THE LEGAL POSITION OF SAFE DEPOSIT BOXES IN BANKS

The old practice of keeping valuables for safe custody either in bank's safe or vault has now been more or less displaced in Singapore and Malaysia by what is called by banks the "hiring" or "rental" of safe deposit boxes or lockers. What is now a very controversial question is: what is the relationship between the banker and the customer who rents such a locker?[1]

Unfortunately, English banking law does not offer much help on this question. In fact most of the leading English text books on banking law deal with old cases where admittedly the relationship was that of bailor and bailee.[2] In those days, valuables might be left in a sealed envelope, and if the customer had a personal seal he would make an impression with it on the wax. If not, he would sign his name in ink across the wax when it had set. Alternatively, he might be asked to sign his name across the flap of the envelope and the signature would be covered by a special form of sealing tape, which, if removed, would take the signature with it. Sometimes, the customer would leave the valuables in a locked box, and he would keep the key.[3]

Under the old system outlined above, the bank would either be a gratuitous bailee or a bailee for reward. The duty of care of a gratuitous bailee is well stated in the case of *Giblin* v. *M'Mullen*[4] as follows:

> He is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description.

If however, the bank takes a small charge, it will be held to be a bailee for reward. Thus, it would be bound to adopt at its own expense all appliances and safeguards procurable.[5]

As banks in Singapore and Malaysia today usually take a small charge in hiring out lockers, it is natural that they would like to avoid the

1. In talks with several bank officers in Singapore, it seems that the present practice is to rent out "lockers", *i.e.* safe deposit boxes, and the older practice of keeping valuables for safe custody in a safe at the Bank has disappeared in Singapore.
2. For example, see *Paget's Law of Banking,* 8th ed., 1972, pp. 189-207; Lord Chorley, *Law of Banking,* 6th ed., 1974. See also Holden, *Law and Practice of Banking,* Vol. I, p. 323.
3. See Holden, Vol. I, p. 323.
4. (1868) L.R. 2 P.C. 317.
5. See *Re United Service Co.: Johnston's claim,* (1870) 6 Ch. App. 212.

duty of care applicable to a bailee for reward. Accordingly, in the documents that a person hiring a safe deposit box or a locker has to sign, the terms used are deliberately coined in such a way as to resemble the relationship of "lessor" and "lessee", or "licensor" and "licensee".

Thus, in the document presently used by the Bank of America, which has branches in both Singapore and Malaysia, the person hiring the safe deposit box is called the "renter", and those renting jointly with him (if any) are referred to as "co-tenants". Similarly, in the document used by the Oversea-Chinese Banking Corporation (O.C.B.C.), which is a large local bank with branches in Singapore and Malaysia, it is stated that the bank "agrees to let". The charge made for use of the box is called the "rental".

A slight variation is to be found in the document used by some other banks, where the relationship described is that of licensor and licensee. For example, in the document used by the Lee Wah Bank [6] the hirer is called the "licensee". The money paid for the use of the box is referred to as "the consideration for granting the Licence".

The desired consequence of creating a landlord and tenant (or lessor and lessee) relationship is well put by a writer commenting on the legal implications of a safe deposit box as follows :[7]

> An important consequence of the designation of the relation as that of landlord and tenant is that the safety deposit box company would owe no duty of care towards a box or its contents, unless that is expressly contracted for.

Of course, one cannot expect a bank to "expressly contract for" a duty of care. In fact, it is the other way round. Thus, in the O.C.B.C. form referred to above, one finds this interesting condition (condition 4):[8]

> 4. The Bank shall not be deemed to become a bailee of the contents of the box or any part thereof.. . .

Regarding the relationship of licensor and licensee, the consequences are similar to that of the relationship of landlord and tenant. Perhaps, it is more accurate to call the hirer of a safe deposit box a "licensee", for a licensee has a lesser right to exclusive possession. As is to be expected, a person hiring a safe deposit box in a bank cannot have access to it beyond normal banking hours.

