HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **Joanne Edith Willmot**
Appellant

and

The State of Queensland
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Statement of issues

2. The central issue before the Court is whether the permanent stay granted by the primary judge and upheld by the Queensland Court of Appeal should remain, and therefore whether a trial of the claim would be unfair to the Respondent or so unfair or oppressive to the Respondent as to constitute an abuse of process.

3. Subsidiary issues arising are:

   (a) whether the unfairness to the Respondent that otherwise derives from the loss of witness and documentary evidence can be sufficiently ameliorated by the application of any processes of the trial court hearing the matter such as to render a trial *"fair"* or *"not unfair"* to the Respondent or *"not so unfair or oppressive"* to the Respondent as to constitute an abuse of process;

   (b) whether, on the facts of this case, the criteria for the *"correctness"* test described in *GLJ v The Trustees of the Roban Catholic Church for the Diocese of Lismore*

(***GLJ***)[1] have been met notwithstanding the Court of Appeal's application of the *"discretionary test"*;

(c) whether the Respondent discharged the onus of demonstrating that the permanent stay should be granted, notwithstanding the subsequent decision in *GLJ*. That is, whether the decision was correct in light of the decision in *GLJ*.

4. Subsidiaries issues arise as described in the Appellant's Submissions (**AS**).

Part III: Section 78B notices

5. Notice does not need to be given under sec. 78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of Facts

6. The Respondent agrees with the facts stated in the Appellant's Submissions (**AS**) at [6], [7], [9], [12], [13], [14], [15], and [17].

7. AS [8] conflates facts with allegations. While Jack and Tottie Demlin are deceased, RS *says* she was a witness to the Demlin assaults and *alleges* that she was in the same bedroom at the time the assaults occurred and *alleges* that she was also assaulted by Jack Demlin. It is incorrect to treat those allegations as being facts.

8. AS [16] is incorrect. The Affidavit of Ruth Hegarty was rejected, and that rejection was not challenged.[2] It should not form part of the material before this Honourable Court.

9. The affidavits of Joan Nielsen,[3] Aileen Watson,[4] and Eva Collins[5] were objected to, and were not relied upon by the Appellant for *"tendency"* evidence. They were not admitted on the basis that they contained relevant *"tendency"* evidence. The Appellant in fact eschewed reliance on those affidavits to evidence tendency or propensity, there

[1] [2023] HCA 32.
[2] Core Appeal Book, page 13 at [24].
[3] Appellant's Book of Further Material pp 484-492.
[4] Appellant's Book of Further Material pp 493-498.
[5] Appellant's Book of Further Material pp 581-592.

having been no pleading that any of the alleged perpetrators had a propensity or tendency to offend in the manner alleged. They were admitted on the basis of relevance to the issue of whether there was no, or no adequate, system of monitoring and supervising children in the dormitories.[6] The error also infects AS [40].

10. In circumstances where the Appellant has not raised a ground challenging those rulings, the Appellant is bound by them in this Court.[7]

11. Matters of fact are otherwise addressed in context, below.

The record

12. The correctness of the primary judge's decision to grant the permanent stay is to be determined on the evidence adduced at the hearing (supplemented by any further evidence that the appellate court may allow to be adduced on the appeal).[8]

Part V: Respondent's Argument

Summary of Respondent's Argument

13. This proceeding is not capable of being the subject of a fair trial. If required to proceed, it will be necessarily unfair, and that unfairness cannot be cured by any process of the court, power or discretion of the trial judge, judicial attitude toward actual persuasion or enhanced scrutiny of the evidence. There is no technique available to the trial court hearing this matter which will transform the unfairness to the Respondent into a fair trial.

14. In undertaking the task of deciding whether a permanent stay is to be granted,[9] the evaluative steps lead to the conclusion of incurable unfairness, and once that conclusion is reached, a permanent stay must be granted. The Respondent demonstrated that the evaluative steps led to that conclusion, and the decision of the

[6] Core Appeal Book, pages 12 and 13 at [23] and [24].
[7] *Zuvela v Cosmarnan Concrete Pty Ltd* (1996) 140 ALR 227 at 229-230; *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423 at 441. [46]; *Zoef v Nationwide News Pty Ltd* (2016) 92 NSWLR 570 at [118].
[8] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at 556 [31].
[9] *GLJ* [2023] HCA 32 at [28] (Kiefel CJ, Gageler and Jagot JJ).

primary judge was correct, whether viewed on the basis of relevant authority at the time, or in light of the decision in *GLJ*. The Court of Appeal's application of the *"discretionary test"* to the intermediate appeal rather than the *"correctness test"* has not rendered the ultimate decision to uphold the stay incorrect. On either test, it was the correct decision.

