HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27A – Appellant's submissions

Note: see rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: JOANNE EDITH WILLMOT
Appellant

and

THE STATE OF QUEENSLAND
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES ARISING

2. In determining whether a Court should order a permanent stay of proceedings in a claim against an institution arising from an allegation of historical sexual or physical abuse:
   (a) How should the availability of evidence of an eyewitness to some of the sexual assaults alleged be regarded in the context of determining whether a trial will be unfair to the respondent or so unfair or oppressive to the respondent as to constitute an abuse of process;

   (b) Does a psychiatrist's expressed difficulty in disentangling the events in the appellant's history "with absolute precision" lead to the conclusion that it would be "insurmountably difficult" to extract the psychiatric impact of an assault by one perpetrator from other events in the appellant's life such that a trial would be unfair to the respondent or so unfair or oppressive to the respondent as to constitute and abuse of process;

(c) Does the discovery that a perpetrator is alive but has not been interviewed impact on whether a trial will be unfair to the respondent or so unfair or oppressive to the respondent as to constitute and abuse of process;

(d) Does the "heavy onus" that an applicant for a permanent stay bears to demonstrate a trial will be unfair to the respondent or so unfair or oppressive to the respondent as to constitute and abuse of process require it to demonstrate that the absence of evidence from a perpetrator is likely to have a practical and meaningful impact on the trial.

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PART III: SECTION 78B NOTICE

3. No notice is required under s78B of the *Judiciary Act* 1903 (Cth).

PART IV: CITATIONS

4. The primary judgment is unreported. The medium neutral citation is: *Willmot v State of Queensland* [2022] QSC 167.

5. The judgment of the Court of Appeal is unreported. The medium neutral citation is: *Willmot v State of Queensland* [2023] QCA 102.

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PART V: FACTS

6. The appellant was born on 6 April 1954. She is an Indigenous woman. Her claim is for damages as a result of serious physical and sexual abuse which she claims she suffered whilst she was a State Child pursuant to the *State Children Act*, 1911 (Qld) and under the control of the respondent by virtue of the *Aboriginals Protection and Restriction of the Sale of Opium Act*, 1897 (Qld) (CAB 6; SC [1]; CAB 36; CA [2]).

7. The applicant alleged and gave evidence by affidavit (AFM, no 8) that she suffered sexual and physical abuse perpetrated by Jack Demlin whilst in the care of "foster
30 carers", Jack and Tottie Demlin (**Demlin assaults)** (CAB 8; SC [10]; CAB 10; SC [13]; CAB 36; CA [4]; CAB 38 – 39; CA [18] – [19]); serious physical abuse whilst a resident of the Girls' Dormitory operated by the respondent in Cherbourg (**Girls' Dormitory assaults**), the abuse being severe floggings administered by Maude Phillips (the Girl's

Dormitory Supervisor) (CAB 10; SC [14]; CAB 36; CA [6]; CAB 41 – 42; (CA [20]); and two sexual assaults whilst she was visiting her maternal grandmother's house near Ipswich; the first in 1960 by a relative described in the SC and CA reasons as NW (**NW assault**) (CAB 13; SC [25]; CAB 36; CA [5]; CAB 42 – 43; CA [23]) and the second in or around 1967 by a relative described in the SC and CA as "Pickering" (CAB 13; SC [27]; CAB 36; CA [5]; CAB 42 – 43; CA [23]).

8. Jack and Tottie Demlin are dead. RS was a witness to the Demlin assaults. She was in the same bedroom at the time the assaults occurred. She was also assaulted by Jack Demlin. A comprehensive affidavit detailing her account was relied on by the appellant at the primary hearing (AFM, no 7; CAB 8 – 9; SC [11]). She was not cross examined on her affidavit.

9. RS claims to have reported the abuse to Maude Phillips. Her report was met with an allegation that she was lying and that "Jack Demlin is a Christian man." There is no documentary record of the report or any investigation into the Demlins undertaken at the relevant time (AFM, no 7; CAB 9; SC [11]).

