

L A W Y E R S

20 December 2001

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Dear Sirs

BRISBANE GRAMMAR SCHOOL (BGS) - CLAIMS BY VARIOUS FORMER STUDENTS

We refer to previous correspondence in relation to claims by various former students against BGS for damages for personal injury arising out of alleged misconduct by Mr Kevin Lynch who was the School Counsellor from 1977 until 1988. In particular, we refer to our letters to each of you on 21 June in which we provided details of the proceedings issued of which we were aware at that time.

We are writing to you in order to resolve indemnity issues because, to date, no insurer has confirmed indemnity in respect of any of the claims in circumstances where:

- four claims are currently proceeding;
- 45 other claims have been filed in the Supreme Court but not served.
- despite the obvious differences in the circumstances giving rise to the claim, the claimants will be encouraged to proceed following upon the outcome of the widely publicised case against the Anglican Church in Toowoomba where judgment was handed down last week for a substantial amount of damages; and

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SYDNEY MELBOURNE BRISBANE PERTH CANBERRA GOLD COAST
OUR LIABILITY IS LIMITED BY THE SOLICITORS SCHEME, APPROVED UNDER THE PROFESSIONAL STANDARDS ACT 1994 (NSW)
THIS LIMITATION OF LIABILITY APPLIES TO CLAIMS THE PROPER LAW OF WHICH IS THE LAW OF NEW SOUTH WALES.



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- Shine Roche McGowan, who acted for the plaintiff in the Toowoomba case, and who are acting for all but two of the claimants against BGS, approached us, prior to commencing proceedings, with a view to establishing a framework to settle the claims against BGS;
- Because the insurance position has not been resolved there is currently a complete lack of dialogue between BGS and the claimants which can only increase the anger of the claimants making it more difficult to settle as time progresses.

We believe it to be in the interests of both the insurers and BGS that any indemnity issues be resolved immediately, as we are of the opinion that the delay in resolving this is already affecting the proper management of the claims which is undesirable, particularly when we do not believe there is any indemnity issue which cannot be resolved sensibly and quickly.

CURRENT POSITION

- 1 We have obtained from Shine Roche McGowan a list of 61 former students on whose behalf they say they are acting and have instructions to pursue claims.
- 2 Of those 61 former students Shine Roche McGowan have commenced 47 actions in the Supreme Court.
- 3 Of the 47 actions commenced so far, two have been served and are proceeding (Jardine and Iselin referred to below). In both of those cases they have served the plaintiff's Lists of Documents and Statements of Loss and Damage and are pressing for disclosure on behalf of BGS.
- 4 Outside of the Shine Roche McGowan group there are two other claims where proceedings have been issued and served by other solicitors (REDACT BQA and REDACT referred to below).

Senior Counsel has advised that in the BQA action we should apply to strike out the claim on the basis it is statute barred, and, in the alternative, have determined as a preliminary point an application to strike out the plaintiff's claims under the Trade Practices Act and on the basis of breach of fiduciary obligations. This suggested approach in relation to the BQA matter is because our assessment is that the plaintiff will have difficulty obtaining an extension of the limitation period. There are facts in that case relevant to in the application to extend the limitation period which, so far as we are aware, are not present in other cases. Such application will inevitably be met with a cross-application for an extension of the limitation period. A Judge hearing the case may decide it or may decide on the limitation point prior to the trial. It may be tempting for the Judge to put off this application until the trial.



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The suggested strategy in the [BQA] matter has clear risks, is tactically critical to the management of all the claims and all insurers have a vested interest in whether we pursue that strategy or retain the limitation period issue as a live issue in negotiations for as long as possible.

CLAIMS WHERE PROCEEDINGS ARE BEING PURSUED

[BQA] (Formerly [BQA])

Holland & Holland are acting on behalf of the plaintiff. The Statement of Claim alleges that the plaintiff attended BGS in 1980/81/82 and was abused by Lynch in 1981/82. However, the School records indicate that the plaintiff attended school in 1981/82/83 in which case we assume that the alleged abuse was in 1982/83.

