MONAHAN + ROWELL

LAWYERS

17 March 2006

Attn: Ms Marita Wright
Liability Claims Officer – Special Issues
Catholic Church Insurances Limited
DX 30577
SOUTH MELBOURNE VIC

Dear Marita,

RE: SYDNEY ARCHDIOCESE –JOHN ELLIS / FR AIDAN DUGGAN
Our Ref: pjm/40492 Your Ref: 2372019

1. Thank you for sending me a copy of the lengthy (56 page) judgment of Patten AJ of the New South Wales Supreme Court dated 3 February 2006, in which he dealt with the application by Mr. Ellis to extend the limitations period.

2. I have now had the opportunity to read the judgment carefully, and to review our own file in the light of the judgment.

Some Comments on the Judgment

3. As you know, Mr. Ellis originally sued three Defendants –

   (a) Cardinal George Pell, Archbishop of Sydney;

   (b) The Trustees of the Roman Catholic Church for the Archdiocese of Sydney; and

   (c) Fr Aidan Duggan.

4. As you obviously (and no doubt painfully) appreciate, the limitations application extended over ten hearing days from 25 July to 12 October 2005, with the lengthy judgment then having been handed down by Patten AJ on 3 February 2006.

5. In the course of the argument of the matter, Counsel representing Mr. Ellis indicated that they did not propose to proceed with their claim against the Third Defendant (Fr Duggan), who had died on 5 October 2004, very shortly after the action was instituted.

6. This left two Defendants.

7. In the judgment, Patten AJ concluded that there was no possible basis for the direct claim against Cardinal Pell, as it was pleaded. He has accordingly dismissed the action against Cardinal Pell with costs.

8. Ultimately, after quite a careful (but in some respects still rather superficial) review of the complex issues, the Judge extended the limitation period for the causes of action pleaded in the Statement of Claim against the Second Defendant, The Trustees of the Roman Catholic Church of Sydney, and reserved costs in that regard for further argument (which might have been done by now).

9. I note from the emails which have been provided to me that Corrs were seeking Senior Counsel's advice on the prospects of appealing the Plaintiff's successful extension of time against the Trustees. You will no doubt be informed when that advice has been obtained.

10. I should mention, however, that my own impression from the judgment is that there are a number of separate and distinct issues where Patten AJ reached certain relevant conclusions which could very easily be viewed differently be an Appeal Court. A great deal of his judgment really turns ultimately on a series of *"judgment calls"* which he has made. By way of example:-

    (a) Based on a somewhat limited and superficial analysis, he has concluded that there is *"an arguable case"* that *"the Trustees, at all relevant times, constituted the entity which the Roman Catholic Church in the Archdiocese of Sydney adopted and put forward as the permanent corporate entity or interface between the spiritual and temporal sides of the Church legally responsible for the acts and omissions of the Archbishop and his subordinates in the performance of his role"* (paragraph 73);

    (b) He has based this view about solely on a recently reported Canadian High Court case of John Doe v Bennett (2004) 236 DLR 577;

    (c) He has quoted extensively from that judgment in paragraph 66;

    (d) That judgment dealt with differently worded Canadian legislation, but legislation which also on its face limited the activities of the Diocesan corporation to issues relating to the holding of property. Patten AJ nevertheless concluded that the corporation had a broader purpose *"to serve as a point of legal interface between The Roman Catholic Church and the community at the Diocesan level"*;

    (e) Patten AJ stated clearly in paragraph 73 that *"I am not required to decide the matter finally"* and concluded only that *"the approach taken in Doe v Bennett is at least arguable in NSW"*;

    (f) It is quite possible that an appeal Court could view this issue differently, and make a more serious effort to decide whether the approach followed in the Canadian case really could be followed in NSW or not. If not, of course, the claim against The Trustees is doomed to fail and there is accordingly no point in intending extending the limitations period;

(g) He acknowledged in paragraph 79 that the issue about "*knowledge of the nature and extent of injury*" under Section 57 of the Limitations Act "*involves questions of degree and judgment*". He found that Mr. Ellis' symptoms progressively worsened and that it was not until September 2001, in a critical consultation with a psychotherapist named Mr. Murray, that he "*had the means of knowledge of the nature and extent of the personal injury caused by the alleged sexual assaults of Fr Duggan*". If it was earlier than that (even in August 2001), there was no proper legal basis for the extension;