10. Several other witnesses gave evidence by affidavit that Maude Phillips regularly administered severe floggings during the course of her tenure as Girls' Dormitory Supervisor (AFM, no's 4, 5, 6; CAB 11 – 13; SC [17] – [24]; CAB 42; CA [21] – [22]). There was also reference to her assaulting girls in the Girl's Dormitory in the documentary records of the respondent (AFM no 3; CAB 11 – 13; SC [17] – [24]; CAB 44 – 45; CA [26] – [28]).

11. NW is alive. The fact that he was living was discovered shortly prior to the application for a permanent stay. The lawyers for the appellant spoke to him but did not put the allegations of abuse to him (CAB 9; SC [26]). The respondent has provided no evidence that any representative has spoken to him or taken a statement from him at any time.

12. By claim and statement of claim filed 11 June 2021, the appellant commenced proceedings against the respondent for damages for personal injuries as a consequence of its alleged negligence in the care of the appellant whilst she was a State Child. The

claim is based on allegations of negligence alone. The appellant did not advance a case based on vicarious liability for the assaults. Rather the claim is based on the failure by the respondent to properly monitor and supervise her and those into whose care she was placed by the respondent (CAB 66; SC [40]; CAB 37; CA [7]).

13. The appellant's claim is not subject to a limitation period. Section 11A(1) of the *Limitation of Actions Act* 1974 (Qld) (**LAA**) provides that an action for damages for personal injury resulting from the abuse of the person when the person was a child may be brought at any time and is not subject to any limitation period under any act or rule of law. Abuse is defined to include sexual, serious physical and psychological abuse perpetrated in connection with sexual or serious physical abuse: s 11A(6) LAA.

14. Section 11A(5) LAA provides that s11A does not limit any inherent, implied or statutory jurisdiction of the court. The section includes, as an example, that the section does not limit a court's power "to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible."

15. On 14 December 2021, the respondent filed an application to permanently stay the appellant's proceedings. The application was heard in the trial division of the QSC on 14 July 2022.

16. The appellant relied upon her own affidavit in addition to an affidavit from RS. She also relied on affidavits from her lawyer, Kate Ross. Affidavits from Joan Neilsen, Eva Collins, Ruth Hegarty and Aileen Watson provide additional evidence of the conduct of Maude Phillips in the management and care of children in the Girls' Dormitory. There was some debate about the admissibility of some of the affidavit evidence from Neilson, Watson, Hegarty and Collins. Her Honour rejected the evidence of Hegarty but admitted the evidence of Neilson, Watson and Collins on the basis of "tendency" evidence (CAB 11 – 13; SC [17] – [24]; CAB 42; CA [21] – [22]).

17. By order of 22 August 2022, the primary judge ordered that the applicant's proceedings be stayed. The QCA heard an appeal on 20 March 2023 and upheld the primary judge's

decision on 16 May 2023. The CA treated the review of the primary judge's decision in accordance the rule in *House v The King* and concluded that no error in the exercise of discretion had been demonstrated (CAB 64; CA [86]-[87]). Special leave to appeal to this court was granted on 9 November 2023.

PART VI: ARGUMENT

1 – Correctness not Discretion test

18. The principles upon which a permanent stay should be granted in a case involving allegations of historical sexual abuse were examined in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*[1] (***GLJ***). *GLJ* considered the issue of a permanent stay in the context of the operation of s6A *Limitation Act 1969* (NSW). Section 6A is not materially different from s11A LAA.

19. The appellant relies upon the principles emerging from *GLJ* including:[2]

(a) The applicable standard for appellate review of such an order is the "correctness standard" identified in *Warren v Coombes*.[3] An error of principle by the court below, as applied to appellate review of a discretionary decision in accordance with *House v The King*, is not required to be identified;

(b) A court must not permit trials that will be demonstrably unfair. Courts have many tools which can be used to prevent trials which will be necessarily unfair, as a result of which only exceptionally will there be an occasion for the remedy of a permanent stay:

(c) There are separate principles for permanent stays of criminal claims and civil claims which do not attract s 6A *Limitation Act 1969* (NSW), as opposed to applications for permanent stays to which s 6A applies; and

(d) Permanent stays might more readily be available in a domestic or private context, as opposed to an institutional context.

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[1] [2023] HCA 32 at [20] - [26].
[2] *CM v The Trustees of the Roman Catholic Church of Australia* [2023] NSWCA 313 at [87]-[90].
[3] (1979) 142 CLR 531 at 552.

