SUN MOBILITY
Insurance and Claims Services Limited
新移動保賠顧問有限公司

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To: Transport Industry Operators

Bank guarantee

In its Judgment dated 5/8/2004, High Court of Australia held a bank liable to indemnify a carrier under two letters of indemnity signed and stamped by the bank for cargo delivery without production of original bills of lading.

The proceedings arose out of the sale of a cargo of legumes by an Australian seller to an Indian buyer in July and August 1998. The discharge port was Calcutta. Loading was completed in January 1999. On 24/1/1999, the vessel arrived in India. However, the buyer had not yet got the bills of lading. To avoid delay in discharge, the seller asked the carrier to commence discharging against letter of indemnify pending arrival of bills of lading. The carrier insisted that the letter of indemnity had to be co-signed by a bank. The seller asked the Manager of its bank to assist. The Manager signed the two letters of indemnity dated 28/1/1999 and 19/2/1999 and affixed the bank's stamp. The letters of indemnity were in the following form:

Quote

To (the name of the carrier)

From (the name of the seller)

Dear Sirs,

SHIP: (the name of the vessel)
VOYAGE: FREMANTLE/ESPERANCE/BRISBANE, AUSTRALIA TO CALCUTTA, INDIA
CARGO & ORIGINAL BILLS OF LADING NUMBERS: (the details)

The above goods were shipped on the above vessel by (the name of the seller) (and consigned to order) for delivery at the port of CALCUTTA, INDIA, but the Bills of Lading have not yet arrived and we, (the name of the seller) hereby request you to give delivery of the said cargo to RECEIVERS AS DIRECTED BY (the name of the buyer) without production of the original Bills of Lading.

In consideration of your complying with our above request we hereby agree as follows:

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability loss or damage of whatsoever nature which you may sustain by reason of delivering the goods to RECEIVERS AS DIRECTED BY (the name of the buyer) in accordance with our request.
2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the goods as aforesaid to provide you or them from time to time with sufficient funds to defend the same.
3. If, in connection with the delivery of the cargo as aforesaid, the ship or any other vessel or property belonging to/chartered by you should be arrested or detained or if the arrest or detention thereof should be threatened, to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such vessel or property and to indemnify you in

respect of any liability, loss, damage or expenses caused by such arrest or detention or threatened arrest or detention whether or not such arrest or detention or threatened arrest or detention may be justified.

4. 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.
5. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.
6. The liability of each and every person under this indemnity shall in no circumstances exceed 200% of the CIF value of the above cargo.
7. This indemnity shall be construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Stamp and Signature: (the name of the seller)

Stamp and Signature: (the name of the bank)

Unquote

Two letters of indemnity were signed by the seller and the bank, and addressed and delivered to the carrier. The cargo was delivered without production of the bills of lading. The Indian buyer was financed by a Singapore company for the purchase of the goods. The bills of lading were in the possession of the Singapore financier. The buyer dishonestly failed to pay the purchase price. Claims made by the Singapore financier against the carrier were settled on the basis that the carrier paid substantial damages and interest. The seller became insolvent. The carrier claimed, pursuant to those letters of indemnity, to be entitled to be indemnified by the bank in respect of the losses of about US$4,200,000 it suffered by reason of delivering the cargo in the absence of bills of lading.

The bank's defence was that, on the true construction of the letters of indemnity, only the seller was bound to indemnify the carrier, and the bank's role was merely to verify or authenticate the seller execution of the documents.

The Court did not agree to the bank's defence. The meaning of commercial documents is determined objectively: it was only the documents that spoke to the carrier. The construction of the letters of indemnity was to be determined by what a reasonable person in the position of the carrier would have understood them to mean. That required consideration, not only of the text of the documents, but also the surrounding circumstances known to the carrier and the bank, and the purpose and object of the transaction. The primary indemnifying party was the seller. The question concerned the effect of the bank's signature and stamp. The carrier argued that it was a bank endorsement under which the bank also accepted liability as an indemnifier. The commercial purpose was plain. The carrier was being requested by the seller to take a risk by delivering cargo to receivers who could not produce the bills of lading. The carrier informed the seller, and the seller informed the bank, that the carrier would not agree to take that risk unless the seller's bank also signed the document. The carrier had only limited knowledge of the financial capacity of the seller to meet its obligations under the indemnity. The terms of the document, understood in the light of the surrounding circumstances and the purpose and object of the transaction, and the market in which the parties were operating, meant that the bank was undertaking an obligation of indemnity. Relevant to the meaning of the document was not only what it said, but also what it did not say. There was nothing in the terms of the document to indicate that the bank was

merely authenticating the execution by the seller, and there was nothing in the surrounding circumstances to suggest that the carrier would accept such authentication only. A reasonable reader in the position of the carrier would have understood the document as a bank endorsed absent bills of lading indemnity, and would have understood that the bank was undertaking liability as an indemnifying party to support the liability undertaken by the seller. The Court rejected the bank's arguments.

