



L A W Y E R S

12 September 2001

Partner
 David Abernethy (07) 3228 9456
 Email: David_Abernethy@corrs.com.au

Mr Howard Stack
 Chairman
 Brisbane Grammar School
 Board of Trustees

Our reference
 DJA/NA-0000000

BY EMAIL

Dear Howard

LYNCH RELATED LITIGATION

You have requested a report for consideration by the Board tomorrow.

Shine Roche McGowan Proceedings

On 27 April 2001 Shine Roche McGowan issued proceedings on behalf of 38 students. None of those proceedings have been served on the School. The proceedings were issued to stop the limitation periods running. Presumably Shine Roche McGowan are taking statements, preparing evidence etc, knowing that once they serve the proceedings they will probably have to bring an Application for an extension of the limitation period. Their argument will be that until the matter broke in the press in May 1999 each plaintiff was not aware he had a claim.

Other Proceedings

Two other actions have been instituted by solicitors other than Shine Roche McGowan on behalf of BQA [redacted] and REDACTED [redacted]. Both those proceedings have been served and Defences have been filed. The next step in each of those actions is that both parties should disclose to the other all documents which they have which are directly relevant to the issues in the action.

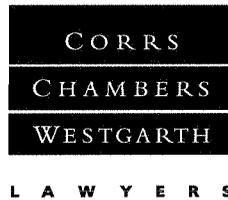
The issue for current consideration is whether or not we should take steps in each of these two actions to force the plaintiff to apply for an extension of the limitation period.

The Legal Position

Broadly, the various actions claim damages for personal injury based on the

WATERFRONT PLACE 1 EAGLE STREET BRISBANE 4000
 GPO BOX 9925 QLD 4001
 TELEPHONE (07) 3228 9333 INT +617 3228 9333 FAX (07) 3228 9444
 DX 135 BRISBANE





12 September 2001
 Brisbane Grammar School
LYNCH RELATED LITIGATION

Page 2

following causes of action:

- 1 In negligence and for breach of contract.
- 2 Pursuant to the Trade Practices Act.
- 3 For breach of fiduciary obligations owed by the School to the plaintiffs.

(i) Negligence/Breach of Contract

Claims for damages for personal injury based upon negligence or breach of contract must be commenced within three years of the cause of action arising. Although that three year period does not commence to run until each claimant turns 18 years of age, the three year period has now been expired for some time in all actions. However, under the Limitation of Actions Act there is provision for the Court to extend that three year period in certain circumstances. Essentially, the plaintiff in each case has to establish that a "material fact of a decisive character" relating to the right of action only came to the plaintiff's knowledge within 12 months prior to the date upon which the proceedings were actually issued, that is on or after 27 April 2001.

(ii) Claims Under the Trade Practices Act

Such claims must be commenced within three years of the cause of action arising and there is no provision for that period to be extended. Therefore, the claims, in so far as they are based upon the Trade Practices Act, should fail.

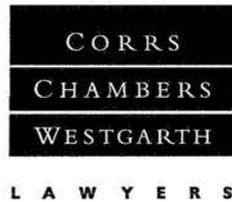
(iii) Breach of Fiduciary Obligation

Claims based upon breach of fiduciary obligation are not subject to any statutory time limitation period. They are subject to a defence of laches, which would attract the same considerations as a limitation period defence.

In any event, the law is fairly well settled in Australia, although not beyond argument, that the school/student or teacher/student relationship does not give rise to fiduciary obligations. Therefore, the claims on the basis of fiduciary obligation should also fail.

Therefore if the plaintiff in each case is unsuccessful in obtaining an extension of the limitation period in relation to the claim for breach of contract or in tort, the





12 September 2001
Brisbane Grammar School
LYNCH RELATED LITIGATION

Page 3

claims should not succeed.

Further Conduct

The only matters in which we can take any action are those which have been served – BQA and REDACT

Mr Sid Williams QC and Mr Kevin Holyoak have jointly advised that we should proceed by way of an Application for Summary Judgment which will no doubt lead to a cross Application for an extension of the limitation period. Their view is that:

- 1 There are very strong prospects of having the Trade Practices Act part of the claim struck out.
- 2 There are also very strong prospects of having the claim based upon fiduciary obligations struck out.
- 3 On the information which we have, BQA in particular, will have difficulty obtaining an extension of the limitation period.