Technically, there is some difference between a lease and a licence, and this is described by Megarry as follows:[9]

> It is of the essence of a lease that the tenant should be given the right to exclusive possession, that is, the right to exclude all other persons from the premises. A right to occupy certain premises for a fixed period cannot

6. This bank is one of the smaller local banks in Singapore. It has been taken over by the United Overseas Bank (U.O.B.) since 1972. It also has branches in Malaysia.

7. Ira. L. Tilzer, (1936) 21 *Cornell Law Quarterly,* 325.

8. At the same time, there is another clause which says that the interest conferred on the hirer is no greater than a *licence* to use the box.

9. R.E. Megarry, *The Law of Real Property,* 3rd ed., p. 624.

> be a tenancy if the person granting the right remains in general control of the property. This is normally the case with rooms in an inn or boarding house, so that a lodger is commonly a mere licensee and not a tenant. It makes no difference that the parties make a formal agreement purporting to be a lease and call themselves landlord and tenant; for the test is one of fact, not one of form.

The question is what is the true relationship of the hirer of a safe deposit box with the bank? Is he the "lessee" (renter) or "licensee" with regard to whom the bank wishes to say that there is no duty of care, or is it still in essence a contract of bailment? To echo the words of Megarry "the test is one of fact, and not one of form".

This question has occupied the attention of American Courts for over three quarters of a century. Thus, one can trace rulings since 1890, where an American court has held that a safe deposit company is a bailee for hire.[10] In 1924, this matter came up once again, with regard to a country bank which advertised safe deposit boxes for rent.[11] The plaintiff rented a box, depositing securities therein. According to its custom, the bank gave the plaintiff one key, and retained the master key itself, both keys being necessary to open the box. The plaintiff's box was burglarized. Both the lower court and the Court of Appeal held that the bank was a bailee for hire. However, it was held that it had exercised such care as was customary with country banks in like circumstances.

It would appear that prior to that decision many legal writers had been inclined towards treating the relationship as that of landlord and tenant. Thus, the writer of a case note on the decision comments:[12]

> Most text writers recognise that some of the factual elements of a normal bailment are lacking and deny that the relation is a bailment, the bank not having possession of the box contents which are generally unknown to it, and the depositor alone having access to the box.... Some of the adherents of this view consider the relation of that as landlord and tenant. ... But the few favouring cases lend scanty support to such a view.. . . 'Bailment' is a mere label of convenience attached to analogous situations in which the courts recognise certain uniform legal relations. The lease of a safe deposit box may actually embody factual elements not present in other situations which the court have called bailments. But where the relation is sufficiently similar to give rise to the same legal relations, overemphasis of the technical accuracy of terminology seems hardly justifiable.

This approach is supported by another writer, Ira L. Tilzer, who further points out that "a great majority of the courts" have termed the relation a bailment, and finally expresses her own view that the relation is that of bailment:[13]

> Whether an instrument is to be construed as a lease or licence, or other arrangement always depends upon the intention of the parties, their relations and circumstances of the situation. Can it be said that the parties intended that a licence or lease should be created with its resulting non-duty of

10. See, e.g. *Roberts* v. *Stuyvesant Safe Deposit Co.* (1890) 123 N.Y. 57, 61.

11. *Young* v. *First National Bank of Oneida* (1924 Tenn.) 265 S.W. 681. See also a note on this case in (1924-25) 34 *Yale Law Journal* 795-796.

12. *Ibid.*

13. See fn. 7, above.

> care on the safe deposit company? This is obviously not the intention of the parties, for the patron of the safety deposit company desires great diligence in the maintenance of modern equipment and devices to safeguard his property.

