PRACTICE & PROCEDURE - pre-trial preparation - directions hearings - duties of parties and court to ensure speedy resolution of litigation - adjournment not to be expected "as of right" where pre-trial preparation inadequate.

INSURANCE - where insurer conducts insured's defence - named defendant/insured is no " mere witness" to proceedings - insurer need not concede liability to indemnify insured.

SOLICITORS' DUTIES - when acting for insured and insurer - fiduciary duties owed to both clients - solicitor and client relationship - potential conflict of interests when insurer repudiates its liability under the insurance policy - legal professional privilege - r9A3 ***Professional Conduct Rules of the Law Society of the Northern Territory.***

Kennedy and Ors -v- Cynstock Pty Ltd (T/As Outback Helicopters) and Ors

25.11.93 Kearney J

This was an action for damages under the *Compensation (Fatal Injuries) Act* brought by the family of E Kennedy after his death in a helicopter crash. It was originally set down in June 1993 for trial in November 1993. The defendants were the lessee, the pilot of the helicopter and the company which carried out maintenance on it; the fourth defendant was a liability insurer for the first and second defendants, jointed late in the proceedings by the plaintiffs, once its identity was discovered. The first "formal" indication by the solicitors for the first and second defendants that their clients' case was being conducted by a liability insurer was not made until September. The actual identity of the liability insurer was not ascertained until one week before trial; solicitors for the plaintiff foreshadowed joining it as a fourth defendant in the proceedings in October, when leave was sought by solicitors for the first defendant to cease to act for it. Once joined, the fourth defendant denied liability to indemnify the second defendant. The solicitors for the second defendant remained on record for the second defendant up to the date set for trial (15.11.93); they were also acting for the fourth defendant at this stage. When the application was made by them for leave to cease to act for the second defendant on 15.11.93, the second defendant (self-represented) asked for an adjournment.

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The second defendant claimed that he had not been advised of the fourth defendant's decision not to indemnify him until 12.11.93. The plaintiffs and second and third defendants sought orders for costs thrown away as a result of the adjournment. In the course of ruling on these applications, his Honour made certain observations as to the conduct of proceedings by the parties' solicitors.

HELD inter alia, allowing the adjournment, resetting fresh trial dates and finding the fourth defendant liable for costs thrown away by the plaintiffs and second and third defendants:

(1) The duty of solicitors to prepare for trial once the trial date is fixed.

The court expects the parties' solicitors to act sensibly at directions hearings to achieve the end stated by Sheppard J in ***Du Pont de Nemours - v- Commissioner of Patents*** (1988) 83 ALR 499 and 500, "... to bring litigation to an end at the earliest possible moment so long as the primary goal of achieving justice is not lost sight of...". It is the "overriding obligation" of the court to ensure this occurs. Where solicitors have not adequately prepared their case within the time allowed, without good reason, then even though the presentation of their client's case at trial may be detrimentally effected by their lack of readiness, they need not expect the trial dates to be vacated. During the preliminary, pre-trial stage the solicitors know much more about the case than the judge, and their responsibility is correspondingly greater to ensure that the case is kept within manageable proportions and that their efforts are directed to the resolution of the issues really in dispute. ***Ashmore -v- Corporation of Lloyd's*** (1992) 2 A11ER 486 at @488, followed.

(2) Matters which may arise when an insurer conducts its insured's defence.

In cases such as this one, where the liability insurer has (initially) exercised a contractual right under the insurance policy to undertake that insured's defence against a claim potentially covered by the policy, it is not

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uncommon for the solicitor for the insurer to wrongly treat the named defendant/insured, for whom he is solicitor on the record, as more akin to a witness than a party to the action. A named defendant is no mere witness; he is the party sued in the action, and thereby subject to any orders made in the litigation, while the insurer, as a non-party, is not. Where the insurer exercises its contractual right to conduct the defence, there is always a potential conflict of interest between the defendant on the record and his insurer. A solicitor acting for both the insurer and the defendant on the record, owes a fiduciary duty to the defendant by virtue of the solicitor and client relationship; information imparted to solicitors in this context is the subject of legal professional privilege and cannot be used to assist the insurer as client should he wish to repudiate liability or bring proceedings to establish the defendant's liability. In such a case, an insurer may be restrained by injunction from using information given by the defendant to his solicitors in confidence, in circumstances where its use would result in detriment to the defendant.

Unless the insurance policy contains a term by which the insured waives the solicitor-client relationship he would normally have with the solicitor, it is clear that such a relationship exists between an insured/defendant and his solicitor on the record, as well as between the insurer exercising its contractual right and the solicitor. As a consequence of this relationship, a solicitor owes a fiduciary duty to both his clients and must act reasonably in both of their interests. His role is to defend the insured against those claims which the insurer wishes to defend. He owes them both his undivided loyalty.

An ethical problem may arise where during the course of litigation, the insurer decides to repudiate its liability under the policy to the insured. This gives rise to what may be termed a "coverage" issue as between insurer and insured. The solicitor is faced with the situation where the interests of his two clients have come into conflict - on the point whether the insured is covered - yet he cannot breach their respective confidences in him or act without their authority, or contrary to the interests of either of them.

Where such a conflict situation arises, it is the solicitor's duty to recommend to both his clients that they obtain independent advice. He cannot simultaneously represent two clients with conflicting interests in litigation, actual or contemplated. He cannot as a matter of professional ethics continue to act in litigation where there is a real and sensible possibility of a conflict of interest between his clients: see r9A3 of the ***Professional Conduct Rules of the Law Society of the Northern Territory***. If necessary, he must withdraw entirely from the litigation; he must do so where there is a substantial risk that information given to him in confidence by the insured may be disclosed to or used by the insurer against the insured in the coverage issue. He cannot then represent the insurer on the coverage issue against the insured.

