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Pacific Carriers Ltd v BNP Paribas

[2004] HCA 35; High Court of Australia (5 August 2004)

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LETTERS OF INDEMNITY – DELIVERY OF GOODS WITHOUT BILLS OF LADING

Pacific Carriers Ltd v BNP Paribas
[2004] HCA 35; High Court of Australia (5 August 2004)

Facts

This appeal to the High Court from the Supreme Court of New South Wales centres on two legal issues:

- the construction of certain letters of indemnity given in favour of carrier in relation to the discharge of cargo without bills of lading, and
- whether the letters of indemnity, signed by an unauthorized officer of the bank, were binding on the bank.

A contract of sale of a cargo of legumes was made between NEAT, an Australian grain exporter, and Royal, an Indian grain importer. NEAT's bank, BNP Paribas in Sydney, was financing the export transaction. The cargo was to be carried on the *MV Nelson*, a ship hired under a time charter by a company called Pacific.

The initial bills of lading were switched and split. There were also serious delays in the discharge of the goods. NEAT then sought to speed up the process by asking Royal to obtain a letter of indemnity from the latter's bank to persuade the carrier to deliver up the goods without production of the bills of lading. Royal drafted a form of words and approached its bank. However, the bank declined to act as indemnifier. NEAT then approached its own bank, BNP Paribas, with a view of obtaining a letter of indemnity for the same purpose. The letters of indemnity issued by the bank's officer in Sydney was in fact in the form drafted by Royal and contained an English law clause. The letters of indemnity were signed first by the director of NEAT and then immediately below NEAT's director's signature was the BNP officer's signature.

The cargo was subsequently delivered without production of the bills of lading in Calcutta. The vessel was subsequently arrested. NEAT became insolvent. Pacific had delivered the goods without seeking production of the bills of lading because of two letters of indemnity issued to their favour by BNP Paribas. They claimed to be indemnified by the bank. BNP's defence was that, on a true construction of the letters of indemnity, only NEAT was bound to indemnify Pacific, and BNP's role was merely to authenticate or verify NEAT's execution of the documents. Additionally, BNP argued that as the officer who signed the letters of indemnity had no authority to issue them, the bank was thus not bound.

The Court of Appeal held against Pacific, ruling that although the letters of indemnity did purport to indemnify the carrier for delivering up goods without seeking production of the bills of lading, the bank was not bound by the unauthorized acts of its officer.

Decision

The High Court allowed the appeal. It upheld the Court of Appeal's construction of the letters of indemnity but disagreed with the Court of Appeal's position on the lack of authority issue. The Court of Appeal had thought it material that the requisite representation of authority by the bank was absent. It was persuaded by the argument that the necessary representation of authority must have been made to Pacific by BNP about the officer's authority, not one made by the officer about herself. Although the High Court agreed that this was a correct statement of law, the way it was applied was an over-simplification. The High Court considered that on an assessment of case law, what was material was whether the respondent had been persuaded to believe that the bank had indeed made the representation. The bank officer in the case had signed and stamped the letters of indemnity. The presence of the stamp was, as far as the High Court was concerned, pivotal. Pacific was clearly persuaded by the signature and by the bank's official stamp that the officer in question had indeed the authority to bind the bank.

Comment

This case raises an important practical matter: the form of words used in a letter of indemnity issued in support of delivery of goods without production of the bills of lading. It is trite law that the carrier would be liable for conversion if he delivers goods carried on his vessel to a person without the relevant bill of lading. However, the common law recognizes that it should not be illegal for a third party (such as a bank) to issue a letter of indemnity promising to indemnify the carrier for any probable or eventual liability for delivering up goods without production of the bill of lading (*Sze Hai Tong Bank v Rambler Cycle Co Ltd* [1959] AC 576) given the commercial exigencies at port when turnaround time for the ship might be short. The difficulty in the case, however, was how the letter of indemnity should be construed. The bank's position was that when the letters of indemnity were issued, it was for a 'back-to-back' purpose, as Royal's own bank was unprepared to act as indemnifier. Moreover, the bank officer who signed and issued them gave evidence that she had mentioned to NEAT that the letters were only for verification of the signatures.

