

NO. 6

APPLICATION FOR SPECIAL LEAVE TO APPEAL
DATED 2 NOVEMBER, 1995

1. The Applicants apply for special leave to appeal from
5 part of the judgment of the Court of Appeal given on
12 October 1995.
2. The grounds on which the judgment is sought to be
challenged and the specific questions of law raised by
the application are set out in the statement in support
10 of the application dated the 2nd day of November 1995.

DATED 2 day of November 1995.

(Sgd)
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Solicitors
(Handwritten) PETER GORDON by his partner
ANNE-MAREE FARRELL

15 TO: The First & Second Respondents
c/- Their Solicitors
Dunhill Madden Butler
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TAKE NOTICE, Before taking any step in the proceedings you must, within 14 DAYS after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the applicants.

5 The Applicants' Solicitors are:
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NO. 7STATEMENT IN SUPPORT
DATED 2 NOVEMBER, 1995STATEMENT IN SUPPORT OF APPLICATION FOR
SPECIAL LEAVE TO APPEAL

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A. FACTS ON WHICH THE APPLICATION IS BASED:

1. The Applicants are 201 Plaintiffs who allege that they were sexually and/or physically abused as children between the 1940s and the 1970s ("the relevant period") whilst they were residents at Christian Brothers orphanages in Western Australia. They allege that the Defendants acted negligently and in breach of fiduciary duties whilst the Plaintiffs were in their care and control.

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2. The Applicants commenced proceedings by summonses filed in the Supreme Court of New South Wales on 31 August 1993, seeking, inter alia, an extension of the limitation period and leave to file an abbreviated Statement of Claim. Amongst the original 21 defendants named in the summonses were the First Respondent named "Barry James Hickey, Archbishop for the Time Being of the Archdiocese of Perth" as well as a number of other Australian Bishops and Archbishops of the Roman Catholic Church.

3. Various interlocutory applications dealing with subpoenas, medical examinations and cross-vesting were heard during 1994. By 10 March 1995, the Applicants had discontinued (or had been given leave to discontinue) proceedings against all defendants except the Trustees of the Christian Brothers (The First Defendant) and the First Respondent.

4. On 10 March 1995 Levine J heard an application by the First Respondent that the proceedings against the First Respondent be struck out, and an application by the Applicants that, inter alia, the Court grant leave to the Applicants to correct the name of the First Respondent to "the Roman Catholic Archbishop of Perth". Both applications were contested.

5. At the hearing before Levine J the First Respondent contended that

(a) Barry James Hickey, the natural person could not be personally liable for torts occurring in the relevant period;

(b) The Roman Catholic Archbishop of Perth was not a corporation sole at common law;

(c) The statutory corporation sole named the Roman Catholic Archbishop of Perth was created for limited purposes relating to property ownership and could not be held liable for the torts of the Archbishop (in whatever capacity) in the relevant period.

For these reasons, the First Respondent contended that the proceedings against him should be struck out, and the amendment sought by the Applicants should not be granted since it was futile. The First Respondent did not contend that the Applicants did not otherwise satisfy the requirements of Part 20 Rule 4(3) of the Supreme Court Rules and the rule in Bridge Shipping Pty Ltd v Grand Shipping (1991) 173 CLR 231, 260.

6. The Applicants conceded issue 5(a) above as they had from the commencement of the proceedings. However, they contended that the Roman Catholic Archbishop of Perth was a corporation sole both at common law and pursuant to the Roman Catholic Church Property Act 1911 ("the 1911 Act") and therefore would be liable for torts committed by the corporation sole in the relevant period.

7. Levine J found (at p 8.7) that he did not ultimately need to determine whether the Roman Catholic Archbishop was a corporation sole at common law but stated that he was not persuaded by authority on that matter. He found (at p.17.5) that:

- (a) The liability of the corporation sole created by statute (the Second Respondent) was clearly arguable;
- (b) That the Applicants had never intended to "sheet home to Barry James Hickey in a personal sense liability for events that occurred when he was a young child but rather liability ... was to be sheeted home to the office"; and
- (c) The amendment came within the rule in Bridge Shipping Pty Ltd v Grand Shipping SA supra.

Accordingly, His Honour refused the First Respondent's application, and granted leave to the Applicants to amend the Summons to substitute the

Second Respondent for the First Respondent.

8. The Court of Appeal granted the First Respondent leave to appeal and, on the appeal

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- (a) granted leave to the Second Respondent to be added as an Appellant;
 - (b) Allowed the Respondents' Appeal;
 - (c) Set aside the order of Levine J granting leave to substitute the Second Respondent for the First Respondent;
 - (d) Struck out the proceedings against the First Respondent.

10 **B. GROUNDS ON WHICH THE JUDGMENT BELOW IS SOUGHT TO BE CHALLENGED:**

1. Their Honours erred in holding by majority (at p 24.4) that the claim against the First Respondent be struck out.
2. Their Honours erred in setting aside (at p 22.7) the decision of Levine J
15 granting the Applicants leave to amend the name of Barry James Hickey, Archbishop for the Time Being of the Archdiocese of Perth to the Roman Catholic Archbishop of Perth.
3. Their Honours erred in holding, by majority (at page 24.4) that the First Respondent was sued in his personal capacity, and not as a corporation
20 sole, when the Appellant contended (at pp 22.9 - 23.1) and the Respondents asserted (at pp 12.5, 12.9-13.1, 14.4) and also the trial judge recognised (at pp 7.9-8.3) that the First Respondent was not sued in his personal capacity but was sued as a corporation sole.

