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Ref : Chans advice/203

To: Transport Industry Operators

As agent for the Carrier? (II)

In Chans advice/14 dated 28/2/2002, we discussed this topic 15 years ago. In its Judgment dated 16/10/2017, the District Court of New South Wales in Australia had to deal with, inter alia, a malpractice that a forwarder issued its own house B/Ls but signed off with as agent for China Ocean Shipping, Pacific International Lines, Mitsui O.S.K. Lines Limited or Orient Overseas Container Line without authority. [2017 NSWDC 279]

This matter concerned bills of lading created by the defendant, which was a freight forwarder. The plaintiff was a finance company, which lent money to an exporter to purchase goods for export. The exporter engaged the forwarder to arrange shipment of its product to ports in China. During the course of so acting, the forwarder created bills of lading. The exporter provided the B/Ls to the finance company as security for borrowings. When the exporter later defaulted on its obligations to the finance company, it was found that the bills of lading issued by the forwarder were not valid securities which would enable the finance company to take action to obtain possession of the cargo.

Background

On 16 May 2014 the finance company entered into a Loan Agreement with the exporter. That agreement provided that the exporter could make drawdowns for the purchase of sheep skins and/or cow hides for export to China. It was a term of the contract between the finance company and the exporter that all original shipping documents, including bills of lading, relating to a proposed advance of funds by the finance company to the exporter would be deposited with the finance company

There were some early drawdowns which were repaid on time. The exporter made three later drawdowns which totalled \$742,800 and which were not repaid:

- (a) On 8 July 2014 - \$289,120
- (b) On 29 July 2014 - \$271,000
- (c) On 29 August 2014 - \$182,680

The forwarder issued eight original bills of lading in respect of the goods purchased by the exporter with the three drawdowns. The exporter provided those bills of lading to the finance company as part of the documentation which the finance company required to be lodged with it, before making each further advance of funds.

Each of the bills of lading purported to be and had the hallmarks of a negotiable instrument providing an entitlement to the holder to present the bill of lading to obtain delivery of the goods. Each bill of lading on its face appeared to be:

- (a) a receipt for the relevant goods specifying the cargo and the containers for transportation;
- (b) evidence of a contract of carriage; and
- (c) a document of title providing rights to the holder of the originals and identifying the "Consignee" as "TO ORDER".

The goods were subsequently delivered to unidentified receivers in China and that when the exporter failed to pay its outstanding obligations to the finance company, the finance company was unable to use the bills of lading issued by the forwarder to obtain delivery of the goods.

The finance company had two causes of action against the forwarder. Firstly it sued for misleading or deceptive conduct within the meaning of the *Australian Consumer Law*. It was said that by issuing the bills of lading, the forwarder represented that:

- (a) each bill of lading was a negotiable instrument providing an entitlement to the holder to present the bill of lading to obtain delivery of the goods;
- (b) alternatively, in issuing sets of "original" bills of lading consigned "TO ORDER", each bill of lading could be held by a third party as security for payment for the goods and/or to secure financial arrangements.

The finance company alleged that in reliance upon those representations the finance company accepted the bills of lading as security for amounts outstanding by the exporter to the finance company, did not take any steps to obtain further security, and made advances to the exporter in the belief that it had taken security by acceptance of delivery of the bills of lading. The finance company claimed damages for such misleading or deceptive conduct.

The second cause of action pleaded by the finance company was for breach of warranty of authority. It was said that by signing each of the bills of lading the forwarder held itself out as having authority to act on behalf of each relevant carrier described in each bill, including the authority to issue bills of lading providing an entitlement to the holder to present the bill of lading to obtain delivery of the goods described. Each of the bills were signed by the forwarder as agents for the carrier, and purported to be a negotiable instrument providing an entitlement to the holder to present the bill of lading to obtain delivery of the goods. The forwarder did not have authority to act on behalf of each relevant carrier and that its warranty of authority in respect of the bills of lading induced the finance company to make the further advances to the exporter, which advances would not have been made but for the warranty of authority. As a result of the alleged breach of express warranty of authority, the finance company suffered loss and damage, being the amounts further advanced to the exporter plus interest.

For each of the drawdowns under the loan facility, the exporter deposited bills of lading supplied to it by the forwarder with the finance company, by sending the original bills of lading by post, or by delivering the bills of lading to the finance company's Sydney office by hand. As each drawdown was repaid, the finance company arranged for the return of the original bills of lading to the exporter.

The particular bills of lading issued by the forwarder and provided to the exporter, which were then lodged with the finance company, were:

- (a) Bill of lading no. MELZHE1010 dated 25 June 2014
- (b) Bill of lading no. MELZHE1011 dated 25 June 2014
- (c) Bill of lading no. MELZHE1020 dated 7 July 2014
- (d) Bill of lading no. MELZHE1012 dated 7 July 2014
- (e) Bill of lading no. MELCGO140000075 dated 7 July 2014
- (f) Bill of lading no. MOLU17101551936 dated 24 July 2014
- (g) Bill of lading no. OOLU3079110572 dated 31 July 2014
- (h) Bill of lading no. MOLU17101564173 dated 7 August 2014.

