already been briefly suggested in the preceding section that if the consept of consent is liberally applied, there would, in essence, be very little at least practical difference between the two doctrines.

Secondly, it is true that (whatever the difficulties in the early case law) present authorities now clearly establish that the relationship of bailor and bailee arises between the bailor and sub-bailee by virtue of the latter taking voluntary possession of the former's goods. It is respectfully submitted, however, that it does not follow that the duty of care cannot therefore be qualified by the terms of the sub-bailment, except with the consent of the bailor himself. It is suggested that a distinction ought to be drawn between the establishment of the *existence* of the relationship of bailor and bailee on the one hand and the *content* of the duty of care arising out of that relationship on the other.[34] Or, to put it another way, there is no reason in principle why consent is necessary in order to ascertain the precise content of the duty of care owed by the sub-bailee to the bailor. That the sub-bailee has stipulated the terms upon which he assumes his duty to the bailor is not unjustifiable and may, on the contrary, lead to a fair result in the final analysis.[35] If this distinction is accepted, the difficulty embodied in the quotation above[36] is

32 See eg Swadling, n 1 above, especially at pp 10 and 13, and Palmer, n 11 above, at p 473, the latter of whom argues that the '*Johnson Matthey* doctrine' should be seen as an *exception* to the '*Morris* doctrine' (cf also, by the same author, n 30 above, at pp 1643–1644). Cf Bell, n 5 above, at pp 174–175 and n 30, at pp 90–91, who premises his attempted reconciliation of the two doctrines on the principle of ratification under the law of agency; cf also Palmer, n 11 above, especially at p 474. But this approach was rejected by Lord Goff in the instant case: see [1994] 3 WLR 1, at p 12; [1994] 2 All ER 250, at p 261; though cf the comments below. Cf also *Dresser UK Ltd* v *Falcongate Freight Management Ltd* [1992] 2 All ER 450, at p 546, *per* Bingham LJ (referring to 'possible differences' between the two doctrines, but declining to rule on the issue as it was not necessary to do so on the facts at hand).

33 It is, of course, true that whilst the doctrines may lead to the same result, this need not necessarily be the case (hence engendering inconsistency, but more as to consequences). Cf also the absence of practical difference between the two doctrines if the concept of consent is liberally applied: as to which, see the preceding section as well as the main text following.

34 The Board in the instant case apparently assumed that both existence and content were coincident with each other. A slight problem with the drawing of such a distinction may also arise from a cursory reading of part of Donaldson J's judgment in the *Johnson Matthey* case itself, where he observed ([1976] 2 Lloyd's Rep 215, at p 222) that 'the plaintiffs cannot *prove the bailment* upon which . . . they must rely, without referring to the terms upon which [the good concerned] was received' (emphasis added). It is submitted, however, that the learned judge was, in fact, referring to both the existence of the bailor–bailee relationship as well as (more importantly) the content of the duty of care itself.

35 See Phang, n 2 above, at p 420, and the materials cited therein. See further Palmer, n 11 above, at p 473. Indeed, the Board in the present case in fact emphasises the issue of assumption of responsibility by the sub-bailee, but more from the perspective of the *existence* of the bailor–bailee relationship: see [1994] 3 WLR 1, at p 13; [1994] 2 All ER 250, at p 262.

36 n 29 above.

also resolved. It should also be mentioned that the views of Professor Palmer[37] relied upon by the Board to support its conclusion are difficult to reconcile with the same author's views in another part of the work cited that actually endorse the '*Johnson Matthey* doctrine.'[38] The apparent inconsistency in this respect can, again, be resolved by recourse to the distinction just canvassed: the former part of Professor Palmer's work (as relied on by the Board) being taken as referring to the existence of the relationship of bailor and bailee, the latter as referring to the content of the duty of care instead.

