



## Précis Paper

### Di Cesare v Bishop Paul Bird and Congregation of the Christian Brothers [2021] VSC 25

A discussion about *Di Cesare v Bishop Paul Bird and Congregation of the Christian Brothers* [2021] VSC 25, including a discussion about the involvement of insurance companies, responses to subpoenas, privilege, confidentiality, relevance and redaction of documents.

#### **Discussion Includes**

- Key facts
- Subpoenas
- Arguments raised by CCI
- Subpoenaed parties
- Privilege
- Wide and oppressive
- Redactions

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# Di Cesare v Bishop Paul Bird and Congregation of the Christian Brothers [2021] VSC 25

In this edition of BenchTV, Dr Gideon Boas (Barrister, Castan Chambers, Victoria) and Dr Eamonn Kelly (Barrister, Tanfield Chambers, Victoria) discuss the case of *Di Cesare v Bishop Paul Bird and Congregation of the Christian Brothers* [2021] VSC 25. They discuss the involvement of insurance companies, responding to subpoenas, privilege, confidentiality, relevance and redaction of documents.

### Key facts

1. This case involved a hearing de novo following an earlier decision of the Judicial Registrar as to whether a subpoena issued by a plaintiff served a legitimate forensic purpose. Catholic Church Insurance Ltd (CCI) appealed the first instance decision under Rule 84.05 of the *Supreme Court (General Civil Procedure) Rules 2015* (VIC).
2. This case was brought by Mr Di Cesare. He was a child living in Ballarat in the 1980s when he was sexually abused by a priest. Mr Di Cesare claimed that upon the death of his brother, the priest attended the family home to administer pastoral care and in the process of doing so, sexually abused him in his home. The priest was roaming around various parishes of the Ballarat Diocese between 1969 and the early 1990s. The priest was convicted in 2016 after pleading guilty to abusing a number of boys, including Mr Di Cesare.
3. This was assault and battery committed by the priest for which the Ballarat Diocese was said to be vicariously liable for an intentional tort. The plaintiff also claimed that the Ballarat Diocese was negligent as it failed to uphold its duty of care to Mr Di Cesare, and having breached it, injury was caused.
4. Bishop Paul Bird had been sued as he stands in the place of the Ballarat Diocese, and was named by the Diocese as the proper defendant.
5. The purpose of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (VIC) is to get around a difficulty plaintiffs face in suing churches, particularly the Catholic Church. The Catholic Church, having arranged its assets behind trusts, was not able to be sued in a way that would enable the plaintiff to recover from the Catholic Church. This was known as the 'Ellis defence' (*Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis & Anor* [2007] NSWCA 117). The legislation enables plaintiffs to sue and recover from institutions.
6. The plaintiff claimed he complained to a Bishop of the Diocese of Ballarat at that time, who made a note of it and told him he would take action. On attending St Patrick's College, he was subjected to further physical abuse, such as bullying and assault by clerical teachers and other teachers and students.

7. The plaintiff brought a claim for aggravated and exemplary damages as the priest was allowed to continue to perform his duties and continue to abuse other children. This circumstance may be relevant in a claim in aggravated or exemplary damages.

### Subpoenas

8. Mr Di Cesare issued a subpoena to CCI. Claimants will generally issue subpoenas to bodies that hold documents.
9. CCI objected to the subpoena issued to it. Typically, CCI will open a file in relation to a claim when it receives a notification from one of its insured clients. Once CCI determines that insurance coverage is available, it appoints its solicitors to act on its behalf in respect of the insured client. The distinction between the insurance stage and the ordinary privileged communications stage is important to understand when bringing a claim. CCI instructs insured clients to provide any relevant records in relation to the claim, the claimant or the alleged offender for the purpose of investigating and defending the claim. As many of the offenders exist on multiple insurance files, CCI has extensive holdings with respect to a particular offender that might be relevant to a claim being brought.
10. The nature of the documents that were sought from CCI included a schedule of six items, two of those items, items three and six, were forgone by the plaintiff during the course of the appeal hearing because, on questioning from the Judge, the plaintiff conceded that those two items were absorbed into other paragraphs in the schedule and were unnecessary. The documents that were sought concerned complaints, allegations, warnings, concerns, investigations, including internal investigations of sexual abuse committed or alleged to be committed by the priest, as well as file notes, letters, memoranda, reports, minutes or like documents relating to or recording disciplinary or proposed disciplinary actions against the priest in relation to sexual abuse or alleged sexual abuse.
11. CCI's claims were threefold. Firstly, either the subpoena does not go to any properly articulated allegation or alternatively is an impermissible attempt at fishing. Secondly, the alleged abuse is not a real issue in dispute in the proceeding and proof of the abuse is therefore not a legitimate forensic purpose supporting the subpoena. Thirdly, the subpoena is too wide and oppressive.
12. The defendants' pleaded position was that the priest's actions, being the abuse against Mr Di Cesare, was admitted to the extent that it was described in the sentencing judgment per the criminal conviction but not otherwise admitted. It also was not admitted that the abuse was voluntary, positive and intentional. This left some gaps in the proof required by the plaintiff of the abuse itself.
13. CCI complained that this is a restrictive or technical reading of the pleadings. The defendant was ostensibly admitting that the abuse occurred. The plaintiff rejected that position in its submissions. He said he was required to prove what was not admitted by the defendant.

