KATHLEEN BILES v STATE OF NEW SOUTH WALES

ADVICE RE SETTLEMENT

Introduction

1. By an Offer of Compromise the plaintiff, Kathleen Biles (hereafter referred to as "Kathleen") made an offer to settle her proceedings in the sum of $170,000 plus costs.

2. Each counsel briefed on behalf of the defendant[1], the State of New Wales (hereafter referred to as "the defendant") advised that the Offer should not be accepted.

3. By an Offer of Compromise the defendant offered to resolve the proceedings on a basis of a verdict for the defendant, with no order as to costs. That Offer has expired.

4. Since the making and the lapsing of the plaintiff's Offer of Compromise, the two Motions dealing with issues re the *Limitation Act* and the abuse of process point arising out of potential prejudice to the defendant of a trial this long after the events in question, have commenced in the District Court of New South Wales before his Honour Judge Curtis.

5. Mr Catsanos, counsel briefed on behalf of Kathleen, has again raised the question of settlement of Kathleen's claim with Mr Cashion QC.

6. Given the progress of the hearing of the Motions, it is appropriate to assess the current position in relation to the hearing and to advise in relation to settlement.

The Plaintiff's Motion

7. The plaintiff, by an Amended Notice of Motion seeks, inter alia, a finding that the plaintiff has, at all material times, been under a disability as provided for in ss.11(3) and 52 of the *Limitation Act*. In the alternative, the plaintiff seeks an extension of time.

8. If the plaintiff is found to be under a disability, the limitation period for the bringing of her cause of action will not have expired. If this is so, consideration of whether the plaintiff passes through the "Gateway" provisions (ie, s.60I) or questions of prejudice to the defendant will not arise in the context of the *Limitation Act*.

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[1] Mr Cashion QC, Mr Arblaster and myself

The Capacity of the Plaintiff

9. In a nutshell, the plaintiff needs to establish that she has been substantially impeded in the management of her affairs – in relation to the cause of action arising out of the events at BethCar.

10. In relation to management of her affairs, Campbell JA (with whom Basten JA and Handley AJA agreed) said at [139]-[143] in*Guthrie v Spence*[2009] NSWCA 15:

> *"139 The word "affairs" is one which is capable of a variety of meanings and can be quite broad: NSW Crime Commission v Murchie[2000] NSWSC 591; (2000) 49 NSWLR 465 at 469 [21] ff. Without trying to be exhaustive, the management of a person's affairs can include the management of the whole range of practical matters of a business nature that that person is involved in.*
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> *140 In the context in which it occurs in section 11(3)(b), the relevant "affairs" are ones in relation to a particular cause of action. In a general sense, managing one's affairs in relation to a particular cause of action includes doing the various things that would need to be done if that cause of action were to be dealt with. Thus, it includes seeking advice about whether a civil remedy exists for some perceived wrong, seeking advice about the difficulties, risks, cost and effort involved in pursuing any such remedy and the likely returns, comprehending and evaluating that advice, and, if the decision to commence proceedings is taken, thereafter engaging in the continuing process of co-operation, interaction and decision-making that exists between lawyer and client in running any civil action.*

11. Also *Guthrie v Spence* Campbell JA dealt with the term "substantially" at [144], [152]-[153] as follows:

> *"144 While I would not disagree with Slattery J's view in Kotulski at 117 that in section 11(3)(b) "substantially" "does not mean trivial or minimal, neither does it mean total", that still leaves open a wide range within which "substantially impeded" might fall. I do not read Slattery J as saying that falling anywhere within that range would suffice. ...*
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> *152 In the present context, whether the plaintiff has been "substantially" impeded is decided bearing in mind the context and purpose for which the court is called on to make the decision. It is for the purpose of deciding whether an as-of-right suspension of a limitation period will arise. It needs to be an impediment that has interfered with the ability of the plaintiff to commence the action within time to an extent sufficient to warrant the suspension of the limitation period.*