15. This case has far more in common with *Connellan v Murphy* [2017] VSCA 116 than with *GLJ*, and the circumstances more starkly favour the granting of the permanent stay than those in *Connellan v Murphy.*

Statement of Respondent's Argument

16. In an adversarial system, the rule of law functions only when a plaintiff is able to identify the claim made and the material facts on which it is based, and the defendant is able to consider and respond to the claim in some meaningful way. [10] Otherwise, the trial court would be faced with the *"practical inability of reaching a decision based on any real understanding of the facts, and the practical impossibility of giving the defendants any real opportunity to participate in the hearing…"*[11] For the reasons addressed below,[12] in the circumstances of this case, there is *"nothing that a trial judge can do in the conduct of the trial [to] relieve against its unfair consequences"*.[13]

17. In *GLJ* the majority determined that there was a *"new context"* or *"new reality"* arising from the lifting of the limitation period for claims for sexual abuse. The legislative amendments created a *"new normative structure"*.[14] The new normative structure is, however, built on the scaffold of an assumption that the allegations made by the plaintiff are true before they are challenged, defended or tried in any way; that is, that the plaintiff in fact falls within a vulnerable category of claimants by reason not of what has in fact occurred to that person in the past, but what they say has

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[10] *GLJ* [2023] HCA 32 at [20] (Kiefel CJ, Gageler and Jagot JJ); [124]-[125] (Steward J) citing *R v Presser* [1958] VR 45 adopted by Bell P in *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 241-242 [105]-[109]; [166]-[167], [179] (Gleeson J).
[11] *Bastistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 277-278 [54], quoting *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 405-406 [80] confirmed at *GLJ* [2023] HCA 32 at [47] (Kiefel CJ, Gageler and Jagot JJ).
[12] *GLJ* [2023] HCA 32 at [52] (Kiefel CJ, Gageler and Jagot JJ).
[13] *GLJ* [2023] HCA 32 at [48] (Kiefel CJ, Gageler and Jagot JJ) quoting *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34, quoting *Barton v The Queen* (1980) 147 CLR 75 at 111, and *R v Clarkson* [1987] VR 962 at 973.
[14] *GLJ* [2023] HCA 32 at [40] and [50] (Kiefel CJ, Gageler and Jagot JJ).

occurred to them.[15] It is respectfully submitted that this means that while the Respondent bears what has been described as a *"heavy onus"* for an application for a permanent stay, the bar cannot be moved so far in favour of the plaintiff that the *"exceptional case"* is rendered impossible to satisfy. If the permanent stay is discharged in this appeal, on the facts of a case such as this one, then, with respect, that will be the effect of the decision; and it would, with respect, reset the dial of the *"new reality"* too far in favour of such claimants where the language of sec. 11A of the *Limitations of Actions Act* 1974 (Qld) does not require it, nor does the common law support it.

Allegations of physical abuse whilst living in the Girls' Dormitory

18. The Appellant alleges that in 1959 while living in the Girls Dormitory she was beaten for minor infractions of the rules[16] and locked in the women's prison on a number of occasions.[17] The Appellant was also required to observe other residents receiving similar punishments.[18] The Appellant alleges that in her mid-primary school years she was forced to stand in the corner on one leg for many hours, on a couple of occasions.[19] The Appellant alleges that when she was in late primary school she was subjected to some severe floggings by Ms Phillips with a 'switch' until she had welts and was "black and blue".[20] The beatings were administered by Ms Phillips who required the Appellant to bend forward while Ms Phillips repeatedly hit the Appellant over the buttocks about six to ten times or more on each occasion.[21]

19. The Appellant first raised the allegations of physical abuse whilst at the Girls' Dormitory in 2008[22] in the confidential context of the Queensland Department of Communities' Redress Scheme for former residents of Queensland children's institutions.

20. The Respondent has been able to ascertain certain basal facts:

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[15] *GLJ* [2023] HCA 32 at [50] (Kiefel CJ, Gageler and Jagot JJ).
[16] Appellant's Book of Further Material p 11 (Amended Statement of Claim [13(a)]).
[17] Appellant's Book of Further Material p 11 (Amended Statement of Claim [13(b)]).
[18] Appellant's Book of Further Material p 11 (Amended Statement of Claim [13(f)]).
[19] Appellant's Book of Further Material p 11 (Amended Statement of Claim [13(c)]).
[20] Appellant's Book of Further Material p 11 (Amended Statement of Claim [13(d)]).
[21] Appellant's Book of Further Material p 11 (Amended Statement of Claim [13(e)]).
[22] Appellant's Book of Further Material p 104 (Mills Affidavit at JM-06).

(a) the Appellant was placed in the Girls' Dormitory at about the time she turned five years old (in 1959);[23] and

(b) Ms Phillips was employed as the supervisor of the Girls' Dormitory between 1959 and 1966.[24]

21. However, the Respondent also ascertained and evidenced below that:

(a) Ms Phillips died in 1982.[25]

(b) The only persons in positions of authority referred to by the Appellant are Matron Pascoe and the Cherbourg Superintendent.

(c) Ms Pascoe, Dormitory Matron died in 1983.[26]

(d) George Sturgess, Superintendent of Cherbourg from 1954 to 1964[27] and Harry Sedgwick, Superintendent of Cherbourg in 1951[28] are deceased (having been born in 1905 and 1907, respectively).

(e) The Respondent was unable to locate any persons who were at the Cherbourg Dormitories when the alleged abuse occurred because of the absence of particularity as to the timing of the alleged events by the Appellant. Absent an allegation as to when the events occurred, it is not possible to determine from the available endowment records when residents came and went.[29]

(f) Jack Pascoe, the Hygiene Officer, died in 1986.[30]

(g) Ivy Rees, Manager of Cherbourg Dormitory died in 1985.[31]

(h) Two residents of Cherbourg in the 1950's, who were able to be identified, Mary Daylight[32] and Dianne Dawson,[33] are also both deceased.

