

**IN THE DISTRICT COURT OF NEW SOUTH WALES AT SYDNEY
PROCEEDINGS NO 2008/316976**

AIL [REDACTED] & 14 OTHERS

v

STATE OF NEW SOUTH WALES

**MEMORANDUM OF ADVICE ON PROPOSED
APPLICATION TO STAY OR DISMISS PROCEEDINGS**

1. Fifteen plaintiffs (including Kathleen Biles) commenced proceedings against the State in 2008 seeking damages for personal injuries suffered as a result of sexual assaults perpetrated against them whilst placed at Bethcar home in Brewarrina as children between 1970 and 1989.
2. In response to defences filed for the State in which it pleads that the claims are statute barred, the plaintiffs filed applications seeking declarations that the limitation period was suspended because the plaintiffs were under a disability or alternatively seeking an extension of the limitation period.
3. Kathleen Biles' limitation application has been set down for hearing on 20 February 2012 with an estimate of 3 days. A further 2 days have been reserved by the Court if required. Ms Biles' application was set down separately from and in advance of the other plaintiffs' limitation applications on the basis that it may provide a yardstick against which those applications may be assessed by the parties.
4. The evidence upon which the State proposes to rely at the hearing of Kathleen Biles' limitation application comprises two affidavits sworn by Peter Maxwell, investigator, and exhibits thereto together with a bundle of documents extracted from material produced in response to various subpoenas issued by the Crown Solicitor's Office.
5. Mr Maxwell's affidavits depose to the death, incapacity or unknown whereabouts of numerous witnesses referred to in the files maintained by Department of Community Services and its predecessors who may otherwise have been called to give evidence in relation to the allegations pleaded in the Statement of Claim. The affidavits also identify a number of pertinent documents that Mr Maxwell has been unable to locate. This loss of

evidence seems to be principally due to the significant delay in the commencement of the proceedings.

6. In those circumstances, an issue arises as to whether an application should be made to permanently stay or dismiss or strike out the plaintiffs' claims on the basis that the proceedings are an abuse of the process of the Court. The rationale for such an application is that the effluxion of time since the events giving rise to the plaintiffs' claims has resulted in the deterioration of evidence upon which the State would otherwise have relied in its defence of the substantive proceedings, with the consequence that a fair hearing is no longer possible.
7. Such an application was upheld by the High Court of Australia in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256. In that matter, the plaintiff suffered personal injury in a motor vehicle accident in 1965. Proceedings were commenced in 1994. Interlocutory applications were made by the defendants (the Roads and Traffic Authority of New South Wales and Newcastle City Council) seeking the summary dismissal or permanent stay of the action. The majority described the gravamen of the defendants' submission (at 273) as "that the *objective* consequence of the lapse of time was that a fair trial was no longer possible, and so constituted an abuse of process." In support of that submissions, the defendants referred to the deterioration of evidence such as the inability to locate or obtain police records, medical records, documents relating to the construction and design of the subject road and documents that would assist in proving the insurer on risk at the relevant time as well as difficulty identifying and locating material witnesses in relation to the physical state of the road and its maintenance. In upholding the New South Wales Court of Appeal's decision to permanently stay the proceedings, the majority (comprising Gleeson CJ, Gummow, Hayne and Crennan JJ) stated (at 280):

The plaintiff certainly has a "right" to institute a proceeding. But the defendant also has "rights". One is to plead in defence an available limitation defence. Another distinct "right" is to seek the exercise of the power of the court to stay its processes in certain circumstances. On its part, the court has an obligation owed to both sides to quell their controversy according to law.

It is a long, and impermissible, step to deny the existence of what may be the countervailing right of a defendant by imputation to the legislature of an intent, not manifested in the statutory text, to require the court to give absolute priority to the exercise by the plaintiff within the limitation period of the right to initiate proceedings. ...

The "right" of the plaintiff with a common law claim to institute an action is not at large. It is subject to the operation of the whole of the applicable procedural and substantive law administered by the court, whose processes are enlivened in the particular circumstances. This includes the principles respecting abuse of process.

8. The State's evidence on a stay or dismissal application would comprise Mr Maxwell's two affidavits and the exhibits thereto. In other words, the application would require no additional evidence to the material the State proposes to rely upon at the hearing of Ms Biles' limitation application.
9. In our view, the prospects of success of a *Batistatos*-style application seeking a stay or dismissal or striking out of all 15 plaintiffs' claims are sufficiently high to have reasonable prospects of success (and good prospects before the Court of Appeal). We therefore recommend the filing of an application returnable at the hearing on 20 February 2012 seeking the following orders:
 - (a) That the proceedings be dismissed as an abuse of process of the Court pursuant to Rule 13.4 of the *Uniform Civil Procedure Rules 2005*;
 - (b) Alternatively, that the plaintiffs' claims be struck out as an abuse of process of the Court pursuant to Rule 14.28 of the *Uniform Civil Procedure Rules 2005*;
 - (c) Alternatively, that the proceedings be permanently stayed pursuant to section 67 of the *Civil Procedure Act 2005* or section 156 of the *District Court Act 1973*;
 - (d) Such further or other orders as to Court sees fit;
 - (e) Costs.
10. The reserved hearing days ensures that there is likely to be sufficient time for the application to be heard as a preliminary issue. Ultimately, the question of whether the application should or is able to be pursued at the forthcoming hearing will depend upon whether the Court is disposed to hear it and whether the plaintiffs are ready to meet the application.

Michael Cashion SC

Paul Arblaster

Chambers

1 February 2012