That position was understood and endorsed in the first instance and on appeal. It makes relevant any documents that might tend to show that the priest did in fact abuse Di Cesare, and that might include evidence of abuse by the priest that predated or postdated the incident. That evidence might be used as tendency evidence that the priest would have been more likely to have perpetuated the abuse.

14. The plaintiff alleged that the duty that the Diocese owed him extended to protection of the plaintiff from sexual abuse by priests engaged by the Diocese, to act on knowledge that the priest had sexually abused children, including within the Diocese, and upon that knowledge to have removed him from priesthood and therefore not to expose the plaintiff to the abuse he experienced.
15. The position of the defendant was to ostensibly not admit that which was alleged to have been done by the priest and deny that it had knowledge of abuse that predated Mr Di Cesare's abuse.
16. In respect of knowledge, the plaintiff pleaded that the priest was a pedophile, that the Diocese knew or ought to have known that he was a pedophile and sexually abused children in the Diocese since 1970, and that he assaulted the plaintiff on or about 5 November 1984.
17. It was pleaded that a reasonable person in the position of the Diocese would have protected the plaintiff against sexual abuse, acted on that knowledge and removed the priest from the priesthood upon becoming aware of that.
18. The Judge noted that some of the documents being sought went to a broader notion beyond simple constructive or actual knowledge to allegations that there was a duty on the part of the Diocese to do certain things for the protection of children, including the plaintiff.

#### Arguments raised by CCI

19. CCI raised several objections. One of the objections it raised was that what was happening was a fishing expedition. CCI also argued that there was no legitimate forensic purpose for the documents that were being sought and the plaintiff was really trying to work out whether it had a case.
20. The decision is based on a series of cases that are well known and applied often by the courts. They include *Woolworths Ltd v Svajcer* [2013] VSCA 270 and *Volunteer Fire Brigades Victoria v CFA (Discovery Ruling)* [2016] VSC 57, which set out the expectations of a subpoenaing party and a party responding to a subpoena.
21. The documents that were sought would have to be relevant in accordance with the terms of section 55 of the *Evidence Act 2008* (VIC).
22. One of the arguments raised by CCI was that there is a delineation between documents sought that predate and postdate the abuse. CCI argued that any documents that postdate the abuse could not possibly be relevant to knowledge and therefore more broadly not

relevant to the case that the plaintiff sought to bring. The plaintiff argued this was a fairly reductive approach to both the question of knowledge and broadly the case the plaintiff wanted to establish. This is because evidence of, or information that might make its way into evidence of sexual abuse by the priest that postdates the plaintiff's abuse can contribute to an understanding of the system that was in place or not in place that had operated in the Diocese at the time. It might inform the mosaic of the case to determine whether it can be found on the balance of probabilities that the defendant knew or ought to have known about the priest, his behaviour and the risk that he posed to the plaintiff. The Judge concluded that these were matters that the documents could inform, and the test for the production of documents under subpoena was met in that respect.

23. As to the relevance of the documents sought about the priest's abuse, CCI argued that, firstly, there is no issue in dispute, and if there is no issue in dispute then the documents are not needed as proof is not required. Secondly, CCI argued that the statement of the pleadings and the particularization of knowledge in the pleading was inadequate and, because it was inadequate, this subpoena was really designed to 'fish out' some information that would enable the plaintiff to make out its case on knowledge.

