

KINGS



9 September 2003

Our Ref: PGJ/8648904/kal

PRIVATE & CONFIDENTIAL

The Most Reverend Ian George
 Archbishop of Adelaide
 Anglican Church Office
 26 King William Road
 NORTH ADELAIDE SA 5006

By Courier

and to:

The Reconciliation Committee

Dear Archbishop and Reconciliation Committee

District Court Action – BYN and REDACTE v The Synod of the Diocese of Adelaide of the Anglican Church of Australia Inc.

1. Enclosures and Introduction

- 1.1. Yesterday evening we met with Mr R C White QC to settle the draft Defence that we have prepared in this matter.
- 1.2. Please find **attached** a copy of the draft Defence settled by Mr White marked "DRAFT 3".
- 1.3. The Defence must be filed and served by no later than this **Friday, 12 September 2003**.
- 1.4. Therefore, we request your comments as a matter of urgency to ensure that the draft Defence reflects your instructions to us.
- 1.5. Perhaps the quickest way of obtaining those instructions is to have a meeting tomorrow with the Archbishop and as many members of the Committee as possible. Once the Archbishop and Reconciliation Committee are happy with the draft then it will be necessary for us to forward a copy to Minter Ellison (Royal & Sun Alliance) and Allianz (HIH Relief Scheme) for their input.

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- 1.6. Set out below are:
 - 1.6.1. our general comments reflecting our approach to drafting the Defence;
 - 1.6.2. matters that we need instructions on from both the Archbishop and Reconciliation Committee;
 - 1.6.3. matters that we need specific instructions on from the Archbishop.
- 1.7. Although we have attempted to be as accurate and comprehensive as possible in drafting the Defence, we suspect, in a matter such as this, that the Defence will have to be amended once new evidence (documentary and oral) comes to hand. However, it is important that the Defence is as accurate as possible from the outset.

2. Our General Approach

Pleading Rules

- 2.1. Without going into too much legal technicality, it used to be that a Defence, when answering allegations in a Statement of Claim, could "*admit*" some allegations; "*deny*" other allegations; and where the defendant was not sure of the position, respond in terms – "*the defendant does not know and therefore cannot admit*".
- 2.2. However, the pleading rules have now changed and all that is required is for a defendant to:
 - 2.2.1. "*admit*" those allegations that it is prepared to admit;
 - 2.2.2. raise any "*matters of law*" that may provide a defence;
 - 2.2.3. positively plead an "*alternative case*" if there is one.

Therefore, it is important to note that if an allegation in the Statement of Claim is not *admitted* then automatically it is denied. Hence, if when reading the enclosed draft Defence there is no specific answer to an allegation in the Statement of Claim then it should be understood that that specific allegation is *denied*.

3. Legalistic Approach v Pastoral Approach

- 3.1. In drawing the Defence we have, where possible, attempted to strike a balance between a "*strict legal approach*" (i.e. to protect the Church's legal position and to present its defence) and a "*pastoral approach*" (i.e. to keep the door open for settlement of these claims).
- 3.2. In addition, we have also kept in mind that any potential insurer(s) may wish to adopt a more "*legalistic approach*" than the Church. Therefore, until the insurance position is confirmed one way or the other, we have drafted the Defence keeping in mind that the Church should act as a "*prudent uninsured*".

- 3.3. Therefore, with these guiding principles in mind, and where possible, we have watered-down or tried to keep neutral a number of pleas which may otherwise be interpreted by the plaintiffs as inflammatory. However, you must be aware that in a number of instances we have had to adopt a position that may provoke an adverse reaction and hence adverse publicity against the Church. For example, but without being comprehensive, paragraph 35 of the Statement of Claim alleges that The Synod owed a duty of care to the plaintiffs arising from the defendant's position "*as the organiser and sponsor of CEBS*". In answer to these allegations you will note (paragraph 15 of the draft Defence) that we specifically deny that The Synod owed the duty of care as alleged. Understandably, the plaintiffs (and possibly the Press) may interpret such a plea as the Church attempting to avoid all responsibility by denying the existence of a duty of care. However, in our opinion, it is important that the duty of care (as alleged) be denied because there is a real question as to the extent that The Synod was responsible for activities that went on within CEBS.
- 3.4. Therefore, we raise, as a matter of precaution, that some aspects of the Defence may generate adverse publicity but we have done the best we can to minimise that risk but at the same time presenting the Church's defence.