> *153 It is not as though there is a single theme that can be perceived in subparas (i)–(iv) of section 11(3)(b) that could provide assistance in reaching that conclusion. The matters in subparas (i) and (ii) are often matters that are outside the control of the person in question, but not always - something within subpara (i) could arise from deliberately carrying out an activity that had a risk of impairing the person, and being imprisoned could be an indirect consequence of a deliberate decision to commit a crime. Further, subparas (iii) and (iv) would be available to a volunteer soldier as well as to someone involuntarily caught up in a war or its consequences. In situations where there has been more than one contributing cause to the plaintiff failing to start the action within what would otherwise have been the correct limitation period, a court deciding whether the plaintiff has been "substantially impeded" by one of the matters in subparas (i)–(iv) is required to assess the significance that the particular cause that falls within subparas (i)–(iv) has had in the plaintiff's failure to start the action earlier."*

12. On this issue, Kathleen relies upon the opinions of Dr Jungfer and Dr Green. The defendant relies upon the opinion of Dr Skinner. Each of those experts has now given evidence at Court.

13. Dr Jungfer's evidence, given with force, was that the plaintiff was particularly and substantially impeded in relation to dealing with the events surrounding BethCar. Dr Jungfer accepted that the plaintiff may have been able to attend to the management of her affairs in relation to other issues, although any such acceptance by her was qualified. However, she clearly indicated that the plaintiff was under a disability in relation to dealing with the events of BethCar.

14. Part of the evidence given by Dr Skinner, under questioning from His Honour, is informative:

> *"Q. But if [the events at BethCar] did happen, is your opinion that she would have come out with psychiatric damage, out of that home?*
>
> *A. Yes. Yes, your Honour.*
>
> *Q. Would that psychiatric damage account for symptoms including avoidance behaviour?*
>
> *A. Yes, your Honour.*
>
> *Q. Is avoidance behaviour an illness or a symptom of illness?*
>
> *A. It might be a symptom of illness, your Honour. A--*

Q. Would that affect her conscious ability to put herself in circumstances that she's been trying to avoid?

A. Yes, your Honour.

Q. So she may not want to confront the reality of what happened in that home?

A. She might not, your Honour. Yes.

Q. If making a claim for compensation involved confronting that unfortunate memory, she would be impaired in her ability to do so?

A. If she didn't make the claim, yes; if she avoided making a claim.

Q. She'd be impaired in making the claim--

A. (No verbal reply)

Q. --for not wanting to confront the realities? That's avoidance, is it not?

A. That's avoidance, your Honour."

15. It is relevantly clear from that exchange that Dr Skinner has made sufficient concession, particularly in the underlined answer, to make it clear that his Honour will find that Kathleen was relevantly under a disability in the management of her affairs in relation to BethCar, including the bringing of a claim for compensation.

16. Once this conclusion is reached, the observations of Campbell JA in *Guthrie v Spence* 142 become relevant:

> *"141 In deciding the meaning of "affairs" in section 11(3)(b), one must bear in mind that the context in which it occurs is that of the Limitation Act. The sole concern of the Limitation Act is with the time within which an action must be commenced - anything that happens after an action has been commenced is irrelevant to it. The Act prescribes various limitation periods for different types of causes of action. The purpose of section 11(3) and section 52 is to identify circumstances in which it would always be just to allow the plaintiff a longer time within which to commence an action. (That is a different purpose to the purpose of provisions of the Limitation Act that empower a judge to grant a discretionary extension of the limitation period.) If a plaintiff were to become substantially impeded in the management of his or her affairs in relation to the cause of action after the action had been commenced that would not be relevant to the application of section 11(3)."*

17. As such, the only basis upon which the defendant will be able to avoid Kathleen's claim going to trial is by success on the abuse of process point, based upon the decision of *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256.

In that case, the High Court considered whether an action constitutes an abuse of process on the basis that the lapse of time since the events giving rise to the plaintiffs' claim has resulted in the deterioration of evidence upon which the defendant would otherwise have relied in its defence with the consequence that a fair hearing is no longer possible (at 273).

