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To: "Joanna.Mitchell" <joanna.mitchell@dhs.nsw.gov.au>
Sent: Wednesday, 04/05/2011 03:15 PM
Attachments: Affidavit 4 May.pdf
Subject: AIL

CSO REFERENCE: 200801481 - D2011/149849

E-mail to: Joanna.Mitchell@dhs.nsw.gov.au

Re: State of New South Wales ats AIL & Ors 200801481 MPL7300972

I refer to our e-mails dated 3 May, and I now report to as to the status in the matter and the result of the Directions Hearing before the List Judge on 4 May 2011.

The enclosed Affidavit sworn by me on 4 May reflects on the status of the matter. What I can add to that is that following the receipt of instructions from your predecessor Ms Emma Hurford on 5 April 2011, the submission was made to the Attorney General to approve the briefing of Mr Michael Cashion SC as Senior Counsel in this matter. That approval was given and Mr Cashion has now been briefed as Senior Counsel in the matter.

On 4 May 2011, this matter was listed for Directions before the List Judge, McLaughlin DCJ, at the District Court Sydney. I attended to instruct Mr Michael Cashion SC and Mr Paul Arblaster at that Directions Hearing. Mr Cashion handed up my Affidavit sworn on 4 May (a copy of which is enclosed).

My Affidavit outlined the state of preparation of the case for the defendant in relation to the limitation motions. It also argued for an extension of time within which the defendant could serve the balance of its evidence. The Affidavit notes that the defendant had complied with an order to have its medical evidence served by 11 March, but could not comply with the order to serve all its other evidence by 29 April. The reasons for that were outlined in the Affidavit. Briefly, the biggest stumbling block has been simply the mammoth task of sifting through mountains of documentation produced on subpoena of approximately 40 lever arch folders and counting.

The Affidavit also reflected on the number of documents that had been produced but to which the defendant had still not obtained access (for various reasons) as well as the issue of further subpoenas.

In my Affidavit I indicated that whilst an investigation into the allegations of the fifteen plaintiffs had commenced shortly after receipt of this Statement of Claim, obtaining access to a number of documents after that time had suggested further lines of investigation and that such investigation was continuing.

Whilst his Honour was initially adverse to granting any extension of time, once he was further addressed by Mr Cashion on the subject his Honour showed some leniency to granting a short extension and made the following orders:

1. Defendant to file and serve Affidavit by Investigator as to prejudice within fourteen days
2. Defendant to serve as much as possible of its other lay evidence within a further fourteen days
3. Matter listed for further Directions at 9:30am on 9 June 2011.

His Honour acknowledged that the existence of fifteen plaintiffs in a consolidated action which also comprised allegations stretching back 40 years as a big and complex matter and was willing to review the situation of the preparation of the defendant's case on the next occasion. We gleaned from that that his Honour would, depending on the circumstances, grant a further

extension if all the defendant's other lay evidence could not be served within the above timetable.

There was also some discussion between Counsel and his Honour as to the estimate of the matter and it was generally accepted both by Counsel for both parties and his Honour that six weeks for the limitation motion was a conservative estimate with the possibility being that the actual time could go as long as nine or ten weeks.

Following the Directions Hearing before his Honour, there was some informal discussion amongst Counsel for both parties and the suggestion was made by Counsel for the plaintiffs that to shorten the hearing time for the limitation motion, the plaintiffs would run only one of the claims for the limitation motion. Mr Cashion argued against that suggestion on the basis that it would not serve any purpose, as each plaintiffs' claim was based on different facts and circumstances and therefore any findings in relation to one claim could not apply to any of the other fourteen claims. Mr Cashion noted the advantages for the plaintiffs; but would dispose of one of the 15 claims, and it would allow the other fourteen plaintiffs to further fix their cases up in respect of their claims. For example, if the psychiatric evidence in respect of that one plaintiff was thrown out by the Court, the other 14 plaintiffs could go and get another psychiatrist to assess them in respect of their individual claims, not making the same mistakes on which the Court might throw out the psychiatric evidence of the one claim that was run.

There would be no advantages to the defendant to agreeing to this. Whilst it would assist in the expeditious disposal of one of the claims on the limitation question, any findings in relation to that one claim would have no application to the other 14 claims because as noted above, each claim has its own set of facts and circumstances.

Mr Cashion indicated to Counsel for the plaintiff that if that was what the plaintiffs wanted to do, he suggested that it should be done by way of Notice of Motion whereby the plaintiffs would indicate which of the 15 plaintiffs they wished to proceed with on the limitation motion and allowing the defendant ample time to consider the defendant's position in relation to the proposal.

There was no informal resolution of that question amongst Counsel for the parties.

Mr Cashion mentioned to me after that discussion that he thought that the Order for consolidation of the fifteen claims needed further consideration on the part of the defendant and he would spend some time thinking about what, if anything, the defendant should do in respect of that Order by Judge Knox in 2009. Mr Cashion noted the possibility of an Application to the District Court to vary the Order by Judge Knox; on failure of that, consideration as to whether an Appeal to the decision of Judge Knox DCJ should be filed out of time. Senior Counsel will address these issues in an Advice in the near future.

Our timetable for complying with the fresh orders is that we anticipate having the final draft of Mr Maxwell's Affidavit settled today (4 May 2011). Apart from that it is necessary to collate the Exhibits referred to in that Affidavit, which are contained in approximately 11/2 lever arch folders. I note that on 4 May I discussed with you the question as to whether the names of reporters (informants) and the names of other children who are not parties to the litigation, should be redacted from the Departmental documents which will be exhibited in Mr Maxwell's Affidavit.

I confirm your instructions that in the case of reporters (informants) their names should be redacted, as well as the names of the other children who are not parties to the litigation, as per your emailed instructions earlier this afternoon. As noted in your email this will considerably add to the time it will take to complete the exhibit bundle.

Once the Exhibit bundle is ready, it will be paginated and arrangements are being made for Mr Maxwell to swear the Affidavit by the end of next week, that is to say by 13 May 2011. It is hoped that it will be ready to be served by

the following week, that is to say by about 16 May.

Following that, work will recommence on sorting through documents produced on subpoena which we expect will tend to suggest that at least some of the plaintiffs were not under any disability. For example, many of them had been involved in litigation or defended criminal charges over various periods after leaving Bethcar and well before the present litigation was commenced. Their argument is that they were or still are under a disability. The defendant will try to show that they had the capacity to instruct lawyers at a much earlier time than when they decided to file the Statement of Claim against the State. If the State is successful in that argument, that they were not under a disability or at least some of them were not, the Court has no discretion to extend the limitation period and must dismiss the action.

As noted above, this is a mammoth task, as documents produced on subpoena cover some 40 lever arch folders. I advise, however, that this task is well advanced but as you can imagine is a very time consuming exercise. It is anticipated that within the further two weeks allocated by his Honour, the defendant will be able to serve a bundle of documents comprising two further lever arch folders. The task cannot be completed within that time because there are still a number of subpoenas outstanding and further subpoenas to be issued.

I trust that this report has brought you up to date on the status of the matter, should you have any questions please telephone me. I am uncertain as to whether this e-mail should be copied to the TMF and in the circumstances I have not copied it to the TMF and trust that you will forward a copy of this report to the TMF if necessary.

Evangelos G. Manollaras
Solicitor
for Crown Solicitor

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