4. Specific Instructions: Archbishop and Reconciliation Committee

Introduction

- 4.1. In this letter we will not address each and every allegation in the Statement of Claim and our proposed response in the Defence. Rather, we ask that you cross reference each allegation in the Statement of Claim with the Defence and if you have any specific queries then we can discuss those in conference. Again, we ask that you keep in mind that if an allegation is not admitted then by virtue of the *District Court Rules* it is denied. However, there are some matters with respect to which we require your specific instructions because the Church may be perceived as being unnecessarily "*technical*" and not taking an appropriate "*pastoral response*". These matters are set out below.

Relationship Between The Synod and CEBS

- 4.2. Paragraph 10 of the Statement of Claim says:

"10. *The first and second Plaintiffs allege that at all material times the Defendant was nominally, or held out to be, the person or body having ultimate control of or responsibility for the CEBS organisation in the said State.*"

In paragraph 6 of the Defence we answer this allegation in the following terms:

"6. *The defendant denies the allegations in paragraph 10 of the Statement of Claim and specifically denies that it was nominally, or held out to be, the body having ultimate control of or responsibility for CEBS in South Australia. The defendant further says that CEBS, prior to and after*

its incorporation (2 July 1980) acted as an independent and self-controlling association administered through a State Organisation, Federation Organisation and Branch Organisation."

- 4.3. In relation to this plea there are two matters to discuss. First, we think there is a real issue concerning The Synod's responsibility for CEBS. On our investigations to date, although CEBS could be described as an association/society within The Synod, we understand that it operated quite independently of The Synod and was controlled very much at Branch (Parish) level by the incumbent Priest who was responsible for appointing the Branch Governor. Therefore, on present information, we think there is a reasonable dispute as to the extent to which (if any) The Synod was responsible for CEBS.
- 4.4. Secondly, we point out that a possible consequence of The Synod denying responsibility for CEBS is that there may be ramifications for that Society, e.g:
- 4.4.1. out of an abundance of caution the plaintiffs may seek to join CEBS as a second defendant. This could then create a conflict between The Synod and CEBS;
- 4.4.2. if CEBS was sued and found liable who would pay? In this regard there are two aspects. First, prior to CEBS being incorporated (2 July 1980) it was a voluntary association. Therefore, those exposed to liability may be the CEBS leaders from time-to-time in each Parish. Second, as from the date of incorporation, was CEBS insured? If not, any liability would have to be satisfied out of its current assets.
- 4.5. Having raised these problems, we remain of the view that paragraph 6 of the Defence should stand as it is. However, may we have your specific instructions?

Representative Action v Single Actions

- 4.6. Referring to paragraph 11 (page 4) of the Statement of Claim and the relief sought in paragraph 1 (p24) of the Statement of Claim, you will note that the named plaintiffs (Messrs BYN and REDACTE) not only bring the action in their own names but also in a "representative capacity", i.e. representing a class of individuals (yet to be defined) who were abused by Brandenburg. Although this does not have to be finally decided before filing the Defence consideration has to be given as to whether the Church is prepared for this matter to proceed as a representative action or, alternatively, whether it will seek to argue that each claimant should bring their own action. There is also an issue as to whether the current proceedings as instituted should have Mr BYN and Mr REDACTE as joint plaintiffs. In our opinion, there are advantages and disadvantages in this matter proceeding as a representative action. We can address those advantages and disadvantages in more detail in conference but for the present we seek your instructions as to whether we are to maintain the following pleas in the Defence:

"7. *Save that the defendant admits that the plaintiffs sue for themselves and to purport to sue as representative*

parties, it denies the balance of the allegations in paragraph 11 of the Statement of Claim. The defendant denies that it is appropriate for this action to be maintained as a representative action.

