

Our reference
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BRIEFING NOTE **Private and confidential**

To Dr Michael Casey, Private Secretary to Cardinal Pell - Archdiocese of Sydney

From Paul McCann & John Dalzell

Date 23 November 2007

Subject ***John Andrew Ellis v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (HCA no 325 of 2007)***

1 Executive Summary

On Friday 16 November 2007, the High Court of Australia refused the plaintiff leave to appeal the decision of the NSW Court of Appeal¹.

The Court of Appeal's decision now stands as the final authority in this matter in New South Wales and ACT and is of the utmost persuasive weight in the other states and territories throughout Australia and indeed elsewhere in the common law world.

The findings of the Court of Appeal can be summarised as follows:

- (a) The "Church" is an unincorporated association which cannot sue or be sued;
- (b) Cardinal Pell, is not a corporation sole and therefore, in the civil law at least, is not liable for the actions of his predecessors.
- (c) A representative order against the Trustees of the Roman Catholic Church for the Archdiocese of Sydney (**Trustees**) or the Cardinal is impossible unless it can be proved that all the members of the Archdiocese have the "same liability".
- (d) The Trustees are not liable for the actions of clergy as the *Roman Catholic Church Trust Property Act 1936 (NSW)* (**Trust Property Act**) does not confer the power to appoint, manage or discipline priests.
- (e) The Trust Property Act does not render the Trustees liable as the "universal nominal defendant" for each and every claim against the Church.
- (f) The amendment to the Trust Property Act in 1987 was of no help the plaintiff as there was:
 - (i) no evidence of the Trustees appointing a priest after 1987;
 - (ii) positive evidence of the consultants appointing priests; and
 - (iii) the legislative changes fall short of involving the Trustees in episcopal activities of the Church.

¹ [2007] NSWCA 117, 24 May 2007

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- (g) The Archbishop of the day *might* be vicariously liable for the acts of clergy whom he appoints, manages and has the power to remove.

This decision represents a conclusive victory for the Archdiocese and provides the Church in Australia with significant options as to the manner in which it manages sensitive claims.

2 The Claim

The plaintiff alleged that while he was a young altar server in the Bass Hill Parish, he was sexually abused by an assistant priest during the period 1974 to 1979. The plaintiff also alleged that the abuse continued until he was 27 years, but the proposition that such abuse could continue beyond majority was rejected by the court, both at first instance and on appeal, although he sought to reagitate the claim in his High Court leave application.

A highly qualified lawyer and psychiatric nurse, the plaintiff claimed that he first became aware of the nature and extent of the psychiatric injury caused by the abuse in late 2001. In 2004, he was expelled from the partnership of Baker & McKenzie Lawyers. The plaintiff alleged that his expulsion was as a direct result of the effects of the abuse. He therefore sought to recover the salary he would have received as an international partner but for his expulsion.

3 The Defendants

The alleged perpetrator died in October 2004 after a long period of dementia. It was therefore not possible to interview the only party who could contradict the plaintiff's allegations. For this reason, the factual allegations in this case were never challenged and, indeed for the purposes of the proceedings, it was conceded that the plaintiff had been exposed to the abuse as alleged.

The plaintiff discontinued his claim against the assistant priest. The remaining parties were:

- (a) George Cardinal Pell in his capacity as Archbishop for and on behalf of the Roman Catholic Church in the Archdiocese of Sydney; and
- (b) The Trustees.

4 The Pleadings

4.1 Cardinal Pell

The plaintiff claimed against Cardinal Pell on the basis that:

- (a) he occupies the office of Archbishop of Sydney at present and is a corporation sole with perpetual succession (juridical person) and is therefore liable for the actions of his predecessors ; and
- (b) he is head of the Archdiocese and therefore represents the members of the Archdiocese.

It should be pointed out that Cardinal Pell did not dispute that he was a juridic person under Canon Law. Canon 393 clearly appoints the Bishop as a juridical representative of the

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diocese. The argument advanced by the defendants was that the Cardinal did not assume the liability of his predecessors in the civil law.

4.2 The Trustees

The plaintiff alleged that the Trustees were liable both as representatives of the members of the Archdiocese (as a body corporate with perpetual succession) and directly, in that they appointed, managed and disciplined priests at the material time.

The plaintiff also pleaded that both the Cardinal and the Trustees were vicariously liable for the alleged abuse suffered by the plaintiff, (that is, in their capacity as employers), and directly, that is, as a result of breaches of their duty of care towards the plaintiff.

The plaintiff alleged that the Cardinal and the Trustees:

- (a) *"had the care, control and management of the Bass Hill parish"*;
- (b) *"engaged"* priests;
- (c) *"appointed"* priests to various positions in the Archdiocese;
- (d) *"owed a duty of care to the plaintiff to take reasonable measures to protect the plaintiff from foreseeable harm"*; and
- (e) *"are jointly and vicariously liable for the actions or failures of the perpetrator"*.

5 The Court of Appeal's Decision

The specific findings of the court have been set out in the executive summary to this briefing note, and are more fully dealt with below.

