PARTIES:	PALMER HOOK AND: THE TERRITORY INSURANCE OFFICE
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE NO:	M1 of 1994
DELIVERED:	19 January 1995
HEARING DATES:	29 June 1994
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Costs - Motor Accidents (Compensation) Appeal Tribunal - Jurisdiction to award costs against third party - Motor Accidents (Compensation) Appeal Tribunal Rules 1986 (NT) r 11 - "Party" defined broadly - Includes a solicitor who institutes proceedings without authority -
Costs - Whether breach of warranty of authority by solicitor - Applicant deceased at time of Reference to Tribunal - Whether lack of due diligence by solicitor by not becoming aware of applicant's death -
Legal Practitioners - Motor Accidents (Compensation) Appeal Tribunal Rules 1986 (NT) r 5 - References to Tribunal to be signed by the party or his solicitor - CAALAS not a solicitor for the purposes of the Legal Practitioners Act 1974 (NT) -

Legislation

Motor Accidents (Compensation) Act 1979 (NT) s 17, 28, 29, 29A(1)(b), 31 Part V; Part Viii
Motor Accidents (Compensation) Appeal Tribunal Rules 1986 (NT) - rr 3, 5 and 11
Rules of the Supreme Court of Queensland - O 91 r 1
Supreme Court Act 1981 (UK) s 51(1)
Judiciary Act 1903 (Cth) s 43
Supreme Court Act 1979 (NT) - s 30 and 32
Legal Practitioners Act 1974 (NT)

Cases

Knight and Another v F. P Special Assets Limited and Others (1992) 174 CLR 178, followed.
Aiden Shipping Ltd v Interbulk Ltd [1986] AC 965, considered.
Caboolture Park Shopping Centre Pty Ltd (In Liquidation) v White Industries (Qld) Pty Ltd (1993) 45 FCR 224, considered.
Wilson v General Commissioners for Leek and Inland Revenue Commissioners (1994) 12 ACLC 3201, considered.
Salton v New Beeston Cycle Co [1900] 1 Ch 43, considered.
Smout v Ilbery (1842) 10 M & W1; 152 ER 357, applied.

REPRESENTATION:

Counsel:

Appellant:	Mr S Brown
Respondent:	Mr D Farquhar

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Cridlands

JUDGMENT CATEGORY:	CAT B
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IN THE MOTOR ACCIDENTS (COMPENSATION)
APPEAL TRIBUNAL

No M1 of 1994

BETWEEN:

PALMER HOOK

Applicant

AND:

THE TERRITORY INSURANCE OFFICE BOARD

Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT
(Delivered 19 January 1995)

This is an application for an order for costs against the Central Australian Aboriginal Legal Aid Service Inc. ("CAALAS"), which purports to be the solicitors on the record for Mr. Palmer Hook.

The Respondent seeks the following orders:-

1. that the Central Australian Aboriginal Legal Aid Service Incorporated pay the Respondent's costs of and incidental to the reference dated 6 January 1994, and the application to amend the Reference in terms of the document dated 9 March 1994.

2. in default of agreement, such costs are to be taxed by the Registrar according to the Supreme Court scale on a standard basis.

3. the hearing on 3 May 1994 is certified fit for counsel.

On or about 8 October 1982, Palmer Hook (the deceased) suffered personal injuries in a motor vehicle accident. On 18 June 1992 the deceased made application for compensation under the Motor Accidents (Compensation) Act.

On 9 September 1993 the designated person under the provisions of the Act determined:

"1. that the application for benefits was made later than six (6) months after the date of the accident and on the evidence available the Board will be prejudiced in considering the claim;

2. that the Board declines to consider the claim pursuant to Section 31 of the Act; and

3. further, it is considered that the application made more than six months after the accident was not made as soon as practicable after the accident."

In a further determination dated 9 December 1993 the Board of the Territory Insurance Office dismissed an appeal against that decision, by upholding the decision of the designated person dated 9 September 1993.

