*Hazanee Pty Ltd v Elders Ltd & Ors* [2006] NTSC 8

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| PARTIES: | HAZANEE PTY LTD<br>(ACN 005 357 522)<br><br>v<br><br>ELDERS LIMITED (ACN 004 045 121)<br>and<br>CGU INSURANCE LTD<br>(ACN 004 478 371)<br>and<br>BLACK, Gregory Robert |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | 87 of 2000 (20010131) |
| DELIVERED: | 10 February 2006 |
| HEARING DATES: | 6 February 2006 |
| JUDGMENT OF: | OLSSON AJ |

**CATCHWORDS:**

PROCEDURE -- COSTS -- 3rd PARTY

Claim to indemnity in respect of flood damage by corporate entity against insurer and insurance agent - Sub-agent joined by defendant insurance agent as third-party - Plaintiff's claim dismissed as against both defendants - Whether appropriate to adjourn the question of costs to permit defendant insurance agent to seek reinstatement of plaintiff as a registered corporation - Discussion of principles related to the award of costs to a successful third-party.

Held, that the successful third-party was entitled to an order that defendant insurance agent pay its costs - Question of possible Bullock order in favour of that defendant reserved pending outcome of any application to reinstate plaintiff to ASIC register.

*Lombard Insurance Company (Australia) Ltd v Pastro, Pastro & Pastro and Voivodich* (1994) 175 LSJS 448; discussed
*Johnson v Ribbins & Others (Sir Francis Pittis & Son (a firm), third party)* [1977] 1 All ER 806; *Gladstone Park Shopping Centre Pty Ltd v Ross Wills and Others* (1984) 6 FCR 496; *Burke and Another v Gillett and Another* [1996] 1 VR 196; applied

**REPRESENTATION:**

*Counsel:*

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| 1st Defendant: | J. Kelly |
| 3rd Party: | C. Ford |

*Solicitors:*

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| 1st Defendant: | Clayton Utz |
| 3rd Party: | Cridlands |

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| Judgment category classification: | C |
| Judgment ID Number: | ols0601 |
| Number of pages: | 17 |

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

*Hazanee Pty Ltd v Elders Ltd & Ors* [2006] NTSC 8
No 87 of 2000 (20010131)

BETWEEN:

**HAZANEE PTY LTD**
**(ACN 005 357 522)**
Plaintiff

AND:

**ELDERS LIMITED (ACN 004 045 121)**
1st Defendant
and
**CGU INSURANCE LTD**
**(ACN 004 478 371)**
2nd Defendant
and
**BLACK, Gregory Robert**
3rd Party

**CORAM**: OLSSON AJ

**REASONS FOR JUDGMENT**

(Delivered 10 February 2006)

**Preliminary**

[1] These reasons are supplementary to those published by me in this matter on 8 July 2005. I shall continue to employ the various expressions contained in those reasons, to which I shall refer as "*my primary reasons*".

[2] In my primary reasons, I held that the plaintiff had failed to establish liability against the defendants. I entered a judgment of dismissal

accordingly and indicated that I would subsequently receive submissions from counsel as to what consequential orders ought to be made between the various parties, particularly as to costs.

[3] The matter was briefly listed for mention on 9 December 2005, whilst I was sitting at Alice Springs. However, the parties indicated that it was not practicable to finalise the outstanding issues at that time. Accordingly, it was again listed in Darwin on 6 February 2006 for submissions as to those issues.

[4] The parties were at odds as to certain aspects of the manner in which these proceedings should be finalised. I therefore heard detailed argument from counsel in light of the factual situation that they then outlined. The present reasons express my conclusions with regard to those submissions.

[5] It should be mentioned that the two defendants, Elders and CGU, were *ad idem* as to the manner in which the proceedings on the contribution notices exchanged by them ought to be progressed. Directions in that regard were given accordingly. I will hear detailed argument as to the relevant issues later in the current sittings.

[6] However, Elders sought an adjournment of the proceedings as to the issue of third-party costs, for reasons that will shortly emerge. This proposal was objected to by counsel for the third-party on the basis that his client was entitled to an immediate order for costs against Elders, leaving the latter to

seek a Bullock order against Hazanee at a later stage, should it become feasible to do so.

