

HGH

14 February 1995

STRICTLY CONFIDENTIAL

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

BY FAX 810 3033

Dear Brother

RE: SLATER & GORDON PROCEEDINGS - SYDNEY

We refer to recent discussions and to the meeting to take place on 16 February next in Sydney in relation to legal matters.

We will have advice from Counsel prior to this meeting and will dispatch the same to you.

In the meantime, in this letter we set out to:

- A. Overview the current position with the Sydney proceedings brought by Slater & Gordon including current insurance considerations.
- B. Review alternative strategies for dealing with this litigation problem.

A. The Sydney Slater & Gordon proceedings

Background

In August 1993 some 241 applications for extension of time were filed in the Sydney Supreme Court by Slater & Gordon on behalf of clients alleging physical and sexual abuse in the Western Australian Institutes between the mid-1930's and the early-1960's. There was considerable publicity including an interview between Slater & Gordon and the Sydney Morning Herald in connection with the commencement of the proceedings.

The proceedings were brought against the Trustees of the Christian Brothers (the body corporate created by the New South Wales Roman Catholic Church Communities Lands Act - "the Trustees"), the Archbishop of Perth, individual Provincials as well as a number of other Archbishops and Bishops, the Commonwealth and the State of Western Australia. Orders suppressing the identity of the Plaintiffs were secured from the Sydney Supreme Court and remain on foot.

In October/November 1993 most states enacted Choice of Law Limitation Provision Statutes to deal with the growing problem of forum shopping. This legislation requires a Court in one state dealing with claims arising from another state to apply the limitation laws of the state in which the litigation arose.

In April 1994 the Brothers, on advice, resolved to adopt a pro-active defensive strategy in relation to these cases involving applications to invoke the intervention of the Court for orders dismissing or transferring the cases to the west. At the same time, counselling and similar pastoral assistance would remain open to any ex-student wishing to avail himself of such help including Slater & Gordon Plaintiffs.

In May 1994 Mr Justice Hayne, in the Victorian Supreme Court, cross-vested two matters filed in Sydney and Melbourne (VZ & VY) to Western Australia.

In November 1994 Mr Justice Anderson of the Perth Supreme Court ruled that the law of Western Australia should apply to any hearing of the VZ & VY cases. Slater & Gordon sought to appeal to the High Court on the rulings of Justices Hayne and Anderson and the High Court rejected the application for leave to appeal on 8 December 1994.

In the meantime, a hearing of preliminary procedural matters in relation to six of the Sydney Supreme Court cases commenced before Mr Justice David Levine in the Sydney Supreme Court on 5 December. By that time a number of the Sydney actions had been discontinued bringing the total to approximately 220. (Mr Gordon has recently indicated that in addition to those matters still before the Courts there are a further 40-50 individuals who have instructed Slater & Gordon to act for them in claims against the Christian Brothers who were too late to file proceedings prior to the enactment of the Choice of Laws Limitation Legislation). At the outset of the hearing before Mr Justice Levine Counsel for the Plaintiffs advised the Court that the Plaintiffs were discontinuing the proceedings in the six "test cases" and "probably" in relation to all matters against all Defendants except for the following Defendants who remain in the proceedings:

- (a) The Trustees.
- (b) Brother Julian McDonald (as Provincial of the St Marys Province and arguably successor in title to those Provincials who held office during the period that the Institutes in the west were administered from Strathfield).
- (c) Brother Paul De Noonan (as Provincial of the St Patricks Province and arguably successor in title to those Provincials who held office during the period that the Institutes in the west were administered from Melbourne).
- (d) Archbishop Hickey.

After some argument His Honour directed that the Defendant's application for cross-vesting proceed first. This judgment handed down on 6 December included the following:

"As I have said Mr Gross QC for the First Defendant submitted that the Plaintiff's submissions do not appear to distinguish between the wrong doing by individuals against the respective Plaintiffs and legal responsibility in relation to the remaining Defendants for any such wrong doing. Exhibits A and B do not constitute evidence establishing that any of the named Defendants had advance knowledge of the propensities or alleged propensities of the wrong doings or that they were in a position to prevent whatever occurred. It is of vital importance to bear in mind what actually bears upon the particular cases as between the Plaintiffs and these Defendants. In so far as the Plaintiff contends that "decisions were being made at Strathfield" the institution at Strathfield, as far as I understand the submission, is a Provincial Council which has not been made a Defendant".