On 6 January 1994 CAALAS, purported to issue a Reference to this Tribunal on behalf of the deceased on the following grounds:

"1. At all material times the applicant was a resident of the Territory within the meaning of the Motor Accidents (Compensation) Act.

2. On or about 8 October 1982 the applicant suffered personal injuries in a motor vehicle accident and he is entitled to compensation pursuant to the Act in respect of these injuries.

3. On or about 20 October 1988 the applicant became aware of his entitlement to compensation and attended Central Australian Aboriginal Legal Aid Service.

4. That on or about 9 December 1993 the Board determined in writing that it upholds the decision of the designated person dated 9 September 1993.

5. That the Board is not prejudiced in considering the claim.

6. The claim was made as soon as practicable after the accident.

7. The applicant is aggrieved by the Boards determination and seeks a determination that:

   (i) the Board consider the claim pursuant to Part VII of the Act;
   (ii) the applicant be paid compensation in accordance with the Act."

The matter first came on before me on 10 February 1994 when it was adjourned to 10 March 1994. On 10 March 1994 the matter was adjourned until 3 May for a preliminary hearing. On 3 May 1994 I heard the submissions of Mr. Farquhar for the Respondent and adjourned the further hearing of the matter and the question of costs thrown away of the hearing until 16 May 1994. Mr Farquhar's submission was that as the deceased had died on 9 June 1993, the Reference to this Tribunal was incompetent.

On 16 May 1994 I heard an application made by CAALAS to substitute Sammy Hook and Helen Hook, two of the deceased's children, for the deceased. There was no evidence to show that those applicants are in law the deceased's personal representatives. I refused the application for leave to amend the Reference, and I dismissed the Reference of 6 January 1994 and adjourned the question of costs to a date to be fixed.

Subsequently arguments as to costs came on before me on 29 June 1994.

Mr Farquhar for the Respondent submitted that CAALAS brought on the Reference before this Tribunal without any authority to do so and accordingly an order for costs ought to be made against it.

DOES THE TRIBUNAL HAVE JURISDICTION TO AWARD COSTS AGAINST A SOLICITOR (NOT BEING A PARTY TO THE REFERENCE)?

It is well established that neither statutory courts nor tribunals have any inherent powers to award costs. If the power exits, it must be conferred by Parliament: Knight and Another v F.P. Special Assets Limited and Others (1992) 174 CLR 178.

S28 of the Motor Accidents (Compensation) Act (1979) establishes the Motor Accidents (Compensation) Appeal Tribunal which shall be constituted by a Judge of the Supreme Court.

S29A(1)(b) of the Act provides:

> "The Judges appointed under Section 32(1) of the Supreme Court Act who are not additional Judges, or a majority of them, may make rules, not inconsistent with this Act -
>
> (b) providing for the awarding of costs in matters before the Tribunal;" (my underlining)

Rule 11 of the Motor Accidents (Compensation) Appeal Tribunal Rules provides:

"11. COSTS

(1) Subject to these Rules and the Act, the costs of and incidental to a reference to and a proceeding before the Tribunal shall be at the discretion of the Tribunal.

(2) Costs shall follow the event, unless the Tribunal otherwise orders.

(3) In making an order as to costs, the Tribunal may make such further orders as are necessary to give effect to its order, including, but not limited to, an order -

(a) that costs be taxed before the Registrar and the procedures to be followed in taxing costs;

(b) specifying the scale of costs to apply;

(c) fixing a lump sum amount of costs; or

(d) that a party pay the costs of a witness required to attend before the Tribunal.

(4) Where it appears to the Tribunal that costs have been improperly, or without reasonable cause, incurred, or there has been a failure, without reasonable excuse, to comply with these Rules or an order of the Tribunal made pursuant to these Rules, the Tribunal may penalise the party at fault by making such order as to costs as it thinks fit. (my underlining)

(5) Where the Tribunal orders a party to pay costs to another party, that other party may recover those costs as if they were a judgment debt obtained in the Supreme Court."