**Relevant background factors**

[7] Hazanee commenced the present action by writ of summons dated 22 June 2000, naming Elders and CGU as defendants.

[8] On 30 September 2003 Elders issued a third party notice against Greg Black, asserting that, as its sub-agent, he had failed to exercise the degree of care, skill and diligence that was reasonably necessary for the due performance of his duties. The notice pleaded that, as a consequence of the breach of his obligations, Elders had suffered, or would suffer, loss and damage; and that he was, accordingly, liable to compensate it for that loss and damage.

[9] The action ultimately came on for trial before me from 14 to 18 March 2005 as to the primary issues arising on Hazanee's claim. The third-party was represented by separate counsel and participated in the trial in the usual manner for the purpose of protecting his proper interests. An order had been made by Riley J on 3 March 2005 that the issues on the third-party proceedings, other than those that were also the subject of the proceedings between Hazanee and the two defendants, be tried after the proceedings between Hazanee and the defendants had been determined.

[10] The evidence on the trial of the primary issues as between Hazanee and the defendants concluded on 18 March 2005, on the basis that the parties were

to submit written, note form addresses according to an agreed timetable that, in the event, they found themselves unable to meet.

[11] Ultimately, all submissions having been received and considered, my reasons were published on 8 July 2005, as already recited.

[12] Following publication of those reasons, some correspondence ensued between solicitors for the defendants concerning the topic of costs. At one stage, the solicitors for Elders indicated that it was possible that an order for costs might be sought against the solicitors for Hazanee. In the event, that proposal was not proceeded with.

[13] On 8 December 2005, the solicitor for Greg Black e-mailed the solicitor for Elders advising that the position of Greg Black was that a formal order dismissing the third-party proceedings ought to be made and that Elders should be required to pay the third-party costs. This stance was reiterated in a confirmatory letter written on 16 November 2005.

[14] On about 13 January 2006, Mr John Trezona, the former accountant for Hazanee and a witness at the trial, advised the solicitor for Elders of the following facts:

> Approval had been given by the Australian Securities and Investments Commission, on or about 1 August 2005, for the deregistration of Hazanee Proprietary Limited, pursuant to the provisions of s 601AA (2) of the Corporations Act (Cth). This was on the basis that such

deregistration would take effect after two months following the day of publication of a gazetted notice of intention to deregister.

(Note: The documentation before me indicates that the application for deregistration was submitted on or about 21 July 2005 and based on a director's declaration to the effect that -

all members of the company agreed to the deregistration; and

the company was not carrying on business; and

the company's assets were worth less than $1000; and

the company had paid all fees and penalties under the Act; and

the company had no outstanding liabilities; and

the company was not a party to any legal proceedings.

It follows that very real issues arise as to the accuracy of certain aspects of the declaration made).

Hazanee had no assets and had not had any assets for approximately six years (the last set of trading accounts having been prepared in respect of the financial year ended the 30 June 2000).

When Hazanee ceased trading, it had a liability to the Shell Company of approximately $50, 000, after liquidating all assets. The Shell Company wrote off that debt.

[15] This communication fell to be considered in light of the finding in my primary reasons to the effect that, on Trezona's evidence, the Shell Company had re-acquired the business premises when the Hazanee lease expired in November 2000. The obvious implication is that Hazanee ceased trading at that time.

[16] The clear inference arising from the evidence is that it must have been apparent to Elders from an early stage of the litigation that it was bringing action against a corporate entity that had ceased to trade and was in an apparently dubious financial position.

[17] At no stage was any application made by either defendant for an order against Hazanee for security for costs.

**The present issues**

[18] Ms Kelly, of counsel for Elders, accepted that there was no reason why the ordinary principle that costs follow the event should not apply. She submitted, that in due course an order ought to be made that Hazanee pay not only the defendants' costs but also the costs of the third-party. She contended that this was a situation that ought to attract a *Sanderson* order, rather than a *Bullock* order.

[19] So it was that Elders sought an adjournment of the proceedings as to costs, to enable it to initiate an application pursuant to s 601AH of the

Corporations Act to re-register Hazanee. Re-registration would then bring a legal entity in existence, against which appropriate orders could be made.

