

**ROYAL COMMISSION INTO INSTITUTIONAL
RESPONSES TO CHILD SEXUAL ABUSE**

**Public Hearing - Case Study 11
(Day WA16)**

Level 18, Industrial Relations Commission
111 St Georges Terrace, Perth

On Thursday, 1 May 2014 at 10.00am

Before The Chair: Justice Peter McClellan AM
Before Commissioners: Mr Robert Atkinson AO APM
Professor Helen Milroy

Counsel Assisting: Ms Gail Furness SC

1 MS FURNESS: I call Hayden Stephens. His statement can be
2 found in tab 12, volume 1 for the Commissioners, and, your
3 Honour, volume 2, tab 12.

4

5 <HAYDEN JAMES STEPHENS, affirmed: [10.03am]

6

7 <EXAMINATION BY MS FURNESS:

8

9 MS FURNESS: Q. Would you tell the Royal Commission your
10 full name and occupation?

11 A. Hayden James Stephens. I'm a qualified lawyer
12 employed at Slater & Gordon.

13

14 Q. Are you a partner at Slater & Gordon?

15 A. My title is chief executive officer of the personal
16 injury division within our Australian business.

17

18 Q. Does that mean you're a partner or not?

19 A. We don't formally have a partnership as we are an
20 incorporated body and therefore we don't have a
21 partnership, as such; thus my title.

22

23 Q. You have prepared a statement to assist the Royal
24 Commission?

25 A. That's right.

26

27 Q. Do you have a copy with you?

28 A. I do.

29

30 Q. Is there an amendment that you want to make to that?

31 A. Yes, at paragraph 109(k) you'll see in the second line
32 reference to "20 claimants". That should read "25
33 claimants".

34

35 Q. With that amendment, are the contents of that
36 statement true and correct?

37 A. Yes.

38

39 MS FURNESS: I tender that statement.

40

41 THE CHAIR: The statement will be exhibit 11-19.

42

43 **EXHIBIT #11-19 STATEMENT OF HAYDEN STEPHENS**
44 **DATED 11/04/2014**

45

46 MS FURNESS: Q. Mr Stephens, you've worked all of your
47 working life as a solicitor with Slater & Gordon?

1 A. That's right.
2
3 Q. You were admitted in May 1994?
4 A. Yes.
5
6 Q. When did you first commence work in relation to the
7 class action the subject of interest in this case study?
8 A. In approximately - sorry, I was admitted from 1994,
9 I was working in 1993, so about mid 1993.
10
11 Q. So you were working initially on the class action
12 before your admission, when you were employed as an
13 articulated clerk?
14 A. That's right.
15
16 Q. If we can have your statement up on the screen, at
17 paragraph 12 you refer to Slater & Gordon being first asked
18 to become involved by the coordinator of VOICES; is that
19 right?
20 A. That's right.
21
22 Q. You obtained instructions that there were over 200 men
23 who had made contact with or were otherwise known to VOICES
24 as having suffered sexual assault, physical assault or a
25 combination at the four Christian Brothers institutions?
26 A. That's right.
27
28 Q. If we can deal with it in as chronological order as we
29 can, if we can turn then to paragraph 25 of your statement,
30 you say there from about mid 1993 you and a partner at
31 Slater & Gordon began to research and consider the causes
32 of action - that's right?
33 A. That's right.
34
35 Q. That's following on receiving instructions from
36 VOICES?
37 A. That's right.
38
39 Q. You set out in paragraph 27 that it became apparent
40 early in your research that the Limitation Act in Western
41 Australia would likely preclude the men from bringing an
42 action in WA. Bearing in mind, Mr Hayden, the audience of
43 the Royal Commission is not solely comprised of lawyers,
44 can I ask you explain what was in your mind in respect to
45 the Limitation Act so that as many people as possible
46 following this case study can understand it?
47 A. In every Australian State and Territory there are

1 these laws which prescribe strict time limits in which a
2 person can bring a claim. In Western Australia, at that
3 time, the time period was six years.
4

5 Q. Six years from when?

6 A. Six years from the date of the tort or, in this case,
7 from the date of the abuse. As you can see, from the time
8 that passed between the date of the abuse and the time in
9 which we were receiving instructions, these men were well
10 out of time. Unfortunately, in Western Australia no
11 provision exists within those laws to extend time - to make
12 an application to court to persuade the court that it is
13 just, in the circumstances, to allow them to bring a claim.
14

15 Q. There were good reasons why they weren't able to bring
16 the claim until now.

17 A. That's true, and in fact it led to us considering
18 whether we should take advantage of more flexible
19 limitation laws in the Eastern States.
20

21 Q. You then go on --

22
23 THE CHAIR: Q. Is that still the position in WA, there is
24 no discretion in the court?

25 A. There is now a discretion in the court to grant an
26 extension of time although the time period has, as
27 I understand it, been reduced to three years, not six.
28

29 Q. Three years with an unlimited discretion?

30 A. The discretion is qualified having regard to the
31 plaintiff bearing the onus of persuading the court that it
32 was only within recently - within the three-year time
33 period - that he or she has become aware of a material fact
34 relevant to their cause of action that they were otherwise
35 unaware of outside that limitation period.
36

37 Q. It's a large hurdle for cases of this type. That
38 discretion would not work for cases of this type, would it?

39 A. Well, for reasons which I think counsel will take me
40 to, I think there are just reasons in which these
41 plaintiffs could establish that they were not aware of
42 material facts up until just prior to this litigation
43 starting - material facts such as that there existed a
44 cause of action against the Trustees of the
45 Christian Brothers. Another material fact would be, for
46 example, that they only became aware of the nexus or
47 connection between their psychiatric injury and the abuse

1 that they suffered. These are important facts that came to
2 them late in time and, therefore, form the basis for an
3 application for an extension of time.
4

5 Q. I'll have to think about that.

6 A. Your point is a good one, your Honour. These are
7 still hurdles that are unnecessary in cases such as these,
8 and certainly from our perspective, even though there is
9 some provision to extend time within Western Australia, we
10 would urge, to the extent that the Commission makes
11 recommendations in this area, that those hurdles be
12 removed.
13

14 HIS HONOUR: The problem then, of course, is you open up a
15 whole area of statute of limitations in relation to all
16 sorts of claims. Yes, there is a special need here, but
17 can you confine it? That's an issue that we'll have to
18 look at.
19

20 MS FURNESS: Q. The second issue you refer to in
21 paragraph 28, if we can scroll down, is how to identify the
22 proper defendant or defendants. What do you mean by that?

23 A. Certainly early in our research it was very difficult
24 to understand the complex organisational structure of the
25 church - certainly from my perspective, and I speak for the
26 legal team working on this. What we did learn was that the
27 trustees of the Christian Brothers were the relevant
28 governing body, based in Strathfield New South Wales,
29 established under a law of that State for the purposes of
30 holding land.
31

32 It was important for us to try to attach some
33 liability, even at this early stage, to a body of persons
34 who could have some form of liability, even though those
35 individuals in office today were not in office at the time
36 that the abuse occurred.
37

38 Q. Not only have some form of liability, but presumably
39 have access to some assets to satisfy any decision?

40 A. That's precisely right.
41

42 Q. They were the two challenges initially?

43 A. That's right.
44

45 Q. You commenced proceedings, I think, in New South Wales
46 first?

47 A. That's right.

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Q. And that was to avoid the Western Australia limitation issue you've discussed where there was no discretion in Western Australia?

A. That's right.

Q. I think you understood that there was likely to be some change in the New South Wales law coming up?

A. Yes. We had to act with haste back in August 1993. There were new laws being introduced which would have the effect of placing a New South Wales court in the position where it must apply the limitation laws of Western Australia.

Q. So that was the reason why you moved as quickly as you did?

A. That's right.

Q. So on 31 August 1993, you commenced proceedings by way of summons on behalf of each plaintiff, naming 21 defendants?

A. That's right.

Q. There was a suppression order made at that time in respect of the names of the plaintiffs?

A. That's right.

Q. And that was presumably on your motion?

A. Yes.

Q. Why did you seek a suppression order as to the names of the plaintiffs?

A. We felt at that early stage it was inappropriate to disclose the identity of the plaintiffs, in which case, because we had to act with haste, we had not obtained instructions otherwise to disclose their names; in other words, our primary objective in those early days was to protect our clients' interests and, in doing so, protect their identity.

Q. And you also filed a master statement of claim to plead the substantive action on the same day?

A. Yes.

Q. That was the beginning of the Queensland proceedings. You deal with that in paragraphs 15 and 16 of your statement. Can we just have that up?

1 A. Counsel, if I could correct you, it's the New South
2 Wales proceedings not the Queensland proceedings.
3
4 Q. I'm sorry, did I say Queensland. I meant New South
5 Wales, thank you. In paragraph 16 you note that you had
6 12 months to serve the summonses from the date of filing.
7 What you mean by that is on 31 August you gave the court
8 the documents, but you had 12 months from that date to give
9 the defendants - the various arms of the
10 Christian Brothers - that's right?
11 A. That's right.
12
13 Q. Then you refer in paragraph 16 to the defendant, the
14 Trustees of the Christian Brothers, becoming aware of the
15 proceedings, do you see that?
16 A. They did.
17
18 Q. I think that Slater & Gordon held some sort of media
19 event, didn't they, around the time of the filing of the
20 summons in the New South Wales court?
21 A. I don't believe so. I can't recall the specific
22 circumstances as to why the media contacted
23 Slater & Gordon. I recall that a partner at
24 Slater & Gordon made some comment in response to a media
25 approach in relation to these summonses being issued.
26
27 Q. You're giving evidence that Slater & Gordon didn't
28 initiate the media contact; it came out of the blue, as it
29 were, to Slater & Gordon?
30 A. To the best of my recollection.
31
32 Q. But you understood there was some media reporting of
33 the case and quotes of a partner of Slater & Gordon in the
34 media?
35 A. Yes.
36
37 Q. In those circumstances, it is not surprising that the
38 Trustees of the Christian Brothers became aware of the
39 proceedings?
40 A. Yes.
41
42 Q. You indicate in paragraph 16 what happened next, that
43 Carroll & O'Dea arranged to have the matters listed - that
44 means the court to hear something in respect of those
45 summonses; is that right?
46 A. That's right.
47

1 Q. What happened at that hearing?
2 A. Certainly prior to that hearing Howard Harrison, the
3 partner at Carroll & O'Dea, contacted the senior partner at
4 our firm, Peter Gordon, and indicated to him that the
5 Christian Brothers were going to bring these matters on for
6 directions and to, I think, press home with clarity in
7 relation to what these matters were about.

8
9 So, in those circumstances, the first hearing by which
10 the court dealt with these matters I believe, from
11 recollection, was largely matters in relation to procedural
12 directions, but certainly the Christian Brothers very early
13 on signalled their intention to be proactive in bringing
14 these matters on.

15
16 Q. At that early stage, did Mr Harrison or anyone on
17 behalf of the Christian Brothers ask you to provide the
18 names of the plaintiffs?

19 A. I can't recall, to be precise. I do know soon after -
20 whether it was at that direction or some subsequent
21 hearing - there were numerous requests for further
22 particulars in relation to the group of plaintiffs that we
23 acted for.

24
25 Q. Is it the case that you provided them with the details
26 of the plaintiffs before the suppression order was lifted?

27 A. I can't --

28
29 Q. I'm assuming at some stage the suppression order was
30 lifted?

31 A. Yes. I can't recall. I don't believe the suppression
32 order was lifted. I believe it remained in place for the
33 entire proceedings.

34
35 Q. But at some stage you must have provided the
36 Christian Brothers with the names of the plaintiffs?

37 A. Yes, of course, at some stage. I just can't recall
38 exactly when.

39
40 Q. Do you recall now refusing to provide those names on
41 request?

42 A. No, I don't recall.

43
44 Q. In paragraph 19 of your statement you talk about key
45 aspects of the litigation, and the first is you say the
46 case in negligence against the church authorities appeared
47 strong. What did you base that opinion on?

1 A. Certainly, from the instructions that we obtained from
2 these men, we heard accounts of devastating sexual abuse
3 inflicted upon men as children in these four institutions.
4

5 Through that period, we also obtained instructions in
6 relation to those men complaining to relevant authorities -
7 a headmaster; in some cases State authorities, such as the
8 police. We formed the view that certainly at the outset
9 there appeared a strong case in negligence, that in
10 circumstances where these children were sent to these
11 institutions for care and education, this could occur; that
12 the governing body, or the persons responsible for those
13 schools should be held in some way accountable for these
14 atrocities.
15

16 Q. And that was based on the accounts given to you by the
17 men?

18 A. In the early stage, yes.
19

20 Q. So the view you express in 19(a) was based on what you
21 were told by the men?

22 A. Certainly the way in which paragraph 19(a) is phrased
23 is reflecting the litigation, but certainly in
24 chronological order, at that early stage, we formed the
25 view that there was a liable case based on the instructions
26 of the men only.
27

28 Q. Turning to subparagraph (c), we've dealt with the
29 limitation issue and you say that, secondly, the usually
30 impecunious perpetrators belonged to an organisation which
31 could not be sued for that abuse. That's related to the
32 evidence you gave earlier about the proper defendant. Can
33 you elaborate on what you mean by "could not be sued for
34 the abuse"?

35 A. The two major defendants in this litigation were the
36 Catholic Archbishop of Perth and the Trustees of the
37 Christian Brothers. The Catholic Archbishop of Perth, in
38 the final stage of this litigation, we asserted, was a
39 corporation sole for the purposes of facing actions in tort
40 such as these.
41

42 Q. They were a legal entity?

43 A. That's right. We formed that view because, like the
44 Trustees, he was a corporation sole created pursuant to a
45 statute in Western Australia back in 1911. Similar with
46 the Trustees of the Christian Brothers: in 1942, pursuant
47 to a statute, it was created as a corporate entity. But

1 the common theme in both statutes was that they were
2 corporate entities for the purpose of holding land, and the
3 challenge in this litigation was clearly persuading a court
4 that, on the one hand, while they take the benefits of
5 incorporation for holding land, they should also face the
6 liability of the corporation.

7
8 Q. And therefore be responsible for the actions of those
9 that went before them?

10 A. That's right.

11
12 Q. You speak about the "usually impecunious
13 perpetrators". By that I assume you mean the various
14 brothers who were accused of the abuse?

15 A. Yes.

16
17 Q. Not only were they impecunious, many of them were
18 likely to have been deceased by that time?

19 A. That is right. Many had died in the meantime.

20
21 Q. In paragraph (d) you say that on numerous occasions,
22 firstly before the litigation, you invited the
23 Christian Brothers to resolve these claims. Do you see
24 that?

25 A. Yes.

26
27 Q. Given the haste with which you brought on the action,
28 when did you, before the litigation, invite them to resolve
29 the claims?

30 A. It's a good point you raised. I think we acted with
31 haste back in August 1993 to protect these plaintiffs'
32 interests, but upon the Christian Brothers and their
33 lawyers being informed of these actions, we did reach out
34 to the brothers and their representatives to try and avoid
35 litigation and to try and resolve these matters quickly and
36 efficiently.

37
38 Q. So was the answer to my question you did not, before
39 the litigation, invite them to resolve the claims?

40 A. Not before August 1993, that's my recollection.

41
42 Q. So, insofar as it says on numerous occasions "before"
43 the litigation, we should strike that?

44 A. You should strike the "before" but certainly keep
45 "during".

46
47 Q. I'm just dealing with "before". Because you have said

1 "on numerous occasions before", so it wasn't even on one
2 occasion before the litigation; is that how we should
3 understand it?

4 A. Yes.

5

6 Q. So then dealing with the second point, "during", you
7 say that on numerous occasions during the litigation you
8 invited them to resolve the claims, was that done in
9 writing or orally?

10 A. My recollection is it was done orally. Peter Gordon,
11 as senior partner at our firm, had established a dialogue
12 with Howard Harrison at Carroll & O'Dea and, indeed, the
13 senior partner acting for the Catholic Church, Paul Gamble
14 at Dunhill Madden Butler and on several occasions, to my
15 recollection, he reached out to both of them to see if
16 these matters could be resolved quickly and efficiently in
17 the interest of the men.

18

19 Q. So several, not numerous?

20 A. No, I would say numerous. Sorry, I've been clumsy
21 with my language. I would stand by the word that I've used
22 in my affidavit.

23

24 Q. So on numerous occasions, orally, Mr Gordon reached
25 out to Carroll & O'Dea?

26 A. Yes, that's my recollection.

27

28 Q. On those occasions where the reaching-out was done,
29 were numbers put to it?

30 A. I'm unable to answer that question. I think, like in
31 any approach to resolve litigation, you first must gauge
32 the interests of the other party, and I must say, certainly
33 my recollection is there was no interest on the part of the
34 defendants, and therefore it is very likely no money was
35 mentioned, or no amounts should be mentioned.

36

37 THE CHAIR: Q. From your side of the Bar table, as it
38 were, when did that perception change? When did you, for
39 the plaintiffs, come to think that the Christian Brothers
40 may be prepared to talk about some sort of financial
41 accommodation?

42 A. This is relevant to the reference to "numerous
43 occasions". So there were numerous occasions in which we
44 canvassed the idea of a settlement of this action.

45

46 When the High Court decided that the Catholic
47 Archbishop could not be held liable for these actions in

1 light of its corporate structure, it's fair to say that
2 Mr Gordon and Mr Harrison had more fruitful discussions,
3 because, to be frank, at that point in time, the strength
4 or position of the Christian Brothers was at its greatest,
5 and certainly reflecting on that period the
6 Christian Brothers and Catholic Church, I believe, felt
7 that they were at the high point in this litigation in
8 which to resolve these matters more along their interests
9 as opposed to the plaintiffs'.

10
11 Q. It's plain, isn't it, that the forensic battle was
12 effectively won at that point, but, from your side, did you
13 discern that the fight to that point in time had been about
14 defending the Christian Brothers' position in the forensic
15 battle; is that what you perceived was happening?

16 A. Yes.

17
18 Q. Then from your point of view, having won the forensic
19 battle, what was the trigger, though, for providing the sum
20 of money that was provided?

21 A. I think, as Mr Harrison alludes to in his affidavit,
22 we had a - the firm Slater & Gordon - very strong
23 reputation in conducting litigation of this kind. They
24 knew we weren't going to go away. They knew that we would
25 stand by these men. Even though we had been unsuccessful
26 against the Catholic Archbishop there was some small light
27 that we'd be able to persuade the court of a different line
28 of argument in relation to the Trustees for the
29 Christian Brothers. Difficult, I concede, but arguable
30 nonetheless. And, in those circumstances, again, when you
31 look at our respective negotiating positions - theirs, one
32 of strength; ours one of weakness - I believe they formed a
33 view that this was the moment in which to resolve these
34 matters.

35
36 I believe it was motivated by two factors. The first
37 was, like any defendant in negotiations, they would be
38 performing a cost benefit analysis - the costs of fighting
39 on, paying their own legal expenses, and the benefit of
40 trying to resolve these matters now and having men sign
41 deeds of release where it offered closure to the
42 Christian Brothers and the Catholic Church finally. And
43 the point in which that, I think, offered its greatest
44 opportunity was, as I say, when they were at their greatest
45 strength after the High Court victory.

46
47 Q. If that analysis is right - and the defendants will

1 help us - there is not much room for a response recognising
2 need; it comes down to the conventional litigation
3 parameters that plaintiffs' and defendants' lawyers apply,
4 doesn't it?

5 A. That's right, that's right. So, you know, I'll be the
6 first to say the outcome that we reached, both in terms of
7 the trust mechanism and the amount of money deposited in
8 the trust, did not fairly reflect the suffering that these
9 men went through. It just did not. But it was the best
10 that we could do in the framework that you suggest - in the
11 parameters of this litigation.
12

13 We knew that, absent resolving these matters at that
14 time, there was a very strong prospect that around the
15 corner these men were facing a zero result - in fact, worse
16 than zero, they would be facing adverse cost orders. So
17 while I place emphasis on what I believe the
18 Christian Brothers' motivation was at that time, it should
19 not be forgotten our motivation, on behalf of our clients,
20 was that there was a real prospect that they would receive
21 nothing very soon.
22

23 Q. You've had a lot of experience in this sort of
24 litigation, not necessarily involving the church, but
25 what's your perception of the common law's capacity to
26 resolve these sorts of issues?

27 A. I think, from our clients' perspective, first and
28 foremost, it has an important role to play, because it
29 provides a forum in which their claims, their allegations,
30 can be heard. They were denied that opportunity in this
31 process, which was very unfortunate.
32

33 I do believe the common law recognises loss and
34 suffering in an appropriate way, recognises them by heads
35 of damages such as pain and suffering, which was prevalent
36 in these matters. It recognises when a person, in light of
37 their injury, is not able to work by way of claims for loss
38 of earnings - again, relevant in this litigation. It
39 recognises the repayment of expenses and medical
40 treatment/therapy, which again were key ingredients of the
41 hurt and suffering these men experienced.
42

43 So to be direct in relation to your question, I do
44 believe that the principles of common law, particularly in
45 relation to recognising suffering and the damage incurred,
46 do have a role in matters of this kind. And even in
47 circumstances where settlement schemes are established to

1 bypass the common law system, I do believe the common law
2 system has a role to play in shaping the principles of that
3 settlement scheme such as those that I've described.
4

5 Q. The problems you then confronted were firstly the
6 limitation provided by statute?

7 A. That's the first problem, yes.
8

9 Q. The second problem is that although a structured and
10 managed organisation had inflicted the damage, you couldn't
11 sue anyone?

12 A. That's the second problem - that's the second problem.
13 And for reasons I'm sure counsel will take me through, they
14 were tools, if you like, that the Christian Brothers and
15 the Catholic Church and their representatives used to their
16 advantage.
17

18 We have talked about us proceeding in New South Wales
19 to avoid the strict limitation laws of Western Australia.
20 At every turn in this litigation the Christian Brothers and
21 the Catholic Church attempted to bring these claims back to
22 Western Australia where they knew they would be barred.
23

24 Q. But I'm right, aren't I - they are the two issues
25 which the common law, in this case, was not able to cope
26 with?

27 A. That's true, yes. The common law and, in part, the
28 common law in its interpretation of statute law.
29

30 Q. That's part of the common law. That's the judges'
31 fault.

32 A. Yes.
33

34 Q. But they are the two issues that your attempts throw
35 up as issues which this Commission must look at and try to
36 resolve one way or the other?

37 A. Yes, absolutely.
38

39 MS FURNESS: Q. Did you at any stage ask the
40 Christian Brothers, through their lawyers, for assistance
41 in identifying the proper or correct defendant?

42 A. Yes, we did.
43

44 Q. What was the response?

45 A. We were ignored.
46

47 Q. When you say "ignored", you didn't get a response?

1 A. My recollection is the response was such, either in
2 writing or certainly in discussions with the partner of the
3 time, Peter Gordon, that they were offering no assistance
4 in giving us clarity around the organisational structure of
5 the church bodies.
6

7 Q. Do you know recall when that assistance was sought, in
8 terms of the litigation?

9 A. No. I do recall, as you can see from the master
10 statement of claim, in acting with haste back in August
11 1993 we named something in the order of 21 defendants. So
12 the request for assistance in clarifying the appropriate
13 body to sue would have been made subsequent to the filing
14 of that master statement of claim.
15

16 Q. Can I just ask you about the fee structure. At
17 paragraph 39 of your statement you say that the firm
18 entered into retainers with about 240 men you had at that
19 stage on a conditional fee basis. What is a "conditional
20 fee basis"?

21 A. In this instance we entered arrangements with the men
22 where we would only seek payment of our professional fees
23 in circumstances where we were able to reach a successful
24 resolution.
25

26 Q. Was that defined?

27 A. Under the terms of the retainer, yes.
28

29 Q. "Success" in terms of a money amount or any amount?

30 A. A compensation amount.
31

32 Q. It could be a dollar?

33 A. It could be, but of course in those circumstances, as
34 in these cases, you would not seek to recover full payment
35 of your professional fees. Certainly a principle
36 underpinning these arrangements, these conditional fee
37 arrangements, is that the fees recovered at the end of the
38 matter are proportionate to the outcome.
39

40 Q. You referred to your professional fees, but of course
41 in litigation of this sort you spend a lot of money in
42 filing fees and expert fees and barrister fees and the
43 like. What did you say to the men about what would happen
44 with those fees, which are amounts that are normally called
45 disbursements?

46 A. It was clear from the instructions that we took that
47 these men were impecunious. These men had no means to meet

1 the disbursements or expenses that you've just described.
2 In those circumstances, the firm agreed to meet those
3 disbursements and recover same, but only if there was a
4 successful outcome.

5
6 Q. With interest, or not?

7 A. Without interest.

8

9 THE CHAIR: Q. It used to be called a "spec brief" when
10 I was a barrister. What did your barristers do? Did they
11 agree on the same basis, that they would only take a fee if
12 there was recovery?

13 A. There were special arrangements with the barristers we
14 used. I can't recall the specifics of the individuals and
15 the arrangements we met, but I can say as an overarching
16 statement their fees were not on a conditional fee basis.
17 However, in some instances arrangements were met to reduce
18 their fees to reflect the outcome reached.

19

20 Q. So does that mean that they were paid from
21 Slater & Gordon's pocket?

22 A. That's right.

23

24 Q. And you would be familiar with the fact that the legal
25 profession - both through your firm and through the Bar -
26 underwrites litigation in the common law quite a lot. Is
27 that right, that's your experience?

28 A. Yes.

29

30 Q. But the barristers here either reduced or accepted a
31 conditional arrangement?

32 A. In this instance, not always. Through the course of
33 the litigation we did meet payment of barristers, but, as
34 I said, specific arrangements were met, often then
35 withholding payment until the conclusion of the litigation,
36 in some instances.

37

38 MS FURNESS: Q. But they got paid from time to time
39 throughout the litigation?

40 A. That's my recollection, yes.

41

42 Q. So not a classic spec brief?

43 A. No, not as black and white as you've described, but
44 simply in the manner there were some arrangements met where
45 interim payments were made.

46

47 Q. The next event chronologically is that you instituted

1 proceedings in Victoria in November 1993. Why did you do
2 that?
3 A. Again, first and foremost, was to avoid the strict
4 limitation laws in Western Australia. What was unique
5 about these cases was these men were resident in Victoria
6 and we felt that we had a very good chance of holding forum
7 in that State and, therefore, taking the advantage, as
8 I indicated earlier, of the more flexible limitation laws.
9
10 Q. In Victoria?
11 A. That's right.
12
13 Q. That was in November 1993. Then in January 1994, the
14 Christian Brothers issued a summons to attend court to the
15 plaintiffs for a hearing of an application that the action
16 be stayed or cross-vested to Western Australia. What does
17 "cross-vested" mean?
18 A. It means transferred.
19
20 THE CHAIR: It's a big word for "transfer".
21
22 THE WITNESS: That's right. It means transferred.
23
24 MS FURNESS: Q. You responded to that summons?
25 A. Yes.
26
27 Q. What was the outcome - I think it was heard in the
28 Supreme Court of Victoria in June 1994?
29 A. It was heard by the then Justice Hayne. The outcome,
30 put simply, was that the plaintiff was unsuccessful in
31 persuading the court that the matter should remain in
32 Victoria.
33
34 Q. So that means the Victorian proceedings were now
35 transferred to Western Australia, where you had the real
36 problem with the limitation period and no discretion in the
37 court to extend it?
38 A. Yes, and in fact in argument before Justice Hayne, we
39 were at pains to stress that if he elected to transfer
40 these matters to Western Australia, they would be dead in
41 the water.
42
43 THE CHAIR: Q. Justice Hayne must have been sitting as a
44 trial judge, was he?
45 A. That's right, your Honour.
46
47 MS FURNESS: Q. You then, the month after Justice Hayne

1 delivered his decision, sought leave to file in the
2 High Court. So you were seeking the leave of the High
3 Court to appeal against his decision?

4 A. Yes.

5
6 THE CHAIR: Q. So you took proceedings directly from
7 Justice Hayne's decision, did you?

