

FILED

- 9 OCT 2012



26/10 J
Garling
Direction



DEFENCE

COURT DETAILS

Court Supreme Court of New South Wales
Division Common Law
List Common Law General List
Registry Sydney
Case number 2009/00329777

TITLE OF PROCEEDINGS

First plaintiff **Geraldine Dorothy Giles**
Second plaintiff **Vivian Catherine Drady**

First defendant **Commonwealth of Australia**
Number of defendants 3

FILING DETAILS

Filed for **The Fairbridge Foundation, Third Defendant**
Legal representative David Clifton Ford, Emil Ford Lawyers
Legal representative reference PCN: 2065 NSW Ref: 7559
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PLEADINGS AND PARTICULARS

Representative Proceeding

1 The Third Defendant admits the allegations in paragraph 1 of the Second Amended Statement of Claim.

The Group Members

2 In answer to paragraph 2 of the Second Amended Statement of Claim the Third Defendant:

- (a) as to subparagraph (a):
 - (i) denies that there were any children who were residents of the Fairbridge Farm School in 1937;
 - (ii) otherwise does not admit the allegations therein;
- (b) does not admit the allegations in paragraphs (b) to (d);

- (c) says that s 162 of the *Civil Procedure Act 2005* (NSW) confers a power upon a group member to opt out of representative proceedings;
- (d) says that the identity of the Represented Persons will only be able to be determined after group members have been given the right to opt out these proceedings.

The Defendants

- 3 The Third Defendant does not plead to the allegations in paragraph 3 of the Second Amended Statement of Claim.
- 4 The Third Defendant does not plead to the allegations in paragraph 4 of the Second Amended Statement of Claim.
- 5 The Third Defendant admits the allegations in paragraph 5 of the Second Amended Statement of Claim.

The Plaintiffs

- 6 The Third Defendant admits the allegations in paragraph 6 of the Second Amended Statement of Claim.
- 7 The Third Defendant admits the allegations in paragraph 7 of the Second Amended Statement of Claim.

Duties Owed

- 8 In answer to paragraph 8 of the Second Amended Statement of Claim the Third Defendant:
 - (a) does not plead to the allegations in subparagraph (a);
 - (b) does not plead to the allegations in subparagraph (b);
 - (c) as to subparagraph (c):
 - (i) denies the allegations in subparagraph (i);
 - (ii) with respect to the allegations in subparagraph (ii);
 - (A) denies those allegations;

(B) says that the legal custodian of each of the Plaintiffs, and each of the Represented Persons who was an immigrant child within the meaning of s 4 of the *Immigration (Guardianship of Children) Act 1946* (Cth) was:

(1) from on or shortly after 17 December 1946 to 30 November 1949 the Chairman for the time being of the Council of the Third Defendant;

(2) from 30 November 1949 to approximately 16 September 1969 the Chairman for the time being of the Board of Governors appointed by The Fairbridge Society (Incorporated) of the United Kingdom (**UK Society**);

(3) from approximately 16 September 1969 the Chairman for the time being of the Council of the Third Defendant.

(iii) with respect to the allegations in subparagraph (iii):

(A) denies those allegations;

(B) says that from 17 April 1957 to 1 November 1969 the place situated at Molong and named Fairbridge Farm School was licensed under s 28 of the *Child Welfare Act 1939* (NSW);

(C) says that from 1 November 1969 the licence referred to in subparagraph (B) was deemed to be a licence granted under s 29 of the *Child Welfare Act 1939* (NSW) as it was in force from that date.

9 In answer to paragraph 9 of the Second Amended Statement of Claim the Third Defendant:

(a) as to subparagraph (a):

(i) admits that the Plaintiffs and Represented Persons were vulnerable because of:

(A) their age;

(B) the absence of any parental and/or supportive family environment;

- (C) the fact that they could not reasonably be expected adequately to safeguard themselves from harm;
- (ii) otherwise denies the allegations therein;
- (b) denies the allegations in subparagraph (b);
- (c) as to subparagraph (c):
 - (i) denies the allegations therein so far as they relate to the Third Defendant;
 - (ii) otherwise does not plead to be allegations therein;
- (d) as to subparagraph (d):
 - (i) denies the allegations therein so far as they relate to the Third Defendant;
 - (ii) otherwise does not plead to be allegations therein;
 - (iii) says that the Third Defendant from 30 December 1937 to 1974 was the trustee of a charitable trust for the relief of poverty and the advancement of education and in this capacity pursuant to successive agreements with the UK Society had no control in relation to the care, supervision, welfare and education of the children at the Fairbridge Farm School.

