In the leading work on the law of agency the principles concerning the apparent and ostensible authority of an officer of a company dealing with a third party are stated as follows:

Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone’s dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.1

While there remains debate as to the exact basis of ostensible authority, it is generally said to arise out of the doctrine of estoppel.2 This in turn imports a need for there to be a representation made by the principal.

The recent decision of the High Court of Australia in Pacific Carriers Ltd v BNP Paribas (‘Paribas’)3 concerns that type of representation described in Bowstead & Reynolds on Agency as ‘a representation only of a very general nature’,4 which arose from BNP’s having put its documentary credits manager in a specific position carrying with it a usual authority. Thus, as Lord Diplock said in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd, by so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has the authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the course of his principal’s business has usually “actual” authority to enter into.5

Professor Reynolds comments that, in such a context, the notion of representation to the third party, on which the estoppel is based, seems more artificial and thus the explanation of the principal’s liability in terms of estoppel is more difficult to maintain.6 The unusual feature of this in Paribas, as observed by the High Court,7 is that the manager had authority to sign the documents in

---

1 FMB Reynolds, Bowstead & Reynolds on Agency (17th ed, 2001) [8–013].
2 Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, 503.
4 FMB Reynolds, above n 1, [8–018].
5 [1964] 2 QB 480, 503.
6 FMB Reynolds, above n 1, [8–018].
issue in one capacity but not in another, and the documents made no express reference to the capacity in which they were signed.

The decision that BNP Paribas (BNP) was estopped from denying the authority of its manager to sign the documents on its behalf will provide comfort to third parties who rely on documents signed for and on behalf of financial institutions and, in particular, to those involved in the shipping industry who regularly seek letters of indemnity relating to the discharge of cargo without production of bills of lading.

I THE FACTS

In 1998, an Australian grain trader, New England Agricultural Traders Pty Ltd (NEAT), sold a quantity of chickpeas and dun peas to an Indian grain trader, Royal Trading Company (‘Royal’). Under the contracts of sale, payment was to be by irrevocable 90-day letters of credit to be opened and payable in Sydney by a first class bank acceptable to BNP. The peas bought by Royal were to be transported to India on a vessel chartered by Pacific Carriers Ltd (PCL) from Bolton Navigation SA. While the vessel was at sea, between Esperance and Brisbane, Royal requested NEAT to ‘split’ the bills of lading. NEAT agreed to this request. Due to a number of complications that ensued in relation to the retrieval and destruction of the original bills of lading, and their replacement with the new ‘split’ bills, it became apparent that it was unlikely bills of lading could be presented at the port of discharge. Bolton moved to seek a Letter of Indemnity (LOI) from PCL, who proceeded to seek similar protection from NEAT. The LOI was to accord with the 1998 standard form of the international group of P & I clubs.

In early 1999, a director of NEAT began discussions with the manager of BNP’s documentary credits department about providing the LOI sought by PCL. A copy of the LOI that was to be issued by NEAT was forwarded to the BNP manager, Ms Dhiri, who signed it in the space reserved for ‘Banker’s signature’ and affixed BNP’s stamp. This same procedure was repeated in relation to a further LOI one month later.

II THE DECISION AT FIRST INSTANCE

The vessel was subsequently arrested, and PCL demanded that NEAT and BNP provide bail or security for its release. Upon BNP’s refusal to provide any such security, PCL sued and succeeded at first instance before Hunter J, who found that the NEAT LOIs should be regarded as BNP’s assurance that NEAT was good for the indemnity provided and that BNP was liable in negligence for giving such an assurance.8 BNP appealed against the findings of Hunter J as to negligence, while PCL cross-appealed on the basis that Hunter J should have

found that BNP had made itself a party to the LOI or, in the alternative, that BNP had partaken in conduct that was in contravention of s 52 of the Trade Practices Act 1974 (Cth) (TPA).

### III The Decision of the Court of Appeal

In the subsequent appeal to the New South Wales Court of Appeal, the main issue before the Court was whether BNP could rightly be said to have become a party to NEAT's LOIs as a consequence of the signature of the BNP manager. The BNP manager had signed at the bottom of both LOI, which were in the form of a letter, under the words 'for and on behalf of [insert name of bank]'. It was the case for BNP that the purpose of the signature was simply to verify the signatures of the officers of NEAT. No evidence had been offered at first instance as to standard banking practice for this type of LOI. The Court of Appeal, therefore, approached the issue as an ordinary matter of construction and held that, construed in the context of each LOI as a whole, the signature of the BNP manager suggested that BNP 'backed' the indemnity and indeed became a party to the indemnity.