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[23] Appellant's Book of Further Material p 20 (Amended Defence [1(a)(vi)]).
[24] Appellant's Book of Further Material p 21 (Amended Defence [1(b)(vii)]).
[25] Appellant's Book of Further Material p 422 (Mills Affidavit at JM-28).
[26] Appellant's Book of Further Material p 420 Mills Affidavit at JM-26).
[27] Appellant's Book of Further Material p 47 [92] (Mills Affidavit at [92]); p 447 (Mills Affidavit at JM-39).
[28] Appellant's Book of Further Material p 48 [94] (Mills Affidavit at [94]); p 448 (Mills Affidavit at JM-40).
[29] Appellant's Book of Further Material p 50 [111] (Mills Affidavit at [111]).
[30] Appellant's Book of Further Material p 421 (Mills Affidavit at JM-27).
[31] Appellant's Book of Further Material p 446 (Mills Affidavit at JM-38).
[32] Appellant's Book of Further Material p 449 (Mills Affidavit at JM-41).
[33] Appellant's Book of Further Material p 482 (Mills Affidavit at JM-53).

22. There are no contemporary documents relevant to the Appellant's specific allegations. A complaint was made by the Women of Cherbourg in a letter dated 18 January 1951, almost a decade before the Appellant commenced residing in the Girls' Dormitory, about Ms Phillips' being *"no good in the dormitory because she is bad to the girls"*. Reference is made in the letter to the manageress flogging the girls with *"great big sticks"* and *"grab[ing] them by the hair and bash[ing] them against the walls and steps"*.[34] The complaint was investigated and the Superintendent reported in a letter dated 8 March 1951 that while Ms Phillips *"deals out a slap or two"*, the allegations made by the Women of Cherbourg were *"completely unfounded"*.[35] In a separate document, Matron Rees referred to Ms Phillips engaged in *"caning"* of the children.[36] Neither slapping nor caning are the subject of the Appellant's allegations. That Ms Phillips reportedly engaged in this behaviour in 1951 is not relevant to, and does not bear upon, whether she behaved in the way alleged by the Appellant between eight and fourteen years later. That Ms Nielsen,[37] and Ms Watson[38] say that they saw Ms Phillips abuse others cannot be relied upon in determining whether to grant a permanent stay. This evidence was relied on by the Appellant and admitted only as going to the *"system"* in place to determine whether the Respondent was negligent; but it adds nothing to the question whether the assaults on the Appellant actually occurred.

23. Had Ms Phillips or others who worked in the Girls Dormitory in the 1950s been alive, the Respondent would have sought information from them or necessarily called them as witnesses in their case.[39] This should be inferred from the fact that when, in 1951, an allegation was made involving Ms Phillips, it was investigated.

24. In circumstances where there is no one available to address the foundational allegations concerning Ms Phillips' alleged behaviour, there are no documents directly relevant to the Appellant's allegations, and the allegations are not particularized sufficiently to investigate surrounding or contextual circumstances, the Respondent cannot meaningfully respond.

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[34] Appellant's Book of Further Material p 429 (Mills Affidavit at JM-32).
[35] Appellant's Book of Further Material p 430 (Mils Affidavit at JM-33).
[36] Appellant's Book of Further Material p 431 (Mills Affidavit at JM-49).
[37] Appellant's Book of Further Material p 474-475 [23]-[27] (Mills Affidavit at JM-50)
[38] Appellant's Book of Further Material p 466-467 [15]-[19] (Mills Affidavit at JM-49).
[39] cf. *GLJ* [2023] HCA 32 at [76] (Kiefel CJ, Gageler and Jagot JJ)

25. The Appellant received compensation under the redress scheme in response to the Commission of Inquiry into Abuse of Children in Queensland in 2008. However, unlike in *GLJ*,[40] where the Diocese had many occasions to test and question Father Anderson in relation to similar allegations to those made by GLJ, the redress process was confidential, the standard of evidence required to demonstrate an entitlement to compensation did not invoke challenge to personal statements, and the fact that it happened within the last 15 years, meant that it was neither necessary nor desirable for the State to conduct investigations at that time, nor that they would or could have improved its ability to respond to this Claim. Neither direct nor circumstantial facts can be ascertained at this stage. Everything depends on the acceptance of the Appellant's uncorroborated account and the Respondent has no ability to respond to it.[41]

Allegations of sexual abuse by Jack Demlin

26. The Appellant alleges that on a weekly to fortnightly basis between October 1957 and May 1959,[42] Mr Demlin sexually assaulted the Appellant by, on each occasion, entering the Appellant's bedroom at night where the Appellant was in bed, sliding his hands under the Appellant's blankets and touching her lower stomach and upper thigh area, putting his hand under the Appellant's night clothes so that he was touching and fondling the outside of her vagina with his fingers and then pushing his finger inside the Appellant's vagina, while grasping the Appellant's hand and placing it on his penis forcing her to stroke his penis in a masturbation action.[43]

27. The Appellant first disclosed the allegations of sexual assault by Mr Demlin to the Respondent in either June 2019[44] or 2020.[45]

28. The Respondent was able to ascertain as basal facts that the Appellant was placed in foster care with Mr and Mrs Demlin between 1957 and 1959.[46]