#### Subpoenaed parties

24. Often the institution deposes to having few documents in its possession which would go to the question of knowledge. It is normally CCI who holds the most extensive records.
25. Normally, insurance companies have substantial carriage of the matter and they are involved in every step of the way, including in settlement, which is the way in which most of these matters resolve.
26. The plaintiff complained that CCI was not a third party to the proceeding, it was a subpoenaed party, and it was not the job of CCI to raise arguments as to the adequacy of the particulars. It was not the role of CCI to stand in the place of the defendant and argue the pleadings were not inadequate. If the defendant wished to do that, the defendant could have brought an application to strike out, or sought more particulars, which it had sought and been provided with.
27. A subpoenaed party can object to production. A party normally is limited to objecting to inspection. When there is a non-party who objects to production and raise issues, the question is really whether they are in fact a non-party.
28. Section 3 of the *Supreme Court Act 1986* (VIC) provides a broad definition of who a party is to a proceeding. It is not just the named parties. It includes 'every person served with notice of or attending any proceeding'. An insurer may be captured by that definition.
29. Under the *Civil Procedure Act 2010* (VIC), such party by virtue of the overarching obligations that are provided for under that Act may have to disclose documents that end up being part of contested subpoena hearings of the kind that occurred in this case.

30. Section 10 of the *Civil Procedure Act 2010* (VIC) defines who is bound by the overarching obligations. Section 10(1)(d) extends to any person who provides financial assistance or other assistance to any party insofar that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of the party in respect of that civil proceeding including, but not limited to, an insurer or a provider of funding or financial support including any litigation funder. There is little controversy that CCI is bound to follow the overarching obligations.
31. This does not necessarily extend to discovery and that question might be better considered by reference to section 3 of the *Supreme Court Act 1986* (VIC) as to whether the insurer is a party or not. It certainly extends to section 26 of the *Civil Procedure Act 2010* (VIC) which provides an overarching obligation to disclose the existence of documents. Those are ongoing obligations.
32. Section 26(1) provides that a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control of which the person is aware, and which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.
33. CCI was identified as an active participant in the proceedings, arguably was a party and was obliged to follow the obligations of the *Civil Procedure Act 2010* (VIC). There are penalties that are available for non-compliance and orders may be sought from the Court in respect of that Act to compel disclosure.

### Privilege

34. Where there are insurers who are making privilege claims, particularly in relation to communications from or to an insured about a potential or actual insurance claim, the Supreme Court noted the insurer claiming such privilege must satisfy the Court that the dominant purpose of such communication was the insurer or insured being provided with legal advice or professional legal services in relation to the proceeding rather than insurance services.
35. In *Brunswick Hill Apartments Pty Ltd v CGU Insurance* [2010] VSC 532 at paragraph 30, the Court noted documents are not privileged merely because one of their intended destinations is the desk of a lawyer. Of particular relevance in insurance claims are the reports and documents which owed their existence to the insurer looking to investigate the facts about a particular incident or event. Where the purpose of such report is for the insurer to satisfy itself about facts in order to understand its exposure or whether the event fell within the terms of the policy, great care must be taken to ensure that the investigative purpose is not then ex post facto turned into an assertion that the dominant purpose was for the purpose of confidential legal advice or in apprehended litigation. A process of investigation may be regarded as a precursor to the point at which it may be said that proceedings are prospective or reasonably anticipated.

36. There is some clarity that is required when client legal privilege is asserted by an insurer. In *IOOF Holdings v Maurice Blackburn Pty Ltd* [2016] VSC 311 at paragraph 47, the Judge noted formulaic and bare conclusory assertions are insufficient to discharge the onus of the party asserting privilege. Only focused and specific material will provide the necessary evidence.
37. In addition to the subpoena, a person may owe obligations as a party and under the *Civil Procedure Act 2010* (VIC). These can be run separately or in tandem with a subpoena objection.
38. When privilege is claimed, it is important to discern the work that has been done in the normal nature of an insurer and the point in which it could become liable to client legal privilege.