The important features of bill of lading no. MELZHE1010 were as follows.

- ✧ In the top right-hand corner it was said to be a bill of lading issued by Freight Solutions (Vic) Pty Limited (i.e. the forwarder).
- ✧ The carrier was said to be "China Ocean Shipping". In the bottom right-hand box these words appear:

"In witness of the contract herein contained the above stated number of originals have been issued one of which being accomplished the other(s) to be void.

For the carrier CHINA OCEAN SHIPPING. "

- ✧ That box was then executed under the name of Freight Solutions (Vic) Pty Limited. The seal of the forwarder and a signature was placed on an execution line against which were the words "Signed As Agents Only".
- ✧ Above the execution box was, in large capital letters, the word "ORIGINAL".
- ✧ In the top left-hand corner of the bill of lading the Shipper was ASSH (i.e. the exporter). The Consignee was "TO ORDER".
- ✧ The port of loading was Melbourne, the port of discharge was Shanghai and the place of delivery was Zhengzhou.
- ✧ There were three original bills of lading and three copies of the bills of lading. The goods were described, along with their marks, numbers and weights.
- ✧ There was no endorsement on the bill of lading.

Bill of lading number MELZHE1011 was in identical terms, except for the description of the goods.

Bill of lading number MELZHE1020 was in identical terms apart from the description of the goods and the name of the vessel.

Bill of lading number MELZHE1021 was in identical terms apart from the description of the goods and the name of the vessel.

Bill of lading number MELCGO140000075 was in similar terms, except that the carrier was "Pacific International Lines". The forwarder had signed as agent only for Pacific International Lines. Once again the description of the goods and the name of the vessel was different.

Bill of lading number MOLU17101551936 was in similar terms except that the carrier was Mitsui O.S.K. Lines Limited. The forwarder had signed as agent only for Mitsui O.S.K. Lines Limited. The description of the goods and the vessel was different. The port of discharge was the same as the port of delivery being Qingdao.

Bill of lading number OOLU3079110572 was in similar terms except that the carrier was Orient Overseas Container Line. The forwarder had signed as agent only for Orient Overseas Container Line. The description of the goods and the vessel was different and the port of discharge and delivery was Quingdao.

Bill of lading number MOLU17101564173 was in similar terms except that the carrier was Mitsui O.S.K. Lines Limited and the forwarder had signed as agent only for that carrier. The description of the goods and the vessel was different, and the goods were being discharged at and delivered to Quingdao.

Misleading or Deceptive Conduct

The finance company firstly sued the forwarder for a breach of s 18 of the *Australian Consumer Law* which is contained in Schedule 2 to the Competition and Consumer Act 2010 (C'th). Section 18(1) provides:

"A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

The relevant legal principles in relation to a misleading or deceptive conduct claim are set out in paragraph [10] in *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 as follows:

- (1) A contravention of s 18 is established by "conduct" which is misleading or deceptive or likely to mislead or deceive;
- (2) Section 18 is concerned with the effect or likely effect of "conduct" upon the minds of that person or those persons in relation to whom the question of whether the "conduct" is or is likely to be misleading or deceptive falls to be tested. The test is objective and the court must determine the question for itself;
- (3) "Conduct" can, of course, include making a statement that is misleading or deceptive or likely to mislead or deceive;

- (4) By making a statement of past or present fact, a corporation's state of mind is irrelevant unless the statement involved the state of the corporation's mind;
- (5) Contravention of s 18 does not depend upon the corporation's intention or its belief concerning the accuracy of the statement of fact but upon whether the statement conveys a meaning which is false;
- (6) A false meaning will be conveyed if what is stated concerning the past or present fact is inaccurate but also if, although literally true, the statement conveys a meaning which is false.

The intent of the defendant is not relevant under s 18. All that is relevant is whether, tested objectively, the conduct was misleading or deceptive or likely to mislead or deceive – *Hornsby Building Information Centre Pty Limited v Sydney Building Information Centre Limited* (1978) 140 CLR 216 at 223.

The remedy sought by the plaintiff is damages under s 236 of *Australian Consumer Law*. This provides as follows:

“(1) If:

(a) a person (the claimant) suffers loss or damage because of the conduct of another person; and

(b) the conduct contravened a provision of Chapter 2 or 3;
the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.”

It is not essential that the contravention be the sole cause of the loss or damage. Where there are two concurrent causes, and misleading or deceptive conduct was one of those causes, that is enough – *Henville v Walker* at [14].

The plaintiff must prove that it has relied upon the conduct, in acting as it did, thus suffering loss.

The Judge found that (i) by issuing the bills of lading the forwarder represented that each bill of lading was a negotiable instrument providing an entitlement to each successive lawful holder of the bill to present the bill of lading to obtain delivery of the goods, and that (ii) by issuing the bills of lading the forwarder represented that because they were “ORIGINAL” bills of lading consigned “TO ORDER”, each bill of lading could be held by a third party as security for payment for the goods and/or to secure financial arrangements.