The bank's second defence was that the letters of indemnity were signed without the bank's authority and were therefore not binding.

The Manager, who signed the letters of indemnity on behalf of the bank, and affixed the bank's stamp, was Manager of the Documentary Credit Department. Her duties included supervising the day-to-day handling of import/export letters of credit, the day-to-day handling of import/export collections, and the staff of the Documentary Credit Department. The stamp was one that was used for the purposes of letters of credit. The issuing of indemnities and guarantees by the bank was the function of the Guarantee Loan Department, not the Documentary Credit Department. Guarantees and indemnities were to be signed under power of attorney. The Manager did not have authority to bind the bank to a guarantee or indemnity. There was no established practice within the bank as to the procedure to be followed where the bank was asked by a third party to verify a customer's signature on a commercial document. There was nothing to put the carrier on notice or inquiry as to her lack of actual authority to bind the bank. As a matter of administration she did not have such authority, but that was the consequence of the bank's internal procedures, not of its constitution.

The carrier regarded the letters of indemnity as carrying an indemnity from the bank and that, in all the circumstances, it was reasonable for the carrier to rely upon the letters as carrying a bank indemnity. It was reasonable for the carrier to rely on the signature and the stamp as binding the bank.

As to the general principles concerning the apparent or ostensible authority of an officer of a company dealing with a third party. Where an officer is held out by a company as having authority, and the third party relies on that apparent authority, and there is nothing in the company's constitution to the contrary, the company is bound by its representation of authority. The representation, when acted upon by the third party by entering into a contract with the officer, operates as an estoppel, preventing the company from asserting that it is not bound by the contract. The assurance with which outsiders deal with a company is more often than not based, not upon inquiry, or positive statement, but upon an assumption that company officers have the authority that people in their respective positions would ordinarily be expected to have. If the conduct of a party "induced or assisted" an assumption, that party ought not to be permitted to depart. Commercial documents, such as the letters of indemnity in the present case, are commonly relied upon, and intended to be relied upon, by third parties who act upon an assumption of authenticity created or reinforced by their mode of execution, and by the fact and circumstances of their delivery. Within a commercial enterprise, such as a bank, there will normally be internal lines of authority, and procedures, designed to ensure that, when documents are issued to third parties, appearances are reliable. Such an enterprise might induce or assist an assumption, not only by the representation conveyed by its organizational structure, and lines of communication with third parties, but also by a

failure to establish appropriate internal procedures designed to protect itself, and people who deal with it in good faith, from unauthorized conduct.

The carrier's reliance upon the letters of indemnity was based upon their form and contents, the signature of a person who appeared to be (and was) an officer of the bank, the stamp or "chop", and the fact that the carrier was sent copies of the documents, directly or indirectly, by the bank. The stamp was probably more significant to the carrier than the signature, which was indecipherable. It was designed for use on letters of credit, and it allowed the person who was authorized to use it to give an appearance of authenticity to documents to which it was applied. The organizational structure of the bank at the time was such that the Manager was the bank officer to whom the carrier's request, would be, and was, communicated by the seller. She was the person who dealt with the request, and who communicated the bank's response to the carrier. That response, involving her signature of the letters of indemnity and fixing the bank's stamp to them, would signify to a reasonable third party, and signified to the carrier, agreement to what was requested. The stamp was not the bank's common seal, but placing it on a commercial document which named the bank as a party strongly enhanced the appearance that the document was signed on behalf of the bank. The Manager was given the stamp without any instructions as to how she should use it. There were no procedures within the bank under which she was to seek legal advice about the manner and form of the bank's signature, or take other steps to see that it was communicated to the carrier that the only role the bank was willing to undertake was one of authentication. She was placed in a position to sign and stamp the documents, and send them to the seller and the carrier, but without any internal check upon their final form and, in particular, without any qualification or limitation of the capacity in which the bank was participating in the transaction.

The assumption made by the carrier, found by the Court to have been reasonable, upon which the carrier acted to its detriment, was induced and assisted by the conduct of the bank in placing the Manager in a position which equipped her to deal with the letters of indemnity as requested by the carrier. It would be unjust to permit the bank to depart from the assumption.

The Court held that the carrier was entitled to succeed in its claim against the bank based on contract.

Please feel free to contact us if you have any questions or you want to have a copy of the Judgment.

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