

Our reference
AR/CATH4300-9006837

Governor Phillip Tower
1 Farrer Place Sydney NSW 2000
GPO Box 9925 NSW 2001
Tel (02) 9210 6500
Fax (02) 9210 6611
www.corrs.com.au

**CORRS
CHAMBERS
WESTGARTH**
lawyers

To Michael Casey - Archdiocese of Sydney
Fr. John Usher - Archdiocese of Sydney
Michael Moore - Archdiocese of Sydney
Marita Wright - CCI
Joe Bucci - CCI

From Paul McCann and Anna Ross

Date 6 June 2007

Subject **Meeting of 5 June 2007 to discuss the possibility of a special leave application by John Ellis and options arising in relation to settlement**

Dear all,

As requested by Marita during our meeting on 5 June 2007, the purpose of this memorandum is to summarise the various issues discussed during our meeting.

1 Procedures and costs associated with special leave

Were Mr Ellis to file a special leave application, he would need to do so before 21 June 2007. A special leave application is required to be concise and targeted and will identify one or more discrete points of law which Ellis argues were the subject of error by the NSW Court of Appeal (**NSWCA**). The application could **not** seek to reopen all the matters considered by the NSWCA or by Acting Justice Patten at first instance.

If made, the hearing of the application would be very brief, being unlikely to exceed 45 minutes in length. It is likely that the application would be heard in August or September this year. Between 2 to 3 Justices of the High Court hear the application for special leave, probably at the Sydney registry.

Because of the narrow nature of the application, applications for special leave are not generally expensive to run or defend. We would estimate that both Ellis and the defendants would expend between \$25,000 to \$30,000 should Ellis apply for special leave.

If Ellis is successful and obtains special leave to appeal, he will be allocated a hearing date for the matter to be heard before the High Court in Canberra, probably late in 2007 or early in 2008. The appeal would generally be heard by 5 Justices of the High Court and would be held in Canberra. Depending on the grounds identified by Ellis in his leave application, the hearing is unlikely to take more than 2 days. During the preparation stage, detailed submissions and appeal books must be prepared by the parties. As a consequence, we estimate that both Ellis and the defendants would need to expend between \$80,000 and \$100,000 taking the matter to the ultimate hearing before the High Court.

2 Likelihood of success of special leave application by Ellis

The likelihood of success on a special leave application is notoriously difficult to predict. As a general rule, less than 5% of cases are successful in obtaining special leave to appeal.

6 June 2007
Archdiocese of Sydney



In considering whether to grant special leave, the High Court "may have regard to any matters that it considers relevant" but it "shall have regard to" the two matters set out in s35A of the *Judiciary Act 1903* (Cth), namely:

- (a) *whether the proceedings in which the judgment to which the application relates involve a question of law:*
 - (i) *that is of public importance, whether because of its general application or otherwise; or*
 - (ii) *in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and*
- (b) *whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates."*

In this particular case, the points in favour of a grant of special leave are:

- (a) The underlying points, particularly as to the nature of the position of Archbishop, would certainly interest the High Court. The NSWCA judgment seems to be the only real Australian authority on the question whether a Catholic Archbishop in Australia is a corporation sole. In that sense, it is a classic special leave point.
- (b) Due to similarities in the legislation establishing the Trustees in other states, it is likely that the NSWCA's approach to interpretation of church property legislation would have at least some application around Australia.
- (c) The issue is one of considerable social importance, particularly so far as there are, and may be other, claims affected by the decision of the NSWCA.
- (d) The practical result in this case - that there appears to be no substantial defendant against which/whom abuse claims from (at least) the early 1980s and earlier may be brought - is likely to trouble at least some members of the Court.

The points we would use to argue against the grant of special leave would include that:

- (a) The decision below is unanimous, particularly emphatic and entirely orthodox. We would argue very strongly that it is plainly correct.
- (b) The current case is not a suitable vehicle. The Court of Appeal did not decide any of the limitation/factual points, which would all remain alive for further determination. Although the High Court would probably remit those issues to the Court of Appeal for decision if it were otherwise minded to grant the appeal on the "proper defendant" points, and so not have to deal with the limitation/factual issues itself, that would be a most unsatisfactory result for the parties. We would face further litigation on the limitation and factual arguments (and in all likelihood a further special leave application) if the Court went down that path.
- (c) At least some of the Justices may prefer not to enter into an area of contentious social policy which, after the Court of Appeal's judgment, is effectively settled in any event.

