



Crown Solicitor's Office

File Note

Matter: AIL & D B v State of NSW - Alleged Abuse While in Foster Care **Telephone:**
Matter No: 200801481 **Conference:**
CSO Officer: Jodie Vella **Attendance:**
With: **Other:**
Date: Friday, 5 August 2011 **Time:**

File Note - Attendance at Directions Hearing on 5 August 2011

I attended the directions hearing in the above matter on 5 August 2011 in the District Court of NSW on 5 August 2011 at 9:30am.

Ms Helen Wall appeared for the plaintiffs. Mr Michael Cashion SC and Mr Paul Arblaster appeared for the defendant.

Cashion SC submitted that the parties have conferred and agreed on a number of matters. Conditions still need to be agreed on. He suggested the matter be stood over for two weeks to enable further discussions.

Cashion SC said in short we have been discussing picking one or two plaintiffs whose limitation applications will be run with a view to establishing a 'yardstick' against which the remaining plaintiffs can be assessed.

Truss DCJ queried what the motion was, as she could not see it on the file.

Cashion SC explained it was for a limitation application in advance of the substantive proceedings. That is, to be resolved first, rather than all set down and heard on merits.

There was then some discussion on the consolidation etc. and what SofCs there are in the matter. It was explained that there are two SofCs, one for AIL & Douglas and a second for Kathleen & Others

Truss DCJ indicated that there are a number of motions on the file and she wanted clear idea on where it had been. It was therefore stood down in the list and she called for the other court file.

Ms Wall had a chronology which she showed Counsel for it to be copied and handed up to assist her Honour. Cashion SC and Arblaster reviewed the chronology and agreed it could be handed up. It dealt with the applications, motions etc. in the proceedings to date.

Once the matter was called again, the chronology was handed up.

Her Honour found a copy of the motion filed on 11 February by the defendant for strike-out under the UCPRs (not on limitation basis). Cashion SC made it clear that there is no defendant's motion!

It was explained that Knox's judgment dealt with strike-out under UCPR.

Arblaster clarified what happened before Knox, as he appeared. That is, it dealt with consolidation, particulars, evidence etc.

The discussion then came back to the two SofCs. Cashion SC said have been using **AIL** **AIL** as mode of identification, but are actually two.

There was then a bit of a summary about the case. Truss DCJ said this involves plaintiffs who had been placed in homes and now alleging abuse. Ms Wall said some were placed by their parents and that they came to the home by various means.

Truss DCJ said the claim is intentional tort or in the alternative, negligence and queried whether the damages are purely psychological. Ms Wall said yes.

Truss DCJ asked whether the Court can make the sort of relief that is claimed in the NofM (namely, declarations)? Truss DCJ asked Ms Wall who her leader is (John Catsanos).

Truss DCJ asked who came up with it (or something similar)? Ms Wall said Knox did. Paul Arblaster said this issue was not ventilated before Knox, Knox dealt with other issues.

Asked if defendant had turned its mind to it. Cashion SC said he hadn't turned his mind to it, but would now that her Honour had raised it.

Truss DCJ summarised the plaintiffs' motion:

1. Plaintiff seeking declaration that all material times plaintiff under disability; or
2. Not outside limitation, but if so, should be extended.

Truss DCJ then said to Ms Wall words to the effect: "You're the plaintiff, your motion, and it needs to be put into a better state." Truss DCJ thanked Ms Wall for the chronology.

Truss DCJ asked whether the parties agree that the limitation application should be heard as a preliminary issue, and the parties agreed.

Truss DCJ made order for it to be heard as separate matter under UCPR. In fact, Truss DCJ said: "Under r 28.2 court order limitation questions subject of Notice of Motion filed 13 February 2009 be decided separately from other questions before the trials."

There was then a general discussion regarding which two plaintiffs' limitation applications should be heard. Ms Wall indicated that they have put forward two, but could do one. Cashion SC indicated that this is an area that needs further discussion to ensure the plaintiff chosen is as representative as possible. Although decision not binding on others, want a yardstick. Therefore, plaintiff chosen has to be as relevant to the others as possible to assess prospects. Cashion SC indicated that the defendant is not necessarily rejecting the two put forward by the plaintiffs, but need to consider if it meets the criteria. If not, might suggest one. At moment not agreed upon, but will try.

Truss DCJ then queried the appropriateness of her previous order under r 28.2 Noting that assuming their successful, would want them to determine for all before going through to substantive trial.

Cashion SC said irrespective of outcome of discussion, the order her Honour made needed to be made.

Cashion SC said the approach is for either one or two applications to be heard, despite facts being different. Test approach may not resolve, but at least we have a yardstick and get determination and then resolve others by reference to the others.

