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18 December 2008

Mr G Sapwell
Employee Relations Director
The Salvation Army
DX 35602
BLACKBURN

CONFIRMATION OF FAX

BY FACSIMILE: 8878 4840

Dear Graham

Claim by Rundle

We enclose:

1. Copy judgment of the Court of Appeal dated 11 December 2008.

THE RESULT

The Army's appeal against an extension of time in relation to the "systems" case and on the question of costs has been dismissed with the Army being ordered to pay Rundle's costs in relation to the appeal.

FURTHER CONDUCT

The proceeding is listed for callover in Sydney on Monday 16 February 2009 at 9.00 am.

At the callover it is likely that the proceeding will either be set down for trial or referred to a directions hearing so that orders for interlocutory steps can be made.

Interlocutory steps include the Army filing a formal defence to Rundle's allegations in his statement of claim, the parties swearing affidavits of documents and the proceeding being referred to mediation.

Once these steps have taken place, and if the proceeding does not settle in the meantime, it will then be fixed for a trial to take place in Sydney.

Presently our estimate of the likely length of the trial is 15 sitting days (3 weeks).

What may influence Rundle when he asks for a trial date is the status of the Ellis criminal proceedings in Adelaide.

As you are aware, the trial has been adjourned because of issues relating to Ellis' fitness to stand trial until 2 March 2009.

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Now that the appeal has concluded, Rundle might decide to wait in the hope that the criminal trial proceeds and Ellis is convicted.

THE COSTS ORDER MADE AGAINST THE ARMY

As advised by our New South Wales based counsel, the question of costs is not dealt with until all proceedings in the Supreme Court of New South Wales have concluded.

Presently, this will be at the end of the trial against the Army and Ellis.

At that point an assessment will be made as to the amount of costs recoverable.

Although Rundle now has two costs orders in his favour against the Army (relating to the original application for an extension of time and the appeal), the Army also has two orders in its favour against Rundle from applications relating to access to documents and notices to produce. The costs orders that the parties have will be set off against each other. We estimate that any setoff will be Rundle's favour.

RESPONSE TO MEDIA INTEREST

This is a difficult matter for us on which to advise the Army. This is because we believe that the less said about any litigation the better.

At the same time we understand that the Army's preferred position is to respond meaningfully to inquiries made of it.

We therefore offer the following as a response to any media inquiries:

> *"The Salvation Army is presently involved in proceedings in the Supreme Court of New South Wales relating to incidents that a Mr Graham Rundle of Gosford New South Wales alleges occurred at the Eden Park Boys Home, Mt Barker, South Australia, in the 1960s.*
>
> *When notified of allegations of physical or sexual abuse of children previously in its care, the Army attempts to resolve any claim in a compassionate and co-operative manner.*
>
> *Unfortunately this approach was not successful with Mr Rundle who has sued the Army.*
>
> *Recently, Mr Rundle was successful in obtaining an extension of time in which to claim compensation from the Army.*
>
> *The Army opposed him being granted an extension of time on the basis that a fair trial would not now be possible.*
>
> *The New South Wales Court of Appeal has disagreed with that proposition with the result that the Army expects that a trial relating to Mr Rundle's allegations will be held some time in 2009.*

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The Army remains willing to negotiate with Mr Rundle but in the event that settlement cannot be reached it is content to have his allegations tested by the court process."

there is little alternative but

APPEAL TO THE HIGH COURT

In the wake of the decision of the Court of Appeal, the Army could apply for special leave to appeal to the High Court.

It has until 7 January 2009 to do so.

We believe that an application for special leave to appeal is bound to fail because the Army cannot meet the criteria for a grant of special leave as set out in section 35A of the Judiciary Act 1903.

Those criteria are that:

1. The Court of Appeal judgment dated 11 December 2008 involves a question of law of public importance;

2. The administration of justice requires the High Court to consider the Court of Appeal judgment.

The High Court has settled the law relating to limitation periods and whether they should be extended in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

The Army accepted that Justice Simpson relied on the principles set out in that case. It argued that she had the law correct but how it applied specifically to the Rundle case wrong. As Justice Simpson was right on the law (as opposed to its application), the High Court would not find that there was public importance in re-arguing the matter for it to say that it is all a matter of discretion and there has been no error in the exercise of her discretion.

Peter Garling SC, who has read the judgment, also believes that there is no basis for an application for special leave.

ANALYSIS OF THE COURT OF APPEAL JUDGMENT

Introduction

The Court of Appeal made two factual mistakes that do not affect the overall result.

