

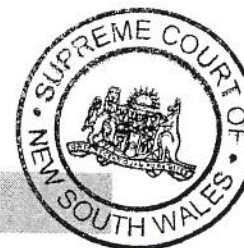
20/10
Carling J

DEFENCE

COURT DETAILS

| | |
|-------------|----------------------------------|
| Court | Supreme Court of New South Wales |
| Division | Common Law |
| Registry | Sydney |
| Case number | 2009/329777 |

FILED
31 AUG 2012



TITLE OF PROCEEDINGS

| | |
|----------------------|----------------------------------|
| First plaintiff | Geraldine Dorothy Giles |
| Second plaintiff | Vivian Catherine Drady |
| First defendant | Commonwealth of Australia |
| Second Defendant | State of NSW |
| Number of defendants | 3 |

FILING DETAILS

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|--------------------------------|--|
| Filed for | State of NSW, Second Defendant |
| Filed in relation to | Second Amended Statement of Claim |
| Legal representative | IV Knight, NSW Crown Solicitors Office |
| Legal representative reference | PCN:3321 200902953 T03 |
| Contact name and telephone | Bruce Cantrill, Tel: (02) 9224 5128 |
| Frequent User ID | AG4NSW |

PLEADINGS AND PARTICULARS

In response to the Second Amended Statement of Claim, the second defendant pleads as follows:

- 1 In answer to paragraph 1, the second defendant denies that the proceedings were properly commenced by the plaintiffs as representative proceedings and further denies that the proceedings can properly be continued by the plaintiffs as a representative proceedings either on their own behalf or on behalf of the group members.
- 2 The second defendant denies paragraph 2 in so far as it contains assertions of fact pertaining to treatment of the plaintiffs while at Fairbridge Farm School and otherwise does not admit the balance of that paragraph.
- 3 The second defendant does not plead to paragraphs 3, 4, 5, 8(a), 8(c), 11, 13, 15(l), 15(o), 15(q), 16(a), 16(c), 16(d) and 16(f) of the Second Amended Statement of Claim.

- 4 The second defendant does not admit paragraphs 6, 7, 8(b)(i)-(viii), 8(b)(x), 9, 10, 12(a)-(c), 15(a)-(e), 15(g)-(k), 15(m), 15(n) and 15(p), 17, 19, of the Second Amended Statement of Claim.
- 5 The second defendant admits paragraph 8(b)(ix) and (xi) therein pleaded, but does not admit that the paragraphs as pleaded fully and accurately set out the powers and duties referred to in the legislation.
- 6 The second defendant denies paragraph 15(f), 16(b), 16(e) and 18.
- 7 In answer to paragraphs 20, 21, and 22 of the Second Amended Statement of Claim the second defendant says:-
- (a) The second defendant denies that there are substantial common interests and issues sufficient to enable the matter to proceed by way of representative proceedings;
 - (b) The second defendant does not admit the circumstances alleged by the plaintiffs namely the sexual and/or physical abuse of each of them during their residence as immigrant children at Fairbridge Farm School;
 - (c) The second defendant does not admit that the common issues of law (referred to as "*Common Questions of Law*") in annexure A in the Second Amended Statement of Claim arise in the events which happened, nor does the second defendant admit that the alleged common issues of law give rise to an entitlement to conduct the proceedings by way of representative proceedings.
 - (d) The second defendant does not admit that the occurrence of the alleged facts (referred to as "*Common Questions of Fact*") in annexure B in the Second Amended Statement of Claim, nor does the second defendant admit that the alleged common issues of fact (which are not admitted) give rise to an entitlement to conduct the proceedings by way of representative proceedings.
- 8 Further and in the alternative, the second defendant will rely on s. 5B(1), s. 5B(2) and s. 5C of the *Civil Liability Act, 2002* in answer to the claims that the second defendant was in breach of any duty owed to the plaintiffs at all material times to take adequate precautions against a risk of harm to the plaintiffs.
- 9 Further and in the alternative, the second defendant says that in the event the Court finds the second defendant to be liable for negligence, which is not admitted, the second defendant will rely on the provisions of s. 5D(1)-(4) inclusive of the *Civil Liability Act, 2002*, in answer to claims that any such negligence caused any particular harm to the plaintiffs.
- 10 In so far as the plaintiffs allege any liability in negligence against the second defendant, for providing professional services, the second defendant will rely on s. 5O

of the *Civil Liability Act, 2002*, and in particular, the second defendant says that at the time any such professional services were provided, the second defendant acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice.

- 11 Further and in the alternative, the second defendant will rely on the principles set out in s. 42(a)-(d) of the *Civil Liability Act, 2002*, in answer to the plaintiffs' claims that the second defendant has breached any duty of care alleged by the plaintiffs.
- 12 Further and in the alternative, in so far as the plaintiffs' claims are based on a breach of statutory duty by the second defendant in connection with the exercise of or a failure to exercise a function by the second defendant, pursuant to s. 43 of the *Civil Liability Act, 2002*, the second defendant says that any such acts or omissions were, in the circumstances, not so unreasonable that no authority having the functions of the second defendant could properly consider the said acts or omissions to be a reasonable exercise of its function.
- 13 Further and in the alternative, in so far as the plaintiffs allege that the second defendant's liability is based on its exercise of, or failure to exercise a special statutory power conferred on the second defendant, it says pursuant to s. 43A of the *Civil Liability Act, 2002*, that any such acts or omissions were not in the circumstances so unreasonable that no authority having the special statutory power could properly consider the acts or omissions to be a reasonable exercise of or failure to exercise its power.
- 14 Further and in the alternative, in so far as the plaintiffs allege that the second defendant's liability is based on the second defendant's failure to exercise or consider exercising any function to prohibit or regulate an activity, including the issue of licences for the operation of the activities of the third defendant, then pursuant to s. 44 of the *Civil Liability Act, 2002*, the second defendant says it could not have been required to exercise any such function in proceedings instituted by the plaintiffs.
- 15 Further and in the alternative, in so far as the plaintiffs allege they were physically abused by the second defendant or its servants or agents, the second defendant relies on s. 156 of the *Child Welfare Act, 1939* and its successors which authorised teachers or other persons having lawful care of a child or young person to administer punishment to such children or young persons.
- 16 Further and in the alternative, the second defendant relies on s. 158(1) of the *Child Welfare Act, 1939* and says that at all material times it acted in good faith and with reasonable care in the circumstances applicable at the relevant time.
- 17 In further or alternative answer to the whole of the Second Amended Statement of Claim the second defendant says:-

- (a) The claims of the plaintiffs and each of them are statute barred by reason of the provisions of the *Limitation Act, 1969*.
- (b) The claims of the plaintiffs and each of them are further subject to the ultimate bar under s. 51 of the *Limitation Act, 1969*;
- (c) By reason of the provisions of s. 158(2) of the *Child Welfare Act, 1939*, each and every member of the class (including the plaintiffs) is prohibited from commencing an action against the second defendant by reason of the time provisions referred to therein.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

Bruce Cantrill, Solicitor for the Second Defendant

Date of signature

31/8/12.