20. The CA should have reviewed the primary judge's decision in accordance with the "correctness standard" as identified in *Warren v Coombes* rather than approaching the question as one of the review of a discretionary decision such that an error of principle was required to be identified before the decision might be overturned.[4] The reasoning in *GLJ* is applicable in this case.

2 – Evidence Relating to RS

21. The primary judge noted that the respondent accepted that it was responsible for the appellant's care while she was in the care and control of the Demlins; that it "gave the plaintiff into the care and control of the Demlins"; and that it engaged the Demlins as foster parents and allowed the Demlins to be primary carer for the appellant while she was resident with them (CAB 17; SC [44]; CAB 46; CA [32]). There was no dispute on the pleaded case that the appellant and Jack Demlin were in the same premises for a period of time and that he may have therefore had the opportunity to commit the assaults as alleged.[5]

22. As noted above, the appellant led evidence from RS that she was present when assaults of the appellant occurred. RS was also assaulted. The primary judge found that the unfairness that flowed "as a consequence of the lengthy passage of time since the alleged events occurred, and the death of Jack Demlin, the evidence of RS highlights that the unfairness, and would, I accept, only render the trial more unfair" (CAB 28 – 29; SC [80]).

23. The CA considered that the evidence of RS was "evidence that would be called in the plaintiff's case. It might well assist Ms Willmot to establish her claim. However, the availability of it to her does not assure a fair trial to both parties. It does not repair the State's inability to investigate or obtain instructions, lead evidence or cross-examine about the foundational allegations" (CAB 61; CA [68]).

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[4] *House v The King* (1936) 55 CLR 499 at 504-505.
[5] Compare *GLJ* at [71]where there was considerable debate about whether Father Anderson was likely to have been in Lismore at the relevant times.

24. The appellant submits, with respect, that this conclusion is an error. The reasoning implies that the evidence of RS could only be regarded as being supportive to the appellant's allegations rather than being an objectively accurate account of the events in the broader factual matrix. Rather it should have been perceived as additional independent evidence available to the Court in order to determine whether the appellant's allegations were true or otherwise.

25. The evidence of RS is additional evidence that assists the court in determining the factual circumstances, and counters the allegation by the respondent that there was no useful evidence available to conduct a trial into the question of whether the appellant's injuries were caused by the negligence of the respondent.

26. Both RS and the appellant can be cross-examined on their evidence. A trial judge is not bound to accept their evidence. It may be that their evidence conflicts on key points or is "too vague or internally inconsistent or otherwise unconvincing to enable a positive inference to be drawn" that the Demlin assaults occurred.[6]

27. This is not a case like *Batistatos*, where "no useful evidence is available on which to conduct a trial into the question whether the plaintiffs injuries were caused by the negligence of the defendants, and no further search or enquiry is in any way likely to locate any such evidence; so that a trial of the proceedings could not rise above a debate about the effect of scraps of information, and it is impossible to inform the debate with any realistically useful information."[7]

28. The availability of the evidence of both the appellant and RS, in conjunction with the admissions on the pleadings and the matters set out below relating to the availability of Jack Demlin as a witness and his prospective role in any trial, places the allegations in relation to the Demlin assaults in a category where the litigation of those issues is not such as to render any trial so unfair or oppressive to the respondent to justify a permanent stay.

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[6] *GLJ* at [71].
[7] *Batistatos v. RTA* [2006] 226 CLR 256 at 55, the majority citing the reasons of Bryson JA in *RTA v. Batistatos* (2005) 43 MVR 381 at 405.

3 - Evidence Relating to NW

29. As noted above, the primary judge found that NW was still alive. Her Honour found, however, that while the parties were able to speak to him about the allegations, he was a 78-year-old man who would be asked about something he is alleged to have done when he was a teenager. Her Honour also found that it would be insurmountably difficult to extract just one event from the allegations of what happened at the Demlin's house, and from the broader allegations of what the appellant endured whilst at the Girls' Dormitory and other subsequent life events (CAB 28; SC [79]).

