SUPREME COURT OF QUEENSLAND

CITATION:	*Mount Isa Mines Ltd v Port of Townsville Ltd* [2016] QSC 112
PARTIES:	**MOUNT ISA MINES LTD** (applicant) **v** **PORT OF TOWNSVILLE LTD** (respondent)
FILE NO/S:	SC No 3743 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2016
JUDGE:	Martin J
ORDER:	**Upon the undertaking of the respondent to withdraw the notice to remedy breach referred to in paragraph 1 below and not to terminate the lease referred to in paragraph 1 below in reliance on that notice, the order of the Court is that:** **1. Declare that the applicant has not acted in breach of the lease from the respondent to the applicant dated 6 November 1987 (as varied by a deed of variation of lease dated 20 June 1996), as asserted in the respondent's notice to remedy breach dated 1 April 2016.** **2. The application is otherwise dismissed.** **3. The respondent is to pay the applicant's costs of the application.**
CATCHWORDS:	SHIPPING AND NAVIGATION – NAVIGABLE RIVERS, HARBOURS, PORTS AND RELATED AREAS – HARBOUR TRUSTS AND BOARDS AND MARINE BOARDS – PROCEEDINGS BY AND AGAINST – OTHER CASES – where the lessee (MIM) of a berth was charged with collecting and passing on harbour dues owing to the port authority (POTL) as lessor – where harbour dues had not been paid to MIM and were unlikely to be paid at all because the

debtor company had entered liquidation – where POTL brought an action to recover the unpaid dues from the lessee

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the lease agreement appointed MIM as agent of POTL and required it to "collect all harbour dues payable" to POTL – where the agreement provided that MIM was to pay to POTL "all dues collected by it" – where the agreement also contained terms which, among other things, required MIM to report in writing any non-payment of the harbour dues and required POTL to pay MIM the equivalent of 20 per cent of the value of the dues that MIM had paid to it – whether MIM is liable to pay to POTL the equivalent of the harbour dues which it failed to collect

Transport Infrastructure Act 1994, s 279, s 280

Gokal Chand-Jagan Nath v Nand Ram Sa-Atma Ram [1939] AC 106, applied

COUNSEL: B D O'Donnell QC for the applicant
P Franco QC for the respondent

SOLICITORS: Allens for the applicant
Roberts Nehmer McKee for the respondent

[1] This case concerns the proper construction of a clause in the lease between the respondent (POTL) as lessor and the applicant (MIM) as lessee.

[2] POTL is the statutory authority responsible for the management of the Port of Townsville pursuant to the *Transport Infrastructure Act* 1994. In 1987 it leased the No. 2 Wharf to Townsville Transport and Services Pty Ltd (T.T.S.). That company's interest as lessee was assigned to MIM in 1992.

[3] The clause the subject of this dispute is clause 14. The references to T.T.S. are to be read as references to MIM. The clause provides:

> "14. APPOINTMENT OF T.T.S. AS AGENT
>
> 14.1 The Authority does hereby appoint T.T.S. from the date of commencement of this Lease, its agent and requires T.T.S. to collect all harbour dues payable under the provisions of the By-Laws of the Authority in respect of any cargo shown or intended to be shown on the vessels manifest passing over the wharf at No. 2 Wharf to or from any vessels berthed thereat by Stevedoring methods or by trans-shipping between vessels berthed thereat or in proximity thereto. The appointment of T.T.S. as agent to collect such harbour dues shall continue for as long as this Lease shall continue in existence.

14.2 T.T.S. shall pay to the Authority all dues collected by it under the provisions of the proceeding [sic] sub-paragraph on the last day of each and every month during which the same is received or within seven (7) days of the last day of each and every month. At the same time, T.T.S. shall supply to the Authority copies of all Bills of Lading, Freight Lists, Manifests of Cargo or other proper accounts as may be required by the Authority relating to such cargoes handled by Stevedoring methods upon which the dues have been paid.

14.3 If any person liable or required to pay Harbour Dues under the By-Laws of the Authority:-

(i) Evades or attempts to evade the payment of any harbour dues;

(ii) Fails to pay any harbour dues payable

T.T.S. shall forthwith report in writing such evasion, attempted evasion or failure to pay as the case may be.

14.4 The Authority in appointing T.T.S. to act as its agent to collect dues as provided by this clause does hereby grant to T.T.S. all the powers and authorities which are given under the provisions of the Harbours Acts to any person authorised to collect harbour dues.

14.5 The Authority shall pay to T.T.S. for the provision by T.T.S. of cargo services a fee equivalent to 20% of the amount paid by T.T.S. to the Authority under the provisions of clause 14.2 hereof. Such sum shall be paid by the Authority to T.T.S. within seven (7) days of the payment by T.T.S. to the Authority of the monies referred to in clause 14.2.

14.6 The term 'stevedoring methods' referred to in this clause shall mean the handling of cargo by passing it over the wharf to or from any vessel berthed thereat or by trans-shipping between vessels berthed thereat or in proximity thereto by any means that shall not include the loading or unloading of bulk petroleum products by means of pipeline.