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[40] *GLJ* [2023] HCA 32 at [80] (Kiefel CJ, Gageler and Jagot JJ).
[41] Including on the grounds referred to at *GLJ* [2023] HCA 32 at [60] (Kiefel CJ, Gageler and Jagot JJ).
[42] Appellant's Book of Further Material p 8 (Amended Statement of Claim [7(a)-(b)]).
[43] Appellant's Book of Further Material p 8-9 (Amended Statement of Claim [7(c)]).
[44] Appellant's Book of Further Material p 77-94 (Mills Affidavit at JM-1 and JM-2).
[45] Appellant's Book of Further Material p 147-175 (Mills Affidavit at JM-08). See in particular p 156 [26].
[46] Appellant's Book of Further Material p 19 (Amended Defence [1(a)(iv)]). Appellant's Book of Further Materials p 97 (Mills Affidavit at JM-05).

29. However, the evidence below also demonstrated that :

(a) the alleged sexual assaults occurred in a private context, although RS says she was in the room at the time;

(b) Mr Demlin died in 1962.[47]

(c) Tottie Demlin, with whom Jack Demlin lived, died in 1965.[48]

(d) the Appellant says there was another woman and her baby sleeping in the rear room of the house, but does not say that she was a witness to any of the assaults;

(e) according to the Appellant, during the period she lived with Mr and Mrs Demlin, she shared a bedroom with Rachel Lee (nee Solomon) (RS) who was aged between 8 and 10 years of age at the time, Cecelia Campbell (nee Solomon) who was aged between 4 or 5 and 6 or 7 years of age at the time and, Alistair Solomon who was about the age of or a little younger than the Appellant at the time.[49] Alistair Solomon is deceased.[50]

(f) there are no records of any alleged abuse of the Appellant by Mr Demlin.[51]

30. The Appellant contends that the presence of RS as a witness meant that there was additional evidence that assists the court in determining the factual circumstances, that both the Appellant and RS can be cross-examined and that a trial judge is not bound to accept their evidence.[52] The following submissions pertain to these contentions.

31. The Appellant herself did not have a recollection of the alleged sexual abuse until she had a conversation with Ms Lee in 2016,[53] who alleges that she saw Mr Demlin sexually assault the Appellant on various occasions.[54] Ms Lee has also brought a claim against the State for damages as a result of the sexual abuse she alleges Mr Demlin

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[47] Appellant's Book of Further Material p 451(Affidavit of Janice Mills sworn 30 March 2022 (**Mills Affidavit**) at JM-43).
[48] Appellant's Book of Further Material p 450 (Mills Affidavit at JM-42).
[49] Appellant's Book of Further Material p 153 [19]-[20] (Mills Affidavit at JM-08).
[50] Appellant's Book of Further Material p 553 [8] (Affidavit of Raquel Maria Lee (nee Solomon) sworn 16 March 2022 (**Lee Affidavit**)).
[51] Appellant's Book of Further Material p 66 (Mills Affidavit at [68]).
[52] AS [21] et seq.
[53] Appellant's Book of Further Material p 319; p 532 [3] (Lee Affidavit). See also Appellant's Book of Further Material p 217.
[54] Appellant's Book of Further Material p 534 [11], p 540 [32], p 544 [45]-[46], p 545 [48], p 546 [52], [54] (Lee Affidavit).

perpetrated against her.[55] The circumstances in which the Appellant's conscious awareness of the alleged events arose, takes the Appellant's circumstances outside the scope of plaintiffs who *"allow time to pass"* consequent on the psychological harm alleged to have been caused by the alleged child abuse.[56] As a consequence, this is not a case where the significant delay in commencing the proceedings and the consequent impoverished state of the material is *"properly to be understood as routine and unexceptional sequelae of the harm caused by the alleged act the subject of the claim"*.[57] The Respondent's inability to investigate and respond to the Appellant's allegations concerning Mr Demlin is not an *"unexceptional sequelae of the harm"* caused by the alleged abuse, rather it is a consequence of the timing of Ms Lee's disclosure to the Appellant.

32. In any event, Ms Lee's evidence does not allow the Respondent to meaningfully respond to the Appellant's allegations and, rather, exacerbates the unfairness to the Respondent. Ms Lee's allegations of abuse perpetrated against her by Mr Demlin are an attempt by the Appellant to bolster her own allegations with the effect that the unfairness to the Respondent is magnified, not diminished. In light of the role played by Ms Lee in the Appellant recalling the events relevant to this allegation, Ms Lee is not an independent witness[58] and the possibility of unconscious reconstruction looms large.[59]

33. As to Ms Lee's evidence of witnessing Mr Demlin assault the Appellant, the Respondent is unable to assemble material that would allow it to cross-examine Ms Lee. Unlike in *GLJ*, there is no material upon which inferences may safely be drawn about Mr Demlin's response to the allegations[60] and the Respondent had not been on notice of the allegations such that it could have conducted inquiries that would have enabled it to fully inform itself about Mr Demlin's alleged crimes.[61] The absence of any documentary evidence, which may have at one time existed in light of Ms Lee reporting it to Cherboug authorities,[62] leaves the Respondent in the position of not knowing the cause for their non-existence – loss due to the passage of time or because

