Joanna Mitchell

From: Joanna Mitchell
Sent: Friday, 29 July 2011 11:10 AM
To: 'Evangelos_Manollaras@agd.nsw.gov.au'
Subject: RE: NSW ats AIL

Dear Evangelos

Thank you for your advice and your time for our discussion yesterday.

I have received instructions that you should proceed on the basis recommended by Counsel.

Please advise if you require anything further from me at this stage. I look forward to hearing the outcome of discussions with the plaintiffs and the directions on 5 August 2011.

Kind regards
Joanna

From: Evangelos_Manollaras@agd.nsw.gov.au [mailto:Evangelos_Manollaras@agd.nsw.gov.au]
Sent: Tuesday, 26 July 2011 04:24 PM
To: Joanna Mitchell
Subject: Fw: NSW ats AIL
Importance: High

E-mail to: Joanna Mitchell, Department of Family & Community Services Joanna.Mitchell@dhs.nsw.gov.au

Re: AIL & Ors v State of New South Wales (our ref: 200801481) MPL7300972

I enclose a joint advice by Messrs Cashion and Arblaster, together with a note from Mr Woods agreeing to the approach recommended by Messrs Cashion & Arblaster.

I apologise for the lateness of the Advice, which as you will note was only received earlier today, which calls for urgent instructions so as to ensure that adequate time is available for discussion of these matters with the plaintiffs' lawyers prior to the Directions Hearing on 5 August 2011.

As you are no doubt aware, the plaintiffs say that there are points of commonality. On that basis, they got the actions consolidated. I am still of the view that the decision to consolidate was wrong. Indeed there are no points of commonality; each plaintiff alleges separate and distinct acts of abuse at different times. Each claim needs to be considered separately, both as to limitation issues and liability, as well as quantum.

The plaintiffs argument of points of commonality would appear to be fuelled by the belief that they can more cheaply resolve all fifteen claims together, possibly by the use of tendency and similar fact evidence. This aspect is discussed at some length in the enclosed Advice, and I refer you to the Advice by Counsel in this regard.

You will note that in that discussion, the case against tendency evidence is partly supported on the basis of the possibility of concoction. In this regard, I note from reading the medical reports that there is some possibility of this evidence in those reports. I recall that in a number of cases, the individual plaintiffs stated that their interest in commencing this litigation arose after having a few drinks with "the sisters" and in some instances the suggestion is made that they were all quite inebriated at the time. One is left with the impression from reading these reports that one mentions rape, and the others say "me too".

In discussing the pros and cons of having one of the plaintiffs' limitation motion only being listed for hearing, Counsel notes that if the applicant is permitted to call several plaintiffs to give evidence, then it would be more time and cost efficient for the limitation applications of all 15 plaintiffs to be heard together.

Counsel have also considered the possibility of hearing one claim in its entirety and have concluded that this approach is unattractive, mainly because the limitation issue would be mixed in with the liability issue and thereby be diminished in

circumstances where the defendant would appear to have a good case to defeat the claim on the limitation issue.

At the conclusion of the Advice, Counsel seek instructions based on the recommendations made therein. I agree unreservedly with those recommendations and I seek timely instructions to proceed on the basis recommended by Counsel. Should you wish to discuss the matter, please telephone me.

I have not separately written to the TMF. I mention that I am in the process of reviewing the Costs Estimate for the matter and will communicate separately with you in relation to that aspect in the near future.

Evangelos G. Manollaras
Solicitor
for Crown Solicitor

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----- Forwarded by Evangelos G Manollaras/CSO/NSW_AG on 26/07/2011 12:21 PM -----

Steven Woods <swoods@wentworthchambers.com.au>

26/07/2011 11:45 AM

To Paul Arblaster <parblaster@selbornechambers.com.au>, "Evangelos_G_Manollaras@agd.nsw.gov.au" <Evangelos_G_Manollaras@agd.nsw.gov.au>, "Jodie_Vella@agd.nsw.gov.au" <Jodie_Vella@agd.nsw.gov.au>

cc 'Michael Cashion' <mcashion@sixthfloor.com.au>, "swoods@wentworthchambers.com.au" <swoods@wentworthchambers.com.au>

Subject RE: NSW ats AIL

Angelo and Jodie,
I agree with this approach.
It may be that certain matters in relation to which we assert prejudice (eg death) can be collated into a Notice to Admit Facts, which would then be served in each proceeding.
This increases the chance that a favourable finding of fact, based on such a Notice, cannot then be challenged in a later application.

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From: Paul Arblaster [mailto:parblaster@selbornechambers.com.au]
Sent: Tuesday, 26 July 2011 10:59 AM
To: Evangelos_G_Manollaras@agd.nsw.gov.au; Jodie_Vella@agd.nsw.gov.au
Cc: 'Michael Cashion'; swoods@wentworthchambers.com.au
Subject: NSW ats AIL

Dear Angelo and Jodie

On 9 June 2011, Truss DCJ directed the parties to confer with a view to identifying ways of expeditiously progressing the proceedings. Her Honour expressed reluctance to set all 15 limitation applications down for hearing.

Set out below is our suggested approach. Subject to your views, we recommend that instructions be sought from the client to proceed along those lines. We then propose to approach counsel for the plaintiffs with a view to reaching agreement on that course prior to the directions hearing on 5 August 2011.

