

Maynegrain Pty. Limited

Appellant

v.

Compafina Bank

Respondent

(and Cross-Appeal)

FROM

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 25TH JANUARY 1984

Present at the Hearing:

LORD DIPLOCK
LORD ELWYN-JONES
LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN

[Delivered by Lord Templeman]

In these proceedings the respondent plaintiff, Compafina Bank ("Compafina"), claims damages from the appellant defendant, Maynegrain Proprietary Limited ("Maynegrain"), for conversion and negligence. The alleged act of conversion and the alleged breach of duty in negligence consist of allowing 28,000 metric tonnes of barley stored by Maynegrain, and the subject matter of a pledge, to be removed from store without the consent of Compafina which was entitled to the benefit of the pledge.

In September 1976, a Mr. Jamieson acting on behalf of Bulk Terminals & Exporters Proprietary Limited ("BTE") arranged for Compafina, a Swiss bank, to finance the purchase of Australian barley by BTE. The arrangement made between Compafina and BTE was that barley would be purchased by BTE and accumulated in a store belonging to Maynegrain at Brisbane. As and when the barley was received in store, Compafina would advance the cost price to BTE on the security of a pledge of the total barley in store. The advances by Compafina would be made on the advice and under the control of Australia & New Zealand Banking Group Limited ("ANZ") which had offices in Melbourne

and Sydney. These arrangements were not communicated to Maynegrain which thereafter stored barley in its store at Brisbane at the request of BTE.

On 23rd November 1976 ANZ passed on to Compafina a request by BTE for an advance of US\$222,000 being the cost price of 1760 tonnes of barley which had been purchased by BTE and stored with Maynegrain at Brisbane. On 30th November 1976 Compafina credited ANZ with the requisite advance and instructed ANZ to make payment to BTE:-

"....against your receiving warehouse receipt addressed to us."

The advance was in fact passed on by ANZ to BTE in reliance on a letter dated 1st December 1976 from BTE addressed to Compafina Bank c/o ANZ at Sydney. The letter stated that 1760 tonnes of barley were:-

"....held in stock by us on your account. Please treat this document as our warehouse receipt for 1760 metric tonnes of barley."

This letter could not by any stretch of imagination constitute a warehouse receipt by the warehouseman Maynegrain in whose store the barley had been deposited by BTE.

Additional stocks of barley were purchased by BTE and added to the Maynegrain store at Brisbane and further advances were made by Compafina through ANZ. Early in January 1977 at a discussion between Mr. Jamieson and Compafina it was agreed, according to a contemporaneous internal memorandum of Compafina, that the barley and other goods purchased by BTE or its associate company Penmas would be held at Brisbane by Maynegrain:-

"....and warehouse receipts in respect of them are to be made out in our name, and deposited with ANZ.... As soon as the warehouse receipts have been received ANZ is to make the request for funds and we shall transfer the corresponding sums to them - the advances to be made on the basis of 80% of the purchase price....but we shall subsequently be called after the sale to finance the balance up to the price of FOB, cost and freight or CIF basis.... Mr. A. Jamieson has assured us that....his entire harvest amounting to some 30,000 tonnes will be sold within 15 days for loading in February/March 1977. The sale price is in the region of US\$134. per tonne FOB for a cost price FOB of \$112. Penmas is the company which will appear as sellers.... We mentioned to Mr. Jamieson that we would like settlement by the buyers to be made against presentation of documents by ourselves, if not by the opening of documentary credits lodged with us, so that we could earn an additional commission...."

On 6th January 1977 BTE informed Maynegrain by telex that:-

"We have made arrangements through the ANZ bank for loan monies coming in from a bank through Geneva.... What we simply do is send a warrant to the ANZ warranting that we have "x" amount of tonnes in stocks and we would like to draw down "x" amount of dollars as pre-shipment finance.... As we are the borrowers, the ANZ bank has asked us could we get you to give us a warehouse receipt for the stocks...."

The telex message then set out in full the draft of the required warehouse receipt to be addressed by Maynegrain to The Manager ANZ, Sydney warranting receipts of additional barley:-

"....making the total held on your account "x" metric tonnes...."