However, following a lengthy hearing His Honour delivered a judgment on 15 December in which he refused to make the cross-vesting orders sought by the Brothers and Catholic Church Insurances Limited ("CCI") on behalf of Archbishop Hickey. This was a disappointing decision consistent with the impression that the Plaintiffs were able to make some ground during the course of the hearing. It would seem with this decision that our prospects of securing an early decisive outcome in relation to these proceedings have diminished. It had become increasingly apparent during the hearing that His Honour's attitude towards the Defendant's application had hardened as a consequence of the use that Mr Semmler QC was able to make of:

- (a) The distressing evidence in relation to the six particular cases which, in all probability, involve the most serious factual allegations which are likely to be levelled in relation to the Western Australian Institutions.
- (b) Some of the statements and conclusions incorporated in Brother Coldrey's work - "Reaping the Whirlwind".
- (c) The "Strathfield factor" and the geographical nexus between the allegations of negligence and the Western Australian Plaintiff's choice of Sydney as venue.

His Honour declined the cross-vesting application at this time. It is fair to say that he did not do so in final and emphatic terms. He observed that it was arguable that the Summons before him were not a "proceeding" amenable to crossvesting. Further there were some indications of tentativeness in his

judgment - page 25 - "At this stage the status quo should be maintained".
Page 26 - "I am of the view overall that justice can be done to both sides by refusing the order at this stage".

Current state of proceedings

His Honour will recommence the hearing on 20 February next, at which time he will deal with certain cost questions arising from the failed cross-vesting application as well as applications to have the Archbishop and Brothers McDonald and Noonan removed from the proceedings.

This hearing should take some two days. His Honour will then set aside perhaps a fortnight to hear the applications for extension of time in mid-1995.

In summary:

- (a) His Honour may well order that Brothers Noonan and McDonald be removed from the proceedings. He is less likely to remove the Archbishop. An appeal could arise on these issues. Ultimately, the Trustees may well be the sole Defendant in the proceedings with consequential elimination of some potential legal cost duplication.
- (b) There are still most significant legal hurdles to be overcome before the Trustees. a New South Wales asset holding vehicle could be held liable to pay compensation in relation to the Western Australian matters. Counsel's advice will deal with this in more detail.
- (c) There have been a number of recent superior court decisions which confirm that the Limitation Statute "amnesty" in New South Wales which expired a day or so after Slater & Gordon commenced these cases does provide the Plaintiffs with a most favourable legislative framework in which to argue that it is "just and reasonable" to extend the time to sue.
- (d) His Honour could well ultimately grant an extension of time and then cross-vest the proceedings to the West. Counsel's advice will deal with this issue.

- (e) His Honour would no doubt be hoping that some form of settlement might occur whilst he keeps the litigation alive.
- (f) Our ongoing examination of the documents relevant to the decisions made and policy developed by the Executives in Strathfield and Melbourne during the relevant period by no means indicate that the Brothers face insurmountable difficulties on the ultimate question of negligence even if a finding of negligence against earlier administrations could logically and legally form a basis for a finding of liability on the part of the Trustees. The records examined to date indicate that in most ~~cases~~ of complaint decisive action was taken by the relevant administration. It is now necessary to seek to recover some ground by shifting the emphasis from Brother Coldrey's tentative interpretations and conclusions to a more objective analysis of the documents and the facts.

Insurance Position

1. Public risk cover - QBE Insurance Limited

At this stage it would appear that the St Marys Province took out public risk cover in April 1959 with QBE Insurance Limited (QBE). Cover was not taken out in Melbourne it would seem until the late 1960s. The current six cases do not encompass allegations during the period of cover with QBE. Some of the other cases will. Whilst QBE have indicated that they do not regard themselves as being liable in relation to these claims we are keeping them informed as to developments.