18. The majority concluded that "... attention must be directed to the burdensome effect upon the defendants of the situation that has arisen by lapse of time" (at 281). After noting that "The Court of Appeal held that this was so serious that a fair trial was not possible. The result was that to permit the plaintiff's case to proceed would clearly inflict unnecessary injustice upon the defendants" (at 281), the majority confirmed the decision of the Court of Appeal in ordering that the proceedings be stayed permanently (at 282).

19. Whilst prejudice to the defendant is clearly relevant in this regard, it has to be accepted that the onus of proof on all issues will clearly be upon the defendant. It must also be accepted that obtaining a permanent stay in a civil proceeding is a most unusual event. It can fairly be accepted that the defendant will have a much greater difficulty in establishing the requirements for a stay pursuant to the *Batistatos* principles as opposed to merely opposing the plaintiff's application for extension of time.

20. Given that it is clear that his Honour will find that Kathleen was under a relevant disability and that as such the limitation issue falls away, it is recommended that the State's defence in the matter of Kathleen's case[2] be amended so as to no longer rely upon the limitation issue.

21. In light of the above, consideration ought now be given to settlement of the plaintiff's claim. It does not appear to be seriously contested by Dr Skinner.

Quantification of the Plaintiff's Claim For Damages

22. The assessment of damages in a sexual abuse claim is fraught with difficulty. On the one hand, it can be said that every aspect of a plaintiff's life since the abuse has been profoundly affected. In this regard, Kathleen asserts that everything that has occurred

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[2] And only in Kathleen's case

to her since BethCar, including abusive relationships, occurred due to the impact upon her psyche of the events at BethCar. This proposition is supported by Dr Jungfer.

23. There therefore exists a significant prospect that extensive damages may be awarded.

24. Whilst a substantive award for sexual assault is certainly possible[3] there are many other cases where damages have been comparatively small. It has been said[4] that:

> case law suggests that the amount of damages available is generally not high enough to encourage malicious claimants seeking windfall gains. In *Paten v Bale* (unreported, Supreme Court of Queensland, 19 October 1999) the plaintiff was awarded $183,282. In *Bird v Bool* (Unreported, W; R and G (1994) FLC 92-475 where two girls were awarded damages from their stepfather who had sexually abused them in the sums of $90,000 and $80,000 respectively. These three cases involved serious sexual assaults. The Toowoomba Preparatory School jury award of $400,000; *S v Corporation of the Synod of Diocese of Brisbane* [2001] QSC 473. There are few cases where civil damages have been awarded by the courts, demonstrating the rarity with which survivors can institute proceedings within time, at least in cases where the abuse is not occurring within an institution: Paten v Bale, Wilson J acknowledges the paucity of claims throughout Australia; ibid at para [13].

25. A recent decision of Judge Delaney in the District Court of New South Wales at Parramatta is indicative of the potential for damages to be conservative. In a matter of *Bittar v Urch* the plaintiff had been sexually abused on at least four occasions at the age of or about 11 years by a man who was in the process of becoming a police officer. At times she saw him carrying his police uniform. Subsequent to the assaults her life dissembled into shambles, significant episodes of drug abuse, prostitution and armed robbery. Her case was complicated by a previous sexual assault by an uncle. Judge Delaney awarded damages of $107,500.

26. Having regard to all of the material presently available in relation to Kathleen it can certainly be accepted that, if successful in her action, she is likely to obtain an award of damages that would reflect at least a 33% to 40% of a most extreme case (being a monetary amount of $176,500 to $214,000).

27. Even if the plaintiff was assessed at 30% of an extreme case, the allowance for non-economic loss would be $123,000.

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3 See for example *S v Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473 where a jury awarded $834,800, including exemplary damages in the amount of $400,000.