It was not submitted that because the application to this Tribunal was made without authority, there was no "matter" before the Tribunal within the meaning of s.29A(1)(b) of the Act. The position is analogous to a proceeding commenced without leave, where leave is necessary. In Ceric v C E Health Underwriting and Insurance (Australia) Pty Ltd (1994) 99 NTR 1 at 9 Gallop ACJ and Morling J said:

> "We find it difficult to describe a proceeding commenced in a court which has jurisdiction to entertain the proceeding a nullity."

In this case the Tribunal had jurisdiction to entertain the kind of application which had been made to it on behalf of the deceased had he been living. I consider that the original application before the Tribunal was therefore a "matter" before the Tribunal. The application to substitute the deceased's children for the deceased is likewise a "matter" before the Tribunal even though that application was bound to fail.

The main thrust of the submissions centred around Rules 11(1) and (4) of the Rules. CAALAS submitted that this Tribunal has no jurisdiction to award costs against a

non-party to the Reference. This submission was based upon Rule 11(4) and by the definition of "party" found in Rule 3(1):

> " "party" means a party to a reference and includes the Board."

CAALAS' submission was that as it was not a party to the Reference, no costs could be awarded against it.

In my opinion CAALAS' submission cannot be sustained. In Knight v F.P. Special Assets Pty Ltd (supra), the High Court considered whether O91 R1 of the Rules of the Supreme Court of Queensland conferred a power to avoid costs against a non-party. This rule provided that

> "... the costs of and incident to all proceedings in the Court ... shall be in the discretion of the Court or Judge..."

This rule is in pari materia to Rule 11(1) of this Tribunal's rules. The majority of the High Court were of the opinion that this rule conferred a power to award costs against a non-party for a variety of reasons, but I shall mention two of these reasons. First, the words of the rule were sufficiently expansive to enable the Court to make an award against a non-party, and there was no good reason why the words should be given a restricted meaning based upon the jurisdiction lending itself to abuse. As to this, I consider that the possibility of abuse in this Tribunal is so remote as to be discounted. The Tribunal must be constituted by a Judge of the Supreme Court. Whilst s30 of the Act provides that there is to be no appeal from a decision of the Tribunal the Judges will develop principles governing the exercise of the discretion to ensure there is no abuse. Secondly the majority of the High Court considered that although the general rule was that costs would only be awarded against a party, there were a number of well-recognised cases where Courts, whose jurisdiction to award costs depended upon a similar statutory grant of power, would award costs against a non-party who was the real party to the action,

for example, a solicitor who instituted proceedings without authority.

In Aiden Shipping Ltd v Interbulk Ltd [1986] AC 965, the House of Lords considered another statutory provision as to the power to award costs which included a definition of the word `party'. The statutory provision, s.51(1) of the Supreme Court Act 1981 (UK) provided:

> "Subject to the provisions of this or any other Act and to rules of Court, the costs of and incidental to all proceedings ... shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid."

The word `party' was defined elsewhere in the Act to include a person upon whom notice of the proceedings had been served. The House of Lords concluded that no implied limitation could be read into the broad words of the statute with reference to the definition of `party'. The High Court in Knight (supra) approved of the reasoning in that case.

The question of jurisdiction to award costs against a third party was also considered by the Full Federal Court in Caboolture Park Shopping Centre Pty Ltd (In liquidation) v White Industries (Qld) Pty Ltd (1993) 45 FCR 224. This required an examination of s43 of the Judiciary Act (1903) (C/W), a provision similar to O91, rule 1 of the Queensland Supreme Court Rules. The Court held that there was no reason to doubt that s43 conferred upon the Court jurisdiction to award costs not only against persons who are parties but also against persons who are not. The Court adopted the expression the High Court used in Knight and Another v F.P. Special Assets Limited and Others, supra, that the Queensland Supreme Court Rules allowed an order against the appellant for initiating the proceedings as being the "real party" to the litigation.

I therefore consider that the word `party' in the expression `party to a reference' appearing in the definition of `party' in Rule 3(1) includes someone who is the real

party to the Reference, and that this would include a solicitor who instituted an application to this Tribunal without authority. Accordingly an award of costs could be made against CAALAS (assuming it is a solicitor) either under Rule 11(1) or under Rule 11(4).