Thereafter as and when BTE stored additional barley at Brisbane, Maynegrain provided BTE with warehouse receipts addressed to the ANZ Sydney in the form requested by BTE in their telex dated 6th January 1977. BTE presented the Maynegrain warehouse receipts to ANZ at Sydney together with a letter from BTE to ANZ requesting an appropriate advance. BTE also presented ANZ Sydney with a letter from BTE addressed to The Manager Compafina Bank c/o ANZ Sydney and purporting to be a warehouse receipt by BTE. ANZ then applied to Compafina for the advance which in due course was forthcoming.

For example, Maynegrain, by warehouse receipts dated 7th February 1977 and 11th February 1977 addressed ANZ Sydney, acknowledged receipt of additional barley consisting of 1,555 metric tonnes of malt barley and 82 metric tonnes of feed barley:-

".... making the total held on your account...."

21,215 tonnes of malt barley and 1,950 tonnes feed barley. BTE presented these warehouse receipts to ANZ Sydney together with a letter from BTE dated 11th February 1977 requesting the advance appropriate to the additional barley. BTE also sent to ANZ a letter dated 11th February 1977 addressed by BTE to Compafina c/o ANZ Sydney, warranting that:-

"....we now hold on your account 21,215 metric tonnes of malt barley and 1,950 metric tonnes of feed barley.... Please treat this letter as our official warehouse receipt."

ANZ then sent a telex to Compafina asking to be credited with the advance appropriate to the additional barley. That telex informed Compafina that BTE:-

"....now hold in stock 21,215 metric tonnes of malt barley and 1,950 metric tonnes of feed barley.... Warehouse receipt for Bank Compafina is in the mail and will be held before funds are released."

Compafina responded to that request by telex dated 14th February 1977 saying that the advance had been credited to ANZ as requested and also saying:-

"....it is understood that you are holding warehouse receipts in our name for above goods...."

This state of total confusion as between Compafina, ANZ and BTE was never resolved while the barley was in store. Maynegrain were never informed of the interest of Compafina while the barley was in store.

The final warehouse receipt issued by Maynegrain, dated 25th March 1977, was in these terms:-

"The Manager,
ANZ Banking Group Limited,
4 Bligh Street,
Sydney, N.S.W. 2000

Dear Sir,
Bulk Terminals & Exporters Pty.Ltd
Barley Stocks

Further to our warehouse receipt date 21st March 1977, we further warrant that we have received an additional 39.83 Metric Tonnes of Feed Barley, making the total held on your account 2523.48 Metric Tonnes of Feed Barley and 25510.98 Metric Tonnes of Malting Barley.
Yours faithfully,

Sd: P. Johnston
P. JOHNSTON
MANAGER
MAYNEGRAIN PTY. LIMITED."

This final warehouse receipt was duly collected by BTE and presented to ANZ.

All the barley held by Maynegrain pursuant to the final warehouse receipt dated 25th March 1977 was reclassified as feed barley by April 1977. In May 1977 ANZ noted that the barley amounting to a shipment valued at \$3.4 million remained in Brisbane awaiting sale. On 29th June 1977 Compafina noted that they were:-

"....financing a stock of 27,500 tonnes approximately of barley, warehoused in BTE silos, warehouse receipt to our order being held by the ANZ Sydney. Our present exposure in this financing amounts to US\$2,725,793.--.... The sale of the barley in bulk which should have taken place at the beginning of the year has been missed by our debtor. The latter has now the possibility to sell the total quantity to Kuwait, to the Kuwait Supply Co. (apparently a State Enterprise) at a price US\$160/- metric ton C & F Kuwait for goods delivered in bags. The demand for delivery in bags is causing certain problems.... A contract will be drawn stipulating payment by documentary credit lodged with our bank and confirmed by us,

negotiable against presentation of the B/Lading and usual shipping documents for the full amount contracted, upon shipment on board of the barley in bulk at Brisbane. Beforehand we would be called upon to issue a performance bond.... US\$440,000.--.... in favour of the buyer, guaranteeing both the delivery on board at Brisbane of the barley in bulk and ultimately the bagging, either on board the ship or at discharge...."