PARTICULARS

- (1) The Memorandum of Association of the Third Defendant in their original form provide that the objects for which it is established included:
 - (a) the entry into an agreement with the UK Society for general cooperation and in particular for the purpose of undertaking in New South Wales all the obligations assumed by the UK Society in connection with the conduct and maintenance of the UK Society as required from time to time by contributing Governments and to carry those obligations into effect with or without modification made either before or after the execution of the agreement in the form of the identified draft agreement (cl 3(a));
 - (b) to acquire by purchase or otherwise certain real property at Molong (cl 3(f)).
- (2) From 30 December 1937 the Third Defendant acquired property including the real property at Molong on which the

Fairbridge Farm School was carried out which it had held in trust for the objects in its Memorandum of Association.

- (3) On 28 January 1938 the UK Society entered into an Agreement (**1938 Agreement**) whereby:
- (a) the UK Society would at all times thereafter have the free and unrestricted right to appoint and dismiss from time to time the Principal of the Fairbridge Farm School who would have full charge of the children for the time being at the Fairbridge Farm School and would be responsible in the first instance to the Third Defendant for the general routine administration and management of the Fairbridge Farm School and the general order control maintenance and discipline of employees and children subject to the terms of the 1938 Agreement (cl 4(a));
 - (b) the UK Society and the Third Defendant would procure the Principal to enter into an agreement with the UK Society in such form as the UK Society might require for the purpose of regulating relationship between the Principal and the UK Society (cl 4(a));
 - (c) the Third Defendant agreed to assist the Principal in the carrying out of his duties under the agreement between the Principal and the UK Society and to cooperate with the Principal in the fullest possible manner (cl 4(a));
 - (d) the UK Society would have the full powers of hearing and determining all disputes or differences between the Principal and the Third Defendant and the Third Defendant would give to the UK Society full information in connection with such dispute or differences (cl 5);
 - (e) subject to the terms of the Agreement subsisting between the Principal and UK Society the Third Defendant undertook to observe and perform certain powers duties and discretions in relation to the Principal including:
 - (i) to consult with advise and co-operate with the Principal in the general discharge of any of his duties (cl 6(a));
 - (ii) to approve or otherwise the appointment or dismissal by the Principal of senior members of the Fairbridge Farm School and the Farm Manager (cl 6(e));
 - (f) that the UK Society might at any time take such steps as it thought necessary and proper for the purpose of ensuring that all children sent by the UK Society to the Third Defendant would have proper care maintenance education and training (cl 10);
 - (g) that the 1938 Agreement would continue for a period of ten years and so long thereafter as the UK Society maintained a certain number of children at the Fairbridge Farm School (cl 12).
- (4) On 23 May 1938 the UK Society and Mr Richard Ralph Beauchamp (**Mr Beauchamp**) (called the Principal therein)

entered into an Agreement (**1938 Principal's Agreement**) whereby:

- (a) the UK Society would employ the Principal and the Principal would act as the Principal of the Fairbridge Farm School for a period of one year from 26 November 1937 and thereafter unless determined by the UK Society (cl 2);
 - (b) the Principal would have the full charge of the children for the time being at the Fairbridge Farm School and subject to the terms of the 1938 Principal's Agreement would be responsible in the first instance for the Third Defendant for the general routine and administration and management of the Fairbridge Farm School and the general order control maintenance and discipline of employees and children (cl 4);
 - (c) the Principal would have the right, inter alia, to appoint and dismiss all employees and members of staff subject nevertheless to the approval of the Third Defendant in the case of senior members of the staff and the Farm Manager (cl 6(i));
 - (d) the UK Society could determine the 1938 Principal's Agreement at any time upon giving one month's previous notice in writing to the Principal if it considered in its absolute discretion it was in the interests and welfare of the Fairbridge Farm School that the 1938 Principal's Agreement be determined (cl 7(a));
 - (e) the Principal would be liable to be suspended from his office by the Third Defendant pending receipt of instructions from the UK Society if the Third Defendant considered in its absolute discretion that such a course was essential to the interests and welfare of the Fairbridge Farm School and the Principal agreed with the UK Society to observe and abide by any such action taken by the Third Defendant (cl 7(b)).
- (5) During the period between 28 January 1938 and 30 November 1949 the following persons were appointed by the UK Society to the following positions and held office for the following periods:
- (a) Mr Beauchamp, Principal, from 26 November 1937 to 23 August 1940;
 - (b) Mr Frederick Kynnersley Smithies Woods (**Mr Woods**), Assistant Principal July 1939 to May 1943, Acting Principal from May 1943 to February 1946, Principal from February 1946.
- (6) On 25 September 1940 the Council of the Third Defendant confirmed the appointment of Mr ER Heath (**Mr Heath**) as the Acting Principal.
- (7) In the period from 28 January 1938 to 30 November 1949 Messrs Beauchamp, Heath and Woods while they held the office of Principal and Acting Principal as the case may be appointed, determined the duties and supervised the staff at

the Fairbridge Farm School and had full charge of the children at the Fairbridge Farm School.