SHOULD COSTS BE AWARDED AGAINST CAALAS?

It is now necessary that I deal with the facts in a little more detail.

On 2 March 1989 the senior legal officer for CAALAS, Mr Stewart Brown wrote to the Territory Insurance Office (TIO) informing the office that it acted for Mr Palmer Hook, an aboriginal man of approximately 40 years of age. On 20 October 1988 Mr Hook had attended at the CAALAS offices reporting that he had injured his right arm badly in a motor vehicle accident "a long time ago". He consulted a doctor following the injury and a subsequent medical report obtained from the Alice Springs hospital indicated that Mr Hook was hit by a motor vehicle on 9 October 1982 and as a result dislocated his right shoulder. Mr Brown's letter to the TIO stated that whilst they had no other details of the accident - (they had written to the Northern Territory Police for the registration number and name of the driver of the car involved), CAALAS was merely writing to inform the TIO that notwithstanding the claim being out of time they wished to give the TIO notice of a forthcoming claim. The TIO responded to this letter on 16 March 1989 acknowledging receipt of their 2 March letter enclosing an application form and medical authority, stating that they would await further advice from CAALAS before taking further action on the matter.

There apparently was no further correspondence in this matter until 7 April 1992 when CAALAS wrote again to the TIO stating that they had been unable to obtain from the Northern Territory Police any information regarding Mr Hook's accident as apparently it was a "hit and run accident". CAALAS requested the TIO to inform them of its attitude to the lateness of the claim and stated that their client's

claim would possibly be a s17(1)(7) claim.

On 29 April 1992 the TIO wrote to CAALAS acknowledging receipt of their letter of 7 April 1992. However the request from CAALAS that they inform CAALAS of their attitude to the late claim was ignored. The TIO requested that the application form previously sent to CAALAS be completed by them or Mr Hook and returned to it together with the medical report obtained from the Alice Springs hospital and any other documentation from the NT Police they might have: this notwithstanding CAALAS's previous notification to them that they had received no documentation from the NT Police. The final paragraph of the TIO's letter to CAALAS did not make sense. I think the TIO attempted to inform CAALAS that once the completed application form and any other documentation that the designated person might be required to take into account pursuant to s31 was received, the TIO would proceed to consider the claim. The letter is of little assistance to me and could not have been of any assistance to CAALAS.

In its letter to the TIO on 18 June 1992 CAALAS stated that the TIO's previous correspondence did not answer the question it had raised in their earlier correspondence. CAALAS, on 18 June 1992 returned the claim form completed to the best of its instructions, a brief medical report from the Alice Springs hospital, and informed the TIO that the accident was never reported to the police but nonetheless CAALAS was still endeavouring to ascertain whether there were any witnesses still living who might provide statements. CAALAS also wrote that Mr Hook had worked as a fencer and a stockman but currently they had no instructions to make a section 13 claim. CAALAS also requested the TIO to inform it if the TIO had ever paid any accounts as a result of the accident for "accident travel", or any other matters.

The TIO's letter to CAALAS of 7 July 1992 provides a little more light. Because there was no police accident report the TIO requested a statutory declaration from Mr Hook containing some considerable degree of information: details of the

accident; the actual place of the accident; residence status of Hook at the time; injuries sustained; subsequent injuries sustained; employment, social security benefits history prior to and subsequent to the accident; the reasons for delay in seeking compensation including Mr Hook's knowledge of his rights to compensation and what assistance he has sought subsequent to the accident; confirmation of period of residence prior to the accident; and a full medical history which ought include an up-to-date report on his current condition and any injuries or illness suffered since 1982. In this letter the TIO indicated that further consideration would be given to the late application once the information was received.

