STANDING OF THE HULL INSURER VIS-À-VIS SUB-CHARTERERS: THE POSSESSORY TITLE PRINCIPLE

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I. INTRODUCTION

In bareboat charterparties, it is common for the parties to include a *co-insurance provision*, *i.e.* a clause providing for the joint insurance of the interests of both the shipowner and the charterer in the same hull policy. According to English case law, this can be interpreted, on the one hand, as meaning that the intention of the parties is to exclude the bareboat charterer's liability for damage he may cause to the vessel during the term of the contract. On the other hand, and as a consequence of the above, it also implies that the insurer, after compensating the owner, cannot claim from the co-insured charterer who caused the damage by way of subrogation.

Furthermore, bareboat charterers frequently exploit the vessel either through time or voyage charters, or even through sub-bareboat charters. In such cases, it is not necessarily the bareboat charterer but the (sub-)charterer who is responsible for the damage to the ship, if any. The question therefore arises whether the insurer can claim by subrogation (or assignment) against the sub-charterer.

This debate arose in the *Ocean Victory* case, where the homonymous vessel had been bareboat chartered and subsequently chartered and sub-chartered, and the damage was caused by the last of the sub-charterers in the chain. After compensating the owner, the hull insurer filed a claim against the first charterer, who, in turn, brought proceedings against the last charterer in the chain. One of the questions that arose was precisely whether the insurer as assignee of the owner's and bareboat charterer's rights could claim against the charterers who caused the damage.

The argument brought forward by the insurer was that, to the extent that the bareboat charterer was liable to the owner for damage to the ship, he himself would have suffered damage and thus had an action against the sub-charterers. However, the UK Supreme Court —in *dicta*, as it had already denied a breach of the charter agreement— applied the theory of the interpretation of the main contract and declared that the inclusion of a co-insurance clause excluded the liability of the charterer for damages to the vessel. It therefore concluded that the hull insurer had no action against the (sub-)charterer based on this argument either.

A few months after the decision was issued, BIMCO published BARECON 2017, which included an amendment to the insurance clause. As it now reads, "(n)otwithstanding that the parties are co-assured, these insurance provisions shall neither

exclude nor discharge liability between the Owners and the Charterers under this Charter Party"; and "(n)othing herein shall prejudice any rights of recovery of the Owners or the Charterers (or their insurers) against third parties". It is clear that the new policy seeks to prevent a similar decision in the future by avoiding the bareboat charterer's absence of liability and, consequently, the insurer's lack of standing against sub-charterers.

But be that as it may, in the *Ocean Victory* case, Lords Sumption and Mance have identified two arguments that could have justified the insurer's standing to claim against the sub-charterers: the *possessory title* and the *performance interest* principles. Although they acknowledged that the former could have been successful, they did not further the analysis because the insurer had not invoked it. This paper therefore aims to elucidate whether the insurer could have based his standing on the possessory title principle.

II. THE POSSESSORY TITLE PRINCIPLE

Under English possessory law, when a good is bailed, the bailor can only claim damages to the asset from the bailee. On the contrary, unless the bailment is at will or gratuitous[1], or permanent damages occur[2], the bailor is not entitled to claim against a damaging third party. In such cases, the bailee, and only he, can claim full compensation from the tortfeasor for the damage undergone by the asset itself. As the Court of Appeal noted in *The Winkfield*, the third-party tortfeasor need not be aware of the rights and obligations between the parties to the bailment and must therefore treat the possessor as the owner of the thing for all purposes, regardless of the rights and obligations between the latter and the true owner[3]. For this reason, "as between bailee and stranger possession gives title"[4] and, if the asset is in his possession, the bailee will be entitled to take legal action against the tortfeasor as if he were the owner of the property[5].

The title held by the bailee is not "a limited interest, but absolute and complete ownership and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself"[6]. Consequently, the bailee is entitled to claim

[1] Frederick Pollock, Robert Samuel Wright, *Essay on Possession in the Common Law* (F.B. Rothman 1985), 166.

