Hazanee Pty Ltd v Elders Ltd & Ors [2006] NTSC 26

PARTIES:	HAZANEE PTY LTD v ELDERS LTD and CGU INSURANCE and BLACK, Gregory Robert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	SC 87/00 (20010131)
DELIVERED:	30 March 2006
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JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

CONTRACTS -- CONSTRUCTION AND INTERPRETATION OF CONTRACTS

Cross claims on contribution notices exchanged by co-defendants - contract of agency whereby first defendant appointed agent of second defendant to solicit and/or write insurance business on behalf of latter as underwriter - general business policy written in respect of plaintiff's business on proposal secured by first defendant through its sub-agent - claim by plaintiff pursuant to policy in respect of flood damage rejected by second defendant - present proceedings initiated by plaintiff against both defendants - assertion by plaintiff of negligence and misleading and deceptive conduct against first defendant - claim by plaintiff under policy and assertion of estoppel as against second defendant - all claims by plaintiff dismissed after trial - plaintiff deregistered and without assets with which to satisfy costs - discussion of principles relating to interpretation of commercial documents - whether contract of agency negated implied term that principal would indemnify agent - discussion of application of contra proferentem principle - whether first defendant contractually bound to indemnify second defendant as to costs - held, contract did not exclude implied right of first defendant to be indemnified by second defendant.

REPRESENTATION:

Counsel:

Plaintiff:	
1st Defendant:	J Kelly
2nd Defendant:	S Owers
3rd Party	Not Joined

Solicitors:

Plaintiff:	
1st Defendant:	Clayton Utz
2nd Defendant:	Hunt & Hunt
3rd Party	Not Joined

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hazanee Pty Ltd v Elders Ltd & Ors [2006] NTSC 26
No. SC 87/00 (20010131)

BETWEEN:

HAZANEE PTY LTD
Plaintiff

AND:

ELDERS LTD
First Defendant

CGU INSURANCE
Second Defendant

GREGORY ROBERT BLACK
Third Party

CORAM: OLSSON A/J

REASONS FOR JUDGMENT

(Delivered 30 March 2006)

Preliminary

[1] The present reasons relate to issues raised by contribution notices exchanged between the two defendants in these proceedings. They should be read against the background of reasons published by me on 8 July 2005 in relation to the primary issues that arose between the plaintiff and other parties to the action ("*my primary reasons*") and subsequent reasons

published on 10 February 2006 as to the costs of the third-party ("*the third-party costs reasons*").

[2] As appears from my primary reasons, the plaintiff failed in its claim. A judgment of dismissal was entered. Following a later hearing as to the costs of the third-party, I published the third-party costs reasons. At that time I formally dismissed the third-party notice issued by the first defendant ("*Elders*") and ordered that Elders pay to the third-party his costs of, and incidental to, his participation in the trial and also the subsequent hearing as to costs.

[3] Certain issues arising on the contribution notices exchanged by the two defendants remained unresolved. In essence, these related to who should ultimately bear the burden of the costs of the proceedings, given that Hazanee had been deregistered in mid-2005 and had had no assets for almost six years.

[4] By its contribution notice, Elders asserted that it was entitled to indemnity and interest or contribution in respect of any liability incurred by it in respect of these proceedings, by reason of its status as agent of the second defendant ("*CGU*").

[5] In its contribution notice directed to Elders, CGU claimed, by virtue of the relevant agency agreement entered into by the parties, to be entitled to indemnity in respect of the whole of the plaintiff's claim, including all costs and expenses incurred by it in defending the action and all costs and

expenses of its involvement in the third-party proceedings against Greg Black.

Introduction

[6] Hazanee issued its writ of summons in these proceedings on 22 June 2000. Both Elders and CGU were named as defendants. Elders later joined Greg Black as a third-party.

[7] As appears from my primary reasons, the plaintiff at all material times owned and operated a service station business in Katherine, as a lessee from Shell. Its business premises were inundated by water, following a flooding of the town caused by a prolonged tropical rain storm that occurred on 26 and 27 January 1998.

[8] At the time of the rain storm, Hazanee maintained a business insurance policy with CGU in respect of its business premises and contents. That policy and its precursor had been negotiated and renewed through Elders as the local agent for CGU, the transaction being handled by the third-party who worked as sub-agent to Elders.

[9] On 16 February 1998 Hazanee made a claim under the policy in respect of the flood damage sustained by it. The claim was rejected by CGU on the basis that the relevant risk had not been covered by the policy. That rejection gave rise to the present litigation.