In response to our Application for Judgment, and assuming he cross applies for an extension of the limitation period, he will have to put forward Affidavit material setting out the basis upon which he says he is entitled to an extension of the limitation period.

The outcome remains at the discretion of the Court and one of the issues to be taken into account when exercising that discretion is whether the School would suffer any prejudice by the limitation period being extended. The prejudice we can point to includes that:

- 1 Lynch is dead and he is the only person who can comment on the allegations made, however this issue may largely be overcome if each applicant puts in Affidavits by a number of other applicants alleging abuse. As such, Lynch being alive and able to respond to the allegations would have little impact on the outcome.
- 2 At this stage, no insurer has agreed to indemnify the School in relation to the claims. Even although the School had insurance at the relevant times, because of the effluxion of time, the School now lacks the means to prove cover.

On balance, we do not think there is any down side in our pursuing the





12 September 2001
Brisbane Grammar School
LYNCH RELATED LITIGATION

Page 4

Application in respect of BQA The claims are not going to go away. At some time the issues, particularly the extension of the limitation period issue, will have to be confronted. While a decision on the limitation issue in the BQA case will not effect the outcome on the same issue in other cases, the outcome on the Trade Practices Act and fiduciary obligation issues will have an impact.

Insurance

As previously advised there are two policies of insurance which could provide cover in respect of these claims.

(i) Professional Indemnity Insurance

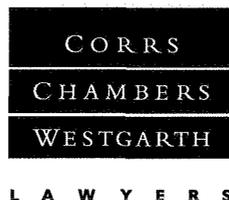
The policy which responds is that policy which was in place at the times the claims were made or at the time circumstances arose where a claim could be made. The relevant period was May 2000 and following. The professional indemnity insurer at that time was HIH. While we had lodged notices of claim with HIH prior to its insolvency, it had responded saying that its policy did not cover the claims. We are not convinced their position is correct.

However, it seems to us that if HIH is the insurer which should respond to these claims then the School may qualify for assistance under the Government Rescue Package. One of the categories of insured entitled to assistance is "not for profit organisations". There has been no direction or definition from the Government as to what that term means. My interpretation is that it is an organisation which does not distribute profits. It does not mean the organisation has to be a registered charity. Therefore, on its face, we think the School qualifies and we are accordingly lodging claims as required by the process set up under the rescue package.

(ii) General liability policies

The relevant policy is that which was in existence at the time the incidents occurred, that is during the time that Lynch was a teacher at the School. AON and its predecessor have been the brokers to the School throughout the period. At this stage they have identified the public liability insurers for many of the relevant years. However we have not been able to establish beyond doubt the identity of the insurer from September 1977 until September 1982 although the indications are it was Insurance Company of North America (now Ace Asia Pacific) for some years and American International Underwriters (now AIG) for some





12 September 2001
Brisbane Grammar School
LYNCH RELATED LITIGATION

Page 5

years. Both are yet to confirm indemnity because they say they have no evidence of their being on risk during the relevant periods.

I have had meetings with Rick Edwards of Aon who currently has responsibility for the School's account and also Ross Nuttal who was involved with the account at the relevant time. In addition I have spoken with a former Aon employee, Lyle Ackworth. Steven Tyrrell has put me in touch with the Bursar at the relevant time, Jim Brittain who in turn has made contact with a John Glover who he said was the contact at Aon for part of the period. I think we have reasonably good prospects of establishing who the insurers were at the relevant time to the satisfaction of the Court if necessary but we then have to establish the terms of the policy and I am liaising with Aon to see whether or not they are able to produce copies of policies from the same insurers during that period.

I will keep you informed of developments on the insurance issue but in the meantime would be obliged if you would confirm instructions for us to apply for judgment in the Amies matter.

Yours faithfully
CORRS CHAMBERS WESTGARTH

David Abernethy
Partner