[2] *Mears v The London and South Western Railway Company*, 142 ER 1029. See also *Hunter and Others v Canary Wharf Ltd*, [1997] 2 All ER 426 (HL).

[3] *The Winkfield*, [1902] P 42 (CA) at [54]-[55].

[4] [1902] P 42 (CA) at [60].

[5] Andrew P. Bell, *Modern Law of Personal Property in England and Ireland* (1st edn, Butterworths 1989), 76-77; Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell 2009), 317.

[6] [1902] P 42 (CA) at [60].

compensation for the damage suffered by both the bailee and the bailor, which amounts to the market value of the asset, in cases of total loss, or the decrease in value or the repair cost, where the loss is partial[7]. However, this does not mean that any amount received by the bailee from the tortfeasor belongs to him in full, since he must account to the bailor[8].

Furthermore, the possessory title principle is not applicable where: *a)* the wrongdoer defends the action for and on behalf of the true owner; *b)* the conduct giving rise to the claim brought by the bailee has been authorised by the true owner; *c)* the wrongdoer becomes the owner of the property after the damage has occurred. In such cases, the bailee may only recover from the tortfeasor the amount of the damage suffered directly by him[9].

III. POSSESSORY TITLE PRINCIPLE AND BAREBOAT CHARTER AGREEMENTS

There is little doubt as to the fact that the bareboat charterer is the possessor of the ship and that the possessory title principle applies to him. Therefore, if *vis-à-vis the tortfeasor possession is title*, the bareboat charterer should be entitled to bring an action against whoever caused damage to the vessel during the term of the contract. However, it is not clear whether the claim can be brought against *any* person. Where the damage is caused by a third party completely unrelated to the bareboat charterer (e.g. the owner of another ship), and provided the exceptions set out above do not apply, the bareboat charterer seems indeed to have an action against such third party for the damages suffered personally and those of the shipowner, irrespective of whether or not he is exposed to liability towards the latter. However, there are more doubts when the damage is not caused by a person unrelated to the bareboat charterer, but by someone with whom he has a contract, in particular, a sub-bareboat charterer or a time or voyage charterer.

1. The actions of the shipowner and of the bareboat charterer against the sub-bareboat charterer: the sub-bailment

Sub-bareboat charter agreements are subcontracts, *i.e.* the transfer of possession of the vessel is articulated through a separate legal transaction between the bareboat

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[7] Cynthia Hawes, 'Tortious Interference with Goods: Title to Sue' (2011) *CLR* 17(2) 331, 339; Norman Palmer, 327.

[8] [1902] P 42 (CA) at [55]. See also *The Jag Shakti*, [1986] 1 Lloyd's Rep. 1 (PC) at [5]-[6].

[9] Norman Palmer, 323-327. Likewise, Elizabeth Blackburn and Andrew Dinsmore, 'Joint Insurance Issues in the Ocean Victory: The Roads Not Taken' (2018) *LMCLQ* 50, 62.

charterer and the sub-charterer to which the owner is not privy[10]. In bailment terms, a sub-bareboat charter is indeed a sub-bailment, which has been defined as "that relationship which arises whenever a bailee of goods transfers possession to a third party for a limited period or a specific purpose, on the understanding (express or implied) that his own position as bailee is to persist throughout the subsidiary disposition"[11].

Regarding the standing to claim against the sub-bareboat charterer causing total or partial loss to the ship, it has been considered that, "vis-à-vis the bailee, the sub-bailee simply occupies the position of a normal bailee and has the rights and duties of such"[12]. Therefore, the bareboat charterer would have a claim in bailment (*i.e.* in contract) against the sub-bareboat charterer.

On the contrary, the possessory title principle does not seem to allow the parties to the original bareboat charter to bring a claim against the sub-charterer who caused the loss. Indeed, to the extent that, by means of the sub-charter agreement, the charterer transfers possession of the vessel to the sub-charterer, he arguably loses the right to claim against the latter under the mentioned principle. And the same seems to be true for the owner, who has still no possession of the ship.

