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15 April 1996

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Brother Julian McDonald, cfc
Provincial
St Mary's Provincial Administration
Christian Brothers
Private Box 154
BALMAIN NSW 2041

Dear Brother

RE: SLATER & GORDON PROCEEDINGS - SYDNEY AND MELBOURNE

We refer to previous discussions and summarise the position herein as follows:-

1. New South Wales proceedings

We confirm that these matters did not proceed to a Hearing as scheduled on the 18 March last. The proceedings were mentioned on several occasions during the week commencing the 18 March before Mr Justice Levine. However unfortunately a defamation hearing proceeded beyond its expected duration and the Western Australian litigation was not reached by His Honour.

The proceedings were eventually stood over for hearing for two weeks commencing Monday 3 June 1996.

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We confirm that the question of joining additional parties to the Sydney actions will not arise until such time as Mr Justice Levine has dealt with and granted (if he does) an amendment to Slater & Gordon on the Summons - Statement of Claim issue.

You will recall that the need to join parties to the proceedings in Sydney and Melbourne arises inter alia in an effort to ensure that:-

- (i) The Cross Vesting Application is not dealt with in circumstances where the Court has before it one New South Wales Defendant only;
- (ii) All parties who are potentially required to share any liability that might be determined to flow from the operation of the orphanages and the Child migration scheme are before the Court, actively involved in the proceedings and thus hopefully dispose to actively participate in relevant settlement negotiations.

2. Victorian Proceedings

These matters are now being pursued and Cross Vesting Applications are likely to be heard in June/July 1996. A telephone conference took place recently involving Messrs Gross, Santamaria, Mitch McKenzie and ourselves. Investigations into the four lead Plaintiffs in relation to the Melbourne cases are being pursued.

We will be requesting that these Plaintiffs attend medical examinations with Dr Milton. Carrington investigations will probably be instructed to undertake enquiries in Victoria and Western Australia.

3. Joinder of the Archbishop of Perth and other Parties from Western Australia to the Slater & Gordon proceedings in Sydney and Melbourne

You will recall the various reasons for having to take the politically awkward step of joining the Archbishop of Perth and/or the Catholic Episcopal Migration and Welfare Association (Inc) to the proceedings. Mr Santamaria is drafting the legal documents required.

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The Cross Claim against the Archbishop will be couched in carefully balanced and contingent terms.

The stronger claim for contribution appears to lie against the State of Western Australia. However, Mr Gross QC has advised that the prospects of securing Cross Vesting Orders will be appreciably enhanced if the Court can see through the proposed pleadings, the future involvement of not only the State of Western Australia but the Archbishop of Perth and other parties.

In this regard we enclose copy of letter to hand from Mr McKenzie dated 11 April 1996 in which Mr McKenzie raises the need to at least seriously consider joining to the proceedings the two surviving Western Australian brothers who were involved in the operation of the orphanages in Western Australia.

We can see that notwithstanding the practical human problems involved in such a proposition, it does warrant serious consideration and may have some impact on our chances of securing cross vesting orders.

Such orders would effectively resolve the litigation problem once and for all.

It would obviously be necessary for Brothers Doyle and O'Doherty to be carefully counselled as to the need for and significance of such a step.

There is a prospect that such a step would trigger involvement of the insurers for the Western Australian province.

It would seem that we will need to move quickly on this front.

We will be discussing the same with Mr Gross shortly and then contacting you for instructions.

4. Settlement

In accordance with our previous discussions we have pursued preliminary negotiations with Mr Gordon and he has foreshadowed a settlement package of 9.5 million dollars involving the withdrawal of the cases from Court, the

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establishment of a trust fund, the payment of legal costs to Slater & Gordon and the payment of some cash to some 50 Plaintiffs.

Settlement at this level would in our view amount to an inappropriate capitulation on behalf of the Christian Brothers.

However as discussed it would seem that there is potential for movement on the part of Slater & Gordon and we are currently awaiting advice from Catholic Church Insurances Limited before requesting instructions from the Brothers to put a concrete proposition to Mr Gordon.

