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 SETTLEMENT

1. Fifteen plaintiffs (including AIL [redacted]) commenced proceedings against the State in 2008. The plaintiffs seek damages for personal injuries suffered as a result of assaults perpetrated against them whilst placed at Bethcar home in Brewarrina, and later in Orange, as children between 1970 and 1989.

2. Defences filed for the State deny liability and raise a number of statutory defences including that the claims are statute barred pursuant to the *Limitation Act* 1969.

3. The plaintiffs have 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.

4. The State has filed an application seeking a permanent stay or dismissal of the proceedings on the basis that it is not possible for the State to receive a fair trial due to the deterioration of evidence with the passage of time.

5. The limitation and stay applications for one of the plaintiffs, Kathleen Biles, have been set down for hearing on 12 November 2012 with an estimate of 3 days plus. Those applications were set down separately from and in advance of the applications for the other 14 plaintiffs and the final hearing on the basis that the outcome may provide a yardstick against which the parties may assess their position in relation to the remaining applications and their position in the litigation generally.

D2012/201867

6. By offer of compromise dated 11 May 2012, All has offered to settle her claim on the basis of a verdict for the State and each party bearing their own costs. The offer is made in accordance with Rule 20.26 of the *Uniform Civil Procedure Rules* 2005 and is open for acceptance until 8 June 2012 at 4.00pm.

7. We have been asked to advise in relation to the offer. We will first address All 's offer and then turn to the settlement options available in relation to the other plaintiffs.

All 's offer of compromise

8. The correspondence accompanying All 's offer of compromise gives no insight into the rationale behind the offer. We can do little more than speculate as to why it was made. It seems to us that it is more likely to have been driven by All 's desire to move forward with the family, employment and other attributes in her life and avoid the stress of protracted litigation (including tensions within the Aboriginal community caused by the litigation) rather than any strategic move on the part of the plaintiffs to "sacrifice" All 's claim for the sake of the other 14 claimants.

9. Having regard to the commercial imperatives that underlie our views in relation to Ms All 's offer, it is not necessary to closely analyse the merits or otherwise of her claim other than to note the following. In essence, All alleges that she was repeatedly sexually assaulted by Colin Gibson between 1977 and 1984. On 12 April 2007, Mr Gibson pleaded guilty to charges of committing an act of indecency and assaulting Ms All whilst she under 16 years of age for which he was sentenced to three years imprisonment. All does not allege that Mr Gibson was the State's agent; rather she says that the Gordons were the State's agents and that the State is vicariously liable for the Gordons' acts or omissions which included a failure to take reasonable care to protect All from sexual assaults by Mr Gibson and/or allowing him access to Ms All in circumstances where the Gordons knew or ought reasonably have known that Mr Gibson posed a threat to her safety. The claim therefore raises a number of issues of fact and law such as whether the Gordons were agents of the State, the scope of their duty to All , their knowledge of Mr Gibson's activities and the vicarious liability of the State for the Gordons' conduct.

10. Accepting All 's offer would result in a verdict for the State (ie it will not be exposed to the risk of a judgment in favour of All) and avoid the risk of being exposed to an adverse costs order. Acceptance of the offer also means that the State would cease to incur further costs of defending All 's claim in circumstances where the litigation is still at a relatively early stage in terms of its progression towards a final hearing and the State will incur significant further costs, particularly if the interlocutory applications are appealed and/or the claims proceed to a final hearing. Further, Kathleen Biles has received a grant of legal aid for her limitation application. The other plaintiffs may well also be granted legal aid prior to the hearing of their limitation applications. As the proceedings progress, this aid may be extended to include the substantive proceedings. Section 47 of the *Legal Aid Commission Act* 1979 places significant constraints on the extent to which a legally aided person may be liable for an adverse costs order, which would diminish any chance of the State recovering its costs. In other words, the State's costs position is likely to deteriorate rather than improve with the passage of time.

11. Against this, acceptance of the offer would require the State to bear its own costs. We are informed that the costs to date of defending the claims by all 15 plaintiffs amount to about $630,000 plus GST. Applying a pro-rata approach, the defence costs in relation to All 's claim are probably somewhere in the order of $42,000 plus GST.

12. If the offer is not accepted and the State is successful in its defence of All 's claim with an order requiring her to pay the State's costs, it seems to us that the outcome will be no better than the terms of the offer because there are two likely scenarios – neither of which will result in the costs order being satisfied.