This latter rule was acknowledged by the Court of Appeal in its decision on the *Morris v Martin* case[13]. Nonetheless, it went on to state that, "*if the sub-bailment is for reward*, the sub-bailee owes to the owner all the duties of a bailee for reward; and the owner can sue the sub-bailee direct for loss of or damage to the goods: and the sub-bailee (unless he is protected by any exempting conditions) is liable unless he can prove that the loss or damage occurred without his fault o that of his servants"[14]. The sub-bailee is thus committed not only towards the sub-bailor with whom he entered the contract (in this case, the bareboat charterer), but also towards the bailor (*i.e.* the shipowner), as if it were

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[10] Therefore, the bareboat charterer continues to be bound to the owner on the same terms as before the sub-charter: Mark Davis, *Bareboat Charters* (2nd edn, Informa 2005), 121.

[11] Norman Palmer, 1240. See also, *China Pacific SA v The Food Corporation of India (The "Winson")*, [1982] 1 Lloyd's Rep. 117 (HL) at [123]; and *Wincanton Ltd v P&O Trans European Ltd*, [2001] EWCA Civ 227 at [13].

[12] Andrew P. Bell, 129.

[13] *Morris v CW Martin & Sons Ltd*, [1965] 2 Lloyd's Rep. 63 (CA).

[14] [1965] 2 Lloyd's Rep. 63 (CA) at [72]. This opinion has been unanimously endorsed by the English courts: *The Owners of Cargo Lately on Board the Vessel KH Enterprise v The Owners of the Vessel Pioneer Container (The "Pioneer Container")*, [1994] UKPC 9; *Owners of Cargo Lately on Board the Ship or Vessel "Starsin" & others v Owners and/or Demise Charterers of the Ship or Vessel "Starsin"*, [2003] UKHL 12; *East West Corp v DKBS 1912*, [2003] EWCA Civ 83.

a true bailment ("collateral" bailment). Accordingly, he is obliged to take reasonable care of the property in relation also to the head bailor[15]. Likewise, although in *Morris* the doctrine of collateral bailment was only associated with *bailment for reward* cases, its application has subsequently been extended to *gratuitous bailment* cases as well[16].

Thus, if the sub-bailee causes damage to the property in his possession by breaching his duties as a bailee, he is also obliged to compensate the head bailor directly[17]. He therefore incurs a double liability: towards the bareboat charterer for breach of his contractual obligations and towards the owner for breach of the obligations inherent to his status as collateral bailee.

However, where the interpretation of the main contract leads, as in *Ocean Victory*, to the exclusion of *inter partes* liability, the bareboat charterer is not entitled to claim against the sub-charterer on the basis of his liability to the owner (which does not exist). In such cases, the only action in which the insurer could be subrogated is that which the shipowner would have under the doctrine of collateral bailment established in *Morris*. This raises the question of whether the sub-bareboat charterer can invoke the provisions of the original charter agreement to discharge his liability towards the shipowner. Initially, the answer seems to be negative: by virtue of the doctrine of privity of contract[18], the sub-charterer could not invoke the exclusion of liability agreed between the owner and the bareboat charterer, as he is a third party not privy to this contract.

Nonetheless, English case law has established a series of exceptions to this rule in cases of sub-bailment. In the *Elder Dempster* case[19], *Elder, Dempster & Co* (the shipper or bailor) entered a contract with *Paterson, Zochonis & Co Ltd* (the charterer or bailee) for the carriage of a cargo of palm oil. For the performance of that contract, the latter entered an agreement with *Griffiths Lewis Steam Navigation Co Ltd* (the carrier or sub-bailee) to charter the vessel *Grelwen*. The goods were delivered directly by their owners to the shipowner, but the master furnished them a bill of lading which was issued in the

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[15] Graham McBain, 'Modernising and Codifying the Law of Bailment' (2008) *JBL* 1, 58; Ewan McKendrick, 'Bailment', in Hugh Bale (ed.), *Chitty on Contracts.* Vol. II. *Specific Contracts* (34th edn, Sweet & Maxwell 2021), 123-124; Norman Palmer, 275.

