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BCC:

Subject: Ellis - Appeal

Attachment: None

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Dear Fr John, Michael and Michael

Stephen Rushton SC has now advised that we should appeal the decision of Patten J in the Ellis matter.

The appeal should be in relation to His Honour's findings that:

there is an arguable case that the Trustees are the proper defendant in cases of alleged sexual abuse by individual clergy; and  
the Plaintiff did not have the means of knowing the nature and extent of his injury until September 2001 (pursuant to Section 58 and 60G of the Limitation Act); and  
the Plaintiff ought not to have known of the nature and extent of his injury pursuant to Section 60I(b) of the Limitation Act (constructive knowledge).

Stephen agreed that His Honour's refusal to be bound by Court of Appeal's decision in the Archbishop of Perth v AH & JC [1995] 18 HCSR 333 may be a significant point of appeal. The 1986 amendments to the Roman Catholic Church Trust Property Act 1936, in Stephen's opinion, merely increased the powers of the Trustees to deal with educational institutions and the like and were not intended to increase the scope of their liability.

On Section 58 and 60 of the Limitation Act, the fact that the Plaintiff was too embarrassed or 'not able to face' his injury sooner is not a relevant consideration for the Court, he had been presented with the 'means' of finding out the nature and extent, at the latest, through the treatment of his psychologist Fleur Bishop in December 2000.

With regards the constructive knowledge point (number 3 above), His Honour did not provide any written reasons for his finding of when the plaintiff ought to have become aware of the nature and extent of the injury.

The Court of Appeal's decision in Telstra Corp Ltd v Rea [2002] NSW stands as authority for the proposition that what a person 'ought' to know or be aware of for the purposes of s 60I(1)(b) must necessarily take account of the circumstances of the particular applicant. Quoting the remarks of Lord Reid in Smith v Central Asbestos Co. [1973] AC 518 at 530 Foster AJA said:

'In order to avoid constructive knowledge the plaintiff must have  
  
taken all such action as it was reasonable for him to take to find  
  
out. I agree with the view expressed in the Court of Appeal that

this test is subjective. We are not concerned with 'the reasonable man.' Less is expected of a stupid or uneducated man than of a man of intelligence and wide experience' (emphasis added)

The subjective test of s60(l)(b) expounded in *Telstra* was approved by the Court of Appeal in *Commonwealth of Australia v Smith* [2005] NSWCA 478. Basten JA concluded that the term "ought" requires more than an explanation as to why an applicant did not ask a question or seek advice at a particular time it requires "justification".

In our opinion, the plaintiff in *Ellis* has not justified why, with the opportunity and availability by at least December 2000 when he consulted Fleur Bishop (if not in 1997) to elucidate the nature and extent of his condition, he chose to wait until September 2001 to overcome his embarrassment and talk to his therapist. His email to Fleur Bishop on 5 August, does a lot more than 'make a fleeting reference to being sexually abused as a teenager' [judgment of Patten J - paragraph 35], it reveals a willingness to discuss the nature of his problem with his therapist and the fact he had previously 'come close a couple of times, but stopped short.'. As an intelligent lawyer with qualifications in nursing and married to a lawyer who specialised in child protection issues within the Church, a higher standard of constructive knowledge should apply in this case.

There are of course inherent difficulties in appealing the decision of a judgment at first instance where, as in this case, the Judge has a wide discretion as to the findings he makes. There is also the problem that His Honour found the Plaintiff to be a reliable witness and a witness of truth.

In our opinion, however, which is supported by Stephen Rushton, there are reasonable prospects of successfully appealing the decision of Patten J.

Subject to receiving your instructions, we shall prepare the necessary paper work to apply for leave to appeal. Leave should be granted in this case due to the novel arguments relating to the Trustees liability.

We await your instructions. If you require any further information, please do not hesitate to contact me on 9210 6160.

Finally, the argument on the costs of the plaintiff's application has been re-listed for hearing next week.

Kind regards

John D

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