GOOD FAITH INTERMEDIATION IN THE LAW OF CONVERSION

The authorities and textbooks alike support a broad common law proposition to the effect that an innocent "handler" of goods without notice of his consignor's lack of title is not liable for conversion to the true owner. The authenticity of the proposition is questionable, the principle supposedly underlying it is obscure, and the case law is argued to be best understood and rationalised in terms of a principle of just compensation.

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I. Introduction

1 Two recent decisions (both of the courts in Singapore) draw attention to a well-known but surprisingly little-developed proposition that a good faith bailee or custodier of goods apparently belonging to or in the unauthorised custody of his consignor is excused from liability in conversion if all that he does is change the custody of those goods (hereinafter the good faith excuse).[1] The first decision, *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd*[2] ("*Tat Seng Machine Movers*"), involved carriers who typically intermediate in a non-transactional manner between sellers and buyers, donors and donees, or owners and repairers, by carrying the goods from the one to the other. It does not appear to differentiate between a carrier who carries goods from a thief who appears to him to be the owner and a sub-carrier who carries goods under a sub-bailment from an intermediate carrier whom he reasonably believes is in authorised custody of the goods.

2 According to the books, the same good faith excuse describes and governs the liability of a broker, dealer or other non-employee agent who intermediates a sale from a non-owner to a good faith purchaser if this is no more than a "ministerial" intermediation. These, unlike the bailee, are intended "transactional" intermediaries. They seek to facilitate, and if they succeed cause, alterations in title; however, it is maintained that they do not convert the goods of the true owner if what they have

1 *Clerk & Lindsell on Torts* (M Jones & A Dugdale eds) (London: Sweet & Maxwell, 20th Ed, 2010) at paras 17-74 and 17-77 refers to this as an exception to strict liability.
2 [2009] 4 SLR(R) 1101.

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done is no more than a ministerial intermediation. The second decision, *Antariksa Logistics Pte Ltd v McTrans Cargo (S) Ltd*[3] ("*Antariksa Logistics*"), appears to affirm this.

3 Both decisions, it is argued, do not hold up well under scrutiny. The first fails to reflect a vital distinction between protecting non-transactional intermediaries such as carriers against ownership-related risks and authority-related risks. The second is puzzling since an agent who merely has custody but not possession when intermediating should hardly be guilty of conversion in the first place. The more fundamental problem is that the extensions suggested in both cases are the product of an ill-defined proposition. The authorities and textbooks alike support a broad common law proposition to the effect that an innocent "handler" of goods without notice of his consignor's lack of title is not liable for conversion to the true owner. The authenticity of the proposition is questionable, the principle supposedly underlying it is obscure, and the case law is argued to be best understood and rationalised in terms of a principle of just compensation.

II. Carrier for ostensible owner

4 The good faith excuse as it applies to carriers who are bailees at will needs to be situated against a larger backcloth. More often than not, a bailee will be a convertor if his bailor is a non-owner and his bailment is not merely a deposit but a bailment for his own use or use on behalf of another.[4] Liability for conversion is strict and it is immaterial whether or not such a bailee knows that he is committing a conversion. In particular, it is immaterial whether or not he has acted in good faith in taking possession subject to the bailor's reversionary interest. Having possession of the property, the bailee for a term will inevitably be interfering with the true owner's right to possession since his intention to use the property must be to exclude all others from possession.[5] The

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3 [2012] 4 SLR 250.

4 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19 at [42]; [2002] 2 AC 883 at 1084, [42], *per* Lord Nicholls:

> Mere possession of another's goods without title is not necessarily inconsistent with the rights of the owner. To constitute conversion detention must be adverse to the owner, excluding him from the goods. It must be accompanied by an intention to keep the goods.

Arguably, therefore, while the pawn of someone else's goods is a conversion on the part of the pawnor (see *Parker v Godin* (1728) 2 Sra 813), the pawnee does commit conversion merely by receiving the goods on pledge. His security title is quite consistent with the right to possession of the true owner since the pledge is invalid.

5 "[A] taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession" is certainly conversion: *Fouldes v Willoughby* (1841) 8 M & W 540 at 550, *per* Rolfe B. But there is no necessary requirement that without exercising ownership, there can be no conversion. The

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private carrier as a bailee at will is also bound to be a convertor since he is in possession, even if his possession is determinable at the will of his bailor, for the purposes of asportation for the use of another. This act of asportation necessarily derogates from the immediate right to possession of the true owner; and in any case, no positive act of withholding is necessary for his possession to be inconsistent with the true owner's immediate right to possession when he is entitled to an immediate and enforceable lien over the goods being carried against the non-owner bailor.[6] Against this backcloth, the excuse which singles out the bailee for carriage operates as a qualification which favours the non-transactional bailee with an innocent mental state.

5 The excuse which postulates that good faith carriage[7] is an excuse to conversion can be traced back to a *dictum* of Blackburn J in *Hollins v Fowler*.[8] Blackburn J in laying down the rule spoke of excusing the bailee for the sake of the bailee's protection. He said:[9]

> [O]n principle, one who deals with goods at the request of the person who has actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody.

6 There is much that is obscure about the supposed principle contained in these remarks. The principle could hardly be a principle of representation, namely, that the carrier of goods from a non-owner nevertheless acts for the true owner. There would be considerable if not insuperable difficulty in accepting a putative representation of the true owner who is unknown to the carrier, certainly when the non-owner does not purport to act as the owner's agent. Nor is it any easier to ascribe the excuse to a principle of deemed representation. Under a principle of deemed representation, what is done for the benefit of the true owner consistent with the minimal rights of a finder or authorised custodier will not involve the doer in liability in conversion to the

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exercise of control over property being detained inconsistent with another's possessory title is also conversion.

6 *Cf* a common carrier who only has a lien after completion of the carriage. Until then, his lien is prospective in nature. See *George Barker (Transport) Ltd v Enyon* [1974] 1 WLR 462 and *De Lorean Motor Car Ltd v Northern Ireland Carriers Ltd* [1982] NI 163. See also *Wiltshire Iron Co v Great Western Railway Co* (1871) LR 6 QB 776 at 780. The alternative view espoused in *Marcq v Christie Manson & Woods Ltd* [2003] EWCA Civ 731; [2004] QB 286 is discussed at para 10 below. It is that a bailee for carriage who is in possession as a carrier insufficiently encroaches on the true owner's right to possession.

7 Understood to include storage and other functions or tasks which are incidental to the carriage.

8 (1874–1875) LR 7 HL 757.

9 *Hollins v Fowler* (1874–1875) LR 7 HL 757 at 766–767.

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true owner. The carrier, however, invariably acts for his own benefit so as to earn the fees of intermediation, and not for the benefit of the non-owner, let alone the true owner.[10]

7 The remarks of Blackburn J also clearly do not indicate that a principle of estoppel is involved. A principle of estoppel requires that the true owner must have consented to the non-owner taking possession or custody in circumstances which mislead a third party including the carrier into supposing that the non-owner is the true owner or his authorised custodier. However, in the circumstances postulated by Blackburn J, consent on the part of the true owner to actual custody in the non-owner is inconsequential.

8 The principle as formulated involves in reality more equiparation than representation. A possible basis for equiparation could be recommended but must in the end be rejected. This is that a true owner who has failed to keep his goods securely in possession must be taken to approve of all things done to those goods that could have been done by a notional finder. If the person in actual custody as an apparent owner were a finder he would have had putative authority to carry the goods to the true owner or his order or to change their custody; and so any such carriage by a *bona fide* carrier for these purposes would be excusable.[11] This principle of equiparation contains a hint of disapprobation of the failure of the true owner to keep his goods securely. While ordinarily the true owner can be as careless as he likes with his own goods in the sense that his negligence in safekeeping them will not disentitle him from recovering them from any convertor, he should not be in a better position than if his goods had been found and held for him on an involuntary bailment by a finder.