[10] Elders was sued on the basis that Hazanee had retained it to service its insurance needs and on the footing that it had relied on Elders for proper advice and recommendation as to insurance cover appropriate to its needs. Hazanee claimed damages in negligence, breach of s52 of the Trade Practices Act 1974 (Cth) and breach of s13(1)(b) of the Insurance (Agents and Brokers) Act 1984 (Cth).

[11] This prompted Elders to issue a third-party notice against Greg Black, the duly appointed sub-agent of Elders, who had actually negotiated Hazanee's insurance cover. The third-party notice alleged breach of contract and negligence and also sought contribution pursuant to s12(4) of the Law Reform (Miscellaneous Provisions) Act.

[12] In the primary claim Hazanee sought a declaration that CGU was in fact liable to indemnify it in respect of the flood damage under the terms of the policy, and claimed damages for breach of contract and interest pursuant to s57 of the Insurance Contracts Act 1984 (Cth). It also alleged estoppel against CGU, as to the risk covered by the policy, based on what were said to have been representations made by Elders through its sub-agent Black concerning the nature and extent of the cover to be granted under the relevant policy.

[13] My primary reasons reflect my ultimate conclusions as to all those issues. It is unnecessary to repeat what I there said *in extenso*. It will suffice if I merely summarise the situation in these terms:

(1) The claims against CGU were dismissed on the bases that -

(a) the plaintiff's claim did not fall within the risks covered by the relevant policy and was, in fact, specifically excluded by it; and

(b) no relevant representations were made to Hazanee that could form an equitable estoppel against CGU.

(2) By the conclusion of the trial, the only live issues as between Hazanee and Elders were -

(a) a claim for damages based on an allegation of misleading or deceptive conduct by the third-party, as it sub-agent, it being said that he had made representations to the effect that Elders would provide Hazanee with a policy that would cover it for all appropriate risks arising in its business; and

(b) a claim for damages based on an allegation that Elders had failed to advise Hazanee that the policy did not cover flood damage.

(3) The first head of claim against Elders failed by reason of a specific finding that no such representation had ever been made.

(4) The second head of claim failed because it was found that the third-party had not been negligent - he had satisfied the mandate ultimately given him, by securing a policy the coverage of which was

that sought by Hazanee. In any event, such a claim would have failed by reason of a lack of evidence as to causation.

Contractual arrangements between the defendants

[14] The relevant agency arrangements between Elders and CGU were governed by a written contract of agency entered into between them on 5 September 1986.

[15] By virtue of the agreement, Elders was authorised to:

- issue cover notes and otherwise enter into contracts of insurance for classes of insurance, types of policies and classifications of insurance risk specifically agreed in writing between the parties from time to time;
- arrange completion and submission of proposals to CGU as stipulated by the agreement;
- collect and receive premiums for new insurance business; and
- collect and receive premiums for renewals and adjustments

for the benefit of CGU.

[16] The contract further stipulated a range of ancillary duties and responsibilities of Elders.

[17] Article 10 of the contract provided for payment by CGU to Elders of such commissions or other amounts on policies arranged by it at rates agreed from time to time.

[18] For present purposes, there are two "Articles" of the contract of agency that specifically arise for consideration. These are:

> "Article 3. INDEMNITY
>
> The Agent shall indemnify the Insurer against actions, costs, claims or demands for loss or damage caused by the Agent's negligence, wilful act, neglect or default, or that of any employee, agent, or sub-agent or contractor of the Agent".
>
> "Article 12. AGENT'S EXPENSES
>
> All expenses incurred by the Agent in transacting insurance business with the Insurer are to be borne by the Agent unless otherwise agreed by the parties".

The issues between the parties

[19] It may be said that Elders and CGU were *ad idem* as to certain aspects arising in relation to their business arrangements.

[20] There is no dispute that the events that were the subject of the Hazanee allegations in these proceedings related to Elders' status as agent under the contract to which I have referred.

[21] It is accepted that, as a matter of general, common-law principle, an agent appointed pursuant to a contract of agency has a right to be reimbursed by the principal in respect of all expenses and to be indemnified against all losses and liabilities incurred by the agent in the execution of its authority

(see Dal Pont, *Law of Agency (2001), pages 455 - 456* and the authorities there referred to). Such right is said to derive from a term of the contract that will be implied if not clearly excluded (*Re Clune* (1988) 14 ACLR 261 at 266, *Richardson v Martin* (1882) 16 SALR 44).