8 A. Yes, my recollection is the provisions of the
9 cross-vesting legislation, or the Cross-vesting Act, did
10 not allow an appeal to the appellate court and, therefore,
11 prompted us to explore an appeal to the High Court.
12

13 The hearing before Justice Hayne was marked, I think
14 importantly, by this important point. Justice Hayne was
15 persuaded by the Christian Brothers and the
16 Catholic Church's argument that under the cross-vesting
17 legislation, even if he transferred these matters, there
18 was still the prospect that a Western Australian judge
19 would use his or her discretion to apply the procedural law
20 or the limitation law of Victoria. We turned to the
21 Christian Brothers --

22
23 MS FURNESS: Q. Is that a statutory discretion or an
24 inherent discretion?

25 A. It's a statutory discretion conferred under the
26 Cross-vesting Act. We turned to the Christian Brothers and
27 the Catholic Church and sought an undertaking from them
28 that if the matter was transferred to Western Australia,
29 that they would support an application that the trial judge
30 in Western Australia applied the Victorian limitation laws.
31 They refused to give that undertaking, and even in light of
32 that refusal, Justice Hayne saw fit to transfer the matters
33 to Western Australia.
34

35 We did lodge an appeal, but, to explore that conferred
36 discretion under the legislation to apply the Victorian
37 law, we also brought an application before Justice Anderson
38 in Western Australia for him to use his discretion to apply
39 the Victorian limitation law. The Christian Brothers and
40 the Catholic Church vigorously defended that application.
41

42 MS FURNESS: Q. When you say "the Catholic Church", the
43 defendants were the Christian Brothers?

44 A. The defendants were the Christian Brothers - the
45 Trustees of the Christian Brothers, and the Catholic
46 Archbishop of Perth.
47

1 Q. So when you refer to the Catholic Church, you're
2 talking about the Archbishop Hickey?
3 A. Yes, I am, I'm sorry.
4
5 Q. So in August 1994 you made an application, as you have
6 described, to the Supreme Court of Western Australia. That
7 was heard in August, and then in November Justice Anderson
8 dismissed your application and held that the WA rules of
9 procedure would apply?
10 A. Yes.
11
12 Q. So that meant you remained, in your words, dead in the
13 water?
14 A. Yes, that was the death knell of these two cases.
15
16 Q. You then sought special leave to appeal
17 Justice Anderson's decision in that regard to the
18 High Court?
19 A. That's right.
20
21 Q. So you then had two special leave applications before
22 the High Court - one in relation to Victoria and one in
23 relation to Western Australia; is that right?
24 A. That's right.
25
26 Q. They were heard in December 1994?
27 A. Yes.
28
29 Q. What was the result?
30 A. We were unsuccessful in seeking special leave.
31
32 THE CHAIR: Q. Your chances were very small, as I'm sure
33 you recognised at the time?
34 A. Absolutely, your Honour, but faced with the
35 death knell that was given to us by both Justice Hayne and
36 Justice Anderson, we saw no alternative but to give it a
37 go.
38
39 MS FURNESS: Q. So where were you left in December 1994
40 after you'd taken all those various procedural steps?
41 A. Well, the Victorian claimants - their claims were
42 dead. What was left were the summonses and master
43 statement of claim issued in respect to the New South Wales
44 proceedings.
45
46 Q. So we're at the end of 1994 - that's right?
47 A. Yes.

1
2 Q. In terms of the New South Wales proceedings, what did
3 you do next?
4 A. Well, buoyed by the success that the
5 Christian Brothers and the Catholic Archbishop had before
6 Justice Hayne they brought an application in the New South
7 Wales Supreme Court to cross-vest or transfer the New South
8 Wales proceedings back to Western Australia.
9
10 Q. So the same thing that had happened in respect of the
11 Victorian proceedings?
12 A. That's right.
13
14 Q. What was the result of that?
15 A. The result was that the plaintiffs were successful in
16 holding forum in New South Wales.
17
18 Q. What did the defendants do in relation to that
19 decision?
20 A. They --
21
22 Q. Was it accepted, or was there an appeal?
23 A. It was accepted. They turned the battle, as it were,
24 to then the issue of the corporate identity of the
25 defendant.
26
27 Q. In the meantime there was a process of discovery
28 whereby one party asked the other party for access to
29 documents; that's right?
30 A. Yes, just prior to the cross-vesting application
31 in December 1994. Yes.
32
33 Q. If we can have paragraph 72 of your statement on
34 the screen, you say there that the defendants - that is,
35 the Christian Brothers, in a broad sense, and
36 Archbishop Hickey - were obliged to discover documents
37 relevant to the matters in dispute, and as part of that
38 process you were given a series of documents entitled
39 "Reaping the Whirlwind... The Christian Brothers and Sexual
40 Abuse of Boys in Australia 1920-1944. A Secret Report for
41 Congregation Executives". I take it that was the first
42 time you had seen that document?
43 A. Yes.
44
45 Q. You understood from reading it that it was authored by
46 Brother Barry Coldrey?
47 A. Yes.

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Q. And it was part of a history of the Christian Brothers Order?

A. Yes.

Q. In paragraph 74, if we can have that on the screen, you state there that the report referred to evidence from contemporaneous primary sources. Contemporaneous to the writing of the report, I take it?

A. Yes.

Q. Not contemporaneous to the events described?

A. No.

Q. You say there that you regarded it important because "it expressly affirmed many of the types of complaints and allegations our clients made". So I take it from that that what you read from that report was that other people, be they named or not, had made similar claims to the men that you were representing?

A. That's right.

Q. Were they named, the complainants? Were you able to tell from the report whether any of the men you were representing - whether their stories were reflected in that report, or not?

A. To be frank, I can't recall. I can't recall whether the specific men we acted for were in fact named in the secret report.

It's fair to say that the secret report referred to incidence of abuse well prior to our men joining the orphanages, which, of course, led to us gaining confidence that the action in negligence was growing stronger against the Trustees of Christian Brothers. But in answer to your specific question, I can't recall whether the actual report made reference to the men the subject of this action.

Q. It was 1920 to 1944 [sic]. The men who you were representing - did they speak of abuse of them prior to 1944, or post?

A. Some prior to 1994. I'm going off memory here. I think importantly, while your question is directed to whether our claimants themselves were referred to in the secret report - and I've given my answer in respect of that - importantly, the perpetrators that inflicted abuse upon our clients - some of them were referred to in the

1 secret report.

2

3 Q. That's the next paragraph. It refers to that it named
4 as paedophiles several of the brothers your clients had
5 named?

6 A. That's true.

7

8 Q. And, thirdly, you say that it cited primary source
9 material which showed that the decisions affecting the
10 control, staffing and running of the institutions were
11 taken in Strathfield by the Trustees of the
12 Christian Brothers. Now, that primary source material was
13 reference to visitation reports and the like?

14 A. That's right.

15

16 Q. Receiving that report was a significant advantage to
17 you in conducting the litigation at that time?

18 A. It was. It clearly was a pivotal moment in the
19 litigation. As the three points that you've described
20 show, it certainly gave us confidence that the case in
21 negligence against the Trustees of the Christian Brothers
22 and the Catholic Archbishop of Perth was growing in
23 strength, but importantly, this document was forwarded to
24 us just prior to the cross-vesting legislation and we were
25 able to show Justice Levine in that cross-vesting
26 legislation that the decision making and the decisions to
27 suppress complaints were many, and were made by the
28 executive of the Trustees of the Christian Brothers Order.

29

30 Q. This is all based on Brother Coldrey's report?

31 A. That's right.

32

33 Q. Did you have any of the documents that formed part of
34 the research done by Brother Coldrey?

35 A. Some, but not all. It was as though Brother Coldrey -
36 this insider's account, was in fact, in some perverse way,
37 briefed by us to compile our various threads of thoughts
38 and research and put together, very much in chronological
39 order, the knowledge held by the executive of the Order and
40 their acts and omissions taken in respect of their failure
41 to properly care for these children.

42

43 THE CHAIR: Q. You are using two terms. You are
44 referring to the "executive" and then the Trustees of the
45 Christian Brothers. Can you help me to understand --

46 A. It's deliberate, the distinction I make. In Coldrey's
47 report, reference is often made to knowledge held by the

1 provincial leaders of the Trustees of the
2 Christian Brothers. When you look at the names of the
3 provincial leaders and those that held office of the
4 Trustees of the Christian Brothers, they were one and the
5 same people. So a challenge for us was presenting to the
6 court that you can't, in one person, have knowledge - as
7 they were then, a provincial leader - and not, in the cap
8 of a Trustee of the Christian Brothers, deny having that
9 knowledge.

10
11 Q. The leaders were no doubt responsible for using the
12 property and assets of the Brothers for the purposes of the
13 Brothers; is that right?

14 A. The leaders --

15
16 Q. The leaders, in the sense that they were trustees in
17 their role as trustees, were responsible for using the
18 assets of the Brothers for the purpose of the Order; would
19 that be right?

20 A. That's right, but I repeat that your question is
21 appropriate insofar as defining the trustees as a
22 property-holding body. The point that Coldrey's report
23 makes clear is that those same people who held that office
24 as Trustees of the Christian Brothers were themselves
25 provincial leaders who were responsible for the management
26 and control of the four Christian Brothers institutions.

27
28 Q. Precisely. They were making the decisions about the
29 personnel who utilised the assets of the trust, if you
30 like, for the purposes of the Christian Brothers.

31 A. That's right.

32
33 Q. Was that argument exposed in the Court of Appeal in
34 New South Wales?

35 A. Not framed precisely in that way.

36
37 Q. No.

38 A. Not framed - it's interesting that in subsequent
39 litigation the connection between the property-holding body
40 and the assault or battery which was inflicted upon
41 children on that property was one that was amplified in
42 subsequent litigation that I'm aware of. But framed in the
43 manner that you've just described, not precisely, no.

44
45 Q. In the subsequent litigation, did the argument
46 succeed?

47 A. It was never - it certainly succeeded in persuading

1 the defendants in that litigation to resolve the matters,
2 or it was a contributing factor in that litigation, but it
3 wasn't tested in a court of law, no.
4

5 Interestingly, you know, this issue that we've talked
6 about today in relation to the limited interpretation of
7 the accountability of the property-holding body - it's
8 precisely the same issue, if you like, as was ventilated
9 later in New South Wales in the Ellis case.

10
11 Q. It's a little different.

12
13 MS FURNESS: It is a little different.

14
15 THE CHAIR: Q. Because if you've identified correctly
16 that the same people are responsible for the dual function,
17 that's a bit different to Ellis.

18
19 MS FURNESS: It is.

20
21 THE WITNESS: It is slightly. I can see that it is
22 different in that respect.

23
24 THE CHAIR: Which is why I took you to it to find out if
25 it had ever been argued.

26
27 MS FURNESS: Q. In order to use Brother Coldrey's report
28 to most effect, you would need either the documents upon
29 which it was based, or him. Did you try and get hold of
30 him?

31 A. We did. We did. We tried to get hold of him. In
32 fact, we traced him down. He'd been - he'd travelled to
33 Ireland, is my memory, and Peter Gordon, I recall, rang the
34 residence that he was placed at. We had great hope he
35 would come to the phone, but were told that he was not
36 able, at that time, to come to the phone, and then in all
37 subsequent attempts we failed.

38
39 Q. So you never got to speak to him?

40 A. No.

41
42 Q. Coming back to the New South Wales Supreme Court
43 litigation, at paragraph 81 of your statement you deal with
44 that. We've touched on this already, Mr Stephens, that
45 in February 1995 you filed an amended notice of motion to
46 discontinue proceedings against everyone but Archbishop
47 Hickey and the Trustees of the Christian Brothers. That's

1 right?

2 A. That's right.

3

4 Q. And Justice Levine, who was looking after the cases at
5 the time, heard that application?

6 A. That's right.

7

8 Q. What was the result?

9 A. We were successful in the amendment and the
10 discontinuance of the other defendants.

11

12 Q. I think the Christian Brothers argued before
13 Justice Levine something different; is that right? Were
14 they arguing that Archbishop Hickey couldn't be a
15 corporation sole under the terms of the relevant
16 legislation?

17 A. Sorry, you threw me. It wasn't the Christian Brothers
18 who argued that; it was the representatives of the Catholic
19 Archbishop of Perth.

20

21 Q. What was the result of that argument?

22 A. We were successful in seeking the amendment and that
23 there was an arguable case against the Catholic Archbishop
24 as a corporate entity for the purposes of facing these
25 actions, and the matter subsequently went on appeal.

26

27 Q. So Archbishop Hickey appealed that decision?

28 A. That's right.

29

30 Q. To the New South Wales Court of Appeal?

31 A. That's right.

32

33 Q. What did the Court of Appeal find?

34 A. The Court of Appeal held that the Roman Catholic
35 Archbishop of Perth, as a corporation sole, could not be
36 sued in actions of tort such as these actions.

37

38 The focus of the decision was, as I've described
39 before, that the legislative instrument, the laws that
40 created this corporation sole, defined that he could only
41 be held as a corporation sole for the purpose of holding
42 land.

43

44 Q. And he was not responsible for those who had gone
45 before him?

46 A. That's right, so there was no successive liability, as
47 it were.

1
2 Q. So you were left, then, with the trustees as the sole
3 defendant; is that right?
4 A. That's right.
5
6 Q. In New South Wales?
7 A. That's right.
8
9 Q. These were the only proceedings you had on foot at
10 this stage - this is October 1995 when the Court of Appeal
11 handed down its decision; is that right?
12 A. That's right.
13
14 Q. You then appealed that decision of the Court of Appeal
15 in relation to Archbishop Hickey, so you sought special
16 leave to appeal in November 1995?
17 A. Yes, we went back to the High Court.
18
19 Q. What happened there?
20 A. We were again unsuccessful in that special leave
21 application.
22
23 Q. Can I just note at this stage, Mr Stephens, that there
24 had been a significant amount of court appearances and
25 filing of relevant documents which must have incurred
26 significant costs by Slater & Gordon?
27 A. That's right.
28
29 Q. You were obviously knowing, from period to period, how
30 much you were spending. Was that a factor that you took
31 into account in November 1995, thinking about what you
32 would do next?
33 A. Not a factor in determining what next strategic step
34 we should take in relation to this litigation. No, it
35 didn't offer much influence in that regard.
36
37 Q. You must have been significantly out of pocket?
38 A. We were.
39
40 Q. And that wasn't a factor?
41 A. In terms of what next to do in this litigation in the
42 best interests of our clients, no, it wasn't a factor.
43
44 Q. You say in paragraph 100 that settlement negotiations
45 began in about early 1996. Do you see that?
46 A. Yes.
47

1 Q. That's very shortly after your application for special
2 leave, but before that special leave was refused, because
3 that was refused in March 1996. So at the time you entered
4 into negotiations in early 1996, you still had the prospect
5 of there being some success arising from the High Court?

6 A. Yes, your summary is correct.

7

8 Q. Although, reasonably speaking, you wouldn't have been
9 too hopeful?

10 A. No. To pick up his Honour's earlier comment, we
11 didn't hold much hope, having regard to the Court of
12 Appeal's reasons for decision.

13

14 Q. Turning to the settlement negotiations, as
15 I understand it, your firm had originally written to
16 Mr Harrison at Carroll & O'Dea in December 1994, so this is
17 a year earlier to the time we're talking about, indicating
18 that the total cost would be about \$18 million to
19 \$20 million if, indeed, it was thought to resolve it at
20 that stage. Do you remember that?

21 A. I've not sighted that correspondence, but consistent
22 with my earlier evidence, it would have been one of the
23 numerous occasions that we've reached out to the defendants
24 to try to resolve the matter.

25

26 Q. We'll get copies at the morning tea adjournment in
27 relation to that correspondence. The figure of \$18 million
28 to \$20 million, if I can ask you to assume for a moment
29 that that was put to Mr Harrison in December 1994 - was
30 that an amount that you were considering, at that time, was
31 an amount that the men would settle for?

32 A. I think, clearly, certainly from Peter's perspective,
33 he would have been endeavouring to try and reach an amount
34 that in some way reflected some element of fairness for the
35 suffering and trauma these men had experienced. In terms
36 of the particulars of how that amount might have been made
37 up, I was not privy to that at the time.

38

39 Q. You weren't involved in the settlement negotiations
40 while the litigation was on foot; is that right?

41 A. Not directly, no - no, not in discussions directly
42 with Mr Harrison. They were held between Peter and
43 Mr Harrison.

44

45 Q. Were you involved in discussions prior to the
46 establishment of the trust?

47 A. Yes, as part of our legal team, while the lead

1 negotiator certainly from the plaintiff's perspective was
2 Peter Gordon, certainly he sought input and feedback and
3 assistance in relation to the mechanics of that settlement.
4

5 Q. So ultimately, the litigation was resolved by the
6 establishment of a trust?

7 A. That's right.
8

9 Q. Perhaps if we can have tab 60.
10

11 THE CHAIR: Q. Before we go there, I know you weren't
12 directly involved in the negotiations, but can you give us
13 some idea, where did they start? What was the opening
14 offer, if you like, from the Christian Brothers?

15 A. "You pay us our costs".
16

17 Q. Conventional defendant's position?

18 A. Yes. You know - and I know you do appreciate, having
19 regard to the evidence received during the week - from our
20 perspective, if these claims could be resolved without the
21 need to drag these men through a lengthy court battle, then
22 they should. At every opportunity we explored that.
23

24 Insofar as the quantum of settlement, clearly in any
25 negotiation we would have started in the range of the
26 figures that you've mentioned, and predictably the
27 defendants, again from their position of strength, having
28 regard to these obstacles that they played to, started from
29 a position of "you pay us our costs".
30

31 Q. Did it take them long to move from that position?

32 A. Yes, of course it did, but again I think - you know,
33 I've had the opportunity to read Mr Harrison's affidavit.
34 He talks of our firm having a strong reputation in group
35 litigation, and I think our reputation was such that the
36 defendants knew that we would not leave the side of these
37 men.
38

39 I also think that there was, as I alluded to earlier,
40 recognition on the part of the Catholic Church - the
41 archbishop and the Trustees of the Christian Brothers -
42 that this was a moment in time, prior to or just after the
43 special leave application, to press home their advantage
44 and to resolve these claims for an amount - a minuscule
45 amount, but an amount, nonetheless, which would buy them
46 resolution and closure through deeds of release.
47

1 MS FURNESS: Q. If we can have tab 60 on the screen -
2 and I'll take you through the trust, Mr Stephens, to
3 explain what its component parts were and how they worked,
4 but this is the trust deed itself. You've seen this
5 recently, I take it?

6 A. Yes, just of recent days.

7
8 Q. And, relevantly, it was made on 14 August 1996. Do
9 you see that?

10 A. Yes.

11
12 Q. So is it the case that the discussions that began in
13 early 1996 continued on for some eight months before being
14 resolved in this document?

15 A. Yes.

16
17 Q. Perhaps if we could have tab 61, which is the annual
18 report of the trust, which is perhaps a simpler way of
19 understanding its terms, if we can scroll down, are you
20 familiar with this document, Mr Stephens?

21 A. Yes, I am.

22
23 Q. Firstly, if we can turn to 0477 at the top, it's noted
24 there:

25
26 *The Trust was established after acceptance*
27 *of an offer of reconciliation by the*
28 *Christian Brothers ...*

29
30 Do you know how the term "reconciliation" came to be used
31 in this context?

32 A. Certainly from the commencement of discussions the
33 Christian Brothers and their representatives made clear
34 that under no circumstances would they engage in a
35 settlement where it was seen that they were paying
36 compensation to victims. So you see throughout this
37 document references such as "reconciliation", "pastoral
38 care", "responding to need". These are concepts that were
39 introduced to the discussions by the Brothers on account of
40 their insistence that they not be seen to be paying
41 compensation.

42
43 Q. Scroll up to the "Term". Do you see that the term is
44 for a maximum of three years? How was that period arrived
45 at?

46 A. It was an arbitrary number really to have regard to
47 the fact that I think both parties thought that the amount

1 given would be extinguished by that time frame.
2
3 Q. Would be extinguished, so you would have paid it out?
4 A. Yes.
5
6 Q. If we can scroll up to the parties, so the chairman
7 was Barry MacKinnon, who was a former Leader of the
8 Opposition in Western Australia; is that right?
9 A. That's right.
10
11 Q. You were a trustee as an appointee of the men,
12 effectively, in Slater & Gordon?
13 A. Yes.
14
15 Q. Peter McGowan was the appointee of Carroll & O'Dea and
16 he was a lawyer with Phillips Fox, was he, at that time?
17 A. I believe so, yes.
18
19 Q. So he was there representing the interests of the
20 Christian Brothers?
21 A. Yes.
22
23 Q. There were two neutral trustees appointed as well.
24 They were appointed a bit later, in October 1996. How did
25 that come about?
26 A. I think the gap between the August execution of the
27 agreement and the October appointment was a search to find
28 people who would bring suitable qualifications to the group
29 of trustees. In Dalton Gooding's case, he's a very
30 experienced accountant, and Carol Bahemia was a former
31 leading either head or certainly a member of the executive
32 of the Legal Aid Commission in Western Australia. We felt
33 that they brought unique experience to the trustee group.
34
35 Q. All the other trustees agreed with their appointment?
36 A. Yes.
37
38 Q. Turning to the next page under "Beneficiaries", the
39 beneficiaries were those ex-residents who were plaintiffs
40 in the proceedings we've discussed, that's the first
41 category?
42 A. Yes.
43
44 Q. And "foreshadowed becoming plaintiffs". What does
45 that mean?
46 A. Those that had registered an interest with
47 Slater & Gordon but did not meet, necessarily, the deadline

1 of August 1993, but their interests remained registered
2 with us. So certainly, again, very early in the
3 discussions we wanted to impress upon the
4 Christian Brothers that those people not be excluded from
5 any settlement.
6

7 Q. Was that - that is, including the foreshadowed
8 becoming plaintiffs in this trust - part of the negotiation
9 process, in that you wanted it and the Christian Brothers
10 didn't, in the lead-up to this trust being agreed?

11 A. I don't believe that was a large number of plaintiffs
12 so I don't - and I cannot recall resistance from the
13 Christian Brothers in relation to that category of
14 claimants.
15

16 Q. Those beneficiaries undertook to discontinue the
17 claims that were on foot, which is only the New South Wales
18 claims at this point?

19 A. Yes.
20

21 Q. And, secondly, not to commence further proceedings or
22 seek leave to commence further proceedings against the
23 Christian Brothers or anyone else previously in relation to
24 those actions, and sign a deed of release to that effect.
25 Was that a bargaining chip during the eight months leading
26 up to this trust?

27 A. Was it ever. Certainly, again from the outset, we
28 made clear to the Brothers that it was important that our
29 clients have an opportunity to seek other avenues of claim,
30 should they wish to do so, even though --
31

32 Q. By which you mean civil avenues?

33 A. Civil avenues to claim, even though, as I think the
34 three years prior to that demonstrated that their prospects
35 were extremely poor, we still sought to keep that door open
36 for those that wished to explore their rights. Again,
37 reflecting our positions of strengths and weakness in this
38 negotiation, that was a non-negotiable as far as the
39 Christian Brothers were concerned.
40

41 Q. Did you get anything in return for giving up the right
42 to continue if they wished?

43 A. Well, the settlement funds of \$3.5 million deposited
44 into the trust to be distributed in accordance with the
45 terms of that trust was the bargaining chip used and, from
46 my own perspective, certainly, in explaining this
47 settlement at the time, I wanted to place before the men

1 information about this, as I did, so that they could make
2 an informed decision: do they take the small
3 compensation/rehabilitation money --
4

5 Q. Reconciliation?

6 A. -- or reconciliation money now, small as it was, and
7 in exchange for that give up their right for any further
8 avenue. And that was a decision that we certainly placed
9 before the men.

10
11 Q. At this stage, Towards Healing hadn't quite begun.
12 I think that was more later in 1996. Did that factor in
13 any discussions?

14 A. No.

15
16 THE CHAIR: Q. Did you know it was in prospect?

17 A. No.

18
19 MS FURNESS: Q. Just moving down that page, there are a
20 number of categories of people. The first are those who,
21 by 14 August, had agreed to resolve their claim and sign
22 the deed; the second were those who hadn't agreed to but
23 might; and the third were ex-students of institutions
24 conducted by the Christian Brothers other than the four
25 we're concerned with - Bindoon, Clontarf, Castledare, or
26 Tardun - who alleged sexual and/or psychological and/or
27 physical abuse and who may agree to resolve their claims
28 against the Christian Brothers. How did that group of
29 people come to be part of this trust arrangement?

30 A. Again, that group of people had contacted
31 Slater & Gordon some months, years, prior at the time that
32 we instituted proceedings. We may or may not have
33 instituted proceedings for them as part of the summons
34 issued in August 1993, but certainly the structure of the
35 trust was, by and large, directed to those ex-students of
36 the four institutions, but because these other ex-students
37 who hadn't attend those institutions had registered an
38 interest, we wanted to protect their rights, should they
39 wish to exercise them under the trust.

40
41 Q. So there were only three people in that category in
42 the trust deed, and possibly another eight if you all
43 agreed about them?

44 A. That's right.

45
46 Q. How many were in categories 1 and 2?

47 A. Well, the size of the group that we acted for was

1 approximately 240. I believe later in the document -
2 whether it's this document or another - that information is
3 provided. I think the majority were in category 1, but
4 there was still, at that date, a significant number in
5 category 2.

6
7 Q. The trust fund, or the "settled sum" as described at
8 the bottom of that page, was the amount of \$3.5 million, so
9 that was the amount that you negotiated with the Trustees
10 of the Christian Brothers for them to deposit in the trust
11 fund. That's right?

12 A. Yes.

13
14 Q. You said earlier, in response to a question from his
15 Honour, that the starting point for the Christian Brothers
16 was, "You pay our costs" - that's right?

17 A. Yes.

18
19 Q. Did they tell you what their costs were at that stage?

20 A. No, that was an unacceptable position from our
21 perspective.

22
23 Q. What was the process of getting from that to
24 \$3.5 million?

25 A. Like any negotiation, you know, we certainly started
26 much higher than that, as I think the correspondence that
27 you refer to showed, and the Trustees of the
28 Christian Brothers and their representatives assumed the
29 position you've just described.

30
31 It was very much a tug of war, but like any
32 negotiation, the parties come to it from respective
33 positions that mirror the state of what was the parameters
34 of the litigation.

35
36 We had battled for three years in the manner that
37 you've just described and, although this amount of money
38 does not fairly reflect the suffering that these men had
39 suffered and experienced at these institutions, it was the
40 best that we could achieve through these negotiations.

41
42 To be blunt, the Trustees of the Christian Brothers
43 had their knee on our clients' throat, and there was little
44 opportunity for our clients to flex their negotiation
45 muscle, or us on their behalf, faced with the judicial
46 decisions that had preceded this negotiation.

47

1 Q. If we can turn to the next page, there is reference to
2 "Benefits" and then underneath that "Non-Cash Benefits".
3 Let's just deal with the non-cash benefits for the moment.
4 Do you see there are various specified categories of
5 assistance set out on the screen - therapy, treatment,
6 rehabilitation, re-training and the like. Were those
7 matters negotiated between you and the Christian Brothers
8 as to the categories in which assistance would be paid?
9 A. My recollection is yes, under the banner of, as
10 I indicated earlier, "We won't" - I'm speaking now for the
11 Christian Brothers - "We won't pay lump-sum compensation.
12 We will pay assistance responding to need," so through the
13 negotiations, the areas you've just identified were areas
14 of recognised need.
15
16 Q. So part of the negotiation process was the Trustees
17 for the Christian Brothers saying, "We will pay non-cash
18 benefits" if you like "or amounts of cash that reflect
19 those needs set out on the screen, but not a lump sum", is
20 that what you are saying?
21 A. Save for the category of what I'll call the "sexual
22 abuse payments", your observation is correct.
23
24 Q. What did you want?
25 A. We wanted lump-sum payments to be made to all men in
26 which they could have closure. It was very important from
27 our perspective, certainly early in the negotiations, to
28 press home that these men had no desire to go cap in hand
29 for further help from the Christian Brothers or CBERS or
30 any other such body. They wanted closure, and certainly at
31 the beginning of these negotiations we pressed home that
32 issue very strongly.
33
34 Q. Let's turn to the next page. You see at the top of
35 the page, which is a continuation from the earlier heading
36 of "Non-Cash Benefits", \$2,000 as reimbursement for
37 miscellaneous expenses incurred by each beneficiary in
38 relation to medical, psychological, travelling and/or
39 schooling expenses. If they get more, the \$2,000 is
40 deducted, but each gets \$2,000. Is it the case that
41 everyone in categories 1, 2 and 3 got \$2,000 on signing the
42 deed of release?
43 A. That's my memory.
44
45 Q. And that was no questions asked?
46 A. That's right.
47

1 Q. Then if we can move to the document "Direct Financial
2 Help" below. The trust deed provided for payments of lump
3 sums to those beneficiaries deemed to have been the most
4 seriously sexually abused and who had suffered a
5 significant psychological impairment of such severity as to
6 warrant therapy or treatment on an ongoing basis. Was that
7 provision the subject of negotiation?