Under this proposal Compafina would have received a letter of credit for the contract price exceeding the monies owed by BTE to Compafina and the cost of the performance bond. The barley would then be released from store and loaded aboard a vessel for Kuwait, the bill of lading and shipping documents would be handed to Compafina which would then receive payment under the letter of credit sufficient to repay the monies due to Compafina. Compafina did not inform ANZ or Maynegrain of the arrangements which they had made with Mr. Jamieson.

By a contract dated 9th July 1977 the Kuwait Supply Co., the buyers mentioned to Compafina, agreed to buy from Gulf Fisheries Co. (which was part of the group of which BTE and Penmas were members) barley to be loaded in Brisbane, transported in bulk, bagged in Kuwait and delivered at the rate of 1,000 tons per weather working day at the price of US\$160 per metric tonne of bagged barley made available to the buyers cost and freight, free out, Kuwait. Payment was to be by revocable, assignable and divisible letter of credit for US\$4,400,000. The terms of the credit were to permit partial drawings on production of certificates of the actual weight of bagged barley made available to the buyers under the terms of the contract. Under this arrangement payment under the letter of credit could not be obtained as soon as the ship had been loaded and a bill of lading issued. Payment could only be obtained on account of the letter of credit as and when bagged barley was delivered to the buyers in Kuwait.

On 10th July 1977 the Commercial Bank of Kuwait, on behalf of the Kuwait Supply Co., issued an irrevocable and transferable letter of credit in the sum of \$4.4 million valid until 31st October 1977 (later extended to 10th November 1977), in favour of His Excellency Sheikh Hamad Sabah Al Anmag of Kuwait in respect of 25,000 tonnes of Australian bagged barley to be shipped in bulk within 45 days at the price of \$160. per metric tonne C & F Kuwait. Payment under the letter of credit was expressed to be conditional on production of a bill of lading evidencing bulk shipment of the full quantity of barley from the Australian port and on production of certificate of the actual weight of bagged barley made available to the buyers Kuwait Supply Co., under their contract of sale. Under this document also

payment was not obtainable except to the extent that bagged barley was delivered to the buyers in Kuwait. If BTE had attempted to negotiate for payment on shipment, supported by a performance bond as indicated to Compafina, those attempts must have been unsuccessful. BTE did not inform Compafina of the arrangements which BTE had in fact made to dispose of the barley by the contract of 9th July 1977 and by the letter of credit dated 10th July 1977. On 11th July 1977 Mr. Jamieson told ANZ that his:-

"...group recently sold long standing 28,000 tonne barley shipment to Kuwait for \$3.2 million with shipment due by 31/7/77. Overseas finance for the shipment of \$2,773,281 is to be cleared from the sale proceeds with the balance of \$426,000 approx. to come to our accounts."

At that date the BTE group companies were running overdrafts with ANZ so that ANZ were informed that the Compafina barley loans would be paid out of the proceeds of the shipment leaving a balance available to reduce the group debts to ANZ. Shortly thereafter Compafina gave a credit reference on behalf of BTE to the owners of the vessel Bellnes with whom BTE were negotiating for the shipment of their barley from Brisbane to Kuwait. Compafina were also given some information regarding progress in obtaining bagging equipment. Compafina were not informed that the letter of credit which they expected to replace their interest in the barley in store would not provide for payment once the barley had been loaded on the Bellnes and a bill of lading issued but would only provide for payment in respect of barley delivered in bags at Kuwait.

By a charterparty dated 22nd July 1977 the vessel Bellnes was hired by Penmas for the purpose of transporting the BTE barley to Kuwait. On the same day BTE sent a telex to Maynegrain whereby BTE nominated the Bellnes to lift the BTE barley stocks and asked for loading to be at the rate of 3,048 metric tonnes per day commencing on 2nd August 1977.

