

| | |
|--------------|------------------------------------|
| FILED | SUPREME COURT OF N.S.W. |
| | 1 Form 62 (Version 2) Rule 35.1 |
| \$ | REC No. |

AFFIDAVIT OF JOHN DALZELL – 11 April 2006**COURT DETAILS**

| | |
|-------------|----------------------------------|
| Court | Supreme Court of New South Wales |
| Division | Common Law |
| Registry | Sydney |
| Case number | 20308 of 2004 |

TITLE OF PROCEEDINGS

| | |
|----------------------|--------------------------|
| First plaintiff | <u>John Andrew Ellis</u> |
| Number of plaintiffs | One |

| | |
|----------------------|---|
| First defendant | <u>His Eminence Cardinal George Pell Archbishop of Sydney</u> |
| Number of defendants | Three |

FILING DETAILS

| | |
|-----------|---|
| Filed for | Second Defendant |
| Address | c/- Corrs Chambers Westgarth Lawyers Governor Phillip Tower Level 32 1 Farrer Place Sydney NSW 2000 |

AFFIDAVIT DETAILS

| | |
|------------|---------------------------------|
| Name | John Dalzell |
| Address | 1 Farrer Place, Sydney NSW 2000 |
| Occupation | Solicitor |

On 11 April 2006, I, John Dalzell, of Governor Phillip Tower, 1 Farrer Place Sydney in the state of New South Wales, solicitor, say on oath:

- 1 I am a solicitor in the employ of Corrs Chambers Westgarth (**Corrs**), solicitors for the first and second defendants and as such have conduct of this matter under the supervision of Mr Paul McCann, a Corrs Partner.
- 2 At all material times, I have had the day-to-day conduct of this matter and was responsible for, among other things, corresponding with the plaintiff's lawyer, David Begg of David Begg and Associates (**Mr Begg**).
- 3 I make this affidavit in support of the Second Defendant's motion seeking leave to withdraw admissions of fact which are deemed to have been made by the Second Defendant under UCPR 17.3(2) by reason of the Second Defendant's failure to respond within 14 days to a Notice to Admit Facts served by the plaintiff on 8 March 2006.

- 4 Exhibited to me at the time of swearing this affidavit and marked "JD-1" is a folder of documents. The documents in this folder have been separated by tabs. Where in this affidavit I have first referred to a document in JD-1, I have referred to it using the respective tab number.

Procedural history

- 5 By his Statement of Claim filed 30 August 2004 and his Amended Statement of Claim filed with leave on 25 August 2005, the plaintiff seeks damages for personal injury arising from allegations of sexual abuse between 1979 and 1987.
- 6 On 10 December 2004, I received a Notice to Admit Facts from the plaintiff. A true copy of that notice is exhibited at **Tab 1**.
- 7 On 20 December 2004 I served a Notice Disputing Facts upon the plaintiff in accordance with instructions from the Second Defendant. A true copy of that notice is exhibited at **Tab 2**.
- 8 On 15 June 2005, I caused a draft Defence filed on behalf of the first and second defendants to be served on the plaintiff (**draft Defence**). A true copy of that document is exhibited at **Tab 3**. On 5 September 2005, I caused a Defence in answer to the plaintiffs Amended Statement of Claim to be filed and served upon the plaintiff (**Defence**). A true copy of that document is exhibited at **Tab 4**.
- 9 By his Amended Notice of Motion filed in court on 25 July 2005, the plaintiff sought relief under section 58 or, in the alternative, section 60G of the *Limitation Act 1969* (NSW), seeking an extension of the limitation period.
- 10 The plaintiff's Notice of Motion was heard before the court on the following dates:
- (a) 25 July 2005 to 28 July 2005 (inclusive); and
 - (b) 10 October 2005 to 12 October 2005 (inclusive).
- 11 On 3 March 2006, his Honour Acting Justice Patten handed down judgment on the plaintiff's Notice of Motion. A true copy of the judgment is exhibited at **Tab 5**.

Circumstances in which deemed admission inadvertently occurred

- 12 Following the delivery of the judgment, on 8 March 2006, I received a facsimile from Mr Begg which, among other things, attached a further Notice to Admit Facts. A true copy of that correspondence and notice is exhibited at **Tab 6**.
- 13 Also on 8 March 2006, I received a telephone call from Mr Begg. A true copy of my file note of that conversation is exhibited at **Tab 7**.
- 14 On Wednesday 15 March 2006 the matter came back before his Honour Acting Justice Patten for an argument on the costs of the plaintiff's Notice of Motion.
- 15 On 28 March 2006, I received an email from Mr Begg. A true copy of that correspondence is exhibited at **Tab 8**.
- 16 On 30 March 2006, I caused a Form 59A Holding Summons for Leave to Appeal the decision of his Honour Acting Justice Patten delivered on 3 March 2006 to be filed in this court and served upon the plaintiff.
- 17 On 31 March 2006, I received a facsimile from Mr Begg. A true copy of that correspondence is exhibited at **Tab 9**. In this facsimile, Mr Begg referred to the Notice to Admit Facts that was served on 8 March 2006 (Tab 6), specifically that the facts contained within that notice were now deemed to have been admitted.

