PARTIES:	ANNE ELIZA JESSIE WOLF v MARY PUNITHAM AND THE FAMILY PLANNING ASSOCIATION OF THE NORTHERN TERRITORY INC AND COMMERCIAL UNION ASSURANCE CO. OF AUSTRALIA LIMITED
AND	
	THE FAMILY PLANNING ASSOCIATION OF THE NORTHERN TERRITORY INC. v HALFPENNY AND EWENS PTY LTD (ACN 009 623 894) TRADING AS HALFPENNYS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	47 of 1988 141 of 1996
DELIVERED:	14 October 1997
HEARING DATES:	9 October 1997
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Applicant:	J.E.Hebron
Respondent :	G.M. Berner

Solicitors:

Applicant:	De Silva Hebron
Respondent:	Cridlands

Judgment category classification:	
Judgment ID Number:	kea97029
Number of pages:	11

kea97029

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 47 of 1988

BETWEEN:

ANNE ELIZA JESSIE WOLF
Plaintiff

AND:

MARY PUNITHAM
First Defendant

THE FAMILY PLANNING ASSOCIATION OF THE NORTHERN TERRITORY INC
Second Defendant

COMMERCIAL UNION ASSURANCE CO. OF AUSTRALIA LIMITED
Third Party

No. 141 of 1996

BETWEEN

THE FAMILY PLANNING ASSOCIATION OF THE NORTHERN TERRITORY INC.
Plaintiff

AND

HALFPENNY AND EWENS PTY LTD (ACN 009 623 894) TRADING AS HALFPENNYS
Defendant

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 14 October 1997)

After the ruling of 10 October 1997 (document 72) in proceedings 47 of 1988 the second defendant's summons of 3 October (document 55) seeking consolidation of proceedings nos. 141 of 1996 and 47 of 1988, was argued. I rule on that application today.

Background

In proceedings no. 141 of 1996 the second defendant as plaintiff issued a Writ on 25 July 1996 against its former solicitors in proceedings no.47 of 1988, Messrs Halfpennys, claiming damages for negligence and/or breach of contract and/or breach of the *Trade Practices Act* 1974 "while the Defendant was acting on behalf of the Plaintiff [in proceeding no.47 of 1988] to which the plaintiff was joined as a third party, since 25 May 1990, and up to and including the 25th of June 1996".

As I noted at p2 of the ruling of 10 October the plaintiff in proceedings 47 of 1988 joined the second defendant as a defendant to those proceedings on 24 May 1988. That order was not authenticated until 11 September 1990. The first defendant in those proceedings meanwhile joined the entity which is the second defendant, as a third party, on 21 May 1990; this order was authenticated on 25 May 1990. There was no appearance for the third party at

the hearing of that application, on 21 May 1990. The Third Party Notice, dated 11 June 1990, was filed on 14 June 1990. The entity which is the second defendant entered an Appearance as third party by its solicitor Mr Ewens of Messrs Halfpennys, on 5 July 1990. It also entered an Appearance by Mr Ewens, in its capacity as second defendant, on 30 November 1990.

On 11 November 1991 the solicitors for the first defendant in proceedings 47 of 1988 issued a summons (doc 23) to the entity which is the second defendant, in its capacity as third party, requiring it to "serve a Defence to the Statement of Claim endorsed on the Third Party Notice within 14 days." This application was supported by an affidavit of 8 November 1991 (doc 24) of Mr Stuart, the solicitor for the first defendant. Annexure "C" to that affidavit is a letter of 30 May 1991 from Messrs Halfpennys to Messrs Lawson Downs, the solicitors for the present Third Party to proceedings no.47 of 1988, Commercial Union Assurance Co. of Australia Limited, the Public Liability insurer of the second defendant, noting the qualified indemnity which the Third Party was prepared to give to the second defendant - that is, an indemnity other than for the second defendant's "vicarious liability where there is a breach of duty owed in a professional capacity".

On 14 November 1991 Mr Stuart appeared before the Master as counsel for the applicant (the first defendant) and Mr Ewens appeared as "Counsel for the third party" - that is, for the entity which is the second defendant. The Master ordered that the entity which is the second defendant as third party

"serve a Defence to the [first defendant's] Statement of Claim within 28 days".