On 3rd August 1977 ANZ's internal memoranda record that their representatives told Mr. Jamieson that a credit of \$600,000 which had been promised in reduction of the group's overdraft with ANZ:-

"...had not arrived and naturally we were concerned at another breakdown. He produced copies of a head credit established by Commercial Bank of Kuwait SAK for U.S.\$4.4.million against which he claims 5 credits are to be issued including the credit that we are expecting. He went on to say that the vessel had arrived in Brisbane and was next in line for loading after a vessel already docked - he expected complete loading by 15/8 by which date he was certain we would have received the U.S.\$600,000 proceeds."

It was also recorded that on 5th August Mr. Jamieson informed ANZ that:-

"It is proposed to pay out the Swiss borrowing by direct remittance from Kuwait but RBA [Reserve Bank of Australia] situation regarding this pre-shipment finance will need to be confirmed."

Thus ANZ knew that the barley for which they held warehouse receipts was about to leave the warehouse and to be loaded on a vessel for trans-shipment. They had been shown the existing letter of credit which provided for payment after delivery of the barley in bags in Kuwait. The Bellnes in fact began loading on 8th August and the whole of the barley, the subject of the warehouse receipts, was loaded by 13th August and the Bellnes duly left for Kuwait. On 16th August Mr. Jamieson saw representatives of ANZ at Sydney. They noted that "...the situation remained pretty well as advised....on 3/8/77". Under the heading "Barley Shipment to Kuwait US\$ 4.4M" they commented:-

"This shipment left on 12/8/77 and although we sighted a copy of the head credit, the LC in the company's favour for US\$ 600,000 has still not been received. The problem with the shipment was that it was required to be landed in bagged form not bulk but due to the prohibitive costs of bagging in Australia the shipment left in bulk form to be bagged on landing in Kuwait....it will be possible to land the shipment in bagged form at the rate of 2000 tonnes per day and at a much cheaper cost in Kuwait. However as the head credit calls for bagged grain the backing credit in the group's favour would also need to be on this basis and accordingly we would be unable to negotiate under our credit for the other backing credits as shipment was in bulk form.

Accordingly the overseas end purchaser has agreed to pay daily for the amount of bagged grain landed after arrival of the vessel in early September..."

This memorandum does not display any surprise or alarm that the barley had been loaded and had departed for Kuwait on the Bellnes. Neither then nor subsequently did ANZ lodge with BTE or Maynegrain any objection to, or protest at, the loading and shipment of the barley. The Bellnes duly arrived at Kuwait on 4th September 1977. By a letter dated 15th September 1977 Compafina informed Maynegrain that Compafina had:-

"....financed 27.109 t. of barley for an amount of US\$ 2'043'814,-- we had entrusted ANZ BANK to hold the corresponding warehouse receipts in our name for the goods stored in your Brisbane Warehouses.

Without any instructions having been given from our end, it has come to our knowledge that 27.495

long tons of the above barley have been shipped per M/V "BELLNES" from Brisbane to Kuwait as per B/L dated Bergen 24.8.1977, shipper appearing to be BTE.

Your release of the goods without our consent representing an undeniable breach of the pledge in our favour, we must reserve our right and hold you responsible...."

In fact of course the warehouse receipts were in the name of ANZ and not Compafina. The letter dated 15th September 1977 which was forwarded to Maynegrain by ANZ with a letter from ANZ dated 23rd September 1977 was the first intimation received by Maynegrain of the interest of Compafina in the barley which they had stored for BTE. On 25th September Sheikh Hamad authorised the transfer of the letter of credit to Compafina but only to the amount of \$3.3 million. The delivery of the barley in bags was not completed before the letter of credit expired on 10th November 1977. The Sheikh declined to extend the letter of credit save on payment to him or to his Kuwait nominees of \$600,000. Compafina paid freight and demurrage charges. Some of the barley was damaged by rain. In the result Compafina received under the letter of credit \$2.38 million but paid out \$550,000 to meet freight and demurrage charges.

The question is whether Maynegrain committed the torts or either of the torts of conversion and negligence when they allowed to be loaded on the Bellnes the barley for which Maynegrain had issued warehouse receipts to ANZ.