The opposing American views, as to lease or bailment, were considered in an article by Alice Tay.[14] She refers to the American decision of *Zweere* v. *Thibault*[15] where Sherburne J. was concerned in bringing out the paradigm case on each side. She then comments as follows:[16]

> The more modern practice followed by an increasingly large number of banks and safety deposit companies in offering safe-keeping facilities to the public does not fall within any of these paradigm cases.

She then summarised the practice followed by these banks and companies and the contents of the agreements that are signed, and further states:[17]

> There is a surprising amount of authority in American case law for the proposition that depositing in a box under these conditions still creates a bailment to the bank; indeed, one might say that this is the dominant view.

At the same time she points out that some courts have held that the relationship between the renter and the company is that of lessee-lessor and not that of bailment.[18] She feels that it is possible to argue that the relationship can be of lessor and lessee, and formulates her own view on the liability of banks as follows:[19]

> Its liability rests on the express or implied terms of a specific contract with the renter, on the fact that the company holds itself out as providing a very high degree of protection, such as is normally associated with vaults, safes and banks. Its liabilities under such undertakings (where there has been consideration) are at least as high as those of a bailee for safe-keeping, but this does not mean that the company thereby accepts bailment.

There is no doubt that her views deserve considerable respect. She also points out that to hold that there is no bailment does not impose any hardship on the depositor, for in a claim for damages for negligence it does not require the bank to have possession of the articles deposited. In other words, while there is no "contract" of bailment, a bank can still be liable for negligence in tort.

Nonetheless, the view that the bank is contractually liable, is still prevalent on the American continent. This view forms the dominant theme of a relatively recent article by a Canadian writer on the safe deposit box.[20] In discussing the nature of the basic contract between

14. See "Bailment and the Deposit for Safe-Keeping", (1964) 6 Mal. L.R. 229.

15. 23 A. 2d., 138 A.L.R. 1131 (1942).

16. *Op. cit.,* p. 244.

17. *Op. cit.,* p. 245. She then gives a line of authorities supporting this view.

18. *Op. cit.,* p. 245. Authorities in favour of this view are also given by her.

19. *Op. cit.,* p. 246.

20. A.L. Stein (Q.C.), "The Safety Deposit Vault or Leased Metal Box: The Responsibility of a Bank to its Customer", (1972) 18 *McGill Law Journal* 45.

the parties, he stresses the fact that the intention of the customer in hiring a safe deposit box is to store "valuables or other property and papers". He then states as follows:[21]

> What is more important, however, is not the intended use for deposit, storage, or placement of values in the said box, but the feature of acquiring thereby a form of security and protection which otherwise would not be available to the customer either at his own home or place of business, or by the use of a small safe, or a vault at home....
>
> It is in this feature of special security and protection that the basic relationship between the customer and the bank is to be found....
>
> In consequence it is hardly reasonable to assume, that the customer merely sought to lease a space within which to place certain objects without regard to the security and protection features which are described above.

What is most valuable in his article is that he also analyses the objectives of the bank in providing the use of the safety deposit box. He points out forcefully that in spite of its own choice of nomenclature for the agreement, the very use by the bank of the phrase "safety deposit box" in the documents, shows that the image of security and protection which the banks wishes to project is the most important factor in its agreement and relationship with the customer.[22] He is therefore of the view that in interpreting any clause of the agreement used by the bank, the courts should also take into account the additional obligations which result from, or are the consequences of, the nature of the contract itself, or usage, or the law. He thus poses the intriguing question whether what the bank is providing for is the "safety deposit vault", or a mere "leased metal box".[23]

Terms and conditions used in the documents

Most of the terms and conditions used by the various banks in Singapore and Malaysia, whatever their origin, with regard to safe deposit boxes, are more or less the same. As pointed out at the beginning of this article, there are of course slight variations in emphasis and in wording. The practice involved is also about the same. The safety deposit box is locked by a double lock, for which two keys are given to the customer, and the bank retains a master-key. The box cannot be opened without the use of both sets of keys. Bank regulations also require the customer to sign a card or form upon admission. The customer is also attended by an employee or official of the bank while in the vault where the safe deposit boxes are fixed to the cement wall.