14.7 If during the term of this Lease, the Authority shall request T.T.S. to collect tonnage dues or other dues or charges payable to the Authority in respect of vessels berthed at No. 2 Wharf then T.S.S. shall collect such dues at no cost to the Authority and remit them immediately to the Authority."

[4] The circumstances giving rise to the dispute are as follows:

(a) There are unpaid harbour dues in respect of 13 ships which used the No. 2 Wharf for shipping cargo for Queensland Nickel Pty Ltd (QNPL) over the period October 2015 to February 2016.

(b) MIM has taken steps to recover the amount due.

(c) Administrators were appointed to QNPL in January 2016 and MIM lodged a proof of debt in the administration.

(d) MIM has given QNPL a notice terminating the licence agreement it had with QNPL.

(e) QNPL went into liquidation in April 2016.

(f) The liquidators of QNPL have paid MIM approximately $263,000. The balance of the harbour dues which remain owing is approximately $1 million.

(g) On 1 April 2016 POTL gave MIM a Notice to Remedy a Breach of Covenant. In that notice, POTL asserts that MIM breached the lease by failing to collect and pay to POTL all harbour dues in respect of the 13 ships. The notice required MIM to remedy the breach either by collecting the harbour dues from QNPL or by MIM paying them regardless of whether QNPL has paid the amount owing.

[5] It is POTL's case that cl 14 requires that MIM ensure that all harbour dues are paid to POTL. Further, it argues, that requirement entails a condition that, to the extent that MIM does not collect those dues, then it is responsible for paying them to POTL.

[6] The basis for MIM's contention that it is not required to pay to POTL the equivalent of any uncollected dues is that cl 14 does not require that and, also, it has the effect of appointing MIM as POTL's "commission agent".

[7] Cause 14.1 works to appoint MIM as POTL's agent and requires MIM to collect "all harbour dues payable under" the relevant by-laws.

[8] Clause 14.2 then requires MIM to "pay to [POTL] all dues collected by it" under cl 14.1. MIM emphasised the different expressions used in cl 14.1 and 14.2. Clause 14.1 refers to "all harbour dues payable", whereas cl 14.2 is concerned with the "dues collected by" MIM. That, says MIM, demonstrates that MIM only had to remit the dues it actually collected rather than all the "harbour dues payable".

[9] This construction was supported, argued MIM, by cl 14.3 which imposes a duty on MIM to report a failure to pay (or an evasion or attempted evasion of payment). This, it was said, demonstrated the extent of MIM's duty with respect to non-payment.

[10] Clause 14.4 purports to grant to MIM all the powers POTL has under the *Harbours Act* 1955 (now the *Transport Infrastructure Act* 1994) to collect harbour dues. Whether such a delegation under the legislation was or is possible was not the subject of submission, but this clause was not an important part of either side's argument.

[11] In order to construe a clause such as this it is appropriate that it be considered in its context. The agreement between POTL and MIM is for the lease of Wharf No 2 and, among other things, it requires (in clause 13) that MIM provide all "cargo services" and it allows MIM to "collect and retain reasonable charges for the services".

[12] Clause 13 provides:

> "13 PROVISION OF CARGO SERVICES BY T.T.S.
>
> 13.1 T.T.S. shall provide all cargo services required by vessels berthed at No. 2 Wharf and shall determine the order of berthing.

> 13.2 T.T.S. shall be entitled to collect and retain reasonable charges for the services referred to in the previous sub-paragraph but such charges shall be subject to the prior approval of the Authority which approval shall not be unreasonably withheld."

[13] "Cargo services" are not defined in the lease but would appear to differ from "harbour dues" which are defined in the *Encyclopaedic Australian Legal Dictionary* as meaning:

> "A levy on ships for entering and using harbour facilities charged according to the number of days the ship stays in port, and the size and tonnage of the ship."[1]

[14] The term "harbour dues" was defined in s 8 of the *Harbours Act* 1955 as including:

> "… any dues, rates, fees, tolls, taxes, or charges in the nature of harbour dues by or under this Act leviable or chargeable by or payable to a Harbour Board."

[15] Under s 125 of the *Harbours Act* the following were jointly and severally liable to pay harbour dues in respect of any vessel:

> "(i) the owner of the vessel;
>
> (ii) the agent of the owner of the vessel;
>
> (iii) the master of the vessel; and
>
> (iv) any person who has paid or made himself liable to pay those harbour dues or any other dues, rates, or charges on account of the vessel."

[16] In the *Transport Infrastructure Act* and the *Transport Infrastructure (Ports) Regulation* 1994 the term "harbour dues" ceased to be used and the Act currently provides:

> "**279 Port authority may impose a charge**
>
> (1) A port authority may impose a charge for the use of its port area.
>
> (2) A charge may, for example, be imposed by reference to—
>
> (a) a ship using its port; or
>
> (b) goods or passengers loaded, unloaded or transhipped to or from a ship using port facilities in its port.
>
> (3) This section does not limit the powers a port authority has apart from this section.

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[1] *Encyclopaedic Australian Legal Dictionary*, LexisNexis Australia, 2011.