[16] See *James Buchanan & Co Ltd v Hay's Transport Services Ltd* [1972] 2 Lloyd's Rep. 535 (QBD).

[17] Peter Brinks, *English Private Law*, Vol. II (1st edn, Oxford University Press 2000), 400; Norman Palmer, 1240.

[18] Andrew P. Bell, 'Sub-bailment on Terms: A New Landmark' (1995) *LMCLQ* 177.

[19] *Paterson, Zochonis & Co Ltd v Elder, Dempster & Co Ltd, and Others*, (1924) 18 Ll.L.Rep. 319 (HL).

name of the charterers, so the contract of carriage (the head bailment) was held to exist between the shipper and the charterer. The bill of lading also included a waiver of liability for damage to the goods caused by poor stowage.

The controversy arose because some of the cargo was damaged, and its owner sued both the charterers and the shipowners for damages. By finding that the damage had been caused by poor stowage, the House of Lords held the charterers not to be liable, in accordance with the waiver clause[20]. The question to be decided then was whether or not this clause extended to shipowners, who were not a party to the bill of lading.

The House of Lords unanimously concluded that the shipowners were entitled to rely on the waiver clause contained in the bill of lading, even though they were not a party thereto, albeit on different grounds. In particular, Lord Sumner held a bailment to exist, which nonetheless was made on the same terms as the bill of lading, so the shipowner's obligations to the owner of the goods were the same as those provided for in the document[21] (bailment "on terms"). Consequently, the shipowner was also freed from liability for the damage caused by defective stowage[22].

In this case, the shippers delivered the goods directly to the shipowners and, accordingly, there was no true sub-bailment. However, the reasoning of Lord Sumner was subsequently confirmed by the Privy Council in *The Pioneer Container*[23]. Lord Goff, in analysing the terms of the *collateral bailment* between the *bailor* and the *sub-bailee*, as well as the existing case law to date, agreed with the opinion of Lord Sumner in *Elder Dempster*. He pointed out that, in cases of genuine sub-bailment, the solution could not be otherwise. Since in *The Pioneer Container* the shippers or bailors had delivered the goods to the charterers, who had subsequently loaded them on board the ship, they were deemed to have accepted, albeit impliedly, that the sub-bailment was concluded on the same terms as the first bailment, including the waiver of liability for poor stowage[24].

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[20] Cfr. Robert Merkin, 'Third Party Immunity Granted under Contract', in Robert Merkin (ed.), *Privity of Contract* (Informa Law 2000), 68. See also Law Commission, 'Privity of Contract: Contracts for the Benefit of Third Parties' (Consultation Paper No. 121, 1991), para 3.24.

[21] (1924) 18 Ll.L.Rep. 319 (HL) at [333].

[22] Cfr. Simon Baughen, 'Bailment's Continuing Role in Cargo Claims' (1999) *LMCLQ* 393, 401; Robert Merkin, 68-69; Guenter Treitel and F. M. B. Reynolds *Carver on Bills of Lading* (4th edn, Thomson Reuters, 2017) 428-429.

[23] *The Owners of Cargo Lately on Board the Vessel KH Enterprise v The Owners of the Vessel Pioneer Container (The "Pioneer Container")*, [1994] UKPC 9.

[24] [1994] UKPC 9 at [9]-[10].

In view of the above, it has argued that, in order for the sub-bailee to be able to invoke a bailment on terms, *i.e.* the exoneration of liability based on a clause in the head bailment, two conditions must be met: the consent of the head bailor to the bailee transferring possession of the vessel to the sub-bailee on the same terms as the initial bailment; and the consent of the sub-bailee to acquire possession of the asset on these same terms[25]. Where no express consent is given in the main contract, it will be necessary to ascertain, by way of interpretation, whether or not the owner of the property consented to the sub-bailment being made on the same terms as those of the bailment.