#### Wide and oppressive

39. The final argument raised by CCI was that the terms of the subpoena were too wide and oppressive. In that respect there were a large number of documents and, given the fact the documents were insufficiently relevant or the plaintiff was unable to identify adequately the relevance of them, that meant that the subpoena was too wide or oppressive and that CCI should not be required to respond to it.
40. CCI was able to identify to the Court the scope of the documents that were caught by the subpoenaed schedule and able to identify the quantity of that, being 3751 pages. CCI asserted in affidavit evidence that for it to comply with the subpoena and produce those documents in the manner in which it felt that it had to, it would cost \$30,000-\$35,000. In addition to that, there would be legal fees of around \$36,000.
41. An issue that was raised in the hearing was that CCI had prepared, presented to and assisted in multiple claims that had been made in the past in relation to a number of priests in the Diocese of Ballarat and that it should be in a position to access documents that presumably have previously been reviewed and in some way organised into claim files.
42. At paragraph 26 of the judgment, it was said that for a subpoena to be oppressive in relation to production of documents, it must be excessively burdensome and the documents sought to be produced must not appear to be sufficiently relevant to the proceedings. It is a conjunctive test. The relevant case on this point is *Spencer Motors Pty Ltd v LNC Industries Ltd* [1982] 2 NSWLR 921.
43. The plaintiff's position was that it was very clear what the plaintiff was seeking and that the terms of the pleadings were more than adequate to understand the nature of the claim. The plaintiff also argued that the defendant had not admitted the abuse for which the priest had been convicted. He had admitted the conviction. He had not admitted that his conduct in abusing Mr Di Cesare was voluntary, positive and intentional, which are important elements of the claim in vicarious liability against the Diocese. It was necessary for the plaintiff to prove the abuse and be able to prove knowledge on part of the Diocese, whether

that be knowledge in fact or constructive knowledge from which an inference could be drawn. There was information contained in the claim files identified by CCI that would assist the plaintiff in proving his claim.

44. The judgment is summed up in paragraph 36, where the Judge concluded that, subject to a possible revision of the wording, CCI was to produce the documents responding to categories one, two, four and five. Categories three and six were abandoned by the plaintiff as being duplicative. The Court found the subpoena was properly brought and CCI was required to respond to it. In coming to this conclusion, the Judge considered the nature of the plaintiff's claim and the breaches alleged, which went beyond the question of mere knowledge to a failure to adequately supervise the priest and put in place systems and reporting requirements.
45. One additional change to the term 'relating to' was required to enable categories two and five to proceed because the language is broad and capable of being oppressive. The plaintiff was content with amending that language and did so by consent after the conclusion of the hearing with the defendant.

### Redactions

46. Another issue in this case was whether CCI was permitted to redact the documents. The three common claims made with respect to unilateral redactions are privilege, confidentiality and relevance. Courts have jurisdiction and can inspect documents to determine whether in fact the privilege claim or relevance or irrelevance claim is made out and whether confidentiality in fact exists.
47. There has been a series of judgments involving CCI in which the question of confidentiality of other victims whose information was contained in documents that CCI was to produce arose. In case of *Stephensen v The Salesian Society Inc; Easton v The Salesian Society Inc* [2018] VSC 602 (*Stephensen*), the Judicial Registrar declined to allow the documents to be inspected by the plaintiff in unredacted form because the Court had some duty of confidentiality to victims who had provided information or about whom information existed in claims that did not concern them.
48. In a subsequent ruling in the case *Levey v Bishop Paul Bird* [2020] VSC 615 (*Levey*), the Judicial Registrar noted that she did not intend by the ruling in *Stephensen* to suggest that in all circumstances a subpoenaed party should redact the information pertaining to other victims of abuse not the subject of the claim. She intended that it be a relevant factor for consideration.
49. That obiter in *Levey* was reiterated in the first instance decision in *Di Cesare* at paragraph 20, where the Judicial Registrar provided guidance for parties in understanding and applying the question as to whether or not to redact.
50. In *Hera Projects Pty Ltd v Bisognin* [No 4] [2017] VSC 270 (*Hera*) from paragraph 38, Justice Riordan stated that, except in limited circumstances, a party will not be entitled to inspect

privileged documents, but a party having a legitimate forensic purpose will not otherwise ordinarily be denied inspection of a subpoenaed document. There is a distinction between privileged material and material which is confidential.

