NSW Supreme Court orders stay of both primary and cross-claims in historical abuse matter

BRJ v The Corporate Trustees of The Diocese of Grafton [2022] NSWSC 1077

SEPTEMBER 2022

At a glance

- Since 2019, the New South Wales Court of Appeal has heard five permanent stay applications relating to historical abuse allegations. Of those, it has ordered four stays and dismissed just one.[1]
- On 2 September 2022, the Supreme Court of New South Wales ordered a stay of both the primary claim and the cross-claim brought by the defendant against the alleged perpetrator.
- The judgment is notable as it sets out the grounds that led to the stay, even in circumstances where the alleged perpetrator had prior criminal convictions for similar offending.
- The decision also tackles the issue of whether the defendant was prejudiced by the stay of the cross-claim.

The primary and cross-claims

In this matter, the plaintiff was BRJ (a pseudonym) and the defendant was the Corporate Trustees of the Diocese of Grafton (Diocese). Mr Allan Kitchingman was joined by the Diocese as a cross-defendant. His wife, Mrs Janette Kitchingman, was appointed his tutor for the proceedings as Mr Kitchingman was found to be suffering from Alzheimer's Disease and was unable to provide instructions to his solicitors.

BRJ brought the primary claim against the Diocese in negligence (directly and vicariously). The Diocese brought the cross-claim against Mr Kitchingman, seeking an indemnity or contribution under s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

In response to the cross-claim, the solicitor for Mr Kitchingman filed a notice of motion seeking a permanent stay under s 67 of the *Civil Procedure Act 2005* (NSW). The Diocese, in turn, filed its notice of motion seeking a permanent stay of the primary claim.

Both notices of motion were heard together by His Honour Justice Garling.

Background to the case

On 27 April 1974, BRJ became a resident of North Coast Children's Home (the Home), located in Lismore, NSW. He remained there until late 1979. The Home was situated on grounds adjacent to St Andrew's Church, Lismore (the Church).

At that time, Mr Kitchingman was a curate and assistant priest at the Home and the chaplain of the Church. The Church was responsible for the management and control of the Home.

The Diocese was responsible for Anglican priests within the Diocese, including Mr Kitchingman.

BRJ alleges that during the Christmas holiday period of 1974-1975, he was billeted to stay with Mr Kitchingman and his wife, Mrs Kitchingman, at their home in Byron Bay. During the stay, he was fondled by Mr Kitchingman and made to masturbate in his presence under the pretence of Mr Kitchingman providing him with 'sexual education'. This occurred on one occasion and there were no other witnesses. BRJ first reported the abuse to his brother in 2018.

In 1968, Mr Kitchingman was convicted for an offence of indecent assault against a 16 year-old boy in Newcastle. He was transferred from the Diocese of Newcastle to the Diocese of Grafton. Letters at the time evidence that the Bishop of Grafton knew about the conviction.

[1] For: *Moubarak bht Coorey v Holt* [2019] NSWCA 102; *The Council of Trinity Grammar School v Anderson* [2019] NSWCA 292; *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78; and *Smith v The Council of Trinity Grammar School* [2022] NSWCA 93. Against: *Gorman v McKnight* [2020] NSWCA 20.

In 2002, Mr Kitchingman pleaded guilty to five counts of indecent assault against a 13 year-old resident of the Home in 1975.

In 2020, Mr Kitchingman was committed to stand trial regarding another offence (buggery) alleged to have occurred in 1978 at Lennox Head. The District Court, and subsequently the Mental Health Review Tribunal, determined that Mr Kitchingman was unfit to stand trial based on expert evidence diagnosing him with Alzheimer's Disease. This condition was said to impair his memory and ability to provide instructions.

Judgement

Justice Garling first dealt with the notice of motion filed on behalf of Mr Kitchingman. His Honour considered that:

1) Mr Kitchingman did not have the capacity to give instructions nor give reliable evidence.

2) At no time had Mr Kitchingman been confronted with the allegations nor provided an opportunity to provide a response.

3) There were only two possible eyewitnesses (BRJ and Mr Kitchingman) and there were no documents in existence that related to the allegations.

4) The position in which Mr Kitchingman found himself was not of his own making, in the sense that he had not done anything consciously to put himself in a position where he could not give instructions or accurately recount events.

5) There were findings in recent criminal proceedings that Mr Kitchingman was not fit to be tried. Those findings were considered relevant (but not determinative) to the civil proceedings.