Test case approach

In our view, the most suitable approach is for the limitation application for one applicant (agreed by the parties) to be heard and determined. This "test case" approach would be subject to a number of qualifications, namely that it is:

1. subject to the parties' right to appeal;
2. not binding on the parties in any of the other limitation applications or the other substantive proceedings - although it would be acknowledged that the decision in the test case may provide a yardstick against which the parties may consider their positions in relation to the other limitation applications;
3. not used to prejudice the fair hearing of the other limitation applications in the event that they proceed. For example, a different Judge would need to be allocated to avoid the danger of the Court having pre-conceived views on credit and the facts, etc; and
4. subject to agreement being reached as to who will be called as witnesses in the "test case".

Hearing all limitation applications

Unless each of those qualifications is satisfied, it would seem that the "test case" approach is not feasible; particularly in relation to point 4 above if the chosen applicant seeks to call some or all of the other 14 plaintiffs to give evidence. That evidence may be limited to direct evidence of what the other plaintiffs saw or heard viz acts perpetrated against the applicant. However, if the other plaintiffs are called to give tendency evidence or evidence generally in relation to their experiences at Bethcar then the position becomes more complex.

F 3.6 of the *Evidence Act* 1995, which relates to evidence of tendency and coincidence, requires notice to be given (unless that requirement is dispensed with) identifying the particular tendency evidence the applicant seeks to adduce. Further, the Court must be satisfied that the evidence is of "significant probative value". This is determined by way of voir dire which may itself be a lengthy process given that it could require cross-examination of a number of the plaintiffs on issues such as the possibility of concoction.

In the criminal trials of Colin Gibson in 2006, the Crown sought to adduce evidence of tendency concerning Colin Gibson's modus operandi when perpetrating the assaults. The Crown sought to establish the admissibility of such tendency evidence as a basis for having all counts involving the five complainants placed on the one indictment. A number of plaintiffs were called on the voir dire and were cross-examined on the issue of concoction. In his Judgment, Acting Judge Woods did not permit tendency evidence from each complainant to be used in the trials of the other complainants and did not permit all of the complaints to be heard on a single indictment. His Honour referred to the danger of emotional overtones that sexual assault cases can raise and the real danger in sexual assault cases that a similar story may have arisen by the process of infection even if there is no evidence of concoction. Perhaps a further application was made because a number of the plaintiffs subsequently gave evidence of their experiences at Bethcar in other complainants' cases - without objection - and his Honour's summing up referred to that evidence being considered by the Jury to establish tendency.

Notwithstanding the uncertainties surrounding the approach taken during the criminal trials and the different evidentiary rules that apply for criminal and civil cases, the conduct of the criminal trials suggests that there is at least some chance tl the applicant will seek to call evidence of tendency or similar fact evidence from other plaintiffs. Whether that evidence is permitted remains to be seen. It seems to us that such evidence would arguably not be of significant probative value; indeed, its value would probably be very limited for the purposes of the limitation applications.

Another relevant consideration is sections 56-58 of the *Civil Procedure Act* 2005. Those provisions emphasise the just, quick and cheap determination of the real issues in the proceedings. If the applicant is permitted to call several plaintiffs to give evidence then it will be more time a cost efficient for the limitation applications of all 15 plaintiffs to be heard together.

If the applicant foreshadows calling evidence from other plaintiffs that goes beyond direct evidence of witnessing acts perpetrated against the applicant then we recommend that an application be made for all of the limitation applications to be heard together.

Identifying issues of law for separate determination

This approach would enable the limitation applications and the substantive proceedings to be "de-cluttered" and heard more expeditiously on the basis of certain binding pre-determined findings of law.

However, we are unable to identify any issues of pure law in relation to either the limitation applications or the proceedings that could be determined as discrete issues and that would either determine the proceedings or significantly narrow the issues for determination.

Hearing one claim in its entirety

This approach has been previously suggested to the Court by counsel for the plaintiffs on the basis that there would be significant overlap between the evidence adduced during the limitation applications and at the final hearing.

In our view, this approach is the least attractive. Most of the plaintiffs have been subjected to abusive relationships, serious substance dependency and generally traumatic lives. Evidence about the plaintiffs' backgrounds is likely to elicit significant sympathy from most Judges. If the limitation applications are subsumed within the hearing of the claims then such evidence is likely to dilute the impact of otherwise favourable limitation evidence with the consequence that the prospect of the limitation defences succeeding is likely to be diminished, potentially significantly.

Instructions

We sense that the resolve of the plaintiffs - and perhaps their lawyers - for long, hard-fought limitation applications and final hearings is waning. Accordingly, we feel that they will be attracted to the test case approach.

We recommend the following course:

1. That at the directions hearing on 5 August 2011 we:

(a) propose that the limitation application for one of the plaintiffs (agreed between the parties) be heard;

(b) request that the proceedings be stood over briefly to organise the mechanics of the hearing eg. identifying the evidence the applicant proposes to rely upon;

(c) request that the matter be relisted in the near future to seek any further directions in relation to the conduct of the hearing (including the evidence) and to allocate a hearing date.

2. If the applicant foreshadows calling multiple plaintiffs as witnesses, that we apply to have all of the limitation applications heard together.

3. That we approach counsel for the plaintiffs to seek agreement to the course outlined in 1(a)-(c) above prior to the directions hearing.

Regards

Michael Cashion SC
Paul Arblaster