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To <Evangelos_Manollaras@agd.nsw.gov.au>, <Jodie_Vella@agd.nsw.gov.au>
cc
bcc
Subject 200801481 - D2012/72359 : Kathleen Biles

History: This message has been replied to and forwarded.

Dear Angelo and Jodie

The Department has sought the views of counsel in relation to:

1. vacating the costs order made by Judge Truss on 14 February 2010;

2. the possibility/prospects of appealing her Honour's decision to vacate the hearing;

3. prospects of the Court hearing the stay application first.

**Costs order made by Truss DCJ**

I have discussed this issue with Michael Cashion SC and we are of the view that it would be premature to apply to vacate the costs order prior to the limitation and stay applications being heard.

At the recent mention, Mr Cashion submitted that costs should be reserved for two reasons:

1. Events may demonstrate that the defendant's primary argument is correct; namely, that the issue arising from the stay application is the same as one of the issues arising from the limitation application. Therefore, the adjournment is not due to the stay application but is due to the plaintiff not being properly prepared.

2. If the plaintiff serves no further evidence of significance in opposition to the stay application then the adjournment will have been unwarranted.

If these matters come to pass in the fullness of time – once the applications have been heard – then it will be appropriate to revisit the question of whether an application should be made to vacate the costs order.

In any event, it is to be noted that the plaintiff's costs of the mention are at Legal Aid rates. Further, on assessment it may be that a costs assessor forms the view that all other costs claimed relate to work performed which benefitted the applications and, as such, that there are no costs thrown away. In those circumstances, in practical terms the costs falling within the order may well be very modest.

**Appeal of decision to vacate hearing**

In my view, there is little chance of successfully appealing Judge Truss's decision. The first step would involve seeking leave which I also view as most unlikely. Judge Truss is the list judge. Her Honour has been case managing the proceedings. Her Honour's decision was discretionary. It was made after hearing from both parties. It was based upon issues of fairness and concern about "forcing the plaintiff on" in circumstances where counsel for the plaintiff indicated that further time was required in order to enable the plaintiff to prepare evidence. Her Honour embraced that submission. As outlined above, if it transpires (after the hearing) that the adjournment was unnecessary then the costs order can be revisited.

Two practical issues also militate against challenging the decision. The first is that it is unlikely a leave application and any appeal would be determined prior to the allocation of a further hearing date. Secondly, the hearing date has now passed and her Honour indicated that the Court is allocating dates in September 2012. By the time the matter is again before the Court, the available dates are likely to be in the final quarter of 2012. An appeal will not change that constraint on the timing of the hearing. In other words, there is no practical remedy.

**Prospects of having the stay application heard first**

Whilst it would be quicker and cheaper to hear the stay application first (rather than the stay and limitation applications together), Judge Truss has highlighted a difficulty in taking that approach. Peter Maxwell's evidence is the evidence on both applications and he is likely to be cross examined during the hearing of each application. Splitting the applications may cause evidentiary complexities if he is cross-examined on the same evidence twice. If the applications are heard before two different judges then rulings on objections to the

admissibility of parts of Mr Maxwell's evidence may cause inconsistencies. Further, there will inevitably be duplication of cross examination particularly in circumstances where – on our argument – the issue on the stay application is subsumed within the issues arising on the limitation application, which is inefficient.

Her Honour has not made a ruling on this issue and it was not addressed in any significant way on the last occasion. However, her Honour seems to see merit in an approach that avoids these kinds of difficulties by having the stay and limitation applications in relation to Kathleen Biles heard concurrently.

It should be noted, however, that whilst the issues of prejudice (in the context of the limitation application) and whether there can be a fair trial (in the context of the stay application) involve similar tests, with significant overlap, the tests are not entirely the same. Consideration of whether there can be a fair trial can only be properly considered in the context of the circumstances relating specifically to each plaintiff and will therefore inevitably involve as least some considerations above and beyond those in common with the issue of prejudice on the limitation application. These plaintiff-specific aspects may be limited but are likely to be important. For example, the issue of fair trial would be different for a claim based on one assault which was documented at the time, investigated and reported compared with a claim involving multiple assaults by a number of people over an extended period of time.

It would be in the defendant's interests to seek to have the stay application heard first if the evidence is limited to Mr Maxwell's affidavit. This would avoid infecting an otherwise "mechanical" stay application with evidence from the plaintiff and medical experts on the limitation application that is likely to be highly emotive and result in considerable sympathy from most judges.

I will be better placed to express a view on this issue once the plaintiff has identified the evidence upon which she proposes to rely on the stay application. If Mr Maxwell is the only witness for the purposes of the stay application then the Court may be persuaded that the efficiencies involved in hearing the stay application separately outweigh the evidentiary complexities of Mr Maxwell's evidence being adduced twice – particularly if it avoids the need to call the plaintiff and medical witnesses and if there is agreement as to the issues that may be put to Mr Maxwell or the way in which his evidence is to be treated. Those issues can be given further consideration once the plaintiff has disclosed the evidence she proposes to rely upon, if any.

Kind regards

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