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Fellowes, McNeil v. Kansa General International Insurance Co.

Fellowes, McNeil, Plaintiff/Defendant by Counterclaim and Kansa General International Insurance Company Ltd. and Kansa Canadian Management Services Inc., Defendants/Plaintiffs by Counterclaim

Ontario Court of Justice, General Division

E.M. Macdonald J.

Judgment: October 14, 1998[FN*]
Docket: 94-CU-78160CM

Proceedings: additional reasons at ((June 30, 1999)), Doc. 94-CU-78160CM (Ont. S.C.J.)

Counsel: *W.S. Wigle, Q.C.*, and *M.R. Pietrangeli*, for the Plaintiff/Defendant by Counterclaim.

A. Burke Doran, Q.C., C. Elkin and *E. Llana Nakonechny*, for the Defendants/Plaintiffs by Counterclaim.

Subject: Torts

Barristers and solicitors --- Negligence — Miscellaneous issues

Plaintiff solicitor acted for defendant insurance company — Defendant issued policy for excess coverage to lawyer found to be negligent in mortgage transaction — Plaintiff took over matter from another law firm — Defendant counterclaimed, in plaintiff's action for payment of unpaid accounts, for losses alleged to have been caused by professional negligence — Plaintiff fell below standard of care expected of competent, experienced and specialized counsel by failing to canvass with and advise defendant that lawyer probably knew or ought to have known of circumstances giving rise to potential claim against him when he applied for excess coverage — Had plaintiff advised defendant of issue, defendant would have denied coverage and would not have been exposed to payment of judgment — Defendant's counterclaim allowed in part.

Barristers and solicitors --- Negligence — In conduct of action — General

Plaintiff solicitor acted for defendant insurance company in four insurance actions — Defendant counterclaimed, in plaintiff's action for payment of unpaid accounts, for losses alleged to have been caused by professional negligence — In one action, trial judge rejected expert opinion retained by plaintiff — In second action, plaintiff filed notice of intent to defend when statement of claim had not been served — Decision to retain one expert as opposed to another is question of judgment — Plaintiff made appropriate and reasonable inquiries as to expert's qualification — Trial judge's disagreement as to expert's qualification was not ground for claim for plaintiff's

negligence — Obligation to defend does not exist when insurer can deny coverage on basis of clear application of exclusion clause — Defendant had sufficient grounds to deny coverage and no duty to defend existed — Plaintiff's notice to defend was filed without directing his mind to coverage matters — Defendant could have successfully denied coverage in both actions — Defendant incurred, in first action, damages plus legal costs of $765,000, and in second action, $4,850,000 — Damages incurred had been discounted by 10 per cent to reflect possibility that defendant might not have been successful in denial of coverage — Defendant entitled to damage award of $5,600,000.

Cases considered by *E.M. Macdonald J.*:

Aikmac Holdings Ltd. v. Loewen (1993), 86 Man. R. (2d) 56 (Man. Q.B.) — referred to

Anastasakos v. Allen (1996), 16 O.T.C. 413 (Ont. Gen. Div.) — referred to

Bartolovic v. Bennett (March 26, 1996), Doc. 95-CU-86639 (Ont. Gen. Div.) — referred to

Blackburn v. Lapkin (1996), 134 D.L.R. (4th) 747, 28 O.R. (3d) 292 (Ont. Gen. Div.) — referred to

Boudreau v. Benaiah (1998), 154 D.L.R. (4th) 650, 37 O.R. (3d) 686 (Ont. Gen. Div.) — referred to

Bow Valley Resource Services Ltd. v. Kansa General Insurance Co. (1991), 49 C.C.L.I. 230 (B.C. S.C.) — considered

Central & Eastern Trust Co. v. Rafuse, 37 C.C.L.T. 117, *(*sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, *(*sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, *(*sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, *(*sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109, *(*sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 42 R.P.R. 161, 34 B.L.R. 187, *(*sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only) (S.C.C.) — referred to

Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins (1992), 29 R.P.R. (2d) 271 (Ont. Gen. Div. [Commercial List]) — referred to

Demarco v. Ungaro (1979), 21 O.R. (2d) 673, 8 C.C.L.T. 207, 95 D.L.R. (3d) 385, 27 Chitty's L.J. 23 (Ont. H.C.) — referred to

Duncan Estate v. Baddeley (1997), 145 D.L.R. (4th) 708, 196 A.R. 161, 141 W.A.C. 161, 50 Alta. L.R. (3d) 202, 36 C.C.L.T. (2d) 156, 18 E.T.R. (2d) 79 (Alta. C.A.) — considered

Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills (1985), 47 C.P.C. 256, 31 C.C.L.T. 201 (Ont. H.C.) — referred to

Fasken Campbell Godfrey v. Seven-up Canada Inc. (1997), 142 D.L.R. (4th) 456 (Ont. Gen. Div.) — referred to

Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd. (1995), 37 C.P.C. (3d) 119, 95 F.T.R. 43 (Fed. T.D.) — referred to

Karpenko v. Paroian, Courey, Cohen & Houston (1980), 30 O.R. (2d) 776, 117 D.L.R. (3d) 383 (Ont. H.C.) — referred to

Major v. Buchanan (1975), 9 O.R. (2d) 491, 61 D.L.R. (3d) 46 (Ont. H.C.) — referred to

Marbel Developments Ltd. v. Pirani (1994), 18 C.C.L.T. (2d) 229 (B.C. S.C.) — referred to

Martin v. Goldfarb (1998), 112 O.A.C. 138 (Ont. C.A.) — considered

Nichols v. American Home Assurance Co., [1990] I.L.R. 1-2583, 45 C.C.L.I. 153, 39 O.A.C. 63, 107 N.R. 321, 68 D.L.R. (4th) 321, [1990] 1 S.C.R. 801, 72 O.R. (2d) 799 (note), [1990] R.R.A. 516 (S.C.C.) — considered

R. v. Kansa General Insurance Co., 13 C.E.L.R. (N.S.) 59, *(*sub nom. *Ontario v. Kansa General Insurance Co.)* [1994] I.L.R. 1-3031, 21 C.C.L.I. (2d) 262, *(*sub nom. *Ontario v. Kansa General Insurance Co.)* 17 O.R. (3d) 38, *(*sub nom. *Ontario v. Kansa General Insurance Co.)* 69 O.A.C. 208, *(*sub nom. *Ontario v. Kansa General Insurance Co.)* 111 D.L.R. (4th) 757 (Ont. C.A.) — considered

Yamada v. Mock (1996), 2 R.P.R. (3d) 162, 136 D.L.R. (4th) 124, 29 O.R. (3d) 731, 5 O.T.C. 391 (Ont. Gen. Div.) — referred to

120 Adelaide Leaseholds Inc. v. Thomson, Rogers (1995), 43 R.P.R. (2d) 79 (Ont. Gen. Div.) — referred to

Statutes considered:

Condominium Act, R.S.O. 1990, c. C.26

Generally — referred to

s. 7(9) — referred to

s. 7(10) — referred to

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 13 — considered

COUNTERCLAIM for loss arising from solicitor's negligence in solicitor's action for payment of unpaid accounts.

***E.M. Macdonald J.*:**

Introduction

1 In this action Fellowes, McNeil a Toronto law firm specializing in insurance law, acted for the Kansa General International Insurance Company Ltd. and Kansa Canadian Management Services Inc. ("Kansa") from 1979 to November, 1993. At that time, Kansa terminated its retainer and began a long process of arranging for

the transfer of its files to other Toronto law firms.

2 A dispute erupted between the parties to this action over the payment of outstanding legal fees and disbursements said to be owed by Kansa to Fellowes, McNeil. This dispute resulted in the commencement of this action which sought the payment of 62 unpaid accounts. In its statement of defence, Kansa raised a number of defences and counterclaimed for very substantial losses alleged to have been caused by professional negligence on the part of Fellowes, McNeil.

3 I released reasons for judgment on the claims raised in the statement of claim on November 6, 1997. I invited counsel to make submissions about costs or any other matter arising from my reasons. I then heard submissions on costs which were disposed of in supplementary reasons for judgment released on December 19, 1997, now reported at (1997), 37 O.R. (3d) 464 (Ont. Gen. Div.) . The allegations raised in the counterclaim are the subject matter of these reasons. These allegations arise in four actions in which Fellowes, McNeil were retained by Kansa. All four actions have now been disposed of. I now set out relevant background to the counterclaim.

4 By order dated November 23, 1994, Madam Justice Gotlib directed that the claim and the counterclaim be moved to the standard track in the Case Management System. The matter then came before Mr. Justice Wilkins who acted as case management/pretrial judge. He met with counsel on numerous occasions to streamline the preparation for trial including the production of relevant documents, identifying issues, exchanging admissions and otherwise managing the pretrial processes with a view to shortening the trial and reducing costs. One result of this process is that the claim for the unpaid accounts was tried before the trial of the matters raised in the counterclaim. I released my reasons on the claim before I began to hear the evidence related to the counterclaim.

5 The counterclaim causes the court to revisit four matters which have been before the courts. Within the context of this trial, they have become known as the *Cabaret ats. Downey; Fruitman ats Niagara; Little ats Confederation Life* and *Uniroyal ats Sundor*. Mr. Justice Wilkins directed that each of these matters be tried as four separate "mini-trials" in the following order:

(a) *Cabaret ats Downey ("Cabaret")*

(b) *Fruitman ats Niagara ("Fruitman")*

(c) *Little ats Confederation Life ("Little")*

(d) *Uniroyal ats Sundor ("Uniroyal")*

6 In each of these matters Kansa issued policies of insurance to the defendants. The issues raised in each of the underlying statement of claims exposed Kansa to the potential for payment of large losses. The portion of the counterclaim related to *Fruitman* was settled during this trial. The parties agreed to its dismissal. Costs remain to be dealt with. In the three remaining matters, Kansa has paid in excess of $10,000,000 pursuant to judgments and legal costs. Kansa now seeks to recover these amounts, alleging that but for the professional negligence of Fellowes, McNeil, it would not have been exposed to payment of the losses which give rise to the claims against its insureds.

7 The trial in this matter was what is now referred to as a long trial. It began in October, 1997 and, with frequent and unavoidable interruptions, ended on June 26, 1998. Even with the interruptions to accommodate scheduling of the court, counsel and witnesses, the trial was lengthy. At the conclusion of this trial, I expressed

my gratitude to counsel and to those who worked with them from behind the scenes for their assistance in organizing and identifying relevant documents. At the conclusion of each of the three mini trials, I asked counsel to provide for me a brief of key documents, it being my experience that in almost all cases (even where there are thousands of documents) there are relatively few documents which are relevant.