5.1 Cardinal Pell

The court agreed that Cardinal Pell, who did not become Archbishop of the Archdiocese of Sydney until 2001, had no personal involvement in the matters complained of. As to whether the Cardinal could represent the members of the Archdiocese (in a legal sense), the court concluded that *"the relationship between an assistant parish priest and the members"* [of the unincorporated association ie. the Church] as a whole is too slender and diffuse to establish agency in contract or vicarious liability in tort.

The court proceeded on the assumption but, without deciding the matter, that there is factually and legally an arguable case that the priest's superiors in the 1970s, including the Archbishop of the day, might on some basis be vicariously accountable for the priest's torts. The court said that *"it is wrong to see holding an ecclesiastical office as necessarily incompatible with a legal relationship capable of giving rise to some incidents of an employment relationship"*. The court did not identify the particular facts which may give rise to such liability.

5.2 The Trustees

The court accepted that the appointment, management and removal of priests are not functions that the law confers upon the Trustees. The court accepted that the NSW legislation did not intend to regulate the ecclesiastical, liturgical or pastoral activities of the

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Archbishop, or to address the relationship between a bishop and his clergy, or between clergy and laity.

Importantly, the court said that *"the commonplace situation that the body corporate [ie. the Trustees] is capable of being sued in its corporate [name] is not a provision that renders the Trustees some universal nominal defendant responsive in law to any and every claim for legal redress that a person might wish to bring against a Catholic in the Archdiocese"*.

"The fact", the court went on to say *"that the Trustees hold property for and on behalf of "the Church", including property devoted to various charitable trusts, cannot be inverted into the proposition that the Trustees (and the funds they administer, many of them on specific charitable trusts) can be rendered subject to all legal claims associated with Church activities"*.

6 Unresolved Issues

6.1 Occupiers Liability

The plaintiff did not plead occupiers liability and so the court did not have an opportunity to dismiss liability on this basis.

6.2 Priests as Employees and Vicarious Liability

Although the proposition that the Trustees employ clergy was firmly rejected, the issue of whether clergy are capable of being considered "employees" and the Cardinal's liability for the actions of priests remains unresolved².

As stated above, the court left the question open as to whether the Archbishop of the day, might, on some basis, be vicariously accountable for a priest's torts. This proposition appears to be founded on the factual basis that Cardinal Freeman had *"extensive control over the appointment, removal and day-to-day activities of an assistant priest"*.

7 Conclusions

The legal principles enunciated by the court, particularly with regards the liability of the Trustees, are of critical importance and the decision by the court, now reinforced by the High Court refusal of leave, marks a conclusive victory for the Archdiocese.

That said, this was very much a "fact" case. If there had existed evidence that the Trustees had appointed priests to a particular diocese, or that the Archdiocesan Consultors were acting in their capacity as Trustees when they appointed or removed clergy, the outcome may have been different.

The decision has affirmed the proposition that the Trustees are not the proper defendant in non-property related litigation. This has the effect of at least partially protecting the assets of the Archdiocese from speculative claims such as that brought by the plaintiff.

² Although, the Court did hear extensive argument about the applicability of the House of Lords case *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195 HL, which reversed the long-standing presumption that clergy are not employees.

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Bishops (who are not incorporated³) are protected from the legacy and liability of their predecessors. The Trustees and the Cardinal are also protected from representative actions brought against the Archdiocese.

8 The Future

The court confirmed that the plaintiff would have a viable cause of action against the perpetrator⁴ and left open the possibility that there may be a possible action against the Bishop of the day. The decision has therefore not left those Church representatives "immune" from legal action in all sensitive claims.

In reaching its conclusions, the court merely applied settled principles of law to the facts of the case.

The role of the Trustees in NSW is clearly set out in the Trust Property Act. By virtue of section 4(3), the Trustees have wide powers of management and administration of property, including:

- (a) *the operation and conduct of educational, welfare and health institutions, organisations or other bodies, and*
- (b) *the performance of all such acts, matters and things of any nature (which may include, without limiting the scope of this paragraph, borrowing money) as, in its opinion, are or may be for its benefit or for the benefit of the Church.*

It is therefore arguable, if not likely, that the Trustees would be liable for an action arising out of the conduct of a school, including an allegation of abuse against a teacher. It is of course difficult to speculate on such a claim, however, it is sufficient to say that the decision in this case does not address each and every issue that can arise in an abuse claim.

Having said this, the decision places a number of significant obstacles that will need to be addressed by any claimant seeking to resolve claims litigiously rather than through Towards Healing. Refocusing the resolution of these claims through Toward Healing has alone been a significant and favourable outcome of this litigation at the very least.

Finally, as this decision has provided significant protection to the Cardinal and the Trustees, this in turn will give rise to a significant reduction in damages exposure and therefore the risks that are presently insured against.

Please do not hesitate to contact me to discuss this memo, or matters generally.

³ Such as the Archbishop of Perth.

⁴ In criminal and in civil law with the remedy of Victims Compensation Tribunal awards.

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