9 The problem, however, with this basis is that it bites off more than it can chew. It will not readily accommodate the case of a custodier notionally authorised to be in custody of the true owner's goods. The finder knows that the goods are lost, claims no title to the goods, and stands ready to return the goods to the true owner or his order. However, while the custodier likewise claims no title, he can never cede custody to the true owner's order without specific authority. Any logical equivalence between the hypothesised and notional situation where a true owner has lost his goods which are found by a finder and where he has entrusted the custody of the goods to a custodier is only superficial.

10 In the end, the latter remarks alluding to the notional position of the finder and the authorised custodier as baselines for evaluating the carrier's liability for conversion seem to be limiting the excuse to those acts that are capable of being lawfully performed by a finder or duly authorised custodier. This explains what the limits on the excuse are but sheds no light on the key to the principle of the excuse.

11 A true owner might conceivably also excuse any carriage for the purposes of urgent and necessitous repair of the goods.

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In the latter case, the owner notionally can or may investigate the suitability of the person whom he will place in custody of his goods. Even if it seems right to posit that the true owner cannot complain if all the non-transactional intermediary has done is what a finder could do, it seems wrong to apply the notional attribution of authorised custody to the intermediary where the custodier who engaged the intermediary is an intermeddler. The true owner cannot choose his finder but may choose the person he will authorise as custodier. Consequently, he ought not to be precluded from complaining that the intermeddling notional custodier was not one he would have chosen or from contending that the custodier he would have chosen would not have engaged an intermediary in the first place.

10 Shedding some of these difficulties, Lord Nicholl's formulation of the notion of conversion in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*[12] may seem at first blush to offer a stronger foundation for the good faith excuse. Instead of conceiving the good faith excuse as an exoneration, one could cite it as being a case of insufficient encroachment or an insufficiently extensive encroachment of the true owner's right to possession.[13] This was the view taken by the Court of Appeal in *Marcq v Christie Manson & Woods Ltd*.[14] Good faith handling which is a mere possession will count as being insufficient encroachment on the true owner's right to possession if receipt is *qua* bailee from a purported bailor who was *in actual custody*. In *Tat Seng Machine Movers*,[15] the Court of Appeal in Singapore was also inclined to the same view when it considered whether what the defendant carrier

12 [2002] UKHL 19; [2002] 2 AC 883.

13 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19 at [39]; [2002] 2 AC 883 at 1084, [39], *per* Lord Nicholls of Birkenhead:

> Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, and not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods.

14 [2003] EWCA Civ 731 at [14]; [2004] QB 286 at [14]. The Court of Appeal was dealing with a bailee for sale and would seem to have ignored the fact that a bailee for carriage has an immediate lien enforceable against the non-owner bailor. The court took the view that the mere existence of a possessory lien is inconsequential and will not amount to a sufficient encroachment of the true owner's right to possession. Only the assertion of a possessory lien will be an act of conversion. This, however, seems too wide a proposition since the case relied on, *Tappenden v Artus* [1964] 2 QB 185, was that of a repairman who merely had detention and whose lien only arose upon the completion of repairs. A bailee for carriage has possession and a lien which is immediate once performance of the carriage contract has commenced.

15 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [57].

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had done was merely ministerial or beyond merely ministerial so as to amount to conversion of the true owner's property.[16] As we shall see, ministerial receipt is central to an alternative test to the good faith excuse. According to this formulation, innocent ministerial receipt is an insufficient encroachment to count as conversion. However, the formulation creates its own difficulties. Admittedly, there is a sense in which degrees of encroachment may be a relevant inquiry in a case of conversion. This is because the intention with which an act has been done to the subject property may have to be appraised in the context in which it occurs. This can be seen in the New South Wales case of *Bunning Group Ltd v CHEP Australia Ltd*[17] where Chep as owner of proprietary pallets hired them out to its customers for use in transport, handling and storage. The appellant was not a customer but had received these pallets from its suppliers who were. The Court of Appeal said:[18]

> How people use those goods in transport, handling and storage and whether their use is repugnant to Chep's legal rights incidental to its ownership of the goods is to be assessed in the context of the realistic, practical and honest conduct of business of use of the goods for the evident purposes for which they have been released into the commercial community by Chep.

11 However, it is quite another thing altogether to suggest that the good faith of an intermediary in the conduct of his business ought also to be relevant in relation to the position of a true owner who was never a participant in the market but whose goods were stolen by the apparent owner and released into the market. If conversion is to depend on whether the existence or non-existence of good faith constitutes sufficient or serious encroachment, there is not only uncertainty in the determination of conversion but also inconsistency with the orthodox analysis of conversion which eschews inquiries into the state of mind of the convertor, certainly when there is absent any express or implied relationship between the true owner and the convertor.

12 Superficially, it might also seem attractive to recast the principle of the good faith excuse as a customary principle. There is some authority that if there is a custom binding on all parties, including the true owner, receipt or delivery in reliance on that custom will not be conversion. Good faith reliance on custom will preclude liability in conversion. In *Sanderson v Marsden & Jones*,[19] a carrier delivered by

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16 See *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [48] where the court explained that temporary possession by the carrier or warehouse operator is not a conversion because it does not *sufficiently interfere* with the title to the goods to warrant liability for conversion.

17 [2011] NSWCA 342.

18 *Bunning Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342 at [127].

19 (1922) 10 Ll L Rep 467.

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mistake timber of one consignee to another consignee. The first consignee sued the second who had taken possession of his timber for conversion but it was held that the action failed. Both parties had relied on the custom of the port in taking possession of their respective cargoes and accordingly the second consignee had merely trespassed on the first consignee's timber battens. The important points that must not be missed are that the second consignee had possession and that although both consignees were strangers to each other, both relied on the same custom of the port where the battens were unloaded and delivered. The case therefore will not be of assistance if the true owner is a stranger to the intermediary. Even if the intermediary and the person in actual custody with whom he has dealt are relying on a custom of receipt in good faith, this customary reliance will not be binding on the true owner unless he is also trading in or must be presumed to be a participant in the market, or if the custom is attached to a locality, he resides in that locality.

13 Of course, if there is such a custom it would be eminently reasonable and could seldom be repugnant to the nature of a contract of carriage.[20] It would be grounded in the basic fact that carriers would reasonably refuse to run ownership-related risks when all they seek to do is move the goods from one position to another and when they are not concerned with the value of the goods, charging freight fees by volume, weight or package. However, there is a serious problem with seeing a customary principle in the good faith excuse as formulated. If good faith reliance on custom is to serve as the principle for excusing the good faith carrier from strict liability, there should be actual proof of the existence of the custom in question.[21] Ordinarily, no such custom in the abstract can be presumed as between the claimant and convertor. Nor can a custom be judicially noticed in a dispute between the true owner as bailor and the sub-bailee; even less where the dispute is between a non-owner and a carrier from a purported owner. In any case, in Blackburn J's remarks, there is no suggestion that custom is relevant in any sense.

14 There is a further problem with any presumptive customary principle. The good faith excuse would prove to be anomalously one-sided. As enunciated, it is confined to receipt from an apparent owner in custody or someone apparently authorised to be in custody. It does not embrace the situation where the intermediary is requested by an apparent new owner (such as a buyer who has purchased goods and to whom property has passed) to collect the goods from the seller who is the person in actual custody. If there is a presumptive custom, it would be odd, albeit not impossible, to develop a one-sided custom that

20 See *Chan Cheng Kum v Wah Tat Bank Ltd* [1971–1973] SLR(R) 28.
21 See *Chan Cheng Kum v Wah Tat Bank Ltd* [1971–1973] SLR(R) 28.

