



Trade and Transport – Client Alert

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To what extent can a carrier rely on a bank's letter of indemnity which has been signed and stamped by the bank?

The High Court of Australia has held that the meaning of what is a bank letter of indemnity is to be determined by what a reasonable person in the carrier's position would have understood it to mean, based on the wording of that letter of indemnity and the surrounding factual circumstances.

Pacific Carriers Limited v BNP Paribas [2004] HCA 35 – 5 August 2004

Facts

Upon arrival of a cargo of chickpeas and dun peas from Australia to India, the original bills of lading were not available to enable that cargo to be unloaded. The original bills of lading were also switched and split. The carrier, Pacific Carriers Ltd (PCL), therefore required bank-endorsed letters of indemnity before it would release the cargo. Two letters of indemnity addressed to PCL were signed by the shipper, New England Agricultural Traders Pty Ltd (NEAT), and by its bank BNP Paribas's (BNP) documentary credits/trade finance department manager (Ms Dhiri) who faxed them directly to PCL. Ms Dhiri also affixed the bank's stamp next to her signature. PCL sustained losses and claimed against BNP, NEAT became insolvent.

BNP argued that it had simply verified or authenticated NEAT's signature on the letters of indemnity and that NEAT was bound to indemnify PCL. BNP also claimed that if the letters of indemnity required it to indemnify PCL, then they were signed without its authority and they were not binding. PCL argued that BNP's signature and stamp was a bank endorsement under which it also accepted liability as an indemnifier.

Findings

The High Court held that Ms Dhiri's belief and subjective intention as to what the letters of indemnity were meant to convey were irrelevant and that the construction of the documents was determined by what a reasonable person in PCL's position would have understood them to mean, based on their wording and surrounding factual circumstances. That requires consideration not only of the text of the documents but also the surrounding circumstances known to PCL and BNP and the purpose and object of the transaction. A reasonable reader in the position of PCL would have understood the document as a bank endorsed indemnity, and that BNP was undertaking liability as an indemnifying party to support the liability undertaken by NEAT.

The Court further held that nothing in the letters of indemnity indicated BNP was merely authenticating NEAT's signature and that nothing in the circumstances suggested PCL would be satisfied with such a verification. Although Ms Dhiri had no authority to sign letters of indemnity, nothing put PCL on notice or inquiry as to her lack of authority. PCL did not know what was going on in Ms Dhiri's mind, or what she may have communicated to NEAT as to her understanding or intention. The assumption which was made by PCL and upon which it acted to its detriment was induced and assisted by the conduct of BNP. Therefore, the Court held that Ms Dhiri did have apparent authority, that PCL reasonably relied on that authority and BNP was bound to honour the letters of indemnity.

This decision provides a good example of the reason why the meaning of commercial documents is determined objectively, as it "was only the documents that spoke to PCL".

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When is a container a package or unit for limitation purposes under the Hague-Visby Rules?

The Full Federal Court has determined that, for package limitation purposes under the Hague-Visby Rules, the bill of lading must identify clearly by way of enumeration the number of packages or units as packed into the container and that individual items or pieces are not considered as packages or units.

Where it is not clear from the face of the bill of lading how many packages or units have been packed in the container, there is only one package or unit, namely the container itself.

El Greco (Australia) Pty Ltd & anor v Mediterranean Shipping Co SA [2004] FCAFC 202 – 10 August 2002

Facts

El Greco (Australia) Pty Ltd (El Greco) sold a number of posters and prints (the cargo) to John Theodorochopolous (Theo) and arranged for the cargo to be shipped by container from Australia to Greece under a Mediterranean Shipping Co SA (MSC) ocean bill of lading.

It was found that the container was damaged during the carriage to Greece. The cargo, which outturned in a wet and damaged condition, was a constructive total loss. El Greco was identified by the cargo insurers who paid out approximately AUD900,000. Those cargo insurers by subrogation brought a recovery action against MSC.

The description of the cargo on the face of the bill of lading was "1 x 20FT FCL/FCL GENERAL PURPOSE CONTAINER SAID TO CONTAIN 200945 PIECES POSTERS AND PRINTS". This description of cargo, which included a notation "SHIPPERS LOAD STOW AND COUNT", appeared in a box headed "ALL PARTICULARS FURNISHED BY SHIPPER. CARRIER MAKES NO REPRESENTATION". Beside this box was a second box headed "Carrier's Receipt". Within this box was a column headed "No. of Pkgs." which contained the number "1". The bottom of that column was headed "Total Number of Packages" and contained the number "1".

Clause 21 of the bill of lading provided:

"Where the goods have been packed into containers by or on behalf of the Merchant, it is expressly agreed that each container shall

constitute one package for the purpose of application of limitation of the Carrier's liability."

The weight of cargo was stated to be 8,500kg.