8 The task of the court was compounded by conflicting expert opinion on the question on whether or not Fellowes, McNeil fell below the standard of reasonably competent solicitors in the discharge of its retainer with Kansa. In this case, very experienced counsel who have advised insurers and their insureds over many years took sharply opposing views on this question. Conflicting expert opinion is but one part of all the evidence that I have a duty to consider in deciding whether, on the balance of probabilities, Kansa has discharged its onus of proving that Fellowes, McNeil fell below the standard and that this caused the losses alleged by Kansa.

9 At this point I raise one other matter. The trial proceeded with each of the "mini trials" being dealt with separately. I have not permitted my findings of fact and conclusions of law in one matter to influence the outcome in another. For example, my decision that Mr. McNeil did not fall below the standard in the *Cabaret* matter (contained in preliminary reasons released on December 8, 1997) does not influence the results in the *Little* or *Uniroyal* matters.

10 While Kansa is knowledgeable and experienced it is not a sophisticated client. Its employees, charged with the responsibility of administering the claims department, relied on Fellowes, McNeil for advice on a wide range of issues as they arose over the course of the retainer. Senior management within the claims department sometimes took naive positions which were to the ultimate detriment of Kansa. This is apparent not only from the evidence of claims personnel at this trial, but also from correspondence exchanged between Kansa and Fellowes, McNeil and from internal memoranda of Kansa exhibited at trial. An example is Kansa's adamant refusal to consider conceding liability in the *Little* matter. It was part of Kansa's approach to "push the envelope" so to speak, particularly when settlement positions were being considered. One expert described Kansa as "capable of being stubborn". I mention this because it would have been well known to Fellowes, McNeil who acted for Kansa for a period in excess of 15 years. Its presence created a tone and ambiance in the working relationship among Kansa, its insureds, opposing counsel, and Fellowes, McNeil.

11 The results in each of the three underlying actions were not good for Kansa. The court, in disposing of these claims, recognizes that poor results tend to put a law firm such as Fellowes, McNeil to an exceptional scrutiny by an unhappy client which would not occur if the client had been successful, or at the very least, had better results, Caution is to be exercised so that the law firm does not become the "scapegoat" for the consequences of decisions about the management of its claims made by Kansa, as opposed to their solicitors.

12 Finally, by way of introduction, I observe that there can be few experiences more distasteful for a solicitor than the experience of defending a claim which alleges professional negligence. This is particularly so in this case because Fellowes, McNeil has expertise in insurance law. Mr. John McNeil, who had carriage of these matters, has had to endure the process of facing his professional peers with expertise similar to his, criticizing and scrutinizing his decisions and strategies in defence of Kansa. The "hindsight" inherent in this process cannot be overlooked to the detriment of Mr. McNeil and to the benefit of Kansa.

General Factual Background to the Claims

13 The focus of Kansa's claims relates to issues of coverage and in *Little*, the added issue of failure to call expert evidence at trial. Both Mr. Fellowes and Mr. McNeil have written papers and given lectures on both de-

fence and coverage aspects of insurance law. Mr. McNeil has written and presented on the environmental aspects of comprehensive general liability policies. This aspect of Mr. McNeil's expertise will become relevant in the court's assessment of his retainer in the *Uniroyal* matter. Fellowes, McNeil were retained to defend Kansa's insureds and on some specific occasions, to act as coverage counsel. Fellowes, McNeil admitted to bringing coverage issues to Kansa's attention without being instructed to do so in cases where Kansa was not already aware of coverage issues.

14 I now turn to particulars of Kansa's claims. Kansa seeks damages, pre and post judgment interest and costs. In the *Cabaret* matter, it is said that Mr. McNeil acted contrary to and without instructions which resulted in substantial losses. Kansa's representative, Claude Fauré, with whom Mr. McNeil dealt, complains that he Was not receiving responses regarding the direction of the file. More generally, it is alleged that Kansa's concerns were not being addressed by Mr. McNeil. Paragraphs 33, 34, 34A and 34B of the counterclaim set out the bases for Kansa's claim in the *Cabaret* matter. I reproduce them as follows:

> 33. The Plaintiff failed to advance the defence of courting the risk despite being instructed by Kansa to do so. If such defence had been advanced, it would likely have resulted in a successful defence to the action or favourable early settlement.
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> 34. As the trial approached, Claude Fauré repeatedly attempted until the eve of trial (Sunday) to reconfirm by fax certain instructions which had been given to the Plaintiff. On the day the trial was to commence, the Plaintiff advised Kansa by telephone that he had already agreed to certain facts with the opposing solicitor and could not backtrack in accord with what Kansa was asking of him. The Plaintiff removed itself as solicitor of record but $34,000 in costs had to be paid by Kansa.
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> 34A. The Plaintiff failed to act with all reasonable diligence in its role as coverage counsel throughout the action. In particular, it provided erroneous and confusing opinions with respect to the extent of the risk exposure to Kansa and to other counsel in the action. In addition, it failed to properly investigate the coverage issue prior to providing its opinion to Kansa thereby jeopardizing settlement negotiations prior to trial and unnecessarily prolonging the litigation.
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> 34B. The Plaintiff did not fully consider the ramifications of failing to recommend an appeal of the judgment of the Honourable Mr. Justice Gibson as it related to the finding of liability on behalf of the individual insureds in the action thereby limiting the chances of successfully defending the action.

15 In the *Uniroyal* matter the claim is footed on the failure of Mr. McNeil to deny coverage based on a policy exclusion which would have resulted in a finding of no liability on the part of Kansa. Paragraphs 36, 37, 38 and 39 of the counterclaim are reproduced below:

> 36. In respect of a file entitled *Uniroyal Chemical* the Plaintiff failed to deny coverage in the action based on a policy exclusion when to do so would have resulted in a finding of no liability on the part of Kansa. Instead, the Plaintiff prepared a Notice of Intent to Defend the action when served with the material without reserving the right to deny coverage despite the fact that there were five other possible insurers from whom coverage could be claimed.
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> 37. The Plaintiff failed to review policies forwarded to it when to do so would have made the Plaintiff aware of the clear pollution exclusion. The Plaintiff overlooked the exclusion for a number of years.

38. During the litigation the Plaintiff applied for intervenor status on behalf of the Defendant and in so doing prepared an affidavit which was sworn by a representative of the Defendant stating that the Defendant may be responsible to indemnify the insured some day. The statement was taken as an admission on the part of the Defendant and a motion was brought by the insured in that action requiring the Defendant to pay for the insured's defense. The defense costs were estimated to be $1,000,000.00. The order that the Defendant is to pay for the defense is being appealed. Even the appeal material, also prepared by the Plaintiff, did not recognize the pollution exclusion.

39. The Plaintiff was negligent in failing to recognize the exclusion in failing to properly consider and advise with respect to Kansa's duty to defend and in failing to deny coverage which resulted in the Defendant being held liable for the costs of defending the litigation and for all costs of the appeal which would have been avoided but for the Plaintiff's negligence.

16 In the *Little* matter the counterclaim pleads as follows:

40. In respect of a file entitled *Little v. Confederation Life*, the Plaintiff did not properly retain the appropriate expert for trial. The expert put forward by the Plaintiff on behalf of the Defendant was not an expert in MURB financing which would have been required under the circumstances of the case. This expert's testimony was a significant part of the defense of this case. As a result of the lack of his qualifications, the expert testimony put forward by the Plaintiff was rejected and a severe judgment resulted against Kansa's insured. The Plaintiff failed to follow Kansa's instructions to adjourn the trial to permit Kansa to retain an expert in MURB syndication.

40A. In this same matter, the Plaintiff failed to adequately and properly consider, investigate and advise Kansa with respect to the issue of whether coverage should be given to Mr. Little and Shepherd, McKenzie, Plaxton, Little & Jenkins (the "Firm").

40B. In 1983 and 1984, Little and the Firm knew or ought to have known of the dispute between Mr. Khoury and Confederation Life and of the potential claim against them. Neither Little nor the Firm disclosed this potential claim to their insurers until Spring, 1985.

40C. Kansa assumed the risk under policy no. 3001755, effective January 20, 1984 and renewed effective January 1, 1985. At all material times, the Plaintiff knew or ought to have known that Mr. Little and the Firm had known of or ought to have known of a potential claim against them in 1983 and 1984.

40D. The Plaintiff failed in its duty to Kansa by failing to retain or consult lawyers involved with MURB and real estate litigation and accountants and financial advisors familiar with and having expertise in MURB syndication in the *Confederation Life v. Little* action.

Background and Disposition of the *Cabaret* Matter

17 As a result of inappropriate behaviour toward a server, Mr. Downey was forcibly evicted from the Cabaret Tavern by bouncers who then re-exited the tavern and inflicted a brutal beating on Mr. Downey. Mr. Downey's injuries were severe. Mr, Downey and members of his family brought an action against the tavern and its owners Mr. Sit and Mr. Rajan. The action was based on vicarious liability for the assault and on the basis that the owners had failed to train and supervise its employees. Two of the three bouncers were charged criminally for the assault. The charges led to conviction and incarceration.

18 In November, 1984, Kansa's adjuster, Ponton Coleshill, prepared their first report in the claim. This report was provided to Fellowes, McNeil when it was retained on the issue of coverage. The report advised Kansa that the tavern had in place a $1,000,000 comprehensive general liability policy and an excess policy of $2,000,000. The report also advised Kansa of an eviction endorsement contained in one of the policies which also contained an intentional act exclusion.

19 The tort action was defended by Mr. William McMurtry on behalf of Kansa.

20 The Cabaret Tavern had a reputation of unruly patrons and violent ejections. It was a "strip joint". Cabaret's broker sought coverage from an agent for Kansa in Ontario who, in turn, went to Kansa's underwriters to obtain coverage. It was part of Kansa's business to extend coverage to insureds who were having a difficult time securing coverage elsewhere. The existence of agents and sub-agents led to confusion about the extent and nature of coverage.

21 While there was an inherent sloppiness and lack of attention to detail in Mr. McNeil's conduct of the coverage action, he did not fall below the standard of a reasonably competent solicitor. Because of mistakes made by Kansa, Mr. McNeil was provided with incorrect information with respect to the extent of coverage. Early in his defence of the tort action, Mr. McMurtry sought confirmation from Mr. McNeil as to the extent of coverage. His letter inquiring about coverage is dated June 4, 1986. It was answered by Mr. McNeil on September 25, 1986 and on October 14, 1986, at which times he confirmed the existence of a $1,000,000 primary policy and $2,000,000 of excess coverage.