8 A. It was, and it follows my earlier evidence in regard
9 to our starting position, that lump-sum payments should be
10 afforded to these men to give them closure. The negotiated
11 outcome of that position was what you see before you, where
12 those that were severely sexually abused and had suffered
13 significant impairment should receive at least some
14 lump-sum compensation through this deed.

15
16 Q. We'll come back to how that was determined. If we go
17 to the next paragraph, \$25,000 was to go to 30 people and
18 \$10,000 to 25, and those 55 people were to be determined by
19 Slater & Gordon and their counsel who would certify that
20 the recommended beneficiaries met the required criteria.
21 Are we to understand that the 30 people would be the most
22 seriously sexually abused and who had suffered significant
23 psychological impairment; is that right?

24 A. Yes.

25
26 Q. The criteria referred to in the second paragraph is
27 what's set out in the first paragraph; is that right?

28 A. Yes. Sorry, can you take me to that question again?

29
30 Q. Certainly. The second paragraph says that you and
31 your counsel will certify that the recommended
32 beneficiaries - that is, the 55 people - meet the required
33 criteria. Is it the case that that criteria is set out in
34 paragraph 1 - that is, those who have been most seriously
35 sexually abused and have suffered a significant
36 psychological impairment, et cetera?

37 A. I believe that the category for the \$25,000 payment
38 were for those most seriously sexually abused and who had
39 suffered significant psychological impairment. The
40 category for the \$10,000 payment were for those sexually
41 abused and who had suffered less impairment, but I'd have
42 to return to the deed to try and clarify that statement.
43 But certainly the intention behind this summary is to
44 capture what I'd described as the lump-sum payments for
45 those who had suffered sexual abuse, but for Mr Rush to
46 have regard to those within a very severe category and
47 those in a less severe category.

1
2 Q. Again, just before we come back to how that was
3 determined:
4

5 *In addition the Trustees shall make*
6 *available from the trust fund a further*
7 *\$160,000 for the making of cash payments to*
8 *beneficiaries who were seriously sexually*
9 *abused and seriously affected and, at their*
10 *discretion, a further one-third of the*
11 *income of the Trust.*
12

13 Are we looking at three levels - the most seriously
14 affected, of which \$25,000 would be given to 30 people who
15 fit that criteria; secondly, another 25 got \$10,000 on
16 level 2; and level 3 is that cash payments would be made up
17 to a further \$160,000 to a number of beneficiaries, which
18 was not limited. Is that how that's to be read?

19 A. It's certainly, as the summary presents, how it's to
20 be read. I must say that the third category, the \$160,000,
21 I can't recall exactly how that money was distributed to
22 those abused. I certainly am aware that the trust deed
23 contemplates that interest gained through the trust moneys,
24 one-third of that income be attributed to that category,
25 but certainly that \$160,000 - I'm not entirely sure of the
26 method of distribution, save perhaps for a discretion in
27 the trustees.
28

29 Q. Were these figures arrived at by a mathematical
30 equation of looking at how much money you had and how you
31 could distribute that amount of money to the number of
32 people you knew were in the pool?

33 A. No, not by any mathematical equation. It was, as
34 I say, a meeting in the middle - well, less than the
35 middle. It was certainly us pressing home that there
36 should be many more persons who are eligible for these
37 payments and the Brothers resisting that overture and
38 suggesting that there should be less. And the arbitrary
39 number of 30 and 25, as I think you'll take me to in my
40 evidence, suggests that there were many more than that who
41 had suffered sexual abuse and deserving of those payments.
42

43 Q. If we do the sums, which someone will do for me, I'm
44 sure, if we look at 30 times \$25,000, you get \$750,000. If
45 you look at 25 times \$10,000, you get \$250,000, so that's
46 \$1 million. The trust is \$3.5 million plus interest, and
47 then you get \$160,000, so that leaves an amount of money

1 left for the non-cash benefits we referred to before - is
2 that the thinking?
3 A. That's the thinking.
4
5 Q. So the \$1.16 million, which is the amounts in those
6 two paragraphs, are a third of the trust, I'm told?
7 A. That's right.
8
9 Q. So the other two-thirds, what was it contemplated
10 would be done with those two-thirds?
11 A. To meet the needs identified earlier in the document.
12
13 Q. Was there any actuarial work done with respect to
14 coming up with these figures?
15 A. No.
16
17 Q. You said you had an accountant as one of the trustees.
18 Did you rely upon him?
19 A. Not in respect of the clause you've just alluded to in
20 terms of the sexual abuse payments. These were terms and
21 definitions arrived at through the course of the
22 negotiations. The parameters were very much defined by the
23 time the trustees were involved.
24
25 Q. The categories weren't closed at this time, were they?
26 A. No.
27
28 Q. How, then, could you determine the most seriously
29 affected 30 and then 25 without the categories having been
30 closed and you knew the pool from which you were making the
31 decision?
32 A. Certainly from our experience in this litigation,
33 there were a handful of men who, certainly beyond doubt,
34 would satisfy the most seriously affected and most
35 seriously impaired.
36
37 Q. And that was based upon the statements you had
38 obtained when commencing the litigation?
39 A. The statements that we obtained not just at the
40 commencement but throughout the litigation and,
41 importantly, the medical reports that supported their
42 injuries, so already in our possession, as part of the
43 litigation, we had for a number of men medico-legal
44 material which supported their level of trauma.
45
46 Q. Is it the case that in order to satisfied of a
47 significant psychological impairment of such severity as to

1 warrant therapy or treatment on an ongoing basis, you
2 needed a medical report?

3 A. That's right. That was certainly the guidance
4 provided by Mr Rush in offering advice, but, secondly,
5 supported by the trustees in them affirming that advice,
6 that they would like to sight psychiatric or psychological
7 material that supported the level of severity of injury.
8

9 Q. Leaving aside those who had that report as part of the
10 litigation, who paid for those reports for those who didn't
11 have it?

12 A. My understanding is that in the accounts of the
13 trust - which again I've read in passing, there were
14 payments made for men who sought medico-legal opinion to
15 support an application for this category. In other cases,
16 men had already sought treatment, and so requests for
17 reports from their treating practitioner, to the extent
18 that payments were made to those treating practitioners, it
19 came from the trust.
20

21 Q. By saying that the criteria was "such severity as to
22 warrant therapy or treatment" would preclude those who, for
23 whatever reason, did not seek treatment, notwithstanding
24 they may have needed it?

25 A. Not necessarily. In fact, the question you raise,
26 I know, was the subject of debate among trustees.
27

28 Q. It's not surprising.

29 A. No. And certainly in many cases men had suffered
30 horrific problems - alcoholism, sleep disturbance, sexual
31 dysfunction - but had not sought treatment. It was very
32 important, as I think the minutes will record, that the
33 trustees support those men in gaining the relevant medical
34 material to support an application for this category.
35

36 Q. Notwithstanding that they hadn't had therapy or
37 treatment on an ongoing basis?

38 A. That's right.
39

40 MS FURNESS: I note the time, your Honour.
41

42 THE CHAIR: We'll take the morning adjournment.
43

44 **SHORT ADJOURNMENT**

45
46 MS FURNESS: Q. Mr Stephens, if we could continue with
47 the annual report, if we could have that back on the

1 screen, and have 0481, at the bottom of that page, "Time
2 Limit". The trust deed provided that those wishing to make
3 a claim had to do so in writing before 1 November 1996. Do
4 you see that?

5 A. Yes, I do.

6
7 Q. But there was a discretion in the trustees to take a
8 claim after that, but only for a period of about five
9 months.

10 A. That's right.

11
12 Q. So that was from August to November they were given
13 that opportunity?

14 A. That's right. My memory is that there were a number
15 of clients where they were very difficult to contact, given
16 change of address and other circumstances, and my memory is
17 that the trustees were proactive in placing advertisements
18 and the like in trying to trace down a number of those
19 claimants.

20
21 Q. If we can turn to the next page, it states there that
22 in October 1996, so a couple of months after the trust deed
23 was entered into, reimbursements of \$2,000 were paid to all
24 beneficiaries who had signed a deed of release at that
25 time. Do you see that?

26 A. Yes.

27
28 Q. And then underneath that, in relation to applications,
29 there is reference there to an application form having been
30 sent to 191 claimants.

31 A. Yes, I see that.

32
33 Q. That's a significantly smaller amount, isn't it, than
34 the number you had in the class action. Didn't you have
35 something like 250?

36 A. 240. Yes. But, again, I think the balance were those
37 that we were not able to contact or, indeed, those who had
38 not signed the deed of release.

39
40 Q. Then there is reference underneath that to the
41 extension of the time limit. In April 1997 the trustees
42 accepted that the notification to claim made by you was
43 compliance by the men named by you. That was to enable
44 more people to have the benefit of the trust, I take it?

45 A. Yes. I was cognisant of the fact that a person who
46 had moved address and we had not been able to contact -
47 that their interests be protected, and so I sought

1 authority from the trustees for Slater & Gordon to step
2 into their shoes for the purposes of registering their
3 interest under the trust.
4

5 Q. If we can over to the next page, under the heading
6 "Deceased Claimants", it was resolved that non-cash
7 benefits weren't to be paid, nor was direct financial
8 assistance, and claims for reimbursement of past expenses
9 would be considered on a case-by-case basis. Was that the
10 subject of any discussion or negotiation?

11 A. Certainly not negotiation as part of the litigation,
12 but it was certainly, I think, resolved by the trustees to
13 approach deceased claimants in this way, striking a
14 balance, I think, on the one hand keeping cash reserves for
15 those that required the cash, the funds; on the other, on a
16 case-by-case basis, giving us enough discretion to give
17 money to those family members of deceased claimants where
18 just circumstances arose.
19

20 Q. The next heading is "Serious Sexual Abuse Claims",
21 just before the adjournment, Mr Stephens, we talked about
22 the difficulties in determining those most seriously
23 affected without understanding the whole pool, and this
24 indicates that on 16 December 1996 - that's after the
25 period of time to apply had finished - that's right; it was
26 by November 1996, wasn't it, that all had to apply, with a
27 discretion to April the next year?

28 A. That's right, yes.
29

30 Q. So after the first time period had expired, and
31 in December, the trustees had approved the payment of
32 \$25,000 to 11 men. So that's 11 out of the 30 you could
33 give money to under the trust?

34 A. That's right.
35

36 Q. This refers to you having had sufficient documentation
37 of the abuse to make the recommendation. Did you
38 understand that the pool from which you were selecting was
39 closed at that time?

40 A. The pool from which I was selecting?
41

42 Q. The pool of people who had, or would, come forward to
43 make a claim in respect of that amount of money.

44 A. No, it wasn't closing at that time. We had - the
45 trustees had an overarching discretion to extend time, and
46 I felt confident that these men who would qualify for this
47 payment would be protected.

1
2 By way of context, certainly from the general
3 manager's position, the general manager of the trust, I do
4 recall she was very anxious at the time to extract from
5 Slater & Gordon the 30 names that would qualify for this
6 category. We were able to identify 11, as the annual
7 report shows, but I was very conscious not to nominate
8 others absent the balance having an opportunity to apply.
9 So while I felt confident that I could perhaps nominate
10 more, I wanted to be true to my word, as explained to the
11 men at the time of settlement, that everyone will have an
12 opportunity to apply for this category.
13

14 Q. In selecting the 11, did you apply any more refined
15 criteria than the criteria we discussed before the
16 adjournment?

17 A. No.
18

19 Q. Did you rank them?

20 A. I don't believe so.
21

22 Q. If we can then turn over, by 6 March 1997, two more
23 payments of \$25,000 were recommended and approved.
24 However, by that time, 117 men had claimed payment under
25 that category and you only had provision for 30; is that
26 right?

27 A. Yes. I think the sentence more accurately reads that
28 117 men had claimed either the \$25,000 or \$10,000, is
29 certainly my reading of that paragraph, but your point is
30 accurate, that we had a pool of men that far exceeded the
31 eligible pool defined by the trust.
32

33 Q. Did you expect that when you were negotiating as to
34 the terms of the trust deed?

35 A. Yes, certainly. We expected that, from our own
36 knowledge of the group that we acted for, the number of
37 people - men - who had suffered sexual abuse far outweighed
38 the 55 nominated as a number.
39

40 Q. The 55 came about as a process of negotiation?

41 A. Absolutely. You know, to labour the point, every
42 aspect of the design and structure of this trust was a
43 consequence of heated negotiations framed by the parameters
44 of the litigation we've described.
45

46 Q. If we turn to the next paragraph, it was resolved on
47 6 March that no claim for a serious sexual abuse payment

1 would be considered unless supported by a
2 psychological/psychiatric assessment, and no further
3 payments would be made until all claimants had had an
4 opportunity of providing a report. Before the adjournment
5 I asked you whether or not those without a pre-existing
6 report would be supported financially to obtain one, and
7 I think you said they would?

8 A. I think so, yes.

9
10 Q. So in respect of that paragraph, the trustees expected
11 that those assessment reports would be paid for out of the
12 trust?

13 A. I believe so, yes.

14
15 Q. Was there a sum of money available for that, or did
16 it --

17 A. No, I believe it came from the proceeds the subject of
18 the settlement.

19
20 Q. If we can scroll down the page, there is
21 "Reimbursement of Past Reunification Travel Expenses". So
22 what, as I understand it, the annual report is doing here
23 is explaining how the trustees came to decide who would get
24 what in respect of reimbursement or non-cash benefits by
25 reference to these definitions; is that right?

26 A. That's right.

27
28 Q. So, firstly, past reunification matters were defined.
29 If we can turn over, at paragraph 4 there is reference to a
30 maximum reimbursement for airfares of \$2,500 to the UK and
31 \$2,800 to Malta. That was based, presumably, on available
32 fares at the time?

33 A. That's right.

34
35 Q. Then if we can scroll down to number 9, there is
36 reference there to how much a week people would get when
37 travelling. How was that determined?

38 A. Certainly our general manager of the trust conducted
39 some research and placed before the trustees, is my
40 recollection, some guidance around weekly expenses, and
41 what you're reading here are the conclusions of the
42 trustees.

43
44 Q. What were the manager's qualifications?

45 A. I can't recall, to be specific. I'm sorry, I just
46 can't recall. She went through an interview process with
47 the chairman at the time, and I think was appointed on the

1 basis of her qualifications and experience.

2

3 Q. Was it, as far as you know, by reference to how much
4 it might cost somebody to stay in London for a week, or was
5 it by reference to how much money there was and how many
6 people might be wanting to access it for these purposes?

7 A. Largely the former, that is, reference to what were
8 the reasonable expenses one would incur when travelling.

9

10 Q. If we can scroll down to the bottom of the page, there
11 is reference to "Future Travel" and a maximum amount is
12 indicated in paragraph 2 - \$10,000. Do you see that?

13 A. Yes.

14

15 Q. Again, was that determined on a similar basis to as
16 you've described in relation to the weekly amounts - that
17 is, by the manager doing her own research?

18 A. To the best of my recollection, yes.

19

20 Q. If we can turn over the page, there is reference to
21 "Low and/or No Interest Loans". There is reference to an
22 amount of \$5,000 to \$7,000, and any amount more than that
23 would be examined more carefully. Again, how did you come
24 to arrive at that amount being a threshold?

25 A. Again, it was the subject of discussion among the
26 trustees. It was shaped very much by the existing requests
27 at the time. A number of men - a relatively small number
28 of men, but nonetheless several - had made requests for
29 loans in the range of, you know, less than \$10,000.

30

31 There was, I think, a preparedness by the trustees to
32 consider those requests so long as there was a reasonable
33 expectation there was some mechanism of repayment.

34

35 Q. So was there some sort of deed or agreement entered
36 into with those who received a loan?

37 A. I believe there was at the time. I believe there was.

38

39 Q. If we can then scroll to page 0487, the last
40 paragraph there, Mr Stephens, tells us that to June 1997 -
41 that is, after a year operation of the trust - 170
42 individual requests had been received and it was noted that
43 there was a significant demand to non-cash benefits not
44 relating to reimbursements or therapy, and \$62,000-odd was
45 paid for emergency relief, housing/accommodation,
46 transportation and employment?

47 A. Yes.

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Q. And \$1.063 million was paid to or on behalf of beneficiaries under all categories?

A. Yes.

Q. So of the \$3.5 million, in one year just over \$1 million had been paid out?

A. That's right.

Q. Did that meet with your expectation as to what would be the case after a year?

A. It did. As a matter of principle, certainly having settled the matter in the way that we've just described, I was very anxious to try to disburse the funds as quickly as possible, particularly in relation to the sexual abuse payments.

So to answer your question directly, it was no surprise to me that after that period we had disbursed a third of the settlement fund.

Q. But there wasn't an expectation that all or more of it, closer to two-thirds, would be --

A. Not necessarily.

Q. Can I take you to some minutes of meetings of the trust. Firstly, if we can have tab 62 on the screen. I think there might be an issue with a redaction on this page. If I can ask for only one particular paragraph to be put up. This is on page 1077 and it's the third paragraph only, so no paragraphs after the third paragraph. Can I ask you to assume that these are minutes of 22 May 1997, and there's reference there to "After the arrival of Peter McGowan". He was the trustee who was representing the interests of the Christian Brothers, wasn't he, Mr Stephens?

A. That's right.

Q. "a decision was made that no further sexual abuse payments would be made until reports were received", and you've given evidence about that. Then there is a reference that, "As a result", you requested "that payments be made to the aforementioned men", whose names are redacted above, "was not minuted". Can you explain that to us?

A. I've read this paragraph recently and it's - piecing together the preceding paragraph, I believe that prior to

1 Mr McGowan's arrival --

2

3 Q. At that meeting?

4 A. -- at that meeting, I had requested that certain
5 payments be made to the named individuals, which have been
6 redacted in this instance. After his arrival, the decision
7 is made by the collective - us as the collective trustees -
8 that we would not make payments unless psychiatric reports
9 were forwarded and provided and, as a result of that,
10 I asked that the prior requests not be minuted.

11

12 Q. I see. Perhaps if we can have tab 64 up. These are
13 the minutes of 8 August 1997, so these minutes post-date
14 the annual report I've taken you to, Mr Stephens.

15 A. Yes.

16

17 Q. Can we have page 1395 --

18 A. Counsel, just before you leave the minutes of the
19 22nd, I appreciate you're not able to put up additional
20 paragraphs, but these minutes - I do recall the meeting,
21 because in addition to the example you've just cited, there
22 was an additional request by me that the trustees
23 accelerate a payment of \$25,000 for an individual whose
24 wife was dying of cancer. The trustees rejected my
25 request. Soon after I approached the partners of
26 Slater & Gordon to provide an advance to that claimant.
27 They did that promptly, and then in subsequent meetings
28 Slater & Gordon was reimbursed.

29

30 Q. Thank you. So tab 64, 8 August 1997, page 1395. If
31 we can scroll up a little, do you see there is reference
32 there to the manager having reported that a person was
33 liaising directly with the Christian Brothers about [VI]
34 and [VJ]. The Royal Commission has heard that [VI] and
35 [VJ] put in a claim through Slater & Gordon and it got lost
36 in the mail, and that they had significant difficulties,
37 subsequently, obtaining any money. Does that ring a bell
38 with you?

39 A. My best recollection of the events were that there
40 were some members - I think in this instance two - who
41 asserted that they had registered an interest to be part of
42 the group action back in 1993. There was no record of
43 their registration and therefore, in this instance, we
44 sought to support the individuals in an application for
45 funds from the Christian Brothers Order directly.

46

47 Q. I see. That was a claim that was made through VOICES

1 to Slater & Gordon, I understand. Perhaps if we can turn
2 to 1403 in this document, do you see the second arrow on
3 that page:
4

5 *The Chairman proposed that in the event*
6 *there were more than 55 men considered to*
7 *be severely affected ... the*
8 *Christian Brothers be asked to make an*
9 *ex-gratia payment to increase the amount*
10 *available ...*
11

12 Did that happen?

13 A. Yes, in part, but to answer your question directly,
14 yes, we - the chairman and myself in particular - were
15 persuaded that there were a great number of men over and
16 above the category 55 - the number of 55 - that were
17 deserving of a payment, that had been sexually abused and
18 had suffered significant psychological and psychiatric
19 impairment, and we were persuaded and put the case to the
20 trustees that we find a way in which to compensate those
21 men by way of lump-sum cash payments.
22

23 Q. Was there subsequently some discussion about the
24 ceiling of \$1.16 million in the trust being varied so as to
25 accommodate that?

26 A. That's right.
27

28 Q. Ultimately, I think you got some advice to the effect
29 that you could do that?

30 A. Yes, yes.
31

32 Q. And the trustees resolved to vary that ceiling?

33 A. That's right.
34

35 Q. As a result, how many additional men received funds
36 who wouldn't have under the initial terms of the trust?

37 A. I think the vast majority of those who fell within the
38 sexual abuse category - so those who had made applications
39 under that category received some funds. They did not
40 receive the mirrored amounts of \$10,000 and \$25,000
41 respectively but they received some cash payments - \$4,000,
42 \$7,000 and the like.
43

44 Q. Can I show you a schedule of payments, of which we
45 have copies, and they have been redacted. This is a
46 schedule that was provided to the Royal Commission from
47 Slater & Gordon's documents, you understand. This tells us

1 that there were 30 people who received payments of \$25,000.
2 Do you see that?
3 A. Yes.
4
5 Q. In terms of the \$10,000, there were 25?
6 A. Yes.
7
8 Q. And then there is a third payment, which is \$9,750.
9 How was that determined?
10 A. Again, it was a discussion among the trustees as to
11 how we should award these men, and there was a request that
12 they be awarded \$10,000 to mirror the entitlement of the
13 category that you've just referred to.
14
15 Q. So the second category of \$10,000?
16 A. That's right. And, if I dare say, the negotiated
17 outcome around the trustees table was to award them \$9,750,
18 close to the payment that you've described.
19
20 Q. And those men's stories fell within the same category
21 as the men's stories in B; is that right?
22 A. Broadly speaking, yes.
23
24 Q. How did D come about, the \$6,750 payments that 51 men
25 received?
26 A. Again, it was very much a discussion around whether
27 there was some other payment that we could award the men.
28 From the trustees' perspective there was an examination of
29 some of the medical reports and, dare I say, in the wash-up
30 there were a category of men who were less severely abused
31 than the category above, but severely abused and
32 traumatised nonetheless, and the monetary amount of \$6,750
33 was agreed by all trustees as an amount designated to that
34 category.
35
36 Q. Was that amount determined by reference to how much
37 money was left, or by some other criteria?
38 A. We felt confident, even at this stage, that we had
39 sufficient funds to meet additional payments for these
40 sexual abuse categories and so there wasn't necessarily an
41 eye to what funds were left. I think we felt confident at
42 that stage that we would have enough. The discussion
43 rather, as the minutes record, largely focused on the level
44 of injury arising from the abuse.
45
46 Q. And then D, \$2,000 - this doesn't reflect the \$2,000
47 we talked about earlier, in that everyone who signed up got

1 the \$2,000. This is another category, isn't it?
2 A. Yes.
3
4 Q. Why did these six men get \$2,000?
5 A. To be frank, I do recall that, from the trustees'
6 perspective, or some number of them, they felt that they
7 didn't qualify for the above categories, and this was in
8 some way some small compensation to acknowledge, first,
9 their application and, secondly, that they had asserted
10 suffering some abuse and psychological trauma.
11
12 Q. So is it the case that 124 men were paid for serious
13 sexual abuse?
14 A. Yes. Consistent with my earlier evidence that
15 130 claims were considered in these categories and 124
16 received some payment.
17
18 MS FURNESS: I tender that document.
19
20 THE CHAIR: That document will become exhibit 11-20.
21
22 **EXHIBIT #11-20 REDACTED DOCUMENT ENTITLED "SCHEDULE OF**
23 **RESULT OF ASSESSMENT OF CLAIMS FOR A PAYMENT UNDER THE**
24 **CATEGORY OF SEXUAL ASSAULT"**
25
26 MS FURNESS: Q. The trust was ultimately wound up?
27 A. Yes.
28
29 Q. I think you deal with this in your statement. If we
30 could have paragraph 116 on the screen. It was wound up
31 three years after it commenced and there was \$700,000 left.
32 I take it it was wound up because the term of the trust was
33 three years, and three years had been reached is that
34 right?
35 A. Yes.
36
37 Q. Leading up to 30 June 1999, was attention given to how
38 to expend all the funds in the trust by the winding up
39 date?
40 A. Yes, there was discussion and attention given to that
41 issue.
42
43 Q. But you didn't achieve it?
44 A. The disbursement of funds?
45
46 Q. Yes.
47 A. We received legal advice which prevented us from

1 necessarily dividing the remaining pool among the
2 beneficiaries, and that legal advice, to the best of my
3 recollection, directed us to make certain requests of the
4 founder, being the Christian Brothers, in relation to how
5 we ought vary the terms of the trust to do what we wanted
6 to do, and that ultimately led to the establishment of a
7 further trust to distribute further funds in accordance
8 with need.

9
10 Q. So the further trust is referred to in
11 paragraph 116(a) - that's the CBERS trust; is that right?

12 A. Yes.

13
14 Q. That was connected with the CBERS organisation?

15 A. Yes.

16
17 Q. \$85,000 for CBERS to distribute as it thought fit,
18 presumably in accordance with whatever trust deed was
19 relevant?

20 A. Yes.

21
22 Q. Were you a member of that trust?

23 A. I don't recall it being called the CBERS trust. I do
24 believe there was a subsequent trust created in which
25 Barry MacKinnon, Peter McGowan and I were trustees, but
26 I must say that I don't recall the trust which I was a part
27 of being called the CBERS trust but I stand to be
28 corrected.

29
30 Q. This is your statement?

31 A. I accept that, but your question goes to whether I was
32 a member of that trust, and I can't be certain of that.

33
34 Q. You became a trustee of a subsequent trust?

35 A. That's right.

36
37 Q. That subsequent trust - did it have \$85,000 put in it?

38 A. My memory of that is that that is right.

39
40 Q. The terms of that trust were less complex, if I can
41 put it that way, than the terms of the trust we've been
42 dealing with?

43 A. Yes, from my recollection, yes.

44
45 Q. Is it the case that in addition to the \$85,000, seven
46 men received additional payments?

47 A. Yes. In fact, in the schedule that you earlier handed

1 to me where the names are redacted, Mr Rush, in his advice,
2 identified those within the \$10,000 category who were
3 deserving of being in the \$25,000, category and
4 Barry MacKinnon, in his capacity as chair of our trust - of
5 the trust - made application to the Christian Brothers that
6 those seven men receive additional funds, and they received
7 something in the order of a further \$15,000.

8
9 Q. So they effectively became part of the \$25,000 group?

10 A. That's right.

11
12 Q. Then the remaining funds were divided equally between
13 all beneficiaries of the trust, by which you mean all
14 people who had already received an amount of money under
15 the trust?

16 A. Or beneficiaries, being those who had registered an
17 interest in receiving funds under the trust.

18
19 Q. So that included those who had not received even the
20 \$2,000?

21 A. From my recollection, that's right.

22
23 Q. Do you remember how much each got?

24 A. No, I don't, I'm sorry. I don't believe it was a vast
25 amount - it was \$2,000 or \$3,000 is the best that I can
26 remember.

27
28 Q. Then the trust was wound up when all the funds were
29 expended?

30 A. That's right.

31
32 Q. Do you remember how long that took?

33 A. No.

34
35 Q. Can I just turn to your reflections on your experience
36 with the trust. As you know, Mr Stephens, a significant
37 part of the work of the Royal Commission is in relation to
38 redress and understanding different ways in which redress
39 can be provided. In paragraph 20 you call it a
40 "rehabilitation fund". I take it from your earlier
41 evidence you mean a reconciliation fund?

