

# SUPREME COURT OF QUEENSLAND

CITATION: *Garside v Rohan (No 2)* [2018] QSC 313

PARTIES: **GLENN STUART GARSIDE**  
(plaintiff)  
**v**  
**DAN ROHAN**  
(first defendant)  
**TREVOR JAMES MILES**  
(second defendant)  
**JEFF ROBERTSON**  
(third defendant)  
**QBE INSURANCE (AUSTRALIA) LTD ABN 78 003 191 035**  
(fourth defendant)  
**NOMINAL DEFENDANT ABN 65 207 831 553**  
(fifth defendant)

FILE NO: Rock No 499 of 2017

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 20 December 2018

DELIVERED AT: Brisbane

HEARING DATE: 30 August 2018; 3 to 5 September 2018; 11 December 2018

JUDGE: Davis J

ORDER: **1. The fifth defendant pay the plaintiff's costs of the proceedings to be assessed on an indemnity basis; and**  
**2. The fifth defendant pay the first, second, third and fourth defendants' costs of the proceedings.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – COSTS IN PROCEEDINGS WHERE MULTIPLE PARTIES – COSTS AGAINST ONE OF SEVERAL DEFENDANTS – BULLOCK AND SANDERSON TYPE ORDERS – where the plaintiff sued all the defendants for damages arising out of a motor vehicle accident – where the fifth defendant was found to be liable – where the fifth defendant concedes that it ought pay the plaintiff's costs on an indemnity basis – where the first to fourth defendants seek their costs – whether the plaintiff or the fifth defendant should pay the costs of the first to fourth

defendants

*Motor Accident Insurance Act 1994 (Qld) s 31*  
*Uniform Civil Procedure Rules 1999 (Qld) r 681*

*Bullock v London General Omnibus Company* [1907] 1 KB 264,  
 cited

*Dominello v Dominello and Anor; Dominello v The Nominal Defendant and Anor (No 2)* [2009] NSWCA 257, distinguished  
*Garside v Rohan & Ors* [2018] QSC 295, related  
*Sanderson v Blyth Theatre Company* [1903] 2 KB 533, cited

COUNSEL: M Grant-Taylor QC and R Green for the plaintiff  
 R Morton for the first to fourth defendants  
 G Diehm QC and G O’Driscoll for the fifth defendant

SOLICITORS: Grant & Simpson for the plaintiff  
 Barry Nilsson for the first to fourth defendants  
 Moray & Agnew for the fifth defendant

- [1] The plaintiff, Mr Garside sued the five defendants seeking damages for personal injuries suffered by him on 25 November 2014 when he was riding his motorcycle along the Gregory Highway travelling north from Emerald to Capella.
- [2] The five defendants fall into two categories. The first, second, third and fourth defendants form one category, because each of the first, second and third defendants were driving vehicles whose compulsory third party insurer was the fourth defendant, QBE Insurance (Australia) Limited (QBE). I will refer to that first category of defendants as “the QBE defendants”. The second category of defendants only has one member and that is the fifth defendant, the Nominal Defendant.
- [3] On 11 December 2018, I delivered judgment on the trial of Mr Garside’s claim which was heard in Rockhampton.<sup>1</sup> I made the following orders:
1. The claim against each of the first, second, third and fourth defendants is dismissed;
  2. Judgment for the plaintiff against the fifth defendant in the sum of \$723,761.64; and
  3. The parties be heard on costs.
- [4] I further ordered that the parties exchange written submissions on costs and that I would decide the costs on those written submissions unless one or more of the parties sought an oral hearing. The parties have filed written submissions and none have sought an oral hearing.
- [5] Mr Garside seeks his costs against the Nominal Defendant on an indemnity basis. I have been told by the parties that formal offers were made by Mr Garside under the *Uniform Civil*

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<sup>1</sup> *Garside v Rohan & Ors* [2018] QSC 295.

*Procedure Rules 1999 (Qld) (UCPR)* and that the judgment exceeds the offers. No evidence to that effect has been put before me, as the Nominal Defendant concedes that it should pay Mr Garside's costs on an indemnity basis.

- [6] Unsurprisingly, given that they were completely successful in the proceedings, the QBE defendants seek their costs. Those defendants make no submissions as to whether their costs should be paid by Mr Garside or by the Nominal Defendant, or by Mr Garside with him to be indemnified by the Nominal Defendant.
- [7] It is not submitted either by Mr Garside or by the Nominal Defendant that the QBE defendants should not have their costs. Mr Garside submits that the Nominal Defendant should pay the QBE defendants' costs, and the Nominal Defendant submits that those costs should be paid by Mr Garside. That is the only remaining issue.