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promoted handling for custodiers in fact but not handling for custodiers to be.

III. Another test and suggested rationale

15 An alternative test to the good faith excuse has been formulated in terms of ministerial receipt as follows:[22]

> [A] merely ministerial handling of goods at the request of an apparent owner having the actual control of them is not a conversion and a handling is ministerial where it merely changes the position of the goods and not the property in them.

This test (hereinafter the innocent ministerial receipt rule) was identified by the UK Law Reform Committee as one of two alternative tests, the other being the good faith excuse stated by Blackburn J. The principle embodied in this test is equally obscure. In its report, the Law Reform Committee took the notion of innocent handling for granted and therefore did not address the principle underlying it. Nor did it suppose that a different principle was embodied in the test. It considered that what was problematic was to draw the boundaries of innocent handling but omitted to provide a definitive opinion, leaving no further clue as to what the actuating principle might be.

16 The Committee thought that the alternative test was clearly different in some respects from that stated by Blackburn J.[23] But considered on its own terms, the ministerial receipt rule can hardly be clearer than the good faith excuse stated by Blackburn J. It introduces a superadded notion of ministerial receipt which then needs to be defined with precision. Depending on what that means, the rule could be both broader and narrower than the good faith excuse. It will be broader if it extends to persons who are reasonably believed by the intermediary to be intermediate bailors. The key to ministerial receipt according to the Committee lies in changing the position of goods without altering the title to them. That notion too is vague. It could bear the narrow meaning of the non-transactional intermediary retaining for or returning custody to his consignor. It could envisage a wider notion of change of custody to another intermediary custodier whether appointed by the intermediary as agent for the consignor or by the consignor or an even wider notion of change of custody accompanied by control whereby the consignor delivers possession of the goods to a sub-bailee under a sub-bailment for carriage. For that matter, it could even

22 United Kingdom, Law Reform Committee, *Eighteenth Report (Conversion and Detinue)* (Cmnd 4774, September 1971) at para 46.

23 United Kingdom, Law Reform Committee, *Eighteenth Report (Conversion and Detinue)* (Cmnd 4774, September 1971) at para 47.

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embrace changing the custody from the consignor to the consignor's buyer in circumstances where the intermediary as a transactional intermediary has played a part in concluding or implementing the sale between them. Such wider notions are possible simply because actual possession includes custody and a change of actual possession entails a change of custody.

17 In Singapore, there is now authority, not only preferring the alternative test, as did the English Court of Appeal in *Marcq v Christie Manson & Woods Ltd*,[24] but also giving the notion of change of position an extended meaning of change of possession without altering the title.[25] The alternative test was adopted in *Tat Seng Machine Movers*, where the Singapore Court of Appeal also suggested a commercial rationale for the innocent ministerial receipt rule. The court supposed that the ministerial receipt rule was a concession to justice since:[26]

> … the rigorous and unthinking application of … a rule of strict liability could lead to injustice, and perhaps even constrict the growth and flow of commercial dealings; especially among those involved in the transportation and storage of goods industries.

For the sake of keeping down business costs and fostering trade, the rule was needed since carriers or other handlers "routinely deal with goods belonging to other parties, often without having the practical means to ascertain and verify ownership of the goods received".[27] By way of elaborating the court's view, one could suggest that there are considerable economic advantages under a ministerial receipt rule because a bailee for carriage who is a non-transactional intermediary would otherwise be at undue risk of being sued (being more likely a business or trade) for more than the costs of carriage. Even if such costs could ultimately be recovered from the non-owner joint convertor, the carrier would be out of pocket in the meantime. He would be permanently disadvantaged if the non-owner decamped abroad and could not be found or became insolvent. Furthermore, the carrier *ex hypothesi* would have parted with possession and having lost his lien would be at a disadvantage when attempting to recover these losses from the apparent owner or authorised custodier or the person to whom he delivered the goods on the order of the apparent owner or apparently authorised custodier. Protection by way of third-party insurance would

24 [2003] EWCA Civ 731 at [14]; [2004] QB 286 at [14].

25 *Clerk & Lindsell on Torts* (M Jones & A Dugdale eds) (London: Sweet & Maxwell, 20th Ed, 2010) at para 17-77 also contemplates that a sub-bailee acting on his bailor's orders without notice of any lack of title is not liable to the true owner for conversion.

26 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [43].

27 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [43].

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also be problematic since the non-transactional intermediary would ordinarily lack knowledge of the value of the goods to be carried as well as of their provenance to be able to obtain adequate or appropriate cover.

18 This functional conception of the rule probably explains why the Court of Appeal not only adopted the alternative test but also appeared to have applied it affirmatively to a good faith sub-carrier who carries the goods on behalf of a carrier. The material facts in *Tat Seng Machine Movers* involved transportation, storage and redelivery (not to the apparent owner) but to the apparent owner's order. Orix Leasing Singapore Ltd, the true owner and head bailor who had not consented to the intermediate bailor creating a sub-bailment to the ultimate bailee, had sued the ultimate bailee for converting its goods. The Court of Appeal held that the ultimate bailee was absolved from liability in conversion for first carrying the true owner's property to a place of storage and subsequently redelivering it to the intermediate bailor (a lessee of the property under an equipment lease).[28] It was not altogether clear whether the sub-bailee reasonably believed that the intermediate bailor was the owner of the equipment or merely an authorised custodier, with no notice that he was actually only an intermediate bailor committing a breach of bailment.[29] There was no clear finding of fact in the lower court on this point and no clear reference to the distinction between ostensible ownership and ostensibly authorised custodiership in the appellate court. In holding that the delivery for purposes of storage and ensuing redelivery by the ultimate bailee to the order of the intermediate bailor were purely ministerial acts as opposed to acts of conversion, the court was of course concerned with whether the intermediate bailor had converted the goods of the true owner who was the head bailor. However, this inquiry was pursued for the sake of establishing the true owner's immediate right to

28 The intermediate bailor was a hirer under a hire-purchase agreement. For the purposes of moving certain highly specialised printing machinery, Kenzone acted as its agent to arrange for carriage of the machinery by the ultimate bailee, Tat Seng. There was no specific finding that Kenzone was merely an agent without custody but the findings of fact are consistent with this. When Tat Seng took possession of the machinery, it did so directly from the head bailor's premises. Although it was initially contemplated that the goods would be stored somewhere else, at the 11th hour it was discovered that the intended place of storage would not be suitable. The ultimate bailee was persuaded to store the goods in the outside yard of its own premises until redelivery. So the ultimate bailee was not only a carrier but also acted as a storekeeper and eventually delivered possession of the goods to the intermediate bailor's bailee who appeared to be a Malaysian transportation company. The machinery was alleged to have been sold but there was no finding that the defendant bailee was aware of this.

29 The authorities discussed in the judgment show that an intermediate bailor commits conversion if he creates an unauthorised sub-bailment which exposes the bailor to unjustifiable risks.

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possession and not as proof that there was something distinguishing about the fact that the invalid bailment was actually an unauthorised sub-bailment. In therefore holding that the ultimate sub-bailee was not liable for conversion, the court would seem to have accepted that as long as the ultimate sub-bailee was merely acting ministerially it did not matter whether he thought he was dealing with an ostensible owner or merely an intermediate bailor.