[20] Mr Ford, of counsel for Greg Black, opposed that application on the footing that not only was there considerable doubt whether an application for re-registration would be successful but also, and more importantly, it was manifestly inappropriate to contemplate the potential making of a *Sanderson* order *apropos* the third-party.

[21] It therefore becomes necessary to consider each of those aspects.

[22] Section 601AH of the Corporations Act stipulates that an application for re-instatement of a de-registered Corporation may be made by an aggrieved person and that the requisite order may be made if it is just to do so.

[23] I did not take Mr Ford to contend that Elders did not have the requisite status to make an application pursuant to s 601AH. Quite clearly the de-registration has adversely affected its legal right to pursue a remedy against Hazanee and it has a genuine grievance that the dissolution of that corporation has thus affected its legitimate interests (*Re Proserpine Pty Ltd* [1980] 1 NSWLR 745).

[24] Mr Ford argued that it may well be that the Court would decline to exercise its discretion under the section. This was because there might be no utility in any reinstatement, given that it was said that, at the time of de-registration, Hazanee had no assets of substance.

[25] In the course of his reasons in *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* [2000] 34 ACSR 232 Austin J pointed out that the decided authorities render it clear that the Court will not make an order that, in practical terms, could well be futile due to the absence of any funds or assets of a revived entity. The learned judge commented that s 601AH is usually invoked to permit the plaintiff to recover damages by bringing proceedings against a defunct company in circumstances where the company's risk has been covered by insurance and, thus, the real defendant becomes the insurer.

[26] Unlike the situation in the *ACCC Case* (supra), nothing has been said to indicate that Elders would undertake to fund any administration costs of a revived Hazanee and the costs of pursuing any possible claims that such corporation might have against its former members or directors.

[27] Ms Kelly's riposte, without going so far as to indicate any specific fiscal commitment on the part of Elders, was that, upon reinstatement, there may well be valid claims against the members or directors, either to pursue assets that had been distributed to them or claims against the directors for continuing operations and activities of the corporation whilst it was plainly in a condition of insolvency.

[28] All that need be said is that, on the face of the situation, an application for reinstatement would patently face serious obstacles. This is so even given that there may be good ground for concluding that the de-registration took

place on the basis of a declaration that was manifestly incorrect in certain respects. Elders would plainly bear a very heavy onus of demonstrating that a revival of Hazanee would be other than futile, in a practical sense.

[29] Placing that issue to one side, the core question is as to whether, on any view, even if Hazanee was reinstated, it would be appropriate to make a *Sanderson* order in relation to the costs of third-party.

[30] As to this, the submissions made by Ms Kelly were to the following effect:

> There is no general rule that the Court should only make a *Sanderson* order when it is apparent that an unsuccessful plaintiff has the resources with which to make such an order;
>
> Where an unsuccessful plaintiff is insolvent (which is almost certainly the situation in the case of Hazanee) then, in determining whether to make a *Bullock* order by way of contrast with a *Sanderson* order, the Court is effectively deciding which successful party will bear the loss caused by the insolvency of the unsuccessful party. In doing so, it balances the hardship which will be suffered by the making of one type of order, as opposed to the other;
>
> In the present litigation it cannot be said that the conduct of either Elders or Greg Black caused or contributed to unnecessary costs being incurred. Both were victims of conduct by Hazanee that *did* cause unnecessary costs to be incurred;

Elders was sued by Hazanee because of what it alleged to be wrongful conduct on the part of Greg Black. The same evidence led to the Court determining that Elders should be successful as against Hazanee and that Greg Black should also be successful in the third-party proceedings; and

If a *Sanderson* order is made, then neither successful party will have their costs paid, each being left to bear their own costs. On the other hand, if a *Bullock* order is made, then Greg Black will have his costs paid and Elders will not only not have its costs paid, but will be forced to meet Greg Black's costs as well. All of the consequential hardship will therefore be borne by Elders and none by Greg Black.

[31] It is fair to say that Ms Kelly based her "*balance of hardship*" concept on the decision of the House of Lords in *Bankamerica Finance Ltd v Nock* [1988] 1 AC 1002 and that of *Milpurrurra and Others v Indofurn Pty Ltd and Others* [1997] 438 FCA.