On balance, we consider that Ellis has better prospects of obtaining leave than the average application. Success or failure may come down to who constitutes the bench.

3 Should the defendants make an offer to prevent a special leave application from being made?

Currently, the defendants have an order in their favour for their costs of the appeal and the costs before AJ Patten. The costs involved are very substantial and after assessment are likely to be in the region of \$460,000 to \$550,000. The Archdiocese and CCI are entitled to seek to recover these costs from Ellis either by payment of funds, recovery of assets or other methods such as through garnishing of income.

There is a real question as to whether Ellis will have sufficient funds to cover the costs incurred by the Archdiocese and CCI. There is, therefore, a high risk that even were they minded to pursue Ellis, a significant proportion of the costs to which the Archdiocese and CCI are entitled will never be recovered. It will also need to be considered whether recovery is worthwhile in circumstances where Ellis is likely to be bankrupted and/or must sell his family home, particularly when it seems inevitable that Ellis would ensure the media become involved.

However, the significant costs to which the defendants are currently entitled remain a bargaining tool while Ellis is considering whether to file a special leave application. The defendants could make an offer to Ellis that they forego the costs he is now obliged to pay in exchange for his agreement not to pursue a special leave application. It would be possible to incorporate pastoral aspects to the offer, including re-entry to Towards Healing – although without the possibility of a monetary settlement.

There are arguments for and against making an offer of settlement. The arguments for making an offer are:

- (a) If Ellis accepts the offer, the NSWCA's decision will be protected and there will be limited risk of ongoing litigation in relation to questions of limitation and the merits of the claim itself.
- (b) Ellis and his legal advisors are in a vulnerable financial position and stand the risk of exposure to a further \$100,000 in costs should the appeal to the High Court ultimately be unsuccessful, as well as significant further costs should matters be remitted to lower Courts and on the ultimate hearing of the claim.
- (c) Ellis may be disillusioned by the decision of the NSWCA and be reluctant to pursue further avenues of appeal, particularly in circumstances where, even if successful, arguments in relation to limitation and facts would be remitted to the lower Courts and he would face several more years of litigation.
- (d) The Archdiocese and CCI would be seen to have done everything they could to resolve this matter without further litigation and could, with careful wording, conceivably make a public statement to this effect.

The arguments against making an offer are that:

- (a) Ellis is unlikely to accept the offer as he appears to be determined to pursue his claim through every avenue possible and may not believe that the Archdiocese and CCI genuinely intend to pursue him for costs.

6 June 2007
Archdiocese of Sydney



-
- (b) There is an argument, raised by Counsel, that such an offer should only be made in circumstances where the Archdiocese and CCI genuinely intend to pursue costs as this may otherwise be misleading.
 - (c) If Ellis is undecided as to whether to pursue a special leave application, an offer may cause him to believe that the defendants consider the decision of the NSWCA to be vulnerable and this may strengthen his resolve to pursue the application.
 - (d) if Ellis accepts the offer, this reduces the ability of the Archdiocese and CCI to comment publicly on what they propose to do in relation to costs orders against unsuccessful complainants. However, a carefully worded statement could still be considered.

On balance, it is our view that an offer should be made. We recommend that if the Archdiocese and CCI form a view that an offer should be made, that it be made as soon as possible as delaying further will decrease the chances of Ellis accepting the offer. Once a decision has been made by him to proceed and time and costs have been expended in preparing the application, he is less likely to be dissuaded from pursuing the application. We also recommend that the letter make clear that the defendants' motivation for making an offer is based on a desire to prevent further wastage of time and expense rather than a concern about frailties in the decision of the NSWCA.

We have **attached** for your consideration, a draft letter that we suggest be sent to Mr Ellis.

Corrs Chambers Westgarth

Anna Ross
Senior Associate
(02) 9210 6904
anna.ross@corrs.com.au

Paul McCann
Partner
(02) 9210 6241
paul.mccann@corrs.com.au