On 28 January 1992 the first defendant applied for an order against the third party (the entity which is the second defendant) that it "be bound by Judgment between the Plaintiff and the First Defendant". This arose from the third party's failure to file a Defence to the first defendant's Statement of Claim; see r11.11(1)(a), which provides for the consequences of such default. Mr Johns appeared on 30 January 1992 for the applicant, the first defendant; Mr Ewens appeared for the third party (the entity which is the second defendant). The transcript of proceedings before the Master (doc 28) records that, without admission of any default, Mr Ewens for the third party consented to a self-executing order; that is, that unless the third party filed a Defence within 14 days, the order sought under r11.11(1)(a) would be made. On 30 January 1992 the Master accordingly ordered by consent:

> "1. Unless the Third Party [that is, the entity which is the second defendant] file and deliver its Defence within 14 days it be deemed to have defaulted in service of its Defence pursuant to the Order of 14 November, 1991.
>
> 2. The Third Party shall then indemnify the First Defendant against any Judgment including costs incurred by the First Defendant.
>
> 3. The First Defendant will be at liberty to enter Judgement for the amount of the Judgment debt and costs of the Third Party proceeding herein. All such costs are to be taxed."

No such Defence by the third party was ever filed and delivered; this failure constitutes the basis or part of the basis, for proceedings 141 of 1996.

The next relevant step in proceedings 47 of 1988 was not connected with the second defendant's role as third party in those proceedings, but with its role as second defendant. By affidavit of 7 June 1993 (doc 31) the plaintiff's solicitor deposed that the second defendant had not filed a Defence in the proceedings; the plaintiff entered judgment under r21.02 against the second defendant on 15 June 1993 for default of filing its Defence, for damages to be assessed.

The submissions

Mr Hebron of counsel for the applicant for consolidation (the second defendant in proceedings 47 of 1988) submitted as follows. The issues as to liability, as between the parties to proceedings 141 of 1996 on the one hand, and as between the second defendant and the Third Party (the second defendant's public liability insurer) to proceedings 47 of 1988, were substantially the same. This was because the second defendant's case against its public liability insurer in proceedings 47 of 1988, was based upon its Policy, and the Third Party's refusal to indemnify the second defendant pursuant to that Policy involved three matters: the construction of the Policy; actions in proceedings 47 of 1988 by the second defendant, apart from actions (or inactions) therein by its former solicitors (Messrs Halfpennys); and the action (or inaction) of Messrs Halfpennys therein (as outlined earlier). It was this third aspect which was common to both proceedings 141 of 1996 and 47 of 1988.

Mr Hebron submitted that the issue of the alleged professional negligence of Messrs Halfpennys, clearly the major issue in proceedings 141 of 1996, was the *only* issue between the second defendant and Messrs Halfpennys which would not arise in proceedings 47 of 1988. He submitted in that connection that there was nothing to suggest that Messrs Halfpennys had a defence to the alleged professional negligence. I observe that it is far too early to adopt any such view; apart from the Writ issued on 25 July 1996, and an Appearance by Messrs Halfpennys on 2 August 1996, no further steps have been taken on file 141 of 1996, apart from appearances at various case-flow management callovers.

Mr Hebron said that the question of damages was essentially the same in both actions: if the second defendant in proceedings 47 of 1988 established that it had once had a right of indemnity from the Third Party, but had lost that right due to the action or inaction of its solicitors Messrs Halfpennys in those proceedings, the damages awarded against the second defendant (or the portion for which the second defendant is held liable to the plaintiff) would also be the measure of the damages which it would seek to recover from Messrs Halfpennys. I observe that the existence of the Master's self-executing order of 30 January 1992 is relevant to the damages for which the second defendant may be liable.

Mr Hebron stressed that in proceedings 47 of 1988, the issue between the plaintiff and the second defendant was currently one of assessment of damages. This was occasioned by the existing default judgment (doc 32). I pointed out to Mr Hebron that currently he had on foot applications (docs 56 and 57) to set aside the Master's self-executing order of 30 January 1992 (doc 29) and the default judgment of 15 June 1993 against the second defendant (doc 32). Mr Hebron responded that he preferred "not to go into that", stating that if the second defendant were successful in these applications the likelihood was "that the trial [of 28 October] would then be adjourned". I must say that I consider it was wrong for the second defendant to have set down for hearing on 28 October these applications of 3 October; 28 October is the date fixed for trial, and these interlocutory applications should have been made returnable as soon as possible after 3 October, in order that those matters were resolved *prior* to trial.