19 Superficially, absolving the ultimate sub-bailee from liability for conversion where the person in actual custody was believed to be an intermediate bailor and not only where he was believed to be an apparent owner would promote the business of transporting goods. Closer examination, however, raises questions about whether this extended notion of ministerial receipt to cover receipt as a sub-bailee is right. In such cases, the lack of title of the intermediate bailor has to be proved. The true owner as head bailor could not have proceeded against the ultimate bailee without joining the intermediate bailor and proving that his right to immediate possession had revived or without the ultimate sub-bailee impleading the intermediate bailor. If so, the ultimate sub-bailee would not be exposed to the risk of being put out of pocket and disadvantaged. With the intermediate bailor as a party to the proceedings, the court would be obliged to assess damages differentially as between the intermediate bailor and the ultimate sub-bailee. The disadvantage which would otherwise have been incurred by the ultimate sub-bailee of having to bear the full loss of the value of the goods in substance for the act of conversion of the intermediate bailor would not arise.

IV. Other problems

20 There are other problems with an extension of the good faith excuse or ministerial receipt rule to sub-bailments created by an apparently authorised custodier such as an intermediate bailor. Under the test stated by Blackburn J, considerable doubts exist as to whether the good faith excuse should be available where the ultimate bailee knows that his bailor is an intermediate bailor but supposes that the intermediate bailor has authority (which does not in fact exist) to create the sub-bailment in question. Blackburn J would seem to have contemplated a reasonable belief of authority to be in custody and excusing only very limited dealings by the authorised custodier.[30] Such a custodier would only be entitled to continue to detain the owner's goods

30 He could not have been contemplating a true case of ostensible authority whereby the true owner would be bound to recognise the authenticity of the bailment created by the entrusted custodier (despite the latter's lack of actual authority to do so).

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or return them to the owner. A notionally authorised custodier clearly would not be empowered to create a sub-bailment.

21 Further, very different risks are involved in the extended situation where the sub-carrier is carrying the goods on behalf of the carrier. Where the person in actual custody purports to be the owner and the bailee for carriage deals with him as such, the ministerial receipt rule relieves the bailee from having to bear the risks of non-ownership. Where, however, the person in actual custody purports to be authorised to create a sub-bailment binding on the true owner and the ultimate bailee deals with him on the basis of his authority to create a sub-bailment, applying the rule to the ultimate bailee would relieve him from the risks of absence of authority to create a sub-bailment. No risks of non-ownership are involved in the extended situation and it is against these risks that the good faith excuse or ministerial receipt rule is intended to safeguard. The commercial rationale already mentioned makes good sense if it is confined to safeguarding ownership-related risks. It ought, however, to be irrelevant where the only risks implicated are authority-related risks.[31] Such risks are peculiar to all who participate in the transportation business, whether as carrier or sub-carrier. They are readily accommodated by them since market participants are typically repeat players, knowledgeable about the business of fellow participants, and in a position to evaluate and protect themselves against authority-related risks. Indeed, as a general rule, the bailor implicitly warrants that he has authority to create a sub-bailment[32] and, in any case, under the contract of carriage in the Singapore case, the intermediate bailor had warranted that he had been authorised by the owner to create a bailment. Put another way, the ultimate sub-bailee had shifted the authority-related risks back to the intermediate bailor or consignor. It is puzzling why this, however, made no impact on the decision.[33] There

31 There is a more exceptional situation where the non-owner purports to be only an intermediate bailor and the ultimate bailee deals with him on that basis. This situation involves both ownership-related risks and authority-related risks. In substance, however, the ownership-related risks are paramount while the authority-related risks are incidental. In this situation, the good faith ultimate bailee is indistinguishable from the good faith bailee and will not be liable for conversion by his act of asportation.

32 See *Webb v Ireland* [1988] IRLM 565 which establishes that the bailor warrants that he has a right to bail (for consensual bailment at any rate). See also *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318.

33 Where the true owner is the head bailor, there may also be a question of title by agency or estoppel. If the intermediate bailor is also a mercantile agent of the true owner or if he is otherwise put in a position to create an estoppel by the true owner, a *nemo dat* exception will protect all good faith purchasers, including arguably the ultimate bailee. The true owner who is estopped from asserting title against others will have recourse only to the intermediate bailor. This of course was not the case before the Court of Appeal where the intermediate bailor dealt with the equipment as purported owner in the absence of any circumstance capable of giving rise to an estoppel on the part of the true owner. There were no notices

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would again be little or no reason to intervene on behalf of the sub-ultimate bailee if, and this was the case, he had provided for the strict recovery from the intermediate bailor of any losses incurred as a result of the intermediate bailor's lack of authority to create the sub-bailment. In short, the extended scope of the ministerial receipt rule was not actually consistent with the commercial rationale which appealed to the Court of Appeal when it adopted the ministerial receipt rule.

22 Significantly, there is no previous authority that goes to the length of protecting the sub-bailee carrying goods for an intermediate bailor against the true owner. Prior authorities only support excusing a bailee under a bailment of carriage for an apparent owner. In *Hollins v Fowler*,[34] Blackburn J supposed by way of an illustrated argument that:[35]

> … the Defendant had sent the delivery order to *Micholls*, who had handed it to the railway company, requesting them by means of it to procure the goods in *Liverpool* and carry them to *Stockport*. He thought that if the railway company had done so, the railway company would not have been guilty of a conversion.

However, that argument premised not an authorised custodier creating a sub-bailment but a delivery order given by the apparent owner and a bailment from an apparent owner arranged through the agency of Micholls, as opposed to a sub-bailment from Micholls as an intermediate bailor. In *National Mercantile Bank Ltd v Rymill*,[36] the defendant-auctioneer was given horses to sell by a rogue. While the horses were as yet unsold and in the defendant's yard, the rogue sold them by private contract and gave the purchaser a delivery order. Aside from receiving a commission from the sale, paying the balance to the rogue and delivering the horses to the purchaser against the delivery order, the defendant was not involved in the sale of the horses. It was held that he was not liable for conversion of the horses. This too was a case of a bailment given by the apparent owner and a delivery to the order of the apparent owner, as opposed to a sub-bailment from an intermediate bailor.

23 The subsequent Singapore case of *Antariksa Logistics* is also distinguishable. It provides no additional support for any extension of the innocent ministerial receipt rule to sub-intermediation by way of a sub-bailment. In this recent case, the Singapore High Court only seems

informing third parties of the hire-purchase but it could not be suggested that the omission to display such notices amounted to an estoppel on the part of the true owner.

34 (1874–1875) LR 7 HL 757.

35 *Hollins v Fowler* (1874–1875) LR 7 HL 757 at 767.

36 (1881) 44 LT 767.

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to have applied the extended notion of ministerial receipt to embrace not a change of custody but a change of possession by the creation of a sub-bailment. The material facts are a little obscure as to whether the second intermediate freight forwarder, who was the source of the dispute, had possession as an intermediate bailor or merely custody as an agent or was merely an agent with neither possession nor custody. The suit in conversion was brought by a first intermediate bailor who, having shipped the goods, had arranged with the second freight forwarder to receive the goods, obtain customs clearance, and arrange container transport to designated warehouses in Indonesia. On arrival, the goods were delivered to a temporary hoarding area used by the carrier where they were detained by the Indonesian Customs. Subsequently, the second freight forwarder arranged for the shipment of the goods back to Singapore but contrary to the instructions of the first intermediate freight forwarder procured the bills of lading to be issued in the name of the defendant consignees instead of the first intermediate bailor. The result was that the defendant took delivery of the goods as consignee to the exclusion of the first intermediate bailor. Supposing that the second freight forwarder was a second intermediate bailor, as a bailee of the first intermediate bailor,[37] the decision would seem to be that the defendants as consignees of the second intermediate bailor pursuant to a sub-bailment would have been entitled to rely on the ministerial receipt rule if they had received the bill of lading, naming them as consignees, in good faith. After all, the High Court in Singapore did not doubt the applicability of the ministerial receipt rule on principle but held on the facts that the defendants were not in good faith.[38] Supposing, as would be more compatible with the facts, that the second freight forwarder was merely an agent in custody and not an intermediate bailor, the High Court would apparently have held the rule applicable if the defendant ultimate bailees had been in good faith.