22 On October 30, 1986, an internal memorandum from Kansa to Mr. McNeil advised Mr. McNeil that the excess policy had been cancelled. Some eight months later in July, 1987, Mr. McNeil acknowledged having received the advice about the cancelled excess policy and stated that he had so advised Mr. McMurtry. This advice was purportedly contained in a letter dated July 15, 1987 from Mr. McNeil to Mr. McMurtry. Oddly, this letter was never received by Mr. McMurtry with the result that Mr. McMurtry proceeded to defend the claim on the basis that the combined limits of existing policies was $3,000,000.

23 On October 28, 1988, Mr. Downey, through his counsel, proposed to settle the tort action for the $3,000,000 policy limits together with $200,000 in costs. It was Mr. Downey's counsel's understanding that the coverage limits were $3,000,000. Mr. McMurtry was always of the view that there was $3,000,000 of coverage.

24 There were several findings at the trial in the tort action which influenced the pleadings in the defence of the coverage action. At the trial in the tort action, Sit and Rajan, the owners of the tavern, testified that prior to hiring their bouncers references were not checked and no investigations were made into their criminal backgrounds. Mr. McNeil was aware of the history of employees of the tavern being charged with assaulting patrons. In the tort action, Mr. Justice Gibson found that the tavern owners were negligent in their personal capacities as a result of the failure to train and instruct their staff. He also found that the activities of the bouncers as they related to Mr. Downey's beating, were in the "course and scope of their employment". Mr. Justice Gibson also made a finding that the individual tavern owners, Sit and Rajan, were vicariously liable for the acts of their bouncers.

25 Mr. Justice Gibson awarded damages in the tort action in the amount of $2,023,310.86, plus pre and post judgment interest. He also awarded damages under the *Family Law Act* in the amount of $145,051.62, plus pre and post judgment interest.

26 Following the release of Mr. Justice Gibson's reasons, Mr. McMurtry issued a notice of appeal on behalf of the owners of the tavern and the numbered company owned by them. This appeal did not proceed.

27 In February, 1991, Mr. McNeil provided Kansa with a preliminary opinion on coverage based upon its review of the judgment in the tort action. It was Mr. McNeil's opinion that Mr. Justice Gibson found that Downey's claims arose from forcible eviction. This opinion led to Mr. McNeil's conclusion that the eviction exclusion contained in the insurance policies would be triggered thereby forming the basis for a denial of coverage. Mr. McNeil was optimistic that liability for Kansa in respect of the judgment in the tort action could be successfully contested, and on May 21, 1991, Mr. McNeil advised Mr. Downey's solicitors that coverage was being denied.

28 In early 1992, Mr. Downey commenced an action against Kansa and the various brokers and underwriters involved, for a declaration that the limits of coverage were $3,000,000 and not $1,000,000 as alleged by Mr. McNeil. This action also alleged bad faith on the part of Kansa. At the same time, Sit and Rajan commenced an action against Kansa for indemnity under Kansa's policy. These actions, referred to as the coverage actions, were case managed by Mr. Justice Lissaman. In March, 1992, Kansa forwarded to Mr. McNeil the statements of claim in the coverage actions. Mr. McNeil filed a statement of defence.

29 This brings me to comment on the allegations that Mr. McNeil fell below the standard of a reasonably competent solicitor in the preparation of the statement of defence, and his carriage of the matter thereafter as it related to the defences of non disclosure and courting the risk. I have concluded that Mr. McNeil did not fall below the standard of a reasonably competent solicitor on this aspect of the matter.

30 Mr. McNeil assessed the non disclosure defence and reported on his assessment in detail to Kansa. His written reports in respect of this matter were not commented on by Kansa which led him to believe, given that he had a free reign in the management of the litigation, that he could withdraw the defence of non disclosure in a trial preparation meeting with opposing counsel on November 10, 1993.

31 Mr. McNeil informed opposing counsel that the non disclosure argument would not be raised at trial. He reported this to Kansa. In response, Mr. Fauré, Kansa's claims manager on this matter, aggressively insisted that the defences of non disclosure and courting the risk be pursued at trial. Mr. McNeil then approached opposing counsel advising that his clients wanted to pursue non disclosure. They would not permit Mr. McNeil to resile from the agreement made by him at the November 10th meeting. This caused Mr. McNeil to decide that he must withdraw as counsel for Kansa on this matter.

32 This turn of events was seen by opposing counsel as one further attempt on the part of Kansa to delay the trial. It added to the perception that Kansa was acting in bad faith. By then the Downey family had been in litigation for approximately ten years with no compensation.

33 On November 16, 1993, at a scheduled meeting amongst all counsel and Mr. Justice Lissaman, Mr. McNeil advised Mr. Justice Lissaman that he had withdrawn as counsel and that he had put his E & O insurer on notice of a potential claim. At this meeting Fellowes, McNeil were removed as solicitors of record in the coverage actions. Mr. Justice Lissaman ordered that Kansa pay costs thrown away, which he fixed at $32,000. Immediately upon Mr. McNeil's withdrawal as counsel Kansa appointed Cassels, Brock and Blackwell to act on its behalf at the trial in the coverage actions which was adjourned by Mr. Justice Lissaman from November, 1993 to February, 1994.

34 Mr. Peter Trebuss of Cassels, Brock and Blackwell took over the matter and began vigorous and urgent trial preparation, including directing others within his firm to assess, by way of detailed research, the viability of the courting of the risk defence. By this time, the mysteries about the extent of coverage were resolved, and it was known that coverage existed for $3,000,000. At the commencement of trial, Mr. Trebuss successfully settled the matter. Kansa contributed $2,000,000 towards the settlement of the tort judgment.

35 I find that it was reasonable for Mr. McNeil to withdraw the defence of non disclosure at the meeting in early November with opposing counsel. He did so after assessing the defence in light of all of the evidence accumulated prior to the trial. He reported his conclusions in respect of this matter to Mr. Fauré. Mr. Fauré's non response to the reports entitled Mr. McNeil to conclude that Mr. Fauré did not disagree with Mr. McNeil's assessment of the non disclosure defence.

36 The defence of courting the risk had not been received with approval in Canada. Mr. McNeil is criticized for not making specific reference to this defence in the statement of defence drafted by him. This criticism has no merit. It does not give rise to a basis for an allegation that Mr. McNeil fell below the standard of a reasonably competent solicitor. Mr. Trebuss' application to amend the statement of defence to explicitly plead courting the risk was rejected by Mr. Justice Lissaman who concluded that the pleading of courting the risk was implicit in the pleading as it stood. Leave to appeal Mr. Justice Lissaman's decision was refused by Mr. Justice Coo, by order dated December 21, 1993. On January 21, 1994, an appeal from the order of Mr. Justice Coo to the Court of Appeal was denied by Justices Osborne, Brooke and Finlayson. Mr. Trebuss ultimately decided that both defences were precarious. His assessment of these defences influenced his negotiations which led to the settlement of the coverage action in February, 1994.

37 For these reasons I have concluded that in the Cabaret matter Mr. McNeil did fall below the standard, with the result that this aspect of the counterclaim cannot succeed. Costs of this matter would, in the normal course, follow the event. I may be spoken to about the scale of costs, whether they are to be fixed or assessed.

Background and Disposition of Little ats Confederation Life

38 There are two bases for the claims of negligence in the conduct of this matter by Fellowes, McNeil. First, it is alleged that Mr. McNeil fell below the standard of a reasonably competent solicitor and that he failed to advise Kansa of potential coverage issues. Second, it is alleged that Mr. McNeil failed to call appropriate expert evidence at the trial of this matter before Mr. Justice Montgomery in November, 1992. In the analysis of these questions caution must be exercised to focus on Mr. McNeil's handling of potential coverage issues. As a result the court must carefully scrutinize the events of the mortgage transaction and following. The relevant time frame is 1982 through to the fall of 1990. The court must ask if having regard to those events, and the issues which underlie them, Mr. McNeil should have advised Kansa to deny coverage. I now provide a summary of the facts that gave rise to the Confederation Life Insurance Company ("Confederation Life") claim against Mr. Little and Shepherd McKenzie, Plaxton, Little & Jenkins (the "firm").

39 Mr. Little was a partner in the firm in London, Ontario. He was a specialist in real estate law, having been called to the Bar in 1960.

40 In January, 1984, Kansa issued a policy for excess coverage to the law firm, the underlying policy being a Lawyer's Professional Indemnity Policy issued by American Home. The policy issued by Kansa was written on a claims made basis.

41 On the issue of coverage there are 3 questions before the court in this trial. They are:

1. Should Mr. McNeil have considered the issue of coverage and advised Kansa that there were potential coverage issues?

2. If Mr. McNeil had alerted Kansa of coverage issues, would a denial of coverage to Mr. Little have been appropriate?

3. If Kansa had denied coverage what would have been the probable result?

42 Before dealing with these questions, I provide a history of the events that gave rise to the claim being made against Mr. Little alleging his professional negligence in the course of his retainer with Confederation Life in a mortgage transaction. On August 10, 1982, Confederation Life retained the firm to act on its behalf on a mortgage transaction wherein Confederation Life was loaning $7,167,294.11 to 511666 Ontario Limited, a numbered company solely owned by Mr. Charles Khoury. On August 10, 1982, Confederation Life sent to Mr. Little a standard form "instructions to solicitors" together with a copy of a mortgage commitment letter addressed to Mr. Khoury.

43 The property over which the mortgage was to be placed was an apartment complex comprised of 2 fifteen-storey buildings each containing 178 units and located on Jalna Boulevard, London, Ontario. The terms of the mortgage commitment may be generally described as being for the loan amount above indicated at an interest rate of 18.25% with a maturity date on January 1, 2003 (i.e. 20 years). *There was to be no prepayment privilege*. This was a very important term and its existence is at the root of the underlying litigation in Little.

44 On August 23, 1992, Mr. Khoury returned the commitment letter to Confederation Life with two additional addenda, one of which contained a provision providing for Confederation Life's consent to the registration of the property as a condominium. Confederation Life accepted and executed the commitment letter as amended by Mr. Khoury. Mr. Little then prepared a draft mortgage in accordance with the terms of the letter of commitment. The mortgage drafted by Mr. Little included clause 28A which reads as follows:

> ... PROVIDED FURTHER that during the full term of this mortgage the lands and premises mortgaged hereby shall be operated as a single rental apartment project and in the event of the sale or transfer of any one or more individual condominium units to a purchaser or purchasers who occupy any such unit or manages the same as a rental unit or units separate and apart from the remainder of the units in the said condominium that all monies hereby secured with accrued interest thereon shall forthwith become due and payable.