A Defence was filed on 13 June and a Reply on behalf of the plaintiff filed on 27 June. Since that date, other than our recently serving a Request for Further and Better Particulars of the Statement of Claim, there has been no activity.

It should be mentioned that the plaintiff has made quite nasty threats against both the School and the Chairman of Trustees.

On the basis of the School records and the allegations in the Statement of Claim, the insurers on risk in respect of this claim are:

- (i) AIG for the period up to September 1982
- (ii) Ace Asia Pacific for the period from September 1982

REDACTED

Goodfellow & Scott act for the plaintiff. A Defence has been filed and the plaintiff has provided medical reports. The plaintiff attended BGS in 1986/87/88 and alleges abuse from September 1986 to June 1987.

On the basis of the allegations in the Statement of Claim, the insurer on risk is Royal Insurance.

REDACTED

[REDACTED] and [REDACTED] (see below) are the two plaintiffs represented by Shine Roche McGowan in which proceedings have actually been served. In [REDACTED]'s claim, a Defence has been filed. The plaintiff has served a List of Documents and Statement of Loss and Damage. There are outstanding



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particulars of the Statement of Claim to be provided and we are due to provide disclosure of documents.

The plaintiff attended BGS in 1986/87/88/89/90 and alleges he suffered abuse in 1986/1987.

On the basis of those allegations, the insurers on risk are:

- (i) Ace Asia Pacific for the period up to September 1986
- (ii) Royal Insurance for the period from September 1986

REDACTED

The position is the same as in **REDACTED** – the plaintiff has served a List of Documents and a Statement of Loss and Damage. There are outstanding particulars in relation to the Statement of Claim but we are due to make disclosure of documents on behalf of BGS.

The plaintiff attended BGS in 1979/80/81/82/83. Pending provision of the particulars, the plaintiff's Statement of Claim does not detail the period during which the alleged abuse was suffered. However, there is a report from a psychiatrist which refers to abuse during the period from late 1979 to mid 1981.

On the basis of the above we believe that the insurer on risk is AIG.

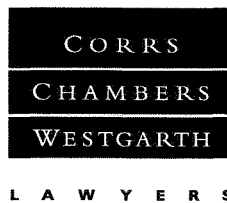
OTHER PROCEEDINGS

The above four actions are the only proceedings which have been served and pursued.

However, we are aware that Shine Roche McGowan have issued, but not served, proceedings in the Supreme Court on behalf of a further 45 plaintiffs. We have obtained copies of the Statements of Claim from the court which are all in the same format. We **enclose** a Schedule which we have prepared setting out details in relation to each of the Shine Roche claims and identifying the insurers who we believe are on risk in respect of those claims.

INSURANCE COVER

- 1 AON and its predecessors, Reed Stenhouse (Qld) Ltd and Alexander Stenhouse were, and continue to be, the only insurance brokers to BGS during the period in which these claims arose.



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2 There is no doubt that, during the entire period, BGS had a complete insurance program, as advised by AON and its predecessors, and in respect of which it paid substantial insurance premiums.

3 We also **enclose** a Schedule identifying the insurers and the level of cover during the relevant period which was compiled by Ken Winks of AON after an exhaustive search of AON's archival records. We have personally conducted an exhaustive search of the archival records held by BGS. Documents we have located confirm the information set out in the Schedules. In addition, we have interviewed the following personnel who were employed by AON and its predecessors and who were responsible for the BGS account during the relevant period:

- Lyle Ackworth who was with Reed Stenhouse from 1974 until March 1982;
- Ross Nuttall who commenced with Stenhouse Queensland Limited in 1971 and is still with AON.

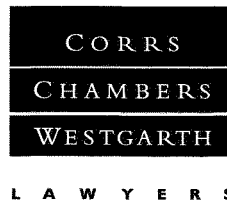
Having considered the documentation available, Lyle Ackworth and Ross Nuttall are of the view that the information as to insurers set out in the Schedule prepared by Ken Winks is correct.