In cases of sub-bareboat charter, the answer accordingly depends on the terms of the agreement between the owner and the bareboat charterer. If it contains a waiver of liability and expressly authorises the charterer to sublet the vessel, without any further conditions, the owner arguably allows the charterer to sub-charter the vessel on the same terms as those provided for in the bareboat charter agreement, thus excluding the liability of the sub-charterer to the same extent as that of the charterer.

Conversely, when the contract does not address this issue, as is the case in both BARECON 89 and BARECON 2001[26], the answer appears to be different. Here the Supreme Court inferred the exclusion of the bareboat charterer's liability from an interpretation of the contract, specifically, the insurance clause, which provides for the joint insurance of the interests of both the shipowner and the charterer. Therefore, unless this clause also provides for the joint insurance of the interests of possible sub-charterers in the same policy, the owner may authorise to sub-charter the ship but not necessarily consent to the waiver of the sub-bareboat charterer's liability. In fact, as the Privy Council pointed out in *The Mahkutai*, the bailor's consent cannot be presumed where it is contrary to the terms of the underlying contract[27].

In my opinion, this is precisely what would happen in the case of bareboat charter agreements concluded under the BARECON policy, in any of its versions, or under similar terms. In its *insurance clause*, the charter party states that the insurances "shall be

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[25] Guenter Treitel and F.M.B. Reynolds, 429 and 441.

[26] BARECON 2017 does not regulate this issue either. However, to the extent that this policy provides that there is no exclusion of liability between the parties to the underlying contract, but that the insurer's compensation of the owner for the damage caused by the bareboat charterer to the ship does not amount to an exclusion of liability, the terms of the policy on this point are irrelevant, insofar as the insurer can base its subrogated action on the liability of the charterer.

[27] [1996] 2 Lloyd's Rep. 1 (PC) at [10]-[11].

arranged by the Charterers to protect the interests of the Owners and the Charterers and the mortgagee(s) (if any), and the Charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint". Certainly, the clause allows the charterer to jointly insure the interests of mortgagees and managers, if any, but is silent as to possible sub-bareboat or time or voyage charterers. Therefore, even if sub-charter were allowed, it could arguably not be inferred that the owner consents to a waiver of the sub-bareboat charterer's liability.

Conversely, if the bareboat charter provided for the insurance of the sub-bareboat charterer's interests in the same hull policy as those of the owner and the bareboat charterer, the answer might well be different. Indeed, since the majority view of the English courts is that the inclusion in the underlying contract of a co-insurance clause is indicative of the parties' intention to exclude liability between them, if the insurance clause also provides for the co-insurance of the sub-charterer, it could be inferred that the shipowner consents to exonerate him on the same terms as the bareboat charterer.

However, this is not usually the case, at least in the standard forms that prevail in international practice, where sub-chartering is rather conditional on the prior express consent of the owner. Indeed, as established by BARECON in all its versions, "[t]he Charterers shall not […] sub-charter the Vessel on a bareboat basis except with the prior consent in writing of the Owners, which shall not be unreasonably withheld, and subject to such terms and conditions as the Owners shall approve" [cl 26 (a) BARECON 2017]. Therefore, in such cases, it will be necessary to determine whether or not the shipowner consents, as well as the terms of the sub-bareboat charterparty.

This raises a further question, namely, as to how the terms of the sub-bailment affect the head bailor; in other words, whether or not a waiver of the bareboat sub-charterer's liability under the sub-bareboat charter would be enforceable against the shipowner. However, this question is not very different from the previous one and the answer again depends on the consent of the head bailor.