### **The conduct of the proceedings**

- [8] While Mr Garside was driving his motorcycle along the Gregory Highway an object fell from a truck and struck Mr Garside, injuring him. The only case pleaded by Mr Garside was one of negligence against the driver of the truck from which the object fell. The negligence for present purposes can be described as driving the truck while there was an object on it which could fall onto the roadway and injure other road users.<sup>2</sup>
- [9] Mr Garside believed that the truck from which the object fell was one operated by JJ Richards & Sons Ltd (JJ Richards). The truck did not stop. Its registration number was not taken and, therefore, there was doubt as to the identity of the truck. Mr Rohan, Mr Miles and Mr Robertson,<sup>3</sup> were the drivers of JJ Richards trucks operating out of the JJ Richards depot at Emerald and which on that day travelled north. The entire JJ Richards fleet of trucks was insured for compulsory third party liability by QBE. Therefore, QBE was liable (presuming negligence could be proven) if the truck from which the object fell was a JJ Richards truck but not one of the trucks driven by Mr Rohan, Mr Miles or Mr Robertson. Conversely, if the truck was not a JJ Richards truck then, subject to negligence being established, the Nominal Defendant would be liable pursuant to s 31 of the *Motor Accident Insurance Act 1994 (Qld)*.<sup>4</sup>
- [10] Mr Garside put his case in the alternative, that is:
- (i) the truck was one driven by Mr Rohan, Mr Miles or Mr Robertson, so QBE is liable; or
  - (ii) the truck was a JJ Richards truck but one not driven by Mr Rohan, Mr Miles or Mr Robertson, so QBE is liable; or
  - (iii) the truck was not a JJ Richards truck but was one that cannot be identified and so the Nominal Defendant is liable.

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<sup>2</sup> The particulars of negligence are detailed at [5] of the primary judgment.

<sup>3</sup> Respectively, the first, second and third defendants.

<sup>4</sup> See analysis at [3] of the primary judgment.

- [11] The QBE defendants pleaded in defence to Mr Garside's statement of claim that any truck from which an object fell and injured Mr Garside was not one driven by any of Mr Rohan, Mr Miles or Mr Robertson and was not otherwise a JJ Richards truck.
- [12] The Nominal Defendant pleaded in defence to Mr Garside's statement of claim that the vehicle from which any object fell was one of the vehicles driven by Mr Rohan, Mr Miles or Mr Robertson.
- [13] There were no pleadings between the QBE defendants and the Nominal Defendant. However, Mr Morton of counsel, who appeared for the QBE defendants, understood that the Nominal Defendant was advocating, as against his clients, that the truck from which any object fell was:
- (i) either driven by Mr Rohan, Mr Miles or Mr Robertson; or was
  - (ii) another JJ Richards truck.
- [14] During the trial, the Nominal Defendant conceded that there was not a basis upon which a finding could be made that the truck was one driven by Mr Rohan, Mr Miles or Mr Robertson. Mr Garside made no such concession.<sup>5</sup> The Nominal Defendant pressed for a finding that the truck was a JJ Richards truck.
- [15] Two witnesses gave evidence that they saw the truck and it was a JJ Richards truck. Mr Garside gave that evidence and so did Mr Mooney, who was driving his Emerald Coaches bus behind the truck and in front of Mr Garside's motorcycle at the time Mr Garside was injured. The QBE defendants led evidence in support of a circumstantial case that the truck was not a JJ Richards truck.
- [16] While I have no doubt that both Mr Garside and Mr Mooney were honest witnesses, I rejected their evidence identifying the truck as a JJ Richards truck and found that the vehicle could not be identified.<sup>6</sup>

#### **The parties' submissions on costs**

- [17] The Nominal Defendant submits that before either a *Bullock*<sup>7</sup> order or a *Sanderson*<sup>8</sup> order can be made, Mr Garside must establish:
- (i) that he acted reasonably in suing the QBE defendants; and
  - (ii) that there is something in the conduct of the Nominal Defendant, beyond a denial of liability, which makes it just to impose upon it liability for the costs of the QBE defendants.

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<sup>5</sup> See primary judgment at [5].

<sup>6</sup> Primary judgment at [58] to [65].

<sup>7</sup> *Bullock v London General Omnibus Company* [1907] 1 KB 264.

<sup>8</sup> *Sanderson v Blyth Theatre Company* [1903] 2 KB 533.

- [18] The Nominal Defendant's identification of the pre-conditions for the making of a *Bullock* or *Sanderson* order is accepted. It is supported by High Court authority.<sup>9</sup> Mr Garside does not contend to the contrary.
- [19] The Nominal Defendant accepts that Mr Garside reasonably joined the QBE defendants, but submits that there are factors which tell against the making of a *Bullock* or *Sanderson* order. In particular, the Nominal Defendant submits:
- (i) The stance it took at trial was based not only on the evidence of Mr Mooney, but also on the evidence of Mr Garside himself identifying the truck as a JJ Richards truck;
  - (ii) Mr Garside maintained at trial at least as one of his alternative contentions that the truck was a JJ Richards truck;
  - (iii) Mr Mooney's evidence was, as I found,<sup>10</sup> corrupted somewhat by the fact that he had been told by investigating police and staff of Emerald Coaches<sup>11</sup> that the vehicle was suspected to be a JJ Richards truck. That information had of course, come initially from Mr Garside;
  - (iv) The Nominal Defendant is in a somewhat vulnerable position as, unlike a more conventional insurer, it cannot compel a plaintiff to provide it with information; and
  - (v) No steps taken by the Nominal Defendant caused the joinder of the QBE defendants, as, given Mr Garside's recollection of seeing JJ Richards signage on the truck, the QBE defendants would always have to be parties to the proceedings.
- [20] The Nominal Defendant relies heavily upon the decision of the New South Wales Court of Appeal in *Dominello v Dominello and Anor; Dominello v The Nominal Defendant and Anor (No 2)*.<sup>12</sup> I will turn to a consideration of that decision shortly.
- [21] Mr Garside points to r 681 of the UCPR which is as follows:

**"681 General rule about costs**

- (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
- (2) Subrule (1) applies unless these rules provide otherwise."