37 There was actually no clear finding of fact that the second freight forwarder was the first freight forwarder's bailee. In *Antariksa Logistics Pte Ltd v McTrans Cargo (S) Ltd* [2012] 4 SLR 250 at [56], the court described the second freight forwarder as a receiving agent (*ie*, sub-bailee) to arrange for shipment of the goods back to Singapore. At [57], the court held that the sub-bailment terminated when the second freight forwarder breached his sub-bailment by switching the name of the consignee on the bills of lading without authorisation from the first freight forwarder. However, the other facts show that the second freight forwarder merely arranged for the issue of the bills of lading in respect of the shipment back to Singapore and are more consistent with the carrier obtaining direct custody of the cargo from the temporary hoarding area with the export permit which the carrier had obtained from the second freight forwarder.

38 The High Court considered that the defendants were aware that they were substituted consignees, that Prolink Logistics had no authority to substitute them for the plaintiffs as original consignees, and that they were assisting in the interference of the plaintiffs' immediate right to possession.

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24 In any case, even if the defendant had been in good faith, the ministerial receipt rule in that case could not have been applied on its terms since the second freight forwarder, whether he was an agent or bailee, was very probably not in custody of the goods at the material time. At the material time, the Indonesian Customs had custody of the goods while the first intermediate bailor had possession. Although there seems to be a gap in the fact-finding, the carrier engaged to carry the goods to be released by the Indonesian Customs back to Singapore probably obtained possession of the goods direct from the Indonesian Customs with the export permit that the second freight forwarder had requested and eventually obtained. So arguably when the second freight forwarder purported to give possession of the goods to the defendant consignees, they did not have custody and the defendants had consequently not obtained possession from a person in custody of the goods. There is no doubt, however, that the innocent ministerial receipt rule like the good faith excuse predicates intermediation with a person in actual custody. So as to provide the necessary context for applying the innocent ministerial receipt rule, it would be necessary to suppose that notwithstanding that the freight forwarder was not in actual custody, as the freight forwarder were the shippers of the goods under new bills of lading, which they procured in the name of the ultimate bailees, they should be regarded as having *eo instanti* obtained constructive possession and therefore custody of the goods before the ultimate bailee obtained possession through delivery of the documents of title. Whatever the merits of such convolution may be, there is no doubt that the reasoning would not be a simple one.

V. The good faith agent

25 If the good faith excuse or ministerial receipt rule should not apply to a dealing by way of sub-bailment by someone believed to be in authorised custody, there is even less reason to extend it to an agent who takes custody on behalf of a person in actual custody.[39] In *Clerk & Lindsell on Torts*,[40] the learned editors discuss the subject under two separate subheadings.[41] The ministerial receipt rule is supposed to be applicable to an agent not intending to alter the property. Blackburn J's good faith excuse is cited for the case of a bailee acting on the bailor's orders. There is at least one significant difference between the two categories. Whereas a good faith agent who delivers to a successful bidder at an auction conducted by the agent commits a conversion,

39 In all places, the common assumption is that an excusable intermediary will be a non-employee agent and that employee agents are outwith the good faith excuse.

40 *Clerk & Lindsell on Torts* (M Jones & A Dugdale eds) (London: Sweet & Maxwell, 20th Ed, 2010) at paras 17-75–17-78.

41 The discussions are sub-headed "Agent not intending to alter property" and "Bailee acting on bailor's orders".

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a good faith bailee who delivers to the order of the bailor does not commit a conversion even though the delivery is for the purposes, known to the bailee, of a sale made between the bailor and the person to whom the bailee has delivered the goods. The UK Law Commission, however, did not see any real distinction between a good faith bailee and a good faith agent in this respect and referred to both generically as innocent handlers.[42] Perhaps influenced by this, as well as by the fact that the ministerial receipt test de-emphasises the distinction, the Court of Appeal in *Tat Seng Machine Movers* appears to have considered the question more broadly in terms of the position of any intermediary, whether a bailee or an agent, and to have comprehended the notion of ministerial receipt as embracing both taking possession for the purposes of carriage and taking custody.[43] The Singapore High Court in *Antariksa Logistics* taking that cue also read the judgment of the Court of Appeal and the ministerial receipt rule in similarly broad terms. With respect, there may well have been a too ready assumption that the good faith excuse or ministerial receipt rule covers any agent appointed as custodier of goods by the apparent owner or authorised custodier.

26 This assumption seems quite amiss because ordinarily an agent in custody of the goods is not guilty of conversion by reason only that his principal is without title. The good faith excuse or ministerial receipt rule would be redundant if the agent in custody is seldom liable, which is the case. Unless the agent custodier has done an act going beyond retaining custody and amounting to excluding the true owner's right to possession, it is his principal in possession who converts the true owner's goods. For instance, an agent who is appointed to pack the apparent owner's goods is given custody of them so that he may pack them. He clearly does not commit a conversion of the true owner's goods when he does so.[44] Nor does he commit a conversion when after the task given to him is completed; he surrenders custody to the principal or the principal's agent. Again, where the agent acts only in facilitating negotiations between his principal and another, and after the sale is struck, has no part in the delivery (because the property is delivered direct to the buyer, say), he cannot be sued in conversion if his principal turns out to be without title. He has had neither custody nor possession and his act at the most was an instigation to the principal to commit conversion.[45] Even if he had notice that another party has better title to the property, not having custody, he would not have been in any position to influence its movement from the principal to the principal's

42 See United Kingdom, Law Reform Committee, *Eighteenth Report (Conversion and Detinue)* (Cmnd 4774, September 1971) at para 46.

43 See also *Halsbury's Laws of Singapore* vol 18 (Singapore: LexisNexis, 2012 Reissue) at para 240.534, which draws no distinction between the agent and the bailee.

44 See *Hollins v Fowler* (1872) LR 7 QB 616 at 630.

45 See *Greenway v Fisher* (1824) 1 C & P 190.

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transferee. Not having possession, he could not be said in the absence of some other act denying the true owner's control to have exercised control inconsistent with the true owner's right to possession. His liability if any would turn on whether he had conspired to injure the owner's interest. In these circumstances, his lack of good faith alone could not possibly be enough to find him guilty of conversion though it might result in other tortious liability.

27 On the other hand, if the agent in custody purports to exercise control over the goods, for instance by taking possession of them, he will either convert them or commit a trespass. Against his principal, he commits a trespass if by exerting control in breach of instructions he is doing so for his principal's benefit. He commits a conversion if he is doing this for his own benefit. Where his principal is a non-owner, he commits a conversion if he exerts control whether for his own benefit or that of his principal. Suppose for instance forwarding agents are tasked merely to procure the release of the principal's goods which are held by the Indonesian customs.[46] If instead of doing so and retaining custody on behalf of the principal, they switch the name of the consignees in the bill of lading and deliver the bill in the defendants' name to the defendants, they commit a conversion. By exerting control and taking possession of the goods, thereby excluding the true owner from possession, they commit a conversion of the true owner's goods. The agent's state of mind is still irrelevant. The question is entirely whether he purports to exert control of the goods, so as to go beyond merely retaining custody of them. The agent's good faith or lack of good faith is likewise of no or, at the most, secondary importance. Even if he is ignorant of the principal's lack of title, his exerting control for the principal's benefit is a conversion of the true owner's goods. Conversely, his knowledge that his principal lacks title does not add anything to his deliberate exertion of control; albeit the knowledge may be evidence that his acts of retaining custody are a deliberate and not an accidental exertion of control.