Indeed, in the *Morris* case, Lord Denning MR, after stating that the sub-bailee has the same obligations towards the bailor as any bailee and that, therefore, he may incur liability towards the bailor if he causes damage to the property, examined the possibility of the sub-bailee invoking the waiver clauses agreed between the bailee and the sub-bailee. In this regard, he noted that the bailor will be bound by the provisions of the sub-

bailment contract if he has consented, expressly or impliedly, to the bailee entering the contract on those terms, *i.e.* exonerating the sub-bailee from liability[28].

Likewise, in *The Pioneer Container*, the Privy Council had to decide whether the sub-bailee could invoke the exclusive jurisdiction clause in the sub-bailment contract against the claimants. It noted that, even where there is no direct contractual relationship between the bailor and the sub-bailee, if the terms of the sub-bailment are consented to by the head bailor, or the sub-bailor has ostensible authority to enter into the sub-bailment contract on such terms, the sub-bailment agreement will regulate not only the obligations between the sub-bailor and the sub-bailee, but also between the sub-bailee and the head bailor[29]. Consequently, the possibility of the sub-bareboat charterer to invoke the waiver against the owner will also depend on the latter's consent[30].

In view of the above, the answer will arguably not vary from the one given when analysing the entitlement of the sub-bareboat charterer to invoke the liability waiver in favour of the main charterer in the bareboat charterparty. Accordingly, if the bareboat charter merely authorises sub-chartering, without any further requirements, the owner's consent could be inferred from the terms of the charter itself. Thus, if the bareboat charterer's exemption from liability is expressly agreed, the owner, by authorising the sub-charter, arguably allows it to be entered under the same conditions as the bareboat charter agreement itself. On the contrary, if the bareboat charterer's lack of liability is merely inferred from the co-insurance clause contained in the underlying contract, the owner has arguably not consented to the waiver of the sub-charterer's liability, unless the clause provides that the hull policy must also insure the interest of the sub-charterer, together with those of the owner and the bareboat charterer.

Finally, if the bareboat charter agreement requires, as is the case of BARECON, prior consent by the owner, both to the entering of the sub-charter and to its terms, his consent makes his relationship with the sub-bareboat charterer subject to the terms of the

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[28] [1965] 2 Lloyd's Rep. 63 (CA) at [72]. However, Lord Denning MR considered that in the case at hand it could not be inferred from the interpretation of the contract that the bailor consented to waive the sub-bailee's liability.

[29] [1994] UKPC 9 at [8]-[9]. The decision has subsequently been upheld by the English courts: see *e.g. P&O Nedlloyd BV v Utaniko Ltd*, [2003] EWCA Civ 83 at [24]; *Sandeman Coprimar SA v Transitos y Transportes Integrales SL & Ors*, [2003] EWCA Civ 113 at [53]-[63]; *Marine Blast Ltd v Targe Towing Ltd & Anor*, [2004] EWCA Civ 346 at [28]; *Jarl Tra AB & Ors v Convoys Ltd*, [2003] EWHC 1488 (Comm) at [20]-[23].

[30] See Ewan McKendrick, 124-125; Robert Merkin, 87-88; Norman Palmer, 1112.

sub-bareboat charter agreement. And the same should be true for the insurer's subrogated action. This seems to be the best option in practice, as it should arguably avoid disputes on this issue and the courts having to determine, by way of an interpretation of the terms of the main contract, whether or not there is consent on the part of the owner.

2. The bareboat charterer's action against the time or voyage charterer

The situation is different when the bareboat charterer enters a time or voyage charter agreement with a third party. In such cases, the charterer does not acquire possession of the ship, so there is no question of sub-bailment: the bareboat charterer continues to hold the possessory title that entitles him to claim against the tortfeasor. Moreover, since no collateral bailment exists between the owner and the (time or voyage) charterer, the former has arguably no action against the liable party; and insofar as the co-insured bareboat charterer's liability has been excluded, he cannot bring an action based on the damage suffered as a result of his liability towards the owner either. The question then is whether, under the possessory title principle, the bareboat charterer is entitled to claim against the charterer causing damage to or the loss of the ship even though there is a contractual relationship between the bailee (the bareboat charterer) and the tortfeasor (the time or voyage charterer). In other words: is the possessory title principle applicable only to cases of liability in tort or also where an agreement exists?

