Casebook Summary (Construing the terms and Implied Terms)

Construction

• In construing a contract, the parties’ intentions are considered objectively

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451

Relevant Facts: Pacific (P) was asked by NEAT to deliver a cargo of legumes from Australia to India. NEAT sent a letter of indemnity to P in respect of loss that P might suffer in discharging cargo to receivers without Bills of Lading. The latter was signed by NEAT’s bank, BNP (B) who disclaimed liability and merely confirmed the purchaser’s signature. P rejected the letter of indemnity and NEAT asked BNP to sign one without the disclaimer. The bank officer signed and stamped the letter and sent it to NEAT who transmitted it to P. The officer was authorised only to verify signatures on letters of indemnity but this limitation was unknown to P. P suffered loss as a result of having delivered cargo to those without bills of lading.

Case History: P sued B in the NSWSC to enforce the indemnity letters (NEAT became insolvent). The trial judge found that signing the indemnity letters represented that NEAT had the financial capacity to honour the obligations under the letter of indemnity. The NSWCA held that BNP was not liable because the officer had neither actual nor ostensible authority to bind BNP to an indemnity.

Issue: To what capacity, on true construction of the letter of indemnity, was the bank involved in the transaction

Decision and ratio (Joint judgement):

• Evidence that the officer gave notice to NEAT that execution by BNP was only for signature verification was denied. The trial judge rejected the that this was effectively communicated to NEAT and more significantly it was never communicated to P

• Their honours proceeded on the basis that the officer’s subjective intention was not important – the meaning of commercial documents are to be determined objectively by what a reasonable person in the position of P would understand

  o This involves consideration not only of the text of the document but the surrounding circumstances as known to Pacific and BNP, and the purpose and object of the transaction

• The commercial purpose of the second letter was plain – it was, after Pacific denied taking the risk of delivering cargo to receivers without bills of lading unless a signature of BNP was obtained (with only limited knowledge of NEAT’s ability to meet obligations), for BNP to undertake the obligation of an indemnity.

• Relevant to this conclusion was that there was nothing in the document to indicate that BNP was merely authenticating the execution by NEAT and there was nothing in the surrounding circumstances to suggest that P was accept it as such

   A reasonable person in the position of Pacific would have understood the document as a bank endorsed absent bills of lading indemnity, understanding that the bank was undertaking liability as an indemnifying party to support the liability undertaken by NEAT.

Inemnity - > we promise you that if you unload the cargo and there is no bills of lading, we will indemnify you
Two possibilities to construe signature – we validate this or we will indemnify
Exclusion Clauses

- An exclusion clause is a term of a contract that attempts to either:
  - Modify the principal obligations arising under a contract of that particular type; or
  - To limit/exclude liability of a party which would otherwise arise as a result of a breach by that party of his primary obligations to perform the contract in accordance with its terms (The Law of Contract (1987 – Greg and Davis)

- In considering whether or not exclusion clauses are effecting – statute (the TPA) must be considered

- Before a party can rely on the protection of an exclusion clause it must be shown that:
  - The clause was incorporated into the contract; and
  - whether, as a matter of construction, the clause applies to exclude or restrict liability in relation to the issue in dispute
  - Whether or not the clause applies to the issue in dispute

Darlington Futures Ltd v Delco Aust Pty Ltd (1986) 161 CLR 500

Relevant Facts: The appellant (DF) was a broker dealing on the commodity futures market. They entered into a contract in 12/6/81 with the respondent (DA) under which they were engaged to take part in a form of commodity futures dealing. Without DA's authority, DF engaged in day trading in the course of which heavy losses were sustained.

Case History: DA sued to recover damages for breach of duty in trading futures without authority. The appellant relied on two exclusion clauses: cl 6: which exempted them from liability for losses arising “in any way out of any trading activity undertaken on behalf of the Client whether pursuant to this agreement or not” and cl 7 which limited liability “for or in respect of any claim arising out of or in connection” with the relationship established in the agreement. The trial judge found in favour of the appellant

Issue: Whether or not cl 6 protects the appellant from the consequences of what would otherwise be breaches of contract

Decision: No, read in context the words plainly refer to trading activity undertaken by the appellant for the respondent with the respondents authority

Ratio (joint judgement: Mason, Wilson, Brennan, Deane and Dawson JJ):

Their honours first had to deal with the question of what the approach was in construing exclusion clauses

- In their decision their honours dealt with submissions involving the English approach to construction of exclusion clauses and explicitly rejected their application since the High Court has authoritatively stated its own approach to construction of exclusion clauses:
  - “…we deny the application of such a clause in those circumstances simply upon the interpretation of the clause itself. Such a clause contemplates that loss or damage may occur by reason of negligence....in carrying out the obligations created by the contracts” - [Sydney Corporation v West (1965) 114 CLR 481]
  - The effect of an exclusion clause must be “resolved by construing the language that the parties used, read in its context and with any necessary implications based on presumed intention” – [Windeyer J (dissenting) in Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd (1966) 115 CLR 353 ]