

# Loans and risk management

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You borrow an object for an exhibition. When it is unpacked it is found to be scratched; whilst in storage awaiting installation of the exhibition there is a flood in the storage room and it suffers damage; while it is being installed, hands slip and it falls to the floor; whilst on exhibition a child walks into it and it falls and breaks; an insane person hits it with a hammer crying out that 'Man shall not worship idols'.

You have all experienced variants of such harrowing events. They are not particularly unusual – a bit like airplane accidents – statistically unusual but happening often enough and with consequences that are sufficiently shocking to give concern to every lender and every borrower.

In order to implement a serious risk management approach to loans you must understand the legal obligations inherent in taking possession of property owned by a third party. Collecting institutions take possession of third party material in many different circumstances and for many different reasons. The legal duties assumed by the borrower of an item for an exhibition is different from those owed to a collector who brings an item to a museum for identification, or to the commercial gallery that leaves a painting with a public gallery on approval. Each of these examples is a loan but each brings with it a different level of legal responsibility.

## WHAT IS A LOAN?

As museum professionals you are comfortable with the concept of 'a loan'. If I tell you that a loan is actually 'a bailment' you might start to develop a sense of unease. Although we may think that we can get through life perfectly adequately without understanding the meaning of 'bailment', it is not by chance that bailment is one of the truly ancient areas of the Law. Given the importance of personal property in the fabric of human relationships, it is hardly surprising that early humans developed rules that protected the rights of ownership when chattels were entrusted to the possession of third parties. This evolved from mere social expectations into a series of rules; it reflected a move from mere etiquette to a legal and enforceable relationship.

This move, from a system of indistinct and idiosyncratic social obligations to a system of enforceable rules, reflected the social and economic importance of chattels to

humans. That importance, together with the development of increasingly sophisticated transport, communication and trading systems, required the development of a legal system that allowed personal property to be physically parted from its owner without threatening the owner's rights. If it were true that 'Possession is 99% of the Law' it would be impossible to have a domestic or international trading system; we could not even leave our clothes at dry cleaners or send our television out for repair; it would also be impossible for those seeking to mount an exhibition to borrow material from third parties. In short, bailment may not sound interesting but it is one of the essential oils that facilitate modern life. It is also the legal basis of all exhibition loans.

## Terms

The term bailment comes from the French, *bailler*, to deliver. The *bailor* is the party who owns the material and delivers it into the possession of the *bailee*. The bailee is the party that receives the material.

## Types of bailment

There are many different types of bailment and each type carries its own rights and obligations. Generally, they fall into three groups:

- those bailments that are principally for the benefit the bailor,
- those that are principally for the benefit the bailee and
- those where the benefit is mutual.

Where the bailment is principally for the benefit of the bailor the courts generally impose a slightly lighter burden of care on the bailee. In such cases the courts will usually require that the breach of care by the bailee must involve 'gross negligence' rather than 'mere negligence'. In contrast, where the bailment largely benefits the bailee,<sup>1</sup> the court imposes a reasonably high duty in the care upon the bailee.<sup>2</sup>

The law further makes distinctions between:

- bailment for reward,
- gratuitous bailment, and
- involuntary bailment.

### 1 Bailment for reward

A bailment for reward arises where goods are taken into custody in return for valuable and mutual consideration. The usual instance

of this is where you hand over goods for service or repair.<sup>3</sup> The bailment is for the mutual benefit of the parties. Where the bailment is for reward, the bailee is under a duty to deal with the goods with the due care and diligence which a careful person would exercise over their own chattels of similar circumstances.<sup>4</sup> Of course this is the very duty of care that is so commonly reflected in loan-in agreements.<sup>5</sup>

### 2 Gratuitous bailment

A gratuitous bailment is one where just one party benefits. Usually a gratuitous bailee has permission to possess goods without payment or consideration but must return them to the bailor on demand. The duty of care owed by a gratuitous bailee is of a lower standard than required of a bailee for reward.

- If you lend a painting to your neighbour, that loan is almost certainly a gratuitous bailment. The neighbour's duty of care is low and the loan can be recalled at any time.
- A loan from one institution to another (without fee) is very likely a gratuitous bailment for the lending institution receives no payment or consideration for the loan.

### 3 Involuntary bailment

This occurs where the goods are found<sup>6</sup> or left<sup>7</sup> without payment. This may occur where an object brought to a museum for identification is left uncollected. This bailment gives rise to the lowest standard of care of all. All the bailee must do is abstain from reckless or wilful damage<sup>8</sup> and there can be no legitimate complaint against a bailee who acts in a manner which is considered 'reasonable and proper' in all the circumstances,<sup>9</sup> including the destruction of the goods if they have become a nuisance.<sup>10</sup> Similarly, a bailee who acts with the object of either returning the goods or mitigating responsibility for them (whether by delivering them to the police or a bank, or by returning an unsolicited letter to the post office) incurs no liability to their owner.

## The joy of contract

Whilst the complexities of bailment will bring a smile to the lips of many lawyers, the wise collection registrar will be one whose first question is not, 'What are the rights and responsibilities of bailees and bailors?'

The much better question is, 'What can I do so that I never have to think about the complexities of the law of bailment?'