18. The defendant opposes the Orders sought by the plaintiffs in Part 2 of the Statement of Claim and in particular says:

18.1 That this action should not be maintained as a representative action;

18.2 It is not appropriate for the claim of the plaintiffs to be joined in the one proceeding."

Bases of Liability

- 4.7. The plaintiffs assert that The Synod is liable on one or a number of bases, i.e:
- 4.7.1. the defendant owed to the plaintiffs a non-delegable duty of care (paragraph 33);
 - 4.7.2. in the alternative, the defendant is vicariously liable for Brandenburg's actions (paragraph 34);
 - 4.7.3. in the further alternative, the defendant owed a duty of care to the plaintiffs (paragraph 35).
- 4.8. By reference to paragraphs 13, 14 and 15 of the Defence, we have denied each basis of liability. Of course, the most controversial one is the third, i.e. that The Synod did not owe a "*duty of care*" to the plaintiffs. However, as discussed above, there are arguments that may support a finding that in law The Synod did not owe a duty of care in relation to Brandenburg's activities whilst he worked in CEBS. However, may we please have your instructions in this regard.

Time Point

- 4.9. In South Australia an injured person (being an adult) must bring a claim for personal injuries within three (3) years of the accrual of the cause of action, i.e. date of injury. For an infant the three year time limit runs from the time they turned 18. The current plaintiffs, and we suspect most of the other potential plaintiffs, are therefore out of time. Accordingly, each plaintiff will make an application pursuant to Section 48 of the Limitations of Actions Act seeking an extension of time. There are two aspects to the granting of an extension of time. First, the plaintiff must produce a "*new material fact*", e.g. a medical report providing a formal diagnosis (e.g. post-traumatic stress disorder). Assuming that a "*new material fact*" is established then the second step is for the court to exercise its "*discretion*" as to whether it is just in all of the circumstances to grant an extension of time. In reality, we suspect that each plaintiff will be able to produce a "*new material fact*" and accordingly the

real argument will turn on the exercise of the "discretion" and in particular whether or not the Church can demonstrate that it has been "prejudiced" by the late issuing of proceedings. There is a risk that in taking a time point the Church will be perceived as being unduly technical. However, we suspect that if ultimately an insurer takes over the defence of the matter, it will wish to maintain the time point even if only as a bargaining tool during negotiations.

- 4.10. Therefore, with these matters in mind, we have raised in a "diluted" form the time point in paragraphs 16 and 17 of the Defence, i.e:

"16. *The defendant says that this action, being an action in which the damages claimed consist of or include damages in respect of personal injuries to the plaintiffs, was not commenced within three years next after the cause(s) of action accrued contrary to the provisions of Section 36 of the Limitation of Actions Act 1936 (as amended) and accordingly each of the plaintiffs is barred from bringing this action.*

17. *The defendant pleads that by reason of the lapse of time, it will be prejudiced in the conduct of the defence of each of the plaintiffs' claims."*

- 4.11. You will note that we have not provided particulars of any "prejudice".
- 4.12. May we please have your instructions in relation to these paragraphs of the Defence. When considering your instructions we ask that you keep in mind that in all probability a potential insurer will wish to maintain those pleas and that, accordingly, you should maintain them for the present acting as a "prudent uninsured".

Costs

- 4.13. Pursuant to the *District Court Rules* a prospective claimant should, at least 90 days before issuing proceedings, provide a detailed formulated claim (with supporting information) to the defendant/its insurer to enable the defendant/insurer to enter settlement negotiations. Failure to provide a detailed formulated claim can have consequences in relation to costs, i.e. the plaintiff may recover no costs or only reduced costs. Therefore, in this regard we have pleaded in paragraph 20 of the draft Defence the following:

"20. *The plaintiffs did not individually, collectively or in their alleged representative capacity, 90 days prior to the issue of these proceedings, forward to the defendant, details of the intended claim for damages, together with supporting documentation in breach of Rule 6A of the District Court Rules. The defendant says therefore that the plaintiffs should not be entitled to their costs of action, or alternatively shall be entitled to partial costs only."*

- 4.14. Again, the Church may be criticised for raising this plea on the basis that it is being unduly technical. However, in this regard, you may recall that on a

number of occasions we have requested Ms Litchfield to provide detailed formulated claims. However, she has declined to do so. In the circumstances, we seek your instructions as to whether we are to maintain this plea. Again, we suspect that any potential insurer would ask for that plea to be maintained. ←

5. Specific Instructions – Archbishop

5.1. Last Monday, 1 September 2003, we attended upon the Archbishop to take his specific instructions in relation to paragraphs 27, 28, 29, 30 and 31 (31.1, 31.2) of the Statement of Claim.

