25/88

HOUSE OF LORDS

BANKAMERICA FINANCE Ltd v NOCK and ANOR

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner

27, 28 October, 3 December 1987 — [1988] AC 1002; (1988) 1 All ER 81

COSTS – BULLOCK/SANDERSON ORDER – TWO INNOCENT PARTIES – INSOLVENT THIRD PARTY UNSUCCESSFUL – WHETHER BURDEN OF COSTS SHOULD BE SPREAD BETWEEN INNOCENT PARTIES – WHETHER BULLOCK OR SANDERSON ORDER APPROPRIATE.

N. bought a motor car from a firm of car dealers by way of a hire-purchase agreement with BFLtd. After N. had paid approx. one-third of the re-payment instalments, the Police took possession of the motor car because it had been previously stolen. Subsequently, BFLtd sued N. for the balance of instalment payments owing and N. counterclaimed for the instalments paid. BFLtd joined the car dealers as a second defendant, claiming damages for misrepresentation, but before commencement of the trial, the dealers became insolvent and went into liquidation. At the trial the judge gave judgment for N. on his counterclaim and for BFLtd against the dealers. In dealing with the question of costs, the judge made a Sanderson order (i.e. the dealers pay all the costs of N. and BFLtd) rather than a Bullock order (i.e. BFLtd pay N.'s costs and be indemnified by the dealers). Upon appeal by N. as to the question of costs—

HELD: Appeal dismissed.

1. As BFLtd's claims against N. and the dealers were in substance alternative claims, BFLtd could not succeed on both and accordingly, it was open to the judge in the exercise of his discretion, to make either a Bullock order or a Sanderson order.

2. By making a Sanderson order, there would be hardship to both parties, but more to BFLtd than to N. By making a Bullock order, BFLtd would bear all the hardship with none to N. In all the circumstances, no error was made by the judge in making a Sanderson order.

Lord Brandon of Oakbrook (with whom their Lordships agreed) *[After setting out the facts of the case, continued]*: ... **[84 All ER]** With regard to costs the judge heard submissions from counsel for the two parties before him. Counsel for the hirer submitted that the finance company should pay the hirer's costs of both claim and counterclaim in any case. He further indicated, at one time at any rate, that he would be content with a Bullock order, that is to say an order (a) that the finance company should pay to the hirer his costs of both claim and counterclaim and (b) that the dealers should pay the finance company's costs of claim to which should be added the costs payable by the finance company to the hirer. Counsel for the finance company submitted that the appropriate order would be what is known as a Sanderson order, that is to say no order as to costs as between the finance company and the hirer, but an order that the dealers should pay all the costs of both the finance company and the hirer. The expression Bullock order is derived from *Bullock v London General Omnibus Co* [1907] 1 KB 264, [1904-7] All ER Rep 44; the expression Sanderson order is derived from *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

My Lords, if the dealers had been financially sound, it would not in the end have mattered whether the order made had been a Bullock order or a Sanderson order. But because the dealers were insolvent it mattered a great deal to both the hirer and the finance company. So far as the hirer was concerned, if a Bullock order was made, he would be assured of recovering his costs of the action in full from the finance company; but, if a Sanderson order was made, the likelihood was that he would be unable to recover his costs from the dealers. So far as the finance company was concerned, if a Bullock order was made, it would be obliged to pay the hirer all his costs of the action, and the likelihood was that it would be unable to recover such costs from the dealers; but, if a Sanderson order was made, the finance company would escape any liability for the costs of the hirer. The judge, expressing the view that he had a discretion to make either the one order or the other, and purporting at least to exercise such discretion, decided to make a Sanderson order. He further refused the hirer leave to appeal against that order... *[His Lordship referred to a procedural matter and certain provisions of the RSC and continued]* ... **[86]** My Lords, counsel for the

hirer put forward three contentions. The first contention was that, as between the hirer and the finance company, the former was the successful party and the latter the unsuccessful party. In that situation RSC Ord 62, r3(3) required the judge to make an order as to costs which followed the event unless there were circumstances in the case which justified him in making some other order. An order following the event would have been an order, either alone or as part of a Bullock order, that the finance company should pay the hirer's costs of both claim and counterclaim. The second contention was that there were no circumstances in the case which justified the judge in making an order as to costs other than an order following the event, from which it followed that the judge either had failed to exercise his discretion at all or had not exercised it judicially. The third contention was that, in these circumstances, the case came within principles (7) and (10) in *Scherer v Counting Instruments Ltd* [1986] 2 All ER 529; (1986) 1 WLR 615, so that the Court of Appeal had power to entertain the hirer's appeal without leave having been given by the judge, and having done so to substitute a different order from that made by him.