- (8) On 30 November 1949 the 1938 Agreement was terminated and the UK Society, the Third Defendant and 16 persons (called the Governors and constituted as the Board of Governors) entered into an Agreement (**1949 Agreement**) whereby:
- (a) the UK Society appointed the Governors to act as the first Board of Governors which would be the agent of the UK Society to act on its behalf in the State of New South Wales (cl 1(a));
 - (b) the UK Society would appoint a person to fulfil any vacancy in the office of a Governor (cl 1(b));
 - (c) the Third Defendant agreed to execute a Declaration of Trust containing specified terms (cl 2(a) and Sch 1);
 - (d) the UK Society and the Third Defendant entrusted to the Board of Governors the management of the property to which the Declaration of Trust applied (cl 2(b));
 - (e) the Board of Governors would be responsible to the UK Society for the general conduct of all establishments and activities under its control in the State of New South Wales (cl 2(c));
 - (f) the UK Society would have the power to appoint any person to be a Principal and terminate any such appointment provided that no appointment would be made or terminated by the UK Society without full consideration of the views and recommendations if any of the Board of Governors, and the agreement between the UK Society and any person appointed as a Principal would be to the effect of a specified agreement (cl 3 and Sch 3);
 - (g) the Third Defendant and the Board of Governors would keep in good order and condition all the assets held by the Third Defendant for the purposes of the 1949 Agreement and generally act in relation to such assets as trustees thereof (cl 6);
 - (h) the 1949 Agreement would continue for a period of ten years from 30 November 1949 and thereafter until twelve months' notice in writing given by the UK Society to the Third Defendant or by the Third Defendant to the UK Society terminating the 1949 Agreement (cl 7).
- (9) On 30 November 1949 the Third Defendant executed a Declaration of Trust whereby it declared that it then held and would thereafter hold its assets and all future assets upon trust to apply those assets for the purposes set out in the 1949 Agreement as it might from time to time be required to do by the Board of Governors.
- (10) On 10 October 1950 the UK Society and Mr Woods entered into a Principal's Agreement (**1950 Principal's Agreement**) whereby:

- (a) subject to direction by the Board of Governors as agent for the UK Society and as thereafter provided the Principal would have full charge of the children at the Fairbridge Farm School and would be responsible for the general routine and administration and management of the Fairbridge Farm School and the general order, control, maintenance and discipline of employees and children;
 - (b) the Principal would have the right and duty, inter alia, to appoint and dismiss all employees and members of the staff, but in the case of senior members (After-care Officer and Bursar and School Farm Foreman) the Principal must obtain the approval of the Board of Governors of such appointment or dismissal before taking action.
- (11) In the period from 30 November 1949 to 16 September 1969 the following persons continued their appointment or were appointed by the UK Society or the Board of Governors to the following positions and held office at the Fairbridge Farm School for the following periods:
- (a) Mr Woods, Principal, until 30 December 1966;
 - (b) Mr Maurice Arthur George Newberry (**Mr Newberry**) Acting Principal, 1 January 1967-6 June 1969.
- (12) Messrs Woods and Newberry while they held the office of Principal and Acting Principal as the case may be appointed, declared the conditions and supervised the staff at the Fairbridge Farm School and had full charge of the children.
- 10 In answer to paragraph 10 of the Second Amended Statement of Claim the Third Defendant:
- (a) denies the allegations therein so far as they relate to the Third Defendant;
 - (b) otherwise does not plead to be allegations therein.
- 11 The Third Defendant does not plead to the allegations in paragraph 11 of the Second Amended Statement of Claim.
- 12 The Third Defendant does not plead to the allegations in paragraph 12 of the Second Amended Statement of Claim.
- 13 The Third Defendant denies the allegations in paragraph 13 of the Second Amended Statement of Claim.
- 14 The Third Defendant does not plead to paragraph 14 as it has been deleted from the Second Amended Statement of Claim.

