

MinterEllison

L A W Y E R S

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To Mr David Abernethy
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Our Ref KJH 1436909

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Number of pages (including this one):

Subject Brisbane Grammar School

'Without Prejudice'

Dear David,

I acknowledge receipt of your fax dated 25 September 2002.

During our meeting in Sydney, you agreed to provide us with copies of the documents that you held that you thought supported your assertion that any duty of disclosure had been waived. I have yet to receive any of that material. Please send it to me as soon as possible.

Otherwise, some issues raised in your fax require a response.

Timing of the BQP Complaint

Your letter suggests that the BQP complaint was made after 1 September 1979. In fact, the probability is that it was made before that date.

In his original e.mail dated 6 June 2000, BQP placed the complaint in either 1979 or 1980. However, in the subsequent note of your telephone conversation with Mr BQP dated 1 February 2002, he places the relevant events during his year 11, which was in 1979. Without any further information, the likelihood is that any random event in 1979 occurred before 1 September 1979 rather than after that date. Accordingly, the probability is that BQP spoke to Mr Howell before 1 September 1979.

The Waiver Assertion

As mentioned, we await receipt of the documents that you say support your assertions with respect to waiver. For the moment, we can say that we have identified some documents that are clearly inconsistent with the assertion. For example, we have a copy of a letter from Mr R W Nuttall to AIG dated 29 October 1979 that reads:

If you do not receive all pages please telephone +61 7 3119 6481

IMPORTANT - The contents of this facsimile may be privileged and confidential. Any unauthorised use of the contents is expressly prohibited. If you have received the document in error, please advise us by telephone (reverse charges) immediately and then shred the document. Thank you.

'We are enclosing for your information, a completed general and products liability application form for this client and would appreciate your advice on your premium requirements for indemnity on limits of \$2,000,000 and \$5,000,000.'

A copy of this letter is **attached** for your information.

Further, the telex's and faxes that you previously provided to us in relation to the policy year 1986/87 appear quite inconsistent with the risk having been negotiated as part of a package. Rather, it seems to have been negotiated as a stand alone account.

The Materiality of the Abuse

Our preliminary enquiries do not support the assertion that, as at 1980, a liability insurer would have had no interest in the allegations made by BQP and BQH.

In this context, it is appropriate to remind you that employees of your client were insureds under the policy. Whilst a claim against your client may have been a novelty as at 1980 (and this issue is not conceded), there was nothing novel about a claim against the perpetrator of the abuse (such as Lynch).

Issues other than Non-Disclosure

There are other issues that justify the discount. As mentioned, any claim for exemplary or aggravated damages is not covered (upon our understanding) under any of the policies. Whether or not such claims are presently advanced, the virtual certainty is that they will be advanced before any adjudication of the claims. As is apparent from the Toowoomba Grammar case (where the exemplary damages award was about 50% of the total award) such awards can form a significant component of the overall liability. In the Toowoomba Grammar case, the reduction (so to speak) on account of that issue alone approached 50%.

Further, both the AIG policy and the Royal & SunAlliance policy included reasonable precautions provisions imposing an obligation on your client to take reasonable measures to avoid incidents that may give rise to claims under the policy. Once again, your client may seek to argue that it had no obligation to respond to matters that it did not perceive may give rise to claims. However, it is doubtful whether the obligation includes a subjective element.

Our Clients' Position

Accordingly, our clients' position remains that, for the periods when each of them were on risk, they are only prepared to meet 70% of the claims pursuant to the terms of the proposal made previously.

Once again, it seems appropriate to remind your client that, if the non-disclosure issue is made out, your client will recover nothing under any of the policies.

In the event that any further allegations of reports to senior members of staff arise, our clients reserve the right to withdraw this proposal at any time before acceptance by your client.

Yours faithfully,
MINTER ELLISON