



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: P7/2023  
File Title: RC v. The Salvation Army (Western Australia) Property Trust  
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#### Important Information

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BETWEEN:

**RC**  
Applicant

and

**THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST**  
Respondent

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## RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

### **PART I PUBLICATION**

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

### **PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

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#### **(1) Test and applicable principles**

2. The relevant inquiry is whether any prospective trial will be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process (RS [18], [25]).

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- *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; 97 ALJR 858 at [23] (JBA, vol 4, pt D, tab 9, p 265).

3. The heavy onus of proving that a permanent stay should be granted lies with the defendant, and it should only be granted in an exceptional case (RS [20]).

- *GLJ* at [3], [21].

4. The inquiry in each case remains a fact-sensitive one (RS [20]).

- *GLJ* at [64].

#### **(2) Reasons of the Courts below**

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5. The judgments below pre-date *GLJ*. Nevertheless, both the primary judge and the Court of Appeal granted the stay based on the cumulative effects of the impoverishment of evidence, the loss of witnesses and the absence of documents. It was not the mere effluxion of time, or the death of the alleged perpetrator that justified the stay.

6. *Reasoning of primary judge*. Mere delay, or the loss of some relevant evidence, will not normally warrant a stay (Supp CAB 43 [138]). Lt Swift's death is a "significant factor" in favour of a stay, but one amongst others, including the loss of "all other relevant witnesses" and contemporaneous documents (Supp CAB 46-47 [141]-[145]).

The respondent “cannot meaningfully defend the Action”; it would be “unjustifiably oppressive” to require it to do so; and a “fair trial is not possible” (Supp CAB 48-49 [149]-[151]).

7. *Reasoning of Court of Appeal.* All relevant witnesses who could be called from the respondent’s perspective are deceased (CAB, Tab 5, p 74 [44]). The respondent’s comprehensive searches for documentary records relevant to the allegations yielded nothing (CAB, Tab 5, p 74 [45]-[46]). This causes specific forensic prejudice in defending the applicant’s allegations (CAB, Tab 5, p 75-77 [47]-[53]). The question is one of “current prejudice” in “the totality of the circumstances” (CAB, Tab 5, p 98-99 [134]). The “cumulative effect” of the findings is that the respondent cannot defend the case in any meaningful way (CAB, Tab 5, p 108 [165]).
8. Although some of the reasoning would now be expressed differently in light of *GLJ*, it is clear that both the primary judge and the Court of Appeal directed themselves to the correct question, i.e. having regard to the *effect* of the effluxion of time, whether a fair trial of the applicant’s claim was possible.
9. This Court will decide the facts and the law for itself applying the “correctness standard” (*GLJ* at [28]; RS [17]). However, the applicant remains bound by the conduct of his case below, and the Court of Appeal rightly held that he was not permitted to advance a new case based upon the absence of evidence to the effect that the respondent would have undertaken investigations had it been aware of the allegations prior to Lt Swift’s death (ground 2; RS [42]-[49]).

**(3) The cumulative effect of prejudicial features would make any trial unfair**

10. *First*, the respondent was not on notice of any allegations against Lt Swift at a time when he was capable of responding. This is unlike *GLJ*, where the defendant was on notice in numerous respects of the alleged perpetrator’s paedophilia while it had the opportunity to confront him (*GLJ* at [66], [75]; RS [67(a)-(b)]) and of his likely response given the prior laicisation process. The absence of notice makes this case like *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 (JBA, vol 3, pt D, tab 10, p 296), where the allegation arose without forewarning and after the alleged perpetrator had lost capacity (*GLJ* at [65]; RS [68(a)-(e)], [69(a)]).
11. *Second*, all other relevant witnesses who could be called from the respondent’s perspective are deceased (Supp CAB 47 [142]). There was no positive finding of this kind in *GLJ*. The absence of these witnesses causes particular prejudice in responding

to the breach of duty and vicarious liability questions that would arise (RS [56]-[57]).

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It also hinders the capacity of the respondent to adduce circumstantial evidence that would enable it to impeach the applicant's credibility with respect to the alleged conduct of Lt Swift (RS [58]).

12. *Third*, the respondent does not possess any relevant contemporaneous documents and there are no other meaningful inquiries that can be made (Supp CAB 47 [144]). In *GLJ*, there was “a considerable body of documentary evidence” available, and further potential avenues of documentary investigation (*GLJ* at [81]; RS [67(c), (f)]). This case reflects the position in *Moubarak* and *Connellan v Murphy* [2017] VSCA 116 (JBA, vol 3, Pt D, tab 8, p 228), where “there was no relevant documentary evidence, nor any prospect of such evidence emerging” (*GLJ* at [65]; RS [68(b)], [69(b)], [70]).

13. The fact that this case arises in an institutional as opposed to a domestic setting does not distinguish it from *Moubarak* and *Connellan v Murphy*, because in this particular case such “[d]ocumentary records and evidence concerning relevant circumstances” as may be thought to be “more likely to exist” do not in fact exist (RS [64]).

- *GLJ* at [64].

**(4) Response to discrete contentions of the applicant**

14. The additional hurdle propounded under ground 1 — which would require defendants to prove to the civil standard what steps they would have taken in response to a hypothetical notification of unspecified content by unspecified means at an unspecified time — is unsupported by principle and authority, and is unworkable (RS [25]-[33]).
15. The evidence cannot sustain a positive finding that the respondent would have ignored any notification of the allegations in this case (RS [34]-[41]).
16. The basis for the stay granted in this case was the same as that in *Connellan v Murphy*, namely that any trial would be manifestly unfair (RS [70]; *contra* Rep [14]).
17. The courts below found that there has been an actual loss of evidence, comprising at least the deaths of the principal protagonists and all other potential witnesses for the respondent, and all documentary records. This goes beyond speculation as to potential loss (RS [54]-[55]; *contra* Rep [12]).

Dominic Villa SC

Rachael Young SC

Henry Cooper

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