5.2. We think that the pleas contained in paragraphs 27 – 31 (inclusive) are an attempt to “set up” the Archbishop in two respects:

5.2.1. first, to ensure that he gives evidence in relation to the allegations and therefore be exposed to cross-examination by the plaintiffs’ counsel;

5.2.2. second, setting up a claim for exemplary damages, (i.e. punitive damages, page 25 of Statement of Claim).

5.3. In this regard we draw the Archbishop’s attention to paragraphs 10, 11 and 12 (12.1 – 12.4) of the Defence which say:

“10. *Save that the alleged meeting may have occurred in late 1999 or early 2000, the defendant admits the allegations in paragraph 27 of the Statement of Claim.*

11. *The defendant admits the allegations in paragraph 28 of the Statement of Claim insofar as it alleges that the second plaintiff provided information about the behaviour or Brandenburg and sexual assaults by him. Save as expressly admitted, the defendant denies the allegations contained in paragraph 28 of the Statement of Claim.*

12. *In answer to the allegations in paragraphs 29, 30, 31 and 31.1 – 31.2, the defendant admits that the second plaintiff did give his business card to the Archbishop but otherwise denies the balance of the allegations contained in those paragraphs. The defendant says that during the Archbishop’s meeting with the second plaintiff, the Archbishop:*

12.1 *listened carefully to the second plaintiff;*

12.2 *did not refuse to accept that there was a problem with Brandenburg;*

12.3 *on a number of occasions during the meeting asked the second plaintiff what could be done to help him;*

12.4 *did offer the second plaintiff counselling."*

- 5.4. Specifically, in relation to these pleas raised in the Defence, we ask that the Archbishop carefully reads and considers them to ensure that they reflect his version of events and his answers to the allegations made against him. In this regard, it is important that the Archbishop understands that he can be cross-examined on the matters raised in the Defence and therefore it is important that the Defence accurately reflects his version.
- 5.5. In this regard, we confirm that when taking instructions from the Archbishop, he made reference to making some notes in a diary. Prior to conferring and settling the draft Defence, we should be pleased if the Archbishop would locate that diary so that we may cross-check any contemporaneous notes made in that diary with the matters pleaded in the Defence. In this regard, we cannot overstress, that the Archbishop must be content with the Defence generally and specifically in relation to the allegations contained in paragraphs 27 – 31 (inclusive).

6. Conclusion

- 6.1. In summary, we ask that the Archbishop and Reconciliation Committee again read the Statement of Claim (previously forwarded) and the attached draft Defence and provide us with instructions in light of the matters raised in this advice.
- 6.2. We suggest that we urgently meet some time on Wednesday, 10 September 2003.
- 6.3. Once the Archbishop and Reconciliation Committee is satisfied with the content of the draft Defence we shall forward a copy to Allianz (HIH Relief Scheme) and Minter Ellison (Royal & Sun Alliance) for their input. In this regard there may be some "*tension*" between what the Archbishop/Reconciliation Committee want in the Defence and what the potential insurers may want. Ultimately, any such "*tension*" should be resolved in favour of the insurers to keep them on-side. The Church should continue to act as a "*prudent uninsured*".
- 6.4. We ask that you keep in mind that the Defence must be filed and served by this coming Friday.
- 6.5. Once the Defence has been filed then we suggest that the Archbishop and the Reconciliation Committee meet with Mr White next week so that we can generally review the matter and discuss:
- (a) The conduct of this litigation on the one hand; and
 - (b) The possibility of an alternative dispute resolution procedure on the other hand.

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We look forward to meeting with you and taking your further instructions.

Yours faithfully
HUNT & HUNT

Per:


PETER G JONES

Direct Line: **REDACTED**

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Enc. Draft Defence No. 3

P.S. We confirm the meeting for tomorrow at 10.30 am at the Church Office.