The contents of the forms will invariably contain a condition that the customer can have access to the box during normal or regular banking hours. Customers will also be prohibited to put in any dangerous or explosive substances into the box; indeed it is stipulated that only money, securities, documents, valuables and other like property are to be deposited. Some forms state the nature of the relationship. Some do not. But what can be gathered from them is that the hirer is either

21. *Op. cit.,* p. 51-52.

22. *Op. cit.,* p. 52.

23. *Op. cit.,* p. 59.

a "lessee" (renter) or a licensee. Bailment is either expressly or impliedly ruled out. At the same time, it is only fair to state that the terms and conditions do not imply that there is no duty of care on the part of the bank. While the exact scope of duty of care is not spelled out, it is implied in most of these documents that the bank does owe some "responsibility" provided the terms and conditions are complied with. Thus there is no doubt that banks can be liable, at least, for negligence under the law of tort, depending on the circumstances of the loss to the customer.

Most American banks have a clause stating the standard of care required of them and further place the burden of proof of loss on the customer. This question of burden of proof on the customer is probably implied in documents by other banks, for in any case the bank does not know what the contents of the box are. Accordingly, it is not unfair for the customer to have to prove in the case of alleged loss as to what was in the box and that it had been lost; and further that such loss excludes the valuables removed by himself or his agent. A higher burden would be unfair.

Perhaps it might be relevant to reproduce a clause in the terms and conditions of hire used by an American bank operating in Singapore and Malaysia, namely the Bank of America. Clause 7 is as follows:[24]

> 7. If the Bank use due diligence to prevent admission of any unauthorized person to the said rented box the Bank will not be responsible in any way for the aforesaid box or the contents thereof, and the opening of the box by an unauthorised person shall not be inferable from the loss or the missing therefrom of any of its contents. Renter agrees to notify the Bank immediately of the loss of the keys to said box or either of them.

Stein, in his article referred to earlier,[25] comments on a similar clause as follows:

> It is submitted therefore, that this limitation even if accepted in its full import cannot have any effect other than with respect to those precautions relating to preventing the opening of the box by an unauthorised person. It does not, by its own terms, limit or restrict the other contractual obligations of the bank. Nor is it to be assumed that this standard (ordinary precautions …) is to be applied to all other contractual obligations of the bank in the inexecution thereof.[26]

Stein also feels that the normal rules with respect to presumptions and burden of proof are also offended by this clause. His view is understandable. It is fair to say that the plaintiff should prove the contents of the box, and that it has been lost or is no longer there and such loss excludes the removal of the valuables by himself or his agent. However, the clause stated above goes further, and in fact means

24. Probably American Banks and Canadian Banks have similar provisions. It will be noted that this clause is similar to that which received interpretation by the Canadian Supreme Court in *Mastracchio* v. *La Banque Canadienne Nationale* [1962] S.C.R. 53, and which has been adversely criticised in the article by Mr. Stein in the *McGill Law Journal* (1972), supra. In fact that clause is also numbered "7".

25. See fn. 20, above.

26. *Op. cit.,* p. 54.

that even after the plaintiff has proved these things it cannot be inferred (i.e. there is no presumption) that it has been opened by an unauthorised person. Thus, the plaintiff is supposed to further prove that it was opened by an unauthorized person — who might very well be an officer or employee of the bank. The presumption should be the other way round.

Though there has been losses from safe deposit boxes in Singapore and Malaysia, unfortunately the relationship between the bank and customer has not been tested in this regard in their courts.[27] The legal issues involved would be fascinating, especially in the absence of "English law" within the meaning of the Civil Law Acts of the two countries.

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27. It seems that such cases are not publicised as it would affect the image of security projected by the bank in the eyes of the public; and in deserving cases the bank would make compensation for the loss.

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