Erdelyi v Santos Limited and Global Marine Bismarck Sea Incorporated and P & O Australia Limited and Territory Insurance Office & Ors [2001] NTSC 15

PARTIES:	BERT ERDELYI v SANTOS LIMITED and GLOBAL MARINE BISMARCK SEA INCORPORATED AND P & O AUSTRALIA LIMITED AND TERRITORY INSURANCE OFFICE & ORS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL
FILE NO:	No 315 of 1992 (9250291)
DELIVERED:	16 March 2001
HEARING DATES:	28 February 2001
JUDGMENT OF:	ANGEL J

CATCHWORDS:

WORKER'S COMPENSATION – INSURANCE – LIABILITY OF INSURER – S 126 WORK HEALTH ACT

Third party claim to indemnity against claims made by the defendants – liability to indemnify "in respect of his liability independently of the Act for an injury to a worker in his employ" – whether the Act extends such liability to indemnify to include contractual liabilities – liabilities voluntarily assumed by way of contract do not fall within the scope of s 126

Jennings Constructions v Worker's Rehabilitation and Compensation Corporation, unreported, Full Court, SA Supreme Court, 3 July 1998; followed
Rheem Australia Ltd v Manufacturers' Mutual Insurance Ltd [1984] 2 NSWLR 370; followed
Caledonian Railway Company v North British Railway Co (1881) 6 App Cas 114; followed
Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd (1995) 8 ANZ Ins Cases 61-235; not followed
Government Insurance Office v Brisbane Stevedoring (1969) 123 CLR 228; mentioned
Manufacturers' Mutual Insurance Ltd v Hooper (1988) 5 ANZ Ins Cases 60-849; mentioned
Worker's Compensation Board of Queensland v Technical Products Pty Ltd (1988) 165 CLR 642; mentioned

REPRESENTATION:

Counsel:

Appellant:	Mr J Sexton SC
Respondent:	Mr M Grant

Solicitors:

Appellant:	Morgan Buckley
Respondent:	Hunt & Hunt

Judgment category classification:	B
Judgment ID Number:	ang200103
Number of pages:	9

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Erdelyi v Santos Limited and Global Marine Bismarck Sea Incorporated and P & O Australia Limited and Territory Insurance Office & Ors [2001] NTSC 15
No. 315 of 1992 (9250291)

BETWEEN:

BERT ERDELYI
Plaintiff

AND:

SANTOS LIMITED and GLOBAL MARINE BISMARCK SEA INCORPORATED
Defendants

AND:

P & O AUSTRALIA LIMITED
Third Party

AND:

TERRITORY INSURANCE OFFICE & ORS
Fourth Party

REASONS FOR JUDGMENT

(Delivered 16 March 2001)

ANGEL J*:*

[1] On 9 November 2000 the Master ordered the trial of the following preliminary question as between the third party and the fourth party:

> "Whether on a true construction the employer's indemnity policy between the fourth party and the third party requires the fourth party to indemnify the third party against the claims for indemnity by the first and second defendants.".

[2] The matter arises this way. On or about 2 December 1989 the plaintiff suffered injury whilst working on the Robert F Bauer oil rig located in the

Ashmore and Cartier Island area. The rig in question was owned by the second defendant and hired by the second defendant to the first defendant. By writ dated 23 November 1992 the plaintiff sued the first and second defendants, at common law. The plaintiff alleges that the first and second defendants were occupiers of the rig and were negligent in failing to establish and maintain a safe system of work. The plaintiff also alleges a breach of certain statutory duties imposed by s 97 of the Petroleum (Submerged Lands) Act. These allegations are denied by the defendants. They assert they had no control or supervision over the plaintiff, and that such control and supervision lay with the third party.

[3] By Third Party Notice dated 21 January 1997 the defendants seek indemnity against the third party in respect of any sum which the plaintiff might recover against them. That claim for indemnity arises out of provisions of a contract between the second defendant and the third party dated October 1989 whereby the third party agreed to supply rig workers to man the rig in question.

[4] Clause 4(c)(i) of that agreement provides as follows:

> "Labour Contractor shall protect, defend, indemnify and hold harmless Owners, the Drilling Unit and the Owners' client from and against any and all losses, costs, expenses and causes of action (including attorney's fees and court costs) for wages, salary, sick leave, vacation pay, termination pay, family bonuses, and for bodily injury to, or illness or death of Labour Contractor's employees, officers, agents, representatives or the employees of Labour Contractor's Parent Company, howsoever caused, whether or not such injuries or deaths are caused in whole or in part by the sole or concurrent fault or negligence of Owners or the Owners' client or

> their respective employees, employees, officers, agents or representatives, arising out of, incident to or in connection with any and all services performed under this Agreement."