2. Professional Standards - Special Issues Policy with Catholic Church Insurances Limited (CCI)

We await advice from Dunhills in respect of our request for clarification of CCI's position on indemnity for the Trustees. You will recall that this is a claims made policy which during the financial year ending 30th June 1994 (a year in which CCI was given notice of these claims) incorporated -

- (a) An overall limit on CCI's liability in the aggregate for all claims made under the policy of \$15 million.
- (b) A \$15,000.00 excess per individual wrongdoer accused per claim or series of claims (that is one \$15,000.00 deductible to be paid for each accused no matter how many claims brought).
- (c) Cover on a "claims made" basis subject to there not being cover for any claim or claims made or threatened or intimated or which should have been anticipated at the time Special Issues cover was taken out.

Document-searching and checking continues in particular as regards the post 1960 records in relation to schools at which some of the Brothers named spent the rest of their teaching careers. It would seem that in the West there might by the early 1990s have been some basis for anticipating that in due course ex gratia payments would be made by the Order to some of the complainants.

However, there does not appear to have been any basis for belief in the West or on the part of the Trustees at the time Special Issues was taken out that civil claims for compensation in respect of these old complainants would be pursued in the manner adopted ultimately by Slater & Gordon.

Discussions with CCI continue. It seems at this time that the Trustees have reasonable prospects of seeking an indemnity pursuant to the 1993/94 special issues policy although it is conceivable that with other claims notified to CCI during that year the \$15 million limit may not cover all potential liability.

B. Alternative Strategies

Ongoing strategy review is of course necessary and appropriate. Recent developments such as Mr Justice Levine's decision not to cross-vest the six test cases currently before him together with the previously mentioned Court decisions in December 1994 on limitation extensions and the introduction of "Reaping the Whirlwind" into the arena have diminished the prospects of the Brothers securing the intervention of the Court to dispose of these old Western

Australian actions on a preliminary procedural basis.

As Mr John Winneke QC has indicated to Brothers Noonan and Brandon the proceedings appear to have developed some real momentum. The legal process may well continue for a lengthy period involving significant and ongoing cost for the Brothers as well as constituting an ongoing public relations dilemma and a drain on morale and administrative resources.

It is to be acknowledged that there is some tension between the legalistic defensive posture necessarily adopted in relation to these old claims and the pastoral philosophy of the Brothers as a caring religious institute which in a perfect world without resource limitations might enable a more charitable position to be taken in relation to the complainants. It is also to be acknowledged that settlement might now be achievable on a commercially compromised basis which might not be available at some future time if the Plaintiffs are able to secure decisions enhancing their procedural position. It is also conceivable that the opportunity to secure contribution from other Defendants may be lost if a settlement strategy is not adopted in the near future.

In these circumstances, alternative "softer" strategies involving mediation or settlement obviously warrant careful consideration.

It is recognised that it has always been the intention of the Brothers to ultimately seek a form of reconciliation with those Plaintiffs who were seriously injured. It was hoped that the Slater & Gordon proceedings could be disposed of in a cost effective preliminary fashion which would enable the Brothers to retain financial control of any ex gratia compensation system. We now confront a situation where further resources which might have been applied towards the funding of such a system will be expended on legal costs.

Quite clearly it would be open to the Brothers to seek to settle these cases now by undertaking discussions with Slater & Gordon and/or involving a mediator. Mr Gordon has indicated a settlement figure and stated that were a fund

established to pay out all current actions, the Plaintiffs would want the fund administered by a non Christian Brother independent third party. Were a decision to be made to explore settlement it would be necessary to undertake a review of the Slater & Gordon files to establish as accurately as possible the extent to which the current group consists of individuals alleging serious sexual abuse as opposed to general physical abuse.

As an alternative to the above, consideration could be given to investigating the possibility of filing offers of settlement in Court in relation to the six clearly seriously injured Plaintiffs of say \$100,000.00 inclusive of costs each.