The mortgage transaction was completed on September 22, 1982, and the mortgage was registered by Mr. Little's firm on title to the property. The full amount of the loan was advanced to Mr. Khoury by December 15, 1982. In early 1983 interest rates were rapidly declining and Mr. Khoury, a sophisticated businessman, set about converting the property into a condominium. Mr. Khoury retained Mr. Little to register the property as a condominium and Mr. Little, while acting for Mr. Khoury, forwarded to Confederation Life a draft declaration of condominium in respect of the property and advised that it was Mr. Khoury's intention to have a condominium corporation created on or before July 31, 1983. Confederation Life wished to avoid the effect of ss.7(9) and 7(10) of the *Condominium Act*, R.S.O. 1990, c.C.26, ("the *Condominium Act*"):

Discharge

(9) Any unit and common interest may be discharged from such an encumbrance by payment to the claimant of a portion of the sum claimed, determined by the proportions specified in the declaration for sharing the common interests.

Idem

(10) Upon payment of a portion of the encumbrance sufficient to discharge a unit and common interest, and upon demand, the claimant shall give to the owner a discharge of that unit and common interest in accordance with the regulations.

45 Mr. Khoury refused to agree to insert these conditions into the Declaration.

46 On August 1, 1983, Mr. Khoury stopped payment on the mortgage payment due on that date. The term of the mortgage was from November 1, 1982, to October 1, 2002. The monthly payments due to Confederation Life were $105,309.

47 On October 12, 1983, 511666 commenced an action against Confederation Life seeking a declaration that it was entitled to the consent of Confederation Life to a declaration made pursuant to the provisions of the *Condominium Act*. In this action, 511666 also sought a mandatory injunction requiring Confederation Life to execute a consent to the declaration for a declaration of the property as a condominium without the restrictions which Confederation Life were attempting to impose.

48 On March 15, 1984, Confederation Life commenced an action against Mr. Khoury and 511666 Ontario Limited for arrears of payments under the mortgage. Confederation Life retained Toronto counsel for these purposes. On March 28, 1985, Confederation Life and Mr. Khoury agreed to settle all outstanding claims and the mortgage was discharged upon Mr. Khoury's payment of arrears of principal and compound interest up to and including April 12, 1985. The total amount of this payment was $7,000,199.82.

49 This amount was invested by Confederation Life at 13% per annum compounded semi-annually from April 12, 1985, to the end of the term of the mortgage.

50 A statement of claim alleging solicitor's negligence against Mr. Little and the firm was issued in the Supreme Court of Ontario on December 3, 1985, and later was amended to allege damages for breach of fiduciary duty arising from the fact that Mr. Little acted for both Confederation Life and Mr. Khoury.

Insurance Coverage Available to Shepherd, McKenzie

51 From 1982 to 1985, Mr. Little and the firm had primary liability insurance with American Home Assurance Company ("American Home"). This policy had limits of $500,000 of liability per occurrence. This policy required American Home to defend professional liability claims brought against Little and the firm during the years 1982 to 1985. From 1982 to January 1, 1984, Mr. Little and the firm had excess liability insurance with Guardian Insurance Company of Canada ("Guardian") which had liability limits of $8,250,000.

52 On December 30, 1983, the firm, in the usual course, completed an application for excess insurance which was forwarded to Kansa. Kansa issued the firm $9,500,000 of excess coverage effective January 20, 1984, to December 31, 1984. When Kansa placed the firm's initial excess coverage with the firm it excluded a $9,000 claim from coverage. This claim was disclosed by the firm in the application for the insurance. By letter dated February 11, 1985, Mr. Little reported the Confederation Life claim to Kansa's adjuster, F.C. Maltman & Co.

Ltd. He did so after having received a telephone call from Confederation Life on January 31, 1985, advising him that Confederation Life would be advancing a claim against him based on allegations of his negligence.

53 Borden & Elliot was retained by American Home. It conducted a detailed investigation of the claim and reported to the Law Society. Its report included reference to its investigations on the date Mr. Little first became aware of a potential claim. Mr. Little took the position, in defence of the claim, that his retainer was a limited and specific one. He was asked to draft the mortgage. He did so on the assumption that the lawyers within Confederation Life were aware of the provisions of the *Condominium Act* and how they could impact on the terms of the mortgage.

54 F.C. Maltman & Co. reviewed the question of when the claim was first made. Mr. McNeil did not conduct any such review of the matter. In fairness to Mr. McNeil, I should note that the matter was not formally transferred to him until February 23, 1987. At that time Kansa's claims examiner, Mr. Charles Charron, asked F.C. Maltman & Co. ("Maltman") to forward the files to Fellowes, McNeil. This request is contained in a cryptic memorandum dated February 23, 1987 which reads as follows:

> In view of primary insurer's position furnish T.E.G. Fellowes with copy of your file — they can act on our behalf under the insuring agreement 4A.

55 Three days later, Maltman forwarded its file summary, including the statement of claim and copies of documents listed in the file summary to Mr. McNeil.

56 Before dealing with the history of the matter as it relates to the coverage issue, I make the trite observations that coverage is of critical importance in the defence of insurers and insureds. This is especially so under a claims made policy. The utmost of good faith underlies every insurance contract with the result that misrepresentation and/or non disclosure are key questions in the representation of insureds and their insurers. I would add that this is one of the few points, on which the experts on coverage issues, agreed.

57 When Mr. McNeil received the file from Maltman, the file contained a letter of opinion written by Mr. Little to Confederation Life and dated June 17, 1983. He was responding to Confederation Life's request for an opinion on the impact of the provisions of the *Condominium Act* upon its existing mortgage with 511666 and Mr. Khoury. In his response to Confederation Life's request Mr. Little did not answer the questions asked of him. Mr. McNeil read this letter. The absence of a response to this important question should have triggered questions of coverage in the mind of Mr. McNeil because by June, 1983 the legal problems presented by the wording of relevant covenants in the mortgage were apparent to Mr. Little. The "penny was dropping" on coverage issues. It would have been reasonable for Mr. McNeil to conclude that Mr. Little, as an experienced real estate lawyer, should have concluded by that time that his omission in respect of the provisions of the *Condominium Act* in the mortgage could probably expose him to an error and omissions claim.

58 Mr. McNeil did not become solicitor of record in the defence of the Little action until April 1, 1991, at which time he served a notice of change of solicitors from Borden & Elliot to Fellowes, McNeil. Mr. McNeil was not requested by Kansa to address issues of coverage. This point was emphasized in the defence of this action. I have concluded that the fact that he was not requested to address coverage, does not absolve him from the obligation to do so. I note in the context of this issue that in the history of representing Kansa, Fellowes, McNeil volunteered coverage advice when not so instructed, including situations in which Fellowes, McNeil was retained by Kansa to defend an insured. Mr. McNeil was very familiar with the appropriate procedures where the positions of an insured and the insurer were conflicted. Mr. McNeil admits that he neither addressed nor can-

vassed coverage issues after assuming the defence of the Confederation Life action in April, 1991. I accept as correct that until Mr. McNeil took over the defence from Borden & Elliot in April, 1991, he had an "unfettered duty" to protect Kansa's interests including drawing any circumstances to the attention of Kansa which would indicate that Kansa's policy would not respond to the claim in question.

59 In assessing the question of when Mr. McNeil should have become aware of the potential coverage issue, I have considered information relevant to coverage from 1985 to 1991. The January 28, 1987 report from Mr. Doner suggests that there is no coverage issue. The relevant contents of this letter are as follows:

> We have neither seen or heard anything that suggests Little) knew or should have known of the claim before 1985. On first notice of claim to him he immediately advised the primary and shortly thereafter gave notice to you [Kansa].

Mr. Doner further reported to Kansa by letter dated March 16, 1985, at which time he enclosed a reporting letter dated May 7, 1985 from Mr. Ross Murray of Borden & Elliot which was directed to the Law Society. Mr. Murray commented:

> We have met with the insured (James H. Little on two occasions. We have also examined the contents of his files and thus are in a position to report to you as follows:
>
> **Date the Insured First Became Aware of Potential Claim**
>
> The insured first became aware of a potential claim against him on January 31(st), 1985 when he received a telephone call from corporate counsel for Confederation Life Insurance Company asking why they had not been advised of the possibility that their consenting to the creation of a condominium might entitle the mortgagor to prepay an otherwise closed mortgage. ...
>
> **Date the Insured Reported the Claim**
>
> The Insured reported the matter to the Law Society on February 5th, 1985. Late reporting does not appear to be an issue. ...

60 Mr. Wigle urged me to conclude that the combination of Mr. Doner's investigations and Mr. Murray's opinion put closure on coverage issues with the result that it was not unreasonable for Mr. McNeil to ignore the matter. This presents the key question: Does the fact that coverage issues were addressed by others absolve Mr. McNeil from the need to do so on Kansa's behalf? I have concluded that the answer to this question is "No".

61 I have concluded that, in the face of the reports of Mr. Doner and Mr. Murray, Fellowes, McNeil would have, up to this point, reasonably concluded that the coverage issue was being addressed, albeit by others whose interests in the matter were different than those of Kansa. I mention these differences because American Home's exposure was $500,000, whereas the exposure of Kansa was substantially in excess of $500,000, particularly alter the statement of claim had been amended.

62 On July 20, 1989, Mr. McNeil wrote to Kansa suggesting that they may wish to be represented at the trial. He further suggested that this could be accomplished by applying for status to intervene or,

> more informally appearing as co-counsel with counsel of record ... I think we have to reconcile ourselves to somehow assisting in the defence of this action and appear at trial.

This suggestion, if carried out, alters the position of Kansa in that it is no longer "behind the scenes" so to speak. It faces the potential of being estopped from raising coverage issues once it becomes an apparent participant in the defence of the action.

Mr. Little's Examination for Discovery

63 I separate the matter of Mr. Little's discovery because it was the focal point of much of the evidence on this aspect of the matter. On September 21, 1990, Mr. McNeil wrote to Kansa and advised that he had completed the review of the discovery transcripts. I was very troubled that Mr. McNeil's dockets, otherwise detailed, do not contain any reference of his review of the discovery transcripts. At trial Mr. McNeil testified that, through inadvertence, he did not record it. He suggested that he probably recorded the time spent in the review of the discovery transcripts under another heading in his time dockets. He was not asked at trial what the other heading may have been and he did not offer any information in this regard. By making these comments I do not want to be taken as drawing an inference that Mr. McNeil did not read the discovery. I can make no such finding. However, it remains that this gap in the evidence is but one of the many troubling aspects of this case.

64 Mr. Little's examination for discovery was conducted on September 23, 1986 and the transcript of the same was received by Mr. McNeil some time in October, 1987. Mr. Doner and Mr. Murray made their comments about coverage issues without having seen Mr. Little's discovery. In addition, I do not overlook the fact, in my assessment of this important issue, that none of Kansa's claims personnel, managerial or otherwise, saw the transcript of Mr. Little's discovery.