13. The first scenario is that All does not have sufficient assets from which to satisfy a costs order. We have not been briefed with searches and financial information with which to make an informed assessment of All 's financial position. The history taken by the medical experts in the proceedings suggests that, of all the plaintiffs, Ms All has best been able to overcome any adverse experiences at Bethcar. However, the medical history also suggests that – like the other plaintiffs – her socio-economic status is low and we therefore assume for the purposes of this advice that neither All nor

any of the other plaintiffs own assets of substance with which to fulfil an adverse costs order.

14. The second scenario is that the State forms the view that it would be inexpedient to enforce a costs order made in its favour against [redacted] having regard to the circumstances of the claims, which include: the sensitive nature of the allegations of physical and sexual assault; that the claims are by indigenous Australians; and that fourteen of the plaintiff's are females who – for a variety of reasons quite apart from the alleged abuse at Bethcar – have mostly lead lives punctuated by drug and alcohol abuse as well as suffering physical abuse, some of which has been quite horrific in nature.

15. In the circumstances, the offer reflects the best result the State is likely to achieve in relation to [redacted]'s claim.

16. The position may be summarised in the following way. On a worst case scenario, Ms [redacted] will succeed resulting in a judgment payable by the State and the State will be ordered to pay her costs (probably on an indemnity basis from the date of the offer). On a best case scenario, the outcome for the State will be the same or similar to the terms of the offer. In practical terms, [redacted]'s offer equates to the best case scenario for the State. We therefore recommend that the offer be accepted.

Settlement options re the other plaintiffs

17. In terms of the bigger picture in the proceedings, it is convenient to consider the settlement options available in relation to the claims by the other 14 plaintiffs. The principal settlement options are to:
    (a) make offers on the same terms as [redacted]'s offer to each of the other 14 plaintiffs;
    (b) make settlement offers to some, but not all, of the plaintiffs; and
    (c) take no steps to settle the claims at this stage.

18. When weighing up each of these options, regard must be had to:
    (a) the approach that is most likely to resolve the claims, either immediately or in due course;

(b) the advantages and disadvantages of each approach;

(c) the cost-benefit analysis for each approach; and

(d) the consequences if the approach is unsuccessful.

Making offers on the same terms to all plaintiffs

19. Serving offers of compromise seeking a verdict for the State with each party bearing their own costs would, if accepted, quickly bring the proceedings to an end. The State would avoid incurring significant further costs which, for the reasons outlined above, are unlikely to be recovered regardless of the outcome. Acceptance of the offers therefore represents the best outcome the State is likely to achieve even if it successfully defends the claims and costs orders are made in its favour. Therefore, from a purely commercial perspective, the State probably has nothing to lose financially by making the offers. Further, it would remove the risk of adverse judgment(s) and costs order(s) – which could have the effect of emboldening other former residents of Bethcar to make claims.

20. Although we do not know the circumstances in which All 's offer was made, a plausible explanation is that after almost four years of litigation with little prospect of a final hearing in the foreseeable future All has lost her stomach for the fight and contacted her lawyers with settlement instructions – rather than the offer being part of a settlement strategy initiated by her lawyers involving all of the plaintiffs. However, if offers are made to each of the plaintiffs, their lawyers will be obliged to bring the offers to their attention and seek instructions; in which case the plaintiffs may be guided by what the others are doing and some may follow All 's lead.

21. On the other hand, if accepted, the offers would require the State to bear costs of around $630,000 plus GST. Unless all of the offers are accepted, the State would not have extricated itself from the litigation. The costs of defending claims by just a few plaintiffs may become disproportionate in the sense that they may be similar to the cost of defending claims by all 15 plaintiffs having regard to loss of the benefit of "economies of scale".

22. From a tactical perspective, making such offers may diminish the threat of the State enforcing a favourable costs order; by sending a message to the plaintiffs that if their

claims fail or if at any stage they lose the resolve to pursue their claims then the State will "let them out" without incurring any costs sanction. Whilst this threat may be limited – given that the plaintiffs do not appear to have assets against which to enforce a costs judgment – it remains a factor.