- 18 On the same day, 31 March 2006, I caused a facsimile to be sent to Mr Begg. Attached to this facsimile, by way of service, was a Notice Disputing Facts. A true copy of that correspondence is exhibited at **Tab 10**.
- 19 On 3 April 2006, I received a further facsimile from Mr Begg, a true copy of which is exhibited at **Tab 11**.
- 20 Between 8 March 2006, when I received the Notice to Admit Facts (Tab 6) and 31 March 2006, when I received Mr Begg's facsimile (Tab 9), I had not sought nor received instructions from the second defendant to admit or dispute the facts contained in the Notice to Admit Facts. Nor, during this period, did I give due consideration to the matters contained within the Notice to Admit Facts.
- 21 Whilst I did not give due consideration to the matters contained in the Notice to Admit Facts, I implicitly assumed that, in light of the previous Notice Disputing Facts (Tab 2) and the correspondence and communications between myself and Mr Begg (Tab 1, Tab 2, Tab 3, Tab 7 and Tab 8) that took place immediately following the handing down of his Honour Acting Justice Patten's decision on the plaintiff's Notice of Motion, that the time for responding to the Notice to Admit Facts, as set down by UCPR r17.3(2) would be suspended by implied agreement between the parties, or in any event, that the plaintiff would not seek to rely upon any non-response by the second defendant to the Notice to Admit Facts.
- 22 I have now consulted UCPR r17.3(2) and sought advice from counsel and realise that the consequences of not responding to a Notice to Admit Facts are automatic under the rules. I had not previously turned my mind to this. In any event, it is clear from Mr Begg's letter dated 31 March 2006 that the plaintiff is now seeking to rely on the strict terms of UCPR r17.3(2).
- 23 I now realise that my failure to respond to the Notice to Admit Facts was an oversight, and the implicit assumption which I made was erroneous. Had I appreciated the correct position under r17.3(2), I would have sought instructions as to whether to file a Notice Disputing Facts. Having now informed my client of the true position under UCPR r17.3(2), I am instructed that had I informed my client of the true position under UCPR r17.3(2) prior to the expiry of the time for responding to the Notice to Admit Facts, I would have obtained instructions to file a Notice Disputing Facts before the time expired.
- 24 On 6 April 2006, I received instructions from the second defendant to appeal the decision of his Honour Acting Justice Patten.
- 25 I apologise to the Court for my oversight and do not wish my client's interests in the proceedings to be prejudiced as a result. The facts contained within the Notice to Admit Facts have at all times been contested in the proceedings, as set out in further detail below.

Contentious nature of the facts in the Notice to Admit Facts

- 26 Of the facts contained within the plaintiff's Notice to Admit Facts (Tab 6) I would make the following observations:
- (a) Fact 1
- This fact was disputed at paragraph 2 of the Notice Disputing Facts filed 20 December 2004 (Tab 2), in a facsimile from Corrs to Mr Begg dated 25 July 2005 (a true copy of which is exhibited at **Tab 12**), at paragraph 4 of the draft Defence (Tab



3) and at paragraph 4 of the Defence (Tab 4). This issue was dealt with at paragraph 7 of his Honour's judgment (Tab 5)

(b) Fact 2

This fact reflects the finding of his Honour Acting Justice Patten at paragraph 73 of his judgment which reads as follows:

"I am not required to decide the matter finally. Although the evidence relied upon by the Plaintiff in the form of minutes of meetings, records regarding pre-1986 activities beyond mere land holding etc. are in my opinion, somewhat equivocal, when such evidence is coupled with the evidence of Dr Austin, and the evidence of the submission of a draft release naming the Trustees, there is, I think, 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 as identified by Dr Austin. In other words, I think the approach taken in Doe v Bennett is at least arguable in New South Wales."

The liability of the second defendant has been, and continues to be a contentious issue in the case. The arguments put forward by both parties are addressed by his Honour at paragraphs 57 to 73 of the Judgment. The second defendant's dispute to its liability in this case is set out at paragraphs 8, 9, 9A, 10, 11, 17, 18, 19, 21, 22 and 23 of the Defence (Tab 4) and at paragraphs 8, 9, 10, 11, 17, 18, 19, 21, 22 and 23 of the draft Defence (Tab 3). The detail of the second defendant's argument on this issue is set out at paragraphs 103 to 151 of the first and second defendant's revised outline of submissions (**Submissions**). A true copy of the Submissions is exhibited at **Tab 13**;

(c) Fact 3

This fact was denied at paragraph 3 of the draft Defence (Tab 3) and at paragraph 3 of the Defence (Tab 4). Again, the practical role of the second defendant has been and continues to be a contentious issue in this case (see paragraphs 68-73 of his Honour's Judgment, Tab 5). The detail of the second defendant's argument on this issue is set out at paragraphs 103 to 119 and at 131 to 137 of the Submissions (Tab 13);

(d) Fact 4

This fact was 'not admitted' at paragraph 7 of the draft Defence (Tab 3) and was similarly not admitted at paragraph 7 of the draft Defence; and

(e) Fact 5

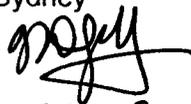
This fact was 'not admitted' at paragraph 16 of the draft Defence (Tab 3) and at paragraph 16 of the Defence (Tab 4).

27 The facts contained in the plaintiff's Notice to Admit Facts therefore have been contentious issues in this case. On the basis of my instructions, I anticipate that these issues will remain contentious in the proceedings.

SWORN on 11 April 2006

At Sydney

Signature of deponent



Signature of witness



Name of witness CHLOE NEIL

Capacity of witness Solicitor
CORRS CHAMBERS WESTGARTH