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16/06/2005 03:10 PM

To: <John.Dalzell@corrs.com.au>, "Stephen Rushton SC"
 <srushton@selbornechambers.com.au>
 cc: <Paul_McCann@corrs.com.au>
 Subject: RE: Proper Defendant

My inclination is to keep our options open as long as we can. Why can't we preserve the position between now and the hearing by sending them a draft defence with either non-admissions or denials at the relevant points in relation to the archbishop and the Trustees and then run the legal arguments about proper defendant on the day if we want to?

Aren't we entitled to say on the limitation application that it's up to them to prove our liability and that any absence of evidence as to the relationship between the archbishop, the trustees and Ellis is their problem, not ours? If so, we wouldn't want to put on any evidence as to the archbishop or Trustees for the limitation argument in any event.

Kind regards.

Richard

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-----Original Message-----

From: John.Dalzell@corrs.com.au [mailto:John.Dalzell@corrs.com.au]
 Sent: Thursday, 16 June 2005 9:54 AM
 To: Stephen Rushton SC
 Cc: mchugh@banco.net.au; Paul_McCann@corrs.com.au
 Subject: RE: Proper Defendant

Thank you Stephen

have now sent our draft submissions on the proper defendant argument to the elusive McHugh. I have now also audited your brief in this matter and will return it today with some extra material and observations

Kind regards

John Dalzell

"Stephen Rushton SC"
 <srushton@selbornechamb To: <John.Dalzell@corrs.com.au>

ers.com.au> cc: <Anna.Ross@corrs.com.au>,
 <Paul_McCann@corrs.com.au>, <mchugh@banco.net.au>
 Subject: RE: Proper Defendant

15/06/2005 03:27 PM

My own view is that if possible we should run all issues now. If we do not finish in the three days then much of at least the legal argument can be put in writing. Keep in mind that the loser in this matter is likely to appeal and therefore ultimately the Court of Appeal may be having a good look at it. However if we really cannot do it then it may be better to leave the issue of proper defendant out of the limitation argument all together. That is, plead it as a substantive defence in our draft defence rather than an add on to para 25 and then if we lose the limitation argument file the defence with a motion to strike out the statement of claim and/or summary judgment.

Richard, your views please.

Kind regards

Stephen

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-----Original Message-----

From: John.Dalzell@corrs.com.au [mailto:John.Dalzell@corrs.com.au]

Sent: Wednesday, 15 June 2005 1:06 PM

To: Stephen Rushton SC
Cc: Anna.Ross@corrs.com.au; Paul_McCann@corrs.com.au; mchugh@banco.net.au
Subject: Re: Proper Defendant

Dear Stephen and Richard

Re: Ellis Submissions

I am now drafting the submissions for Ellis that deal with the proper defendant issue.

The defence to the assertion that the Trustees of the Roman Catholic Church (the Trustees) and the Archbishop are the correct entities to sue in this matter is essentially twofold:

1. They are not the proper defendant - this deals with the incorporation of the Trustees under the Roman Catholic Trust property Act and the limited role that they fulfil pursuant to that Act. With regards the Archbishop, the Plaintiff has pleaded that he is a juridical person pursuant to the Code of Canon Law and therefore he can be liable notwithstanding that he was not the Archbishop at the time of the allegations of abuse;
2. In the alternative, if they are the proper defendant they are not liable in any event - This raises the defence of not being liable in negligence for the actions of a third person, not having a fiduciary duty with the Plaintiff, that a priest is not an employee for which the defendants can be vicariously liable etc

I have some concerns about running the first argument in this case. We have not put on any evidence that sets out the role of the Trustees nor has the Archbishop put on any evidence in this matter. The question as to the role and status of the Archbishop pursuant to the Code of Canon Law is a complex one and one which we may want a Canonical Lawyer to express an opinion on before we file submissions. Although we have previously prepared detailed submissions regarding the status of the Trustees, the question of whether the Archbishop is the proper defendant in these matters is a novel one which will require a lot of time to prepare if we are to put on a proper defence.

Also, the proper defendant argument is complex and would, on its own, take up the three days allocated for the hearing of the limitation argument.

In the case of Gatt, the Plaintiffs are joining Cardinal Clancy as a defendant. I also have concerns that any decision that is made regarding Pell may have a knock-on effect on our opposition to the joinder of Clancy.

In summary, should we simply run the second limb of the proper defendant defence in our submissions and reserve our position as to the first limb which we could re-visit should the Plaintiff be successful in his application to extend the time limits? Otherwise, we may be in danger of not giving the more complex first limb of this defence our fullest attention.

I will send Richard the case law and submissions regarding the Trustees this

afternoon and will speak to the Churches in-house Canon Lawyer today.

Kind regards

John Dalzell

"Stephen Rushton SC"

<srushton@selbornechamb To:
<Anna.Ross@corrs.com.au>, <John.Dalzell@corrs.com.au>,

ers.com.au>
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<rmchugh@sixthfloor.com.au>

15/06/2005 09:55 AM Subject: Draft
Defence

AMDG

I have two amendments only.

1. Para 2 is really a pleading of law and strictly speaking we probably do not have to respond to it. However to avoid any confusion it should be recast as follows:

"2. The defendants do not admit paragraph 2 of the Statement of Claim and will refer to and rely upon the terms of the Act."

2. Para 25 The following should be added:

"The Defendants will also contend that they are not proper parties to this action."

Kind regards
Stephen

Stephen Rushton SC

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