= =

Alternatively the current arrangements in the West for counselling and related assistance could be expanded to include some limited form of financial payment to any individual wishing to opt out of the litigation and resolve the matter.

As you know one of the difficulties with settlement is the lack of a class action settlement facility enabling the class of potential claimant to be closed off through the settlement process. We are investigating whether it would be possible in a settlement scenario to transfer the proceedings to the Federal Court by consent where the rules might permit some form of class settlement.

However, we believe that care must be exercised so as to avoid the Congregation being catapulted into a settlement scenario on the basis of -

- (i) Mr Justice Levine's somewhat tentative judgment in December in which he decided against the cross-vesting application at that time but decided very little else.
- (ii) The distressing evidence and submissions currently before the Court and in the public arena in relation to the six test cases.

We consider it unlikely that settlement of these actions would result in any long term resolution of this litigation problem for the Brothers bearing in mind:-

- 10 -

- (a) The immediate probable settlement cost to the Brothers - Mr Gordon has indicated a figure of \$18 million to \$20 million which obviously would be open to negotiation.
- (b) The public relations perception that could well arise with a settlement that there was after all a significant factual basis underlying the allegations which have been made in relation to events which occurred in the West and the administration of the Western Australian Institutes.
- (c) The very large and incalculable secondary financial costs for the Brothers and other religious institutes with the establishment in Australia of this type of lawyer driven industry and the anticipated waves of further litigation inspired by the settlement of these proceedings.
- (d) The encouragement to the Plaintiffs to continue on with the litigation if it appears that there are some prospects of settlement as well as the risk that signs of weakness or indecisiveness might issue prejudicing our capacity to negotiate for contribution if necessary in due course with CCI and other Defendants.

Conclusion - Future Directions

We therefore recommend the continuation of the current defensive strategy.

However, this strategy must be kept under review and we must all remain alert to any alternative solutions to the problem that might emerge.

Further advice would certainly be provided to you in relation to these matters if our above view were to alter at any time.

There should be additional indications forthcoming from the Court as to the strength or weakness of the defences that remain open to the Brothers.

There is likely to be some delay before the hearing of extension applications to enable further deliberation to be given to these matters.

In the meantime:

- (a) Discussions with CCI will continue.
- (b) The examination and analysis of documents in the possession of the Brothers will continue. This is critical not only as regards confirmation of our current view that the Plaintiffs would have real difficulty in establishing a case of administrative negligence but also from the point of view of being able to demonstrate to CCI if necessary that the Trustees did not have knowledge as at 1990 or 1991 sufficient to trigger the Special Issues exclusion. It will be necessary to have access to the Rome archive and ongoing contact with Brother Coldrey will take place. Counsel's advice will cover these matters in more detail.

We expect that many Brothers would prefer to seek to achieve a form of reconciliation or peace with the Plaintiffs rather than "slugging it out" in Court. However, at this stage the Court could still act to ultimately dispose of these cases thus assuring the Brothers of continued financial control of any ex gratia settlement program. On the other hand settlement now could involve immediate and indirect costs threatening the Order's financial viability unless CCI is locked into an ongoing settlement support role on these cases.

Moreover it must be remembered that it was the Plaintiffs who initiated this massive legal process. The legal steps taken in an attempt to protect the Brothers have not been designed to cheat the Plaintiff's of any legitimate entitlement. Had these matters been brought to light at an earlier time and in different circumstances it would have been legally and financially possible to do potentially much more by way of investigation, verification and/or settlement.

Settlement of these cases would entrench this form of litigation in Australia. The availability of compensation would result in further litigation and related police complaints. Accordingly, we would advise against any settlement strategy unless and until it is clear that the Brothers cannot succeed on the current procedural applications even if ultimately the delay in pursuing settlement results in additional overall cost.

We look forward to discussing these and other matters in due course.

Yours faithfully

CARROLL & O'DEA

Per:

- cc Br B Brandon
- cc Mr M McKenzie
- cc Mr P McGowan
- cc Mr B Gross QC
- cc Mr P Johnson

= =