Content of the Duties

15 In answer to paragraph 15 of the Second Amended Statement of Claim the Third Defendant:

Non-Delegable Duty

- (a) denies the allegations in subparagraphs (a) to (n) so far as they relate to the Third Defendant;
- (b) otherwise does not plead to the allegations in subparagraphs (a) to (n);
- (c) in the alternative to paragraph (a), in the event it is held that the Third Defendant owed a non-delegable duty of care to each of the Plaintiffs and the Represented Persons, then the non-delegable duty did not extend to ensuring that the Plaintiffs and the Represented Persons did not suffer foreseeable injury or disability caused by:
 - (i) any acts of physical abuse which constituted unlawful assault under s 61 of the *Crimes Act 1900* (NSW);
 - (ii) any acts of sexual abuse;
 by the staff at, invitees to, and fellow students at, the Fairbridge Farm School;

Vicarious Liability

- (d) does not plead to the allegations in subparagraphs (o) and (p);
- (e) denies the allegations in subparagraph (q);
- (f) in the alternative to subparagraph (e), says, in the event it is held that any officers servants or agents of the Third Defendant owed a duty of care to the Plaintiffs and the Represented Persons, then the course of their employment did not include:
 - (i) any acts of physical abuse which constituted unlawful assault under s 61 of the *Crimes Act 1900* (NSW);
 - (ii) any acts of sexual abuse.

Breaches of Duties

16 In answer to paragraph 16 of the Second Amended Statement of Claim the Third Defendant:

Non-Delegable Duty

- (a) does not plead to be allegations in subparagraph (a);
- (b) does not plead to be allegations in subparagraph (b);
- (c) as to subparagraph (c):
 - (i) denies the allegations therein;
 - (ii) says that any persons found to be perpetrators of physical and sexual abuse were not officers, servants and agents of the Third Defendant.

PARTICULARS

- (1) Each of Messrs Beauchamp, Woods and Newberry were employed by the UK Society.
- (2) The other members of staff of the Fairbridge Farm School were employees of the UK Society, or alternatively the Fairbridge Governors, or alternatively the Principal for the time being.
- (3) The other perpetrators had not been appointed by the Third Defendant to act on its behalf as principal;
- (iii) says that the acts of physical abuse constituted unlawful assault under s 61 of the *Crimes Act 1900* (NSW);
- (iv) says the acts of sexual abuse constituted various offences under the provisions of Pt III(9) of the *Crimes Act 1900* (NSW) as they were in force from time to time, and the common law;
- (v) says that the Third Defendant is not vicariously liable for any breach of any non-delegable duty of care owed to each of the Plaintiffs and the Represented Persons by reason that:
 - (A) any acts of physical abuse and/or sexual abuse of the Plaintiffs and Represented Persons were not effected by any officers, directors and agents of the Third Defendant;
 - (B) in the alternative to paragraph (A), in the event that it is held that any such acts of physical abuse and/or sexual abuse were effected by any person who was an officer, servant or agent of the Third Defendant, such acts were not engaged in in the course of their employment with the Third Defendant.

Vicarious Liability

- (d) does not plead to the allegations in subparagraph (d);
- (e) does not plead to the allegations in subparagraph (e);
- (f) as to subparagraph (f), repeats subparagraphs (c)(i) to (v).

17 In answer to paragraph 17 of the Second Amended Statement of Claim the Third Defendant:

- (a) does not admit that each of the Plaintiffs and the Represented Persons during their residence at Fairbridge Farm School was subjected to physical abuse and/or sexual abuse;
- (b) otherwise denies the allegations therein so far as they relate to the Third Defendant;
- (c) does not plead to the allegations therein so far as they relate to the First and Second Defendants.

Joint and Several Liability

18 In answer to paragraph 18 of the Second Amended Statement of Claim the Third Defendant:

- (a) denies the allegations therein so far as they relate to the Third Defendant;
- (b) otherwise does not plead to the allegations therein.

Injuries and Disabilities

19 In answer to paragraph 19 of the Second Amended Statement of Claim the Third Defendant:

- (a) denies the allegations therein so far as they relate to the Third Defendant;
- (b) otherwise does not plead to the allegations therein.

Substantial Common Interest and Issues

20 The Third Defendant denies the allegations in paragraph 20 of the Second Amended Statement of Claim.

21 The Third Defendant denies the allegations in paragraph 21 of the Second Amended Statement of Claim.

22 The Third Defendant denies the allegations in paragraph 22 of the Second Amended Statement of Claim.

Statute barred causes of action

23 In further or alternative answer to the whole of the Second Amended Statement of Claim the Third Defendant says:

- (a) these proceedings were commenced after the expiry of the limitation period for the causes of action of the Plaintiffs and the Represented Persons under the *Statute of Limitations 1623 (Imp)* or the *Limitation Act 1969 (NSW)*, and in consequence are not maintainable against it;
- (b) the causes of action of the Plaintiffs and the Represented Persons are further subject to the ultimate bar under s 51(1) of the *Limitation Act 1969 (NSW)*.

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

Solicitor on record

Date of signature

9/10/2012