28 The point that the good faith excuse or ministerial receipt rule is superfluous in relation to an agent with custody can be reinforced in four ways. First, by comparison to an employee agent who is given custody of his employer's goods, such employee agent is not liable for conversion if the true owner is some other person. If it is not needful to speak of excusing the employee agent, why should a non-employee agent be excused? If an employee agent is seldom liable for conversion when all he does is carry out his employer's instructions to handle the goods, it seems anomalous to suppose that the non-employee agent who

46 Since they appeared not to have taken delivery of goods which were held in a customs warehouse.

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is merely a custodier should be liable without more for conversion but would be excused from liability.

29 Second, by comparison with the suggested distinction based on ministerial receipt, the distinction between custody and control is vastly clearer and more consistent with the need for clarity in relation to strict liability. As *Clerk & Lindsell on Torts* acknowledge,[47] the notion of ministerial receipt is difficult to make precise.

30 Third, there is no previous authority to support the notion of ministerial receipt by a good faith agent. In *Marcq v Christie Manson & Woods Ltd*, the claimant alleged that he was the owner of a stolen painting and that the defendant auctioneer's "bailor" was only a purchaser ultimately from the thief. The bailor had delivered the painting to the defendant auctioneers for sale at auction and as the painting failed to meet its reserve price, the auctioneers duly returned it to the bailor who eventually sold it. It was held that where an auctioneer has received goods as bailee for auction from a non-owner in good faith and without notice, he will be not liable in conversion to the true owner if, having failed to sell the goods, he has merely delivered them back to the non-owner. He would be liable only if his contract with the non-owner amounted to a pledge of the goods or conferred security rights on him[48] or if there had been a sale in which he was sufficiently involved, followed by delivery to the purchaser.[49] In the English Court of Appeal case, the defendant auctioneers were not involved in the eventual sale and in returning the property to the seller had done no more that changed the position of the goods. This case clearly falls within the good faith excuse or ministerial receipt rule since the auctioneer's client, the bailor, dealt as ostensible owner, and the auctioneer received the painting as bailee receiving it from the bailor who was in custody and

47 *Clerk & Lindsell on Torts* (M Jones & A Dugdale eds) (London: Sweet & Maxwell, 20th Ed, 2010) at para 17-76.

48 The auctioneers had a contractual lien with power to sell in respect of the painting which, however, was never exercised. Even so, the mere creation of a lien with residual right to sell will not be construed as the provision of security for some future debt "because otherwise any custodian who takes a lien over goods with a residual right to sell (as most do) would be a pledgee". See *Marcq v Christie Manson & Woods Ltd* [2003] EWCA Civ 731; [2004] QB 286.

49 See *Marcq v Christie Manson & Woods Ltd* [2003] EWCA Civ 731 at [24]; [2004] QB 286 at [24], *per* Tuckey LJ: "The auctioneer intends to sell and if he does so will incur liability if he delivers the goods to the buyer." It follows that the auctioneer who has sold the property but as yet not delivered to the purchaser should redeliver to the seller so as to avoid liability for conversion. However, this is a little hard to follow since the auctioneer would have changed the property in the goods. See *RH Willis and Son v British Car Auctions Ltd* [1978] 1 WLR 438 at 442 where it was said that if the sale by way of the provisional bid practice had been concluded directly under the hammer, both the purchaser and the auctioneer would be liable in conversion.

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not merely as an agent to retain custody. Two salient features of the case should be highlighted. Although an auctioneer need not be in possession, and many auctioneers will only have custody, the defendant auctioneers in that case were found to be in possession for the purposes of effecting a sale by auction. The auctioneers were also admittedly agents of the owner to sell the painting to the highest bidder. However, the defendants' role as agent was terminated when no sale eventuated. Thereafter, the agent was either a bailee simply or an involuntary bailee, and as such bailee, he was to redeliver the property to the prospective seller.[50] In those circumstances, the court would be focused on the defendants' position as good faith bailee and in substance applied the good faith bailee exception to absolve them from liability in conversion.

31 In *Tat Seng Machine Movers*,[51] the Singapore Court of Appeal generalised the English decision, saying that the authorities indicate that where an agent obtains custody of goods from his principal who is in custody of the property, and depends entirely on his principal for instructions as to the retention and disposal of the property, he will not have converted the true owner's property by merely acting in good faith on those instructions unless those instructions involve the alteration of the property in the goods.[52] If, however, the agent such as an auctioneer receives goods from his principal into his custody, sells them to the successful bidder and hands them over to him with a view to passing the property in them, he has converted the goods of the true owner, notwithstanding that he has acted in good faith.[53] With respect, this generalisation is too wide. Properly understood, the English case was not a case of a good faith agent returning custody to his principal but a good faith bailee redelivering the property to the bailor after a failed auction.

32 Fourth, there is authority that where an agent receives a third party's property as custodier on behalf of his principal, in accordance with his non-owner principal's orders, he is unlawfully interfering with the true owner's property and commits a conversion however innocent he may be.[54] No one has ever suggested that this kind of dealing is covered by the good faith excuse which requires receipt from a principal

50 See also *Clerk & Lindsell on Torts* (M Jones & A Dugdale eds) (London: Sweet & Maxwell, 20th Ed, 2010) at para 17-77.

51 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [57].

52 See *Hollins v Fowler* (1872) LR 7 QB 616 at 630. *National Mercantile Bank v Rymill* (1881) 44 LT 307 is doubtful. See *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [65]–[67].

53 See *Barker v Furlong* [1891] 2 Ch 171.

54 See *Stephens v Elwall* (1815) 4 M & S 259 where the defendant, an agent with general authority to conduct the business of his principal in England, obtained delivery of goods on behalf of his principal and sent them to his principal in the US.

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who is in custody and not receipt from a third party on behalf of a principal. Under the excuse, a change of custody alone clearly is not sufficient to avoid conversion. It must be one done by request from the person in custody. If it is not, it will be a conversion notwithstanding it may qualify as being a ministerial receipt and will not be excused.

VI. Good faith and notice

33 This is of course critical to the good faith bailee's excuse or the ministerial receipt rule. Here too, difficulties with the excuse or rule reveal the unsatisfactoriness of the good faith excuse or ministerial receipt rule and raise questions about their clarity and provenance. As conceived by Blackburn J, the non-transactional intermediary (good faith bailee or custodier) is one who entertains a *bona fide* belief that the bailor is the true owner or that the consignor has the authority of the true owner to be in custody. There is no separate reference to the question of notice that someone else is the true owner or notice of absence of authorisation to be in custody. In other words, the notion of good faith focuses on the actual custody, on the custodial acts including consignment instructions of the apparent owner or consignor as construed by a reasonable non-transactional intermediary. If the intermediary dealing with the apparent owner or consignor does not reasonably believe that he is the true owner or authorised consignor, as the case may be, that fact alone will be fatal to the good faith excuse or ministerial receipt rule. For instance, if the apparent owner directs the bailee to deliver to the buyer to whom he has sold the goods, the bailee who proceeds to deliver to the bailor's order will be acting in good faith since there is consistency between the apparent ownership of the bailor and the instructions which follow through a sale between the apparent owner and the person to whom he is to deliver the goods. However, if the consignor purporting to be the owner directs a delivery of goods marked as being property of another to his buyer, there is absent a *bona fide* ignorance of the title of another; and it is hard to see that the bailee can reasonably believe that he is dealing with the true owner.[55] Again, if the consignor who is otherwise the apparent owner instructs

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55 *Cf Penfolds Wines Pty Ltd v Elliott* [1946] HCA 46; (1946) 74 CLR 204. Admittedly, the majority judgment seems to suggest that there is a sense in which knowledge of another's title may be relevant in appraising a particular act as a conversion. In that case, the respondent was held liable for conversion when he filled up wine bottles marked as owned by the appellant with his own wine. His knowledge that the appellants owned the bottles was a major consideration in appraising his act of filling up the empty bottles as a conversion. With respect, the dissenting judgment of Dixon J is more convincing. He held that to fill the bottles with wine at the request of the person who brought them could not in itself be a conversion when it did not involve the respondent taking to himself the property in the bottles or of depriving the appellants thereof or of asserting any title therein or of denying that of the appellants.