[32] In my view, the second authority referred to is of little assistance for present purposes because the orders made in that case were very much the product of the assessment of the trial judge of the relevance of the conduct of certain parties in relation to the litigation and how that ought to be reflected in the ultimate cost burden in a situation in which certain respondents were insolvent.

[33] The *Bankamerica Case* focused on the propriety of a *Sanderson* order made in circumstances in which a finance company sued both a hirer of a motor vehicle and the dealer who had sold the vehicle to it. That vehicle had, in fact, been stolen and was seized by the police.

[34] Upon the hirer terminating the hire purchase agreement on the ground of breach of an implied condition as to good title, the finance company sued it for damages for breach of the hire agreement (pleading that the vehicle had not been stolen) and joined the dealer as the second defendant. The dealer became insolvent during the course of the proceedings and took no part in the trial.

[35] The trial judge dismissed the claim against the hirer and gave judgment for the hirer on a counterclaim for monies paid to date of seizure of the vehicle. The judge rejected an application that the finance company pay the costs of the claim and counterclaim and, on its application, made a *Sanderson* order that the dealer pay the costs of both the finance company and the hirer.

[36] On an application for leave to appeal, their Lordships held that the judge had a discretion to make the order sought to be impugned. They concluded that, having regard to the balance of hardship, a *prima facie* case had not been made out that there had been an inappropriate exercise of judicial discretion.

[37] Their Lordships made the point that, in the context of the relevant litigation, the finance company claims against the hirer and the dealer were, in

substance, alternative claims. It was bound to succeed on one or other of them, but could not succeed on both. It was accepted that the dealer, by asserting and maintaining that the vehicle had not been stolen, was responsible for the litigation.

[38] The dismissal of the appeal was based on the proposition that, in the circumstances, it was impossible to say that the exercise of judicial discretion had miscarried and that a consideration of the balance of hardship as between two co-defendants had provided "*a legitimate ground*" for the exercise of judicial discretion to make a *Sanderson* order.

[39] Once again, that was the product of a specific fact situation. It arose in the context of an appeal against a refusal to grant leave to appeal. It is not apparent that their Lordships were setting out to erect a principle of general application.

[40] As Mr Ford pointed out, there is a wealth of published authority bearing on the proper approach to be adopted in relation to the costs of third-party proceedings.

[41] I agree with him that the useful commencement point is the decision of the Court of Appeal in *Johnson v Ribbins and Others (Sir Francis Pittis & Son (a firm), third-party)* [1977] 1 All ER 806. In this case the court reflected upon the approach proper to be adopted as to the incidence of costs between a successful defendant and a successful third-party, in a situation in which the plaintiff proved to be impecunious.

[42] In delivering judgment, Goff LJ said that the court ought to be guided by the normal principle that costs follow the event and that a defendant, though successful in the action, ought usually to be ordered to pay the costs of a successful third-party. Then, if in the circumstances of the case those costs ought fairly to be borne by the plaintiff, it should further be ordered that they be added to the defendant's costs of the action as against the plaintiff i.e. a classic *Bullock* order should be made.

[43] Goff LJ went on to make the point (supra p 811) that, absent some special circumstances compelling a contrary conclusion,

> "… it cannot be right to deprive a third-party of an order for costs to which he is otherwise entitled against the defendant, because the defendant when looking to the plaintiff for reimbursement, finds a person not worth powder and shot".

[44] His Lordship noted that, where the third-party was an agent of the defendant and the plaintiff had joined the third-party as a defendant, a difficult question may have arisen as to the circumstances in which an agent was entitled to look to his principal against a liability not inherent in the performance of its duty, but arising because of a claim wrongfully made by a stranger to the contract of agency that the agent had not properly discharged his duties.

[45] The Court of Appeal said at p 812 that, in the case before it, it was unnecessary to resolve that problem:

> "… because this is a case in which the principals themselves have sued the agents. In such a case it must require very special circumstances to make it just not to order them to pay…"

the third-party costs.

