

The Eastern Shipping Company, Limited - - - - *Appellants*

*v.*

Quah Beng Kee - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT  
OF PENANG).

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER, 1923.

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*Present at the Hearing :*

LORD ATKINSON.

LORD SHAW.

LORD WRENBURY.

LORD CARSON.

SIR ROBERT YOUNGER.

[*Delivered by* LORD WRENBURY.]

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The facts in this case are simple and before their Lordships neither are, nor can be, disputed.

The Peninsular and Oriental Steam Navigation Company were owners of a wharf at Belawan in Sumatra. They granted to the Eastern Shipping Company a right to berth their ships at the wharf upon terms which included terms that the latter should pay 100 guilders a day for every day of 24 hours, and that all damages which might be brought about by the berthing of their steamers at the wharf should be made good by them. Quah Beng Kee was Managing Director of the Eastern Shipping Company. Slot and Company were the shipping agents of that Company. Beng Kee, who had control of the business of the Eastern Shipping Company and was entitled, as Managing Director, to berth at the wharf ships of the Eastern Shipping Company, appointed Slot and Company as his own agents at Belawan as charterer of a ship called the "Kamakata Maru," and instructed

them to berth that ship at the wharf in question. The "Kamakata Maru" was a ship in which Beng Kee was, and the Eastern Shipping Company were not, in any way interested. Beng Kee's instructions to berth this ship at the wharf were wholly unauthorized and were in breach of his duty to the Eastern Shipping Company. Owing to unskilful unloading excessive weight was put upon the wharf and it collapsed. Damage was thus occasioned which the P. & O. Company were under their grant to the Eastern Shipping Company entitled to recover. They brought their action against the Eastern Shipping Company; the latter brought in Beng Kee under third party procedure and obtained an order on the 6th January, 1919, to the effect that Beng Kee should be at liberty to defend and to appear at the trial and should be bound by the judgment and that he might raise points of defence not raised by the Eastern Shipping Company, and that he should deliver his defence to the claim for indemnity raised by the Eastern Shipping Company, and that the question of his liability to indemnify should be tried at or immediately after the trial of the action.

Beng Kee appeared and pleaded and appeared at the trial of the action and in his presence the P. & O. Company established their case and recovered damages to the extent of \$79,860. The trial Judge found that the acts of Beng Kee were within the apparent scope of Beng Kee's authority, and upon that ground held the Eastern Shipping Company to be liable and he reached the same conclusion upon another ground, namely, that by a letter of the 28 August, 1918, the Eastern Shipping Company had ratified and accepted responsibility for the acts of Beng Kee in the matter. This was a letter signed "H. Oxenham, Manager." The trial Judge found as a fact that this was in reality Beng Kee's letter written and sent by H. Oxenham by his instructions. The result of that letter was that Beng Kee thereby raised an additional ground for throwing upon his principals a burden which Beng Kee ought himself to have discharged.

After trial of the action the trial Judge proceeded to try the third party issues, and upon the evidence arrived at findings which are summarized in the appellants' case as follows:—

- (7) That instructions to use the wharf purported to be given by Quah Beng Kee as Managing Director of the defendant company.
- (8) That the instructions for the berthing were given by Quah Beng Kee in his own interest and not in the interest of the defendant company.
- (9) That Quah Beng Kee stood in a fiduciary relationship to the defendant company; and
- (10) That he unjustifiably used his position in the defendant company for his own benefit and so was guilty of a clear breach of duty towards them.

These findings were justified by the evidence and are binding upon the parties.

The trial Judge, however, found that the defendants, the Eastern Shipping Company, had no right of indemnity against Quah Beng Kee, and inasmuch as under third party procedure relief can be given against a third party only in cases where the defendant has against the third party a direct right of indemnity, the proceedings against Quah Beng Kee failed.

An appeal from this order was dismissed with costs.

It was not disputed before their Lordships that in proceedings otherwise constituted Quah Beng Kee on the above findings would have been liable. The present appeal by the Eastern Shipping Company is of the greater importance to the parties by reason of the fact that an action by the Eastern Shipping Company against Beng Kee for damages is now barred by the Statute of Limitation, and unless he can be made liable in these proceedings his liability cannot be enforced at all.

The question for discussion is therefore whether upon the facts stated the appellants have as against Beng Kee a right of indemnity. There is no other question.

A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract, it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring v. Ward*, 7 Ves. Jun., 332, 336; a case of vendor and purchaser) in cases in which the Court will "independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation" of the vendor. These considerations were all dealt with by the L. J.J. in *Birmingham District Land Company v. L. & N.W. Railway Company*, 34 (1h. Div., 261).

The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his e.q. trust. This class of case was particularly discussed by Lord Lindley in *Hardoon v. Belilos*, 1901, A.C. 118. The present case is the converse. The *cestui que* trust is here claiming to be indemnified by the trustee. Beng Kee has been found to stand in fiduciary relation to the Eastern Shipping Company and the latter claim indemnity from him in respect of liability imposed upon them by his abuse of powers in the exercise of which he owed them a duty and was responsible as a trustee of those powers. He was not a trustee in the full sense of that word. No property was vested in him. But he was a trustee of his powers in the sense that they

were vested in him in such manner that he stood in a fiduciary relation to the Company in respect of his exercise of those powers. The nearest simile that was put in argument was that of a trustee in the fullest sense of the word who abuses his powers ; say, the trustee of real estate with power to mortgage who mortgages for his own benefit and in breach of his duty as trustee and puts the mortgage money into his own pocket. In such a case an action would lie in the Chancery Division for a declaration that the defendant was guilty of breach of trust and was liable to indemnify the *cestui que* trust against the mortgage and for an order that he do redeem the mortgaged property and indemnify the *cestui que* trust against the mortgage debt.

In the present case, suppose that it would have taken, say, a month to discharge the "Kamakata Maru" at the wharf and that the Eastern Shipping Company had learned, say, three days after the ship was berthed that the breach of duty had been committed, an action would have lain to restrain the defendant from continuing the ship at the berth and for an order that he do indemnify the plaintiffs against the three day's rental that had been incurred.

In their Lordships' opinion these results follow from the following considerations. If Beng Kee as Managing Director had been granting to a third party the right to berth a ship at the wharf it would have been his duty to his principals to stipulate that the third party should accept the burden which would be cast upon his principals by the user of the wharf. What happened was that Beng Kee as Managing Director gave to himself, as charterer of the ship, the user of the wharf. He cannot be heard to say that in so doing he did not, as Managing Director, require from himself as charterer of the ship the same promise as that which it would have been his duty to require from a third party, viz., a promise that he would indemnify his principals against the consequences of his act. In other words, the relations between the parties was such that the law implies the promise which it was his duty to make and from this arises a right of indemnity. Upon these grounds their Lordships are of opinion that this appeal succeeds.

There should be a declaration that Quah Beng Kee is liable to indemnify the Eastern Shipping Company against or to repay to them the damages awarded to the P. & O. Company by the order made in the action as well as all costs ordered to be paid by them in the several orders for costs made in the action and in the third party proceedings and is liable to pay to the Eastern Shipping Company the costs incurred by them in the action and in the third party proceedings, the costs incurred by them in the action to be taxed as between solicitor and client, but having regard to the fact that they are payable by the third party, and an order to give effect to that declaration. The respondent must pay the costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

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THE EASTERN SHIPPING COMPANY, LIMITED,

v.

QUAH BENG KEE.

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DELIVERED BY LORD WRENDBURY.

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