42 A. Yes.

43
44 Q. Can you help the Royal Commission with your evidence
45 as to what worked and what didn't work in respect of the
46 trust as a vehicle for providing funds to those who have
47 suffered sexual abuse in an institutional context?

1 A. I think the last hour or two of my evidence -
2 particularly in relation to that, the terms and structure
3 of the trust - would support the conclusion that it was a
4 complex instrument. As I said earlier, it was complex
5 because of the nature of the negotiations that led to its
6 establishment and those negotiations led to this vehicle,
7 the trust, because it, in fact, reflected our respective
8 positions in the litigation, as I've made clear.

9
10 From my perspective, it lacked respect and integrity
11 for the victims in many ways. First, the founding
12 instrument was a deed of release, the deed in which a
13 claimant was asked to never claim again and was asked to
14 acknowledge that the Brothers deny any wrongdoing.

15
16 Second, connected with that issue, there was no formal
17 apology. I accept that there was an early apology in 1993,
18 but there was no acknowledgment necessarily as part of this
19 settlement scheme of the abuse and the harm that these men
20 had suffered.

21
22 It was a structure where, contrary to our starting
23 proposition with the Brothers, was distributing funds on
24 the drip where, yet again, these men were asked to go cap
25 in hand in order to seek help. They didn't want to go and
26 seek help from the Christian Brothers Order anymore. They
27 had had that experience as children. What they wanted was
28 closure. This didn't reflect that.

29
30 Q. Are you saying that it would have reflected closure
31 had they been given lump sum figures of a larger amount
32 than they were given?

33 A. Precisely. So not only were the mechanisms of the
34 trust flawed, but the pie of funds was small and
35 insignificant and, yes, it's true it reflected our best
36 possible outcome having regard to the way in which the
37 Christian Brothers and the Catholic Church used the legal
38 obstacles to their advantage. Yes, it was our best
39 possible outcome. But it was not a fair outcome for these
40 victims - it was not a fair outcome at all.

41
42 The instrument described the founder of the trust as
43 being the Christian Brothers. Well, in offering guidance
44 to the Commission in relation to any further schemes that
45 might be contemplated, it's very important that the
46 perpetrator, or its employer, be removed from the
47 instrument of settlement. It is very important that it be

1 impartial and give the perception of being impartial.

2

3 Q. Do you think it wasn't impartial, the trust, and
4 it's --

5 A. I believe the decision making certainly was impartial
6 with the five trustees, who carried out their work
7 diligently and professionally, but the framework and its
8 very seeds of foundation were, in fact, a fund directed by
9 the founder, as named in the trust deed, the
10 Christian Brothers.

11

12 Q. Are you referring more to the perception than the
13 reality, Mr Stephens?

14 A. Yes, I am, and perception as you've heard evidence of
15 this week, looms large in the minds of these men. They
16 felt, yet again, that they'd been let down: they'd been
17 let down by the brothers; they'd been let down by the
18 justice system; and in some instances, I'm sure, felt let
19 down by their advocates, whether it be Slater & Gordon or
20 VOICES, and I have empathy for that position, but as we've
21 heard, the litigation hurdles were so high in this instance
22 that it was, frankly, the best possible outcome in
23 circumstances where, around the corner, these men faced
24 nothing.

25

26 Q. Potentially a costs order?

27 A. Worse than nothing, as you've just described.

28

29 MS FURNESS: Thank you, nothing further.

30

31 THE CHAIR: Does anyone else have any questions?

32

33 <EXAMINATION BY MS NEEDHAM:

34

35 MS NEEDHAM: Q. Mr Stephens, you gave some evidence to
36 this Commission about the taking of instructions from a
37 large number of men who had claims against the
38 Christian Brothers and the way in which you, as an employee
39 of Slater & Gordon, brought those claims to the court. You
40 said in your statement at paragraph 13 that you took
41 instructions at short notice and that those instructions
42 effectively came through VOICES, and I'm using shorthand
43 there. Is that correct?

44 A. That's correct.

45

46 Q. That the men for whom you ended up acting had suffered
47 sexual assault, physical assault, or a combination of

1 sexual, physical and psychological trauma; is that correct?
2 A. Yes.

3

4 Q. At the time you commenced the proceedings, so I'm
5 talking about the first proceedings in time, they being the
6 New South Wales proceedings that were filed in August 1993,
7 were you aware of how many of the pool, if I can refer to
8 them as that, suffered those particular heads of damage -
9 how many, for example, suffered sexual assault only; how
10 many suffered physical assault only; or how many suffered a
11 combination?

12 A. No.

13

14 Q. So when you filed the summonses in the Supreme Court
15 of New South Wales, you were not aware of the kind of
16 damage that had been suffered?

17 A. Prior to us filing summonses, my recollection is that
18 each of the men forwarded registration forms which provided
19 particulars - sorry, not particulars, but certainly
20 information in relation to whether they had suffered sexual
21 and/or physical abuse and whether they'd suffered
22 psychological trauma. Not surprisingly, given the profile
23 of this group, most ticked and wrote in both columns: yes,
24 they'd suffered abuse; and yes, they'd suffered trauma.

25

26 To answer your earlier question specifically, did we
27 know what number precisely had suffered sexual abuse, no,
28 not precisely, but, as explained earlier, we acted with
29 great haste to ensure that we protected their interests.

30

31 Q. And you acted in great haste because you were aware of
32 a change in the New South Wales legislation, which was
33 about to become enacted; is that correct - the Choice of
34 Law legislation?

35 A. It was called the Choice of Law Act, yes, that's
36 right.

37

38 Q. That was being enacted in both Victoria and New South
39 Wales?

40 A. First New South Wales and I believe, after that,
41 Victoria.

42

43 Q. So you sought to take advantage of that legislative
44 change in order to further your clients' interests?

45 A. Absolutely we did.

46

47 Q. You say you had instructions from some 240 men. Did

1 you become aware later that some of the men said that they
2 had not provided you with instructions and had been
3 included on a list either in error or through some
4 misunderstanding?

5 A. Yes.

6

7 Q. And did you take any steps to discontinue those
8 proceedings?

9 A. Yes.

10

11 Q. When you filed in August 1993, I think, as you said
12 earlier, you filed summonses which did not set out in any
13 detail the kind of abuse which anyone had suffered. I'll
14 rephrase that. You weren't able to file pleadings were
15 you?

16 A. Not for each individual, no.

17

18 Q. And for the sake of those who aren't lawyers, a
19 pleading sets out in detail what is alleged to have
20 happened to each of these people - these plaintiffs?

21 A. The master statement of claim pleaded the elements of
22 the cause of action against each of the main defendants and
23 so we were able to offer particulars in that document of
24 the identity of some of the perpetrators and the negligent
25 acts and/or omissions of the Trustees of the
26 Christian Brothers and the accompanying defendants.

27

28 Q. I'm talking about August 1993?

29 A. Yes, I am, too. So the master statement of claim
30 provided those particulars in relation to the defendants'
31 conduct.

32

33 To answer your question in relation to the individual
34 particulars of those where summonses had been filed, no,
35 there had not been specific allegations or pleadings in
36 relation to that.

37

38 Q. Because the master statement of claim was not filed
39 in August 1993, was it?

40 A. I believe it was.

41

42 Q. The Court of Appeal judgment in the New South Wales
43 Court of Appeal mentioned that at no time the master
44 statement of claim had been filed. Are you aware of that?

45 A. No, I'm - well, I'm not aware of the Court of Appeal's
46 reference to that, but my recollection is clearly that we
47 filed a master statement of claim at the time of lodging

1 the summonses.

2

3 Q. Coming back to the position in 1993, August, when the
4 proceedings had been filed, you gave evidence that the
5 Christian Brothers, as far as you were aware, became aware
6 of the proceedings before you had intended them to do so;
7 is that right?

8 A. That's right.

9

10 Q. And Mr Harrison has said, and you can't take issue
11 with the fact, that he became aware of that through a
12 newspaper report with an interview from partners from your
13 law firm?

14 A. A partner, yes.

15

16 Q. Mr Mulvaney?

17 A. That's right.

18

19 Q. Mr Gordon?

20 A. I don't believe Mr Gordon.

21

22 Q. There was a Mr John Gordon cited as a partner of the
23 law firm, but, anyway, that's a detail. But, having become
24 aware --

25 A. Excuse me, it's an important detail, just so there is
26 no confusion. John Gordon and Peter Gordon - Peter Gordon
27 being the partner responsible for this litigation - are two
28 different people.

29

30 Q. All right. But certainly Mr Mulvaney was a partner of
31 your law firm?

32 A. Yes.

33

34 Q. He gave an interview to The Herald in November 1993,
35 shortly after the summonses had been filed, to the effect
36 that a large group of men were suing the
37 Christian Brothers?

38 A. On the basis of Mr Harrison's affidavit, yes.

39

40 Q. After becoming aware, Mr Harrison contacted
41 Mr Peter Gordon; are you aware of that?

42 A. Yes.

43

44 Q. In your affidavit, you say:

45

46 *... Carroll & O'Dea contacted us and*
47 *informed us that they had accepted service*

1 of the summonses ...

2

3 Do you see that in paragraph 16?

4 A. That they would accept service, yes.

5

6 Q. Yes, that's more correct, isn't it? They can't accept
7 service until they are actually served?

8 A. Yes, you're right.

9

10 Q. What they said to you was, "We're happy to accept
11 service, please give us the summonses", do you accept that?

12 A. Yes.

13

14 Q. Is it the case that, on request, Mr Gordon said to
15 Mr Harrison, or wrote to Mr Harrison, that he was not then
16 in a position to provide the summonses to him. Do you
17 recall that?

18 A. No, as I think the chronology shows, I was a junior
19 lawyer on the case at that time. I don't recall it.

20

21 Q. But would you accept that that is something that
22 happened?

23 A. Well, unless I see the correspondence, I'm sorry,
24 I can't accept that.

25

26 Q. As far as the Christian Brothers were aware
27 in September 1993, a claim had been taken against them, of
28 which they had no pleaded details; you agree with that,
29 because only summonses had been filed?

30 A. Can I ask a question, please?

31

32 Q. Yes.

33 A. You said "As far as the Christian Brothers were aware
34 in September 1993" - that a case had been brought?

35

36 Q. Yes.

37 A. And I think the report in The Herald, as you've
38 described, is after that date.

39

40 Q. It is 3 or 4 September - early September?

41 A. Is it, thank you.

42

43 Q. Very shortly after the filing of the summonses.

44 A. Thank you. I wasn't aware of that chronology. Sorry,
45 I interrupted you in your question.

46

47 Q. Perhaps the witness could be shown a document which is

1 CTJH.056.11093.0119. When it comes up, you'll see this is
2 a letter of 21 October 1993 from Carroll & O'Dea to your
3 firm. I could read that on to the record for you while it
4 is coming up. It's a letter from Carroll & O'Dea dated
5 21 October 1993 to Slater & Gordon Melbourne, "Re: claims
6 against the Christian Brothers":

7
8 *Thank you for your letter of 15 October*
9 *last. We are seeking instructions in*
10 *relation to same. In the meantime we note*
11 *that you are to seek instructions to*
12 *provide us with a copy of the initiating*
13 *process filed against the*
14 *Christian Brothers herein and we would be*
15 *pleased to hear from you as soon as*
16 *possible in that regard.*

17
18 So assuming that that is a request for initiating process
19 in the New South Wales proceedings, you were being asked at
20 that point for initiating process to be provided to you,
21 weren't you?

22 A. Yes.

23
24 Q. So at some point, the summonses were provided to the
25 Christian Brothers. Do you remember when that was?

26 A. No, I don't.

27
28 Q. Those summonses would not have assisted, would they,
29 the Christian Brothers to know, firstly, who the parties
30 taking claims against them were, because there was a
31 suppression order?

32 A. Yes.

33
34 Q. They wouldn't have known the names of the persons
35 alleged to have offended against the plaintiffs, would
36 they?

37 A. If I could have the tender bundle, because my
38 recollection, counsel, is that the master statement of
39 claim provided particulars in relation to the perpetrators
40 at the orphanages, but I would just like to check that,
41 thank you.

42
43 Q. Perhaps I could help you with that, Mr Stephens. On
44 21 February 1994 Carroll & O'Dea wrote to Slater & Gordon
45 seeking a copy of the master statement of claim, and on
46 28 February 1994 that master statement of claim was
47 provided to Carroll & O'Dea.

1 A. What date, sorry?

2

3 Q. 28 February 1994.

4 A. Yes.

5

6 Q. So it wasn't until February 1994, do you agree, that
7 the master statement of claim was provided to the
8 solicitors acting for the Christian Brothers?

9 A. Yes, but in context, my recollection of the rules of
10 the Supreme Court at the time placed no obligation on the
11 party to serve proceedings necessarily within 12 months of
12 the action being commenced. So your questions and the
13 correspondence you've read accurately reflect the exchange
14 between the parties at the time, but consistent with my
15 earlier evidence that the Christian Brothers were proactive
16 in their attempts to seek clarity, as you put it, around
17 these matters.

18

19 Q. In fact, it wasn't until 15 April 1994 that the
20 summonses relating to what were referred to later as the
21 six lead plaintiffs, the test cases, if you like, along
22 with the names of the plaintiffs, those six plaintiffs,
23 were formally served upon Brother Julian McDonald as
24 provincial of St Mary's Province by letter of
25 Slater & Gordon, do you accept that?

26 A. Yes. It reflects, I think again, my earlier evidence
27 that at that early stage we were learning about the
28 organisational structure of the church and, indeed, who
29 might be accountable for these actions, and I think at that
30 stage we were gaining confidence as to who the responsible
31 parties were and the case to be put against them.

32

33 Q. I'm not suggesting you've breached any court rules or
34 anything of the like, Mr Stephens. I'm just trying to
35 paint the picture that not only were you and your firm
36 acting in a situation of great stress and pressure in
37 relation to these proceedings, but to point out that the
38 defendants, 21 of them, who had been named in these
39 proceedings, were in a position where, until some eight or
40 nine months after summonses had been filed, were still in a
41 state of lack of knowledge as to, firstly, what was alleged
42 against their clients and, secondly, who was alleging it;
43 would you agree with that?

44 A. I don't accept the proposition. I don't accept it
45 because I don't think the Trustees of the
46 Christian Brothers nor the Catholic Archbishop of Perth,
47 nor, indeed, several other defendants named in that initial

1 summons, could feign shock and horror at these allegations
2 being raised. We know in 1993 the Christian Brothers made
3 an open apology for these atrocities. We know --
4

5 Q. If I can stop you there, Mr Stephens, there's a very
6 great difference between knowing of the general course of
7 allegations and apologising for them in 1993, as the
8 Christian Brothers had, and knowing the specifics of what
9 is alleged to have happened in a formal pleading in
10 proceedings brought against them in August 1993, don't you
11 agree? There is a real and substantial difference between
12 a pleaded case and general knowledge of the accusations.

13 A. I don't accept that the knowledge held by the
14 Christian Brothers executive was necessarily just general
15 knowledge. I think that the events to August 1993 would
16 support that they had thorough knowledge of the events at
17 those four institutions, thorough knowledge of who the
18 perpetrators were, and probable knowledge in relation to
19 the likely class of persons affected by that abuse.
20

21 I don't accept that the so-called request for
22 particulars and the delay in providing those particulars
23 was in any way placing the defendant in a position of
24 meaningful prejudice.
25

26 Q. Mr Stephens, you've agreed with me that until the
27 summonses were provided in February 1994, and until the
28 lead plaintiffs' names were provided to them in April 1994,
29 along with a copy of the as then unfiled master statement
30 of claim, the defendants didn't know who was suing them or
31 the specific details of what they were being sued for, did
32 they?

33 A. They knew - they knew details of what they were being
34 sued for, and I think, as I've indicated earlier in my
35 evidence, I'm not accepting the proposition that the master
36 statement of claim was not filed at the time of the
37 commencement of proceedings by summons. That's a matter
38 that I don't accept absent some contrary evidence.
39

40 THE CHAIR: Q. Mr Stephens, you and counsel seem to be
41 at odds, but your response, I assume, is based upon the
42 knowledge which we now know the Brothers had based upon the
43 research of Brother Coldrey as against the statement of
44 claim that particularised with respect to identified
45 individuals the information that Brother Coldrey had
46 already established - is that what it comes down to?

47 A. Yes, it is. To be frank, in litigation of this kind -

1 how shall I put it? - the early request for detailed
2 particulars is direct from the playbook of major defendants
3 when faced with any litigation. While I accept that in
4 their request for particulars they received a fair hearing
5 at the time from the courts, as those requests being
6 reasonable, I don't accept, with the benefit of hindsight,
7 that, through the evidence that we've uncovered through
8 this commission and other related proceedings, that they
9 weren't aware of these allegations, nor the substance of
10 these allegations.

11
12 MS NEEDHAM: Q. Mr Stephens, you say in paragraph 17 of
13 your affidavit that your work took place under great
14 pressure. Part of that pressure was the imminent enactment
15 or imminent coming into force of the Choice of Law Act; is
16 that correct?

17 A. That's correct.

18
19 Q. And part of that pressure was also the fact that you
20 didn't have, or weren't able to make contact with, all
21 240 plaintiffs in the time available; is that also correct?

22 A. In the time available, that's correct.

23
24 Q. So you weren't able, as I think I've alluded to
25 earlier, to file statements of claim in relation to each of
26 the plaintiffs individually as at the time you commenced
27 proceedings?

28 A. That's true, but I should pause and recall for you the
29 discussions we had with senior counsel at the time. We
30 formed the view that, by issuing the summonses as we did,
31 we had taken a step that was adequate to protect their
32 interests in light of the changing legislative environment.

33
34 Second, we were cognisant of the fact that by issuing
35 individual statements of claims, it carried quite an
36 onerous filing fee - some \$300 or \$400 is my recollection -
37 and so whilst it wasn't the major consideration, it
38 certainly was part of the context in which counsel
39 recommended that we promptly issue summonses, that we
40 prepare and file a statement of claim - the master
41 statement of claim that we've alluded to - and that that be
42 formally the commencement of proceedings that starts these
43 actions.

44
45 Q. I'd like to read to you a paragraph from the decision
46 of Justice Cole in the Court of Appeal proceedings. The
47 reference here is SGL.0001.001.0410. At line 25

1 Justice Cole, with whom the other members of the bench
2 agreed, said:

3

4 *The originating process issued on that date*
5 *[being 31 August 1993] was in the form of*
6 *a summons. Each summons had 21 defendants.*
7 *The first defendant was the Trustees of the*
8 *Christian Brothers.*

9

10 His Honour on the next page goes over to list the other
11 defendants, and at 0411 to set out the relief sought in the
12 summons. At line 23 he says:

13

14 *The "Master Statement of Claim" referred to*
15 *in paragraph 3 of the summons was not then*
16 *filed. It was, apparently, prepared.*

17

18 Then it said it went on to claim damages, including
19 punitive and aggravated damages, flowing from physical or
20 sexual abuse. Do you now accept that the master statement
21 of claim had not been filed as at August 1993?

22

A. I don't accept it for this reason --

23

24 THE CHAIR: I don't know, Ms Needham - judges sometimes
25 are misled. I'm not sure that you can establish
26 sufficiently from the judgment to dissuade Mr Stephens from
27 his position.

28

29 MS NEEDHAM: I think Mr Stephens has already agreed it
30 wasn't served until mid-way --

31

32 THE CHAIR: I know, but I'm saying to you is he will have
33 a recollection; Justice Cole will have written what he was
34 told was the position. That's all.

35

36 MS FURNESS: Your Honour, I have a reference on a
37 chronology which has been prepared for me, which I have
38 given to Ms Needham, which might assist.

39

40 MS NEEDHAM: We can't track it down from that number.

41

42 MS FURNESS: SGL.0001 --

43

44 THE CHAIR: I've just been looking at the documents
45 annexed to the statement --

46

47 MS FURNESS: -- 0002 --

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THE CHAIR: The statement of claim doesn't have a date on it.

MS NEEDHAM: In any event, your Honour, it was not served upon them for some time and really that's the point that I wish to make. I don't want to get into an argument about --

THE CHAIR: Mr Stephens has a recollection and so be it.

MS NEEDHAM: And Justice Cole has a recollection.

THE CHAIR: No, Justice Cole doesn't have a recollection at all. He's just relying on what other people have told him.

MS NEEDHAM: Q. Indeed. Mr Stephens --

MS FURNESS: Just before my friend continues, can we have this document up. It might solve - if it doesn't, that's fine, we will only have taken a minute's time.

MS NEEDHAM: All right. I haven't seen a stamped copy of it at any point. I'm happy to look at whatever this document might be.

MS FURNESS: If there's difficulty finding it, we can deal with it over lunch.

THE CHAIR: It might be sensible, I think. Ms Needham, I don't think we can find it immediately, so I think we'll continue and find it at lunchtime.

MS NEEDHAM: Thank you, your Honour. The only reference my learned junior and instructing solicitor have been able to find are the word "filed" next to the signature of Mr Gordon on a copy of the statement of claim which does not have a file stamp on it and it might be that that is a reference to that page and an assumption. In any event, your Honour has a copy, I think, of the statement of claim in the evidence and what can be taken from that can be taken from that.

Q. Mr Stephens, you discuss in your statement the Victorian proceedings, and those proceedings were on behalf of 23 men who are resident in Victoria and they were also

1 plaintiffs, I think, in the New South Wales proceedings?

2 A. Yes.

3

4 Q. And they were proceedings which were filed out of the
5 same factual bases leading to the injuries suffered by
6 them?

7 A. Yes.

8

9 Q. So those were a subset, were they not, of the
10 plaintiffs in the New South Wales proceedings who were
11 resident in Victoria?

12 A. That's one way of describing it, yes.

13

14 Q. Is that the only criterion that went into the
15 selection of those men as being plaintiffs?

16 A. It was certainly a major motivating factor on the part
17 of the plaintiff litigation team to find a forum, in this
18 case Victoria, where they were resident and where they had
19 received treatment, that would give these men the best
20 possible chance to apply for and succeed in an extension of
21 time.

22

23 Q. There was no way for the defendants to know that those
24 men were a subset of the New South Wales men until the
25 defendants received the list of names, was there?

26 A. That's right.

27

28 Q. So they weren't to know that there were two sets of
29 proceedings arising out of the same issue in two separate
30 fora for a period of some months in relation to the
31 Victorian plaintiffs?

32 A. That's right. My recollection is that the defendant
33 either brought an application, or certainly foreshadowed an
34 application for abuse of process on account of us first
35 protecting the men's interests in New South Wales and then
36 preserving their interests in Victoria. My recollection is
37 upon that application being foreshadowed, we discontinued
38 the Victorian residents' proceedings in New South Wales to
39 avoid that application.

40

41 Q. You say that around 18 to 21 January 1994 each of the
42 defendants in the Victorian proceedings filed a notice of
43 motion. That wasn't restricted to, generally speaking, the
44 Catholic Church defendants, was it?

45 A. Do you mind if I - could you please direct me to the
46 paragraph?

47

1 Q. Paragraph 44. You had sued in Victoria against the
2 Federal and Western Australian Governments, hadn't you?
3 A. Yes.
4
5 Q. And they also took proceedings to move these claims
6 under the cross-vesting legislation to Western Australia?
7 A. Yes. They shadowed the Trustees of the
8 Christian Brothers and the Archbishop of Perth in that
9 application.
10
11 Q. You say that. You don't know that there was any
12 shadowing. You know that they took proceedings at the same
13 time.
14 A. I know from my recollection and experience that at the
15 bar table those most pressing the transfer were in fact the
16 Trustees of the Christian Brothers and the Roman Catholic
17 Archbishop of Perth.
18
19 Q. The orders were made in relation to all of the
20 defendants, not just the Catholic defendants; is that
21 correct?
22 A. Yes.
23
24 Q. There were affidavits prepared by some of the men,
25 were there not, in relation to the New South Wales
26 proceedings?
27 A. Yes.
28
29 Q. Those affidavits are dealt with in paragraph 64 of
30 your statement where you refer to obtaining instructions
31 from six lead plaintiffs in the New South Wales
32 proceedings.
33 A. Yes.
34
35 Q. They swore affidavits which were sworn on or around
36 26 August 1994; is that right?
37 A. Yes.
38
39 Q. Again, those affidavits, leaving aside the pleadings
40 in the master statement of claim, were the first time that
41 the defendants knew of the specific allegations pleaded
42 against them or brought against them in the proceedings by
43 these six plaintiffs; is that right?
44 A. Certainly in terms of the court documents --
45
46 Q. Yes.
47 A. -- you are right. There may have been correspondence

1 exchanged between the legal representatives which gave
2 particulars relevant to these six lead plaintiffs prior to
3 the formal filing and service of affidavit material.
4

5 Q. If there was such correspondence, we would be able to
6 look at that, because you provided all that correspondence
7 to the Commission?

8 A. No. To the contrary, as I made clear early in my
9 affidavit, I've not been able to retrieve our entire file.
10

11 Q. But if such a letter were written, it would be on the
12 Carroll & O'Dea file?

13 A. One would expect so. If not Carroll & O'Dea,
14 certainly the Dunhill Madden Butler file insofar as they
15 acted for the Roman Catholic Archbishop of Perth. I should
16 also add that these affidavits were framed in a manner
17 where it went to material which would be relevant for the
18 plaintiffs' application for extension of time. We took the
19 view that that material was relevant for the purposes of
20 the cross-vesting or transfer application, because under
21 the provisions of the cross-vesting legislation the judge
22 was required to look at the issue of what was in the
23 interests of justice and in those circumstances we felt it
24 incumbent upon us as their representatives to place before
25 the judge what we felt were very good prospects of
26 succeeding in an extension of time application in New South
27 Wales. So I give context to your answer, because I think
28 it's wrong to assert that this was material filed in
29 response to the brothers' request for particulars --
30

31 Q. I didn't ask you about request for particulars,
32 Mr Stephens. I asked you about the affidavits that were
33 filed.

34 A. No, but your question went to whether this was the
35 first time they had particulars of the individual
36 allegations, and I wanted to provide context in my answer,
37 because the affidavits were filed in support really of the
38 cross-vesting or defending the cross-vesting application.
39

40 THE CHAIR: Ms Needham, we are going to take lunch now,
41 but --
42

43 MS NEEDHAM: Can I just ask one more question, and then I
44 am finished with this area.
45

46 THE CHAIR: Thank you, because I was going to ask you
47 where we were actually going.

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MS NEEDHAM: Q. The only other question I had was that the six lead plaintiffs were different from the master statement of claim plaintiffs, weren't they?

A. Yes.

THE CHAIR: We'll take lunch.

LUNCHEON ADJOURNMENT

1 UPON RESUMPTION:

2

3 MS FURNESS: Your Honour, just before my learned friend
4 resumes, can I indicate that we looked at that document and
5 it doesn't help to resolve the issue.

6

7 THE CHAIR: Sorry, looked at which document?

8

9 MS FURNESS: The document which was the master --

10

11 THE CHAIR: The chronology?

12

13 MS FURNESS: No, the master claim, which didn't have
14 a "filed" stamp on it, so it doesn't resolve it.

15

16 THE CHAIR: No, it doesn't. I have seen that, yes.

17

18 MS NEEDHAM: Q. Mr Stephens, you say at paragraph 100 of
19 your statement that Peter Gordon began discussions with
20 Howard Harrison as to the out-of-court settlement. You
21 weren't involved in those conversations, as far as you
22 recall?

23

24 A. I wasn't directly involved in those conversations with
25 Howard, but obviously Peter shared the substance of those
26 discussions, or some of them, with his legal team, which
27 I was a member of.

27

28 Q. You referred in your evidence earlier about an offer
29 which you say was given by Carroll & O'Dea to Slater &
30 Gordon of payment of costs. Do you recall that?

31

32 A. An offer that Carroll & O'Dea had forwarded to Slater &
33 Gordon for its payment of costs?

33

34 Q. Payment of Carroll & O'Dea's payment of costs in
35 settlement of the matter. Do you remember giving that
36 evidence?

37

38 A. Sorry, I'm lost.

39

40 Q. You gave evidence before lunch that one of the offers
41 that was made was that the applicants pay Carroll & O'Dea's
42 costs; do you recall that?

42

43 A. That was a position put by Carroll & O'Dea at the
44 commencement of negotiations, yes.

44

45 Q. That was not a conversation that you were personally
46 privy to?

47

47 A. No.

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Q. And it wasn't reflected in any correspondence, was it?
A. No.