On 7 January 1993 the TIO again wrote to CAALAS informing it that as a result of a lack of response to their letter of 7 July 1992 unless a proper response was received, the matter would be placed before the Board at the meeting of 4 and 5 March 1993. On 1 February 1993 CAALAS wrote to the TIO apologising for the lack of reply and stating that it was still awaiting a reply to its letter of 18 June 1992. CAALAS also requested a copy of the decision made by the designated person, as the TIO's letter of 7 January 1993 indicated that the matter would be put before the Board following a decision of the designated person. CAALAS stated that it was still trying to gather together the information requested by the TIO in its letter to CAALAS of 7 July 1992. The TIO wrote to CAALAS on 16 March 1993 informing it that no decisions had been made in relation to Mr Hook's claim due to insufficient information, that it had no information relating to the accident and it had not paid any accounts in relation to the accident. Again the TIO requested an up-to-date medical examination report on Mr Hook.

The firm Cridlands wrote to CAALAS on Tuesday 13 July 1993 having been retained by TIO to act on its behalf. Cridlands informed CAALAS that the information requested in the TIO's letter of 7 July 1992 was sought with a view to having as much material as possible placed before the Board for a decision on whether or not it ought to consider or refuse to consider the application pursuant to s31(2)(a) as it was made later than 6 months after the accident. Cridlands requested

that CAALAS advise them within 28 days if CAALAS was still instructed in the matter, implying that because the application form was signed by CAALAS and that because the TIO had had no direct dealings with Mr Hook there was a possibility that in fact CAALAS may no longer be instructed. Cridlands requested that if CAALAS were still instructed and if there were no further material forthcoming, to inform them of that fact so that the papers may be prepared for the meeting of the Board members. Cridlands informed CAALAS that the TIO had previously intended putting the application before the Board at its 4 and 5 March meeting in 1993 but because CAALAS wrote on 1 February 1993 indicating that a statutory declaration would be provided in the near future the matter was not put before the Board. Messrs Cridlands reiterated that if the material was not forthcoming, then irrespective of its non- presentation the matter would be placed before the Board as to whether or not the Board should consider the claim for benefits.

On 10 September 1993 the TIO wrote to CAALAS enclosing a copy of the determination dated 9 September 1993 which determination held that as the application for benefits was made later than 6 months after the date of the accident and on the evidence available, the Board would be prejudiced in considering the claim, the TIO had declined to consider the claim. It was also considered that application was not made as soon as practicable after the accident. Following receipt of the determination CAALAS wrote to the TIO requesting that the designated person refer the matter to the Board for its determination pursuant to part 5 of the Motor Accidents (Compensation) Act. CAALAS requested that it be advised of the date that the matter was to be referred to the Board. By facsimile the TIO notified CAALAS on 29 September 1993 that the matter would be referred to the Board meeting to be held on 4 and 5 November 1993. The Board in its 9 December 1993 meeting upheld the decision of the designated person made on 9 September 1993.

CAALAS submitted that the delay of the TIO Board in administering the claim led to a determination being made after the death of the claimant Palmer Hook.

CAALAS submitted that following receipt of the determination on 16 December 1993 it was required to obtain instructions from Mr Hook regarding the Reference to the Tribunal within 28 days. CAALAS pointed out this was 6 working days prior to Christmas and that the solicitor handling the matter proceeded to take leave between 24 December 1993 to 4 January 1994 without the determination of the Board having been brought to his attention. On 5 January 1994 the determination having come to that solicitor's attention CAALAS decided to lodge the Reference before the time limit expired pending confirmation of instructions from Mr Hook to serve the Reference on the respondent. CAALAS could not recall any actual service of the Reference on the Respondent. CAALAS stated that shortly after 5 January 1994 a field officer believed he saw Mr Hook in a river bed from a distance, but the person he saw was in no condition to confirm any instructions on any matter. CAALAS on behalf of Mr Hook, lodged the Reference to the Tribunal on 6 January 1994. The facts in this paragraph were contained in CAALAS' written submission. No point was taken by Mr Farquhar that those facts ought not be received.

Presumably the Reference was served because on 18 January 1994 the respondent filed an Answer.

