Supreme Court Notes

by Anita Del Medico

APPEAL - LEGAL PRACTITIONERS - ss 46(B) and 47 *Legal Practitioners Act* - whether the provisions of the Act relating to the investigation of the professional conduct of a legal practitioner by the Law Society override the principle of legal professional privilege.

AG Rogerson v The Law Society of the Northern Territory COA (Asche CJ, Martin and Angel JJ) 24/2/93

The applicant/appellant (A) had been refused certain injunctive orders, whereby he sought to restrain the Law Society, through its duly appointed investigator, from examining files and documents, later particularised by the investigator, which formed part of his practice. These files related to any clients who had signed or had been requested to sign at any time any document "relating to costs in family law matters" and any documents which contained a contingency fee provision ("percentage clauses"). A appealed, inter alia, on the basis that the Judge at first instance had not properly examined the question "whether legal professional privilege could be raised by a solicitor to protect the interests of clients where the Law Society directed an investigation of the solicitor's affairs which was unlimited as to time or ambit." (The Court found that on the facts, although the investigator had originally been given a very wide mandate by the Law Society [in terms of s 47(3)] to investigate A's affairs, he had particularised his request, as outlined above. The Court confined its decision to these facts.)

Held, per curiam: 1. The provisions of the Act, by necessary intendment, plainly abrogate the principle of legal professional privilege at least, and on these facts, in relation to the examination of solicitor-client agreements as to costs. However the provisions of the Act obviously extend further than this. There is express provision in the Act than an investigator may "at any time during ordinary business hours" inspect documents "in the custody or control" of a legal practitioner and make notes/copies of such documents: s 47(2)(a). There is also, significantly, in relation to the privilege itself, an obligation of confidentiality imposed upon the investigator.

2. There are certain fundamental rules of public policy embodied in the Act which make it plain that such an important and vital privilege as legal professional privilege should not be used to shield misconduct nor prevent those charged with ensuring the proper conduct of practitioners, from carrying out necessary investigations which serve to protect both the profession and the public. A purported exercise of the privilege should not bring into disrepute the very ends for which it was designed. "The contract between the solicitor and client must be taken to contain this implication: the solicitor must obey the law, and, in particular he must comply with the rules made under the authority of statute for the conduct of the profession. If the rules require him to disclose his client's affairs, then he must do so." (per Lord Denning MR, *Parry-Jones v Law Society* [1969] 1 Ch 1 at 7, applied).

A Solicitor v Law Society of NSW (unreported, 26/11/87), approved.

Baker v Campbell (1983) 153 CLR 52, followed.

3. The Law Society's wide powers of investigation under the Act must be exercised bona fide and in a manner such as not to oppress.

Order, leave to appeal refused; A to pay costs of appeal.

Application for leave to appeal and appeal from an order refusing interlocutory relief.

F Gaffy QC with J McCormack, instructed by Loftus and Cameron/ Waters James McCormack (30.11.92), for the applicant/appellant.

G Hiley QC with T Coulehan and N Henwood, instructed by the Law Society, for the respondent.

COURTS AND JUDGES - application for judge to disqualify himself from sitting as member of Court of Appeal - whether a reasonable suspicion of bias - remarks made by Judge in earlier proceedings - who to determine application.

AG Rogerson v A Tchia & Ors COA (Martin CJ, Kearney & Thomas JJ) 23/3/93.

Reasons for Ruling by Kearney J.

Counsel for the appellant applied to the Court for one of its members to disqualify himself from sitting on the Appeal Court on the grounds that there existed a reasonable suspicion of bias against the appellant. The application was based on certain remarks made by the judge in earlier proceedings wherein the appellant had sought injunctive relief against the Law Society. In the course of dealing with the interlocutory application, his Honour had expressed the opinion that the appellant's conduct in providing for a contingency fee clause in a particular costs agreement with a client was "champertous, improper, unethical and tortious," that it was "shocking and distressing" and further, that his conduct revealed "a lamentable and wholly inexcusable ignorance" on the appellant's part of "a fundamental rule in a solicitor's practice." On appeal from this decision, the Appeal Court had approved Kearney J's "properly censorious" remarks.

Held, per Kearney J: 1. The guiding principle to be applied is that laid down in *R v Watson; ex parte Armstrong* (1976) 135 CLR 248 at 258-263. It is the practice in such applications that the Judge the subject of the application determine it.

Barton v Walker [1979] 2 NSWLR 740, referred to.

2. It is fundamental to the administration of justice not only that a judge in fact brings a fair, impartial and unprejudiced mind to decision-making, but that it cannot be reasonably considered by a fair-minded person that he has not done so. But, just as a Judge has a duty to disqualify himself from sitting if he considers that he may reasonably be suspected of bias, so also he has a duty **not** to disqualify himself when he considers that there

cannot be any reasonable possibility of of any such suspicion. The necessary reasonable suspicion must be in the mind of a party or a hypothetical fair-minded person, and formed in light of knowledge of the relevant facts. The suspicion must be determined objectively.