Q. It wasn't a formal offer put in correspondence which could have been relied upon at a later hearing?
A. No, clearly not, no.

Q. Because the first offer from Mr Harrison at Carroll & O'Dea relating to a settlement offer was contained in correspondence of 13 May 1996. I don't expect you to recall that off the top of your head, but perhaps the witness could be shown a document CTJH.056.11125 --

THE CHAIR: This is said to be the first offer in writing?

MS NEEDHAM: In writing yes -- 0080, if that's possible to be brought up. While we are waiting for that, perhaps we could go to page 4 of that document, which is 0083 at the end.

Q. Mr Stephens, this is part of a document dated 13 May 1996. You will see in the second paragraph, the first full paragraph, that the Christian Brothers Order would consider settlement on the following basis - and you see there an offer of \$3 million to be administered in a trust. Perhaps you would like to read the balance of that document, before I ask you any questions about it.

A. What's the date of this letter, I'm sorry?

Q. 13 May 1996.

A. Yes. Can we scroll down, please. Yes.

Q. You will see that that letter proposes, in effect, the setting up of a trust, not in exactly, but in substantially the terms that a trust was set up; do you agree?

A. Yes.

Q. And that that trust be set up with \$3 million; do you see that?

A. Yes, I do.

Q. Do you agree that that was the first formal written offer received from Carroll & O'Dea?

A. It followed, obviously, numerous discussions that I'm aware of between Peter and Mr Harrison - Peter Gordon and Mr Harrison, and again, I have not been able to retrieve

1 the whole file, but if you assert that this is the first
2 offer that the Christian Brothers made, then I'm prepared
3 to accept that.

4
5 Q. In writing?

6 A. In writing.

7
8 Q. And that accords with your recollection, does it not,
9 that the settlement discussions reached a head in the
10 middle of 1996?

11 A. Yes.

12
13 Q. If you look at point 4, which is further down, you
14 will see that part of that offer was the payment of Slater
15 & Gordon's costs in the sum of \$750,000?

16 A. Yes.

17
18 Q. You would agree, would you not, that part and parcel
19 of that offer, given that a sum was being given to pay your
20 costs, was the waiving of any costs order in favour of the
21 Christian Brothers?

22 A. No, I don't - it's not explicit in this letter, but
23 I take your point that if they are contemplating a payment
24 of the clients' costs, that that would, by itself, lead to
25 a waiver of prior costs orders.

26
27 Q. That structure was the subject of some further
28 negotiation, was it not?

29 A. Yes.

30
31 Q. The sums suggested by Carroll & O'Dea in that letter
32 were increased, in relation to the trust fund, by \$500,000;
33 you agree with that?

34 A. Yes.

35
36 Q. And in relation to Slater & Gordon's costs, by
37 a further \$750,000, bringing them up to \$1.5 million; is
38 that right?

39 A. Yes.

40
41 Q. If the witness could also be shown a document,
42 CTJH.056.11134.0096, and again, this is a letter between
43 the partners of the law firms - I will only be asking you
44 as to whether it accords with your understanding of what
45 took place, unless you can tell me that you were a party to
46 these negotiations. It is a letter of 27 May 1996 from
47 Slater & Gordon to Carroll & O'Dea. When that comes up, you

1 will see that that letter acknowledges that by 27 May the
2 two parties had reached an agreement upon which Mr Gordon
3 felt confident to go to some of the men to get
4 instructions. Do you want the number again - the CTJH
5 number? CTJH.056.11134.0096. You can see from the
6 date, May 1996?

7 A. The first letter that you showed me, what date was
8 that, sorry?

9
10 Q. 13 May 1996.

11 A. And this follows that letter?

12
13 Q. I can't say that it follows immediately, but it does
14 seem that there was some correspondence in between, because
15 what happens in this letter is there is some negotiation
16 about the fine details of the trust and things have moved
17 on from the first iteration of 13 May. So if you look
18 down, you will see that it refers to you in the second
19 paragraph, "Hayden and I have perused them", "them" being
20 the letter and enclosures. I can't show you those, I do
21 apologise. But it appears that it might have enclosed
22 a heads of agreement document. Do you agree, from the
23 terms of that letter, of the second paragraph, that that
24 might be true?

25 A. Yes.

26
27 Q. Then, Mr Gordon says:

28
29 *... in the spirit of the negotiations*
30 *conducted so far, I will seek instructions*
31 *over the course of the next few days ... on*
32 *what I understand to be the basic thrust of*
33 *our agreement.*

34
35 So would you agree that by that point the two parties had
36 reached effective agreement upon the outline of the
37 settlement to be reached?

38 A. Can you scroll down, please? I would like to see the
39 balance of the terms.

40
41 Q. Yes.

42
43 MS FURNESS: I wonder if there is a hard copy that we can
44 give the witness.

45
46 MS NEEDHAM: Yes. I can give him my hard copy.

47

1 Q. I am told, Mr Stephens, that you actually signed this
2 letter. Perhaps I was being too careful before. If you
3 would like to read that letter, I have just a couple of
4 questions about it.

5 A. Sure. Yes. I have read it, thank you.

6

7 Q. Do you agree that these were a list of suggestions
8 that your firm made on behalf of your clients to the
9 Christian Brothers as to the final iteration of the trust?

10 A. Certainly at that stage I don't believe it was on
11 behalf of our clients strictly on instructions, but they
12 were part of discussions clearly between Mr Harrison and
13 Mr Gordon in relation to the prospect of settlement, and as
14 you observed, by late May 1996, they are getting down to
15 the detail of what a proposal might look like.

16

17 Q. But these were matters proposed by your firm, you
18 agree?

19 A. No - no, I don't agree with that. This
20 correspondence, both the first letter that you have raised
21 and this correspondence, clearly would follow a number of
22 discussions in person and by phone, in which a variety of
23 issues would have been discussed. I don't think it's
24 proper that these components outlined are necessarily
25 Slater & Gordon's position.

26

27 Q. Well, the first one, the trust terms of reference, is
28 headed, "We believe the trust needs wider terms of
29 reference and we suggest the inclusion of the following" -
30 you would agree that those trust terms of reference were
31 a suggestion by Slater & Gordon, according to the terms of
32 that letter?

33 A. Well, my recollection is the idea of a trust, and the
34 terms that Mr Harrison alluded to earlier - you are seeing
35 in this subsequent correspondence some amendments at the
36 margins of what the Christian Brothers proposed.

37

38 Q. Yes. So what I'm saying is that you were able, by
39 this letter, to propose amendments to the trust, as
40 proposed by the discussions that you had earlier?

41 A. As proposed by Mr Harrison in his earlier
42 correspondence, yes.

43

44 Q. And by saying in this letter, "We believe the trust
45 needs wider terms of reference and we suggest the inclusion
46 of the following", you were suggesting changes to the
47 format of the trust, weren't you?

1 A. Clearly, yes.
2
3 Q. And those items came through in the final version,
4 didn't they?
5 A. I'm sorry, those items --
6
7 Q. That were suggested here, low-interest loans, for
8 example, were included in the final version?
9 A. Yes.
10
11 Q. Housing and accommodation appeared in the final
12 version?
13 A. Yes. Clearly, we are in the throes of the final
14 stages of a negotiation, and clearly, we are at the pointy
15 end, if I dare say, in relation to what particular phrase
16 or words should be used in any agreement.
17
18 Q. And then in paragraph 2 you made suggestions about
19 Peter McGowan and a nominee by Slater & Gordon?
20 A. Yes.
21
22 Q. And that was what happened?
23 A. Yes.
24
25 Q. And then, part 3, you have proposals as to how fund B
26 should work, that persons with significant psychiatric
27 impairment who had suffered sexual abuse should be
28 recipients of \$25,000?
29 A. Well, as I say, these were at the pointy end of
30 negotiations and proceeded from what was our strong
31 position at the beginning of these negotiations that all
32 claimants receive lump-sum compensation. But clearly, as
33 negotiations had advanced, again, reflecting the parameters
34 of the litigation that we were in, we were at a point in
35 the negotiations where we were discussing the finer points
36 of a trust largely designed by the defendants in this
37 litigation.
38
39 Q. And one of the things you refer to as a "finer point"
40 is that each of the claimants should receive a minimum of
41 \$2,000. Do you see point 5?
42 A. Again, you know, starting from the proposition that we
43 wanted everyone to receive a sizeable lump sum, faced with
44 the opposition to that idea, we were seeking to get at
45 least some money in the hands of the men quickly for
46 reimbursement of expenses, which this clause reflects.
47

1 Q. What I'm trying to demonstrate, Mr Stephens, is that
2 despite your colourful phrase before lunch that there was
3 a knee to the throat, it is clear from this letter, isn't
4 it, that the Christian Brothers were quite prepared to
5 consider your suggestions, Slater & Gordon's suggestions,
6 for elements to be incorporated in the trust?

7 A. I don't detract from what I said prior to lunch. When
8 these negotiations started, the Christian Brothers and
9 their representatives were in a very strong position to
10 define exactly the way in which they wanted this matter
11 resolved: a reconciliation trust fund, not a compensation
12 fund; application and distribution be done on a drip feed
13 in accordance with need. Their position, not ours. And so
14 if your assertion by your question is that we are an active
15 participant in the complex and cumbersome trust deed that
16 was eventually signed, that is wrong. We were placed in a
17 position as a consequence of the parameters of the
18 litigation where we had little negotiation other than the
19 proposals you see before you. We are at a stage in
20 late May, as this letter shows, where we are discussing the
21 finer points of that proposal.

22
23 Q. And one of those finer points was that you were of the
24 view that more people would sign up if they each got
25 a minimum of \$2,000. Do you see number 5?

26 A. Yes.

27
28 Q. And that was included in the trust deed as a response
29 to your request, wasn't it?

30 A. Yes, you can see that we have moved the
31 Christian Brothers significantly by position of awarding
32 each of the individuals \$2,000.

33
34 Q. By simply writing a letter?

35 A. No. This followed, as I've said several times,
36 detailed discussions between Mr Harrison and Mr Gordon.

37
38 Q. And the next one I would like to take you to is
39 number 9. That was payment of your costs in the sum of
40 \$1.5 million. Do you see number 9?

41 A. Yes.

42
43 Q. Was that the first time that that sum had been raised,
44 do you recall, or was that something that had been
45 discussed beforehand?

46 A. I believe it had been discussed with Mr Harrison. We
47 were very conscious that it was important that, in the

1 event that we could reach a resolution in this matter, that
2 the men themselves not pay legal costs for their own
3 lawyers' representations. We wanted to attain a position
4 where their legal costs were met by the Christian Brothers.
5

6 In respect of that, the \$1.5 million is an amount
7 which, over a million dollars of that was repayment of
8 expenses and disbursements incurred during the course of
9 the litigation. What was left - what was left - the
10 balance, would have not covered the basic wages of the team
11 that worked on this. So from a financial perspective, this
12 was not a successful result for Slater & Gordon. It made
13 no profit. However, fortunately, I work at a firm where
14 financial reward is not the only criteria of success,
15 and --
16

17 Q. Mr Stephens --

18 A. -- I would stress that it was a privilege to act for
19 these men in these circumstances.
20

21 Q. Indeed, but what --
22

23 THE CHAIR: Ms Needham, how much did your client spend on
24 the litigation?
25

26 MS NEEDHAM: Your Honour, I'm not being critical of the
27 amount.
28

29 THE CHAIR: No, I would like to know the amount.
30

31 MS NEEDHAM: Mr Harrison has said in his affidavit that it
32 was about the same - the same amount. I'm not being
33 critical --
34

35 THE CHAIR: About \$1.5 million. No. There is a different
36 question that arises. I will come to that later. That
37 means the legal costs have consumed, on both sides,
38 \$3 million.
39

40 MS NEEDHAM: Yes. And your Honour made the point --
41

42 THE WITNESS: Sorry, if I could interrupt --
43

44 MS FURNESS: Just before you do, Mr Stephens,
45 Mr Harrison's statement said, to my recollection, "not less
46 than \$1.5 million". He didn't say "about \$1.5 million".
47

1 THE CHAIR: That is what Mr Stephens is saying too.

2

3 THE WITNESS: That's what I was about to say.

4

5 THE CHAIR: So it is at least \$3 million together.

6

7 MS NEEDHAM: Q. Again, I say I am not being critical of
8 the amount. What I am saying is you asked for that and you
9 got it.

10 A. Well, rest assured, we would have asked for more,
11 because the legal costs incurred in this matter were
12 significantly higher than that amount.

13

14 Q. One of the other things you asked for in point 7,
15 Mr Stephens, which is that part of the agreement between
16 the parties was that the trust be limited to clients of
17 Slater & Gordon on or before 1 January 1996 and you agree
18 that that became part of the trust, that the trust fund was
19 held only for the Slater & Gordon clients; do you agree?

20 A. Yes.

21

22 Q. You also sought to confine the Christian Brothers from
23 making any offers of settlement in any other cases to
24 clients not of Slater & Gordon; do you agree that that was
25 what you were asking for in part 7?

26 A. Yes.

27

28 Q. And that you sought that no gratuities - by which
29 I assume you mean ex gratia payments --

30 A. Yes.

31

32 Q. -- be made to clients not of Slater & Gordon for three
33 years. Do you agree with that?

34 A. Yes.

35

36 Q. And that was something that the Christian Brothers did
37 not agree to, isn't it?

38 A. It was important from our perspective that the courage
39 shown by the group who had commenced proceedings be
40 reflected as sole participants in this scheme. First
41 point. The second point is that there was a fear on our
42 part that our clients would be punished as a consequence of
43 the action that they took, and that there was a genuine
44 fear that claimants who had not taken action, for example,
45 were limited to CBERS and other like funds that were
46 accessible at the time - would be rewarded more handsomely
47 than the people the subject of this action.

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Q. Mr Stephens, what you were seeking to do was to exclude any other person for whom Slater & Gordon did not act from any payments by the Christian Brothers for that period, wasn't it?

A. Well, our interest - sorry, our obligation was to our existing clients.

Q. Yes.

A. And that is the framework upon which we were seeking to seek a settlement.

Q. The other half of my question was: and that did not find its way into the agreement between your firm and the Christian Brothers, did it?

A. I don't believe - I don't believe so. I think, in the context of addressing our fear that these men would be punished, I think we gained some confidence from Mr Harrison and the team that they would not be punished.

Q. Yes. Moving on to the trust, you said before the luncheon adjournment that there were some 117 claimants for serious sexual abuse payments; is that right?

A. I think there was a little more than that. I think there was 130 was the evidence within the minutes of the trust.

Q. Yes. If I could just take you to the document that my learned friend Ms Furness took you to, which is the annual report, 1996/1997, which is behind tab 61 of the tender bundle. If we could go to page 0484 of that document. Mr Stephens, you will see from that page that - Ms Furness took you to part of this document, which shows that the 117 men, by 6 March, had claimed a payment under the category of serious sexual abuse?

A. Yes.

Q. And that Mr Rush was required under the trust deed to effectively rank those men's claims and recommend amounts of payment; is that correct?

A. Yes, it is, in terms of what you are reading, yes.

Q. The fourth paragraph on that page says the trustees resolved on 22 May 1997 that those claimants be advised that they had to, firstly, provide a psychological or psychiatric report; and, secondly, that they had to do that by 30 September 1997; is that right?

1 A. Yes.

2

3 Q. And that accords with your recollection of the
4 determination by the trust?

5 A. Yes. Yes.

6

7 Q. As at 22 May, only some of those claimants had put
8 forward a psychological/psychiatric assessment; is that
9 right?

10 A. Yes.

11

12 Q. And did all of them undertake the psychiatric
13 assessment which was required by the trustees?

14 A. I can't recall, I'm sorry. In subsequent trustees
15 moneys in the documents counsel assisting took me to, you
16 can see that there were additional payments made to men who
17 had satisfied the sexual abuse criteria. My understanding
18 is certainly those that fell within the initial group of
19 \$25,000 and then \$10,000, reports were obtained, but
20 I cannot confirm that reports were obtained for the
21 balance.

22

23 Q. And that was a requirement by the trustees, not by the
24 Christian Brothers, that they demonstrate their eligibility
25 for that payment by --

26

27 MS FURNESS: I object. One of the trustees represented
28 the Christian Brothers.

29

30 MS NEEDHAM: Q. One of five. I'm saying the trustees
31 required that psychiatric report. It wasn't an internal
32 request from the Christian Brothers themselves, was it?

33 A. Yes, as the minutes reflect, there was discussion on
34 this issue, and the trustees resolved that psychiatric or
35 psychological reports be required to assist them in the
36 decision making of whether someone should qualify for
37 a particular category.

38

39 Q. Just finally on the question of the winding up of the
40 trust, paragraph 116 of your statement refers to \$85,000
41 being rolled into a CBERS trust. I think you retracted
42 slightly that description of the "CBERS trust". Do you see
43 in paragraph 116(a)?

44 A. Yes, I do.

45

46 Q. Just to assist you with your recollection, there was
47 a recommendation by the trustees before February 1999 to

1 approach CBERS to see if they were willing to take the
2 money, and they said that they were not?

3 A. Yes.

4

5 Q. Do you recall that?

6 A. Yes.

7

8 Q. Do you recall that that was on the basis that they did
9 not want to restrict services to a particular group of
10 people, such as the Slater & Gordon services?

11 A. Yes.

12

13 Q. But wanted to use their money in the way that they had
14 which was untrammelled by membership of a particular group?

15 A. Yes, I think that was the position put by CBERS.

16

17 Q. And in February 1999, the recommendation in the
18 winding up of the trust was that a new trust be
19 established.

20 A. Based on counsel's advice, yes.

21

22 MS NEEDHAM: Thank you. There are no further questions,
23 your Honour.

24

25 THE CHAIR: Q. Mr Stephens, am I right in assuming that
26 at the outset of these proceedings, you and your colleagues
27 were aware of the great difficulties you faced in the
28 litigation?

29 A. Yes.

30

31 Q. And am I right to assume that you made that plain to
32 your clients, both at the beginning and as they came on
33 board?

34 A. Certainly not made plain to our clients as at August
35 1993. We acted, as I said, with speed to protect their
36 interests. But at the time of entering formal retainers,
37 and certainly at the time of the litigation progressing
38 both in Victoria and New South Wales, we explained to them
39 the difficulties encountered with this litigation.

40

41 First and foremost at that time, the difficulty
42 explained was focused on the statute of limitation. To be
43 frank with you, we did not necessarily foresee the likely
44 success of the cross-vesting application, particularly in
45 Victoria. There were authorities, prior authorities of the
46 court, which supported the contention that if a witness was
47 based in Victoria, resident in Victoria, that their

1 treatment was in Victoria, witnesses in relation to their
2 injury were in Victoria, that there was a real prospect
3 that the plaintiff could succeed in a jurisdiction, where
4 the alternative was that they were statute barred, we felt
5 that our prospects were fair to good in holding forum in
6 Victoria, and it was certainly, as my evidence this morning
7 showed, a bolt out of the blue, if you like, that Justice
8 Hayne in those circumstances saw fit to place these men in
9 a jurisdiction where they had no chance.

10
11 Q. Beyond the limitation question, did you foresee the
12 other problem that you ultimately confronted, in terms of
13 who you could sue?

14 A. No, no. We were aware of the statutory instrument
15 that set up the trustees of the Christian Brothers. We
16 were aware that its specific design was for the purposes of
17 holding land. But very early in the piece we felt
18 confident that we would be able to shape the argument to
19 ensure that, on the one hand, while they were taking the
20 benefits of incorporation as defined under the Act, a court
21 would find that they are accountable for the liabilities of
22 incorporation, such as actions of this kind.

23
24 Of course, as the Catholic archbishop mounted its
25 argument, we could see that argument on their side
26 gathering momentum, and in that instance, you know, what
27 I think day one we saw as a prospect of success on that
28 issue, as time progressed could see that that was now
29 looming as - I think I described it earlier - the nail in
30 the coffin of these cases.

31
32 Q. The complementary problem, of course, was what the
33 lawyers describe as vicarious liability. Even if you had
34 been able to get to the trustees, the question of vicarious
35 liability had to be addressed, didn't it?

36 A. Yes. If the negligent act was simply limited to the
37 perpetrator, I think what the secret report in particular
38 gave confidence, certainly to our side of the fence, was
39 this notion of what I will call corporate tort. What we
40 saw was that the tort was not, and may not necessarily,
41 have been the act of abuse which occurred at Bindoon,
42 Tardun, Castledare or Clontarf, but was in fact the
43 decision to place an offending brother there, to place or
44 transfer that brother to another institution where he
45 re-offended. The tort occurred in the heart of the Sydney
46 suburb of Strathfield, not in the far-flung areas of
47 Bindoon. And so we were growing in confidence on that

1 particular issue, as I said, as a consequence of the
2 evidence that we gathered along the way.

3
4 Q. You spent in excess of \$1.5 million, and it would seem
5 that the Christian Brothers did also. That's more than
6 \$3 million spent with the lawyers. You realise it is
7 impossible for any layperson, much less a lawyer, to react
8 to that other than by saying, "Just what's happening here?
9 That's a very large sum of money that's spent in trying to
10 resolve the matter through litigation." You understand
11 that?

12 A. Absolutely. And in fact, as I indicated earlier, to
13 think that the lion's share of that \$1.5 million was
14 directed at external expenses - doctors, court filing fees,
15 barristers in part, travel and the like - you can imagine
16 that while you have mentioned the figure of \$3 million, the
17 costs of this litigation would have far exceeded that, and
18 to labour the point, there was an opportunity very early in
19 the cycle of this litigation for the Christian Brothers to
20 heed our request that these matters should not be dragged
21 through court but should be resolved without the recourse
22 to costly litigation.

23
24 Q. That's what I'm coming to, as you would have worked
25 out. Did anyone ever suggest that you might engage the
26 services of a very experienced mediator at the early stage
27 of these proceedings to help everyone to analyse what was
28 involved and where they were going and try and avoid the
29 costs of \$3 million plus?

30 A. Yes, of course. And in fact, I know Peter Gordon put
31 forward that proposition of an independent mediator, an
32 eminent retired judge was an example, who could sit with
33 the parties and try and reach resolution, sensible
34 resolution.

35
36 These men were let down by the laws. These men were
37 let down by the system. And within those constraints we,
38 acting on behalf of these men, did our very, very best to
39 achieve the outcome we did. But your point is a good one:
40 we ought not have been dragged on that three-year
41 litigation trail in circumstances where the
42 Christian Brothers should have accepted our proposal that
43 the matters be subject to early mediation where an
44 independent conciliator or mediator could hopefully bring
45 them to the table of resolving these matters in a fair and
46 transparent way.

47

1 Q. I take it from your answer that mediation didn't
2 happen.

3 A. No, despite requests.
4

5 Q. Are you familiar with the concept of independent
6 evaluation of a case which is, I suppose, a form of
7 mediation but a little different?

8 A. Yes, I am familiar with it as a broad principle.
9

10 Q. This looks, from the perspective as I see it, to be
11 a case that, if not suitable for mediation, was certainly
12 one which would have benefited from having a very
13 experienced retired judge look at both parties' cases and
14 try and help them to understand where the result was likely
15 to end up.

16 A. I agree with you wholeheartedly. This called out for
17 an independent person with experience in common law and the
18 concepts of negligence to look in upon this case and decide
19 (a) if liability could be established; and, (b), if
20 liability could be established, what was fair compensation
21 having regard to the injuries these men suffered.
22

23 As I say, while I'm an advocate for the common law
24 system and its heads of damage, I'm not an advocate
25 necessarily that sees a system that allows a defendant - or
26 defendants in this instance - to drag these plaintiffs
27 through three years of litigation using every possible
28 technical defence to ensure that they never reach court
29 where their claims can be heard on their merits. That is
30 not a system, with respect, your Honour, that necessarily
31 serves the interests of these clients, or victims more
32 generally.
33

34 Q. When mediation was first suggested by your senior
35 partner, were you aware of the Coldrey report?

36 A. No. No. My recollection - and it is some time ago -
37 was that from a very early stage in these discussions Peter
38 Gordon was of a mind to try to resolve these matters
39 outside court using methods such as mediation,
40 conciliation. That began, as my earlier evidence suggests,
41 very early in the piece, and in fact prior to the exchange
42 of the Coldrey report.
43

44 THE CHAIR: Ms Needham, do you have any questions from
45 those matters?
46

47 MS NEEDHAM: May I just take some instructions,

1 your Honour?

2

3 THE CHAIR: Yes.

4

5 MS NEEDHAM: No, your Honour, thank you.

6

7 THE CHAIR: Ms Furness?

8

9 MS FURNESS: Your Honour, I tender the two letters that my
10 learned friend put to the witness - the letter dated 13 May
11 1996 from Carroll & O'Dea to Slater & Gordon and the letter
12 from Slater & Gordon to Carroll & O'Dea dated 27 May 1996,
13 if I can hand up three copies.

14

15 THE CHAIR: We will mark them together as exhibit 11-21.

16

17 **EXHIBIT #11-21 LETTER DATED 13/05/1996 FROM CAROLL & O'DEA**
18 **TO SLATER & GORDON, AND LETTER FROM SLATER & GORDON TO**
19 **CAROLL & O'DEA DATED 27/05/1996**

20

21 MS FURNESS: Thank you, your Honour. I have no further
22 questions for the witness.

23

24 THE CHAIR: Thank you, Mr Stephens. Thank you for coming.
25 You are excused.

26

27 **<THE WITNESS WITHDREW**

28

29 MS FURNESS: I call Howard Harrison

30

31 **<HOWARD GERARD HARRISON, sworn:** [2.42pm]

32

33 **<EXAMINATION BY MS FURNESS:**

34

35 MS FURNESS: Q. Would you tell the Royal Commission your
36 full name and occupation?

37 A. Howard Gerard Harrison, solicitor of the Supreme Court
38 of New South Wales.

39

40 Q. Your employment arrangement, Mr Harrison?

41 A. I'm a partner at Carroll & O'Dea solicitors,
42 a Sydney-based law firm.

43

44 Q. How long have you been a partner at Carroll & O'Dea?

45 A. 28, 29, 30 years.

46

47 Q. Is it the only firm you have worked at as a solicitor?

1 A. Yes.
2
3 Q. You prepared a statement to assist the
4 Royal Commission?
5 A. I did.
6
7 Q. Do you have a copy of that with you?
8 A. I do.
9
10 Q. Are there any amendments you wish to make to that,
11 Mr Harrison?
12 A. No.
13
14 Q. Are the contents true and correct?
15 A. Yes.
16
17 MS FURNESS: I tender that statement.
18
19 THE CHAIR: That will become exhibit 11-22.
20
21 **EXHIBIT #11-22 STATEMENT OF HOWARD GERARD HARRISON DATED**
22 **23/04/2014**
23
24 MS FURNESS: Q. Perhaps we can have paragraph 11 on the
25 screen. You say in paragraph 11 that the
26 Christian Brothers and you became aware of the proceedings
27 by way of an article in the Sydney Morning Herald. Do you
28 see that?
29 A. I do.
30
31 Q. You had not been contacted by anyone from VOICES - by
32 "you" I mean either you or the Christian Brothers to your
33 knowledge - prior to becoming aware of the proceedings by
34 way of the Sydney Morning Herald?
35 A. Well, I'm aware that Brother Faulkner had been in
36 conversation with VOICES for some time - in the end, some
37 what unsatisfactory conversations, but I'm not aware of
38 Brother Faulkner having had any intimation from VOICES that
39 proceedings were to be brought. I certainly had had no
40 contact at all with VOICES, and that's still the case.
41
42 Q. As at this time, in August 1993, had you acted for the
43 Christian Brothers in litigation?
44 A. Yes.
45
46 Q. What form of litigation?
47 A. Criminal prosecution.