Mr Hebron observed that in any event the plaintiff in proceedings 47 of 1988 had to establish her case on liability against the first defendant, and that case was substantially the same case on liability which she would have to establish against the second defendant, if the default judgment of 15 June 1993 were set aside.

Mr Hebron noted that Messrs Halfpennys had been acting on their own behalf in proceedings 141 of 1996, for a considerable time. Their present

solicitors, Messrs Cridlands, had been instructed only on 26 September 1997. Mr Hebron submitted that this late change in Messrs Halfpennys' solicitors should not weigh against the applicant for consolidation. I accept that. However, it is significant, in my opinion, that there have been no pleadings delivered, or interlocutory steps taken, in proceedings 141 of 1996. The result is that no issues have yet been joined in those proceedings. In a very real sense, that action is nowhere near "ripe" for hearing.

Mr Hebron relied on his affidavit of 3 October (doc 60), Annexure "B" to which is a proposed Third Party Notice in proceedings 47 of 1988 directed to Messrs Halfpennys, incorporating a detailed Statement of Claim.

The essence of Mr Hebron's case for consolidation was that Messrs Halfpennys really had no case to put, in response to the allegation of professional negligence; and that this meant that the remaining issue of damages, the measure of which was common in both proceedings 141 of 1996 and 47 of 1988, was the only real issue between them, and was one in respect of which Messrs Halfpennys could prepare for trial before 28 October.

Opposing the application for consolidation, Mr Berner of counsel for Messrs Halfpennys, relied on his affidavit of 9 October 1997. His firm had been instructed on 26 September 1997 to act, by Messrs Halfpennys' insurers. I note that annexure "A" to his affidavit is a letter of 23 September 1997 from

Mr Hebron's firm to Sedgwicks Limited, relating to proceedings 47 of 1988; after referring to the fact that the trial is due to commence on 28 October, the letter states that:

> "… as we have not secured all necessary medical reports to proceed with the hearing, we are seeking to vacate this current hearing [that is, the trial on 28 October] which is particularly in relation to the assessment of damages. Further, *should the hearing dates be vacated, we will be seeking to consolidate all actions including that against Messrs Halfpennys* in order that our client is able to seek proper reimbursement and indemnification from relevant insurers as a result of its actions and the actions of Messrs Halfpennys in the conduct of its case previously.
>
> It is worth nothing at this point that we have joined CUI [as Third Party to proceedings 47 of 1988], pursuant to the policy held by FPNT [the second defendant] with that company. If we are unsuccessful against CUI as a result of Halfpennys' actions, for example by that firm allowing judgment to be entered against our client by the Plaintiff and the First Defendant [a reference to doc:32], there is obviously little doubt that our client would be successful in recovering this damage from Halfpennys' insurer. It seems either yourselves or CUI will be liable to indemnify FPNT in relation to the litigation currently on foot." (emphasis added)

Mr Berner stressed the words emphasized above.

In general, Mr Berner relied on the short, late notice of the application for consolidation of 3 October, service of which was not effected on his firm until 8 October returnable on 28 October . He conceded that it might be desirable to consolidate the two actions, at some time; however, he could not possibly be prepared to participate in a trial on 28 October.

Conclusions

In my opinion it is crystal clear in the circumstances that Messrs Halfpennys could not be expected to participate in the trial listed to commence on 28 October. The time is far too short. Further, I note that in the ruling on 10 October (doc 72) I indicated at pp15-16 that the issues between the Third Party and the defendants should be tried *after* the trial of the issues between the plaintiff and the defendants. Precisely how long after the trial of the issues between the plaintiff and the defendants this should occur, remains to be worked out, pursuant to the process of case-flow management which I recommended then take place.

The issues between the Third Party and the defendant will only be "live", if the plaintiff recovers against the first or second defendants, or both of them. It is apposite, in that event, that the second defendant *then* seek to have proceedings 141 of 1996 heard and determined at the same time as the trial of the issues between the Third Party and the defendants. It is, however, essential that issues be joined between the parties to proceedings 141 of 1996, and any other essential interlocutory steps be taken in those proceedings, before any such application for a joint hearing is contemplated.

For the reasons I have indicated above, the second defendant's application of 3 October for consolidation of proceedings 141 of 1996 and 47 of 1988, is refused.

It is again desirable to point out that the order made today is subject to the directions of the Judge presiding at the trial proceedings 47 of 1988.

_____