[5] By Fourth Party Notice dated 3 April 1998 the third party brought proceedings against the fourth party claiming an indemnity in respect of the claims brought against it by the first and second defendants. The third party's claim to an indemnity is pursuant to a Workers' Compensation Policy in terms of Schedule 2 of the Work Health Act (NT) in force at the time of the plaintiff's injury on 2 December 1989.

[6] Section 126(1) of the Work Health Act (NT) provides:

> "Every employer who is not a self–insurer shall obtain from an approved insurer a policy of insurance or indemnity for the full amount of his or her liability under this Act (other than Part IV) to all workers employed by him or her and for an amount of not less than the prescribed amount in respect of his or her liability independently of this Act for an injury to a worker in his or her employ, and shall maintain such policy in force.
>
> Penalty: $30,000.
>
> Default penalty: $2,000.".

[7] Section 126(4) provides:

> "An approved insurer shall ensure that each policy of insurance or indemnity referred to in subsection (1) issued by him or her is in accordance with Schedule 2 and does not contain provisions other than those in that Schedule except in relation to the employer's liability at common law or under any other law of the Territory and which are appropriate in the particular case.
>
> Penalty: $15,000."

[8] The recital of the policy contained in Schedule 2 refers to a policy of insurance or indemnity for the full amount of the employer's liability under the Work Health Act (other than Part VI of the Act) to all workers employed by the employer "and for an amount of not less than $2,000,000 in respect of his liability independently of the Act for an injury to a worker in his employ", and the operative part of the policy document provides that in consideration of the premium the insurer (fourth party) will indemnify the employer (third party) against a requirement to pay an amount not exceeding the amount stipulated in the policy "in respect of his liability independently of the Act for an injury to a worker in his employ."

[9] Section 52 of the Work Health Act abolishes common law damages actions by workers against their employers. It follows that the third party's prospective liability to the defendants does not arise out of the commission by it of some negligent act or some breach of statutory duty such as is contended by the plaintiff against the defendants. The third party's prospective liability arises, as I have already related, out of the contractual indemnity provision in the rig labour agreement. The third party's claim for indemnity against the fourth party is based not on any obligation which the third party has to the plaintiff arising out of the plaintiff's injuries, but on a contractual indemnity voluntarily entered into by the third party with the second defendant.

[10] The question in the present proceedings is whether on its proper construction the Schedule 2 Work Health Act policy of insurance extends to

such contractual liability. The present third party's liability in respect of the plaintiff's injuries is derivative only, and not direct, a distinction noted by Barwick CJ in *Government Insurance Office v Brisbane Stevedoring* (1969) 123 CLR 228 at 240, 243.

[11] The common law extension phrase in the policy is of long standing and the subject of differing judicial interpretations. In *Nigel Watts Fashion Agencies Pty Limited v GIO General Limited* (1995) 8 ANZ Insurance Cases 61–235, the New South Wales Court of Appeal held that the provision provided indemnity to an employer for common law liability to a worker qua worker and not in respect of other ways in which the employer might be liable to other persons, in that case a contractual indemnity provision in a lease. Kirby P, as he then was, said at 75,642 (Handley JA concurring):

> " The argument was that the extended terms of the promise 'to pay any other amount in respect of [the employer's] liability independently of the Act for any injury to [a worker]' was wide enough to cover the liability in respect of the injury to the worker in respect of which the employer was liable as third party.
>
> This claim must be rejected. The phrase in the policy is of long standing. Its purpose is plain. It is to provide indemnity to an employer for common law liability to a worker *qua* worker. It is not to provide indemnity to the employer in respect of every other way in which the employer might be liable to other persons, as by a promise in a contract of lease. The judgment against the employer as third party rested entirely upon the employer's contractual liability under the lease. It was based on the exceptional provisions of that document. The workers' compensation policy issued by the insurer to the employer did not respond to such a liability.
>
> For the employer it was put that the outcome might not have been the 'aspiration' of the drafter of the workers' compensation policy but liability arose nevertheless from the words actually used in the policy which would be construed in favour of the insured. I do

> not agree. So to hold would extend unreasonably, and beyond its purpose, the indemnity provided by the insurer under the workers' compensation policy."

Mahoney JA, at 75,648, said:

> " The term 'for' is, of course, one which has a wide operation: see *Robert G Nall Ltd v Federal Commissioner of Taxation* (1936–1937) 57 CLR 695 at 711. The extent of it in each case is to be determined by the context in which it is used. I do not think that the employer's liability in the present case, though arising because Mr Watts was injured, is a liability 'for' that injury. It is, in the relevant sense, a liability arising under the indemnity which, by the terms of the lease, was contracted to be given. I agree with the conclusion of Kirby P on this aspect of the matter.".