It might, however, be argued that to accord primacy to the sub-bailee compared to the bailor is to shift from one extreme to another and that some weight ought to be accorded to the interests of the bailor — the interests of the latter arguably being the focus of the *Morris* decision. Indeed, although we have seen that Professor Palmer supports the '*Johnson Matthey* doctrine,'[39] it is also true that he does appear to attempt to take into account the bailor's interests as well. If this is a correct interpretation of his view, it is a very difficult position to take indeed. This is because the *Johnson Matthey* case does not, on its terms, allow the bailor's interests to be taken into account, since (as we have seen) the consent of the bailor is irrelevant. It is suggested that a closer perusal of Professor Palmer's actual language is necessary. He states that the terms of the sub-bailment 'should constitute the *essential or indispensable* terms upon which the sub-bailee took possession. They should, in Donaldson J's own words, represent an *essential part* of the sub-bailee's consideration; for *not every* provision in the contract of sub-bailment will necessarily be central to the separate relationship between owner and sub-bailee. . . . In some cases the mere presence of exclusion clauses within the sub-bailment may actually be *consistent* with the existence of a duty towards the owner; they will *not* purport to *exclude* that duty but merely to *mitigate the effects of its breach*. In such a case it should by no means follow that the contract of sub-bailment provides a shield against the owner.'[40] It is submitted that, whilst the views just quoted do support the proposition that the bailor's interests should be taken into account, this is more apparent than real. The focus is still on the *sub-bailee* as opposed to the bailor and, in this regard, two further (and related) points should be noted. First, although the exceptional situation postulated by Professor Palmer is theoretically possible, it is difficult to see how (in most cases at least) the bailor is going to be able to prove that the exception clause (or exclusive jurisdiction clause, as was the situation in the instant decision) was not 'central' to the relationship between the bailor and the sub-bailee. Secondly, he appears to be drawing a distinction between exemption clauses on the one hand and limitation clauses on the other,[41] suggesting that whilst the former can operate to negate the sub-bailee's duty of care, the latter does not since it is intended 'merely to mitigate the effects' of a breach of that duty. This is a controversial proposition since the line between an exemption clause and a limitation clause is not as clear as it might seem at first blush. Even if we accept this proposition, it only applies to a situation pertaining to exception clauses and may not impact on other situations (such as that contained in the present case) which then can only be dealt with via the resolution of questions of fact and degree. Finally, it ought to be noted that as the burden of

37 n 30 above.
38 See Palmer, n 30 above, at pp 1325–1327. See also Palmer, n 11 above, at pp 473–474.
39 *ibid.*
40 Palmer, n 30 above, at p 1327 (emphasis added).
41 cf *Ailsa Craig Fishing Co* v *Malvern Fishing Co* [1983] 1 WLR 964 and *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 2 AC 803.

proof is one the sub-bailee to prove that he was not negligent, it is unlikely that acceptance of the '*Johnson Matthey* doctrine' would result in unnecessary injustice to the bailor[42] and mitigates to some extent the Board's concern in the instant case that the bailor would be wholly prejudiced by the application of that doctrine.

Conclusion

The present case, as we have seen, has once again endorsed the '*Morris* doctrine,' although it has not actually clarified its precise basis. It also remains to be seen whether the doctrine can be generalised in order to found an argument for the modification of the standard of the duty of care in a tortious context[43] — a point that did not, of course, arise for decision on the facts of the instant decision.

The greater significance of the present decision lies in the decisive rejection of the '*Johnson Matthey* doctrine.' It is submitted, however, that whilst the reasoning of the Board for such rejection in the instant case is not unpersuasive, there remain persuasive reasons to the contrary. The difficulty, of course, is that the present decision is one emanating from a high judicial body, *viz*, the Judicial Committee of the Privy Council. It is, however, not technically binding on English courts, including the House of Lords, although the House would obviously be reluctant to depart from the holding in the present case. It is, however, certainly no longer binding in other Commonwealth jurisdictions where appeals to the Privy Council have been abolished.

On a rather more general note, Lord Goff's comments on the unsatisfactory state of the doctrine of privity of contract in the present case merely add to the urgency for reform; in his words:

> . . . 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 . . . 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] AC 446, 467–468.[44]

Indeed, recent case law developments in both Australia[45] and Canada[46] have demonstrated the ingenuity of the courts in seeking further ways to avoid the unsatisfactory consequences arising from a strict adherence to the doctrine of privity of contract. There now appears to be a broad consensus across the major Commonwealth jurisdictions that the doctrine ought to be reformed in so far as contracts for the benefit of third parties are concerned, the major issue remaining as to how this might be effected. Reform by way of case law brings, of course, all the difficulties associated with the reluctance to depart from well-established

---

42 See Phang, n 2 above, at p 420.

43 See generally Phang, n 2 above, at pp 421–423. And see now the observations by Lord Goff in the recent House of Lords decision of *Henderson* v *Merrett Syndicates Ltd* [1994] 3 WLR 761, at p 790.