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[55] Appellant's Book of Further Materials p 532 [3] (Lee Affidavit).
[56] *GLJ* [2023] HCA 32 at [50] (Kiefel CJ, Gageler and Jagot JJ);
[57] *GLJ* [2023] HCA 32 at [50] (Kiefel CJ, Gageler and Jagot JJ);
[58] Cf. AS[24].
[59] *R v Davis* (195) 57 FCR 512 at 522 cited in *Moubarak* (2019) 100 NSWLR 218 at 239-240 [95].
[60] cf. *GLJ* [2023] HCA 32 at [78] (Kiefel CJ, Gageler and Jagot JJ).
[61] cf. *GLJ* [2023] HCA 32 at [79] (Kiefel CJ, Gageler and Jagot JJ).
[62] Appellant's Book of Further Material p 550 [68]-[71] (Lee Affidavit).

they never, in fact, existed. The Respondent is in an invidious position with respect to the allegations made against Mr Demlin.

34. The Respondent is further prejudiced in the conduct of the trial by reason of the fact that RS has her own claim against the Respondent, said to arise from alleged sexual assaults by Mr Demlin upon her in the same circumstances. The Respondent cannot confer with RS on the basis that *"there is no property in a witness"* because of the overlap between the claims: she is in fact a claimant or plaintiff, and any interview that RS might consider affording to the Respondent's representatives in relation to the *Appellant's claim* – and she would be, with respect, poorly advised if it was suggested that she should agree to it – would necessarily involve the allegations that RS had made in her *own* claim. Documents which might affect RS' credit obtained in relation to her claim would be subject to the implied duty as to disclosure[63] and therefore would be unable to be used by the Respondent in the Appellant's claim to challenge RS' evidence. RS would be unlikely to agree to the lifting of the implied undertaking, and a court would, with respect, be unlikely to order it.

35. As found by the primary judge, the presence of RS renders the trial *"more unfair"* not less-so.[64]

Allegations of physical abuse whilst living with the Demlins

36. The Appellant alleges that while in the care of the Demlins, she was regularly subjected to beatings by *"the Demlins"* for minor infractions of the rules.[65] No details, whatsoever, accompany that allegation. The Respondent's inability to respond to this vague, uncorroborated, yet uncontradicted allegation, is apparent.[66]

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[63] Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence: *Hearne v Street* (2008) 235 CLR 125.
[64] Core Appeal Book at pages 28 to 29 [80]
[65] Appellant's Book of Further Material p 11 (Amended Statement of Claim [12]).
[66] As was the case in *Connellan v Murphy* [2017] VSCA 116 at [57].

Allegations of sexual abuse when visiting grandmother by NW

37. The Appellant alleges that in about 1960 when she was about six years old, she was sexually assaulted whilst visiting her maternal grandmother's house by her uncle who is referred to below as NW.[67] The Appellant believed NW was 19 or 20 years old at the time.[68] The Appellant alleges that NW picked the Appellant up, carried her to her grandmother's bedroom,[69] forcefully threw the Appellant onto the bed on her back, winding her.[70] NW is alleged to have closed or locked the door, removed the Appellant's underwear, spread the Appellant's legs and laid on top of her and attempted to force his penis inside the Appellant's vagina.[71]

38. The Appellant first raised this allegation with the Respondent in January 2020.[72] While the Respondent was able to ascertain that the Appellant was granted permission by the Cherbourg Superintendent to leave Cherbourg during school holiday periods to visit her maternal grandmother,[73] it has been unable to ascertain whether the Appellant was granted permission to leave, or did leave, on any particular date in 1960.[74]

39. There is evidence that NW, who was 16 years old in 1960, was released into the care of his mother who resided in Ipswich at the time from 29 January to 5 September 1960.[75] The only potential witness to the alleged assault was the Appellant's grandmother who the Appellant alleges came into the room while the assault was occurring and screamed loudly at NW causing NW to run away.[76] The Appellant's grandmother is deceased,[77] as are the Appellant's mother[78] and father.[79]

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[67] Appellant's Book of Further Material p 9 (Amended Statement of Claim [9(b)], [10(b)]).
[68] Appellant's Book of Further Material p 9 (Amended Statement of Claim [10(c)]).
[69] Appellant's Book of Further Material p 9 (Amended Statement of Claim [10(e)]).
[70] Appellant's Book of Further Material p 11 (Amended Statement of Claim [10(f)-(g)]).
[71] Appellant's Book of Further Material p 11 (Amended Statement of Claim [10(h)-(j)]).
[72] Appellant's Book of Further Material p 148-168 (Mills Affidavit at JM-08).
[73] Appellant's Book of Further Material p 98 (Mills Affidavit at JM-05).
[74] Appellant's Book of Further Material p 23 (Amended Defence [5(a)]); Appellant's Book of Further Material p 99 (Mills Affidavit at JM-05).
[75] Appellant's Book of Further Material p 657 (Affidavit of Kate Ross sworn 14 July 2022 (**Ross Affidavit**) at KR-01.
[76] Appellant's Book of Further Material p10 (Amended Statement of Claim [10(n)-(o)].
[77] Respondent's Book of Further Material (Affidavit of Karen Foulds (**Foulds Affidavit**)) (page reference to be provided).
[78] Appellant's Book of Further Material p 318 (Mills Affidavit at JM-12).
[79] Appellant's Book of Further Material p 318 (Mills Affidavit at JM-12).