Truss DCJ suggested the plaintiff(s) and defendant could choose one each. Cashion SC said that is one option, and also the court could choose. Cashion SC said problem with each choosing one is that we would have the two extremes and that doesn't provide any sort of yardstick. Need them to be middle-ground. For instance, if pick strongest, it might not touch upon the issues that arise in the middle ground. Likewise, if choose the weakest. Would prefer middle-ground then the two extremes.

Cashion SC said each could pick a middle ground plaintiff, but not extremes.

Truss DCJ asked if all the evidence is on for the limitation motion. Ms Wall said for the plaintiffs, yes. It will comprise affidavit of the plaintiff and call the qualified psychologist. Truss DCJ asked what gives them an entitlement to call Dr Jungfer because they have the report.

Ms Wall said Dr Jungfer will be available for cross-examination.

Truss DCJ asked if the defendant would want to cross-examine her and Cashion SC said yes.

Defendant was then asked about the evidence. Cashion SC said most of it is complete. However, whether it is complete in relation to the one or two plaintiffs depends on the plaintiff(s) chosen. Cashion SC said Peter Maxwell, Investigator, has put on affidavit and supplementary affidavit. Said bit more work for him to do. May be another affidavit, but depends on plaintiff chosen.

Cashion SC said we have qualified two psychologists and clarified that it is one report for each plaintiff.

Looking at disability from early 1970s to late 1980s to 2008-2009.

Duration

Ms Wall said that if one plaintiffs' application is heard, best estimate is for one or two days. Truss DCJ said Ms Wall was being a bit optimistic. Cashion SC said it would depend on the facts. Truss DCJ said could take a week and suggested it be listed for a Monday.

Evidence

Back on evidence, Cashion SC said it is time consuming to look through subpoenaed documents and depending on the plaintiff(s) chosen, the volume will vary, which makes establishing time difficult. Cashion SC said perhaps best to exercise abundant caution.

Judge asked if the parties were wanting to have it heard this year and the parties said yes.

Then, came back to today's application to stand over to agree on plaintiff(s) to run. Said once decide which plaintiff, will make it clear what the evidence is and how long it will take.

If hear fifteen, would take 6-9 weeks.

Truss DCJ asked if it was appropriate to provisionally set a hearing date for November? Cashion SC asked whether that could be done next time and Truss DCJ agreed.

Ms Wall then indicated two further points about the earlier order Truss DCJ made for the limitation application(s) to be heard first. Firstly, re the date of the NofM, it should be 9 and 13 February 2011. Secondly, Ms Wall said she has no instructions what to do if plaintiff is successful on limitation (ie. whether to proceed through to substantive hearing. Mediation is possible.)

Truss DCJ queried whether to make the order under UCPR r 28.2 next time.

Truss DCJ could have stood the matter over for two weeks, but she indicated she'd prefer to manage it she was not available until 5 or 6 September 2011.

Cashion SC said better to stay with Truss DCJ and can do lots in that month.

Matter stood over for further directions to **9 September 2011**.

After the directions walking back to the office, it was suggested that short minutes of orders be drawn up (for instance, dealing with the conditions) and Mr Arblaster suggested ranking the plaintiffs to find the 'middle-ground' plaintiffs.

COPY OF ORDERS FROM JUSTICELINK:

Heard at: 05 Aug 2011 09:30 AM - District Court - Civil - Sydney - Judge D Truss

2008/00316976-001 /Statement of Claim: **AIL** & DOUGLAS BRUCE BILES v STATE OF NEW SOUTH WALES /

Recorded Order

Order Listing management - adjournments / Adjourned/Relisted (general) no status change made on 05 Aug 11 for proceeding 2008/00316976-001 - Claim

This matter is listed for Directions (List Judge) on 9 September 2011 9:30 AM before the District Court - Civil at Sydney. Estimated duration: 5 Minutes

With regard to the proceedings brought by each of the 15 pls, pursuant to r 28.2 of the UCPR the Court orders that the limitation questions the subject of the NMs (filed 9/2/09 & 13/2/09 on behalf of the pls) be decided separately from any other questions before the trials.

Mr Catsanos leading Ms Wall for pls.

SO/FD on Fri, 9/9/11 @ 9.30am before list judge.

Liberty to apply.

Suggested to Ms Wall that pls consider whether relief sought in [1] of the NM is properly framed (declaration).

As to limitation question, parties hope to agree upon 1 case as being representative and having that determined as a 'yard stick'. Hope to have it heard this year. Pls suggested 1-2 days (unrealistic, D a bit longer, in my view list on a Mon and allow 5 days).

Pl's evidence complete whichever pl is chosen. Affidavit from the pl and report of Dr Jungfer (psych). Likely to be cross-examined on issue as to whether pls were under a disability (s 52 Limitation Act).

D's evidence will depend on which pl selected.

2 affidavits from Mr Maxwell and psychiatrist (either Dr Skinner or Dr Browne) plus there is a large volume of subpoenaed material.

Signed:

Jodie Vella
Paralegal
for Crown Solicitor