The answer is remarkably simple. If the bailee and the bailor enter an agreement, the terms of that contract supersede the Common Law rules. Where the express terms of a contract impose a particular duty of care and level of responsibility, those are the obligations that prevail. However, if the contract is silent as to such matters, or is ambiguous, one must again revert to the complexities of the Common Law or statute.

## RISK MANAGEMENT

The risks inherent in the loan relationship are many and varied: if there is a problem in handling a loan, the fallout may be legal; it may be financial; and it may be political. It will always be costly in administrative time and resources and is often fatal to the relationship of trust between the borrower and the lender.

### The contract as risk management tool

The loan agreement is not just a legal document that evidences the loan: it is the document in which the collected wisdom and experience of the parties is brought together so that foreseeable problems can be averted. Of course there is always risk in the loan relationship and no contract can eliminate that reality but the loan agreement is a key risk management tool: it can play a positive role in the relationship between the parties, cementing trust, preventing misunderstanding and providing agreed procedures for the administration of the loan.

One of the most important functions of the loan agreement is to anticipate problems that might arise during the loan period and to present a framework by which those difficulties can be settled. Thus, both the owner and the borrower use the loan agreement to:

- identify the risks that attend the loan;
- articulate how the loan will be administered;
- implement a mechanism that best avoids the most likely risks; and
- prescribe an agreed protocol in the event of calamity.

These risks affect borrower and the lender (although not always to the same degree). The advantage is in identifying the risks and, together, agreeing how those risks will be met.

### Clear Document Trails

Tracking and managing documentation is one of the primary roles of the loans registrar. There is a strain between torrential developments in communication technology and the demands of risk management. The establishment of clear document trails is fundamental to the establishment of safe loans procedures and, in this task, easier and faster communication technology (particularly e-mail) does not, without modification of established administrative procedures, enhance safety and prudence of the process.

### Value of the loan

Whenever material is lent for exhibition, it is subject to heightened risk of damage, theft or loss. The more valuable the item is, the greater the risk. High value is something that institutions are familiar with. Indeed they are often complacent. Having a middle aged and unfit person in a uniform sitting on a chair supervising a couple of rooms of paintings, is not really providing security that befits the value of the works. The answer may be that the security is geared to the degree of risk rather than the market value of the material being guarded. Indeed it may be so: perhaps the greatest danger is not from the professional thief but rather the small boy with jam on his fingers. If this is the case, it may be that the institution makes the decision to leave theft risks predominantly to the care of electronic guardians and damage risks predominantly to human supervision.

Another strategy for managing the risk of damage, loss or theft to high value exhibition material is to use exhibition design to control the degree and nature of access that the public is likely to have to the item. It is often easier said than done. In museums where the visitors expect a high degree of interactivity with the exhibition material, establishing boundaries for those expectations is a challenge. For this reason, the exhibition designer is one of the key risk management tools by which some of the loan risks can be managed.

### Multi-skilled teams

Few outsiders realise how many skills have to be integrated into the team that mounts an exhibition. Because it is so much a part of everyday life, it is almost taken for granted within exhibiting institutions – but it should

not be. The team that delivers an exhibition is at the heart of the institution's risk management strategy. Every skill added to the team brings with it a greater degree of safety for the loan item, its owner and its borrower. This is already recognised in many institutions.

### Conclusion

Every loan carries with it risks. The registrar who treats the loan agreement as an instrument of risk management will:

- Identify the risks that attend the loan;
- Specify the degree of risk that is being undertaken;
- Articulate how the loan will be administered;
- Implement a mechanism that best avoids the most likely risks;
- Prescribe an agreed protocol in the event of calamity;
- Use a well-drafted agreement to capture all of this;
- Keep a clear and coherent document trail that provides a complete record of the loan;

Look to using multi-skilled teams so that all of the risks can be gauged at the outset and so that each expert can contribute to the minimisation and management of the risks through the life of the loan.

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1 For example where an exhibition organiser accepts an inward loan for the purpose of the show, it bears the duty of due care

2 The mere fact of possession does not automatically give rise to a bailment. Generally, a conscious and willing assumption of possession of the goods is required before bailment can exist: *N E Palmer Bailment* (Law Book Co, 1979) at 1 and note 1 at 30

3 The consideration would be mutual where, say, one party gets paid for the service and the other gets the promise that the goods will be repaired

4 *Coggs v Bernard* (1703) 2 Ld Raym 909;

92 ER 107 per Holt CJ at 916; 111

5 See further discussion at #####

6 Which may be relevant where material is acquired through field trips

7 For example, where an anonymous person leaves a valuable book outside the door of the library. Perhaps the most common example is where possession arises from 'inertia selling' – e.g. *Readers Digest*

8 *N E Palmer Bailment* (Law Book Co, 1979) at Note 1 at 383; see also *Elvin & Powell Ltd v Plummer Roddis Ltd* (1933) 50 TLR 158

9 *Hiori v Bott* (1874) LR 9 Ex 86 at 91 per Cleasby B

10 *Winfield and Jolowicz Torts* (12th ed Sweet and Maxwell, 1984) at 481

11 For example see Section XXX Uncollected Loans