40. The fact that NW is still alive, because almost 65 years have passed since this alleged event,[80] cannot be determinative of whether a trial will be necessarily unfair.[81] Given the private context in which this alleged assault occurred, and in circumstances where it involved two minors – NW himself being a child at the time – the Respondent's ability to meaningfully respond to the allegation is severely restricted.

41. The inability of the Respondent to meaningfully respond to this allegation, and the resulting inability of the Court to ensure a just outcome is pronounced here because the critical factual allegation is sought to be proved by the uncorroborated evidence of the Appellant alone.[82]

42. The Appellant had the opportunity to produce evidence on the hearing of the application for the stay from NW, having ascertained that he was, in fact, still alive (albeit 78 years of age) and he agreed to speak with the Appellant's representatives and they did speak with him. It should be borne in mind that NW is the Appellant's uncle (the brother of her mother),[83] which is relevant context to the fact that she was able to (a) find him and (b) he agreed to speak with her solicitors. The Appellant's solicitors did not ask him about his niece's allegations. The principle in *Blatch v Archer*[84] pertains: all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contracted. The Appellant had the immediate ability to produce evidence as to NW's response to the allegations made against him: did he admit he assaulted her? Did he deny having done so? Did he have any recollection of the events as described? The conversation was not short, and the context suggests that NW thought the solicitor was calling to discuss a claim that he might have had. The Appellant made a forensic decision below not to place before the primary judge evidence on the hearing of the application which would have borne on the issues to be determined by her Honour. She should be held to that forensic decision[85] and the question whether the stay should be granted is to be determined on the evidence on the application.[86]

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[80] *Moubarak* (2019) 100 NSWLR 218 at 235 [77], 235-236 [80].
[81] *Moubarak* (2019) 100 NSWLR 218 at 257 [205].
[82] *GLJ* [2023] HCA 32 at [174] (Gleeson J).
[83] Appellant's Book of Further Material p 567 at [54].
[84] (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].
[85] *Zuvela v Cosmarnan Concrete Pty Ltd* (1996) 140 ALR 227 at 229-230; *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423 at 441. [46]; *Zoef v Nationwide News Pty Ltd* (2016) 92 NSWLR 570 at [118].
[86] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at 556 [31].

Allegations of sexual abuse when visiting grandmother by Pickering

43. The Appellant alleges that in 1967 she was sexually assaulted by her cousin/great uncle, Pickering, while she was visiting her maternal grandmother.[87] The Appellant alleges that while she was getting something for breakfast, Pickering stood behind her and half held onto her from the rear[88] and slid his hand up under her pyjama shirt and began rubbing and fondling her breast and nipple area.[89] Moments later, Pickering put his hand down inside the Appellant's pyjama pants and fondled and penetrated her vagina with his finger.[90]

44. The Appellant first raised this allegation with the Respondent in January 2020.[91] Whilst the Respondent was able to ascertain that the Appellant was granted permission by the Cherbourg Superintendent to leave Cherbourg during school holiday periods to visit her maternal grandmother, it has been unable to ascertain whether the Appellant was granted permission to leave, or did leave, on or about the time the alleged assault occurred due to the vagueness about when in 1967 the assault is said to have occurred.[92]

45. Pickering must be deceased as, according to the Appellant, he was 50 to 60 years of age at the time of the alleged assault.[93] There were no witnesses to the alleged assault[94] and the Appellant did not report it to anyone at the time (and until 2020).[95] The Appellant does not recall any of her siblings joining her on this visit to her grandmother's house.[96] As such, no independent witnesses exist. No documentary material concerning the allegation, contemporaneous or otherwise, exists.

46. The State cannot ascertain if the Appellant was or was not (or should or should not have been) staying at her grandmother's house. Even if the Appellant was able to recall Pickering's full name, and even if the Respondent could use that information to ascertain whether Pickering resided in the Appellant's grandmother's house at all, or

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[87] Appellant's Book of Further Material p 9-10 (Statement of Claim [9(b)], [11(b)]).
[88] Appellant's Book of Further Material p 11 (Statement of Claim [11(h)]).
[89] Appellant's Book of Further Material p 11 (Statement of Claim [11(j)]).
[90] Appellant's Book of Further Material p 11 (Statement of Claim [11(l)], [11(n)]).
[91] Appellant's Book of Further Material p 148-168 (Mills Affidavit at JM-08).
[92] Appellant's Book of Further Material p 23 (Amended Defence [5(a)]).
[93] Appellant's Book of Further Material p 10 (Statement of Claim [11(b)]).
[94] Appellant's Book of Further Material p 11 (Statement of Claim [11(d)]).
[95] Appellant's Book of Further Material p 165 [54] (Mills Affidavit at JM-08).
[96] Appellant's Book of Further Material p 163 [48] (Mills Affidavit at JM-08).

temporarily, in 1967, that would not assist the Respondent to ascertain specific facts relevant to the alleged assault.