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30. The CA approached this question on the basis that if there was no error in respect of the causation issue relating to the difficulty in extracting the impact of the alleged assaults by NW from the impacts of the alleged mistreatment by the Demlins, the events at the Girls' Dormitory and the other life events then evidence that NW was still alive need not be considered as the permanent stay would be granted on the causation issue alone (CAB 62; CA [71]-[73]).

31. The appellant submits that the CA was in error in finding that there was evidence to support that, in terms of causation, it would be "insurmountably difficult" to extract the
20 impact of the alleged assault by NW from other events in the appellant's life.

32. First, the evidence relied upon of the psychiatrist, Dr Pant, only goes as far as to say that it was "difficult to disentangle the events with absolute precision." (CAB 62 – 63; CA [76]). There was no cross-examination of Dr Pant on the issue. To suggest that it was "difficult" does not equate to being "insurmountably difficult". The appellant submits that the finding was unsupported by the evidence and should have been determined to be an error by the primary judge.

33. Second, there is a raft of authority and common law principle that has developed to assist
30 the process of a court in disentangling causative contributions to damage.[8] The problem

[8] See, for example, *Watts v Rake* (1960) 108 CLR 158; *Purkess v Crittenden* (1965) 114 CLR 164 (injury suffered in the context of pre-existing conditions); *Malec v Hutton* (1990) 169 CLR 638 at 642-643 (contingencies in the assessment of damages); *Tubemakers of Australia v Fernandez* [1996] 50 ALJR 720 (in

that would confront a court (and the psychiatrists) in disentangling the effects of a psychiatric condition are commonly dealt with in the trial jurisdiction. The evidence of Dr Pant was inadequate to support the finding of the primary judge that disentanglement of damage was an "insurmountable difficulty".

34. Once that ground of appeal was established, the availability of NW as being a witness who might address the "foundational facts" meant that the claim in respect of those allegations should not have formed part of the permanent stay.

5 – Availability of Evidence and Relevant Onus

35. The applicant's claim for damages is based on direct negligence alone. There was no allegation of vicarious liability. In relation to the allegations of abuse by Demlin and Phillips, the primary judge acknowledged that it was "possible that some further searches could be undertaken, and some further documents may emerge" in respect of those allegations (CAB 27 – 28 SC [76]; CAB 37; CA [7]).

36. The onus of proving that a permanent stay should be granted lies squarely on the respondent.[9] The appellant submits that the obligation to demonstrate that the evidence that is unavailable to the respondent is likely to have been of some value falls within the onus of the respondent in applying for the permanent stay. The applicant submits that the CA erred in failing to find that the primary judge erred in failing to determine that the respondent had not satisfied its onus to satisfy the Court that the absence of Demlin and Phillips is likely to have yielded valuable evidence.

37. The primary judge recognised that it may have been "possible, on the basis of documentary records, and evidence of others who were required to live, or worked, at the Cherbourg dormitories at the time the plaintiff lived there, for the State to deal with the allegations insofar as they concern the "system", or lack of one, for monitoring and supervising children, such that it could not be concluded, in that respect, that the trial was unfair" (CAB 28; SC [78]).

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the context of development of subsequent physical condition); *Jaensch v Coffey* (1984) 155 CLR 549 (in the context of pre-existing psychiatric injury).

[9] *GLJ* at [21].

38. Demlin was not an employee of the respondent and the events relating to the Demlin assaults were conducted in private. Phillips was an employee of the respondent and the events relating to Phillips were largely conducted in view of others.

39. Had he been alive, Demlin might have been criminally prosecuted on the basis of the evidence of the applicant and RS. The appellant submits that Demlin was unlikely to have been available to the respondent to give evidence given the significant criminal consequences he may have faced had he been interviewed and admitted the matters alleged.

40. The evidence in respect of the allegations against Phillips included the evidence of the appellant, some documentary evidence and tendency evidence obtained by the appellant.

41. The CA rejected the appellant's submission that the respondent bore the onus of demonstrating that the respondent's lack of opportunity to confront the alleged perpetrator placed the respondent in a materially different position if the perpetrator were alive as it invited speculation, implied that there was "some onus on the defendant to prove such a material difference" and was unsupported by authority (CAB 60; CA [64]).