280 Liability for a charge in relation to a ship

If a charge is payable in relation to a ship, the following persons are jointly and severally liable for the charge—

(a) the owner of the ship;

(b) the master of the ship;

(c) the agent of the ship's owner;

(d) another person who has accepted liability for the charge."

[17] The legislation has never provided that a lessee, such as MIM, would be liable for harbour dues. It does, though, identify those who are liable and, therefore, would come within the notification provision in cl. 14.3.

[18] Mr Franco QC argued that, since MIM was the party which contracted with QNPL, it made commercial sense to interpret cl. 14 as requiring MIM to bear the risk of default. He also pointed to cl 14.4 and its investing of "plenary authority" in MIM as further grounds for the construction advanced by POTL.

[19] The words used in cl 14 do not support POTL's construction. Clause 14.1 requires MIM to "collect all harbour dues payable" but cl 14.2 refers to "all dues collected". The latter description differs conceptually from the former. The "dues collected" need not equate to the "dues payable". They may be lower. That they might be lower is recognised in cl 14.3 which requires MIM to inform POTL, among other things, of any "failure to pay". That notification provision would, among other things, alert POTL so that it might pursue any of the persons identified in s 280 of the *Transport Infrastructure Act.* Those persons – the owner of the ship, the master, the owner's agent, and any other person who accepted liability – would be unable to be pursued by a lessee like MIM in the absence of some agreement. The agreement between MIM and QNPL does not contemplate anybody other than QNPL being liable.[2]

[20] The so-called investment of a plenary authority in the lessee, especially one which fixes liability on persons who would ordinarily not be party to any agreement with a lessee (e.g., the ship's master), is not supported by any legislative provision to which I was referred. The extent of the power supposedly conferred by cl. 14.4 and how it might have been conferred in light of the statutory provisions was not addressed.

[21] Another element which goes to establish the case advanced by MIM is that cl 14.5 only provides that POTL is to pay a fee of 20 per cent of the amount paid by MIM to POTL under cl 14.2, that is, the amount collected, not the amount due.

[22] It follows, then, that MIM is only obliged to forward the dues which it has collected.

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[2] The licence agreement between MIM and QNPL requires QNPL to "duly and punctually pay all harbour dues to [MIM] as agent of [POTL]." Of course, that term cannot be used to assist in the construction of the lease.

[23] MIM also argued that cl. 14.5 demonstrated that it was a commission agent and that, therefore, the principles discussed in *Gokal Chand-Jagan Nath v Nand Ram Sa-Atma Ram*[3] would apply. POTL argued that this clause did the contrary and that by providing that MIM was to be paid for the "provision of cargo services" it meant that this was a fee for service rather than payment as a commission agent.

[24] *Gokal Chand-Jagan Nath* is authority for the proposition that the duty of a commission agent is "… to do his best to collect all he can in the circumstances …"[4]. Such an agent could only be held liable for the unpaid debt if the agent had acted negligently in performing the task of collecting the debt and that that negligence had resulted in loss to the principal.[5] Although cl 14.5 provides that MIM was to receive 20% of the amount it forwarded under cl 14.2 in return for the provision of cargo services, MIM remained an agent for the purposes of collection of the harbour dues even though it did not receive any identifiable payment for that task. It was a part of the role that MIM, as lessee, had to play in satisfaction of the terms of the lease. The principles enunciated in *Gokal Chand-Jagan Nath* still apply.

[25] POTL also argued that *Gokal Chand-Jagan Nath* was of no assistance because it was concerned with a particular arrangement in which the agent, instead of receiving cash, had given a debtor unauthorised credit. That is not completely correct. The facts were of wider purview and led to the conclusion that, in order for a party in POTL's position to succeed, negligence must be shown. Lord Wright said this:

> "There is not here any question of an authority limited to receiving cash, nor is the agent giving up any valuable thing or right which he should not have given up save against cash. In fact, his duty is to do the best he can to get cash. The onus is on the plaintiff in such a case to prove that the agent has failed in that duty, and that the plaintiff has suffered damage, which he can only do by showing that the agent could have realized more cash in the circumstances of the case than he actually did.... So, in the present case, the respondents did not become guarantors of the debts on the debtor's insolvency. They could only be made responsible for the debts to the extent that it could be established (a) that they were negligent in seeking to realize them, and (b) that loss resulted to the appellants from that negligence."[6]

[26] On the construction of the lease I have set out above and, in the absence of any term in the lease which would deny the effect of the principle above, there is nothing which makes MIM liable to POTL in these circumstances.

[27] The parties agreed as to the form of order I should make if I reached this conclusion.

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3 [1939] AC 106.
4 Op cit at 112.
5 Op cit at 114.
6 Op cit at 113-114.

Order

[28] Upon the undertaking of the respondent to withdraw the notice to remedy breach referred to in paragraph 1 below and not to terminate the lease referred to in paragraph 1 below in reliance on that notice, the order of the Court is that:

1. Declare that the applicant has not acted in breach of the lease from the respondent to the applicant dated 6 November 1987 (as varied by a deed of variation of lease dated 20 June 1996), as asserted in the respondent's notice to remedy breach dated 1 April 2016.

2. The application is otherwise dismissed.

3. The respondent is to pay the applicant's costs of the application.