[22] That right extends to indemnity for all legal costs reasonably incurred by an agent who, as a consequence of carrying out the principal's instructions, is made a defendant in an action and properly defends it (*Williams v Lister & Co* (1913) 109 LT 699, *Broom v Hall* (1859) 7 CBNS 503 at 505; 141 ER 911 at 913).

[23] It follows that, in the instant case, unless the terms of the contract of agency between Elders and CGU can fairly be said to clearly exclude the implied right to indemnity, Elders is entitled to be indemnified by CGU for its costs in defending these proceedings. Those costs include any costs payable by it to the third-party, it not being suggested that it was inappropriate for Elders to join Greg Black as a third-party. Indeed, it might reasonably have been argued that Elders would not have acted properly if it had not effected such joinder - having regard to the assertions made by Hazanee.

[24] It is contended by CGU that, on their proper interpretation, Articles 3 and 12 of the contract of agency not only clearly exclude any right of indemnity in favour of Elders, but actually give rise to a right, on the part of CGU, to be indemnified by Elders in relation to its own costs of defending the action.

[25] The riposte of Elders is that such a construction cannot reasonably be maintained and that the normally implied indemnity arises against CGU in its favour.

Principles of construction

[26] It is trite to say that the relevant contract of agency is a commercial document that falls to be construed according to well settled principles.

[27] In their joint judgment in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462, the Judges of the High Court reiterated that the meaning of commercial documents is to be determined objectively. It is to be determined by what a reasonable person in the position of the parties would have understood the document to mean. That requires consideration not only of the text of the document, but also the context in which it was entered into and the purpose and object of the transaction.

[28] Such an approach was reiterated in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd and Others* (2004) 219 CLR 165 at 179. It was there said that the common intention of the parties to a commercial contract is to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.

[29] It is equally trite to say that, in cases of ambiguity, the courts will construe both all contractual exclusion causes and also all clauses conferring an indemnity *contra proferentem*, that is to say, strictly against the parties

seeking to rely on them (*Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at 433-437).

[30] Those dicta are, of course, subject to the important qualification that the general principle does not demand that, where parties have deliberately chosen to adopt wording of the widest import, that wording is to be ignored. Nor does it oust the principle referred to above that, where wording is susceptible of more than one meaning, regard may be had to the circumstances surrounding the execution of the document as an aid to construction (*Coghlan v S H Lock (Australia) Ltd* (1987) 78 NSWLR 88 at 92).

[31] There is no dispute between the parties as to those matters of general conceptual approach. Where they do part company is in the practical application of them.

The competing contentions

[32] As the conflicting arguments of the parties readily illustrate, Article 3 of the contract of agency is poorly drafted and susceptible of more than one interpretation. The grammar and punctuation employed leaves a great deal to be desired.

[33] Counsel for CGU argues that, properly construed, Article 3 requires Elders to indemnify CGU not only for loss or damage caused by its negligence, wilful act, neglect or default, but also for "*actions, costs, claims or*

demands" for such loss or damage, regardless of the outcome of them. It is said that the right to indemnity does not arise upon the *occurrence* of loss or damage, but, rather, the assertion by a person that it is entitled, as against CGU, to relief arising from loss or damage caused by Elders' negligence, wilful act, neglect or default.

[34] Mr Owers submits that such a construction is supported by the nature of the agency arrangement and an obvious intention to make Elders responsible for its conduct as agent for CGU. So it is that, regardless of whether or not a claim made is spurious, Elders is required to indemnify CGU. He concedes that the claim against CGU for breach of contract does not fall within Article 3, but contends that the estoppel claim does.

[35] Whilst Mr Owers accepts that there is no specific provision of the contract of agency that expressly excludes the implied term of indemnity, he contends that, nevertheless, such an exclusion is plainly inferred. As he put it, there would be no utility in granting an indemnity to it, if CGU then had to turn around and indemnify Elders.

[36] His fallback position was that, in any event, Article 12 requires Elders to bear all expenses incurred by it in transacting insurance business with CGU. The costs of the present litigation are, he said, clearly expenses of that type.

[37] The riposte of Ms Kelly, of counsel for Elders, to that line of argument is, in effect, that it ignores and unacceptably distorts the grammatical construct of Article 3, such as it is.

[38] Whilst she accepted that there are difficulties in making grammatical sense of Article 3, nevertheless, she submitted that it is plain that the phrase "*caused by*" is intended to govern all the words "*actions, costs, claims or demands for loss or damage*" that immediately precede it. However, the draftsman of the Article did not intend the phrase "*for loss or damage*" to separately attach to the preceding words, so that the meaning of the initial portion of the Article was "*actions (for loss or damage), costs (for loss or damage), claims (for loss or damage) or demands (for loss or damage)*". This would, she said, make no sense.