(h) He expressly acknowledged that "*minds might differ*" on this issue;

(i) He then dealt with the question whether there can be a fair trial of the Plaintiff's action (paragraph 87 ff) and considered the "*undoubted prejudice to the Defendants arising from the delay*";

(j) Despite the fact that Fr Duggan died in October 2004 and was not able to provide a proper response to the Plaintiff's claim before that because of his ill health, he felt that the prejudice flowing from that was not sufficient to prevent a fair trial;

(k) He draws a particular inference against the Archdiocese in paragraph 89 of his judgment (that the Church would have been equally disinterested in pursuing a complaint made at the time by Ellis), on what appeared to me to be somewhat flimsy grounds;

(l) He accepted evidence about the death of a number of other apparently key figures in the Church hierarchy over the years, and concluded (page 54) that "*the evidence undoubtedly establishes that the Defendant will suffer prejudice if the action in tort is allowed to proceed*". In that process, he accepted that the passage of time would create significant difficulties in the assessment of damages. Despite this, he expressed the opinion that there could nevertheless be a fair trial of the Plaintiff's action "*albeit not a perfect one*"; and

(m) In that process, he drew another bold inference against the Archdiocese that "*there must be many people alive who could attest to Ellis' service of the Church even though it took place thirty years ago*".

11. The point I am seeking to develop in these observations is that Patten AJ reached a number of adverse conclusions and drew a number of adverse inferences against the Archdiocese at various points in his reasoning process, leading to his ultimate decision to extend the limitations period, where an Appeal Court might well take a different view on one or more of these points and thereby be led to a different conclusion.

12. In my view, what all of this points to is that there would be significant prospects of success in an appeal.

13. One further point which emerged in the judgment was the reference to the Archdiocese having provided Mr. Ellis with a draft Deed of Release before the action commenced, at the time of an early mediation, the Release having named Cardinal Pell and The Trustees of the Roman Catholic Church for the Archdiocese of Sydney as Releasors. This was used to base an argument that they must therefore have some potential legal liability, otherwise: why would the Archdiocese have stipulated the Release?

14. Although the point did not go very far in the reasoning of Patten AJ, I did want to record for you that neither CCI nor Monahan + Rowell provided that Release to Mr. Ellis or his lawyers. Having reviewed my file, I am reminded that Monsignor Rayner himself arranged a Towards Healing facilitation before Monahan + Rowell were instructed, using Mr. Raymond Brazel as the facilitator. Mr. Ellis and his wife attended without legal representation. Monsignor Rayner in fact took Mr. Ellis around to meet Fr Duggan. He must have provided the draft Release. An offer of $30,000 was made by the Archdiocese direct at that time (20th of July 2004) but that offer was vigorously rejected.

15. Accordingly, just in case it ever becomes of any significance between CCI and the Archdiocese, the position is that neither CCI nor Monahan + Rowell had anything whatever to do with that early facilitation, the original $30,000 offer or the provision of the draft Release.

Review of my file

16. Having read the judgment, I decided to review my file just to remind myself about the extent of our involvement in the matter early on. I will **attach** some documents which you might usefully keep handy on your file for future reference, in case there is ever any debate with the Archdiocese about these points, but draw your attention to the following:-

(a) Monahan + Rowell was first instructed (by Lesley Hirten) by email dated the 3rd of August 2004;

(b) Our letter of instruction was dated the 3rd of August and received on the 5th of August 2004;

(c) Jumping ahead, we were ultimately "*discharged of our duties*" by Cardinal Pell by email dated the 14th of September 2004 from Dr Michael Casey;

(d) We accordingly only acted in the matter for less than six weeks;

(e) On the 3rd of September 2004, we were told by email from Dominic Cudmore that "*the Cardinal has indicated today that he wishes Corrs to be involved in some way in this matter*" and we were specifically instructed at that point to "*put this matter in a holding pattern until you hear from us again*";

(f) That was precisely a month after our first instructions;

(g) Before that, I had been dealing directly with Monsignor Rayner, requesting him for information and assistance in the early investigation of the matter (and particularly the question of "*prejudice*");

(h) I had told Monsignor Rayner right from the beginning that "*this particular claim is a very worrying and somewhat urgent one*" and that David Begg & Associates and their client seemed to have researched the matter to a great degree of intensity and complexity –