65 Portions of this transcript are referred to on numerous occasions at the trial of this matter. I have concluded that reading this transcript raises concerns about issues of coverage under the Kansa policy. Before excerpting the relevant and controversial portions of the discovery transcript I comment as follows. Mr. Little acknowledged in the examination for discovery that he was retained in August, 1982 by Confederation Life to act in the mortgage transaction. He acknowledged, as well, that he was aware of Confederation Life's desire to preserve the twenty year term of the mortgage. Confederation Life had asked him to redraft the condominium document to achieve this objective. He was acting on both sides of the transaction in that he had acted for Mr. Khoury and 511666 Ontario Limited. He had been retained for these purposes by a Toronto law firm under cover of a letter dated July 5, 1982. At his discovery Mr. Little acknowledged he was aware that Khoury and 511666 Ontario Limited were taking a position contrary to the interests of Confederation Life. This conflict of interest would ultimately have a very negative impact on the assessment of Mr. Little's liability. Its existence exasperated Mr. Little's position as he attempted to solve the problems created by the omission to include in the mortgage documentation reference to the *Condominium Act*.

66 At p. 129, Mr. Little was questioned by Mr. Lorne, Morphy, acting on behalf of Confederation Life at the discovery, as to whether in June, 1983 he considered himself in a big conflict, to which he replied as follows:

> I can't recall my specific memory. I would expect myself to have considered the conflict.

At p. 130 of his discovery transcript, Mr. Little said that he could not recall whether he had declared the conflict of interest to either of his clients. By November 30, 1983, Mr. Little knew that his services were no longer required in the matter and he forwarded a final account to Confederation Life. Mr. Little also knew by August, 1983 that Mr. Khoury and 511666 Ontario Limited had consulted with McCarthy, Tétrault in Toronto, and that "McCarthy's have instructions to commence litigation next week if there is no consent as is."

67 Mr. Little confirmed at his examination for discovery that Confederation Life had asked him for an opinion letter (to which I have referred earlier in these reasons),

> ... concerning the right of the mortgagor under Section 28A [of the mortgage] to make payment in full of the amount secured by the mortgage in the event the project is registered as a condominium...

68 The discovery transcript also contains reference to Mr. Little's memo, in his own handwriting, dated September 9, 1982, which relates to a telephone conversation he had from Mr. Boddy, at Confederation Life, on that day. The note contains the comment, "Do we see any out for Khoury in this deal?"

69 Mr. Morphy questioned Mr. Little with respect to his failure to alert Confederation Life to the impact of s.7(9) and (10) of the *Condominium Act*. At question 1189 Mr. Morphy asked:

> When did you realize, sir, it was going to be a problem?

Mr. Little replied:

> I believe it was on the 3rd of August, 1983.

. . . . .

> 1229Q. You didn't consider any problem at that point?
>
> A. I thought there was a problem we had to solve which was how do we enter, how do we deal with a consent of the condominium in those terms.
>
> Mr. Dermer: So your problem meaning a potential errors and omissions problem?
>
> By Mr. Morphy:
>
> 1230Q. Yes
>
> A. No.

At question 1313 in the discovery of Mr. Little, Mr. Morphy asked:

> 1313Q. Yes. And, sir, turn to your 241 please. And your note of your conversation with Mr. Plaxton on the 4th of August, did you following your conversation with Mr. Plaxton and the deliberations that you gave at that time, did you think that it was possible at that time to rescue the situation and avoid the effect of 7(9) and 7(10)?
>
> A. I did.

70 Having read and re-read this portion of the transcript I have concluded that Mr. McNeil, upon reading the transcript, should have concluded that there was a potential coverage issue, and so advised his client Kansa. I keep in mind that Mr. McNeil appears to have read the discovery transcripts by as early as September 20, 1990. This is seven months prior to service of the notice of change of solicitors wherein he formally assumed carriage of the defence of the matter on behalf of Mr, Little. I have concluded that it is not correct to say that because the

issues were canvassed by Mr. Doner and Mr. Ross Murray (neither of whom had read these discovery transcripts) they should no longer be a consideration for Mr. McNeil. He, given the mandate that he then had on behalf of Kansa, considered coverage issues and reported on these considerations to Kansa, at which time decisions could be made as to whether Kansa should deny coverage. Accordingly, I have concluded that there was a potential for a denial of coverage by Kansa based on non disclosure and/or misrepresentation, and Kansa should have been alerted to the existence of this potential.

71 As part of my consideration of these issues, I have assessed whether or not a denial of coverage to Mr. Little would have been warranted in the circumstances. This leads me to review the applications for coverage of the firm effective January 1, 1984. This application for coverage is dated December 30, 1983. There is a further application for coverage dated December 28, 1984, for coverage effective January 1, 1985. After both applications were made, Kansa extended coverage to the firm for the periods January 20, 1984 to January 1, 1985, and for January 1, 1985 to January 1, 1986.

72 Question 7 on the application for coverage reads as follows:

> Have any claims or suits been made in the past and are any pending or to the Proposer's knowledge contemplated against the Named Insured or against the present Owner, Partners or Officers or employees, either individually or otherwise?

This question was answered in the negative, and because as at December 30, 1993 there were no claims or suits pending, the answer to this question does not constitute a misrepresentation.

73 On page 2 of the application there is a declaration which reads as follows:

> I/We hereby declare that the above statements and particulars are true, and I/we have not suppressed or misstated any material facts, that at the present time I/we have no reason to anticipate any claims being brought against me/us for any negligent act, error or omission on the part of any member or employee of this Insured or their predecessors in business, and agree that this declaration shall be the basis of the Insurance between me/us and the Insurer.

The application is signed by a partner in the firm on behalf of the firm. The application contemplates answers and declarations to be those of all of the partners and members of the firm. In the context of the declaration which was answered without reference to Mr. Little's "problem" with Confederation Life, one has to ask the question of whether or not Mr. Little would have had any reason as of December 30, 1983 to anticipate any claim being brought against him and his firm as a result of the problem.

74 I have concluded that by then it is reasonable to conclude that Mr. Little would probably have had reason to anticipate that as of December 30, 1983 a claim might be brought against him and his firm based on his failure to advise and consider the effect of s.7(9) and (10) of the *Condominium Act* on Confederation Life's intent to keep in place a twenty year mortgage with no right of prepayment. On August 5, 1983, Confederation Life's representative discussed s.7(9) of the *Condominium Act* with Mr. Little by telephone. I have also concluded as early as September, 1983, Confederation Life was contemplating a claim against Mr. Little and the firm.

75 Based on the manner in which Kansa responded to the declaration of other potential claims it is reasonable to conclude that Kansa, after it assessed the risk in respect of the potential for the Confederation Life claim, would either have refused to extend coverage or, in the alternative, would have excluded the claim from a policy

that they may have chosen to issue.

76 I now turn to the application for insurance dated December 28, 1984. Question 12 reads as follows:

> Have any Professional Liability claims been made against the Applicant Firm, or any of the present Partners;...

No claims had been made against the firm as a result of the Confederation Life problem by December 28, 1984, with the result that this question could have been truthfully answered in the negative. However question 13 in the application form is different. It reads as follows:

> Does the Applicant Firm, know of any circumstance which may result in any Professional Liability claim being made against the Applicant Firm, its predecessors in business or any past or present Partners?

77 In answer to this question the word "yes" was typed into the form, and reference was made to a schedule "B" which does not mention the Confederation Life problem or any other matter involving Mr. Little.

78 It is important, for purposes of my overall assessment of these issues, that in response to the disclosure about a potential claim, thought to be ultimately unsuccessful, Kansa excluded coverage for such claim. Undoubtedly, this endorsement came as a result of the disclosure about a potential claim and resulted in a refusal by Kansa to assume risk for this potential claim.

79 The reality is that Mr. Little acknowledged that he knew of "a problem" created by the mortgage drafted by him for Confederation Life prior to the date of the application for insurance, namely December 28, 1984. I find that a solicitor acting in Mr. McNeil's role should have twigged to coverage issues because, at the very latest, Mr. Little would have known by early August, 1983 that the problem created by the mortgage had become so obvious that Mr. Khoury was considering litigation (which was ultimately proceeded with) against Confederation Life if Confederation persisted in refusing to agree to the conversion of the project to condominium.

80 In dealing with the unfortunate question of Mr. Little's probable knowledge, I also note that two lawyers from the in-house legal department at Confederation Life travelled to London to meet with Mr. Little in his office on September 25, 1984, to discuss the matter of Mr. Little's involvement in the problem between Confederation Life and Mr. Khoury. One of the documents exhibited at trial is a four-page internal memorandum from Confederation Life's associate in-house counsel, Craig Arthurs, to Mr. Rozee of Confederation's legal department. This memorandum is dated September 27, 1984. The meeting took place three months prior to the December 28, 1984 application for insurance. The fact that the meeting occurred and the contents of the discussions at the meeting as disclosed in the memorandum can reasonably lead to the conclusion that after that meeting Mr. Little probably would have known that he was potentially exposed to a claim for professional negligence by Confederation Life.

81 In coming to these conclusions, I point out that I did not hear from Mr. Little or Mr. Plaxton at trial. It was suggested that I should draw a negative inference by reason of their absences. I do not go so far because my assessment of the coverage issue in this trial is confined to the question of whether or not, on the basis of the events which I have outlined above, it would have been reasonable for Kansa to deny coverage, and more importantly, whether or not a solicitor, then acting in the capacities of Mr. McNeil, should have raised coverage matters with Kansa.

82 My analysis of the facts is confined to the events prior to 1991 when he formally became solicitor of record for Mr. Little. I add to, my assessment of the discharge of Mr. McNeil's retainer, the repeated theme, emerging from the opinions of all of the experts, that the assessment of coverage is a key function of counsel in these kinds of matters. It remains that Mr. McNeil did not consider questions of coverage on behalf of Kansa. He cannot say that merely because he was not explicitly asked to do so by Kansa, that he had no professional obligation to do so. Similarly, it is no answer to say that, as the matters of coverage were investigated by Mr. Doner and Mr. Murray, this absolved Mr. McNeil from alerting Kansa to potential or actual coverage issues after he read the transcript of the examinations for discovery of Mr. Little.

83 I have not overlooked the fact that Borden & Elliot was of the initial opinion that liability could be successfully denied by Mr. Little. Over time, and after an opinion from Mr. Donald Lamont about acceptable standards of practice in this area, Mr. Murray changed his view on liability and recommended reserves of $2,000,000 to the Law Society. This change of opinion, to my mind, begs questions about Mr. Little's knowledge in 1983-1984.