To the best of my knowledge, all the occasions on which the English courts have addressed the possibility of invoking the possessory title principle involved tort cases. Therefore, there is currently no certain answer as to whether or not the bareboat charterer can bring an action against the time or voyage charterer under this principle. However, in my view, the best arguments are in favour of considering that, for the application of the possessory title principle, the nature of the tortfeasor's liability is irrelevant.

In developing this principle, the courts have never established that it can only be invoked in cases of non-contractual liability. On the contrary, what has been said is that the possession of the damaged property gives a title to its possessor to claim against the wrongdoer for the damage caused to the property itself. The justification and recognition of this action therefore appears to be based solely and exclusively on the existence of a possessory right over the property. In other words, the bailee's standing to claim against the tortfeasor does not depend on the nature of the liability but arises from the simple fact of possessing the damaged property. In fact, as mentioned above, the bailee is entitled to

claim such damages even if he is not exposed to liability towards the bailor, as well as when he has suffered no damage at all.

Moreover, the irrelevance of the nature of the relationship between the bailee and the tortfeasor also seems to be confirmed by the exceptions to this principle. As has been shown, it cannot be invoked where the wrongdoer defends the action in the name of and with power of attorney granted by the true owner; where the conduct giving rise to the claim brought by the bailee was originally committed with the authority of the true owner; and where the wrongdoer becomes, after the damage occurred, the owner of the damaged good. On the contrary, no mention is made to cases where there is a contractual relationship between the plaintiff and the tortfeasor.

It seems clear, therefore, that, at least to date, the application of this principle requires only that the claimant has possession of the property and that there is a third party liable for the damage. Moreover, it seems to follow from the exceptions set out above that the consideration of 'third party' is in respect of the bailment, since the bailee may claim against any tortfeasor who is not the bailor, or who acts without the bailor's authorisation. Therefore, the possessory title principle should arguably entitle the bareboat charterer to claim the full amount of the damage caused to the ship by the time or voyage charterer.

This also seems to be the view of some authors who have addressed the issue, who rely on a number of decisions handed down by Canadian courts. In *Terminal Warehouses Ltd v J H Lock & Sons*[31] and *Tanenbaum v W J Bell Paper Co Ltd*[32], the Court of Appeal of Ontario and the Supreme Court of Ontario, respectively, following the reasoning of the English Court of Appeal in *The Winkfield*, applied the possessory title principle[33] and recognised the bailee's standing to claim the loss caused by a breach of the contract between the wrongdoer and the bailee.

Similarly, the decision of the Queen's Bench in *The Sanix Ace*[34] is indicative that the bailee might be able claim against a tortfeasor with whom he has a contractual relationship. Indeed, in this judgment, it was pointed out that, "[i]n contract, although nominal damages can be awarded, the right to recover substantial damages can be proved

[31] 1958 CanLII 338 (ON CA).

[32] 1960 CanLII 119 (ON SC).

[33] Cfr. Andrew P. Bell, 80.

[34] *Obestain Inc v National Mineral Development Co Ltd (The "Sanix Ace")*, [1987] 1 Lloyd's Rep. 465 (QBD).

by proving possession or ownership of the relevant goods"[35]. But be that as it may, the fact remains that, to date, there is no decision that directly resolves this issue one way or the other. Therefore, although the possessory title principle can in my view be invoked by any possessor against the tortfeasor, irrespective of whether there is a contractual relationship or not, a decision by the English courts on this issue is still pending.

In any event, what seems clear is that, if they end up confirming that the bailee has a claim against any tortfeasor – unless one of the exceptions noted above applies – the hull insurer, after compensating the insured (the shipowner and the bareboat charterer), could be subrogated to the rights of the demise charterer and bring an action against the tortfeasor. If, on the other hand, the courts end up ruling that the possessory title principle can only be invoked against unrelated third parties, the bareboat charterer would have no claim against the time or voyage charterer and, consequently, the insurer would be deprived of the possibility of recovering the sums paid to its insured.