4 Limitation Periods and Child Sex Abuse Cases: Law, Psychology, Time and Justice. Torts Law Journal 11 (3): pp.218-243

28. The current Medicare charge is in excess of $8,000. To this would need to be added a substantive amount for future psychiatric treatment and medication. At this stage, a buffer of $30,000 would not be unreasonable.

29. The amount of damages based upon an assessment of 33% - 40% of a most extreme case is therefore $214,500 to $252,000. Even if the plaintiff was assessed at 30% of a most extreme case the total would be $161,000.

30. These assessments of damages make no allowance for economic loss.

31. The plaintiff has received an amount of $40,000 in the Victims Compensation Tribunal. That amount is repayable.

Liability

32. The plaintiff's cause of action against the defendant is multifactorial. It is based firstly on an alleged vicarious liability of the State for the Gordons. This cause of action seems somewhat farfetched.

33. Of greater import is the allegations that the defendant breached its duty of care in failing to properly inspect and license BethCar.

34. At this stage, it is not appropriate to descend into a detailed analysis of each factual assertion that could support findings of duty and/or breach.

35. It is, however, sufficient to point to undoubted knowledge of the Department in relation to the activities of Colin Gibson. It was known by the Department that accusations had been made against Mr Gibson in relation to sexual abuse of children at BethCar. That information was known in or about 1980 and 1983. The files of the relevant government departments relating to BethCar are somewhat scanty in relation to the conduct of any detailed investigation into the allegations.

36. The files relating to BethCar also reveal certain anomalies (particularly in relation to sleeping arrangements) which do not appear to have been adequately addressed.

37. It certainly cannot be said that the Kathleen (or indeed any other plaintiff) has no prospect of success in relation to the cause of action against the State.

38. As such, it is not inappropriate at this stage, given the current status of the *Limitation Act* Application, to consider the benefits of early resolution.

Miscellaneous Forensic Considerations

39. Kathleen has made a call upon the defendant for it to produce all documents evidencing the investigations conducted by Mr Maxwell, together with all correspondence between Mr Maxwell and the defendant.

40. The call is opposed on the basis of a claim for legal professional privilege. It is overwhelmingly likely that the majority of the documents encompassed within the call will be held to be subject to legal professional privilege.

41. The question will then arise whether there has been a waiver of that privilege. The waiver is said to arise by the defendant relying upon part but not all of the outcome of the investigations by Mr Maxwell.

42. The call raises complex legal questions which require significant preparation. The argument on the question of privilege, including waiver of privilege, is set down for hearing in the District Court before his Honour Judge Curtis on 13 December 2012. It will be necessary for considerable resources to be expended analysing documents encompassed by the call and determining the appropriate response to take in relation to each document (or at least each category of document) identified.

Settlement Recommendation

43. As a result of the matters set out above, it is appropriate to attempt to Kathleen's claim.

44. In this regard, I recommend an initial offer, to be made by way of Offer of Compromise and also Calderbank letter in the sum of $90,000 plus costs.

45. The making of such offer may facilitate further settlement discussions.

46. If this were to occur, consideration should also be given to being prepared to resolve the claim for an amount up to $140,000 plus costs. This would reflect a settlement figure of $100,000 plus the Victim's Compensation Tribunal payback.

The Other Plaintiffs

47. As my instructing solicitor is aware, each plaintiff's case is different. Each plaintiff alleges different events, some evolving Colin Gibson, some not. Whether any individual plaintiff will succeed in establishing disability or, if necessary, progression through the Gateway provisions, will depend upon an individual analysis of each case.

48. At this stage it is not practical to conduct such an analysis. However, it would be possible to advise, probably before the end of January 2013, in relation to resolution of each case, if consideration was to be given to some form of settlement.

49. Despite this, the present circumstances set out above are considered sufficiently persuasive to justify an attempt to settle Kathleen case, regardless of the impact that such settlement may have on the other litigation.

I so advise.

Steven Woods
13 Wentworth Selborne Chambers
16 November 2012