

them to accept substituted service of Hills' initiating process.

The Decisions Under Appeal

In the subsequent proceedings, the Master of the Supreme Court of the Australian Capital Territory (the Supreme Court) held that the applicants were entitled to discovery of the file notes, as Hills, by waiving the privilege associated with the two statements by providing them to NRMA, had impliedly waived the privilege attaching to the file notes on which the statements were based.

The Supreme Court reversed the Master's decision.² In considering that legal professional privilege had not been impliedly waived, it held that the file notes contained information either relevant to, or which would assist Hills' solicitors to provide advice in respect of, contemplated litigation and were therefore privileged.³

The Federal Court's Decision

Instead of focusing on the issue of an

implied waiver of privilege by the use of otherwise privileged file notes in the preparation of Raunio's statements, the Federal Court considered whether the notes could, in fact, constitute privileged information.

In doing so the court confirmed the principle that the subject matter of legal professional privilege is 'communications made confidentially',⁴ and therefore:

'...public interest could never require that a communication between the legal adviser of one party and the person who was opposed to his client be immune from disclosure, for there could never be any element of confidentiality in such a communication ...'⁵

The court concluded that the Supreme Court wrongly characterised the file notes as being subject to legal professional privilege, because they 'lacked the requisite character of confidentiality' (para 14) - the relevant interests, of Raunio as a defendant in proceedings brought by Hills, being clearly adverse (para 13). Furthermore the

court held that when deciding if communications with another party to litigation are privileged, it is irrelevant whether:

- The action is against that party in their own right or against that party's insurer (via its right to subrogation); or
- The notes were made for the purpose of anticipated litigation, or for advice concerning such litigation (paras 13 and 14). **PL**

Footnotes:

- ¹ Wilcox, Miles and Conti JJ.
- ² *Hills v Raunio* [2001] ACTSC 63, Gray J.
- ³ See [2001] FCA 1831 (para 8) for a summary of the Supreme Court's reasons for its decision.
- ⁴ *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487 per Mason and Brennan JJ, at 490 per Deane J.
- ⁵ *Jamison v The Government Insurance Office of New South Wales* (1988) Aus Torts Reports 80-214 at 68,119 per Carruthers J.

TINA COCKBURN, QLD
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Liability for breach of trust by trustees of damages awards:

Smith v Stewart, Supreme Court of New South Wales Equity Division, Hodgson CJ in equity, no 2478 of 1998, [2000] NSWSC 1224, BC200007837

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In 1984 the plaintiff was awarded approximately \$290,000 for personal injuries sustained when she was aged 10. A trust of the damages award was established in 1985 as it appeared that she was unable to manage her own affairs. The plaintiff's father (the first defendant) and an

accountant (the second defendant) were appointed trustees.

Most of the trust fund was used to buy a house (approximately \$190,000). Funds were also applied towards a car (approximately \$12,000), a bank deposit (\$15,000) and an investment bond (\$70,000). 

The plaintiff and first defendant occupied the house until she moved out in 1992, leaving the first defendant in sole occupation until 1996. The car was sold and the first defendant retained the proceeds. He paid for the plaintiff's wedding and contributed to the honeymoon, but otherwise she received no benefits from the trust after 1992. A request for an advance to buy a unit fell into abeyance.

The plaintiff alleged the following breaches of trust:

- a) failure to keep trust records and provide accounts;
- b) failure to account for the sale proceeds of the car;
- c) failure to apply the trust fund for the benefit of the beneficiary; and
- d) profit from position by the first defendant (living rent-free in the house).

She sought an order that the trust property be transferred to her and remedies for breaches of trust. The first defendant claimed that he should be reimbursed for expenditure incurred and exonerated for breaches of trust.

Hodgson CJ held that although the trustees were in breach of trust for failure to keep proper trust records, this did not directly translate to a monetary award.

It was determined that the first defendant could retain the proceeds of the sale of a car because although there was no legal obligation to pay the carer out of the *Griffiths v Kerkemeyer* award, the sale proceeds could be regarded as in satisfaction of a moral obligation or as an allowance for administering the trust fund.

Hodgson CJ held that the trust property was properly applied for the plaintiff's benefit until she left the house in 1992. He said at para 54:

'In a family situation such as this, I do not think the Court should be too ready to find a breach of trust, when something like a balance of this kind can be seen between the benefit to the trustee from rent-free accommodation,

and very real benefits provided to the beneficiary by the trustee and from the family circumstances.'

However, as to the period after 1992, though it was reasonable to remain for a time (the end of 1992 was deemed appropriate) to allow for the plaintiff's possible return, after this there was a breach of trust for failure to apply the trust property for the benefit of the beneficiary. The first defendant was accountable to the plaintiff for rent.

The first defendant was not entitled to be reimbursed for outgoings, although he could recover the cost of capital improvements.

As the second defendant had known since 1995 that the trust fund was not being applied for the plaintiff's benefit and did nothing, he too was in breach of trust and liable for rent accordingly.

As to the claim for relief from personal liability for breach of trust' on the grounds that the trustees had acted honestly and reasonably and ought fairly be excused, Hodgson CJ determined that although both defendants had acted honestly, insufficient evidence had been led as to the reasonableness of their conduct. In relation to the first defendant, his Honour noted and identified numerous factors which suggested that he had acted reasonably. Although all evidence relevant to exoneration should have been led at the hearing, Hodgson CJ concluded at para 73:

'I am reluctant to finally reject their claim for exoneration, when this could have a severe impact ... which is disproportionate to the benefit to the plaintiff, when this could make the breakdown of the family relationship irretrievable, and when I am not sure if this is what the plaintiff really wants.'

His Honour declared the plaintiff sui juris, ordered that the house be either sold or transferred to the plaintiff, secured the nett rents received since the property was let in 1998, and made no

order as to costs pending final hearing of the remainder of the plaintiff's claim, and the defendant's application for exoneration. **PL**

Footnote:

¹ Pursuant to s.85 Trustee Act 1925 (NSW).

PLAINTIFF

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