Informed by these factors, Justice Garling ordered a stay of the cross-claim.

His Honour next dealt with the notice of motion filed on behalf of the Diocese. His Honour observed that the factors informing the stay of the cross-claim were important in considering the claim against the Diocese. In addition to those factors, His Honour noted that the alleged abuse occurred over 45 years ago and the Diocese would effectively be unable to respond to any tendency evidence relied on by BRJ, in the absence of Mr Kitchingman.

Further, His Honour was unable to find any failure by the Diocese to undertake reasonable enquiries and investigations regarding the claim. This was especially so, given Mr Kitchingman was no longer a part of the Diocese. He had retired as an Anglican priest in 2000 and the Professional Standards Board of the Diocese of Grafton deposed him from Holy Orders in 2014. He was also the subject of criminal proceedings at the time the civil proceedings were commenced, and it was not expected that he would readily assist the Diocese regarding the civil claim.

The Diocese was also not in a position "in the absence of any material in their possession to which reference has been made, of providing any explanation at all as to the circumstances surrounding the billeting of the plaintiff with Mr and Mrs Kitchingman when the abuse occurred". It was notable that the Rector of the Parish of Lismore, the Bishop of Grafton, his successor in office, and the Matron of the Home at the relevant time were all deceased. This meant there was no one to whom the Diocese could speak to obtain information about the billeting of children from the Home, how that was arranged and what steps were taken regarding the billeting.

If the cross-claim the Diocese had brought against Mr Kitchingman were to be stayed (which it was), the Diocese submitted that the inability to cross-claim was another factor to be considered regarding its motion. Justice Garling agreed that it was, in line with the existing case law, as long as the unavailability of the cross-claim amounted to "significant" prejudice. The cross-claim would have to be "viable and realistic" and not merely "fanciful or theoretical" to cause the Diocese "significant" prejudice.

In this instance, His Honour was not persuaded that the unavailability of the cross-claim amounted to "significant prejudice" to the Diocese, partly because "any judgment against the cross-defendant would likely be worthless".

Finally, Counsel for BRJ submitted that the Court should not exercise its discretion to grant a stay in favour of the Diocese for three reasons:

1) it was clear from the records that, in 1968, the Bishop of Grafton had knowledge that Mr Kitchingman posed a risk to young people

2) the Professional Standards Board of the Anglican Diocese of Grafton did not investigate statements from its investigation of Mr Kitchingman that gave rise to the question of whether there may be other unknown victims, and

3) the Trustees had not made all reasonable enquiries, including interviewing Mr Kitchingman's wife, as to the contextual facts surrounding the abuse of BRJ.

Justice Garling did not think it appropriate for the Court to refuse to grant a permanent stay where it was satisfied for the reasons set out above, that any hearing of the proceedings would be manifestly unfair and that the Diocese could not have a fair trial.

Even if the discretion were that broad, His Honour was not persuaded by BRJ's arguments against a grant of the stay. He thought it unfair that the Diocese should be expected to conclude by inference that the alleged abuse occurred "from some material other than that which deals with the facts of this case".

For these reasons, Justice Garling also ordered a stay of the primary claim.

Certification from the solicitors for the Diocese that the defence and cross-claim had reasonable prospects of success did not have any bearing on this determination.

Justice Garling did not think it appropriate for the Court to refuse to grant a permanent stay where it was satisfied for the reasons set out above, that any hearing of the proceedings would be manifestly unfair and that the Diocese could not have a fair trial.

Implications

This decision follows a number of recent decisions in different Australian jurisdictions (especially in NSW) where defendants were successful in obtaining permanent stays of the proceedings in circumstances where the passage of time, the lack of available material regarding the allegations, and the unavailability of the alleged perpetrator had rendered a fair trial impossible.

This decision provides guidance for defendants and their insurers for historical claims where the available material is limited and the alleged perpetrator is mentally incapacitated or deceased. Even if the perpetrator is a known offender, that fact will not necessarily cure the prejudice caused by the passage of time if the alleged perpetrator is mentally incapacitated or deceased and did not have the opportunity to respond to the allegations.

Finally, the unavailability of a cross-claim may be a factor that persuades a court to grant a stay. A cross-claim may be unavailable because the perpetrator is dead or unable to meaningfully respond to the allegations against them.

However, the unavailability of the cross-claim must cause "significant prejudice" to the defendant. To cause "significant prejudice", the cross-claim must be "viable and realistic" and not merely "fanciful or theoretical".

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