Should the insured lose the benefit of his privilege in his communications with his lawyer, because the lawyer in breach of duty discloses those communications to the insurer, the insured will have remedies against the lawyer. Should information come to the insurer's attention during the course of litigation which permits it to repudiate its liability to indemnify the insured, and the insurer with that knowledge nevertheless continues to conduct and control his defence, in the absence of any non-waiver agreement it may be estopped from relying on that information to deny its liability to indemnify the insured, or alternatively, it may be treated as having waived its right to do so.
State Government Insurance Commission -v- Paneros (1988) 48 SASR349, considered and followed; ***Groom -v- Crocker*** (1939) 1KB 194 @ 201 and 222, and further cases referred to at pp 9 - 10 of judgment.

(3) The identity of a client is not, in general, capable of being the subject of legal professional privilege, and a solicitor should disclose the identity of his client when properly called on to do so.
Bursill -v- Tanner (1885) 16 QBD1, referred to.

(4) The position where an insurer is joined as defendant in proceedings, when it disputes its liability to indemnify the insured/defendant, will usually give rise to the need at trial to determine further issues of fact. These will normally be raised in the pleadings between insurer and insured. The joinder of the insurer means that both issues - the insured's liability to the plaintiffs and whether he is indemnified against that liability by the policy - will be determined in the plaintiff's action, but at the cost of expanding the issues for trial in that action.

(5) An insurer may take over the conduct of the defence of an action brought against its insured, in the exercise of its contractual right to do so under the policy, without conceding that it accepts liability to indemnify the insured. Consequently, the fact that the second defendant in this case was always on notice of the fact that his solicitors were only "representing him because they [were] acting for the insurance company", was beside the point. A conflict of interest had arisen as between the insured as second defendant and the insurer as fourth defendant. The real issue was whether the solicitors for the second defendant could continue to act in these proceedings on behalf of the fourth defendant only, having notified the second defendant on 12.11.93 of their intention not to appear for him at trial.

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"... No doubt the solicitors owed a duty of care to the insured notwithstanding the arrangement made between the insured and the underwriters by virtue of which the solicitors were to act, just as the solicitors would have owed a duty of care to the insured had they been instructed in the exercise of the right of the underwriters to defend the proceedings under the policy ..." per Brooking J in ***C E Heath Underwriting and Insurance (Australia) Pty Ltd -v- Campbell Wallis Moule and Co Pty Ltd*** (1992) 1VR386 and 397 - 8, applied.

[It was ruled that the questions whether the solicitors for the second defendant should be granted leave to file a Notice of Ceasing to Act for him and whether they could properly continue to act for the fourth defendant insurer, should be heard by the Master or another judge.]

Ruling in the Supreme Court: applications for adjournment of trial and for costs thrown away as a result of adjournment.

T R Anderson QC with I McD Morris, instructed by Elston and Gilchrist, for the plaintiffs.

No appearance for the first defendant.

Second defendant, self-represented (Mildrens, solicitors on record).

D S Farquhar and H J Langmead, instructed by Cridlands, for the third defendants.

B Morris, instructed by Mildrens, for the fourth defendant.

P Barr, with a general watching brief, for Messrs Mildrens, solicitors.

Meet Receiver at women's lunch

An informal joint women lawyers/business and professional women's lunch will be held on Wednesday 13 April at 12.30pm.

The lunch will be an opportunity to meet the new Official Receiver for the Northern Territory and South Australia, Karen Axford, during her visit to Darwin. Ms Axford is the first female Official Receiver to be appointed in Australia.

The venue has yet to be decided but the organisers plan for the event to be modestly priced.

For details contact Judith Kelly or Liz Palmer on 81 7333 (phone) or 81 4675 (fax).

School's in for summer

The London School of Economics and Political Science has just announced its (northern) summer courses.

Each three week course comprises 45 contact hours and is examined to the exacting standards of the London School of Economics.

As far as possible, students are furnished with the same facilities that are made available to full-time students.

The choice of courses has again been extended, to cover the widest possible range of interests within management, international studies, philosophy and criminology. For more information about the courses contact The Law Society on 81 5104.

ACT Supreme Court Practice Direction No. 2 of 1994 Queen's Counsel - Senior Counsel

1 This practice direction applies to persons admitted to practise in the Australian Capital Territory, or entitled to practise in the ACT under the Mutual Recognition Act, and who practise solely as barristers.

2. In view of the moratorium placed by the Australian Capital Territory Executive upon the further appointment of Queen's Counsel, the Judges have decided that barristers who have been appointed Queen's Counsel for the Commonwealth or for a State or for another Territory should be accorded recognition similar to that accorded to Queen's Counsel for the Australian Capital Territory.

3. Queen's Counsel from outside the Territory may continue to robe as previously and may use within the Territory the title of Queen's Counsel. However, the title "Queen's Counsel for the Territory" may be used only by persons appointed to that office.

4. Queen's Counsel from outside the Territory who wish to be accorded the recognition proposed should observe the courtesy of notifying the Court by writing to the Registrar informing the Registrar of the fact and date of the appointment relied upon and asking that the records of the Court be noted accordingly.

5. Barristers appointed Senior Counsel in New South Wales will be accorded similar recognition. Schemes similar to that in New South Wales will be considered as the occasion arises.

6. Precedence of practitioners continues to be governed by the Legal Practitioners Act and appearances are to be announced according to the precedence laid down in the Act.

Dated: 17 March 1994
The Registrar