47. The allegation is so bare that the Respondent cannot ascertain any surrounding or contextual facts that allow it to meaningfully respond. The bare facts are unremarkable: the vast majority of houses have kitchens; it would not be unusual for a person to remain in their pyjamas while they made themselves breakfast. While there are inconsistencies in the Appellant's description of this allegation in the versions provided since 2020, those inconsistencies will be of no moment where the inconsistencies do not impact the central allegation.[97]

48. The only means by which the Respondent may hypothetically be able to respond to the allegation is wholly dependent on the outcome of questions tangential to the central allegation raised with the Appellant in cross-examination.[98] While a court is not bound to accept uncontradicted evidence,[99] that is distinct from the central issue of whether the Respondent is able to meaningfully respond and participate in the trial. It cannot be said in these circumstances that the Respondent is able to respond to this allegation, at all and, at least not in any meaningful way. None of the ways that a trial judge may be able to assess whether the Appellant's uncontradicted evidence should be rejected[100] are available. This results in manifest unfairness to the Respondent.

Disentangling Causation

49. The Appellant relies on a *"raft of authority and common law principle"* developed to assist the process of disentangling causative contribution to damage. None of the cases cited therein involves *a "disentangling exercise"* with even remote similarity to this claim.

50. The issue concerning causation arises in two respects:

    (a) disentangling causation in relation to the index events *inter se*;

    (b) disentangling the index events from other adverse life events of the Appellant.

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[97] *GLJ* [2023] HCA 32 at [50], [52], [59] (Kiefel CJ, Gageler and Jagot JJ).
[98] Rule 66 of the Bar Association of Queensland Barristers' Conduct Rules.
[99] *GLJ* [2023] HCA 32 at [60] (Kiefel CJ, Gageler and Jagot JJ).
[100] *GLJ* [2023] HCA 32 at [60] (Kiefel CJ, Gageler and Jagot JJ).

51. The manner in which this claim has been cast intrudes on the consideration of the first of these: the Appellant claims damages for *"the injuries"* she says she has been diagnosed as suffered[101] as a result of *"the sexual assaults and serious physical abuse"*.[102] That is, the cumulative consequence of each of the sexual assaults[103] and serious physical abuse[104] taken together resulted in the Appellant's injuries. The Appellant has made no alternative plea that any one or other of the assaults caused her *"injuries"*, nor that her damages might be parsed as between the events. Accordingly, the Appellant's pleaded case is *"all or nothing"*: to succeed at trial, she must demonstrate that all of the foundational allegations occurred as alleged. The Appellant might contend that this is to the Respondent's benefit, but she has not given assurance that the claim will not be amended (which she can presently do without leave[105]) to cast it as separate loss-causing events in the alternative (or any combination thereof).

52. The Appellant adduced evidence from Dr Milind Pant, psychiatrist, in his report dated 20 May 2021. Dr Pant said, *"[i]t is difficult to disentangle the effects of the individual abuse incidents as they are so entwined"*. Dr Pant was clearly unable to disentangle each incident from a causative perspective because his assessment of the cause of the symptoms reported by the Appellant and the PTSD diagnosis, was that it was suffered *"as a result of the alleged sexual, physical and emotional abuse during childhood"* (i.e. all incidents collectively).[106] Moreover, Dr Pant specifically said:[107]

> [T]he Appellant provides a complex history and it is difficult to disentangle the events with absolute precision. The sexual abuse perpetrated on her at the Demlins, the physical and emotional abuse perpetrated onto her at Cherbourg girls dormitory and the sexual abuse perpetrated onto her by her cousin and great uncle have all contributed to her condition. …
>
> The other life stressor events that have happened in her life were after the periods of childhood abuse and would have contributed to her ongoing psychological symptoms but I am unable to estimate the extent that each individual life stressor would have had on her conditions.

53. Not only did Dr Pant explicitly say that he was unable to estimate the extent to which each event was causative of the Appellant's PTSD, he conceptualised the more recent

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[101] Appellant's Book of Further Material p 13 (Statement of Claim [17]-[18]).
[102] Appellant's Book of Further Material p 13 (Statement of Claim [17]).
[103] Appellant's Book of Further Material p 8-10 (Statement of Claim [7]-[11]).
[104] Appellant's Book of Further Material p 11-12 (Statement of Claim [12]-[14]).
[105] Rule 378 of the *Uniform Civil Procedure Rules* 1999.
[106] Appellant's Book of Further Material, page 357, Dr Pant's report page 14.
[107] Appellant's Book of Further Material, pages 384 to 385, Report of Dr Pant page 29-30.

events[108] as either exacerbating or aggravating the existing condition. That is, according to Dr Pant, the vast majority of events reported by the Appellant were relevant to her PTSD diagnosis and could not be distinguished discretely from one another.

54. On the basis of the principles in *Watts v Rake*[109] and *Purkess v Crittenden*,[110] far from being assisted by the principles in those cases, the Respondent will be profoundly prejudiced by them if the stay is not upheld.

Common Law Techniques

55. The process of the common law found to have been available to the respondent in *GLJ* to render what might otherwise be an unfair trial as fair are not available to the Respondent in this case. For instance:

(a) in *GLJ*, it was found that the Diocese had been *"aware of and had acted on"* the fact that Father Anderson had sexually abused boys well before the alleged sexual assault of GLJ occurred;[111] contrast this case, where the Respondent had no knowledge of any sexual assaults being perpetrated by the alleged assailants;

(b) in *GLJ* there was documentary evidence that colleagues and superiors of Father Anderson had *"repeatedly tried to engage with him"* about his abuse of boys, including arranging for him to see a psychiatrist and that he refused to recognise that he had a *"problem"* (which indicates that these matters had been raised with him);[112] contrast this case, where there has been no such engagement or opportunity to engage with any of the alleged assailants;

(c) in *GLJ*, the Court found that if the specific allegations had been put to Father Anderson, there was evidence from which his response could be inferred.[113] There is no such evidence in this case.