Immediately before the Bellnes was loaded between 8th and 13th August 1977 Maynegrain held approximately 28,000 tonnes of barley which, to the knowledge of Maynegrain, had been deposited by BTE and pledged to ANZ. Maynegrain had never heard of Compafina in connection with the barley. In particular Maynegrain did not know that the barley had been pledged to Compafina or that ANZ held the warehouse receipts and the pledge on behalf of Compafina. In these circumstances Maynegrain was accountable for the barley to BTE and to ANZ and to nobody else. Maynegrain could not be guilty of conversion or breach of duty by allowing the barley to be removed from the custody of Maynegrain to the knowledge of BTE and ANZ.

Conversion consists of a positive wrongful act of dealing with goods in a manner inconsistent with the rights of the owner. The act of Maynegrain in loading or allowing the loading of the Bellnes with the barley the subject of the warehouse receipts was not a wrongful act nor was it an act inconsistent with the rights of ANZ provided that ANZ consented to the loading. It matters not that ANZ's consent was not

expressed by ANZ to Maynegrain but was impliedly communicated by BTE's instructions to Maynegrain to load the Bellnes. If in fact ANZ consented to the loading, before or after those instructions were delivered, there was no act of conversion. Similarly negligence consists of a breach of duty and if ANZ consented to the loading then Maynegrain were not guilty of any breach of duty owed to ANZ.

It is abundantly clear that on 3rd August and 5th August ANZ knew from Mr. Jamieson that BTE had made arrangements for the barley to be taken from store and loaded on a vessel and had made further arrangements for the barley thus loaded to be shipped to Kuwait. To these arrangements ANZ raised no objections. Mr. Jamieson knew and Maynegrain must have assumed that ANZ were aware of the arrangements and offered no objections to their implementation. In these circumstances to say that ANZ did not consent or that Maynegrain did not rely on the consent of ANZ is to ignore realities. Once it is conceded that Maynegrain were under no duty to obtain return of the warehouse receipts and under no obligation to obtain approval in writing of ANZ it must follow that Maynegrain were protected by the approval in fact of ANZ. It was not necessary for Maynegrain to receive from ANZ or BTE the return of the warehouse receipts which were not documents of title or to receive written or direct oral instructions from ANZ to allow the barley to be loaded on the Bellnes. Provided that ANZ in fact knew that the barley was being loaded on the Bellnes, there could be no conversion or breach of duty on the part of Maynegrain. At the time, Maynegrain, by neglecting to obtain the return of the warehouse receipts or to obtain from ANZ direct written or oral instructions, ran the risk that ANZ might not be aware that the barley was being loaded. In that event, Maynegrain might well have been liable to ANZ, although BTE which gave instructions for the loading had always been the sole channel of communication between Maynegrain and ANZ.

There is no doubt that ANZ did know that the barley was being loaded for shipment to Kuwait. ANZ were content that the barley should be loaded because they trusted BTE to procure payment of the sums due to Compafina and ANZ by means of the letter of credit which had been issued or by some other method. ANZ were told on 3rd August that the Bellnes was shortly to be loaded and that loading was expected to be completed by 15th August. They were told that they would receive a credit for \$600,000 by 15th August. They were shown the letter of credit which did not provide for payment until the barley had been delivered in bags in Kuwait. They were told by BTE on 5th August that Compafina was to be paid by direct remittance from Kuwait. If they were not satisfied with the assurances of BTE with regard to payment,

they could and should have given orders to Maynegrain that the barley was not to be loaded on the Bellnes pending further orders from ANZ. The instructions of Compafina could then have been obtained. It may well be that the outcome would have been no different but that is a question between Compafina and ANZ. ANZ knew that the barley was being loaded; they knew that Maynegrain were proposing to act on the loading instructions given to Maynegrain by BTE; they knew that Maynegrain had no reason to suspect that ANZ would object to the loading. ANZ did not in fact object to the loading either to Mr. Jamieson or to Maynegrain. In those circumstances, ANZ cannot now say that they did not approve of Maynegrain allowing the barley to be loaded on the Bellnes. In their discussions with Mr. Jamieson ANZ tacitly approved of the barley being loaded and if Mr. Jamieson had been asked by Maynegrain whether ANZ knew and approved of the loading then Mr. Jamieson would truthfully have given an affirmative answer. It follows there was no conversion or negligence for which Maynegrain can be made liable to ANZ and it follows that there was no conversion or negligence for which Maynegrain can be made liable to Compafina, the undisclosed principal of ANZ. It was conceded before the Board that Compafina can be in no better position than ANZ so far as the rights and liabilities of Maynegrain are concerned.