Article 4 Rule 5(c) of the Hague-Visby Rules (the Rules) states:

"Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the sea carriage document as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph so far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit"

Findings

At first instance, the Federal Court held:

- that, for package limitation purposes, the figure of 200,945 was to be applied, as the description of the cargo was found to be an enumeration of the number of units packed into the container for the purposes of Article 4 Rule 5(c), it being common ground that this figure was overstated and that the actual number of pieces was closer to 130,000 which were packaged into about 2,000 packages for shipment;
- that the actual value of the posters and prints, which was based on expert evidence relating to the value of the cargo in Australia (which was given at trial on behalf of MSC) was AUD63,570.

Precision must be exercised when describing (by way of an enumeration for the purposes of Article 4 Rule 5(c) of the Rules) the cargo actually packed into a container in order to achieve the maximum package limitation on a package or unit basis. Here, if the bill of lading had stipulated that 2,000 packages or units had been packed into the container, the limitation of liability amount would have been well in excess of the amount claimed in the recovery action.

Judgment was entered for Theo in the amount of AUD63,570.

On appeal to the Full Federal Court, it was argued on the valuation issue by the applicants that the amount paid for the cargo should be considered the best evidence of value in Greece. MSC, in cross-appealing the package limitation issue, argued that the parties had agreed by virtue of the notations in the "Carrier's Receipt" box and clause 21 of the bill of lading that, for package limitation purposes, only one package was shipped.

The Full Federal Court by majority held:

- that clause 21 was null and void pursuant to Article 3 Rule 8 of the Rules as it sought to limit the operation of those Rules;
- that the words "as packed" in Article 4 Rule 5(c) required an enumeration whereby the number of packages or units actually packed

into the container could be identified and that, if the bill of lading did not state how many packages were actually packed into the container, there was not an enumeration for the purposes of Article 4 Rule 5(c).

- that there was not an enumeration for the purposes of Article 4 Rule 5(c), thereby making the container the relevant package for package limitation purposes. The weight of the cargo (8,500kg) gave a higher limitation amount than the container as one package, namely 17,500 SDRs which was calculated at AUD38,250 at the date of delivery.

Judgment was entered for Theo in the amount of AUD38,250.

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When is a party to a contract bound by the conditions in that contract?

The High Court has reaffirmed the established principle that:

"when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not".

Accordingly, there is no obligation to draw to the attention of the party signing a contract any particular clause in a written contract, if that party had an opportunity to read the contract and there is no question of fraud, misrepresentation or duress.

Toll (FGCT) Pty Limited v Alphapharm Pty Limited [2004] HCA 52 -11 November 2004

Facts

The proceedings concerned the carriage of human influenza vaccines which had to be kept within a certain temperature range. Whilst they were in the carrier's possession (Finemores), they were exposed to temperatures outside the prescribed range and were rejected subsequently by the end users. The claim against Finemores by the owner of the vaccines (Alphapharm) was for damages for breach of duty as a bailee. Finemores relied on an exclusion clause, or alternatively, an indemnity clause to avoid liability. The question was whether those clauses formed part of the contract.

A sub-distribution agreement existed between Richard Thomson (RT), a general wholesaler of medical supplies, and Alphapharm. RT engaged Finemores to collect the vaccines on arrival in Australia, transport them to its warehouse, store and then deliver them to designated customers.

RT asked Finemores to provide a quotation in respect of providing these services. Finemores provided a quotation, which included the following:

Following acceptance to our quotation, it would be very much appreciated if you would complete the Credit Application and sign the Freight Rate Schedule accepting our Rates and Conditions and fax back to our office at your earliest convenience.

A representative of RT visited Finemores and was presented with a form titled "Application for Credit". This is the document referred to in the above quote. This was signed by the representative of RT. Immediately above the signature clause appeared the words:

Please read 'Conditions of Contract' (Overleaf) prior to signing.

Fifteen “conditions of contract” were printed on the reverse of the credit application, including conditions relating to exclusion of liability and indemnity.

Findings at first instance and on appeal

At first instance and on appeal, it was found that the conditions on the reverse of the credit application did not form part of the contract between RT and Finemores. These findings were based on the proposition that it was necessary for Finemores to give RT reasonable notice of the conditions and that Finemores had failed to do so.

Findings by the High Court

In rejecting these findings, the High Court noted that:

The proposition appears to be that a person who signs a contractual document without reading it is bound by its terms if the other party has done what is reasonably sufficient to give notice of those terms. If the proposition is limited to some terms and not others, it is not easy to see what the discrimen might be.

The proposition that one party has to give the other party sufficient notice of terms arises from the “ticket cases”. In the “ticket cases”, one party attempts to incorporate into a contract conditions appearing in an unsigned document by giving notice of those conditions. In those cases, the other party may not have the opportunity to read and appreciate the effect of unusual or onerous provisions.

The High Court held that:

Where a person has signed a document, which is intended to affect the legal relations, and there is no question of misrepresentation, duress, mistake or any other vitiating element, the fact that the person has signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms.

Finemores was entitled to rely on the exclusion clause and the indemnity clause because both appeared in the signed contract.

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The High Court has identified and restated the contractual principle that the conditions agreed in contracts are binding, especially where they have business experience or are corporations who can take legal advice as to the effect of the contracts into which they enter.

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