James Harry Cook, a senior manager in the Motor Accidents (Compensation) Administration of the TIO, by affidavit sworn 9 February 1994 deposed that he was the designated person appointed under the Act: that as a result of a telephone call on 19 January 1994 he was informed that the applicant to this Reference had died sometime previously; that he had caused an enquiry to be made with the Registrar of births, deaths and marriages and received a certified copy of an entry in the Registry, such entry stating that Palmer Hook, on 9 June 1993, in a house at 32 Merryvale Station in the Northern Territory, died from natural courses, namely pneumonia consolidation with possible septicaemia and alcohol abuse. Mr Cook further deposed that his determination on 9 September 1993 and the determination of the Board on 9 December 1993 were made without knowledge of the prior death

of the applicant. Mr Cook deposed that if the Tribunal were to determine that the Board ought to consider the claim for benefits either by the deceased applicant or by his estate, the TIO would now suffer a greater prejudice than previously determined, because now in the absence of any evidence from the deceased applicant or any documentation adopted by him, the respondent Board had lost the opportunity to examine the applicant regarding facts of the accidents, injuries sustained, treatment and rehabilitation undergone, earning capacity lost, and delays in applying for benefits.

As stated, this matter came on before me on Thursday 10 February 1994. Mr Crane from North Australian Aboriginal Legal Service appeared for the applicant as the town agent for CAALAS and submitted that his Principals were unaware of the existence and contents of the affidavit of Mr Cook, and applied for a 2 month adjournment in order to determine if the estate was the proper vehicle to continue with the application, and in so doing required time to contact at least 7 people who were possible beneficiaries, to receive instructions. The whereabouts of these people were unknown.

This application for adjournment was opposed by the respondent (Mr Farquhar appearing) who submitted that the application for benefits had been signed by CAALAS and when the TIO sought details none were forwarded. Mr Farquhar submitted:

1. there was no person aggrieved by the determination because the applicant had died prior to such determination and that the matter must start again elsewhere;

2. that the Reference to the Tribunal be dismissed as the Tribunal had no jurisdiction to hear it; and

3. objected to the application for the adjournment.

I granted an adjournment of one month with a view to having a directions hearing to either list the matter for hearing or make consent orders. The matter was adjourned until 10 March 1994.

On 9 March 1994 a CAALAS solicitor, Mark Russell, deposed in an affidavit that the deceased applicant, Palmer Hook, was survived by a wife, Lena Hook, and five children: Helen Hook, Sammy Hook, Steven Hook, Margaret Hook and Audrey Hook. He further deposed that a Dr Butcher whom he believed treated the deceased currently lived in Alice Springs; that because Darwin was so far distant from Alice Springs neither Mr Hook's wife nor children would have the money to travel to Darwin to give instructions or to appear in Court as witnesses; and that he required time to contact the surviving children of the deceased who lived at Napperby and Ammaroo as well as time to brief counsel to advise in the matter prior to the matter being listed for hearing. An Amended Reference to the Tribunal was filed on 9 March 1994 seeking to substitute Helen Hook and Sammy Hook as the applicants and being people who were aggrieved by the determinations of the designated person on 9 September 1993 and the Board on 9 December 1993. The amended Reference requested a determination from the tribunal that:

1. the board consider the claim pursuant to Part 7 of the Act; and

2. the estate of the applicant's father, Palmer Hook, deceased, be paid compensation in accordance with the Act.

The matter came on again before me on 10 March 1994 with Mr Brown appearing for the applicant and Mr Farquhar for the respondent. Mr Brown informed me that no instructions had been obtained since the last adjournment and made application for a further adjournment to seek those instructions. The matter was set down then for a preliminary hearing on Tuesday 3 May 1994 at 10am. On Tuesday 3 May the matter eventually commenced at 10.15am following various attempts to contact Mr Brown and NAALAS as the town agent for CAALAS. No appearance was recorded

for the applicant and I invited Mr Farquhar on behalf of the respondent to begin his submissions. Mr Farquhar sought and was granted leave to file written submissions and spoke to the these.