4 Neither AON nor BGS have copies of the policy wordings and schedules for the late 1970s and early 1980s and the School Bursars during the relevant period, to whom we have also spoken, do not believe that policy wordings were ever provided to BGS. However, Lyle Ackworth and Ross Nuttall are able to give evidence as to the type of cover provided by the insurance program that was in place. If each insurer no longer has copies of the particular policy wordings and schedules we would be surprised if they do not have available the generic policy wording applicable to each liability policy in place at the time. At worst, we assume the insurers have access to personnel who would be in a position to give evidence as to the nature and extent of the cover.

PROPOSAL

We suggest that a conference be convened as soon as possible, with senior representatives of each insurer attending, to consider how best to resolve any indemnity issues in respect of these claims and also the further conduct of the claims bearing in mind that:

1 If the position is not resolved in the immediate future we will have no alternative but to join insurers to the proceedings which are being pursued. We believe such a step will only encourage the plaintiffs and their lawyers.



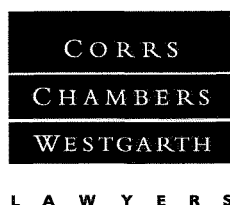
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- 2 Many of the claims involve more than one insurer, particularly as the BGS insurance year ran from 1 September. The claims will be difficult to handle unless there is a co-operative approach.
- 3 There may be a window of opportunity to put in place a framework for settlement of all of these claims now (because of the previous approach by Shine Roche McGowan) while we still have at our disposal all available risk arguments to be advanced against the plaintiffs including:
- (i) the limitation period issue. Once a plaintiff obtains an extension of time we will have largely lost that leverage;
 - (ii) as far as we are aware the plaintiffs have no evidence of specific knowledge on behalf of the School as opposed to "should have known" based on a lack of systems type case. Shine Roche McGowan have written to many of the teachers, including the teachers who are no longer at BGS, inviting them to come forward and provide a statement in relation to the plaintiff's claims. Whilst we have not found any evidence that any teacher or staff member knew of anything untoward at the time, there is always a risk of reconstruction by teachers and/or boys who were at the School at the time who, with the benefit of hindsight, may be able to point to some behaviour on the part of Kevin Lynch which at the time was completely innocuous.
 - (iii) the current lack of certainty, but at present with the balance of decisions in the School's favour, in relation to whether the School owed fiduciary obligations to students. If it did then the limitation issue is potentially overcome;
 - (iv) the uncertainty as to whether the Australian courts will adopt the English position that employers are vicariously liable for criminal acts of their employees in circumstances such as this. This issue will again be revisited by the High Court when the case of Lepore comes before the High Court next year.
 - (v) Our assessment is the legal/moral/community environment appears to be moving in favour of plaintiffs in cases such as this.
- 4 In a multiple claims matter our assessment is that the opportunity to settle is better before the plaintiff's lawyers have made a substantial investment in legal costs and outlays such as medical reports, etc.
- 5 Each of these claims will have to be separately defended. Each of the plaintiffs has elected for trial by jury which inevitably increases the length of the trial. Based on the experience



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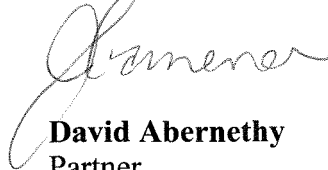
in the Toowoomba case the costs in defending each of these 49 actions commenced so far will be enormous. We understand the Toowoomba case was originally set down for three days but lasted four weeks. We estimate the cost of each party in that action must have been of the order of \$200,000.00.

Therefore, I would be obliged to hear from you whether you are prepared to attend a conference to consider the further conduct of these claims. We suggest that each of you confirm the dates upon which you would be available for a conference in the weeks commencing 14 and 21 January. The conference can be in Sydney if that is the most convenient venue.

We look forward to hearing from you.

Yours faithfully

CORRS CHAMBERS WESTGARTH



David Abernethy
Partner

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