As we see it, there are two reasons for liaising with CCI on Settlement:-

- (i) CCI may agree to contribute towards settlement now financially.
- (ii) Alternatively, in the absence of agreement on a contribution from CCI, if the Christian Brothers wish to settle the cases and keep the Claim for indemnity alive, CCI must be kept informed of the steps involved in achieving settlement and, if at all possible, agreement secured from them in relation to such steps and any final settlement outcome.

We are liaising also with the State of Western Australia and the representatives of the Commonwealth Government.

We consider it unlikely that the Commonwealth Government will agree to contribute anything towards a settlement.

There is a better prospect of contribution being available eventually from the state of Western Australia notwithstanding the letter from the Crown Solicitors office dated 4 April 1996, a copy of which is attached.

There is in all of these circumstances a prospect that if the Brothers wish to resolve this litigation they would have to fund the settlement themselves and then seek recovery of the settlement cost through the Courts from CCI and the State of Western Australia.

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It would clearly be very desirable to agree now on contributions and an overall settlement package assuming that Slater & Gordon are ultimately prepared to come down to a settlement level which is acceptable to the Order bearing in mind the relevant legal issues and the consequences for the Order of a settlement.

5. **Claim for Indemnity against CCI**

We await advice from CCI in relation to claim for indemnity.

We conferred recently with Mr Bill d'Apice a member of the Board to seek assistance on behalf of the Brothers with this process.

We understand that Mr McKenzie has conferred also with another member of the CCI Board.

6. **New South Wales Royal Commission**

The Commission is now proceeding with the paedophile reference.

Evidence has been given in respect of the activities of an alleged paedophilia at a Marist Brothers College.

The New South Wales Department of Community Services is currently under the spot light.

7. **Strike Out Application - The Body Corporate Created by the New South Wales Roman Catholic Church Community Lands Act**

You may recall the comments made by Mr Justice Cole in the Court of Appeal in respect of the Western Australian Legislation relevant to the Archbishop of Perth. His Honour expressed doubt as to whether the Western Australian Body Corporate equivalent of the Trustees is amenable to being sued for tortious liability.

As the High Court rejected the Application for Special Leave to Appeal Mr Justice Cole's Judgment would seem to be the most Senior Judicial pronouncement on this topic.

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The original 1942 New South Wales Act was couched in terms which are similar but not identical to the Western Australian Legislation which was being considered by the Court of Appeal.

The New South Wales Act was amended in 1986 to incorporate additional powers and responsibilities.

As things currently stand there would seem to be a potentially forceful argument for the proposition that the proceedings against the Trustees in respect of any case relying on an allegation of negligence before 1986 should be struck out on the basis that the Body Corporate cannot be held liable at law for such a claim.

However this argument has not been dealt with squarely as yet in that the Slater & Gordon High Court application was decided in the end on a different issue.

Moreover Mr Gross QC has previously indicated his view that notwithstanding the limited nature of the powers of a body corporate created under the original 1942 Act if a Body Corporate did engage in conduct outside of its powers in respect of the operation of orphanages outside of New South Wales then it is susceptible to being held liable in respect of any acts or omissions arising from the operation of such Institutes.

At this stage, this issue will be raised as part of the series of matters the Court must consider in respect of the interlocutory applications outstanding in Sydney and Melbourne. It may be that in either Sydney or Melbourne, this issue will, in light of Cole J. comments, be brought squarely before the Court.

We will need to monitor developments on this issue carefully.

8. Brother Coldrey

We continue to liaise with Brother Coldrey. He is providing assistance in relation to individual cases.

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Mr Johnson is preparing a paper on the position that should be taken in relation to Brother Coldrey and his writings when the legal process reaches this issue in a significant way.

We enclose herewith copy of an Affidavit sworn by Haydon Stephens dated 26 March 1996 which is self explanatory.

We enclose herewith copy of Affidavit sworn by our Mr Harrison in response which raises clearly the issue of whether the company should be the Defendant in such proceedings and also the proposition that the company created by the New South Wales Legislation does not possess documents such as "reaping the whirlwind" but only land holding type documents.

We will keep you informed as to developments.

Yours faithfully
CARROLL & O'DEA
Per.



c.c Brother B Brandon

c.c Mr M McKenzie

c.c Mr P McGowan

c.c Mr B Gross QC

c.c Mr P Johnson

c.c Mr P Santamaria