4. Their Honours erred in holding, by majority (at p 24.4) that the test of whether the Applicants intended to sue the corporation sole at common law is determined by whether the Applicants used the correct corporate name.
- 5 5. Their Honours erred in permitting (at p.15.5) the Respondents to raise on appeal whether a mistake within the meaning of Part 20 Rule 4(3) had occurred, when this matter was not argued by the Respondents before Levine J.
6. Their Honours erred in holding (at p 15.5) that this matter of a mistake
10 within the meaning of Part 20 Rule 4(3)
(a) was raised before Levine J;
(b) was a jurisdictional issue which could not be waived by a party,
and
(c) was a question of law which could not be affected by evidence.
- 15 7. Their Honours erred in holding (at p 14.7) that the Applicants made no mistake in relation to the name or the identity of the party intended to be sued.
8. Their Honours erred in holding (at pp 15.7, 16.2) that the description or characteristic identifying the mistaken party within the meaning of Bridge Shipping Pty Ltd v Grand Shipping SA (1991) 173 CLR 231, 260 was
20 whether the party was (or was believed to be) responsible for the torts of his predecessors.
9. Their Honours erred in holding (at p 16.2) that the Applicants did not
25 intend to sue the Roman Catholic Archbishop of Perth because there was no knowledge of his statutory corporate existence.

10. Their Honours erred in holding (at p.16.6-17.9 and 21.8)that the Second Respondent could not have committed, or been liable, vicariously or otherwise, for torts or breaches of fiduciary duty.
11. Their Honours erred in holding (at p 21.1) that the Second Respondent may only be sued in relation to property.
12. Their Honours erred in focussing on the general statutory function of the Second Respondent and not on the particular acts which may have caused injury, and failed to give any consideration to the authorities of this court, such as Australian National Airlines Commission v Newman (1987) 162 CLR 466 which suggest otherwise.
13. Their Honours erred in holding (at p 23.9) that the Applicants
- (a) had not previously advanced the contention that the Second Respondent was liable both as a corporation sole at common law and as a statutory corporation sole, and
 - (b) had abandoned the claim against the Second Respondent as a corporation sole at common law.
14. Their Honours erred (at p 22.6) in not permitting the Applicants to file the "First Statement of Claim" as amended in the proceedings.

C. SPECIFIC QUESTIONS OF LAW JUSTIFYING GRANT OF SPECIAL LEAVE TO APPEAL:

1. In determining whether a party has made a mistake in the name of a party according to the principles enunciated in Bridge Shipping supra, should the court consider the intention of the party seeking relief, or, as the court of Appeal found, only what the party actually did.

2. Is the Roman Catholic Archbishop of Perth
 - (a) a corporation sole at common law, and/or
 - (b) a corporation sole pursuant to statute capable of being sued for negligence or breach of fiduciary duty.

- 5 3. Does the Court, in determining the liability of a corporation for breach of duty, look to the acts causing the damage, and to the proximity of the parties, or as the Court of Appeal found, to the purposes for which the corporation was established.

- 10 4. Have the Applicants been denied natural justice in the Court of Appeal because that court found that the Applicants never intended to sue the corporation sole at common law, when this matter was never in issue before the Court of Appeal or Levine J.

5. Is, as the Court of Appeal found, a mistake in the name of a party within the meaning of Part 20 Rule 4(3) of the Supreme Court Rules:
 - 15 (a) A jurisdictional issue which cannot be waived;
 - (b) A question of law which cannot be affected by evidence; and
 - (c) A matter which the Respondents were entitled to raise in the Court of Appeal although the Respondents did not argue the matter before Levine J.

D. REASONS WHY SPECIAL LEAVE SHOULD BE GRANTED

Special leave to appeal should be granted because;

5 1. 201 sets of proceedings have been struck out against the First Respondent because of a finding that the Applicants did not intend to sue the corporation sole at common law, notwithstanding;

10 (a) The Respondents asserted (and the Applicants contended and the trial judge found and the contrary was not argued before either Levine J or the Court of Appeal) that the Applicants intended to sue the corporation sole at common law (see Part B para 3 above).

(b) The only basis for the finding that the Applicants did not intend to sue the corporation sole at common law was that the Applicants had not sued the correct corporate name (p24.4).

15 (c) The Applicants application was to amend the summonses to correct the name.

(d) The Court of Appeal expressly reserved the question of whether the Second Respondent is a corporation sole at common law (p24.2); and

20 (e) There was uncontested evidence that the Applicants had intended to sue the corporation sole (p15.1).

2. This case will determine whether any Church corporation - and in particular the Roman Catholic Archbishop of Perth, being the

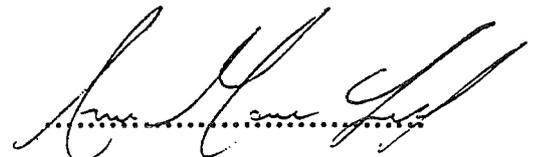
corporate body owning all Catholic church property of whatever kind in Perth - whether as a corporation at common law or pursuant to statute, may be responsible for the wrongful acts and omissions of its office holders and his/her servants or agents.

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- 3. The decision of the Court of Appeal directs courts to look to the purposes of a corporation to determine whether that corporation may be liable for breach of duty, rather than to the acts causing damage and the proximity of the parties.

Dated the 2nd day of November 1995.

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 Solicitor for the Applicants
 PETER CANNON by
 his partner ANNE-MARIE
 FARRELL