The representative for the applicant arrived at the hearing as Mr. Farquhar was concluding his submissions. I adjourned the matter until 16 May 1994 to hear further submissions, particularly those of the applicant, and also the question of costs thrown away in relation to the somewhat aborted hearing of the 3rd of May 1994. As stated (supra) the matter of the Reference to the Tribunal concluded on 16 May 1994.

Mr Farquhar, in his submissions, referred the Tribunal to two cases on breach of warranty of authority by solicitors.

In Wilson v. General Commissioners for Leek and Inland Revenue Commissioners (1994) 12 ACLC 3,201 solicitors acting for an appellant company instructed on 18 June 1993 were unaware until 6 December 1993 that the company had been struck off for failure to make its annual return on 4 May 1993. Substantive costs had been incurred and an application for costs in relation to the struck off company was made by the Commissioners for Inland Revenue against the solicitors who purported to act when at all material times the company did not exist and the solicitors thus had no client. The solicitors had received instructions from a man who ran the company on behalf of himself and the company, who assured the solicitors that all the appellant companies were on the Register of Companies. Knox J in this case relied upon the decision of Stirling J in Salton v. New Beeston Cycle Co [1900] 1 Ch 43. Stirling J in turn had relied upon Smout v. Ilbery (1842) 10 M and W 1; 152 ER 357 which enunciated the principle that where an agent was properly authorised, but whose authority came to an end due to the death of the principal, the agent was not liable for breach of warranty of authority until the agent knew his principal had died, unless the agent was guilty of lack of due diligence in acquiring that knowledge at an earlier time.

In Smout v. Ilbery the wife of a man who died abroad was held not to be liable for goods supplied to her after his death, but before information of his death had been received. Alderson B, in the course of his judgment delivered on behalf of the Court of Exchequer consisting of himself, Gurney and Rolfe BB said (at ER 361):

> "Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing she did any wrong whatever. There was no mala fides on her part - no want of due diligence in acquiring knowledge of the revocation - no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present ..."

Stirling J in Salton v New Beeston Cycle Co, after referring to the above passage said at p.49:

> "... the principle laid down is one of the general law of agency. A solicitor is an agent of a special kind. By entering an appearance on behalf of his client he represents or warrants to the opposite party that he has authority so to do; if it turns out that he has not he is liable ... it is his initial duty, both as regards his client and third parties ... to obtain from his client a proper retainer."

In Wilson, Knox J held that the solicitors were not liable for the costs in the matter up to the day the trial began but found that thereafter due diligence had not been used to ascertain that in fact the company had been dissolved some considerable time previously, and he awarded costs against the solicitors after the date the trial had begun.

Knox J held that there was a sharp distinction between the principle which applied where a solicitor appeared for a client and had no authority to do so and a solicitor who was properly instructed in the first place and who had a proper retainer which for some reason had come to an end without knowledge or fault in lacking that knowledge.

The second case, McAusland v. Deputy Federal Commissioner of Taxation; Antlers Pty Ltd v. The Official Trustee in Bankruptcy (1994) 12 ACLC 78 is a decision of the Full Federal Court of Australia. In that case the Court at first instance had held that there were no directors of the Company in office who could authorise the institution of the proceedings. The court ordered the proceedings to be dismissed and ordered Mr McAusland, as the solicitor on the record, to pay the other sides' costs. This decision was upheld on appeal. But the Full Federal Court did not examine the circumstances under which a solicitor who acted without authority ought to be held liable to pay the costs of the other side, and is of no assistance.

However the principle from Smout v. Ilbery, ancient but valuable, is applicable in these circumstances. I see no reason to draw any artificial distinction between those cases where authority to commence proceedings had been given but the client died before the proceedings were commenced, and those cases where the client died during the course of the proceedings. The principle must be the same in either case. CAALAS received full authority from Mr Hook to make application on his behalf for a compensation claim. He at no time provided any notification of withdrawal of that authority. He was a tribal aborigine who lived at one stage in the Old Timer's Camp at Alice Springs and later in the Todd River. He spoke, apparently, only rudimentary English.