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the bailee to deliver to a person who apparently has bought the goods from some other person, there will be reason to doubt the apparent ownership of the consignor. The important point is that the intermediary does not need to have notice of the identity of the true owner or of the suspicious circumstances whereby the person in custody came to be in custody. There is certainly no separate mention of facts of the history or provenance of the actual custody which is extraneous to the apparent owner or authorised consignor, such as notice of adverse claims by some person whose identity and alleged rights are revealed by the communication of the claim. Nor does the intermediary who is to deliver to the consignor's order need to have notice of the transaction, if any, between the consignor and the person to whom he is to deliver. It suffices that the instructions and the circumstances of receipt by the person to whom delivery is made are consistent with the consignor's apparent ownership or authorised custody.

34 In some authoritative accounts of the good faith excuse or ministerial receipt rule, however, good faith and notice of an adverse claim to ownership or notice that the true owner is some other person are conflated; and the question is asked whether the bailee has acted in good faith and without notice of absence or defect of title. *Clerk & Lindsell on Torts*, for instance, states that:[56]

> A bailee in possession of goods who, without notice of any defect in his bailor's title, delivers goods to the bailor or to his order is protected from liability *vis-à-vis* the true owner.

In *Tat Seng Machine Movers*, the Court of Appeal apparently endorsed the conflation. There was also no concern with whether the intermediary reasonably believed that the person in custody has authority to create a sub-bailment or to sell or pledge the goods. In *Antariksa Logistics*, the High Court continued to conflate this authority and the authority to be in custody.

35 When asking the question whether the redelivery of the consignment to the order of the intermediate bailor was an act of conversion in that case, the court in *Tat Seng Machine Movers*[57] cited and approved of the following passage from *Salmond & Heuston on Torts*,[58] namely that:

> [I]f he who innocently acquires possession of another's goods by way of deposit redelivers them to him from whom he got them, *before he*

56 *Clerk & Lindesell on Torts* (M Jones & A Dugdale eds) (London: Sweet & Maxwell, 20th Ed, 2010) at para 17-77.

57 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [72].

58 R F V Heuston & R A Buckley, *Salmond & Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996).

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> *has received notice of the plaintiff's claim to them*, he is free from responsibility. *He has not deprived the plaintiff of his property, for that property is now in exactly the same position as if the defendant had never interfered with it at all.* [emphasis added]

A little further on,[59] the court cited *Clerk & Lindsell*:[60]

> First, it only protects a bailee who has no notice of his bailor's lack of title. *Once the bailee has notice of the existence of competing claims to the goods, he delivers to either claimant at his peril*: his only safe course is to interplead. *Secondly, protection is limited to the bailee who delivers to his actual bailor (or to his order).* A bailee who delivers, even without negligence, to an imposter, or to anyone else who is not in fact the bailor's representative, is liable in the ordinary way. [emphasis added]

So the conflation of good faith and notice occurred not only because the court relied on *Clerk & Lindsell on Torts* but also because the court considered that this was part of the ministerial receipt rule.

36 This conflation might be sound if the pertinent rule was the equitable doctrine of good faith purchase without notice of adverse rights (whether or not these have been advanced as claims) but here there was conflation of two different situations. The good faith excuse or ministerial receipt rule covers a redelivery that has occurred, predicating that property no longer remains in the possession of the bailee and the right to interplead is gone. The excuse or ministerial receipt rule thus operates *ex post facto*. Its availability depends solely on proof that when the bailee accepted a bailment at will of the property and throughout the course of that bailment until he redelivered the property, he dealt in good faith under the supposition that the bailor was the true owner.

37 Notice of an *ex ante* adverse claim received in the course of a bailment operates or ought to operate differently. For the sake of resolving competing titles, it addresses all bailments and not merely non-transactional bailments. Once a bailee has notice of an adverse claim, he is no longer justified in relying on the fact that what he will be doing thereafter is simply and merely the acts of a bailee. He must interplead. By this he signifies that he is estopped from disputing his bailor's title and has no interest in title whatsoever. If a bailee has notice of an adverse claim at the material time while he is in possession of a

59 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [73].

60 *Clerk & Lindsell on Torts* (A Dugdale & M Jones gen eds) (Sweet & Maxwell, 19th Ed, 2006) at para 17-74, now at para 17-78 of *Clerk & Lindsell on Torts* (M Jones & A Dugdale eds) (London: Sweet & Maxwell, 20th Ed, 2010) but otherwise unchanged in contents from the edition cited in the judgment.

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chattel, he should simply rely on his right to interplead.[61] If he delivers the chattel back to the bailor, he will bear the risks of liability in conversion to the true owner, even if his acts are no more than a change of custody.[62] Although not often highlighted, this right to interplead will not save the bailee, other than the depositee, from liability for conversion by taking possession at the onset if indeed it is determined that his bailor is without title. The advantage of interpleading, however, is that if the outcome is that his bailor has the better title, his bailment will have been valid from the outset and his entitlement to continue as a bailee for the rest of the unexpired term of bailment will be secure. Another advantage is that it limits the damages he will suffer by ensuring that if his bailment is invalid for want of title in his bailor the goods will be returned to the true owner. If one follows through the rationale of the bailee's estoppel, he sees that it also ensures that there will be no deflection of a bailment by reason only that the bailee chooses to be suspicious about his bailor's title. He is not entitled to give up his bailment by going out and apprising himself of suspicious circumstances as to his bailor's title. Once, however, a claim has been notified to him, he must desist from asserting his bailee's possessory title until the claim has been resolved in his bailor's favour, if that be the case.

38 The result of conflating two separate and distinct rules is awkward. It introduces a logical question of constructive notice which is highly dubious. In *Tat Seng Machine Movers*,[63] it led the court to suggest that some notion of constructive notice might be necessary to do justice as between the true owner and the bailee.[64] The court considered, for example, the hypothetical case of goods being clandestinely removed from premises that are apparently not occupied by the bailee's client during the dead of night, saying that under these circumstances "one would ordinarily expect the carrier to make some enquiries as to whether there is indeed proper authority to remove the goods".[65] The court added that "impropriety should not be lightly inferred".[66] On the facts, as the court found, much of what had happened was within the

61 As stakeholder, his costs are payable out of the property in dispute. See *Laing v Zeden* (1870) LR 9 Ch App 736.

62 See *Hollins v Fowler* (1874–1875) LR 7 HL 757.

63 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [73].

64 *Clerk & Lindsell on Torts* (M Jones & A Dugdale eds) (London: Sweet & Maxwell, 20th Ed, 2010) at fn 339 expresses the view that notice seems to mean actual knowledge of facts indicating a lack of right in the *soi-disant* owner.