1
2 Q. For what conduct?
3 A. Sexual misconduct.
4
5 Q. Against brothers?
6 A. Against a brother.
7
8 Q. A brother. So one criminal proceeding?
9 A. Correct.
10
11 Q. And you were instructed on behalf of the
12 Christian Brothers to act on behalf of that brother?
13 A. Yes.
14
15 Q. And they had paid for your services in that regard?
16 A. Correct.
17
18 Q. Was the brother convicted?
19 A. The brother pleaded guilty to an offence.
20
21 Q. Who was that?
22 A. I'm just a bit reluctant to disclose his name
23 publicly. I'm happy to --
24
25 THE CHAIR: Q. Presumably it was publicly known at the
26 time.
27
28 MS FURNESS: Q. He has been convicted of an offence.
29 A. Brother Bill Hockey.
30
31 Q. Where was Brother Bill Hockey working at the time of
32 the conduct the subject of the offence?
33 A. He was working at a refuge in Wollongong known as
34 Eddy's Place.
35
36 Q. Other than that criminal prosecution, had you done any
37 litigious work for Christian Brothers?
38 A. No.
39
40 Q. This was the first civil litigation you were engaged
41 in on their behalf?
42 A. Correct.
43
44 Q. Who had they used before you in civil litigation, do
45 you know?
46 A. I think, for many years, the late Barry McDonald was
47 the solicitor for the Christian Brothers and he had passed

1 away and Carroll & O'Dea tendered and commenced to receive
2 instructions from the Christian Brothers in the late 1980s,
3 early 1990s.
4

5 Q. So there was a tender process, was there?

6 A. Of some sort.
7

8 Q. Had you acted for any church-related entity prior to
9 this?

10 A. I had - was acting for, had acted for, the Marist
11 Brothers in issues involving alleged misconduct, I think,
12 at that time.
13

14 Q. Child sexual abuse type matters?

15 A. Correct. That was a time when complaints had started
16 to come in from the past at an increasing pace, and there
17 was also a perception of an American civil litigation issue
18 arriving in Australia, so around that time we were
19 instructed by the Marist Brothers certainly, and the
20 Christian Brothers, in relation to this type of issue.
21

22 Q. Any other entity associated with the Catholic Church?

23 A. The De La Salle Brothers. I think they are the only
24 ones that come to mind at that time in relation to this
25 sort of issue.
26

27 Q. So those three Orders?

28 A. Correct.
29

30 THE CHAIR: What did you --

31
32 THE WITNESS: May have been some other Orders.
33

34 THE CHAIR: Q. What did you mean the perception of an
35 American-type litigation?

36 A. I think, your Honour, the reality was that these
37 terrible complaints were coming out in relation to issues
38 which had occurred in the 1950s and 1960s and 1970s, and
39 various Orders and organisations were, to some extent, in
40 shock in terms of understanding that this could have
41 happened. I remember myself seeing that BBC series "The
42 Leaving of Liverpool" and being amazed and I suppose a
43 little sceptical as to whether this could be true - we
44 learnt that it was true. So there was also a parallel - so
45 the issues arising were criminal prosecutions, dealing with
46 victims and dealing with litigation and the question of
47 compensation and redress and insurance companies.

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Q. What was your reference to America though? I didn't understand that.

A. I think, your Honour, this had been an issue in America during the early 1980s of a substantial type, and I think the Slater & Gordon cases were the first use of a group action, class action vehicle for historical sexual abuse cases in Australia and possibly the first serious clerical abuse case brought in the country. So we were all on a bit of a learning curve.

Q. I'm still not sure I understand why there is a reference to "America". I know litigation was happening in America at some stage, but did that raise any different landscape for you in Australia?

A. Oh, no, your Honour, just an awareness that it had developed slowly and become quite an issue in the United States, and having regard to the involvement of Catholic religious orders in education in Australia in orphanages and refuges over a 50- or 60- or 70-year period, the anticipation was that it could become an issue in Australia, which it most certainly did.

MS FURNESS: Q. Was your reference to the quantity of damages that were being awarded in America - was that what your reference to an American-style litigation was?

A. No, I think my - perhaps what I'm getting at is, you know, the use of the common law tort system to attribute responsibility for unauthorised criminal activity to an organisation and the prosecution of claims for damages for pain and suffering and loss of earnings and such like, was probably something which had initially occurred in America and then began to occur in Australia.

Q. Wasn't the main concern with American-style litigation the amounts of money that, in their case, juries were awarding?

A. That would be an issue.

Q. You must have been conscious of that at the time.

A. Certainly.

Q. You referred earlier to the shock of the Order. Was that shock at the nature of the allegations - that is, the conduct complained of - or was the shock at the litigation arising from it?

A. I think the nature of the allegations, that this

1 unspeakable, unbelievable behaviour could have been
2 occurring with children who were completely defenceless,
3 had no family support, totally in the control of the Order,
4 complaints which did not appear to have been a part of the
5 landscape early on. It was very confronting, and people
6 could easily be wrong-footed all over the place. So it was
7 quite a distressing experience and there was a lot of work
8 which had to be done to work out how to respond in an
9 appropriate and balanced way.

10
11 THE CHAIR: Q. Confronting for whom? Do you mean
12 confronting for people like you who were advising, or
13 confronting for those within the Order?

14 A. Well, your Honour, from my viewpoint, I was a lawyer,
15 with no training in social work, so confronting enough for
16 me, but certainly confronting for the leadership, the
17 current-day leadership, such as Brother Faulkner, in terms
18 of accepting the reality of what had occurred and trying to
19 come to grips with what needed to be done to help these, in
20 this case, former residents of the WA institutions.

21
22 Q. There must have been many people in the Order who did
23 know what had occurred though, mustn't there?

24 A. Well, your Honour --

25
26 Q. They lived through it; they must have known.

27 A. Perhaps, your Honour - well, your Honour, perhaps
28 I will leave it to your Honour to make your own decision
29 about that. I mean --

30
31 Q. Well, you must have known.

32 A. -- I don't believe, your Honour, there was anything
33 like the current level of understanding within the Order,
34 leadership teams, as to how significant an issue this had
35 been in the past, particularly in closed residential care
36 organisations where there were issues of power and access,
37 and particularly in geographically remote places such as in
38 Western Australia. But, your Honour, I'm just looking at
39 that from the outside as a lawyer.

40
41 Q. Yes, but you have learnt a lot about what happened in
42 the Order in the course of these proceedings where you
43 acted, haven't you?

44 A. Yes.

45
46 Q. And you know of the knowledge which the Order, or
47 those responsible for the Order, gained of the activities

1 of some people within the Order, don't you?
2 A. Yes, your Honour.
3
4 Q. And you know of brothers who were moved because of
5 complaints about them, too, don't you?
6 A. Yes.
7
8 Q. You know that, in fact, there was a very significant
9 body of knowledge within the Order about what had been
10 happening in the past, don't you?
11 A. Your Honour, I hesitate to agree with that completely,
12 I'm aware that --
13
14 Q. Maybe not complete, but nevertheless, there were many
15 people, to your knowledge, in the Order who must have known
16 what was happening.
17 A. I wouldn't disagree with your Honour. I mean, I'm
18 aware of Brother Coldrey's --
19
20 Q. Brother Coldrey comes on top of that, because
21 Brother Coldrey then goes and finds out what people knew.
22 But all is doing is going to people who did know what
23 happened within the Order.
24 A. I think Brother Coldrey put The Scheme in the chapter
25 towards the end of the book on controversial issues as
26 probably the first attempt to document --
27
28 Q. That's right. He provided a documentary account of
29 the knowledge which other people already had; correct?
30 A. Correct.
31
32 Q. That was his task,
33 A. Correct. Well, his task was to write a history, but
34 also to honestly address, your Honour, what were then
35 issues emerging significantly from former residents, often
36 for the first time.
37
38 Q. True. But nevertheless, he is a historian going to
39 those who lived through or had the knowledge to put
40 together the document - that's what's happened?
41 A. Correct.
42
43 Q. And from that we must conclude, without naming names,
44 that many people must have known, within the Order parts of
45 the story.
46 A. Sure.
47

1 MS FURNESS: Q. So when you refer, as you did earlier,
2 to the allegations being unbelievable, in fact, they were
3 very believable, weren't they?
4 A. Well, I found them, myself, difficult to believe.
5 I now believe them.
6
7 Q. Why did you find them difficult to believe,
8 Mr Harrison?
9 A. Just in terms of my own human experience as a father
10 and a lawyer, not having done family law, I just personally
11 had not come across this type of human behaviour.
12
13 Q. Just because you hadn't come across it doesn't
14 necessarily mean you can't believe it, does it?
15 A. No. No. And I have used those words simply to
16 indicate a level of shock and --
17
18 Q. Well, you understand that a problem for most of these
19 men and others who have suffered sexual abuse is that
20 people don't believe them.
21 A. Sure.
22
23 Q. And to describe them as "unbelievable" supports that,
24 doesn't it?
25 A. Look, that's probably a bad word. I would say
26 shocking, upsetting, horrific.
27
28 Q. Did you have discussions with the Christian Brothers
29 in which you shared your view with them that they were
30 unbelievable - the allegations coming out of these four
31 homes?
32 A. Not in those terms.
33
34 THE CHAIR: Q. When the allegations first came to you
35 professionally, and you must have sat down with some of the
36 leaders of the Order to talk about them, did they indicate
37 to you that there was going to be truth in what was being
38 said?
39 A. Oh, I think so, your Honour.
40
41 Q. I'm sorry?
42 A. Yes.
43
44 Q. So right at the start they were saying to you, "Yes,
45 there will be truth in this."
46 A. Yes, there have been some offenders and there have
47 been some people who have been badly hurt. That was

1 certainly, your Honour --

2

3 Q. So the starting point for the discussions between you
4 and your client was an acceptance that some of these
5 terrible things must have happened.

6 A. Certainly.

7

8 MS FURNESS: Q. Just turning to paragraph 16 of your
9 statement - and this is in August 1993 or thereabouts, we
10 are talking about, Mr Harrison - you say that you noted at
11 the time that Western Australia was within the
12 Christian Brothers Province under the leadership of Brother
13 Faulkner and that the complaints likely involved the period
14 of time in which the administrative responsibility rested
15 with the leadership team of the former St Mary's Province
16 and that team was based in New South Wales. Why was that
17 relevant to your thinking as a lawyer acting for the
18 Christian Brothers at the time you heard of the summonses
19 having been filed?

20 A. Well, these were Western Australian cases involving
21 Western Australian victims, Western Australian offenders,
22 Western Australian culture, Western Australian law, Western
23 Australian torts, Western Australian evidence chains. The
24 only connection that came to my mind was the fact that, at
25 that time, the Brothers 'leadership team was based in
26 New South Wales.

27

28 Q. Why was that relevant to you as a lawyer acting for
29 the Christian Brothers?

30 A. Given that we were told that proceedings had been
31 filed in New South Wales, that that was the only, for me,
32 logical connection with New South Wales, and at that time
33 forum shopping was a very controversial issue around the
34 country.

35

36 Q. Did it also help you understand where records might be
37 that you would need to access to act for the brothers?

38 A. Not - well, some records, but most of the records were
39 in Western Australia. When the Western Australian
40 Holy Spirit Province was established, records would have
41 come over here, records were maintained from here, and
42 I wasn't sure what the assumption of - assets would have
43 been transferred, liability may have been assumed in the
44 course of creating that Province over here. So there would
45 be some records going back early, but the bulk of the
46 records would have been Western Australia, I assumed, and
47 I think that turned out to be the case.

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Q. But knowing that the leadership team was based in Strathfield would mean that you would necessarily, would you not, look to see whether there were relevant records in Strathfield?

A. Correct. But I think most relevant records that had been at Strathfield had gone to Perth back in the 1950s.

Q. Just turning to tab 18, you referred to this earlier, that you understood that Brother Faulkner had made unsuccessful attempts to connect with VOICES in a meaningful way. Do you see that?

A. Paragraph 18?

Q. Yes.

A. Yes.

Q. I want to show you a document in relation to that, Mr Harrison. There are a couple of documents I need to show you, so we have put them in binders to make it easier. There are three copies for the bench, and if the witness and Ms Needham can have a copy. If you could just not turn to the document until I ask you to, I would appreciate that, Mr Harrison. Could I ask you to turn to tab A. You see that's a letter from the executive director of P&B Press, who you understood to be a person in charge at VOICES at the time, Mr Blyth; do you see that?

A. Yes.

Q. To Mr Faulkner, dated 21 September 1992.

A. Yes.

Q. Was this letter brought to your attention at any time?

A. I don't think so.

Q. You have not seen it before?

A. No.

Q. If you can see further down the page, there is reference to "Other issues of concern to VOICES", right at the bottom of the page?

A. Yes.

Q. The third point is:

Compensation for men who were exploited as children ie non-payment of wages and other

1 *factors.*

2

3 And then:

4

5 *Compensation for illness and other*
6 *long-term disadvantages resulting from*
7 *physical, psychological and sexual abuse*
8 *suffered in childhood.*

9

10 At the four orphanages?

11 A. Yes.

12

13 Q. Then the fifth point is:

14

15 *How all these matters can be resolved with*
16 *minimum damage to the Church ...*

17

18 That wasn't brought to your attention by Brother Faulkner?

19 A. Not that I can recall.

20

21 Q. So it hadn't come to your attention that VOICES had
22 put forward what they were seeking --

23 A. No, but I'm not surprised. My recollection is there
24 was - a lot of these former residents had stayed in contact
25 with the Brothers over the years that VOICES had been
26 established that these issues were being articulated, that
27 there was a good deal of anger and distress, and rightly
28 so, and that - and that Brother Faulkner was endeavouring
29 to engage with VOICES, but eventually, the relationship ran
30 out of steam.

31

32 Q. Well, when you say "ran out of steam", there was no
33 offer of compensation made to VOICES prior to the
34 litigation commencing?

35 A. I wasn't aware of any particular conversation around
36 compensation or money.

37

38 Q. You would know, wouldn't you, Mr Harrison? If the
39 Christian Brothers had offered VOICES and their members
40 money by way of compensation in respect of these four
41 orphanages before you became involved, you would know,
42 wouldn't you?

43 A. Yes - I think I would know by now. I don't believe
44 any - I know that no such offer was made. I wasn't aware
45 of any conversation which had got to that level.

46

47 Q. Thank you. If you can close the folder for the

1 moment. Coming back to your statement at tab 19, you say
2 that the Brothers informed you - and I take it this is when
3 you were first instructed by them, in terms of timing; is
4 that right?

5 A. Correct.

6
7 Q. -- of various things, the history, the complaints that
8 had started to emerge, that they had established
9 a confidential counselling and support service, and then in
10 subparagraph (e):

11
12 *Work which had already started in the West*
13 *in terms of research, discussions with*
14 *Government and individual complainants and*
15 *VOICES.*

16
17 Do you see that?

18 A. Yes.

19
20 Q. In that context, were you told of any discussion -
21 other than VOICES, which we have just dealt with - with
22 government or individual complainants in relation to
23 settling these complaints which had started to emerge?

24 A. Not that I can recall.

25
26 Q. Then in 19(h) you refer to the Christian Brothers
27 publishing public apologies.

28 A. Yes.

29
30 Q. You weren't involved in providing advice to the
31 Christian Brothers before they published their apology?

32 A. No.

33
34 Q. Perhaps if we can have the apology on the screen. It
35 is tab 46. You have seen the apology recently, I take it,
36 Mr Harrison?

37 A. I have.

38
39 Q. Do you know whether the Brothers got legal advice
40 before issuing the apology?

41 A. Look, I think there was a number of people the
42 Brothers were turning to for advice at the time, including
43 a retired judge, from memory. So I would assume that the
44 Brothers would have discussed what they proposed to do with
45 their solicitor in Perth, but I don't know. I do know that
46 that's an apology which issued, I think, in a fairly open
47 and frank way by the Brothers and before the Civil

1 Liability Act, for example, began to protect apologies in
2 the New South Wales zone as well. But - so I would assume,
3 but I don't know.

4

5 Q. As well as informing you that they had published
6 apologies, you saw a copy of the apology at about this
7 time, I take it?

8 A. Yes.

9

10 Q. If we can just scroll up, there is reference to
11 controversy about the four homes that this Royal Commission
12 is concerned with in this case study, and then under "Our
13 findings", the Christian Brothers say:

14

15 *We have studied the allegations available*
16 *to us, and we have made our own independent*
17 *inquiries. The evidence is such as to*
18 *convince us that abuses did take place,*
19 *abuses that in some cases went well beyond*
20 *the tough conditions and treatment that*
21 *were part of life in such institutions in*
22 *those days.*

23

24 And then it goes on to refer to the fact that such sexual
25 abuse that took place "cannot be excused and is for us
26 a source of deep shame and regret"; do you see that?

27 A. I don't see it, but I am familiar with the words.

28

29 Q. It is on the screen in front of you, under the heading
30 "Our findings", the first and second paragraphs.

31 A. I'm sorry, I have got it, yes. Yes.

32

33 Q. The second paragraph, the last sentence, notes that
34 such abuse "causes psychological and social trauma that can
35 lead to lasting wounds of guilt, shame, insecurity and
36 problems in relationships"; do you see that?

37 A. Yes.

38

39 Q. You were aware when you first received instructions
40 from the Christian Brothers to act on its behalf in this
41 litigation that they had published an apology in those
42 terms?

43 A. Yes.

44

45 Q. In terms of the reference there to "our own
46 independent inquiries", as well as the research that was
47 referred to in your paragraph 19(e), were you given, at

1 this stage - that is, the early stages of your involvement
2 in the litigation - the results of those inquiries and that
3 research?

4 A. Not that I can recall.

5
6 Q. Were you ever given it?

7 A. Well, I know what I was ultimately given - put it this
8 way, certainly Brother Coldrey's work, ISERV reports.
9 I can't recall being given any documentation in relation to
10 any individual complaints that the Brothers in Western
11 Australia had been given, or given any formal report of
12 some type which was generated around that time.

13
14 Q. Did you seek it out, knowing, as you set out in this
15 paragraph, what you were informed as to at the beginning of
16 the litigation?

17 A. I certainly sought information about material and
18 documents the Brothers had in terms of dealing with the
19 Slater & Gordon cases and issues of subpoenas and discovery
20 and suchlike. Whether I specifically sought them out at
21 that time, I may not have.

22
23 Q. It would have been paramount to understand the
24 Christian Brothers results of their own inquiries as to
25 whether such abuses as were alleged in the summons
26 occurred?

27 A. Yes, and certainly once we received summonses and we
28 had some idea of who the complainants were, we were given
29 ample opportunity to inspect records in Western Australia,
30 which would have extended to any documentation which was
31 referred to in this apology.

32
33 Q. Can I take you back to that folder, and if you can
34 turn to tab Q in that folder. I take it you are "HGH", as
35 it appears at the top of that file note?

36 A. I am.

37

38 Q. So this is a file note you made on 6 September 1993.

39 A. Yes.

40

41 Q. Very soon after you had heard of the proceedings?

42 A. Yes.

43

44 Q. You note there:

45

46 *A decision will be required as to the*
47 *extent to which reliance is to be placed on*

1 *technical defences such as the Notation*
2 *Act.*

3
4 A. I think that must have been Limitation Act.

5
6 Q. I thought that might be the case, Mr Harrison. And:

7
8 *A mechanism needs to be developed as*
9 *regards the early resolution of those*
10 *claims which can be properly resolved at an*
11 *early time.*

12
13 Do you see that?

14 A. Yes.

15
16 Q. Does this file note reflect a discussion you had with
17 Brother Faulkner?

18 A. No, I think it would have reflected a thought bubble.

19
20 Q. Your thought bubble?

21 A. Yes.

22
23 THE CHAIR: Q. But clearly your second thought there was
24 a good thought, wasn't it?

25 A. Perhaps, your Honour.

26
27 Q. It didn't happen, did it?

28 A. Well, I think, your Honour, to be fair, early
29 resolution of "those claims which can be properly resolved
30 at an early time", and our battle throughout the Slater &
31 Gordon process was to get enough information, your Honour,
32 to be able to determine what claims involved what, and what
33 could be settled. But your Honour, certainly I am
34 conscious of the questions your Honour has asked about
35 the --

36
37 Q. You know I am going to ask you, surely, the sensible
38 thing was for you and Slater & Gordon, at an early stage,
39 to sit down and say, "How are we going to work our way
40 through to a proper resolution", given the difficulties
41 that were faced ?

42 A. And, your Honour, I had many conversations with
43 Peter Gordon, who was an eminent, powerful, competent,
44 ethical lawyer, about my desire to try to push these cases
45 into some sort of space to be resolved, but the perception
46 of Slater & Gordon overreach, in terms of reacting to the
47 apology, by filing 241 cases on the East Coast against 21

1 defendants, of whom we did not act for a large number, you
2 know, your Honour, was problematic, and the failure to -
3 and the use of the media proactively and Slater & Gordon
4 being a firm, your Honour, as your Honour would recall, who
5 had had significant successes in relation to asbestos, Red
6 Cross, breast implant - so I always would have preferred to
7 see these cases settled. That's what eventually did
8 happen. But, your Honour, we were dealing with - we had
9 people from the Slater & Gordon group contacting the
10 Brothers indicating that they had not given instructions to
11 act. There were issues about whether VOICES could have
12 standing to commence proceedings or not. There was the
13 whole Law Reform Commission controversy around forum
14 shopping. You might remember, your Honour, at that time,
15 there were lots of issues. A motor vehicle accident would
16 occur in the Northern Territory --

17
18 Q. Yes, I do. I was involved --

19 A. -- no fault scheme, they would bring the case in
20 New South Wales. So, your Honour, our difficulty was the
21 Slater & Gordon juggernaut and trying to work out in
22 relation to pleadings of sexual and/or physical and/or
23 exploitation and/or psychological and/or Mrs Musk, which
24 cases involved what and what was the best way to go
25 forward.

26
27 Q. I know of the culture from which we all come as
28 lawyers, but wasn't the sensible thing here, given that
29 your client knew that there was likely to be a significant
30 element of truth in the allegations, but wasn't the
31 sensible thing to have said to Slater & Gordon, "We need to
32 sit down and work our way through all of this together."

33 A. Oh, and, your Honour, I said that, and we did
34 eventually but --

35
36 Q. I know, three years later.

37 A. But, your Honour, Slater & Gordon wanted to test the
38 common law appetite for determining liability and quantum
39 in relation to historic claims. It was two or three years
40 before the various government departments and other
41 defendants were out of the picture, and there was a lot of
42 work, your Honour, that had to be done to get them to waive
43 costs - certainly would not contribute to any settlement.
44 And, your Honour, it was a chaotic and difficult time.
45 Many mistakes were made. But my main memory is - and the
46 Brothers were committed to look after these men somehow,
47 some time. CBERS and all sorts of other things were

1 happening. The issue was whether these cases were properly
2 in the court system, whether they should be in Western
3 Australia or New South Wales. And, your Honour, the common
4 law judges were a long way away from Slater & Gordon on
5 vicarious liability at that time - probably much closer
6 now, and I'm a great supporter of the common law system.
7 But this was the first major attempt to attribute liability
8 to entity X in relation to someone else's criminal
9 behaviour.

10
11 Q. I understand all of that. But the reality here was
12 that your clients knew that in their institutions
13 a significant number of people must have suffered in the
14 way that was being alleged, didn't they?

15 A. Correct.

16
17 Q. Whether you see it in terms of the technicalities of
18 the law, that raised, surely for your clients, a sense of
19 obligation to those people.

20 A. Correct, and, your Honour, they --

21
22 Q. And I say to you again: wasn't the sensible thing on
23 both sides for the lawyers to say, "Look, we have
24 circumstances here where the common law may not adequately
25 address them." But there is a fundamental need that can be
26 provided, in part at least, by your client to help these
27 people who were abused within their institution?

28 A. And, your Honour, help was being provided through
29 CBERS and in other ways, and this, for some time, was an
30 argument between the lawyers about whether compensation
31 should be paid at level X, Y and Z.

32
33 Q. That's what I'm putting to you, you see, it is an
34 argument between the lawyers. Do you think that the legal
35 profession - this is not a fundamental criticism, you
36 understand - that the processes that we put in place and
37 the culture that the lawyers have around it emerges well
38 when we have spent probably \$4 million getting to the point
39 where \$3.5 million was provided in a trust fund?

40 A. Absolutely not, your Honour, which is why Towards
41 Healing and other attempts to provide a space to deal with
42 these cases were developed after these proceedings and
43 absolutely an inappropriate expenditure of money in terms
44 of how much of that outlay was getting through to victims.
45 But, your Honour, it does take two to tango.

46
47 Q. Mr Stephens says that his senior partner offered to

1 tango, as it were, through mediation at an early stage. Do
2 you --

3 A. He did, your Honour, and offered --

4
5 Q. What was your response to that?

6 A. My response was that we needed to get some particulars
7 about how many of these cases involved sexual abuse,
8 physical abuse, exploitation of labour and what have you;
9 that the Brothers would be unlikely to be looking at
10 figures of the size that, at that stage, he was
11 contemplating; that we needed to get the Commonwealth of
12 Australia, the State of Western Australia, the Provincial,
13 the Marist Brothers [sic] and others either on board or out
14 of the way and these cases should have been filed in the
15 Supreme Court of Western Australia where Slater & Gordon
16 had had success on the asbestos cases, and it was not
17 helping me to move things at my end by the fact that these
18 cases had been brought without warning, in conjunction with
19 a media campaign on the other side of the country.

20
21 Q. I'm not following much of that. Wouldn't the sensible
22 thing, given that the offer was being made to mediate, to
23 say, "Yes, what we should do is sit down together and work
24 out what can be said on behalf of each of these plaintiffs
25 in relation to the allegations against the Brothers."
26 That's the starting point - that's particulars, as you put
27 it. Then, having established what's being said, then to
28 sit down with a mediator and see whether or not, together,
29 you could have resolved each of those individual problems.
30 Isn't that what should have happened?

31 A. Your Honour, I don't think you can expect a defendant
32 in a class action of this magnitude to walk in to
33 a mediation space without being given some information
34 about who they actually have got instructions from, who
35 they haven't, and what the nature of the cases are.

36
37 Q. That's what I'm saying. The first point would have
38 been to say to Mr Gordon, "Now you tell us on paper, in
39 relation to each of these people, what the allegation is in
40 respect of that person." That's particulars. Once that's
41 done, to say, "Now let's find ourselves a very experienced
42 common lawyer, preferably a senior retired judge," and with
43 that person, bearing in mind who your client was and what
44 your client knew as to the allegations being true, to have
45 worked through with that senior person how you could best
46 resolve, and if there was a necessity to bring the
47 plaintiffs back into the framework of dollars that was

1 acceptable to your client, to work with the mediator to
2 achieve that?

3 A. Your Honour, I'm not going to disagree with the notion
4 that it should have been done earlier, but I would say that
5 we were not helped by the fact that Slater & Gordon clients
6 weren't willing to attend medical examinations and the lack
7 of particulars and, of course, your Honour, I give advice
8 but take instructions in relation to these issues, and --

9
10 Q. I understand.

11 A. -- there are a number of considerations. There were
12 a number of dilemmas. One thing that was always clear to
13 me from my conversations with the Brothers was that the
14 Brothers would not allow these men to go without some kind
15 of remedy and address [sic] at the appropriate time. The
16 issue was how much of that package of measures should be
17 tied up into the litigation system and how much should come
18 through CBERS and other kinds of supports and facilities.
19 But, your Honour, as to whether the matter could have been
20 dealt with better and in a more cost-effective fashion, I'm
21 agreeing with your Honour.

22
23 Q. You see, one of our terms of reference requires us to
24 look at justice for victims, and there are six
25 Commissioners, and each of us, you would not be surprised
26 to know, reacts somewhat quickly and adversely to the idea
27 that claims like this have to be litigated at this sort of
28 cost in order to achieve this sort of outcome. There has
29 to be some better way of resolving these sorts of issues.

30 A. Certainly, your Honour.

31
32 MS FURNESS: Q. If we can turn to tab B in the bundle,
33 this is a letter, Mr Harrison, from you to Brother McDonald
34 in the early stages of the proceedings. Do you see that?

35 A. Yes.

36
37 Q. Brother Julian McDonald was the person from whom you
38 received instructions and to whom you communicated
39 generally in relation to this litigation; is that right?

40 A. Correct.

41
42 Q. The letter refers to "recent discussions and
43 arrangements for a meeting in December". I take it that
44 that meeting in December was one of the early meetings that
45 was held with the Provincial and others to discuss the
46 litigation?

47 A. Yes.

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Q. You summarise the current position, and you set out at paragraph 8, which is on page 3 - you will see there was some issue in relation to whether CCI was going to indemnify the Brothers.

A. Yes.

Q. And that issue remained for some time.

A. Yes.

Q. But, ultimately, CCI provided how much of the amount that went into the trust fund and to Slater & Gordon's costs - \$2.5 million, was it?