What would have been the Probable Result if Kansa had denied Coverage

84 Prior to January 20, 1984, Kansa was not on risk in respect of the firm's excess claims. Guardian was the excess insurer for the years prior to January 20, 1984. I agree with the opinion of Mr. Gilbertson, qualified as an expert on behalf of Kansa, that it is *probable* that Kansa would either have refused to issue a policy or would have agreed to do so excluding the Confederation claim from coverage.

85 It is at this point that Kansa's history of denying coverage when it was brought to its attention is relevant. I have concluded, on the balance of probabilities, that Kansa would have been successful if it had denied coverage.

86 For these reasons I have concluded that Mr. McNeil fell below the standard of care expected of competent, experienced and specialized counsel by reason of his failure to canvass with and advise Kansa that Mr. Little probably knew or ought to have known of circumstances giving rise to a potential claim against him prior to December 30, 1983, the date on which the firm applied for excess coverage with Kansa.

87 In the context of assessing what Kansa's response would have been had it been alerted to coverage issues I add the following. Coverage issues were not an issue within Kansa until after Mr. Claude Fauré read the judgment of Mr. Justice Montgomery. He then wrote to Mr. McNeil questioning whether or not Kansa was the responsible insurer. Mr. McNeil responded in a letter dated April 16, 1993, advising that it was not then open to Kansa to take such a position on behalf of the insured. I mention this because it is but one piece of evidence, when fitted together with all other pieces of evidence, that suggests that had coverage issues been canvassed with Kansa at an early date, it would have instructed Mr. McNeil to deny coverage.

88 For all of these reasons, this aspect of Kansa's claim succeeds.

The Matter of American Home's Solicitor/Client Privilege

89 During the trial a dispute arose on the matter of solicitor and client privilege asserted by American Home in respect of certain documents that were not passed on to Fellowes, McNeil when the file was transferred from Borden & Elliot to Fellowes, McNeil.

90 Mr. Jeffrey Dermer, of Borden & Elliot, acknowledged that American Home instructed his firm to transfer the files as they related to this matter to "counsel for the excess insurer." Mr. Dermer arranged for transfer of the entire Borden & Elliot file with the exception of a selected correspondence to and from Borden & Elliot and American Home. American Home asserted solicitor and client privilege with respect to certain documents in this correspondence file. At trial Mr. Doran sought production of these documents. As Mr. Dermer and Borden & Elliot no longer acted for American Home, I concluded that it would be necessary, in the event that the matter was pursued, to provide counsel for American Home with the opportunity to make submissions as to whether or not the claim of privilege should be waived by the court.

91 I obtained from Mr. Wigle and Mr. Doran permission to read the impugned documents to determine whether or not there was anything contained in the documents which should, out of fairness to both sides to the issues in this dispute, be before the court. I then adjourned court for approximately 25 minutes and read the documents.

92 When I returned, I advised Mr. Wigle and Mr. Doran that there were some parts of the correspondence which may or may not be relevant to the issues between the parties. The court then adjourned to arrange for representation of American Home, and to permit time for counsel for American Home to become sufficiently familiar with the issues to attend and make submissions. Because daily transcripts were prepared throughout this trial, the court and counsel were in the position of being able to provide American Home with a copy of the transcript of the events relevant to the issue of privilege of these documents.

93 On Monday, February 23, 1998, Mr. Bristow appeared on behalf of American Home and strenuously objected to the manner in which the matter was dealt with by the court. He objected on the basis that no formal motion had been brought by Mr. Doran with respect to the matter and asked that the matter be put over until proper motion material was presented. Secondly, Mr. Bristow submitted that I should disqualify myself from dealing with the motion for privilege on the basis that I had made a "fundamental mistake" in reading the file and that "expediency and convenience" were "overriding justice in this matter". Mr. Bristow asked that arrangements be made to procure another justice to hear the matter "on a proper motion with a proper hearing".

94 I then retired to consider whether or not it was appropriate for me to disqualify myself from hearing the motion as it related to the privilege of American Home's documents. In the course of assessing Mr. Bristow's objection I noted the following summary, contained in the trial transcript, of the events of the previous day made by me, with a view to providing American Home with a record of events. It reads as follows:

> As you are all aware I have asked Mr. Dermer to give me the file. I have looked through the file. It will be my view, subject to submissions from American Home, that there are materials contained in that file over which it now asserts a privilege, that may be relevant to the issues in this case, and may be of such relevance that fairness would dictate for the benefit of both sides that the court override any privilege that American Home may assert.
>
> It remains, however, that that decision cannot be taken until American Home has had an opportunity to make submissions on this issue. To that extent I am going to prevail upon Mr. Dermer's goodwill to try to make arrangements to have American Home's counsel in Toronto, be here to respond to what, in effect, is the motion brought by Mr. Doran on behalf of Kansa seeking a waiver of the privilege now being asserted over those documents by American Home. The practical realities are that it is not possible to have the motion dealt with by tomorrow given the fact that it is now 12:50.

> This matter is being adjourned until Monday the 23rd of February at ten o'clock, at which time we will deal with the motion. American Home will either be here taking a position, and if they choose not to be here I will take it that the privilege is no longer being asserted.

95 A copy of the transcript of the above statements was provided to Mr. Bristow in advance of his attendance before me on behalf of American Home on February 23, 1998.

96 On Monday, February 23, 1998, I adjourned court after hearing Mr. Bristow to consider his comments. When I reconvened court I was advised by Mr. Doran that he was withdrawing the motion respecting privilege with the result that the matter ended.

97 I mention these events for one reason. When I read the documents I did so quickly. I made no notes of what was contained in the documents. I have no recollection of their contents. They have not influenced my disposition of these matters.

The Failure to Call Appropriate Expert Evidence

98 The second aspect of the claim advanced in the Little matter is based on an allegation that Mr. McNeil fell below the standard of care by failing to retain appropriate expert opinion to address the issue of the viability of the property, as a syndicated MURB or as a personal income tax shelter utilizing a MURB. This issue was key to the theory of the defence as it related to damages. It raises several questions. First, Mr. McNeil meet the requisite standard of care with respect to his retainer of Robert Hughes as an expert to testify in the trial in the Little matter? Second, did Mr. McNeil meet the requisite standard of care expected of counsel with his experience and expertise, with respect to his decision at trial not to seek an adjournment to obtain an expert opinion to respond to Mr. Grossman, of Orenstein & Partners, an expert called by Mr. Morphy on behalf of Confederation Life. The theory of damages focussed on the question of whether or not the property was viable as a syndicated MURB. Mr. Hughes was retained by Mr. McNeil to support and develop Mr. McNeil's original theory on damages. Mr. Hughes prepared an expert's report which was delivered to Mr. Morphy. As Mr. McNeil developed his theory of damages, he amended the statement of defence. I find that Mr. McNeil focussed on the damages theory in the defence of the matter. He reported regularly to Kansa on all aspects of his activities in respect of damages. He sought and obtained Kansa's approval for the retainer of Mr. Hughes. Mr. McNeil's initial theory of damages was that the mortgage was bound to go into default prior to maturity and that as a result the losses sustained by Confederation Life would be the difference between the security value as of the date of the default and the amount received in the settlement with Mr. Khoury, Mr. Martin was retained to provide further damages expertise. Mr. McNeil advised Kansa that both Mr. Hughes and Mr. Martin were confident that they could demonstrate that Confederation Life would, as a result of market conditions, have had to access its security. The evidence demonstrates that Mr. McNeil conferred with his experts on an ongoing basis leading up to trial and reported on those consultations with Kansa.

99 Mr. McNeil did not fall below the standard on this aspect of the matter. Mr. Hughes' and Mr. Martin's reports were served on opposing counsel in April, 1992, after a request for extension of time for the delivery of these reports. Confederation Life then sought and obtained an adjournment of the trial in order to have further time to respond to Kansa's experts' reports. This resulted in the delivery of the so-called "Grossman Report" on September 18, 1992, approximately one month before the schedule of the commencement of the trial.

100 Mr. McNeil, after consultation with Messrs. Hughes, Martin and one Mr. Grayhurst formed a view prior to the trial that the Grossman Report could be used to the advantage of Little in support of an argument that

Confederation Life erred by refusing to bargain with Khoury, and in support of the proposition that the project was, in any event, doomed to failure. Mr. McNeil reported to Kansa frequently in advance of the trial, and almost on a daily basis during the trial.

101 Mr. McNeil encountered "heavy weather" at trial before Mr. Justice Montgomery who, in response to Mr. Morphy's objections to qualify Mr. Hughes as an expert, made a ruling that Mr. Hughes was not qualified to tender expert evidence in support of the proposition that without a MURB syndication the project had no viability. At trial, Mr. McNeil contested Mr. Morphy's objections. Nevertheless, Mr. Justice Montgomery ruled against Mr. McNeil's position. Mr. Justice Montgomery therefore rejected the Hughes' evidence as it related to MURB's, and in his reasons for judgment Mr. Justice Montgomery was critical of the Hughes' valuation evidence adduced at the trial.

102 Mr. McNeil's decisions in respect of the retainer of Mr. Hughes, Mr. Martin and Mr. Grayhurst are judgment calls made by experienced counsel in respect of trial preparation and the conduct of the matter once the trial begins. The decision to choose one expert as opposed to another is always a question of judgment. Mr. Joel Richler was qualified as an expert at this trial to opine on this matter. It was his opinion that a lawyer chooses her or her expert by analysing the issues that are to be dealt with by way of opinion evidence, and by matching the expertise of the prospective expert to those issues. I am satisfied that Mr. McNeil made appropriate and reasonable inquiries as to the qualifications of Messrs. Hughes, Martin and Grayhurst. I am further satisfied that it was reasonable for Mr. McNeil to conclude that a trial justice would accept these qualifications even in the face of a possibility that Mr. Morphy may challenge the qualifications of any prospective expert. I would further observe that I consider that it was reasonable for Mr. McNeil to consider that given Mr. Hughes' background he would not be limited, in his opinion evidence, to matters that pertain only to valuation of the property. It was not unreasonable for Mr. McNeil to attempt to offer Mr. Hughes as an expert on broader issues because these issues appeared to be within his expertise and experience. The fact that the trial justice disagreed cannot give rise to a claim for solicitor negligence.

103 I also agree with Mr. Richler that Mr. McNeil, acting as reasonably competent trial counsel, cannot be put in the position of being a guarantor of the court's acceptance of the qualification of any expert that may be called.

104 There is a second aspect of the analysis under this heading. It is that Mr. McNeil fell below the standard of a reasonably competent barrister when he failed to ask for an adjournment after the conclusion of the evidence of Mr. Grossman who was the first witness to testify at the trial, or after Mr. Justice Montgomery rejected Mr. Hughes' qualifications as an expert on the MURB related issues. The fact is that Mr. McNeil had formulated a reasonable theory of damages prior to the commencement of trial. With the assistance of his experts he concluded that the Grossman Report would not cause any damage to his theory of damages that could not be dealt with by contrary evidence or argument.