"*I have never seen a legal letter researched to this degree of intensity and complexity. It reveals that someone has gone into the legal position with incredible thoroughness. The letter also contains a number of arguments which I have not come across before in*

any previous case, so we are dealing with a novel situation. The letter also reveals that someone (with a fair degree of knowledge) has done a lot of research about the Canon Law... Taking all of this into account, coupled with his rather peremptory rejection of the suggestion of a reparation figure of $30,000, this could well turn out to be a worrying and difficult claim";

(i) I transcribed a telephone interview with Monsignor Rayner on the 24th of August, and there was discussion then about Corrs' involvement, and also some rather confident and ambitious statements about liability, limitations, prospects of success, etc by Monsignor Rayner;

(j) My first communication with Mr. Ellis' solicitors (David Begg & Associates) was on 3 September;

(k) At that stage, he was still interested in reconvening a mediation and continuing negotiations;

(l) I wrote to Monsignor Rayner and Dominic Cudmore in this regard on 14 September telling him that David Begg was "*keen to participate in a further mediation before the litigation builds up a head of steam*", adding:-

"*As I mentioned to you, Dominic, I would in ordinary circumstances unhesitatingly and strongly recommend that we should proceed down this track, and have a final attempt at exploring the settlement scenario before we get too far down the litigation path. As you know, this matter has the real possibility of becoming a major legal battleground, involving considerable expense and perhaps even some legal uncertainty for the parties. Accordingly, if a reasonable settlement could be negotiated, that would seem to be advantageous for all concerned. I am, however, of course very conscious of the fact that Cardinal Pell has his own views about the matter, and that he might wish Corrs to be involved*" (!!);

(m) In a letter to Monsignor Rayner dated 3 September 2004, I drew his attention to the fact that the action instituted by Mr. Ellis specifically claimed aggravated and exemplary damages, and pointed out that these are not covered by the Policy and (if sustained) would ultimately be the responsibility of the Sydney Archdiocese; and

(n) When told that Corrs were to be appointed, I discussed the matter in some detail with Paul Reynolds. He expressed a concern that CCI had already informed the Sydney Archdiocese that indemnity was extended, whereas he felt that this should have been qualified. He felt that CCI should only be extending indemnity under the Policy for the abuse which occurred while Ellis was a minor (between the ages of 14 and 18) and pointed out that there is no indemnity under the Policy for "*adult boundary violations*" after he turned 18. He felt that the indemnity should be specifically qualified in that regard, particularly if there is ultimately a settlement to be split.

17. I thought that I would just record these points and observations for posterity, in case they ever become significant. With the hard copy of this letter, I will send Joe copies of the following correspondence and documents, which you might just like to keep handy on your file for future reference:-

(a) My initial letter to Monsignor Rayner dated 5 August 2004;

(b) My letter to Monsignor Rayner dated 23 August 2004;

(c) My letter to Monsignor Rayner dated 25 August 2004 (seeking further documents and information);

(d) The transcript of my interview with Monsignor Rayner on 24 August 2004;

(e) The letter of service from David Begg & Associates to Monsignor Rayner dated 31 August 2004;

(f) My letter to David Begg & Associates dated 3 September 2004;

(g) My letter to Monsignor Rayner dated 3 September 2004 (and the post script on the second page referring to aggravated and exemplary damages – this letter referring to the possibility of us reopening settlement negotiations "*in a less frenetic and litigious environment, and hopefully resolve this claim without undue legal fees and cost*";

(h) Email from Dominic Cudmore dated 3 September 2004 (mentioning Corrs' involvement);

(i) My letter to Monsignor Rayner dated 14 September 2004;

(j) Email from Michael Casey dated 14 September 2004 (instructing that Paul McCann at Corrs would act for the Archdiocese in this matter);

(k) Email from Dominic Cudmore dated 16 September 2004;

(l) Letter from Corrs dated 16 September 2004; and

(m) My letter to Paul McCann of Corrs dated 24 September 2004.

18. If you would like to discuss the judgment, or the matter generally, or (in particular) the indemnity position, further with me, please give me a ring.

Yours sincerely,

M+R.

Patrick Monahan
(Senior Partner)
MONAHAN + ROWELL

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