[46] It seems to me that this reasoning is on all fours with that of Tadgell J in *Burke and Another v Gillett and Another* [1996] 1VR 196 at 200. He arrived at a similar conclusion where the joinder of the third-party was reasonable, but the third-party claim necessarily failed "*… essentially for the same reason that the plaintiffs failed against the defendants*". The fact that the defendants acted reasonably in bringing the third-party proceedings "*was not sufficient to justify an order either that the third-party should not receive its costs, or that the defendants should not be made responsible for them*" per Tadgell J at 200. The costs of the third-party proceedings should normally follow the event.

[47] Tadgell J said that the authorities dealing with *Bullock* orders and the like do no more than relieve a party who has been unsuccessful against another from liability for the costs of that other, if it is appropriate in all the circumstances that those costs be borne by yet another party.

[48] In his reasons in *Lombard Insurance Company (Australia) Ltd v Pastro and Others* (1994) 175 LSJS 448, there is a most helpful review by King CJ of the principles related to orders for costs of third-party proceedings. He there expressed the proper conceptual approach in a case in which a third-

party claim fails solely because the plaintiff has failed in its claim against the defendant in terms similar to the dicta in *Johnson v Ribbins* (supra).

[49] As the learned Chief Justice illustrated, there are valid reasons why a third-party may not be joined as a defendant. Nevertheless, the defendant may fairly seek to have that party bound by findings in favour of the plaintiff, so as to found a proper basis of any consequential claim to recover monies for which the defendant is liable by reason of the actions of the third-party. These are essentially separate proceedings in their own right that will often raise issues, as between the defendant and third-party, that are not wholly identical with those arising between the plaintiff and the defendant.

[50] If a defendant elects, for tactical reasons or reasons of practical expediency, to bring a third-party into proceedings to which it has not been joined as a defendant so as to facilitate a possible future claim to reimbursement, then it necessarily accepts the risk that, for a variety of reasons, the third-party claim may fail with costs following the event. This is a quite different scenario from one in which questions of equity and fairness as between co-defendants may arise.

[51] A similar conceptual approach was adopted by the Full Bench of the Federal Court of Australia in *Gladstone Park Shopping Centre Pty Ltd v Ross Wills and Others* (1984) 6 FCR 496. It was there stressed that the case in question was not one in which the real fight was between the applicant and the third-party, with the defendants little more than nominal parties. The appellants

had sought indemnity against the claim of the applicant in the original proceedings and ought to bear the cost of the attempt to secure such an advantage.

[52] Davies J commented that, in most cases, it will be of no concern whether, in relation to unsuccessful third-party proceedings, a *Bullock* order or a *Sanderson* order is made.

[53] However, he went on to say at 506:

> "But if the applicant be impecunious and the respondent be a person of substance, an order that the costs of the party joined be paid directly by the applicant will deprive the party joined of effective recovery of costs. In such event, the party joined, having been brought in the litigation at the instigation of the respondent, and being successful in the litigation, is ordinarily given an award of costs against the respondent, with the respondent being given the right of recovery against the impecunious applicant."

Once again, *Johnson v Ribbins* was relied upon by way of authority for that proposition.

[54] A similar approach was adopted by Ryan J in *Swisstex Finance Pty Ltd v Lamb* (1993) 2 Qd R 463.

**Conclusion**

[55] In my opinion, the overwhelming weight of authority mandates the rejection of the submissions on behalf of Elders. I conclude that the third-party is entitled to an order of dismissal of the third-party notice and a consequential order that Elders pay to it its costs of action to be taxed, if not agreed.

[56] In so saying, I must confess that I find myself in sympathy with the comment made by Mr Ford that, quite apart from any correct application of principle in this matter, Elders is, in reality, the author of its own misfortune.

[57] It has, over a long period of time, had access to knowledge that Hazanee was out of business and has had good reason to suppose that it may well have had little or no assets. Nevertheless, it has not, at any stage, taken steps to seek an order for security for costs.

[58] That being so, it can scarcely be heard to complain if it is subjected to what is the normal consequence of the outcome of this litigation and finds that it is bereft of practical remedy against an unsuccessful plaintiff.

[59] I adjourn further consideration of the issue of Elders' costs of action and whether a *Bullock* order ought to be made as to the third-party costs. In the event that Elders may succeed in having Hazanee reinstated to the register, it will have liberty to apply in that regard.

[60] It follows that there must be a further order that Elders pay to Greg Black his costs of and incidental to the present application also to be taxed, if not agreed.

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