3. A party or fair-minded observer would not, on the factual basis of this application, reasonably entertain an apprehension of bias on his Honour's part in this appeal, either on the grounds that the issues would be prejudiced or as to the credibility of any of the witnesses, particularly the appellant. The appellant's credibility was not in issue in the earlier proceedings before his Honour; there, the appellant had frankly admitted his conduct in charging contingency fees. Furthermore, the issues in that case appear unrelated to the present case. The fact that a Judge considers a solicitor reveals inexcusable ignorance as to one aspect of legal practice, does not carry any connotation at all as to the Judge's view of that solicitor's general credibility.

Livesey v NSW Bar Association (1983) 47 ALR 45; *R v Maurice; ex parte AG* (NT) (1987) 73 ALR 123; *Re: Morling; ex parte AMIEU* (1985) 66 ALR 608, distinguished.

Application refused.

Application that a Judge disqualify himself from sitting on Appeal Court on grounds of reasonable suspicion of bias.

J McCormack instructed by Close and Carter for the applicant/appellant.

P Tiffin as amicus curiae.

SENTENCING - armed robbery ss 211 (1)(2) Criminal Code - proposed increase in sentencing levels for less serious types of armed robberies - current tariff too low in light of statistics indicating alarming prevalence of offence

R v Y M Lewfatt (Mildren J) 27/4/93 (Reasons for judgment)

The prisoner had pleaded guilty to having robbed the victim of $180.00 in cash whilst armed with an offensive weapon, namely a knife, contrary to ss 211(1) and (2) of the *Criminal Code*. The maximum penalty for this offence is imprisonment for life. The prisoner was sentenced on 2/4/93 to three years imprisonment. The sentence was suspended upon the prisoner entering two separate recognizances: a home detention order for a period of nine months (pursuant to s 19A of the *Criminal Law (Conditional Release of Offenders) Act* (the "Act"), and a recognizance, self, in the sum of $2,000 to be of good behaviour for three years and subject to certain conditions, made pursuant to s 5(1)(b) of the Act. At the time submissions on sentence were made the Crown led evidence through a senior police officer of statistics showing the number of reported cases of robberies involving use of a weapon since 1/6/92. These statistics did not include muggings, and all involved armed robberies of business premises or private homes (at page 3). It was the Crown's contention that prior to the 1980s the offence of armed robbery was not a prevalent one; during that decade it became more prevalent, however the level of sentences has in recent years reflected greater leniency than in the past. The Crown reviewed the sentencing remarks on armed robbery cases of the kind committed by the prisoner from 1984-1992, that is, those robberies which were largely unpremeditated and committed by inexperienced offenders on small scale businesses. (Table of results at pp 5-6.) It was the Crown's submission that the current level of sentences for this kind of offence, in light of the evidence led as to its prevalence, was too low; the Court ought to look at imposing more severe sentences for this type of offence in the future, with greater consideration being given to custodial sentences.

Held, per Mildren J: 1. It must be borne in mind that the statistics presented do not represent a complete survey of all armed robberies that have been before the courts, and that there are inherent difficulties in drawing comparisons where the circumstances of each offence differ from case to case. It should also be noted that no complaint is made in relation to the more serious, planned armed robbery offences. Nevertheless, after making allowances for those factors, the following broad conclusions can be drawn: (1) in the decade prior to 1980, the offence was extremely rare in the Darwin area. (2) between 1984 and 1991, the offence has become increasingly more common. (3) the level of sentences, both in head sentences and non-parole periods set, has, if anything, slightly declined in recent times from that common before the mid 1980s. (4) the offence has become extremely prevalent at least since mid-1992. In these circumstances it is appropriate that a public warning be given that in future his Honour intends to gradually increase the level of sentences for this kind of offence.

R v Valentini [1980] 48 FLR 416, *R v Molina* (unreported 18/7/85, Nader J), *R v Armstrong & McLean* (unreported 5/6/89, Nader J), *R v MacSkimin* (unreported 5/3/92, Nader J), referred to.

2. Subject to any guidance his Honour may receive from the Court of Criminal Appeal or from the other Judges of this Court (for whom he cannot speak), any proposal by his Honour to increase sentences must be gradual and take place after due warning given. If any abrupt increase is warranted, the Court of Criminal Appeal, which has the ultimate responsibility for setting sentencing standards in the Northern Territory, will do so.

Breed v Pryce (1985) 36 NTR 23, *Clair v Brough* (1985-6) 37 NTR 11, *Poyner v R* (1986) 66 ALR 264, referred to.

3. It is not appropriate that an example be made of this particular prisoner by imposing a sentence heavier than the level of sentences which has previously prevailed; no warning has previously been given of the intention to gradually increase sentences for this type of offence so fairness dictates that the sentence to be imposed ought to be consistent with the sort of sentences that currently prevail. [His Honour gave further reasons for why a suspended sentence of imprisonment was appropriate in these circumstances.]

Judicial warning as to proposed increase in sentence for a particular class of armed robbery offences.

RJ Wallace on instructions from DPP, for the Crown.

W Somerville, on instructions from NAALAS, for the accused.