[39] Ms Kelly further argued that the comma between "*actions*" and "*costs*" and between "*costs*" and "*claims*" and the lack of any comma after either "*claims*" or "*demands*" could be taken as suggesting that the phrase "*for loss or damage*" might qualify only "*claims or demands*" and not "*actions*" or "*costs*", but, she submitted, that made even less sense. Equally, she argued, to treat "*loss or damage*" as the sole subject of the verb "*caused*" makes no more sense.

[40] In my opinion, the draftsman has, in fact, employed the word "*for*" in the sense "*in respect of*" and the obvious intention of the Article is that the Agent is to indemnify its principal against any actions, costs, claims or demands that may arise in respect of any loss or damage shown to have been caused by (i.e. that actually arises by reason of) the Agent's negligence, wilful neglect or default, or that of any employee, agent or sub-agent or contractor of the Agent.

[41] Elders is the agent of CGU for certain specified purposes, for which it is paid remuneration. It makes good commercial sense and would be a logical provision that, in the event that it be demonstrated that loss or damage has been caused by the negligence, wilful act, neglect or default of the Agent, or those for whom it is responsible, then that loss or damage ought to be borne by the agent to the exoneration of the principal. I entertain little doubt that this was what was in the mind of the parties in the context of this particular commercial transaction.

[42] I find it impossible to conceive that the parties intended that, whenever a claim was raised or prosecuted against CGU in respect of policy written by its agent, then that agent was to carry the full liability for the costs of the proceedings, merely because the claimant asserted negligence, wilful act, neglect or default, even though the claim was ultimately found to be totally without substance. It would require a very clear expression of intention to achieve such an unusual result and thereby negate the normal implied term entitling the agent to indemnity in respect of the proper discharge by it of its agency duties.

[43] I do not consider that Article 3, as drafted, achieves (or was ever intended to achieve) such a result. It should, in any event, be construed *contra proferentem* against CGU and I do not consider that the reasoning in *Halford v Price* (1960) 105 CLR 23, relied on by CGU, is in any way relevant to the issue now before me. That case focused on a quite different question as to what was the event giving rise to liability under a policy.

[44] As I have pointed out, Mr Owers accepts that at least the claim against CGU based on breach of contract could not be encompassed by Article 3. The findings in my primary reasons negate any negligence, wilful act, neglect or default on the part of Elders or its sub-agent.

[45] Even if I am incorrect in arriving at the foregoing views I agree with Ms Kelly that a large proportion of the costs incurred by CGU in defending the claim against it were in relation to the Hazanee contention that the relevant policy did provide cover in respect of the flood damage. The costs attributable to any suggestion on the part of Hazanee that there had been negligence on the part of Greg Black as sub-agent for Elders, or that his conduct gave rise to an estoppel were relatively limited.

[46] It seems to me that CGU's argument based on Article 12 cannot withstand serious scrutiny.

[47] The expenses referred to are those "*incurred by the Agent*" in transacting insurance business with the insurer. To express the obvious concept in a different way, the clear intention of the contract of agency is to require Elders to accept the appropriate commissions provided for by the contract as full remuneration for the discharge of its agency functions and to be responsible for its own overhead and operating costs in doing so.

[48] The expression "*expenses incurred…… in transacting insurance business*" is simply not apt to describe legal costs associated with what is essentially an attempt by a policyholder to enforce what are said to be the provisions of

a policy against the underwriter, long after it has been written. This is particularly so where liability has been rejected and, as a matter of practicality, it is necessary to join the Agent in the proceedings, as Elders did in this case.

[49] Costs of that type are in no sense expenses "*in transacting insurance business*". That phrase is clearly intended to apply to the costs of securing the business and writing the insurance cover in the first instance and otherwise discharging the Agent's ancillary duties prescribed by the contract of agency. At the very best, it must be said that Article 12 does not, on a fair reading of it, clearly exclude the implied general right of indemnity that Elders would normally have against CGU.

Conclusion

[50] Having regard to the views to which I have come, I find that Elders is entitled to an order that CGU indemnify it against all legal costs properly and reasonably incurred by it in relation to these proceedings, including all costs for which it may be liable to the third-party and the costs of and incidental to the issues to which these reasons relate and any GST that may properly be payable in respect of them. Such costs are to be taxed if not otherwise agreed.

[51] I dismiss the contribution notice served by CGU on Elders.

[52] There will be liberty to either party to apply as to any ancillary or consequential aspect.

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