In his judgment given after the trial of the action in the Supreme Court of New South Wales Rogers J. held that ANZ's failure to object to the loading of the Bellnes was only a silent representation to Maynegrain that ANZ consented to the loading and that there was no evidence that Maynegrain relied on the alleged representation by silence.

In the Court of Appeal Hutley J.A. held that "...there was no consent, indeed no evidence of consent" by ANZ to the loading of the Bellnes. On this point Hope and Mahony JJ.A. agreed with the views of Hutley J.A.. But the failure of ANZ, in their discussions with Mr. Jamieson, to forbid loading until the procedure for payment had been clarified constituted positive consent by ANZ to the loading. That consent ratified BTE's instructions to Maynegrain with regard to the loading and was a consent which not only justified BTE in proceeding on the basis of the loading instructions but also authorised Maynegrain to act in obedience to those instructions. If ANZ had not consented to the loading of the Bellnes they would not have sat back and allowed the Bellnes to be loaded. They would have informed BTE and Maynegrain that the Bellnes was not to be loaded unless and until ANZ was satisfied that the pledge of the barley could safely be released. And if Maynegrain had not assumed, correctly, that ANZ were content with the loading instructions given by BTE, the Bellnes would not have been loaded.

At the hearing of this appeal it was submitted on behalf of Compafina that ANZ was an agent without actual or ostensible authority from their principal Compafina to give consent to the loading of the Bellnes. But this ground of complaint by Compafina against ANZ cannot affect Maynegrain because Compafina was an undisclosed principal when ANZ consented to the loading of the Bellnes. It was also submitted that ANZ consented in respect of their own interests in securing repayment of the monies owed to ANZ by the BTE group but that ANZ did not consent on behalf of Compafina. But so far as Maynegrain are concerned, the consent of ANZ was one and indivisible. Maynegrain had no notice of the equitable interest of Compafina or of the financial interests of ANZ. They only knew that the barley was owned by BTE and pledged to ANZ and that the barley could be loaded if BTE and ANZ approved of that course. It was also submitted that Maynegrain should have insisted on delivery of the warehouse receipts and should not have relied on Mr. Jamieson. No doubt in retrospect prudence required both ANZ and Maynegrain to distrust Mr. Jamieson. Both ANZ and Maynegrain trusted Mr. Jamieson sufficiently to allow the Bellnes to be loaded. ANZ ought to have realised, but Maynegrain had no reason to suspect, that the Bellnes should not be loaded without instructions from Compafina. ANZ should have forbidden BTE to proceed with the loading but ANZ raised no objection. The vessel was loaded upon the instructions of BTE and to the knowledge and with the tacit consent and approval of ANZ.

The judges in the Courts below proceeded on the footing, which their Lordships cannot accept, that the loading of the Bellnes constituted conversion of the barley by Maynegrain. Those judgments were therefore mainly concerned with a number of different and difficult problems which were considered in great depth and detail. Maynegrain disputed the right of Compafina to sue in conversion without joining ANZ as a defendant. A number of issues relating to the liability of a bailee and remoteness of damage were considered. Their Lordships did not find it necessary or desirable to hear full argument on these issues or to debate the evidence as to whether by 8th August 1977 a refusal by ANZ or Compafina to permit loading would have been in their best financial interests. In their Lordships' opinion this appeal ought to be allowed because Maynegrain committed no tort against ANZ by allowing the Bellnes to be loaded and therefore committed no tort against Compafina, the undisclosed principal of ANZ.

In the result their Lordships will humbly advise Her Majesty that this appeal ought to be allowed and the cross-appeal dismissed and that the judgments and orders of Mr. Justice Rogers and of the Court of Appeal should be set aside, so far as they impose any liability on Maynegrain. Compafina must pay the costs of Maynegrain before the Board and in the Courts below.