44 [1994] 3 WLR 1, at p 6; [1994] 2 All ER 250, at pp 255–256. Indeed, in the more recent English Court of Appeal decision of *Darlington Borough Council* v *Wiltshier Northern Ltd* [1995] 1 WLR 68, Steyn LJ was even more express in his critique of the privity doctrine.

45 See *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107.

46 See *London Drugs Ltd* v *Kuehne and Nagel International Ltd* [1993] 1 WWR 1.

positions, as well as the varying perceptions the judges would themselves hold with regard to their respective functions[47]; indeed there is, as Steyn LJ very pertinently pointed out in the *Darlington* case,[48] the obvious fact that, in an adversary system, the courts are 'the hostages of the arguments deployed by counsel,' and counsel in the *Darlington* case itself had openly admitted that he would be 'content to try to bring [the] case within exceptions to the privity rule,' rather than launch a direct challenge to the rule itself; and all this, of course, presupposes that the facts would raise the opportunity for such a direct challenge before (in England at least) the House of Lords in the first place. What, then, about reform by way of legislation? After all, even Viscount Simonds in the *Midland Silicones* case, whose views are referred to by Lord Goff in the instant decision,[49] would have allowed for legislative intervention.[50] Such an alternative route is not, however, unambiguously attractive, if nothing else, because, as Steyn LJ acknowledged in the *Darlington* case,[51] '[t]here is a respectable argument that [the reform of the privity rule] is the type of reform which is best achieved by courts working out sensible solutions on a case by case basis.' It has, in fact, been pointed out that general legislation along these lines[52] has, thus far at least, remained 'obscure and little relied on.'[53] In addition, 'the problems of securing private law reform by statute in any but a small jurisdiction are formidable. The lengthy process of consultation, the immense number of interests which adduce different views, the unexpected snags (or issues said to raise snags), the conversion to a statutory draft — all raise serious impediments, quite apart from the securing of Parliamentary time.'[54]

Recent developments in the United Kingdom, however, suggest that the legislative solution may not be too far away, the potential problems notwithstanding. The comprehensive Consultation Paper by the Law Commission[55] proffers suggestions for such reform. Quite apart from the more obvious problems pertaining to the scope and language of the proposed legislation, at least two other (more specific) points are worthy of note. First, the Law Commission provisionally recommends that existing common law as well as statutory exceptions remain.[56] And as Professors Adams and Brownsword perceptively point out, 'Courts minded to avoid the restrictions of privity have any number of resources by which they can achieve such avoidance'[57]; this means, of course, that the relevant authorities can take a little more time to work through the various difficulties as well as implications of legislative reform. On the other hand, the retention of such exceptions entails the danger of an overly complex overlay (in the context of, especially, the common law) which might serve to confuse rather than enlighten, regardless of whether or not legislative reform is ultimately

47 See Reynolds, 'Privity of Contract, the Boundaries of Categories and the Limits of the Judicial Function' (1989) 105 LQR 1, at p 3.
48 [1995] 1 WLR 68, 78.
49 n 44 above.
50 [1962] AC 446, at p 468.
51 [1995] 1 WLR 68, 77.
52 Principally in Australia.
53 Reynolds, n 47 above, at p 3.
54 *ibid* at pp 2–3.
55 See *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Commission Consultation Paper No 121 (London: HMSO, 1991).
56 *ibid* at para 5.38.
57 See Adams and Brownsword, 'Privity of Contract — That Pestilential Nuisance' (1993) 56 MLR 722, at p 731.

forthcoming. Secondly — and more importantly perhaps for the purposes of this comment — the Law Commission clearly confines its recommendations for reform to the issue of benefit and does not deal with the issue where a *burden* is imposed on the third party.[58] In this respect, therefore, the situation in *The Pioneer Container* remains within the sole purview of the common law, and the decision consequently takes on an even weightier role as well as significance. Indeed, although Lord Goff did (at least implicitly) view the fact situation as being part of the larger issue of reform generally,[59] it is respectfully submitted that the situation concerned is, in actuality, one concerning the imposition of a burden rather than the garnering of a benefit.[60] As already mentioned, however, the decision in *The Pioneer Container* may still be departed from, especially in other Commonwealth jurisdictions where there are no longer any appeals to the Privy Council.

58 n 55 above, at para 4.33.
59 See [1994] 3 WLR 1, at p 6; [1994] 2 All ER 250, at pp 255–256.
60 And see the views of the Law Commission itself: n 55 above, at para 3.21, where, in fact, the specific topic of bailment is dealt with.