51. In *IOOF Holdings v Maurice Blackburn Pty Ltd* [2016] VSC 311, the Judge noted the precision to which a practitioner needs to justify their privilege claim. The jurisprudence is not quite clear on the degree of precision required for a claim of confidentiality or relevance.
52. In *Braham v ACN 101 482 580 Pty Ltd & ors* [2017] VSC 340 at paragraph 42, the Judge noted that, unlike in some other jurisdictions like NSW, in Victoria it may be permissible to unilaterally redact, but that is limited to disclosure and discovery, and is not permissible for subpoenas.
53. According to *Hera*, the appropriate path is to approach the Court by way of application and ask the Court to exercise its discretion to only inspect redacted copies of the documents. A subpoenaed party should present the full set of documents and make an application for a redacted inspection.
54. The redacting party bears the onus on justifying the legitimacy of its redactions. Courts have said that oaths are inconclusive so the subpoena from the objecting redacting party will not be sufficient. A court needs to determine on the material before it whether the redaction was necessary to attain justice between the parties.
55. In *Octagon Inc v Hewitt & Anor (No 2)* [2011] VSC 373 at paragraph 53, the Judge said 'redactions for relevance alone can offend the discovering party's prima facie obligation to produce for inspection the whole of the document being discovered by it. The fact that parts of the document are irrelevant does not ordinarily prejudice the discovering party in ways regarded as unjust. They have the protection of s 27 of the [Civil Procedure Act 2010 (VIC)] or, to the extent that the Act does not apply, the protection of the principle in *Home Office v Harman*'.
56. The test for substantiating a claim for redaction on the basis of confidentiality is that the confidentiality interests must be substantial. The fact that documents are confidential will not ordinarily be sufficient to deny inspection by an opposing party. Evidence needs to be put forward that the claimed confidentiality interests are other than those ordinarily present in litigation and will not be sufficiently protected by the *Harman* undertaking (*Home Office v Harman* [1983] 1 AC 280) and section 27 of the *Civil Procedure Act 2010* (VIC).
57. Where there are thousands of documents, an argument might be raised that it better be dealt with through affidavit evidence and submissions rather than putting it to a judicial officer to inspect.
58. In this case, a couple of sample claim files were provided to the Judge for consideration and that gave the Judge some comfort that what was being sought from CCI was not unduly onerous.

## **BIOGRAPHY**

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Dr Boas practices in the areas of criminal law (trial and appeal), personal injury (including medical negligence) and tort law, industrial as well as other civil and commercial areas. He used to work as a Senior Legal Officer at the United Nations International Criminal Tribunal for the former Yugoslavia.

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Dr Kelly accepts briefs in administrative, commercial, criminal and common law. Before coming to the Bar, he was Senior Associate to the Honourable Justice Ginnane in the Common Law Division of the Supreme Court of Victoria.

## **BIBLIOGRAPHY**

### Cases

*Di Cesare v Bishop Paul Bird and Congregation of the Christian Brothers* [2021] VSC 25

*Braham v ACN 101 482 580 Pty Ltd & ors* [2017] VSC 340

*Brunswick Hill Apartments Pty Ltd v CGU Insurance* [2010] VSC 532

*Hera Projects Pty Ltd v Bisognin* [No 4] [2017] VSC 270

*Home Office v Harman* [1983] 1 AC 280

*IOOF Holdings v Maurice Blackburn Pty Ltd* [2016] VSC 311

*Levey v Bishop Paul Bird* [2020] VSC 615

*Octagon Inc v Hewitt & Anor (No 2)* [2011] VSC 373

*Spencer Motors Pty Ltd v LNC Industries Ltd* [1982] 2 NSWLR 921

*Stephensen v The Salesian Society Inc; Easton v The Salesian Society Inc* [2018] VSC 602

*Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis & Anor* [2007] NSWCA 117

*Volunteer Fire Brigades Victoria v CFA (Discovery Ruling)* [2016] VSC 57

*Woolworths Ltd v Svajcer* [2013] VSCA 270

## Legislation

*Civil Procedure Act 2010* (VIC)

*Evidence Act 2008* (VIC)

*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (VIC)

*Supreme Court Act 1986* (VIC)

*Supreme Court (General Civil Procedure) Rules 2015* (VIC)