- [22] He then submits that the Court should "order otherwise" than costs follow the event, the relevant event being the failure of his claim against the QBE defendants. He submits that a *Bullock* or *Sanderson* order ought to be made. Mr Garside points in particular to the Nominal

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<sup>9</sup> *Gould v Vaggelas* (1984) 157 CLR 215 at 229, 247; *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330.

<sup>10</sup> Primary judgment at [62].

<sup>11</sup> None of whom can be criticised.

<sup>12</sup> [2009] NSWCA 257.

Defendant positively pleading that the driver of the truck was one of Mr Rohan, Mr Miles or Mr Robertson.

- [23] Mr Garside seeks to distinguish *Dominello*. In *Dominello*, the plaintiff was injured when a vehicle in which she was travelling, and which was driven by her husband, crashed. The vehicle slipped on oil that had been dropped onto the roadway. The plaintiff sued her husband's insurer alleging negligence against him and also sued the Nominal Defendant,<sup>13</sup> being liable as the insurer of the unidentified vehicle which dropped the oil. The result after the appeal was that the plaintiff was unsuccessful against her husband but successful against the Nominal Defendant. On the question of a *Bullock* or *Sanderson* order, the Court of Appeal refused to order the Nominal Defendant to pay the costs of the successful defendant, namely the insurer of the plaintiff's husband.
- [24] The New South Wales Court of Appeal observed in *Dominello* that the cases against the respective defendants were not cases raised in the alternative. What was alleged were separate and distinct breaches of duty against each defendant. The Court distinguished that situation from the many cases where alternative claims were made against multiple defendants so that success in the action could only be against one of them.<sup>14</sup>
- [25] *Dominello* is a very different case to the present. Here, there is only one cause of action, being negligence against the driver of the truck from which the object fell. The case was one of alternative liability of either the QBE defendants (if the truck was a JJ Richards truck) or the Nominal Defendant (if the truck could not be identified as a JJ Richards truck).
- [26] True it is that, in defending the claim, the Nominal Defendant relied upon the account given by Mr Garside. It also relied on the account given by Mr Mooney, which may have been influenced by Mr Garside's initial mistake in the identification of the truck as a JJ Richards vehicle.<sup>15</sup> However, there was doubt as to the identification of the vehicle and that is why Mr Garside sued not only the QBE defendants but also the Nominal Defendant.
- [27] The issue as to whether the vehicle was a JJ Richards truck was clearly joined on the pleadings as between Mr Garside and the QBE defendants, and as between Mr Garside and the Nominal Defendant. The issue was certainly litigated at trial. While Mr Garside's evidence may have been that he thought the vehicle was a JJ Richards truck, he was entitled to, and did, sue the Nominal Defendant in the alternative. Ultimately, of course, he succeeded against the Nominal Defendant. Importantly, issue was joined at the trial as between the QBE defendants and the Nominal Defendant as to the identity of the truck. The Nominal Defendant lost that issue as against the QBE defendants.

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<sup>13</sup> Constituted under the New South Wales equivalent to the *Motor Accident Insurance Act 1994* (Qld).

<sup>14</sup> The cases analysed in *Dominello* at [21], [25]; see also *Roads and Traffic Authority & Ors v Palmer (No 2)* [2005] NSWCA 140.

<sup>15</sup> And that account being passed on to Mr Mooney: primary judgment at [62].

- [28] It was obviously appropriate for Mr Garside to join all the defendants. The Nominal Defendant took a positive stance that the vehicle was one operated by JJ Richards. It could have conceded that the vehicle was unidentified.
- [29] In pleading positively as against Mr Garside that the vehicle was one driven by one of Mr Rohan, Mr Miles or Mr Robertson and in advancing that case and the wider case that the truck may have been some other JJ Richards truck, the Nominal Defendant clearly engaged with the QBE defendants on the critical issue between them. Unlike *Dominello*, this was a case of alternative liability. The Nominal Defendant sought to avoid liability by attempting to identify the truck as one insured by QBE. That is the conduct which satisfies the second requirement for a *Bullock* or *Sanderson* order.
- [30] Having lost the forensic contest with QBE, it is just that the Nominal Defendant, rather than Mr Garside, pays the QBE defendants' costs.
- [31] I order that:
1. The fifth defendant pay the plaintiff's costs of the proceedings to be assessed on an indemnity basis; and
  2. The fifth defendant pay the first, second, third and fourth defendant's costs of the proceedings.