In order to decide whether these contentions are correct, it is necessary to examine the **[87]** nature of the discussion with regard to costs which took place between counsel for the hirer and the finance company and the judge after he had given judgment on the merits. That discussion, which is recorded in the transcript before your Lordships, went through four stages. In the first stage counsel for the hirer submitted that, since the hirer had succeeded against the finance company on claim and counterclaim, the finance company should be ordered to pay the hirer's costs of both; to which the judge reacted by suggesting to counsel for the finance company that he could not resist such an order. In the second stage counsel for the finance company submitted that the dealers, by asserting in the first place, and then maintaining right up until the trial, that the car had not been stolen, were responsible for the whole of the litigation. That being so, the appropriate order to make as to costs was a Sanderson order. In the third stage counsel for the hirer said that, while he would be content if the judge made a Bullock order, he strongly opposed the making of a Sanderson order. He did so on the ground that, since the dealers were insolvent, the result of a Sanderson order would be that the hirer, although successful against the finance company, would be left to bear his own costs. In answer to that the judge pointed out that, if a Bullock order was made, the finance company would find themselves paying the hirer's costs and bearing their own, without being able to recover either from the dealers. In the fourth stage counsel for the hirer resiled from his previous willingness to accept a Bullock order on the ground that such an order should not be made when a plaintiff's causes of action against two defendants were not alternative but separate and distinct, which he submitted was the situation in the instant case. In support of this proposition counsel for the hirer referred the judge to a passage in *The Supreme Court Practice* 1985 vol. 1, para 62/2/46 dealing with Bullock and Sanderson orders. In the fourth stage the judge, having read the passage to which he had been referred, expressed the conclusion that he had power to make either a Bullock or a Sanderson order, and that whether he made the one or the other was entirely in his discretion. He then went on, despite further protestation by counsel for the hirer, to make a Sanderson order.

My Lords, three questions arise out of this discussion. The first question is whether the judge was right in holding that the nature of the case was such that he had power to make a Bullock or a Sanderson order. The second question is whether he was right in holding that, on the basis that he had such powers, the choice between making the one order or the other was in his discretion. The third question is whether, in choosing to make a Sanderson order, he exercised his discretion judicially. With regard to the first question I am of opinion that the finance company's claims against the hirer and the dealers were in substance alternative claims. The finance company was bound to succeed on one or other of the two claims, and could not succeed on both. That being so, the judge clearly had power, without infringing Ord 62, r 3(3) and in accordance with long-established practice, to make either a Bullock or a Sanderson order.

With regard to the second question, there is authority in the Court of Appeal, with which I see no good reason to disagree, that, where a judge has power to make a Bullock or a Sanderson order, the choice between them is a matter for his discretion: see *Mayer v Harte* [1960] 2 All ER 840, [1960] 1 WLR 770. With regard to the third question, if the dealers had not been insolvent, it would, as I pointed out earlier, have made no difference in the end which of the two forms of order was made. The real question is therefore whether, having regard to the fact that the dealers were insolvent, the judge could not, if he exercised his discretion judicially, have made a Sanderson order, but was bound to make a Bullock order. As to this it is true that, if a Sanderson order was made, the hirer would probably have to bear his own costs. He would, however, recover the sum

of 8,343.83 pounds awarded to him against the finance company, whereas the finance company would probably be unable to recover from the dealers the sum of 22,996.34 pounds awarded to it or its own costs. There would then be hardship to both parties, but more to the finance company than to the hirer. By contrast, **[88]** if a Bullock order was made, the hirer would recover from the finance company both the sum of 8,343.83 pounds awarded to him and his costs. The finance company on the other hand would probably recover nothing: neither the sum of 22,996.34 pounds awarded to it, nor its own costs, nor the hirer's costs which it would have to have paid. All the hardship would then be to the finance company and none at all to the hirer.

The judge must have been aware of these matters. Having regard to them it seems to me impossible to say that the judge could not, in the judicial exercise of his discretion, have made a Sanderson order but was bound to make a Bullock order. On the contrary, the balance of hardship seems to me, not to require the judge to make a Sanderson order rather than a Bullock order, but at least to provide a legitimate ground for him, in the judicial exercise of his discretion, to do so. In this connection it is pertinent to observe that in *Rudow v Great Britain Mutual Life Assurance Society* (1881) 17 Ch D 600 at 607-608; 50 LJCh 504 Jessel MR expressed the view that, in a case of the present kind, the established practice was always to make a Sanderson order rather than a Bullock order. I recognise at once that this extreme approach must be regarded today as going too far. But the fact that it was adopted formerly is a strong indication that, while a Sanderson order cannot be mandatory, a Bullock order cannot be mandatory either.

My Lords, for the reasons which I have given I am of opinion that the hirer has not made out a *prima facie* case that he has a right to appeal against the judge's order as to costs without his leave, and that the Court of Appeal was therefore right to dismiss his application. It follows that I would dismiss the appeal.