105 Mr. Richler read the evidence of the trial before Mr. Justice Montgomery. I accept his conclusions that Mr. McNeil did not fall below the requisite standard of care in attempting to utilise the Grossman Report to advance his theory of damages. I do not find egregious error in respect of this matter. Mr. Claude Fauré, to obtain alternate expert opinion, strongly urged Mr. McNeil to seek an adjournment. Mr. McNeil's decision not to seek an adjournment in the face of the history of the events that were occurring at the trial, and his assessment of Mr. Justice Montgomery's reaction to those events, was appropriate and reasonable in the circumstances.

106 During his evidence, Mr. McNeil pointed out that the making of a request for an opportunity to retain a further expert at a late date may have been perceived as an obvious sign that Mr. McNeil had a serious concern arising out of the results of the evidence of Mr. Grossman. It was reasonable for Mr. McNeil to decide not to assume the risk of creating this impression, particularly in circumstances where he believed that the evidence of Mr. Grossman did not have to be challenged through another witness. I add to this analysis of these circumstances the fact that the trial was not going well at this point, and it was reasonable for Mr. McNeil to conclude that his chances of obtaining a further adjournment of the trial (one had already been granted at Mr. McNeil's request) were not good, and would further exasperate the difficulties that Mr. Little and the firm were encountering in other aspects of the matter.

107 In coming to these conclusions I have also considered the evidence of Mr. David Roebuck called as an expert on behalf of Kansa, and Mr. Mintz called as a witness on behalf of Kansa to critique the Grossman Report. I do not want to be taken as having ignored this evidence merely because I have not mentioned it in any great detail.

Uniroyal et al. ats Sundor

108 The questions which the court must consider under this heading of whether or not Fellowes, McNeil met the standard of reasonably competent solicitors in filing a Notice of Intent to Defend and in failing to identify pollution exclusions contained in Kansa's policies and advising Kansa as to their potential effect. Underlying these two headings there are sub-issues which necessitate the Court's assessment of whether or not in its decision to seek intervenor status on behalf of Kansa, Fellowes, McNeil fell below the standard of reasonable competent solicitors. There is also an issue of whether or not Fellowes McNeil failed to protect Kansa's interests and rights with regard to Uniroyal's claim for defence costs. An essential step is the consideration of the allegations raised in the Statement of Claim in light of the wording of relevant policies of insurance. I am satisfied that it is well established in Canada that an insurer is entitled to draw upon all of the stated limitations in its policies including exclusions when considering whether there could be coverage for all or some of the claims.

109 Generally speaking, Sundor's Statement of Claim in this action set out specific allegations against Uniroyal all of which arose from a basic proposition that Uniroyal discharged "NDMA" (a carcinogenic chemical) into ground water which eventually found its way into Sundor's fruit juice products. Mr. Douglas McInnis, who took over this file from Fellowes, McNeil, testified that the allegations against Uniroyal could be characterized under four basic categories, all of which are routed in the alleged discharge of a pollutant. These categories are:

1. Uniroyal discharged a contaminant;

2. Uniroyal failed to prevent the discharge of a contaminant;

3. Uniroyal failed to warn of the discharge of a contaminant; and

4. Uniroyal failed to re-mediate/litigate once the contaminants were discharged.

110 The first instruction to Fellowes, McNeil from Kansa respecting this claim came on a printed form, completed by a clerk in Kansa's claims office, dated September 5, 1990 wherein one of the ten boxes was checked. Beside that box were the words: "Please find attached documents related to a new claim. Please investigate".

111 The only document which accompanied the printed form was the Statement of Claim issued on behalf of Sundor by Weir & Foulds on July 13, 1990. Mr. Fellowes received the memorandum and proceeded on September 17, 1990 to serve and file a Notice of Intent to Defend. This put Fellowes, McNeil in a position of counsel for Uniroyal. I agree with Mr. Gilbertson that this was "a remarkable response" to Kansa's request to "please investigate". Mr. Fellowes' act of filing a Notice of Intent to Defend was precipitous. At that time a Statement of Claim had not been served. By its act of filing a Notice of Intent to Defend Mr. Fellowes created a possible waiver/estoppel situation. Mr. Fellowes served and filed a Notice of Intent to Defend at a time when he was about to depart to London, England for a Canadian Bar Convention followed by an extended holiday in Europe. Mr. Fellowes also knew that upon his return from his holiday he would immediately go to Hamilton to commence a long trial.

112 At that time Kansa had not assigned an adjuster to investigate the claim. It was relying on Fellowes, McNeil to complete necessary investigations to protect Kansa's interest. Mr. Fellowes' act of filing a Notice of Intent to defend was the first of a series of events which compounded Kansa's situation. The Statement of Claim claimed damages for $20,000,000. Kansa's policy limits, referable to this claim, were $1,000,000.

113 I accept as correct that the allegations in the Statement of Claim were so obviously pollution oriented that an analysis of them would trigger questions about the applicability of pollution exclusions which were contained in Kansa's policies. In this context, I accept as well, that by the mid 1980's pollution was a big concern in the insurance industry. There was a lot of discussion about the applicability of pollution exclusion clauses. There were seminars were being given within the industry and in the bar on these issues. For this reason, the cautious and necessary step of examining the policy to confirm coverage should have occurred. Mr. McNeil admitted that he missed the pollution exclusion clauses contained in the relevant policies of insurance and the endorsements.

114 Filing the Notice of Intent to Defend fell far below the standard of experienced competent insurance litigators. In this aspect of the matter there is a further difficulty. Kansa first provided a relevant insurance policy numbered 2002867 to Fellowes, McNeil with a memorandum of September 12, 1990. On October 3, 1990 Mr. Fellowes corresponded with Kansa and made no reference to the policy but commented that Uniroyal's solicitor had said "that may be exclusions in the policy that would apply." This acknowledgement from the insured's solicitor should have raised coverage issues in the minds of Fellowes, McNeil to the point where Fellowes, McNeil would seek clarification of coverage issues so as to minimize the risk of creating an estoppel or waiver.

115 The wording contained in the language of the relevant policies was examined in detail in the evidence at this trial. I have come to the conclusion that the general and specific allegations against Uniroyal, contained in Sundor's Statement of Claim when read together with the wording of the exclusions that, on the balance of probabilities, Sundor's claim as framed would have probably been excluded from coverage under Kansa's policies, and that a simple denial of coverage would be an appropriate response. I accept as correct the probability of an absence of coverage was so high that this would have been the correct response. I do not agree that with Mr. Webb that the denial of coverage in the circumstances of this case would have exposed Kansa to the risk of allegations of bad faith. In as much as the duty to defend is only triggered with respect to insurance as it is afforded by the policy, the obligation to defend cannot exceed if it is clear that the insurer can deny indemnity coverage at the early stages of the litigation on the basis of the clear application of the exclusions. In coming to these conclusions, I have analysed and considered, with the benefit of expert opinion, the state of the law with respect to pollution exclusion clauses in the mid 1990s when this claim first came to Kansa's attention and in mid 1991 at the time when Kansa was embroiled in motions respecting the application for intervenor's status and motions to compel Kansa to pay for the defence of Sundor's claim by Uniroyal.

116 I have concluded that the claims set forth in this Statement of Claim could be traced to an excluded event that being a discharge of a contaminant with the result that on the balance of probabilities the exclusions contained in the policies could reasonably be expected to apply.

117 At this point, I comment briefly on the duty to defend. The duty to defend in situations where indemnity may be in doubt was canvassed extensively in the Supreme Court of Canada in *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 (S.C.C.). This judgment was released on April 12, 1990 and became widely known to all members of the insurance bar as a definitive authority on this question. This was a number of months before Uniroyal reported the Sundor claim to Kansa. In *Nichols*, the court held that the widest latitude should be given to the allegations in the Statement of Claim when considering whether a duty to defend existed. However, in as much as the duty to defend was unambiguously restricted to claims falling within the scope of the policy, no duty to defend existed once it was demonstrated that all of the allegations against the insured fell within an exclusion.

118 I have concluded that Mr. Gilbertson and Mr. McInnis are correct in their reasoning that the outcome of the *Nichols* case when matched with the absolute pollution exclusions contained in the relevant policies are such that Kansa would have had sufficient grounds to deny any indemnity obligations and therefore any defence obligations from the outside of the matter.

119 The precipitous acts by Fellowes, McNeil with respect to the filing of a Notice of Intent to Defend were repeated in the application for Intervenor status. The affidavit filed on behalf of Kansa in support of the application for Intervenor status gave rise to reasonable conclusion that Kansa considered that it was on coverage or at least exposed to coverage in respect of this claim. Rule 13 of the *Rules of Civil Procedure* requires that anyone seeking to intervene as a party must do so on the grounds that he or she has an interest in the subject matter of the proceedings or its outcome. When Mr. McNeil first drafted the affidavit in support of the application for Intervenor status he appears to have done so without realizing the existence of pollution exclusions in the Kansa policies. Mr. Lavigne had expressed concerns about admitting coverage under the policies and creating an estoppel situation. In a memo to Fellowes, McNeil dated October 10, 1990, he stated that he wanted to be that the defence would be done on a without prejudice basis as per previous discussions. Mr. Lavigne's affidavit, prepared by Mr. McNeil, on whom he relied, was ultimately seen as containing admissions which influenced the reasons of Mr. Justice Blair dated June 4, 1992 and the subsequent disposition of the matter in the Court of Appeal on January 29, 1996.

120 In concluding as I have on these issues, I have deliberated over the points raised in defence of Fellowes, McNeil. I highlight several of these points. It was argued that Kansa was sufficiently experienced with pollution claims so that it did not rely on Fellowes, McNeil for advice on coverage matters in any event. However, the reality is that Fellowes, McNeil did not raise coverage issues with Kansa, even when alerted about these issues by the Kansa claims department. I have concluded that the fact that Kansa's earlier experience with a denial of coverage in a complex, non pollution action, which resulted in claims in excess of its limits, does not justify a finding that Kansa did not need to be advised on these issues. See: *Bow Valley Resource Services Ltd. v. Kansa General Insurance Co.* (1991), 49 C.C.L.I. 230 (B.C. S.C.). On the contrary, this "prior experience" would give rise to extra diligence in dealing with coverage issues. Mr. McNeil was aware of this case.