A. Yes.

Q. So, ultimately, they paid half of the amounts that went to the fund and the legal costs?

A. Ultimately, there was an ex gratia payment from CCI in relation to a disputed claim for indemnity under the East Coast special issues policies, CCI not having ever insured the Brothers in Western Australia or, as it were, received any premium in relation to these orphanages.

Q. But they nevertheless tipped in \$2.5 million.

A. Because their insureds on the East Coast were sued.

Q. And the other \$2.5 million came from the Christian Brothers' own reserves?

A. Yes.

Q. So coming back to this matter, and leaving aside CCI for the moment, you say here that the Brothers will need to confirm a strategy to be adopted in the defence of these claims, which, secondly:

Utilises in an appropriate and agreed fashion the various substantive defences ...

And then you deal with the first three on that page. Do you see that?

A. Yes.

Q. And then over the page:

Incorporates any necessary balance between legal-pastoral-ethical considerations.

1
2 This was the first occasion in which you had acted for the
3 Christian Brothers in respect of litigation of this sort.
4 Where did you obtain from the notion that there needed to
5 be a balance between legal, pastoral and ethical
6 considerations in respect of the Christian Brothers?
7 A. Well, I was well aware from my conversations with
8 Brother Julian and other brothers that they were far from
9 comfortable with a legal defensive posture in relation to
10 these cases. They accepted that the Slater & Gordon kind
11 of tsunami had to be managed, but --

12
13 Q. By "tsunami", you mean they took an action against you
14 in the court; is that what you mean by "tsunami"?

15 A. Correct.

16
17 Q. Go on.

18 A. And that underneath all of that was a need, in terms
19 of the values and mission of the Christian Brothers, to get
20 these cases into some kind of resolution where there was
21 some prospect of reconciliation and healing. But it was
22 perceived, against the comfort of many brothers, that there
23 was a need to deal with apparent irregularity in the
24 commencement of the proceedings and be mindful that these
25 cases involved four schools only, already 241 people had
26 put in claims, and that an early kind of rollover for
27 Slater & Gordon, without proper particulars and validation
28 and some level of cross-checking, could prejudice the
29 capacity of the Order to continue to undertake its
30 ministry.

31
32 Q. What irregularity in the commencement of the
33 proceedings?

34 A. Filing proceedings without the consent of an
35 individual plaintiff; filing the proceedings --

36
37 Q. Did you know that at that stage?

38 A. Well, we had communication from a number of --

39
40 Q. But at that stage - this is November - did you know
41 that?

42 A. I think we - I believe we had had communications from
43 individual plaintiffs at that time. There was - I had seen
44 questionnaires from VOICES completed by men about "Please
45 tick the box" in terms of --

46
47 Q. So you had access to that material within the first

1 three months of being aware of the litigation?
2 A. I - at an early time, you know, there was either
3 material or reference to material of that sort, which did
4 raise questions as to whether these proceedings had been
5 properly brought. And we had no medical evidence; we
6 certainly did not have the statements that the Commission
7 has had over the last hearing here in relation to that kind
8 of detail, and we were, I think, to some extent in the dark
9 in terms of this Slater & Gordon/VOICES cohort.

10

11 Q. But you understand from what his Honour asked you
12 about earlier that that could have been the subject of the
13 first discussion?

14 A. Certainly.

15

16 Q. And it wasn't?

17 A. No.

18

19 Q. Then (d):

20

21 *Pays sufficient attention to the broader*
22 *objective of containing this type of*
23 *litigation with its potential for*
24 *considerable expense, distraction and*
25 *associated criminal investigations etc.*

26

27 Distraction from what?

28 A. Administrative leadership energy.

29

30 Q. Distraction from the Christian Brothers going about
31 its business of being the Christian Brothers?

32 A. Given the Christian Brothers' legacy in relation to
33 education in the country, given the substantial costs
34 involved in this kind of litigious process, if these cases
35 were settled in a way which established a litigation
36 industry, that would be something which would be very
37 expensive and time consuming.

38

39 Q. But if, indeed, people had suffered at the hands of
40 the Christian Brothers, they should be compensated,
41 shouldn't they?

42 A. They should be, but preferably on a case-by-case,
43 careful, focused - each complaint of sexual abuse from the
44 past is an important matter. The efficacy of some form of
45 group action, class action, on the other side of the
46 country in relation to historic matters troubled the
47 Brothers in terms of --

1
2 Q. Troubled the Brothers or troubled you?
3 A. Troubled me and --
4
5 Q. You shared your trouble with the Brothers?
6 A. It is clear from my correspondence I was, as a lawyer,
7 trying to put in front of the Brothers the various
8 considerations.
9
10 Q. Your evidence in relation to that answer and earlier
11 suggests that you were in some way affronted - and that may
12 be too harsh a word - by the fact that there had been
13 a class action against the Christian Brothers.
14 A. Look, I think the methodology and approach adopted by
15 Slater & Gordon raised some challenges.
16
17 Q. Were you affronted that the Christian Brothers were
18 being sued in such a manner?
19 A. No.
20
21 Q. Were the Christian Brothers affronted that so many of
22 their former residents would gather together and adopt
23 a legal strategy available to them to participate in a
24 class action?
25 A. No. Hurt, but not affronted. And Slater & Gordon, by
26 the way, were respected by ourselves and the
27 Christian Brothers as a firm with a history of taking on
28 important social issues, such as Ok Tedi and other things,
29 and that this was - there was never any thought that these
30 cases weren't meritorious; it was a question of when and
31 how to assess them.
32
33 Q. How to defend yourself against them? That was the
34 question, wasn't it, how to best defend yourself against
35 the meritorious cases?
36 A. Well, to manage this group action.
37
38 Q. Manage by way of defence?
39 A. As a lawyer, yes.
40
41 Q. Just turning to page 5 --
42
43 THE CHAIR: Q. Just pause a moment. You say "as
44 a lawyer, yes". You mean - and I understand this - your
45 object was to win?
46 A. My personal object, your Honour, was to try to get
47 these cases resolved in a fair, just and reasonable

1 fashion.
2
3 Q. Well, to win, wasn't it?
4 A. Oh, no, your Honour --
5
6 Q. The interests of your client were in defeating these
7 claims?
8 A. A win in the litigation sense, your Honour, is a loss
9 in this type of issue. These men had been a part of the
10 Christian Brothers family. We did not want to win the
11 cases, but we did need to manage them.
12
13 Q. We will come to it in a moment, but your view was that
14 any technical point of defence that was available should be
15 taken, wasn't it? You said so at a meeting; correct?
16 A. Yes.
17
18 Q. Yes. And that means winning, doesn't it?
19 A. That means winning the preliminary procedural battle
20 of getting these cases over to Western Australia where they
21 belonged.
22
23 Q. And where, you knew, there was no possibility of time
24 being extended.
25 A. Well, your Honour, I honestly didn't know that as
26 a fact. I was aware that Slater & Gordon had been
27 successful in Western Australia in relation to asbestosis.
28
29 Q. You got Mr Gross's advice about that, didn't you?
30 A. Yes, your Honour.
31
32 Q. And he told you that there was little, if any,
33 prospect of winning a limitation issue in Western Australia
34 compared with New South Wales, didn't he?
35 A. He did, your Honour. But sometimes laws have to be
36 changed; sometimes there has to be lobbying; sometimes
37 there has to be efforts made, and Slater & Gordon had been
38 successful in the asbestos cases in Western Australia,
39 historic cases.
40
41 Q. But why was it in the interests of the people who had
42 been, we have agreed, at least some, if not many of them,
43 clearly, in this institution - why was it in their
44 interests to push them to run the test case to change the
45 legislation rather than saying, upfront, "Let's talk about
46 this."
47 A. Your Honour, I have no answer to that assertion.

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Q. No. I mean, I understand the culture, let me say again, from which lawyers come, but it is very clear that clients will take the advice of the lawyer. If the lawyer says, "You have got a defence", it is very hard for a client to say otherwise, isn't it?

A. Look, your Honour, I think a lawyer does have to provide legal advice, point out the options and the considerations in relation to this novel, unprecedented type of class action; try to put the dilemmas on the table and commence a conversation with the client about where one finally ends up in all of that.

Q. Do you think, in acting for a body like this, that there is an obligation on the lawyer to help guide the client consistent with its own objectives - I don't mean in winning the litigation but its own objectives as an organisation?

A. Yes, your Honour.

Q. That's not consistent with taking every technical defence point that you can, is it?

A. I think, your Honour - I would respectfully put to your Honour that there can be litigation issues where there is a need at the early stages to seek some procedural clarity as a part of managing that issue and getting to an end point, your Honour, which is fair, just and reasonable, as one sees at the time.

Your Honour, I just point out, this is a long time ago. The Brothers did ultimately, even though, clearly, the cases were heading towards a negative outcome in the courts, create a substantial fund then, which was one of a number of measures that they were taking in relation to trying to deal with their moral, your Honour, legal and pastoral responsibilities.

Q. We're going over old ground. We've spent about \$4 million by this stage, haven't we?

A. It was a very expensive process, your Honour, which was why we wanted a settlement which did not unnecessarily encourage others to use that mechanism, if there were better mechanisms.

MS FURNESS: Q. Just turning to page 5, which is 0007, the bottom of that page, there is reference to the correct legal identification of the defendant. Now, at some stage

1 during the litigation, did Slater & Gordon ask for your
2 assistance in identifying the correct defendant or proper
3 defendant to be sued?

4 A. I have no memory of that, and I would be surprised if
5 a letter came in which we would not have responded to. It
6 is these days common practice people write the whole time,
7 we want to know is there an incorporated, yes or no; if
8 not, who are the relevant officer holders of the
9 unincorporated entity, are they alive or dead.

10

11 Q. Just going back to 1993 --

12 A. I can't recall myself. There are other lawyers in my
13 office, in particular, Gerard Phillips --

14

15 Q. It would have been brought to your attention,
16 Mr Harrison, had such a request been made before an answer
17 was given, wouldn't it?

18 A. I think it would have been. I have no memory of such
19 a request, but I'm not ruling out the possibility that it
20 might have come in some letter or in some shape or form,
21 but I can't bring it to mind.

22

23 Q. Would it have been consistent with the attitude you
24 were taking at this stage to have declined to assist in the
25 way sought?

26 A. I would like to think not.

27

28 Q. You may well like to think not now, sitting as you do.
29 However, turning your mind back to 1993 and being aware of
30 the correspondence that was exchanged, it is likely, isn't
31 it, that you would not have assisted?

32 A. Look, my own personal preference would have been to
33 help steer the plaintiffs to the relevant defendants and
34 try and reduce the number of defendants and general
35 procedural chaos to the point where some kind of resolution
36 process could start in relation to meritorious cases sooner
37 rather than later. As to what I may have been instructed
38 to do back there then, it's certainly possible that we
39 could have taken a non-cooperative, "You work it out
40 yourself" posture.

41

42 Q. Was there any defendant that you believe could have
43 been put forward in 1993 who would have had the requisite
44 liability and the funds to meet any judgment?

45 A. I think Mr Gross's advice - I mean, the obvious
46 defendant, which was defendant number 1, and the - it was
47 the Trustees of the Christian Brothers, the body corporate

1 under the 1942 Roman Catholic Church Community Lands Act -
2 now, that company couldn't be sued obviously in relation to
3 pre-1942 issues, of which there were a number.
4

5 Q. The short answer is there wasn't any, isn't it?

6 A. Well, I think counsel's advice was, even though the
7 Act was only amended in 1986 to give it a capacity to be
8 involved in operational issues with schools, if that entity
9 was in fact being used beforehand ultra vires, it may still
10 be - I - we certainly flagged that issue to Slater & Gordon
11 as a consideration. I don't think we ever pleaded it. And
12 I think there is correspondence somewhere indicating some
13 reluctance to get down to that kind of technical level.
14

15 Q. Perhaps if we can turn to page 8, which is 0010.
16 These are the matters that you indicated in your letter to
17 the Christian Brothers that you should talk about when you
18 next met. There were various administrative matters,
19 including the use of legal professional privilege to
20 protect communications between the Brothers - do you see
21 that?

22 A. Yes.
23

24 Q. As well as under "Legal matters", if we can scroll
25 down, the utilisation of technical defences, the timing and
26 extent of those, and thirdly, whether the Brothers should
27 take a hard legal line in respect of initial claims or
28 a softer settlement approach. Do you see that?

29 A. Yes.
30

31 Q. Your view at this time was that they should maintain
32 the hard legal line, wasn't it?

33 A. Look, I was at times not comfortable, but that was the
34 advice that we had from counsel and it was advice that we
35 were passing on to the client. So, yes, it was our view
36 that we had to react to Slater & Gordon overreach in this
37 kind of way at this stage to try to manage these
38 proceedings.
39

40 Q. You are not suggesting by that answer, are you, that
41 counsel was running the show and you were a mere conduit
42 between counsel and the client, Mr Harrison, are you?

43 A. No.
44

45 Q. It was your view, wasn't it, that the hard line should
46 be taken, at least in the short to middle term?

47 A. Yes.

1
2 Q. Can we then turn to tab R. This is a further letter
3 on 13 December. Do you see how that refers to discussions
4 on 6 December?
5 A. Yes.
6
7 Q. Perhaps if we can just turn to those discussions
8 first, which are behind tab C, these are minutes of
9 a meeting held where you and others were present. There
10 were four lawyers present and four Provincials. Do you see
11 that, sir? It should be on the screen in front of you as
12 well.
13 A. Yes.
14
15 Q. There was some discussion about suppression orders
16 initially. Was that concern about the plaintiffs' names
17 having been suppressed, or was it more concern about
18 whether or not the Brothers could suppress any aspect of
19 the proceedings against them?
20 A. Can I just have a look --
21
22 Q. Can you help me with that?
23 A. What paragraph?
24
25 Q. There is significant reference to it. There is the
26 fourth paragraph saying, "Mr Harrison said that".
27 A. Can I just - I haven't read this document. Could
28 I just read it?
29
30 Q. Certainly. It is somewhat lengthy. Perhaps I might
31 pass over that and come back to it, and you might have an
32 opportunity to read it.
33 A. Yes.
34
35 Q. We might go back to the letter, which is behind tab R,
36 which follows on from this meeting. We will come back to
37 tab C. This is a letter from you to Brother McDonald after
38 that meeting of 7 December; you accept that?
39 A. Yes.
40
41 Q. You refer to the various discussions, that there had
42 been a number of further discussions with others, including
43 the CCI solicitors.
44 A. Yes.
45
46 Q. And then discussions with counsel as well. And over
47 on the second page there is reference to counsel's advice

1 in relation to, if I can put it that way, procedural
2 matters.

3 A. Yes.

4

5 Q. Then over to the last page, you say in the first full
6 paragraph:

7

8 *Arising from our discussions on*
9 *6th December it would seem that arguing*
10 *these matters as a Defence to steps taken*
11 *by the Plaintiff would be a more acceptable*
12 *path to the Brothers having regard to*
13 *current public relations considerations and*
14 *philosophical issues.*

15

16 Do you see that?

17 A. Yes.

18

19 Q. Can you help us with what was being referred to as
20 "public relations considerations and philosophical issues"?

21 A. Look, I think that I was reacting to the idea that, in
22 terms of managing this group action, having some
23 preliminary argument about venue and standing to bring
24 proceedings would be necessary, and perhaps desirable, from
25 a public relations viewpoint and a philosophical viewpoint,
26 rather than being in a situation where we were, as it were,
27 you know, being in a very adversarial position with
28 a particular plaintiff.

29

30 Q. So do I understand it that the thought behind that
31 public relations considerations and philosophical issues is
32 that it wouldn't look particularly good for the
33 Christian Brothers to be seen to be arguing against a group
34 of former residents in public about technical matters and
35 generally taking an adversarial stance to their claim; is
36 that a fair summary of the position?

37 A. I might be a bit contrary to you on that one.
38 I think, in my mind, was the idea that if we were going to
39 have to have a fight with somebody, it might be better to
40 have the fight on the procedural legal issues rather than
41 issues of merit or truthfulness in respect of a particular
42 victim.

43

44 Q. That that would go better in a public relations and
45 philosophical sense; is that right, Mr Harrison?

46 A. Look, I really am having difficulty trying to be
47 accurate with you about what was in my mind in that

1 paragraph at this stage.

2

3 Q. Are we right to assume that the philosophical issues
4 relate back to the tension between legal, pastoral and
5 ethical matters?

6 A. Correct.

7

8 Q. If we can come back to your statement, at paragraph 29
9 of your statement you say "around this time" - and from the
10 context, Mr Harrison, you can accept that that is late
11 1993/early 1994 - you were involved in discussions in
12 relation to attempting to discover the basis of the
13 allegations made. Do you see that?

14 A. Yes.

15

16 Q. You say:

17

18 *Neither I nor the Christian Brothers had*
19 *details of the specific allegations ...*

20

21 That's right?

22 A. Yes.

23

24 Q. But, indeed, what you knew from the public apology
25 that the Brothers had was the results of its inquiries,
26 which enabled it to publicly say sexual abuse happened at
27 these institutions?

28 A. What we didn't have in relation to - what we had was
29 a cohort group of a large number of individuals claiming
30 sexual and/or physical and/or and/or and/or, with no
31 particulars which would enable any kind of cross-checking
32 or verification or information about exactly their place in
33 life, the consequences of the abuse - anything which would
34 give us a measure on what a proper figure would be for the
35 individual case and, indeed, whether or not there were, in
36 that group, people on board who had no legitimate claim
37 whatsoever.

38

39 Q. Do you now recall, at this stage, whether you said to
40 the Christian Brothers, "Show us what your inquiries
41 showed"?

42 A. We, I think at this stage, did go into a pretty deep
43 process of examining the archives of the
44 Christian Brothers, including any reports or works that
45 they had, engaging Brother Coldrey to assist with some
46 investigations, and trying to come to grips with certainly
47 any reports and any other documents, including old

1 visitation reports or other records which might assist.
2 But we still, I think at this stage, did not know who the
3 plaintiffs were, what they were --
4

5 Q. I understand that. You have given evidence as to
6 that, that you didn't know the particularity of the
7 plaintiffs. My question was more in relation to what the
8 Christian Brothers already knew about the institutions
9 without knowing the particularity.

10 A. Certainly the Christian Brothers knew that there had
11 been management issues, sexual misconduct issues, a number
12 of offending brothers and a number of men egregiously hurt.
13

14 Q. At those four institutions?

15 A. At those four institutions.
16

17 Q. And they knew that by 1993?

18 A. Yes.
19

20 Q. In terms of Brother Coldrey - and this is at
21 paragraph 29 - at that stage, he had completed, had he, his
22 historical work for the Christian Brothers?

23 A. Yes.
24

25 Q. And you were aware that he had done, in addition to
26 that historical work, or in amplification of that work,
27 another report more detailed on allegations of sexual
28 abuse. Did you know that by this time?

29 A. What - late 1994?
30

31 Q. Late 1993/early 1994.

32 A. Look, I don't think so. I think Brother Coldrey sent
33 in to Gerard and myself his secret report manuscript
34 in March or April of the following year.
35

36 Q. 1995 do you mean or 1994?

37 A. 1994.
38

39 Q. That was the historic manuscript or the "Reaping the
40 Whirlwind" manuscript?

41 A. "Reaping the Whirlwind" manuscript.
42

43 THE CHAIR: There was a research agreement in February
44 1993 which concluded by April 1994. That was not the
45 "Reaping the Whirlwind" matter, was it? That was separate.
46

47 MS FURNESS: As far as I understand it, The Scheme was

1 published in November 1993, and "Reaping the Whirlwind"
2 was made available under discovery somewhat later.
3 Precisely when it was finished is not the subject of
4 current evidence.

5
6 THE WITNESS: I don't think it was ever finished. But
7 Brother Coldrey's draft report was sent to us,
8 I think, March or April of 1994. There was an issue, an
9 argument in front of Justice Levine about subpoenas in
10 discovery, orders made, and we formed the view that it was
11 a report - I don't believe it was ever given directly to
12 the Christian Brothers. I think it came to us. But we saw
13 ourselves as holding that on behalf of the
14 Christian Brothers.

15
16 MS FURNESS: Q. You set that out in paragraph 31. You
17 discovered it, and you provided it to the plaintiffs, and
18 that was, according to paragraph 31, during 1994.

19 A. Right.

20
21 Q. Can I go back up to (c) on the top of that page. You
22 retained Carrington Investigations to undertake inquiries
23 in Western Australia?

24 A. Yes.

25
26 Q. Were those inquiries undertaken with the benefit of
27 documents held by the Christian Brothers, or without the
28 benefit of such documents?

29 A. I think they were briefed with some documents. But it
30 was one of a number of steps that we took to try to come to
31 grips with what the factual position was in terms of who
32 was alive, who was dead, where records were, et cetera.
33 I think. So, yes, I don't think they would have been
34 briefed with - so they were really a firm of factual
35 investigators, sent to Western Australia to collect
36 documents. I recall that, you know, just as an example of
37 the difficulty of litigation, which is very unfortunate, is
38 that, you know, in relation to the cross-vesting matters
39 which you haven't come to yet, there was a psychiatric
40 report saying that a particular plaintiff couldn't possibly
41 travel to Western Australia, and Carringtons identified
42 that, in fact, that plaintiff had been back to Western
43 Australia to Bindoon on a number of occasions. So that was
44 really not something that they were asked to do, but it was
45 part of the difficulty of trying to work out the substance
46 of what had occurred in the group. And money is always
47 tricky.

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Q. Did you take any steps to advise the Christian Brothers to make Brother Coldrey effectively unavailable to the plaintiffs?

A. No.

Q. Were you advised by counsel to do anything with respect to Brother Coldrey or to advise the Christian Brothers to do anything with respect to Brother Coldrey to make him unavailable to the plaintiffs?

A. No, not that I can recall.

Q. Did the Christian Brothers discuss with you what they should do about Brother Coldrey, given that his report was in the hands of the plaintiffs?

A. We had a number of discussions with the Christian Brothers about whether Brother Coldrey would have any potential constructive role around the litigation, bearing in mind that he had finished writing The Scheme, and --

Q. When you say "constructive role around the litigation", what do you mean?

A. Whether he would be available and appropriate to work as a researcher or to be engaged in the litigation process, and I remember the advice was that if he was to come on board with that sort of role, he would need to be given very clear instructions about what to do and about confidentiality and suchlike, and there was some sort of formal agreement with Brother Coldrey entered into when he did commence to undertake some inquiries for us or to do some research.

Q. Was the purpose of that to render any work he did subject to legal professional privilege?

A. Look, that may have been an effect, but the purpose was to be very clear with Brother Coldrey, that if you take on this role, it might be that you cannot be in conversation with other people to the extent that you currently are, and that we need to be clear about it, and if you don't wish to take on that role, then that's fine. So there was a need - there was misgivings as to whether Dr Coldrey was going to be somebody who would be helpful. My thought - my belief was that he could, and I think he did do some work. But - so --

Q. Mr Harrison, the purpose of engaging Brother Coldrey

1 was in order to take him out of the reach of the
2 plaintiffs, wasn't it?
3 A. I would not agree with that.
4
5 Q. The consequences of the way in which you engaged him
6 was to take him out of the reach of the plaintiffs, wasn't
7 it?
8 A. That would be true.
9
10 Q. And that was unintended, was it?
11 A. From my part, yes.
12
13 Q. From anyone else's part who was engaged in the process
14 of bringing Brother Coldrey in?
15 A. Not that I'm aware of. And it was - Brother Coldrey
16 could have terminated his agreement with us at any time.
17
18 Q. I'm interested in your motivation rather than
19 Brother Coldrey's for the moment, Mr Harrison.
20 A. My motivation was to look at what - the job ahead of
21 us in relation to discovery, analysing documents, getting
22 information together in relation to 241, at this stage,
23 court cases, maybe that would grow to 541, and
24 Brother Coldrey had just finished writing The Scheme, which
25 I had not read but skimmed through, which seemed, he was
26 a man with a PhD, an interesting history, had been through
27 the archives. My only motivation was to engage him in the
28 legal process to help us with document production and
29 discovery, et cetera.
30
31 Q. And there was the unintended benefit of the plaintiffs
32 not being able to access him.
33 A. I had no knowledge at that time of Brother Coldrey
34 being someone who would be particularly in contact with
35 plaintiffs or Slater & Gordon.
36
37 Q. But Slater & Gordon had his report; they knew he had
38 written something of relevance to them. Surely, as an
39 experienced litigator, you would expect that they would
40 seek to have a discussion with Brother Coldrey, at the very
41 least.
42 A. And we had entered into our agreement with
43 Brother Coldrey well before he presented us with "Reaping
44 the Whirlwind", and well before we discovered it to Slater
45 & Gordon. He was already on board, for better or for
46 worse, and there were many who thought that wasn't
47 a brilliant idea.

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Q. Perhaps if you could turn to tab N in that bundle in front of you. This is a letter to Barry Coldrey from Brother Faulkner. It is dated April 26, 1994. It refers in the first paragraph to "recent discussions with Mr Gross", who was the silk that you had engaged; is that right?

A. Correct.

Q. And yourself, and conversations that Brother Faulkner had had with him. Then it refers to the research agreement, dated 4 February 1993, and noted that that was now concluded. That was the agreement to research and prepare The Scheme, wasn't it?

A. Correct.

Q. And then noting what that agreement was headed, and noting that the book was selling satisfactorily. The Christian Brothers, I take it, received whatever amounts were forthcoming from the sale of the book.

A. I assume so, but --

Q. Then, further down, if we can scroll down, "Discussions are being undertaken as regards the details of your move to Sydney to participate in a research capacity"; do you see that?

A. Yes.

Q. So as at April 26, 1994, those discussions hadn't been completed, had they?

A. No.

Q. At this stage you had provided "Reaping the Whirlwind" to the plaintiffs, hadn't you?

A. If I had, then my memory is defective. I thought - yes, I - that's not as I recall it, but it may well be correct.

Q. Look at this letter dated April 26, 1994.

A. Yes.

Q. If we go back to your statement in terms of when you provided the document to Slater & Gordon, you say that occurred during 1994. Do you see that?

A. Yes.

Q. That's paragraph 31 of your statement.

1 A. Mmm-hmm. My best recollection is Brother Coldrey came
2 on board, provided his manuscript of his own volition, and
3 that close to the hearing of the cross-vesting applications
4 before Mr Justice Levine at the end of 1994 we presented it
5 to Slater & Gordon, where it was greeted with much
6 enthusiasm and interest.

7

8 Q. So in terms of the cross-vesting proceedings in
9 New South Wales, that was December 1994. So they certainly
10 had it by December 1994.

11 A. Yes, and I think they got it not long before -
12 a couple of weeks before. So I believe it came to us from
13 Coldrey after he was retained by us, and then discovered to
14 Slater & Gordon later that year.

15

16 Q. Just coming back to the letter to Brother Coldrey on
17 the screen, there is reference to Mr Gross "has discussed
18 at length the inevitable use of subpoena and other legal
19 issues and a consequent need for very great care"; do you
20 see that?

21 A. Yes.

22

23 Q. So the agreement that was concluded by this letter was
24 entered into because of concerns about the plaintiffs
25 getting access to Mr Coldrey and his works. That's an
26 inevitable reading of that paragraph, isn't it?

27 A. Look, it may well be. Obviously, this letter is not
28 authored by me.

29

30 Q. No, I understand.

31 A. But my sense of Coldrey was that I felt he could be
32 useful to the legal defence/Slater & Gordon management
33 process. Some of the brothers had some doubts about that.
34 But the ultimate agreement was, if Barry's coming on board,
35 you will need to be very clear about --

36

37 Q. I understand --

38 A. -- scope.

39

40 Q. -- your evidence in relation to that. But reading
41 that paragraph - and this paragraph is in relation to
42 recent discussions in which you were involved -
43 "Mr Gross QC has discussed at length the inevitable use of
44 subpoena." Now, that can only mean the plaintiffs
45 subpoenaing Mr Coldrey or his work, can't it?

46 A. Or subpoenaing documents from around the empire, which
47 need to be collated and organised and found and properly

1 disclosed. Ms Furness, I'm not arguing against the
2 possibility of multiple motivations there, but --

3

4 Q. Let's go back to the first page first. The agreement
5 has, as the first paragraph no written or copied materials
6 from the archives are to be removed - and Westcourt was the
7 headquarters of the Christian Brothers, wasn't it?