Justice McColl (who wrote the leading judgment) referred to Ellis as "an officer" [2] and suggested that Major Ian Huxley had died before Rundle issued proceedings [103] when the evidence shows that he died afterwards.

In the lead up to the hearing of the appeal we set out the issues and the parties' arguments in our letter dated 25 July 2008.

On paper, the appeal involved two questions:

1. Whether an extension of time should be given to Rundle in relation to the "systems" case:

2. Whether a costs order should have been made against the Army when an extension of time was granted to Rundle.

The "systems" case is relevant to the way in which Rundle pleads his claim. First, he says that the Army is vicariously liable for the assaults and breaches of duty that Ellis allegedly committed upon him. Secondly, he says that the Army was *in loco parentis* in relation to him and was negligent in that it essentially failed to have a proper system of supervising staff and boys at Eden Park with the result that he was physically and sexually assaulted by other boys and Ellis.

During the hearing of the appeal itself, attention turned to the third basis upon which Rundle pleads his case, namely that the Army has breached its fiduciary duty to him.

As to the particulars of this duty, Rundle relies on the same particulars as the "systems" case.

In their joint advice dated 14 May 2004 John Timbs QC and Kelly Rees formed the opinion that a claim based on breach of fiduciary duty was not relevant to Rundle's case.

By that we took it to mean that if Rundle pursued a case based on breach of fiduciary duty it was unlikely to succeed.

Since that advice, there has been the decision in *Trevorrow v The State of South Australia (No 5)* [2007] SASC 285.

Mr Trevorrow was 13 months old in 1958 when after being hospitalised for a bowel infection, he was placed in foster care rather than returned to his natural parents. He remained in that care for 10 years, when he was returned to his family.

Justice Gray of the Supreme Court of South Australia, found that Mr Trevorrow's removal was part of a deliberate policy by the South Australian government to remove aboriginal children from their parents regardless of whether they were at risk.

As part of his claim, Mr Trevorrow pleaded that the State of South Australia had breached its fiduciary duty to him.

Justice Gray found that a claim based on a breach of fiduciary duty was not subject to any limitation period specified in the Limitation of Actions Act 1936 (South Australia) ("the Act"). He left open whether Mr Trevorrow succeeded in his claim for breach of fiduciary duty on the basis that other causes of action that he relied upon gave him in essence the same relief, namely monetary compensation.

It was therefore important in the Rundle appeal to ensure that if the Army were successful on the "systems" case that it did not enter by the back door as a breach of fiduciary duty claim.

Thus some time was spent in oral argument on the issue of breach of fiduciary duty and limitation periods.

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Justice McColl's judgment

Justice McColl accepted the proposition that although a claim for breach of fiduciary duty giving rise to a remedy for equitable compensation was not subject to the limitation period specified in the Act in the way that an action for breach of duty in tort giving rise to a remedy for damages for personal injuries is, she thought that a limitation period might apply by analogy.

Having raised this point, she decided "the question of whether the limitation period imposed by section 36 of the Limitation of Actions Act should be applied by analogy to the fiduciary duty case should not be determined at this stage of the proceedings" [94].

We understand her to be saying that although Rundle has his leave on the "systems" case and the vicarious liability case, the Army has not lost the right to argue at trial that the limitation period of 3 years may be applied by analogy to the fiduciary duty claim.

The key element in the appeal was whether under section 48(3)(b) of the Act that it was just in all the circumstances of the case to grant Rundle an extension of time.

The argument was put that the evidence of actual prejudice tendered at the hearing of the application for the extension of time was such that in relation to the "systems" case that the Army could not obtain a fair trial if Rundle were to maintain his claim on that basis.

As Justice McColl pointed out at [95] the appeal related to an exercise of discretion in a matter of practice and procedure. To succeed on the appeal the Army had to show that Justice Simpson had erred in the exercise of the discretion to grant Rundle leave and that the error was sufficient to justify "appellate intervention".

The starting point is that an extension of time should be refused if it would result in significant prejudice to the Army and by significant prejudice is meant that the chances of a fair trial are unlikely.

When Justice McColl reviewed Justice Simpson's judgment she was "unable to discern that the primary judge erred in a manner which would attract appellate review of the exercise of her discretion" [99].

We take this to mean that while Justice Simpson was mistaken in some points upon which she relied to give Rundle an extension of time in the end those mistakes did not add up to anything.

Justice McColl confirmed the view that despite there being obvious prejudice to the Army by the passage of time, the death or absence of witnesses or a loss of documents, a fair trial still remains possible.

In her original judgment, Justice Simpson relied on a number of factors to assist her in the exercise of her discretion to grant Rundle an extension of time. Justice McColl did not think that reliance on those factors was erroneous. At [101]-[108] she set out reasons why she thought it was not.