42. The CA also found that the primary judge was correct in determining that the "unavailability of persons who could give instructions and/or evidence about critical aspects of liability" can result in a practical inability of reaching a decision based on any real understanding of the facts and the practical impossibility of giving the respondent any real opportunity to participate in the hearing, contest them or to admit liability on an informed basis (CAB 61; CA [69]).

43. As this Court found in *GLJ*[10], the notion that the respondent might have taken "instructions" from Demlin or Phillips is untenable. Had either been alive, a forensic decision would have been made as to whether the respondent would interview the alleged perpetrators about the events, call them as witnesses or settle the case. In the context of

[10] *GLJ* at [96].

that decision making process, the significance of the allegations against Jack Demlin and the serious consequences of any adverse findings would need to form part of consideration of the respondent. While it is acknowledged that the opportunity to interview the witnesses has been lost, the "potential importance in the circumstances of the present case is wholly speculative".[11]

44. The primary onus remains upon the applicant for a permanent stay to demonstrate that permitting the plaintiff's claim to go to trial "and the rendering of a verdict following a trial would be irreconcilable with the administration of justice through the adversarial system. That ultimate decision must be one of last resort on the basis that no other option is available".[12]

45. The gaps in the evidence relating to aspects of the appellant's claim are not sufficient to satisfy that test. The techniques developed by the common law courts to enable proceedings to be heard and determined "despite the unidentifiability, death, or legal incapacity of a party"[13] are more than adequate to remedy any disadvantage to the respondent as a consequence of any delay.

46. There is a witness to the Demlin assaults in the background of admissions by the respondent that acknowledge the delivery of the appellant to the care of the alleged perpetrator and his opportunity to commit the offence; there is tendency and documentary evidence to support the allegations of floggings by Maude Phillips; and NW is still alive. This evidence is in the context of a case where the primary allegation is the failure by the respondent to properly monitor and supervise the appellant as a State Child in the care of the respondent.

47. The appellant's claim is not an exceptional case where the administration of justice would be brought into disrepute by permitting the claim to proceed to trial.

[11] *GLJ* at [76].
[12] *GLJ* at [3].
[13] *GLJ* at [58] - [61] and the cases cited therein.

6 – Trial not unfair

48. The appellant submits that the respondent has failed to discharge it's onus of establishing that the litigation of the issues in the appellant's claim would be such as to render any trial so unfair or oppressive to the respondent to justify a permanent stay.

49. First, the primary focus of the appellant's case is the failure by the respondent to properly monitor and supervise her and those into whose care she was placed by the respondent. The respondent is not the perpetrators of the claimed assaults that relate to the claim. There are no "instructions" to be sought from the perpetrators. What has been lost is the opportunity to interview witnesses about the allegations made by the appellant. This is not sufficient to establish an entitlement to a permanent stay.

50. Second, there is evidence before the court about the circumstances of the events giving rise to the appellant's claim. As noted above, the evidence of an eyewitness as to the Demlin assaults, the tendency and documentary evidence in support of the allegations against Maude Phillips and the fact that NW is alive takes this case out of the category of exceptionality where a stay might be granted.

51. Third, as noted above the common law techniques that have been developed in order to assist the court in the adversarial process in weighing evidence in circumstances where there are gaps in the evidence are sufficient to ensure that the administration of justice is not brought into disrepute by permitting the appellant's trial to proceed.

PART VII: ORDERS

52. Appeal allowed;

53. Set aside the Orders of the CA and order that:

    (a) The appeal to the CA be allowed;

    (b) The application by the respondent for a permanent stay be dismissed;

    (c) Order that the respondent pay the appellant's costs in this court and the courts below.

PART VIII: TIME ESTIMATE

54. It is estimated that up to two hours will be required for the appellant's oral argument (including the reply).

Dated: 10 January 2024

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ANNEXURE

Pursuant to para 3 of *Practice Direction No 1 of 2019*, the particular constitutional provisions and statutes referred to in the appellant's submissions are as follows.

	Title	**Version**	**Provisions**
1.	*Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld)	Version as at 1946	ss 1 - 33
2.	*Limitation Act 1969* (NSW)	Version at 1 July 2018	s 6A
3.	*Limitation of Actions Act 1974* (Qld)	Current, at 1 July 2021	s 11A
4.	*State Children Act 1911* (Qld)	Version as at 30 November 1911	ss 1 - 81