3. The bareboat charterer's action against the sub-time charterer

Finally, and without prejudice of the above, if the charterer were to sub-charter the vessel and the sub-charterer were responsible for the partial or total loss of the vessel (as was the case in the *Ocean Victory* case), the issue would seem to be less doubtful. In these cases, there would be three distinct legal transactions: *a)* the bareboat charter, between the owner and the bareboat charterer; *b)* the time charter, between the bareboat charterer and the time charterer; and *c)* the sub-time or voyage charter, between the time charterer and the sub-charterer.

In other words, the sub-charterer would have no contractual relationship with the bareboat charterer, so it would be a third party for all purposes. Therefore, regardless of the decision that the courts may take on whether or not the possessory title principle can be invoked in cases where there is a contractual relationship between the bailee and the tortfeasor, when the damage is caused by a sub-charterer, this dispute will not arise, so that the bareboat charterer will be entitled to claim for the damage suffered by the vessel and, consequently, the hull insurer will have an action in which to subrogate itself.

[35] [1987] 1 Lloyd's Rep. 465 (QBD) at [468]. Cfr. Andrew P. Bell, 80. This criterion was reiterated in *Scipion Active Trading Fund v Vallis Group Ltd*, [2020] EWHC 1451 (Comm) at [79]; and *Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia*, [2006] EWHC 3030 (Comm) at [95].

IV. CONCLUSIONS

When the parties to a bareboat charter agreement include among the provisions of the contract a clause providing for the joint insurance of the owner and the bareboat charterer under the same hull insurance policy, it is to be understood, unless expressly provided otherwise (as is in the current BARECON 2017), that the parties' intention is to exclude the liability of the bareboat charterer for any (insured) damage that he may cause to the vessel. Accordingly, if the vessel suffers a loss attributable to him, the owner can only ask compensation from the insurer. Moreover, once the latter has indemnified the owner, it will have no recourse against the co-insured bareboat charterer.

If the bareboat charterer sub-bareboat charters the vessel and the damage is caused by the sub-bareboat charterer, the shipowner may have a claim against the latter under the doctrine of collateral bailment, which seems to depend on whether or not the shipowner has consented to release the sub-bareboat charterer from liability. If there is no consent, the shipowner will have an action against the sub-bareboat charterer, and the insurer may therefore be subrogated to its rights and proceed against the sub-charterer. Conversely, if the shipowner does consent to the waiver of the sub-bareboat charterer's liability, either expressly or impliedly, he will have no claim against the sub-bareboat charterer and, accordingly, there would be no action in which the insurer could subrogate itself to recover damages from the tortfeasor.

On the other hand, if the bareboat charterer time or voyage charters the vessel and the last charterer in the chain causes the damage, the owner will have no cause of action. Indeed, when a good is bailed, the bailor is generally not entitled to claim against a third party who has caused the damage. Therefore, only the bareboat charterer would be entitled to claim against the sub-charterer. However, if the *Ocean Victory*'s theory of interpretation of the main contract comes into play, the bareboat charterer will not be able to base his claim on the damage suffered as a result of his liability to the owner.

Nonetheless, the bareboat charterer (and the hull insurer by way of subrogation) can arguably bring a claim against the time or voyage charterer and, in any event, against the sub-time or voyager charterers on the basis of the possessory title principle, under which the bailee is entitled to claim from the tortfeasor the full amount of the damage caused to the transferred property. Conversely, this is unlikely to be the case if the tortfeasor is a sub-bareboat charterer, since, to the extent that the bailee transfers possession of the vessel to him, he will lack the possessory title that entitles him to claim for the damage

suffered by the vessel. However, the insurer could in this case still be subrogated to the rights of the owner, who will have an action against the sub-bareboat charterer, unless his liability has been validly waived.