



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

P7/2023

AS IF ON APPEAL FROM THE COURT OF APPEAL OF THE
 SUPREME COURT OF WESTERN AUSTRALIA

BETWEEN:

RC
 Applicant

-and-

THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST
 Respondent

APPLICANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

**PART II: OUTLINE OF THE PROPOSITIONS THE APPLICANT INTENDS TO
 ADVANCE IN ORAL ARGUMENT**

Ground 1

2. Lt Swift's death prior to the respondent learning of the allegations was central to the respondent's application. The PJ's finding as to its relevance was that Lt Swift had died before the respondent became aware of the allegations, not that he was unavailable as a witness or otherwise. *AS [31]-[32]; Rep [4]*.
3. To the extent Lt Swift's death was said to be relevant to the grant of a permanent stay, proof that the respondent would have investigated the allegations had it been aware of them prior to Lt Swift's death was therefore essential (but not sufficient for reasons advanced in the context of ground 3). *AS [33]-[35]; Rep [4]-[6]*.
4. The evidence was against a finding that the respondent would have done so (and affirmatively established the contrary). *AS [26]-[28], [36]-[44]; Rep [7]*.
5. The CA was wrong to find that these matters were irrelevant, including by reference to *The Council of Trinity Grammar School v Anderson* (2019) 101 NSWLR 762 (*Trinity Grammar*). *Trinity Grammar* does not support the CA's approach, but if it does it is wrong. *AS [46]-[54]*.

6. The CA was otherwise wrong to approach the matter on a different factual footing than that of the PJ, namely the absence of ‘*reasonably anticipated litigation*’, including by reference to observations in *Trinity Grammar: AS [55]-[60]*.

Ground 2

7. There was no prejudice to the respondent as suggested. This was not a case on pleadings. The parties filed and served their affidavits before making submissions. The affidavits could not have been severed. The respondent did not assert prejudice in the CA. *AS [61]-[64]; Rep [8]-[10]*.

Ground 3

8. The finding below, and the respondent’s written case, is that the respondent could not receive a fair trial, not that the proceedings are so unfairly and unjustifiably oppressive as to constitute an abuse of process even if a fair trial can be held. *Rep [14]*. The respondent does not point to anything over and above the (suggested) objective effects of the passage of time eg culpability for delay as in *Connellan v Murphy* [2017] VSCA 116 at [61]. No such finding was made or open. *AS [21]*.
9. Trial in this case would be by judge alone. This is agreed.
10. The respondent must show that the trial would be necessarily and irremediably unfair in the sense that there is nothing the trial judge could do to make it fair, including that the application of well-established principles to address evidentiary imbalances would be inadequate: *GLJ* at [48], [49], [56]-[61], [71]. This point was advanced before the CA but not addressed in its reasons, and apparently not accepted by it. *AS [68]*.
11. The respondent points to nothing more than the cumulative effect of the suggested (but speculative) loss of evidence (witnesses and documents) which loss, even had it occurred, would be the natural consequence of the passage of time and incapable of supporting the grant of a permanent stay. *AS [66]-[67], [69]-[71]; Rep [13]*.
12. The respondent’s reliance on *Moubarak v Holt* (2019) 100 NSWLR 218 and *Connellan v Murphy* is misplaced. Each case was materially different to the present. *Connellan v Murphy* was not a case where there could not be a fair trial. *Rep [14]*.

13. Beyond the deaths of Maj Watson (in 1968) and Lt Swift (which is itself to be seen in the context of the issues raised by ground 1), there was not shown to have been a loss of any evidence at all. The PJ and CA each wrongly considered it was not necessary for the respondent to show such loss. The evidence was also to be seen in the context of the respondent's own evidence/admissions to the Royal Commission. *AS* [66], [72]-[83]; *Reply* [12].
14. The suggested loss of evidence in this case may be contrasted with *R v Davis* (1995) 57 FCR 512 (referred to in *Moubarak v Holt* at [93]-[95]), *Connellan v Murphy* and *Trinity Grammar*.
15. The PJ rejected the respondent's submission that the applicant's allegations of abuse are vague: PJ [65]. Refer *GLJ* at [75]. He can be cross-examined on suggested inconsistencies (PJ [65]) and by reference to objective probabilities etc. The respondent can make submissions directed to the plaintiff's evidence, suggested evidentiary gaps and relevant principles designed to address any evidentiary imbalance.
16. The respondent has the requisite institutional knowledge to deal with the issue of vicarious liability. It adduced no evidence that it does not: *AS* [78]; *Rep* [16]-[18]. Refer also *GLJ* at [67]. Almost all of the alleged abuse occurred in the Boys' Home. Cf *The Council of Trinity Grammar School v Anderson* (supra) which was a completely different case.

Dated: 6th May 2024



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