It is immediately obvious that the communications between the bank's officer and NEAT were irrelevant to the construction of the letters of indemnity. Indeed, they would also be irrelevant to the want of authority issue. The person who mattered was Pacific; the question was, on a proper construction of the letters of indemnity, whether Pacific was entitled to treat not only NEAT but also BNP as the indemnifiers. The High Court re-stated the general rule of construction in common law that the construction of the letters of indemnity was to be determined by what a reasonable person in Pacific's position would have understood them to mean. That clearly required consideration, not only of the text of the documents but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction (*Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, per Lord Wilberforce at 995 to 996, whose dictum was accepted by the Australian court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337).

What was troublesome in this case was the fact that the bank officer's signature came immediately below that of NEAT's director, leading to the argument that the bank was doing no more than to verify the director's signatures in both letters of indemnity. That led to the court of first instance to conclude (and in so doing rejected both constructions offered by BNP and Pacific) that when BNP signed the indemnity it was representing to Pacific that NEAT had the financial capacity to honour its obligations under the letters of indemnity. On that basis, it was thus open to Pacific to succeed in a claim in negligence (negligent misstatement about NEAT's financial standing) against BNP. That construction was rejected both by the Court of Appeal and the High Court on the grounds that the commercial purpose of the indemnity was plainly that NEAT was to secure the backing of another person to underwrite the indemnity. The communications between NEAT and Pacific showed that Pacific would not be prepared to deliver the goods without presentment of the bills of lading without an indemnity issued by a bank. What is of some practical importance here is that the court appeared to accept the assumption that, unless made expressly clear, a carrier would expect a bank to act as indemnifier. The commercial nature of such an indemnity is to provide an element of security to the carrier: it would be commercially odd for a carrier to rely on the warranty offered by the consignor whose financial capacity was unknown to him.

There was a subsidiary issue at first instance which was not dealt with by the Court of Appeal. BNP had argued that, by the time the letters of indemnity were invoked, the original bills of lading referred to had been cancelled as a result of switching and splitting, so the letters of indemnity were spent or incapable of having further effect. Clause 4 of the letters of indemnity provided that:

As soon as all original bills of lading for the above goods shall have come into our possession, to produce and deliver the same to you whereupon our liability hereunder shall cease.

The High Court observed that BNP was aware that the bills of lading were to be switched and split. The court reasoned that the letters of indemnity must have been issued for the very purpose of dealing with a situation where no bills of lading were produced by the person or persons seeking delivery of the goods. Given the knowledge of Pacific and NEAT that the initial bills of lading would

be cancelled and switched bills issued, it would be absurd to construe the document as producing the consequence that upon the cancellation of the original bills the obligation to indemnify would cease. This was clearly a case of a contractual clause being construed in a commercially unsound manner. The court thus rejected BNP's argument. What is especially interesting here is the use of a 'standard' indemnity in unusual circumstances (at least from a textbook perspective given the fact that switch bills were used). The lesson is thus that an indemnity should really be drafted with the specific circumstances of the case in mind; practitioners should be careful not to assume that standard precedents will work in all cases.

On the authority issue, the High Court acknowledged that the bank officer had no actual authority to sign and issue the letters of indemnity: she and her department were not so authorized. However, the law is clear that internal limits of authority cannot allow a contracting party to resile from its obligations on the basis of want of authority of the agent provided there is ostensible authority. The Court of Appeal was persuaded by the contention that ostensible authority depended on a representation of authority by the bank, not by the officer herself. The High Court, however, was right to find that although that was a correct statement of the law, the representation of authority need not be confined to an explicit or express representation. Representations of authority could be derived from the company's conduct and that conduct included the company's organizational structure which is apparent to the external person. In the present case, the court found that the bank's organizational structure in Sydney at that time was such that the officer in question was Pacific's contact person. The court was also persuaded by the fact that the stamp used clearly suggested an imprimatur that Pacific was entitled to rely on. The law, as reasserted by the court, was that corporate conduct as a whole must be assessed when deciding whether a representation of authority had been made.

Another practical lesson might be learnt. BNP in Sydney was a relatively small set-up. There were no procedures for the officer to seek legal advice about the manner and form of BNP's signature, or to take other steps to see that it was communicated to Pacific that the bank was only prepared to verify and authenticate the signatures. It is not unusual for merchant banks to have large offices outside their main countries of operation but they would do well to ensure that these smaller offices have access to appropriate legal guidance.

JC