65 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [73]. In the present view, this hypothetical example is more a case of doubting the authorisation to create a bailment than what is required, namely, authorisation to be in custody.

66 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [73].

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ordinary course of business of the defendant carrier and there was nothing else that aroused any suspicion. It was therefore unnecessary to decide whether the doctrine of constructive notice was *within the good faith bailee protection*.[67]

39 With respect, the good faith excuse or ministerial receipt rule is only concerned with whether a reasonable non-transactional intermediary would suppose from the acts of dominion of, and instructions given to the intermediary by, the person in actual custody that he is the owner or authorised custodier. It is not based on what a reasonable intermediary would have done to obtain confirmatory assurance that the person in actual custody is the owner or the authorised custodier in the circumstances. It does not assess whether the steps taken were sufficient to dispel doubts which might have arisen in the course of inquiries into the circumstances whereby the person in custody acquired ownership or custody. In particular, it does not tell the intermediary what more he must do to get a good possessory title as ultimate bailee, where there are suspicious circumstances as to the custodier's authority to create a sub-bailment. As was previously demonstrated, the court is not concerned with absolving an intermediary from the risk that there is no authority to create a sub-bailment or to sell or pledge or otherwise deal with the goods. If the intermediary suspects that the power of the person in custody to create a sub-bailment or to sell and so on is non-existent, he may choose to make inquiries if he wishes to protect his sub-bailment and go further than assisting in changing custody of the goods. Even so, he will do this not so that he can be free of liability for conversion (he certainly will not because liability is strict) but so that he can confidently take or refuse the job. There is in other words no reason or need to require him to dispel suspicions when all he is asked to do is change the custody. All that is needed of him is that he should reasonably believe that he is dealing with an ostensible owner or authorised custodier.

40 Of course, a more far-reaching and extended good faith excuse or ministerial receipt rule could be fashioned which would turn on whether the intermediary will be placed under a doctrine of notice, including constructive notice, of power to create a bailment or dispose of goods. Such an approach would extend the good faith excuse to transactional intermediaries and therefore all bailees and not merely bailees or sub-bailees for carriage provided they have no notice, actual or constructive, of want of title or authority to create the sub-bailment, sell or pledge the goods of the true owner. To an extent this was what the

67 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [73].

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Court of Appeal's stress on the ordinary course of trade could achieve. The court did not:[68]

> … see why a carrier should ordinarily be expected to query its clients as to the purpose of movements of the latter's goods if it reasonably does not have a practice of doing so ordinarily.

41 However, there are counter arguments that this reliance on practice could be unfair to the true owner. First, reliance on contractual usages developed between the apparent owner or authorised custodier and the transactional intermediary would be prejudicial to the true owner if he was not in any bailment relationship with the apparent owner or authorised custodier. Second, it would be unfair to the true owner to take account of individual practices that represent idiosyncratic standards, falling short of more objective standards of good faith. Why should the law automatically approve of idiosyncratic standards of good faith developed by immediate parties for their own benefit which could prejudice true owners? With respect to pertinent customs or trade usages which are proved to exist, a proposal that these should be relevant to the good faith or otherwise of the intermediary is not unattractive. What seems unattractive is that this could furnish a licence to transactional intermediaries to develop self-serving and self-centric trade practices that promote their self-interests at the expense of true owners without corresponding benefits for good faith purchasers. Transactional intermediaries, as has been pointed out, are typically repeat players and informed participants, knowledgeable about the goods which they intermediate. They are also typically liable to their good faith purchasers or other transactors for breach of implied warranty of title should they turn out to have dealt in goods belonging to a non-owner. Consequently, they will prudently develop practices that will protect themselves against ownership-related risks; and where foolproof practices are not devisable, doubly protect themselves by shifting the risks back to the consignor or by taking appropriate third-party insurance cover. There is little reason thereby to absolve them from liability to the true owner when they are experts in the area, skilled to avoid dealing with problematic titles, and able if they choose to do so to protect themselves by disclaiming warranties or obtaining adequate insurance cover to protect themselves against liability for the true and possibly escalated value of the goods at the time of intervention by the true owner.[69]

68 *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [73].

69 See D DeMott, "Artful Good Faith: An Essay on Law, Custom and Intermediaries in Art Markets" (2012) 62 Duke LJ 607.

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VII. Conclusion

42 This article has discussed the merits and demerits of conceiving the good faith excuse or ministerial receipt rule as applicable to intermediaries without differentiation between bailees and agents in custody as well as bailees and sub-bailees. Despite the apparent uncontroversial acceptance of the excuse or rule, one struggles to make sense of the excuse or the rule. The difficulties in the rule are considerable. They throw into question the provenance of a rule said to be grounded on principle. This principle is neither clear nor self-explanatory. If the principle is based on reliance on custom, its formulation as a good faith excuse or a ministerial receipt rule is open to criticism because it should but does not require proof of custom. A commercial rationale has been articulated and relied on in the most recent Singapore cases. A rationale is of course far from being a principle. In any case, if the principle is merely one of commercial expedience, it fails to explain why receipt at the request of the apparent owner who is not in custody from another person in actual custody is not included within the excuse or rule. Nor can it explain why the rule continues to be available even where the non-transactional intermediary has shifted ownership-related risks back to the consignor.

43 It is submitted that the good faith excuse or ministerial receipt rule actually makes more sense as a principle of compensation for determining the just measure of compensation to be applied to a bailee who is not in a position, because he has fully carried out the carriage of the goods, to return the goods to the true owner and thus avoid excessive liability for conversion.[70] The key element to assessing damages for conversion against the good faith bailee is that he would have been entitled to return the goods by interpleading if the true owner had intervened in the course of his bailment. In an interpleader, he could have withheld the goods until his lien was satisfied by the bailor if he should prove to be the true owner or, if otherwise, avoided having to pay compensation for the value of the goods by in effect returning them to the true owner. It would be unjust to allow the true owner to recover the value of the goods from the good faith bailee when the good faith bailee can no longer simply return the goods to the true owner and when the value of the loss of the bailee's right to interplead and thereby avoid being out of pocket to the extent of the value of the goods would be irrecoverable against the apparent owner. Indeed, in cases where the good faith bailee would be entitled to assert his lien against the true owner in the interpleader if the true owner had intervened in the course of the bailment, it would be unjust also to deprive him of recovery of

70 In the case of the innkeeper, he may retain the goods even as against the true owner. See *Robins & Co v Gray* [1895] 2 QB 50 and *Marsh v Commissioner of Police* [1945] KB 43.

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the value of his services from the true owner. However, in the case of a bailment for use, it would not be unjust for the true owner to recover the value of the goods from the bailee. Even if the true owner had intervened in the course of the bailment and the bailee for use had interpleaded, the bailee for use would remain liable for the true owner's loss of hire or such other loss as could be proved notwithstanding that he would be returning the goods to the true owner. If all this is right, the case of a sub-bailee under a bailment for carriage should also be distinguished. In *Tat Seng Machine Movers* the true owner could only have intervened in the course of the bailment and sub-bailment by asserting his immediate right to possession against the intermediate bailor. In a case of breach of the head-bailment, it is the intermediate bailor who would have been answerable to the true owner in the first place for conversion of the true owner's goods. There would be a question about lack of authority to create the sub-bailment, but no question about title to engage any right in the ultimate sub-bailee to interplead. It follows that as the ultimate bailee would not have lost any right to interplead, there would be no reason to reduce damages payable by the ultimate sub-bailee who is sued for conversion to offset a right to interplead which never arose.

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