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[108] Of being racially vilified by a teacher while at school in Ipswich, falling pregnant at 16 years of age with an absent father, being left by her husband to become a single parent in the 1980's, her son's mental illness and subsequent death (by suicide) and the rape of her 14 year old daughter.
[109] (1960) 108 CLR 158.
[110] (1965) 114 CLR 164.
[111] *GLJ* [2023] HCA 32 at [75] (Kiefel CJ, Gageler and Jagot JJ).
[112] *GLJ* [2023] HCA 32 at [75] (Kiefel CJ, Gageler and Jagot JJ).
[113] *GLJ* [2023] HCA 32 at [77] (Kiefel CJ, Gageler and Jagot JJ).

(d) in *GLJ*, there was documentary evidence from which it could be inferred that allegations of sexual abuse of boys had been put to Father Anderson and he had denied wrongdoing and rebutted suggestion of impropriety.[114] No such evidence is available in this case.

(e) in *GLJ*, the Diocese had available to it an inquisitorial process in the laicization process which gave the Diocese the opportunity to make such enquiries as it saw fit about Father Anderson having sexually abused children.[115] There was no such opportunity in this case.

(f) as opposed to GLJ, where there was a *"considerable body of documentary evidence of arguable relevance to the proceedings"* and there were *"other sources of potential documentary record"* including the psychiatrists to whom Father Anderson was referred, there is no such body of records available in this case.

56. As to other *"common law processes"*, each of them will turn on the impressionistic and idiosyncratic approaches by the trial judge to their application:

(a) the principle in *Blatch v Archer* will not assist to render the trial *"less unfair"* unless some evidence that would be available to the Appellant to produce has not been produced by her. There is nothing in the Appellant's submissions which assist on this point;

(b) the trial court's approach to the fallibility of human memory will not assist the Respondent to have a *"less unfair"* trial unless it is applied to so diminish the Appellant's evidence and RS' evidence that it is considered incapable of acceptance. The Appellant does not contend in her submissions that this is an available course for a trial judge;

(c) while the court is not bound to accept uncontradicted evidence, when taken with the issues of challenging, in particular RS' evidence referred to above, the fairness of the trial will depend not on principle but on the trial judge's impression of the content of unchallengeable evidence and the demeanour of the

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[114] *GLJ* [2023] HCA 32 at [78] (Kiefel CJ, Gageler and Jagot JJ).
[115] *GLJ* [2023] HCA 32 at [79] (Kiefel CJ, Gageler and Jagot JJ).

witnesses (noting the body of appellate reasoning elevating the advantage of the trial judge in that regard);

(d) similarly, what amounts to a sense of *"actual persuasion"* may well differ from trial judge to trial judge; and

(e) there is no evidence in this case of communications of the types referred to in paragraph 61 of *GLJ*.

57. In short, none of the mechanisms that may be available to trial judges can be said to ameliorate the unfairness to the Respondent, where there is no way of gauging how a trial judge might apply them in a future hearing.

The Permanent Stay must be Upheld

58. For the reasons outlined above, the Respondent cannot respond in any *"meaningful way"*[116] to the Appellant's allegations and is deprived of any *"real opportunity to participate"* in the trial. Unlike in *GLJ*, the Respondent does not have evidence available to it that would permit it to make submissions as to why the trial judge ought not accept the Appellant's uncontradicted evidence. Even if there were to be some prospect of the Respondent obtaining further material potentially relevant to one or more of the foundational allegations, that would be insufficient in circumstances where the Respondent must respond to a claim for damages for injuries resulting from the cumulative impact of all of the foundational events. As such, any trial would be *"[n]o more than a formal enactment of the process of hearing and determining the Appellant's claim"*[117] with the Respondent relegated to being a passive bystander, a role, as the respondent, the system does not permit it to perform.[118]

59. In these circumstances a permanent stay should be upheld. This is the Respondent's primary position.

60. Alternatively, if this Honourable Court forms the view that the Court of Appeal has applied the wrong test (applying the discretionary test rather than the correctness test)

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[116] *GLJ* [2023] HCA 32 at [20] (Kiefel CJ, Gageler and Jagot JJ).
[117] *Ward v The Trustee of the Roman Catholic Church for the Diocese of Lismore* [2019] NSWSC 1776 at [22] citing *Newcastle City Council v Batistatos; Roads and Traffic Authority NSW v Batistatos* [2005] NSWCA 20 at [80].
[118] *GLJ* [2023] HCA 32 at [20] (Kiefel CJ, Gageler and Jagot JJ).

and that this has undermined the correctness of the decision below, then the matter might be referred to the Court of Appeal for further consideration applying the correctness test.

61. Part VII: Time estimate

62. It is estimated that the Respondent will require 3 hours for oral argument.

Dated 8 February 2024

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ANNEXURE

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

	Title	**Version**	**Provisions**
1.	*Uniform Civil Procedure Rules 1999* (Qld)	Version as at 1 February 2024	s 378