However, it was submitted by BNP that its manager did not have either the actual or ostensible authority to bind BNP to support either of the LOIs. The Court of Appeal agreed that the manager did not have actual authority to sign the letter on behalf of BNP. The Court noted the fact that the manager was only in charge of the documentary credits department and was not authorised to issue bank guarantees or indemnities. PCL submitted that, even if the manager did not have actual authority to sign the LOIs, she had the ostensible authority to do so. Shellar JA held that there was no evidence to suggest that the conduct of any other person associated with BNP (aside from the manager concerned) amounted to a representation that the manager had the ostensible authority to bind BNP to a LOI. The absence of such evidence also meant that PCL could not rely on the 'indoor management' rule in Royal British Bank v Turquand because that rule only operates when the person purporting to act on behalf of the company is acting within the scope of his actual or ostensible authority.

On the issue of negligence, Shellar JA concluded that the proposition that BNP had been negligent because its manager had, by signing the LOIs, given assurances that NEAT would be able to meet the terms of the indemnities offered was insupportable. First, the LOIs were not in the form of 'banker's assurances'. Secondly, even if the LOIs had been in the correct form, that did

---

10 BNP Paribas v Pacific Carriers Ltd [2002] NSWCA 379 (Unreported, Handley, Shelfer and Giles JJA, 29 November 2002) [77] (Sheller JA). Handleby and Giles JJA concurred with the decision of Sheller JA.
11 (1856) 6 E&B 327. The 'indoor management' rule provides that when persons conduct the affairs of a company in a manner which appears to be perfectly consonant with the Articles of Association, those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company.
12 Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146, 198 (Dawson J).
nothing to change the fact that the BNP manager lacked the actual or ostensible authority to sign such assurances on behalf of BNP. 13 His Honour also concluded that PCL’s submission that BNP had been negligent by not specifically qualifying the letters of indemnity to show that BNP was only signing to verify the signatures of the NEAT directors must fail. To find a duty of care in such circumstances would be to subvert the consensual nature of the law of contract.14

PCL’s claim under s 52 of the TPA failed because there was no evidence that any misrepresentation had ever been made by BNP to PCL. More specifically, there was no evidence to suggest that the BNP manager had ever expressly or impliedly communicated to PCL that she had the authority to bind BNP to the LOIs by her signature.15 The only persons involved in discussions with the BNP manager had been the directors of NEAT. Sheller JA concluded that BNP was not liable to PCL under the LOIs co-signed with NEAT. BNP’s appeal was upheld and PCL’s cross-appeal was dismissed.

IV THE DECISION OF THE HIGH COURT

In a unanimous decision, the High Court agreed with the decision of the Court of Appeal in relation to the construction of the LOIs. The Court stated:

the construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction.16

However, on the issue of the authority of the manager of BNP to sign the LOIs, the Court held that the assumption made by PCL, which had been found by the trial judge to be reasonable, and upon which PCL acted to its detriment, was induced and assisted by the conduct of BNP in placing its manager, Ms Dhiri, in a position which equipped her to deal with the letters of indemnity as requested by PCL.17 In such circumstances, it was, in the Court’s view, unjust to permit BNP to depart from the assumption.

The point of departure from the decision of the Court of Appeal related to the requirement that the necessary representation had to be one made to PCL by BNP about Ms Dhiri, and not merely one made by Ms Dhiri about herself. The High Court considered the finding of the Court of Appeal, that Ms Dhiri by herself signing the document represented that she had authority to and did bind

---
14 Sheller JA referred extensively to the High Court case of Sullivan v Moody (2001) 75 ALJR 1570
17 Ibid 227 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
BNP to a contract to indemnify, was an over-simplification. The Court noted that an officer of a company may acquire ostensible authority by virtue of the representation inherent in the title, status and facilities afforded to the officer by the company. Thus, the Court reasoned, issuing a letter of indemnity in respect of the delivery of goods without production of bills of lading was a transaction which formed part of the ordinary course of the business of a bank providing documentary credits in connection with international sale of goods transactions. It was also the case that the Manager of the Documentary Credits Department was the obviously appropriate person to issue the indemnities. This conclusion was, moreover, reinforced by the fact that other documents, evidencing transactions ancillary to and in the ordinary course of the bank’s business of providing documentary credits in connection with international sale of goods transactions, were signed for and on behalf of the bank by the person whom it described as its Manager of the Documentary Credits Department and in respect of which that person had actual authority to do so.

In the peculiar circumstances of this case, therefore, Ms Dhiri was the natural and appropriate person to whom PCL’s request for signature of the documents by BNP was directed. If the role of BNP was to be merely that of authentication of NEAT’s signature, then she was also the appropriate person to sign and stamp the documents. As matters transpired, however, the role of BNP was to be that of an indemnifying party. While Ms Dhiri was not the appropriately authorised person in that context to sign and stamp the documents, the third party, PCL, was not to know that. It relied on the reasonable assumption that Ms Dhiri had the relevant authority and it acted to its detriment. Accordingly, BNP was bound.

---

18 Ibid 225 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
19 Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72, 80 (Gibbs, Mason and Jacobs JJ).