121 I do not agree that this action is based on hindsight because of the results in *R. v. Kansa General Insurance Co.* (1994), 17 O.R. (3d) 38 (Ont. C.A.). The legal considerations that are fully explored in this judgment are, to my mind, the very considerations that should have caused Fellowes, McNeil to conclude that coverage is-

sues were front and centre due to the wording of the pollution exclusions which were missed by Mr. McNeil. Further, the Intervenor application was recommended by Mr. McNeil without directing his mind to coverage matters or reading the wording of the policies.

122 In his evidence, Mr. Webb focussed on the potential risk to Kansa of an outright denial of coverage. These risks were not considered by Mr. McNeil who did not direct his mind to the pollution exclusions. My findings are premised on the concept that, at the very least, these risks ought to have been canvassed by Fellowes, McNeil before embarking on the application for Intervenor status. I note that Mr. Webb admitted to denying coverage in some of his files but he did not elaborate on the details and circumstances of these denials.

Conflicting Expert Opinion

123 I choose to comment on the existence of conflicting expert opinion in this case. The persons qualified as experts are all very experienced with solid and impressive reputations in their areas of expertise. The experts read the daily transcripts of the evidence of other experts and witnesses before giving their testimony.

124 In this case, expert opinion was sharply divided. When expert opinion becomes "advocacy dressed up as expert opinion", it loses the objectivity that is so essential to assisting the court in discharging its duty of assessing, in an objective and impartial manner, the evidence that influences the outcome of the case. The expression "advocacy dressed up as expert opinion" comes from *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.* (1995), 37 C.P.C. (3d) 119 (Fed. T.D.) at 126, per Reed J.

125 While I recognize that experts are retained to give opinions on one side or another, it remains that those experts who advocate a position to the exclusion of all other considerations which may detract from their opinions become advocates; they lose an objective quality which is essential to the role of an expert in its properly defined sense. Mr. Webb and Mr. Lawson were particularly adamant in their defence of Fellowes, McNeil on coverage related issues. After anxious consideration, I have come to conclusions which depart from their opinions. To this extent, I prefer the opinions of Mr. McKeon[FN1] and Mr. Gilbertson. Notwithstanding this, I have been guided by many aspects of the evidence of all of the experts who testified on the many complex issues that face solicitors acting in capacities similar to those of Mr. McNeil and Mr. Fellowes.

126 At this trial, Mr. Doran objected to Messrs. Lawson and Webb testifying as experts on coverage related issues in "Sundor". The basis of his objection was that, the law firms of which Mr. Lawson and Mr. Webb are partners, acted for and advised other insurers of Uniroyal. This matter was resolved between counsel on the condition that certain admissions be read into the record. The relevant admissions were:

1. Mr. McGrenere (Mr. Lawson's partner) represented Allstate in the Sundor matter. Allstate was an insurer of Uniroyal.

2. Allstate denied coverage to Uniroyal.

3. Allstate did not pay anything towards Uniroyal's defence in the Sundor claim.

4. Allstate's file has not be produced to the parties in this action

127 In exchange for these admissions, Kansa withdrew its motion to disqualify Mr. Webb and Mr. Lawson as experts. Without knowing the circumstances of the denial of coverage by Allstate, I do not put much weight on these admissions. However, they form part of the entire context of the evidence facing the court in assessing

the expert evidence.

Damages

128 Under this heading the evidence is very scant. It consists of Mr. Gilbertson's opinion that Kansa could have successfully denied coverage in both the Little and Sundor actions. Mr. Charron also testified that he expected Fellowes McNeil to canvass the issue of the insured's prior knowledge. Aside from Mr. Gilbertson's opinion, I have concluded that, *on the balance of probabilities*, Kansa could have successfully denied coverage. What flows from this conclusion is that, if Kansa had denied coverage, it would not have been exposed to the payment of the judgment in Little.

129 In Sundor, Kansa would probably not have been exposed to the contribution towards settlement of the action and defence costs. After appeal, Kansa paid on account of the judgment, the sum of $5,988,708.91. In assessing damages, this amount would be reduced by $500,000 being the amount contributed by American Home. The results in Kansa's exposure being $5,488,708.91. Kansa damages should also reflect an amount for the legal fees that would have been incurred if it had denied coverage. I have no evidence on this matter. It was suggested during argument that I consider the sum of $100,000. This was not objected to.

130 I keep in mind that I must approach question of damages on the basis that Fellowes McNeil fell below the standard and this caused damage to Kansa. To award damages that take into account the amount of the judgment in Little and notional legal costs, I must ask what position Kansa would have been in had Fellowes, McNeil not fallen below the standard. This question leads me to make the following observations:

1. Kansa has discharged the burden of proving its losses. The discharge of this burden is simplified to the extent that the measure of damages is the amounts paid and Kansa with adjustments as set out above.

2. I do not consider that the measure of damages is, in this case, guess work except with respect to the measure of notional legal costs on Which I have no direct evidence. Uncertainties exist in this aspect of the matter but on the balance of probabilities, I consider that $100,00 is reasonable.

3. In this case, I should not decline to award damages where findings have been made which establish both liability and causation. This is not a case where damages should be measured in a notional fashion or not at all.

131 In assessing these questions I have considered the authorities cited to me by Mr. Pietrangeli and the reasoning of Finalyson J.A. in *Martin v. Goldfarb* (1998), 112 O.A.C. 138 (Ont. C.A.) which refers in detail to many of the authorities referred to by Mr. Pietrangeli.

132 With the same considerations in mind I have assessed damages in the Sundor action in favour of Kansa at $775,000. This reflects legal costs and its contribution to the settlement of the Sundor action in May 1988 totally $850,000 discounted by 10%. I have discounted the damages by 10% in both matters to reflect the possibility that Kansa would not have been successful in a denial of coverage. I have done so in response to Kansas submissions which referred to *Duncan Estate v. Baddeley* (1997), 36 C.C.L.T. (2d) 156 (Alta. C.A.).

133 In the Little matter damages taking into account the 10% discount are measured at $5,326, 838.02. To this sum I add $775,000 (damages in the Sundor matter) for a total award of $6,101,538,02.

Legal Issues Raised

134 I was provided with thick briefs containing cases that refer to solicitors' negligence. The following principles emerge from the case law.

135 In cases such as this, each case is fact driven and fact specific. In examining the standard of care, one must look at whether the particular advice or other act or omission complained of is wrong in the light of the instructions given by the client to the counsel and in light of the information placed before that counsel. What, then, is the standard of care that the courts look to in order to determine whether counsel has fallen below the standard of the ordinary competent counsel?

• In attempting to answer the difficult question of whether a decision made by a solicitor in the conduct of a case constitutes negligence rather than a mere error in judgment, the court will consider whether the error is so egregious as to constitute negligence. See: *Demarco v. Ungaro* (1979), 95 D.L.R. (3d) 385 (Ont. H.C.), *Bartolovic v. Bennett* (March 26, 1996), Doc. 95-CU-86639 (Ont. Gen. Div.) *Anastasakos v. Allen* (1996), 16 O.T.C. 413 (Ont. Gen. Div.), *Boudreau v. Benaiah* (1998), 37 O.R. (3d) 686 (Ont. Gen. Div.) *Karpenko v. Paroian, Courey, Cohen & Houston* (1980), 30 O.R. (2d) 776 (Ont. H.C.), *Aikmac Holdings Ltd. v. Loewen* (1993), 86 Man. R. (2d) 56 (Man. Q.B.). On the issues of the failure to call appropriate expert evidence and not seeking an adjournment at trial, Mr. McNeil did not commit egregious error.

• A case in negligence will not succeed where the only issue is conduct which relates to the exercise of judgment by counsel. See: *Anastasakos v. Allen* (1996), 16 O.T.C. 413 (Ont. Gen. Div.), *Blackburn v. Lapkin* (1996), 28 O.R. (3d) 292 (Ont. Gen. Div.) *Bartolovic v. Bennett* (March 26, 1996), Doc. 95-CU-86639 (Ont. Gen. Div.).

• If a solicitor fails to warn a client of the risk involved in a course of action and it appears probable that the client would not have taken the risk if he or she had been so warned the solicitor will be liable. See *Major v. Buchanan* (1975), 9 O.R. (2d) 491 (Ont. H.C.) . I regard this case as a leading case. It is referred to often and its principles have not been altered in the subsequent case law.

• Where a solicitor holds himself or herself out to a client as having particular expertise in a given area of law, a higher standard applies. The requisite standard is not that of a reasonably competent solicitor or ordinary prudent solicitor, but that of a reasonably competent expert. See: *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992), 29 R.P.R. (2d) 271 (Ont. Gen. Div. [Commercial List])), *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1985), 31 C.C.L.T. 201 (Ont. H.C.). Mr. Fellowes and Mr. McNeil are experts in insurance law.

• The fact that a solicitor's skill and knowledge are being sought by a client means that the solicitor must not allow his or her client to define the retainer unilaterally, in ignorance of material risks of which the solicitor is or should be aware. See: *Marbel Developments Ltd. v. Pirani* (1994), 18 C.C.L.T. (2d) 229 (B.C. S.C.). Kansa gave Fellowes, McNeil a free rein, but as it is not a sophisticated client, Fellowes, McNeil were obligated to taken an active role in assessing material issues relevant to Kansa's risk.

• While a solicitor should not be expected to act as a guarantor, he or she should take reasonable steps to protect the interest of the party which he or she is serving. See: *Yamada v. Mock* (1996), 29 O.R. (3d) 731 (Ont. Gen. Div.).

• There is a positive obligation on a solicitor to be aware of his or her client's ultimate goal in undertaking to

act for that client in a particular transaction. See: *120 Adelaide Leaseholds Inc. v. Thomson, Rogers* (1995), 43 R.P.R. (2d) 79 (Ont. Gen. Div.). Kansa was always interested in coverage issues.

• A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he or she has undertaken. A solicitor must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he or she has undertaken to enable him or her to perceive the need to ascertain the law on relevant points. See: *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.). Fellowes, McNeil was aware of the ramifications of non disclosure and misrepresentation. It was also aware of the impact of pollution exclusions on coverage matters in environmental claims.

• The court must determine the scope of the solicitor's retainer. Fellowes, McNeil were obligated to consider and advise on coverage issues at an early stage. See *Fasken Campbell Godfrey v. Seven-up Canada Inc.* (1997), 142 D.L.R. (4th) 456 (Ont. Gen. Div.).

Disposition

136 I have endorsed the amended trial that judgment in this matter is to go in accordance with these reasons and the reasons released on.

137 I see no reason why costs should not follow the events, but as I have not heard submissions on costs, I invite counsel to re-attend to make submissions on costs including whether they are to be fixed or assessed.

Counterclaim allowed in part.

FN* Additional reasons at (June 30, 1999), Doc. 94-CU-78160CM (Ont. S.C.J.).

FN1 Regrettably, Mr. McKeon died suddenly during this trial.

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