However, the Judge found that the finance company did not become a lawful holder of each bill because each bill was not endorsed. But the Judge found that the finance company could have become a lawful holder of each bill by requesting and obtaining endorsement of the bill by the exporter. The exporter wanted these drawdowns in order to do business, buy goods and sell them for profit in China. The Judge found that if a request was made by the finance company for the exporter to endorse each bill of lading it was likely that it would have done so, just as it voluntarily provided possession of the bills as a condition of the approval of each drawdown.

The Judge found that even without endorsement, each bill of lading, if issued with authority, would have given the finance company a lien as pledgee over the bills of lading, which would have had the practical effect of the finance company being empowered to prevent any other party taking delivery of the cargo, unless the finance company was repaid for each drawdown.

A false meaning was conveyed by these bills of lading issued by the forwarder. Firstly, the falsity was that they were ocean bills of lading issued by the forwarder as authorised agent of each ocean carrier. Secondly, by being specifically stated to be “ORIGINAL” and “TO ORDER” they purported to be ocean bills of lading which would have entitled the lawful holder to possession of the goods.

Even if these were genuine ocean carrier bills (issued by the forwarder with the authority of each carrier), the finance company would not have obtained a perfect security because each bill was not endorsed. However, it had a security which could be perfected by endorsement, which the Judge had found would probably have been given by the exporter if asked.

The Judge found that the finance company relied upon the bills as original negotiable bills of lading (as they appeared to be on their face) and in view of such reliance the finance company suffered loss or damage because of the misleading or deceptive conduct of the forwarder.

The conduct of the forwarder was a cause, in fact the dominant cause, of the loss or damage.

The finance company might therefore recover the amount of the loss or damage against the forwarder under s 236 of the *Australian Consumer Law*.

Breach of Warranty of Authority

The forwarder had no authority from any of the carriers nominated on the bills of lading which the forwarder issued.

The fundamental principle is that a person who enters into a contract expressly as agent for a principal named impliedly warrants his authority. If he has no such authority, he may be sued on that implied contract and is bound to make good to the other contracting party what that party has lost, or failed to obtain, by reason of the non-existence of the authority – *Leggo v Brown & Dureau Limited* (1923) 32 CLR 95 at 99.

In *Firbank's Executors v Humphreys* (1886) 18 QBD 54 Lord Esher MR said (at 60):

“The rule to be deduced is, that where a person by asserting that he has authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and that assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.”

In *BHPB Freight Pty Limited v Cosco Oceania Chartering Pty Limited & Ors* [2009] FCA 1087 Justice Finkelstein said that it is not necessary for the plaintiff to enter into a transaction with the supposed principal in order to establish an action for breach of warranty of authority. The cause of action is established even if the plaintiff enters into a transaction with another person. His Honour cited *Firbanks Executors v Humphreys* and also *Penn v Bristol & West Building Society* [1997] 1 WLR 1356.

In the normal case of breach of warranty of authority, the person to whom the warranty is given is the other party to the purported contract. However, the characteristics of a bill of lading are such that the creation, issuing and delivery of a bill of lading mean that a commercial document is put into the world which can end up in the hands of third parties, and not just the person to whom the bill is originally delivered. One of the three characteristics of a bill of lading is that it constitutes a document of title for the goods nominated in the bill.

A person who is given possession of a bill of lading, even though they did not have the warranty of authority conveyed directly to them, has a document of title purportedly signed by an agent for the carrier, and execution in that fashion carries with it a warranty of authority which is made not only to the original recipient of the bill, but to any person who subsequently comes into possession of the bill.

The Judge found that (i) the forwarder's bills of lading purported to evidence a contract of carriage between the shipper and the forwarder as an agent for the various ocean carriers, and that (ii) the forwarder purported to execute each bill of lading as agent for the ocean carrier, without having authority from any of the ocean carriers, and that (iii) the breach of warranty of authority by the forwarder was a cause of the finance company approving and permitting each of these three drawdowns by the exporter, and that (iv) if the forwarder had not breached its warranty of authority, the finance company would have suffered no loss, as it would never have advanced the three unpaid drawdowns to the exporter.

In the result, the Judge found that the forwarder was liable to the finance company on the cause of action pleaded for breach of warranty of authority.

Conclusions

The Judge's orders were:

- (1) Judgment for the finance company against the forwarder in damages for misleading or deceptive conduct within the meaning of the *Australian Consumer Law*.
- (2) Judgment for the finance company against the forwarder in damages for breach of warranty of authority.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgement.

Simon Chan

Director

E-mail: simonchan@smicsl.com

Richard Chan

Director

E-mail: richardchan@smicsl.com

23/F, Excel Centre, 483A Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong
香港九龍荔枝角青山道 483A 卓匯中心 23 樓 Tel: 2299 5566 Fax: 2866 7096

E-mail: gm@smicsl.com Website: www.sun-mobility.com

A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

香港保險顧問聯會會員



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