[12] On the other hand in *Rheem Australia Limited v Manufacturers' Mutual Insurance Ltd* [1984] 2 NSWLR 370, the New South Wales Court of Appeal held that the phrase "liability … for any injury to" a worker means "liability to any person consequent upon or in respect of injury to" a worker and that such an indemnity included any claim at common law by a person other than the injured worker and in that case a claim of a spouse for loss of consortium. Glass JA said at 373–374:

> " Once it is recognised that the indemnity in respect of the employer's liability independently of the Act covers its liability to the worker's dependants under the *Compensation to Relatives Act* it follows that the connotation of the phrase 'liability for any injury to any worker' is necessarily extended beyond liability to the injured worker himself.
>
> Such extension is also necessarily involved in other decisions of this Court on the same statutory policy. In *Findlay v Westfield Development Corporation Ltd* [1972] 1 NSWLR 422 it was held that the indemnity covered the liability of an employer as tortfeasor to pay a contribution to another tortfeasor under the provisions of the *Law Reform (Miscellaneous Provisions) Act* 1946, s 5. In *Dickson Primer Industries Pty Ltd v National Employers' Mutual General Insurance Association Ltd* [1974] 2 NSWLR 292 Sheppard J held

that a liability of an employer to recoup the nominal defendant under the *Motor Vehicles (Third Party Insurance) Act* 1942 s 32, was within the statutory indemnity.

The right of an employer to enforce the statutory indemnity in the event of his liability independently of the Act to the worker's dependants, to the tortfeasor who has also injured his worker and to the nominal defendant under s 32 of the aforesaid Act produces the following result. There can be no question of the indemnity being confined to situations where the employer is liable to *the worker* for injury to him. Liability for injury to the worker constitutes one only of the elements upon which the employer's liability to others is founded. Other elements must additionally be proved such as the financial loss of his dependants under the *Compensation to Relatives Act* 1897, and the liability to the worker of another tortfeasor for the same injury and that it is just and equitable that a contribution be recovered by him from the employer. In these two instances it might be said that the liability of the employer to others stands at one remove from its liability to the worker.

But the third example stands at even further remove and may not even depend upon liability of the employer to the worker. To prove that the employer has become liable to the nominal defendant under s 32 it would be enough to show that its worker was injured by the negligent use of an uninsured motor vehicle in circumstances which entitled him to recover judgment against the nominal defendant, who could in turn recover the amount of the judgment debt from the employer as owner of the uninsured vehicle, even though the vehicle may have been negligently driven by someone for whom the employer was not responsible. In such a case the event upon which the indemnity hinges 'liability for injury to the worker' is satisfied by proof of the employer's liability to others based upon injury to the worker."

[13] Learned counsel for the third party stressed that *Rheem Australia* (supra) went unnoticed in *Nigel Watts* (supra). He particularly emphasized Glass JA's reference to indemnity not necessarily requiring or depending upon liability of the employer to the worker. He submitted that construing the present statutory policy in accordance with *Rheem Australia* (supra) and rejecting *Nigel Watts* (supra) as having been decided *per incuriam*, that it followed the fourth party was liable to indemnify the third party in the event

the thirty party was held liable to the defendants. Counsel emphasized that *Rheem Australia* (supra) has been followed subsequently by the New South Wales Court of Appeal: see, eg, *Manufacturers' Mutual Insurance Ltd v Hooper* (1988) 5 ANZ Insurance Cases 60–849, and that it was distinguished without adverse comment by the High Court of Australia in *Workers' Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 at 652, 657.

[14] I am of the opinion that the third party's submissions should be rejected. To adopt the familiar language of Lord Selborne in *Caledonian. Railway Company v North British Railway Co* (1881) 6 App Cas 114 at 122:

> "The more literal construction ought not to prevail, if … it is opposed to the intentions of the Legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

Although I think the terms of the statutory indemnity in the present case are to be construed in accordance with *Rheem Australia Ltd* (supra), that is, taking the phrase "liability … for any injury to" a worker to mean "liability to any person consequent upon or in respect of injury to" a worker, the legislature nevertheless intended that the indemnity should be confined to the insurance of risk in respect of obligations compulsorily imposed by law upon the employer and not in respect of liabilities voluntarily assumed in contract. I agree, with respect, with the approach of the South Australian Full Court's decision in *Jennings Constructions v Workers' Rehabilitation*

and Compensation Corporation, unreported, delivered 3 July 1998. As William J said in that case:

> "Legislation of the type now under examination is not concerned with obligations which are contractual in origin. The general words of the Act must be read in light of the nature, purpose and scope of the legislation. As a matter of construction a limitation must be placed upon the generality of the language of s 105 if Workcover's risk is to be manageable.".

[15] I adopt the same approach to s 126 Work Health Act (NT) as Doyle CJ took to s 105 of the South Australian legislation in *Jennings* (supra), that is, the indemnity is not limited to the liability of an employer at the suite of a worker but it nevertheless is restricted to liability at common law other than liability voluntarily assumed by an employer under a contract for the provision of services.

[16] The preliminary question should be answered "no".

[17] I will hear the parties as to the future conduct of this matter and as to costs.