On the question of costs she thought that Justice Simpson had exercised her discretion correctly. She found that the way in which the Army had conducted the original application warranted a costs order against it [111].

Justice Basten's judgment

Justice Basten agreed that the Army had "not demonstrated error of a kind sufficient to justify intervention" [137] but disagreed that a claim based on breach of fiduciary duty could be the subject of a limitation period under the Act [133].

He placed no weight on Justice Simpson's perception of how the Army had conducted the extension of time application but said that all the same Justice Simpson was not diverted from the task required of her, which was to assess whether the justice of the case required an extension of time [137].

Justice Basten found that the lack of documents and the death of witnesses, which would have a bearing on the "systems" case did not demonstrate a significant level of prejudice especially where some witnesses, including Ellis, are still alive who should have knowledge of any systems and whether they were effective [138]-[141].

On the question of costs he saw no reason to interfere with the original order made. As Justice Simpson gave no reasons for her cost order, he inferred that she applied the usual principle that costs follow the event [144].

He distanced himself, however, from Justice McColl by saying that the conduct of an application should have little influence on the making of a costs order where it was otherwise justified [152].

Justice Bell's judgment

Justice Bell agreed with Justice McColl that no error had been demonstrated in the decision to grant an extension of time.

He also agreed with Justice Basten on the role that documents would play in the "systems" case [156].

He preferred to express no view on whether the breach of fiduciary duty case was subject to a limitation period [157].

He agreed with Justice McColl's reasons for the original costs order, that is that the Army's conduct of the application warranted a costs order being made against it.

COMMENTS CRITICAL OF THE ARMY'S CONDUCT

At this point, we confirm that tactically it was decided that no employee or officer of the Army was to swear any affidavit in opposition to the application for an extension of time.

Rundle's lawyers criticised this state of affairs at both the hearing of the application and at the appeal. However neither Justice Simpson nor the Court of Appeal commented at all, let alone adversely, on the Army's decision on this point.

This is because an application to extend time does not decide issues between the parties on a final but only an "interlocutory" basis and it is accepted that hearsay evidence is readily admissible on such applications.

Had employees or officers given the same evidence as that contained in the affidavits of the Army's solicitors, we doubt that the result both of the application and the appeal would have been different.

Having said that, Justice Simpson was critical that parts of some of the affidavits sworn did not portray a true picture, which only emerged on cross examination. This revolved around two issues:

1. The death of Major Ian Huxley; and
2. The fact that Rundle was never a patient of Dr Keith Le Page, the psychiatrist from the Child Guidance Clinic who regularly visited Eden Park.

The Court of Appeal has not tempered the views that Justice Simpson took of these issues in a way that we might have hoped.

Justice Basten appears to have accepted that these issues insofar as they are relevant to conduct did not really influence how Justice Simpson decided the application.

On the other hand Justice McColl appears to have confirmed Justice Simpson's view and used it as the basis to decide that the original costs order was correct. Justice Bell agreed with Justice McColl on the costs issue.

Thus there is a majority view that some parts of the affidavits were properly to be criticised and this reflected itself in the outcome of the application for an extension of time.

The divergence of views shows that the issue of the Army's conduct of the application is not clear cut.

For us the disappointing aspect is not so much the criticism of the affidavits – which we take seriously – but the fact that apart from Justice Basten, the other judges have failed to acknowledge the probable scenario (which is in fact true) that the preparation of the affidavits and the presentation of the Army's case at the hearing of the original application was a collaboration between us, as the Army's principal solicitors in the matter, and our New South Wales based counsel.

We are now confronted with the finding, basically confirmed, that parts of the affidavits misled the court and that they were designed to do that.

We can assure the Army that if that is how they are perceived then it was never intended that that should occur.

In the adversarial system, a party advances the evidence in support of its case. The affidavits did that. We had a statement from Major Ian Huxley before he died and we knew that Rundle was never a patient of Dr Le Page. Both of those facts were not relevant to the points we were trying to make on the question of the actual prejudice that the Army suffered by the passage of time.

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After the original judgment was given, we obtained the advice of Mr David Curtain QC on 14 May 2007 as to whether the affidavits created ethical problems for us. His advice was that they did not.

All the same, we must face that judicial opinion is largely against us and the consequences of that opinion.

CONCLUSION

Please contact us if there is any matter that you wish to discuss or have clarified.

We recommend that you meet with us in the second half of January 2009 to confirm the tactics for the future conduct of the litigation.

Yours faithfully

Nevett ford

Gregory Doran
Direct Dial: REDACTED

Encl