Having given the initial instructions he no doubt would have expected the legal service to do whatever was necessary to act in his best interests. The legal service had the knowledge and skill in these matters; he was an illiterate tribal man; they would do what was required. There is no evidence to suggest he did not give

CAALAS full authority to pursue his claim, and if necessary, to institute proceedings in this Tribunal. CAALAS did not become aware of his death until February 1994. In those circumstances, CAALAS ought not to be held personally responsible for the TIO's costs unless there was lack of due diligence by them in failing to become aware of Mr Hook's death at an earlier time.

WAS THERE A LACK OF DUE DILIGENCE BY CAALAS?

In this case Mr Hook died on 9 June 1993, some seven months before the Reference to this Tribunal was lodged. Until the claim had been rejected by the Board CAALAS was not required to obtain any further specific instructions from Mr Hook, and then only, it would appear, confirmatory instructions that he wished to continue with his application. As events turned out, CAALAS had little time to locate Mr Hook before the application was instituted, and they became aware of the true situation from the Respondent about a month later. In the circumstances of a tribal aborigine with little education, English or sophistication, it is not unusual for a legal aid agency to experience delays in obtaining information as to such a client's whereabouts. There are many activities which may well have been undertaken by a tribal aboriginal which would have placed him well out of contact with the legal Service. It is notorious that tribal aboriginals rarely stay in the one place for very long, and are notoriously difficult to locate for long periods of time. Clearly information as to his death would only be by word of mouth from someone aware of this, aware also that he had a claim pending with the Service, and prepared to tell the Service that he had died.

Whilst some efforts were apparently made to locate the deceased on 5 January, the information at that stage was that he was thought to be still alive but not in a fit condition to give instructions. The solicitor handling the matter wanted to obtain counsel's opinion before seeking confirmatory instructions. In those circumstances I do not consider that it has been shown that CAALAS' failure to learn of Mr Hook's death was due to a lack of due diligence on its part.

Shortly thereafter CAALAS attempted to obtain instructions from the deceased's next of kin and an application was lodged on 9 March 1994 to substitute Helen and Sammy Hook for the deceased. From then on it is apparent that CAALAS was acting for Helen and Sammy Hook, and any costs incurred after that date could not in any event be awarded against CAALAS for breach of warranty of authority as a result of the deceased's death. Most of the costs incurred by the Respondent in these proceedings were incurred after that date. It was not shown that CAALAS lacked instructions to act on behalf of Helen and Sammy Hook.

Mr Farquhar expressly declined to seek any order for costs against Helen and Sammy Hook, and confined his application to a claim against CAALAS.

In my opinion, for the reasons given above, the Respondent is not entitled to the order it seeks, and the application is dismissed.

For its part, CAALAS seeks an order that it should be paid its costs in defending the application made against it personally. I consider that having been successful in defending this application it is entitled to an order for costs of and incidental to the hearing of 29 June 1994 and I so order. I further order that CAALAS' costs be taxed before the Registrar in accordance with the procedures providing for the taxation of costs by the Supreme Court Rules and according to the scale of costs laid down by those Rules on the standard basis. Otherwise there is to be no order as to costs.

However I draw the attention of the taxing office to the first 11.5 pages of the written submission by the solicitor for CAALAS. In my opinion no costs should be allowed for that part of the submission all of which is irrelevant to this application, and some of which (pps6ff) is little more than a political diatribe.

Finally I should record the fact that no point was taken by either party as to CAALAS' status as "solicitor for the applicant" in the original Reference to the

Tribunal. However, CAALAS itself is not a solicitor, nor is it deemed to be a solicitor for the purposes of the Legal Practitioners Act. The Reference, which is signed "CAALAS" as solicitor for the applicant, ought not to have been accepted by the Registrar. Rule 5 of the Motor Accidents (Compensation) Appeal Rules requires a Reference to the Tribunal to be signed by the party instituting the Reference or his solicitor. The Rules do not authorise a party to be represented by a person who is not a solicitor. The Reference should have been signed by or in the name of CAALAS' principal solicitor (who holds an unrestricted practising certificate) as the solicitor for the party.