

ANTHONY JOHN FOSTER & ORS

and

NOREEN HARRISON and OTHERS**MEMORANDUM**

1. We enclose draft summons in one of these proceedings seeking orders in relation to the amended statement of claim.
2. As you will note, the nature of the application in respect of each defendant depends upon the particular allegations made against each of them. The draft summons seeks that certain paragraphs of the statement be struck out as against each defendant under Rule 23.02.
3. The draft summons also seeks orders for summary judgment in favour of the third and fourth defendants. The legal basis of the claim against the third defendant is flawed. As we have previously discussed, the third defendant cannot be “sued as representing the office of the Archbishop of the Roman Catholic Diocese of Melbourne” and is not a “corporation sole” as pleaded in paragraph 4 of the amended statement of claim.
4. Further, the factual basis of the claim against the third defendant is flawed as the third defendant was not the Archbishop of the Roman Catholic Archdiocese of Melbourne at the relevant time. We understand that our instructing solicitor has personal knowledge of when the third defendant became Archbishop of the Roman Catholic Archdiocese of Melbourne. It will be necessary to file an affidavit deposing to these facts. The affidavit should also exhibit the canons of the Code of Canon Law referred to in the amended statement of claim.
5. The draft summons also seeks summary judgment in favour of the fourth defendant. This will depend, in part, upon the receipt of further instructions in relation to the nature and relationship between the fourth defendant and:

- (1) O'Donnell as the resident of the Sacred Heart presbytery; and
- (2) the Catholic Education Office whom we assume conducted the Sacred Heart School.

We are awaiting further instructions as to the basis upon which parish priests like O'Donnell were in possession of the presbytery and upon which the Catholic Education Office conducted the school. The application by the fourth defendant for summary judgment should only be made if affidavit evidence as to these matters is available. If obtaining these instructions will cause more than a very short delay the summons should be issued deleting paragraph 4(a) which seeks summary judgment by the fourth defendant. If the affidavit is available prior to the hearing a further summons could then be issued.

6. In our view, it is unlikely that these applications will be successful in respect of all defendants. However, given the nature of the pleading and the fact that particulars provided in support of at least one allegation are relevant to more than one defendant, it is appropriate to seek the relief of the kind we have sought in the draft summonses attached hereto.

8 December 2004

D.G. COLLINS

K.J.A. LYONS