8 A. In Western Australia.

9

10 Q. No continuing authority for him to further research
11 any matters; do you see that?

12 A. Yes.

13

14 Q. No authority to research from other Australian
15 Provincials?

16 A. Yes.

17

18 Q. And finally, that your silk in the proceedings was to
19 give Brother Coldrey express directions with respect to
20 research and writing for legal purposes. Do you see that?

21 A. I do.

22

23 Q. And, in such matters, to act within the framework
24 agreed. Now, the purpose of that was to contain
25 Brother Coldrey so he could be used for your purposes and
26 the plaintiffs couldn't have access to him; isn't that
27 right?

28 A. Look, I don't believe that was the purpose, but I do
29 agree it was the result.

30

31 MS FURNESS: Your Honour, I note the time, I am happy to
32 continue for another 15 minutes if it is convenient, or
33 to --

34

35 THE CHAIR: Will you finish Mr Harrison today?

36

37 MS FURNESS: I don't think so.

38

39 THE CHAIR: No. Okay. Yes, keep going.

40

41 MS FURNESS: Thank you.

42

43 Q. In terms of the research done - and you have given
44 some evidence about it - can I take you back to your
45 statement, if we can have that back on the screen.
46 Paragraph 60. Mr Harrison, this part of your statement is
47 in relation to specific questions that the Royal Commission

1 asked of you, and the first was in relation to the steps
2 taken to investigate the allegations. You refer to
3 Brother Coldrey's research and that is, as we have
4 discussed, The Scheme and "Reaping the Whirlwind". And
5 then, secondly, you refer to the legal team, and in
6 paragraph 62 you speak of solicitors from Carol & O'Dea,
7 members of the Christian Brothers legal team and counsel
8 undertaking various inspections of archival material held
9 by the Christian Brothers.

10 A. Yes.

11
12 Q. Then, over on the next page, paragraph 64, you refer
13 to the archives that were accessed for that purpose.

14 A. Yes.

15
16 Q. Do you see in (d), you refer to accessing documents
17 from Roman archives.

18 A. Yes.

19
20 Q. What do you mean by "Roman archives"?

21 A. Documents which had emanated from Rome.

22
23 Q. You were satisfied, weren't you, at the conclusion of
24 those researches, that you had accessed all relevant
25 documents to allegations of child sexual abuse at each of
26 those homes from Australia and Rome?

27 A. I don't know about being absolutely satisfied, but
28 I think we had --

29
30 Q. Did you have any concerns that you hadn't accessed
31 what was available to be accessed?

32 A. No.

33
34 Q. Had you had those concerns, I take it, you would have
35 undertaken further inquiries or had further inquiries
36 undertaken by others; is that right?

37 A. Look, I think that's probably right. I mean, we were
38 not in a discovery type of zone with Slater & Gordon,
39 I think, at that stage. We had undertaken inspection of
40 those documents to sort of get a handle on what the picture
41 was in relation to complaints and actions being taken and,
42 quite frankly, the picture was that there had been
43 complaints, they had been recorded, there had been actions
44 taken which may have been inadequate or adequate, and that
45 there were a number of situations where the steps taken by
46 the former leadership teams, given the state of
47 psychosexual knowledge at the time, were probably

1 defendable. I'm not - Gerard Phillips of my office drove
2 that more than I did, but whatever we wanted to see for the
3 purpose of generally assessing what was available, either
4 for the purposes of discovery or for the purposes of
5 strategic or disclosure to insurers or whatever, was made
6 available to us by the Christian Brothers.

7
8 Q. Because that was a motivation, wasn't it - not only
9 understanding it for the purpose of defence, but satisfying
10 the insurer that the exclusion clause wouldn't apply
11 because of prior knowledge? That was one of the reasons
12 for undertaking the researches, isn't that right?

13 A. Look, it may have been. The issue with the insurer
14 was no insurance cover in Western Australia. The only
15 insurance cover was in New South Wales and Victoria, and
16 whether prior to the commencement of the proceedings by
17 Slater & Gordon the Brothers in New South Wales and
18 Victoria knew, or should have anticipated, that proceedings
19 would be brought against them. So it was a fairly finite
20 inquiry, in some ways. This was more directed towards
21 getting a feel for what documentation there was and what it
22 showed around the administrative response in years gone by
23 and --

24
25 Q. It was more than just getting a feel for, Mr Harrison,
26 wasn't it? It was understanding what documents were out
27 there, either that were discoverable, that were relevant to
28 the ongoing dispute with the insurer, or necessary for your
29 defence?

30 A. Yes.

31
32 Q. It was more than getting a feel for; it was getting
33 all the documents that were relevant from Rome or
34 Australia, and understanding their content.

35 A. I agree with that.

36
37 Q. In addition to that, if we can come back to your
38 statement, you had Carrington Investigations, a private
39 investigation company, conduct inquiries, and we referred
40 to that earlier.

41 A. Yes.

42
43 Q. Then if we can go to paragraph 68, you referred there
44 to three reports that were provided from Carrington
45 Investigations.

46 A. Yes.

47

1 Q. Can I take you to a document in that folder you have
2 been given. It is behind tab K. These are conference
3 notes in relation to the litigation, 11 April 1994, with
4 various lawyers present and Brother Dominic Obbins. Who
5 was Dominic Obbins?
6 A. He was the archivist at the St Mary's Province of the
7 Christian Brothers.
8
9 Q. What this appears to be, Mr Harrison, is an index to
10 documents at the archives of Haberfield. Now, Haberfield
11 being the head office of the Christian Brothers?
12 A. At that time in New South Wales, having shifted from
13 Strathfield to Haberfield, and then went on to Balmain at
14 some stage.
15
16 Q. Thank you. So this tells us the titles, if you like,
17 of the documents that were held at Haberfield.
18 A. Yes.
19
20 Q. So you have, just to go through a few of them, the
21 council meeting minute books?
22 A. Yes.
23
24 Q. And the visitation reports?
25 A. Yes.
26
27 Q. Provincial correspondence?
28 A. Yes.
29
30 Q. Including Western Australian Province?
31 A. Yes.
32
33 Q. And then, going over the page, various other
34 documents. Can I take you to the bottom of page 3. There
35 is reference there to "Scrutiny books". Do you see that at
36 the bottom of page 3? Can you help us with what a scrutiny
37 book was?
38 A. Look, my best guess is that that was some sort of book
39 in which things like canonical warnings and such like,
40 issues of discipline, were recorded or copies retained.
41
42 Q. Was there such a thing as a book of complaints or a
43 complaints book?
44 A. I don't believe so, I have never heard of such.
45
46 Q. But was there a book that contained complaints albeit
47 called a different name?

1 A. I don't believe so.
2
3 Q. So the scrutiny book wasn't a complaints book?
4 A. No, a scrutiny book was a sanction book.
5
6 Q. If we can turn over to page 4, about two-thirds of the
7 way down there is reference to "restricted material". Do
8 you see that?
9 A. Yes.
10
11 Q. That restricted material was in the filing cabinet of
12 Brother McDonald's office. Do you see that?
13 A. Yes.
14
15 Q. It concerns "dispensations correspondence from
16 brothers". I take it that dispensations correspondence
17 refers to individual brothers seeking dispensation from
18 their vows to the superiors within the Order?
19 A. Yes, I agree with that.
20
21 Q. Can I then turn to tab 0. Tab 0 was a document that
22 was attached to one of the Carrington investigation reports
23 that you referred to in your statement that I have just
24 taken you to, Mr Harrison, you understand that?
25 A. Yes.
26
27 Q. This document is authored by Brother Faulkner and
28 dated 6 August 1993. Do you see that? It is on page 4 at
29 the bottom.
30 A. Yes.
31
32 Q. It is headed, "Christian Brothers institutions -
33 Information for the Attorney General". Did you know
34 anything of the circumstances in which Brother Faulkner
35 provided information for the Attorney General at this time?
36 A. No.
37
38 Q. Have you seen this document before?
39 A. Yes.
40
41 Q. You saw it when you read the Carrington report?
42 A. Look, I saw this earlier this year as a part of
43 a freedom of information request that was going backwards
44 and forwards between the Brothers and the Premier's
45 Department, I think. I can't recall having seen it before
46 then.
47

1 Q. Do you accept that it was annexed to the Carrington
2 report, or would you like me to show you?

3 A. No, I accept that it was.
4

5 Q. What this refers to is background data in relation to
6 each of the four homes, the number of boys who had lived in
7 the institutions - over 4,000 - and the fact that between
8 1901 and 1983, 175 brothers served. Do you see that?

9 A. Yes.
10

11 Q. Then under number 2, "Allegations of abuse", there is
12 reference to the CIB?

13 A. Yes.
14

15 Q. The CIB is likely, can I suggest, to be the criminal
16 investigation bureau of the police?

17 A. I agree with that.
18

19 Q. And this notes that the CIB had sent Brother Faulkner,
20 on 30 July 1993, a list of 19 names presumably against whom
21 complaints had been made, and there is reference to six
22 living, six dead, six are ex brothers still living, as
23 opposed to brothers, and one is an ex brother unknown, and
24 that Brother Faulkner provided the CIB with available
25 information on all of those people. Now, if we can turn
26 over the page, there is reference to VOICES material, and
27 then various complaints that had been made to the
28 Christian Brothers. Then, at 2.4, reference to the
29 inquiries made by the Christian Brothers itself. Based on
30 those sources of information - that is, allegations and
31 information from the congregational archives - Brother
32 Faulkner's best estimates, as at August 1993, were strong
33 evidence of five brothers being multiple offenders - three
34 dead, two having left the Order; four who admitted offences
35 when confronted by superiors, and to the best of Brother
36 Faulkner's knowledge they didn't re-offend; and others that
37 had been named, but there was no conclusive evidence to
38 substantiate those claims. Do you see that?

39 A. Yes.
40

41 Q. Then there is reference to the handling of complaints
42 by superiors at the time. There is reference to the
43 understanding of congregational superiors of child sexual
44 abuse. In particularly paragraph 32, there is reference to
45 the offences being viewed primarily as "moral offences",
46 and, therefore, moral exhortations, rebukes, canonical
47 warnings and transfers to other schools were employed as

1 responses to offences, although those who were not yet
2 under final vows were dismissed, and in the rare case of
3 a serious offence being proven against a finally professed
4 brother, he was dismissed. Now, that's your understanding
5 of the way in which the Order viewed such matters?

6 A. Yes.

7

8 THE CHAIR: Q. Can I ask, that view, that understanding,
9 is the view that would have been held by those responsible
10 for managing the Order; would that be right?

11 A. I suspect so, your Honour.

12

13 Q. We heard earlier in the day that the trustees were the
14 same people who were the management committee - that's my
15 words - but no doubt it was called something, who managed
16 the order. What were they called?

17 A. The congregational leadership team?

18

19 Q. Is that what it is called, the congregational
20 leadership team are the trustees as well?

21 A. Yes.

22

23 MS FURNESS: Q. Not the executive?

24 A. My understanding is the members of the congregational
25 leadership team at the relevant time were also deemed, or
26 by statutory --

27

28 THE CHAIR: Q. The trustees?

29 A. Were the trustees.

30

31 Q. You know of the evidence that has been given to us in
32 these proceedings, and you know, also, what has otherwise
33 been found. It is very clear, isn't it, that there was
34 a large-scale failure of effective management of the these
35 institutions?

36 A. Your Honour, I would agree that these institutions
37 were, during lengthy periods, probably out of control and
38 that some serious errors of judgment were made. I think,
39 your Honour, if it ever came to adjudicating on what the
40 knowledge was at the relevant time in relation to someone
41 who was hurt in 1962, that this kind of misunderstanding or
42 flawed approach was common enough throughout leadership
43 teams of government and non-government entities.

44 I think --

45

46 Q. It is not a question of misunderstanding; it is
47 a question of an entirely wrong understanding, isn't it?

1 A. Flawed.
2
3 Q. We're talking about criminal offences being committed
4 on small children. That's what we are talking about, isn't
5 it? There is no room for misunderstanding. It is a wrong
6 understanding, isn't it?
7 A. Well, your Honour, I was more - sure.
8
9 Q. To just summarise the breaches that we're looking at
10 here, for some of these children there was a breach of the
11 promise of an education and a better life in Australia,
12 wasn't there; correct?
13 A. Promise by?
14
15 Q. By the Christian Brothers?
16 A. That may - yes, your Honour.
17
18 Q. And that's a promise to which the management
19 committee, the congregational leaders, would have been
20 party?
21 A. Well, your Honour, that's where I don't fully
22 understand the relationship between the Commonwealth
23 Government, the Christian Brothers, the Catholic Episcopal
24 Committee for the - you know, as to who said what to whom,
25 and in Birmingham in 1942, about what was going to happen
26 at Bindoon. I don't understand that.
27
28 Q. Is it possible to believe that the Christian Brothers
29 would have said, "No, we're not going to provide these
30 children with an education; we're going to put them to work
31 in the fields at the age of 12"?
32 A. No. But, your Honour, as to what was doable in 1943
33 or 1944 or post the depression or back there, then, in
34 relation to these institutions, with these kids, coming out
35 of the horrendous experience of World War II, you know -
36 I would have no doubt, your Honour, it was a very difficult
37 time. As to the wisdom of the Christian Brothers caring
38 for very young children in the circumstances that they did,
39 with the benefit of hindsight - and, your Honour, I'm a bit
40 reminded of the Richmond report in New South Wales, in
41 closing down psychiatric institutions --
42
43 Q. I think that's a little different. Every child,
44 Mr Harrison - every child - back in 1943, 1933 - go back as
45 far as you like - was entitled to an education, weren't
46 they?
47 A. Yes.

1
2 Q. And the Christian Brothers described these
3 institutions as "schools" - as "boarding schools".
4 A. Yes.
5
6 Q. That carries with it, obviously, the connotation that
7 there will be an education.
8 A. (Witness nods).
9
10 Q. And the evidence is plain that many of the children
11 didn't get that education, did they?
12 A. Yes.
13
14 Q. We also know - and it is repeated over and over
15 again - of the extreme brutality that was inflicted on many
16 of these children, don't we?
17 A. Yes.
18
19 Q. It is inconceivable that the congregational leaders
20 didn't know that that was the form of punishment delivered
21 to the children, isn't it?
22 A. Yes.
23
24 Q. And it is inconceivable they didn't know that the
25 violence went beyond punishment - it was gratuitous in many
26 cases. It is inconceivable they didn't know that, isn't
27 it?
28 A. Well - yes, your Honour.
29
30 Q. And, also, given the extent to which we now know of
31 the sexual abuse of these children and the circumstances in
32 which it happened, it is inconceivable that the
33 congregational leaders did not also know that sexual abuse
34 was occurring, described in this document as "moral
35 failure"; correct?
36 A. Correct.
37
38 Q. Now, we therefore have the circumstance that whatever
39 be the legal structure, the congregational leaders of this
40 Order plainly failed in their duty to care through their
41 subordinates for these children, didn't they?
42 A. For those children who were hurt?
43
44 Q. Yes.
45 A. Yes.
46
47 Q. And we know that there is a significant number of

1 children who were hurt.

2 A. (Witness nods).

3

4 Q. Now, this is a philosophical question, I appreciate --

5 A. And personal opinion, I assume, your Honour.

6

7 Q. Yes, indeed. But do you think that we should continue
8 to tolerate a common law position where those who had
9 responsibility, and their successors who carried forward
10 the assets and capacity to organise an Order such as this,
11 should be able to avoid legal liability for the harm done?

12 A. Well, your Honour, look, I think it was critical that
13 there be a common law system that Slater & Gordon could use
14 to bring these cases to light and to commence the process
15 that is ongoing. The law on vicarious liability,
16 your Honour, which is more down to you than me, is on the
17 move, and we're now moving in the UK to essentially strict
18 liability --

19

20 Q. They have moved, yes.

21 A. -- for this kind of closed work, because of the power
22 imbalance, et cetera, et cetera. As to whether the law of
23 vicarious liability moves so that Channel 7 is liable for
24 the criminal actions of a high-profile presenter - as to
25 where it goes, but, your Honour, the common law is
26 critical. We live in - our democracy is critically
27 dependent upon the ability of people to bring novel,
28 controversial, social issues to the courts, to have the
29 fight, to win or settle, ventilate. But it does take the
30 common law sometimes a few years to catch up with
31 expectations, and judges, like anyone else, have been
32 learning over the last 20 to 25 years about what was
33 actually occurring in institutions, and perhaps if they had
34 known more back there then, Slater & Gordon would have got
35 more traction with the common law system and we would have
36 been in a different negotiation position.

37

38 Q. I think what you are saying to me is that it is clear
39 that a case such as this, now that it is revealed, tells us
40 that we need to take a very careful look at the common law
41 situation in relation to the liability of such an
42 institution.

43 A. Look, I think we do, your Honour. I do think a part
44 of the common law, part of the checks and the balances of
45 the common law, are defences. I do think the statute of
46 limitations is there but in a much more satisfactory form
47 in the East Coast, about allowing a plaintiff to sue out of

1 time when there are circumstances which warrant the
2 plaintiff being able to sue out of time, but also about
3 setting up some focus on the ability to have a just trial
4 40 to 50 to 60 years after the event, about what happened,
5 who said what, what was known, what the realities were,
6 what cause and effect there was, et cetera, et cetera. So
7 I think, your Honour, I'm a big supporter of the common
8 law, but you have to have some checks and balances with the
9 common law. If you have exemplary damages, punitive
10 damages, interest and what have you, you do need to have
11 the defences which have been developed by - as a part of
12 our common law.

13
14 Q. Yes, or you may need statutory intervention, which
15 might be the reality here?

16 A. I believe, your Honour, any victim of sexual crime,
17 anywhere - at home, in an institution - should be properly
18 taken care of by the State, and that - and I also believe
19 your Honour is going to end up with a redress scheme of
20 some sort, and it is a question of balance. So the three
21 things in my basket are common law, it is good, but you do
22 have to have some checks and balances; secondly, a proper
23 statutory scheme for all victims of sexual crime; and,
24 thirdly, once - some sort of redress scheme around the
25 particular issues that we are currently confronting, in
26 relation to these old residential care institutions.

27
28 Q. Thank you for those thoughts. When you were acting
29 for the Brothers in the course of this litigation, did
30 those instructing you come to a realisation that there had
31 been the failure that we spoke of in terms of the
32 management of this institution?

33 A. Generally, yes, your Honour. The big issue for us was
34 overstretch, the reality of the cases acting competently
35 and prudently so that there are resources for people who
36 deserve them, and some balance to how one responds to
37 a very unsuitable, inappropriate, group action approach to
38 this kind of problem.

39
40 Q. Well, yes, although for any of the 250 to have
41 marshalled their own proceedings would have been almost
42 inconceivable, wouldn't it?

43 A. Your Honour, I believe any case of sexual abuse from
44 the past should be handled as - I do think the class action
45 structure is - was - a part of the difficulty that we had
46 in terms of getting to an earlier, more cost-effective and
47 fairer outcome.

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Q. We discussed what could have been done earlier, but it is just not on to suggest that these individual plaintiffs could ever have themselves mounted their own case.

A. Oh, no.

Q. It is just inconceivable. The only vehicle they had was some cooperative action, wasn't it?

A. But I think there were problems with that model.

Q. It may be, but that was all they had. There was no other way of getting to your clients.

A. I'm not being critical of people - I mean, I'm saying it was important that Slater & Gordon did what they attempted to do for these men, but bringing the cases where they brought them and dealing with them in the way they dealt with them, I think, compounded the problems many, many years ago, in relation to a novel form of claim of getting as quickly as we could have to some sort of sensible resolution.

Q. Did your group - you, the lawyers, in your group - consider whether or not the Christian Brothers were actually vulnerable, leaving aside the limitation question, to a proceeding which was framed upon the negligence in managing the organisation?

A. Oh, yes. I mean, I think, your Honour, the two aspects of liability are that question of whether vicarious liability would extend to a closed residential institute of this type and, secondly, whether there was evidence of administrative negligence or carelessness in relation to managing either known claims, or not having adequate systems in place. But, your Honour, I would, on behalf of the Christian Brothers, contend that when you do look at what the state of knowledge was back at that time, some of this flawed approach was quite commonplace. It is a long time ago, your Honour. I'm not defending it, but - in other words, your Honour, if there is to be a case dealt with in front of a judge and a jury in relation to something that happened in 1944, you would have to go back to look at what the state of knowledge was in relation to systems and --

Q. It didn't take much knowledge to know that sexual assault of a little boy was a serious criminal offence, did it? That has to be the starting point and the end point for this discussion, doesn't it? At the centre of this are

1 very serious criminal offences.

2 A. I agree with that, your Honour.

3

4 Q. And it is just inexcusable to describe them as "moral
5 failures", isn't it?

6 A. Yes, your Honour.

7

8 MS FURNESS: I will just complete a couple of documents,
9 if I can, before we adjourn.

10

11 Q. We are behind tab 0, Mr Harrison. It is up on the
12 screen. Paragraph 3.3. Just to reorientate, this is
13 a document prepared by Brother Faulkner for the attention
14 of the Attorney General in August 1993, prior to the
15 litigation having been commenced. It refers in
16 paragraph 3.3 to the results of inquiries carried out by
17 the Christian Brothers with the conclusion that:

18

19 *While all complaints were investigated by*
20 *Superiors, denial by a Brother accused*
21 *usually meant his word against that of*
22 *a boy.*

23

24 And that usually resulted in warnings and no further
25 action. Do you see that?

26 A. Yes.

27

28 Q. Then if we can turn over the page, there is reference
29 in paragraph 4 to "Practical assistance provided by
30 Christian Brothers", and then "Further movements towards
31 reconciliation". Do you see that further down?

32 A. Yes.

33

34 Q. And also reference in 5.2 to Barry Coldrey?

35 A. Yes.

36

37 Q. Over on page 4, it gives us perhaps the first
38 indication as to why this document might have been
39 prepared. 5.7 says:

40

41 *We believe that a public enquiry is not an*
42 *appropriate way of promoting reconciliation*
43 *or of assisting those who are presently*
44 *suffering.*

45

46 Do you see that?

47 A. Yes.

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Q. Does that help you recall anything about the circumstances of this document?

A. No.

Q. Do you see down at number 7, at the bottom of that page, requesting government assistance in establishing an appropriate medium of reconciliation with the aggrieved, as well as establishing and managing a fund to service needs and contributing towards the travel costs. Do you understand from that that the Christian Brothers was asking for government assistance in doing those things?

A. Yes.

Q. There is nothing you have seen to suggest that that government assistance was forthcoming, is there?

A. Not that I'm aware of.

Q. Can we then turn to tab L in that bundle. This is a letter of 1 December from you to the Office of the Superior General in Rome. Can I indicate to you that there were a number of letters you sent on this date with identical contents to different people. For these purposes, it is the Rome letter that has been included. That is in relation to seeking further documents held by Rome based on, firstly, what Slater & Gordon had sought; and, secondly, what Brother Coldrey had seen. Do you see that? A further indication of accessing the archives held in Rome for the purposes of this litigation; do you agree with that?

A. Yes.

Q. Then if we can turn to tab P, this is a letter from you, 13 February 1995, to Brother McDonald. This refers to:

After extensive consideration of the Christian Brothers' archives in Australia, it is possible to draw the following conclusions.

Now, you can see in the first paragraph that a brother was dismissed in 1943, noting that the brothers were on notice that he was inclined to fondle boys, looking at the scrutiny book on 5/12/30?

A. Yes.

1 Q. So that tells us that the brothers knew in December
2 1930 that he was inclined to fondle boys, and it wasn't
3 until 1943 that he was dismissed?

4 A. I accept that.

5

6 Q. Secondly, three brothers were transferred after
7 allegations were made. Now, are you able to tell us, from
8 your knowledge of these searches, whether they were
9 transferred to other institutions which housed or educated
10 children?

11 A. Look, I can't say that, but I think that may well be
12 the case.

13

14 Q. You certainly wouldn't exclude it, would you?

15 A. No.

16

17 Q. And then two brothers received letters requesting
18 explanations which were responded to with denials. Now,
19 these three conclusions are in respect of one or more of
20 the four homes; isn't that right? It says "Re: Trustees of
21 the Christian Brothers [at the suit of] Slater & Gordon"?

22 A. Yes.

23

24 Q. Then there is reference on the second page to other
25 investigations. Do you see that?

26 A. Yes.

27

28 Q. Can I then turn to tab F. There are just a couple
29 more of these I want to finish off with, if I can. Tab F
30 is another letter from you to Brother McDonald dated
31 19 June 1995.

32 A. Yes.

33

34 Q. And that sets out the fact that additional records -
35 additional to those referred to earlier - were inspected,
36 and indeed, records in Rome were to be inspected, and
37 making various comments in respect of the materials
38 inspected and speaking of the system that was in place at
39 the time.

40

41 If we can turn over to page 4, you note in that
42 paragraph under paragraph (iv) that:

43

44 *There were some strong personalities*
45 *involved in the administration of these*
46 *institutes and a culture which made for*
47 *greater difficulty in the reporting*

1 *processing of such complaints as compared*
2 *with [elsewhere].*

3
4 Do you see that?

5 A. Yes.

6
7 Q. That supports the conclusion that his Honour put to
8 you that there was a manifest and fundamental failure of
9 management in respect of these four institutes; do you
10 accept that?

11 A. Around this issue?

12
13 Q. Yes.

14 A. Yes.

15
16 Q. Coming over to page 6, this is digressing for a moment
17 from the inspection of documents and the knowledge, to the
18 timing of the settlement. You note here, bearing in mind
19 this is June 1995:

20
21 *The consensus seems to dictate preparations*
22 *now with a view to putting a realistic*
23 *proposition to Slater & Gordon ...*

24
25 Do you see that?

26 A. Yes.

27
28 Q. So do we take it that you were of the view that your
29 investigations to date had put you in that position
30 by June 1995?

31 A. Yes.

32
33 Q. Finally, if I can turn your attention to document M,
34 document M was prepared by Ms Rimmer, who was one of the
35 counsel you had engaged. If we can just turn to the last
36 page, which is page 13, it tells you she was the author -
37 it tells you that on the first page, but the last
38 page gives you the date, 27 June?

39 A. Yes.

40
41 Q. This is all of the documents that she had inspected
42 and what they revealed. You have seen this document
43 before, haven't you?

44 A. I have.

45
46 Q. I won't take you through all of the references.
47 However, I will refer you to one aspect of it - I will come

1 back to that one aspect. So junior counsel were also
2 involved in reviewing all of these documents in order for
3 the defendants to be in a position to know what was known
4 at the relevant time by whom in respect of matters the
5 subject of litigation?
6 A. Yes.
7
8 MS FURNESS: Thank you. Your Honour, thank you for the
9 indulgence of those 40 minutes.
10
11 THE CHAIR: Have you more to go?
12
13 MS FURNESS: I do.
14
15 THE CHAIR: We are going to look at some more of these
16 documents tomorrow?
17
18 MS FURNESS: Yes. I indicated to the witness that he
19 might like to look at tab C overnight, which was the longer
20 document of 7 December 2003.
21
22 THE CHAIR: I think he should.
23
24 MS FURNESS: Yes.
25
26 THE CHAIR: Very well. We will adjourn. Do you want to
27 start earlier in the morning tomorrow or not?
28
29 MS FURNESS: Can I just indicate that tomorrow morning we
30 have Mr Harrison's evidence to conclude, and I will
31 probably be about another 20 or 30 minutes.
32
33 THE CHAIR: How long will you be, Ms Needham?
34
35 MS NEEDHAM: Currently, no not very long, your Honour.
36
37 THE CHAIR: What comes after that?
38
39 MS FURNESS: Then we have Ms Lethorn, who is giving
40 evidence in relation to Redress WA. I anticipate she will
41 probably be an hour and a half. I have said this before
42 and been wrong, your Honour, but I will say it again.
43
44 THE CHAIR: We have been planning on finishing tomorrow by
45 lunchtime?
46
47 MS FURNESS: I have some confidence that we will finish by

1 lunchtime.

2

3 THE CHAIR: Should we start at 9.30?

4

5 MS FURNESS: Yes, your Honour.

6

7 THE CHAIR: All right. 9.30am.

8

9 **AT 4.40PM THE COMMISSION WAS ADJOURNED TO**
10 **FRIDAY, 2 MAY 2014 AT 9.30AM**

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