23. Further, the prospect of the offers being accepted is probably low. [redacted] appears to have more reason to want to get on with life without the stress of litigation than do the other plaintiffs whose work and financial prospects seem to be more limited. If any of the other plaintiffs are prepared to settle on terms similar to [redacted]'s offer then one would have expected them to also have made an offer (although this assumes the issue of settlement was recently canvassed with the plaintiffs by their lawyers).

Making offers to some of the plaintiffs

24. A settlement strategy that involves making offers based on targeting plaintiffs with particular weaknesses in their cases may have more prospect of resulting in the offers being accepted. For example, making offers to: Kathleen Biles who, according to her counsel, is in a state of anxiety about being cross examined during her upcoming limitation hearing; [redacted] whose claim may be outside the 30 year ultimate bar; Douglas Biles who seems to have one of the weaker claims; and possibly any plaintiff who may be identified as holding assets of substance against which any future costs order in favour of the State might be enforced. Settlement with plaintiffs whose claims will be more difficult to prove may weaken the resolve of the remaining plaintiffs by eroding the solidarity of the remaining plaintiffs generally and by dividing the position of plaintiffs from particular families where some family members have settled and others have not.

25. This is a more flexible approach than making across-the-board offers; it allows the circumstances of each particular plaintiff to be taken into account and can be deployed at any time throughout the litigation so as to exploit settlement opportunities as and when information about the plaintiffs emerges. That flexibility is also possible procedurally. Rule 20.26(1) of the *Uniform Civil Procedure Rules* 2005 enables an offer to be made that compromises "... any claim in the proceedings, either in whole or in part ..." which

would accommodate this "piecemeal" approach to settlement by permitting effective offers to be made to some of the plaintiffs.

26. This approach will be more costly than making standard offers to all of the plaintiffs because it will require careful consideration of the circumstances of each plaintiff's claim, consideration as to what offer is to be made and may also require the preparation of a detailed covering (or *Calderbank*) letter explaining the reasoning behind the offer. If the offer is not accepted, this approach would put the plaintiff on notice of perceived weaknesses in their case and – in some instances – may give them the opportunity to cure any such defect.

Taking no steps to settle the claims at this stage

27. This approach will keep the pressure on the plaintiffs to take a pro-active approach towards settlement and/or the proceedings if they want closure. Further, given that the plaintiffs are still a long way from a hearing date and even further from coming into the fruits of their litigation after four years, they may be frustrated or disheartened. This may be exacerbated if the State makes no settlement offers. Thus, the plaintiffs' resolve to proceed with their claims could be expected to wane to some degree.

28. However, as the claims can only be disposed of in two ways – by settlement or determination by the Court – the State also has a vested interest in taking appropriate steps towards settlement. This is particularly so in circumstances where the (probably unrecoverable) defence costs continue to accrue and the State's costs position deteriorates commensurately with the passage of time. That factor alone militates against the State adopting a "litigation by attrition" approach.

29. When the plaintiffs previously sought to mediate their claims, the State's position was that mediation would not be appropriate – having regard to the substantial time and costs that would need to be invested in preparing for and attending a mediation – until the limitation applications had been determined. Thus, the settlement strategy was to wait until the limitation applications were determined (or one application determined, if it assisted to inform the position in relation to the others) following which either the claims

would be disposed of or, if the applications succeeded, the parties would revisit the issue of mediation. One of the reasons for this approach was that while ever the limitation applications remained outstanding, the plaintiffs would have an expectation that any settlement offers made by the State at mediation would involve the State agreeing to make a payment to them.

30. Since that approach to settlement was adopted three things have changed. The first is that the limitation applications have taken far longer to come on for hearing then was previously contemplated. The second is that the expectation that any settlement would involve a payment by the State to the plaintiffs has changed, at least for All [redacted] but perhaps also for other plaintiffs. The third is that the State has filed motions seeking a stay or dismissal of the proceedings.

31. We remain of the view that mediation is not suitable until the limitation and stay applications – at least for Kathleen Biles – have been determined.

32. However, we are of the view that a pro-active settlement strategy should nevertheless be pursued. The strategy we recommend is the second approach outlined above ie targeted settlement offers after identifying weaknesses/points of leverage in individual plaintiff's cases.

33. If the State wishes to take this approach then, in the first instance, we will identify the plaintiffs to whom offers should be made and formulate the offers – which will be in the nature of "walk away" offers accompanied by covering letters explaining the basis for each offer.

Michael Cashion SC
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25 May 2012