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
PERTH REGISTRY P7 of 2023

BETWEEN: **RC**
Applicant

and

THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST
Respondent

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RESPONDENT'S SUBMISSIONS

Part I PUBLICATION

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

Part II ISSUES

20 2. The issue is whether the applicant's proceedings against the respondent involve an abuse of process, in the sense that the respondent could not receive a fair trial, thereby justifying a permanent stay of the proceedings.

Part III SECTION 78B NOTICE

3. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV FACTUAL ISSUES IN CONTENTION

4. As to AS [7], the allegations made against the respondent are to be found in the Statement of Claim filed on 2 May 2019 (CAB 5), as further particularised in the Plaintiff's Answers to the Defendant's Request for Further and Better Particulars of the Plaintiff's Statement of Claim filed on 21 August 2019 (CAB 15). The more detailed
30 description of the Plaintiff's allegations can be found in the applicant's Affidavit sworn 7 October 2021 (CAB 341).

5. The respondent does not dispute the facts stated at AS [8]-[9], [11]-[14], [16] and [19]-[25].

6. As to AS [10], the respondent contends that Lt Swift was an ordained minister of the respondent, but not an employee: PJ [45] (CAB 20); PJ [93] (CAB 33). As explained at [55]-[57] below, by reason of the loss of witnesses and documents, there is a dearth of evidence available to enable the careful examination of the role that the respondent actually assigned to Lt Swift (and therefore the position that he was placed in vis-à-vis the applicant) that is critical to any analysis of the respondent's vicarious liability for Lt Swift's conduct.[1]

7. As to AS [15], it should be added that there was evidence that at the time of Lt Swift's retirement in 1989, when he was 65 years old, he was suffering from Alzheimer's disease: CA [95] (CAB 88).[2] There was also evidence of Lt Swift having dementia from some time prior to 2000, and that Lt Swift was "not with it" at the time his son passed away in November 2000.[3]

8. As to AS [16], the applicant places significance on the fact that Lt Swift was not contacted in 2003 when the respondent first learned of an allegation by another care leaver (TD) of sexual abuse by Lt Swift (AS [42]).[4] This allegation related to conduct by "Captain Swift" that was said to have occurred in the early 1950s while TD was resident at the Box Hill Boys' Home in Victoria. So far as Lt Swift's "Personnel Record" reveals, he was not commissioned as an Officer until 9 January 1956.[5] This, in addition to Lt Swift's cognitive condition (referred to at [7] above), provide reasonable and understandable explanations for why Lt Swift was not contacted at that time.

9. As to AS [17], while the applicant alleges, and ultimately seeks to prove, that he made contemporaneous reports of abuse to Major Watson, the proceedings before the primary judge were conducted on the basis that the respondent first became aware of the allegations made by the applicant on 10 February 2014. The Court of Appeal held that the applicant could not contend that the alleged reporting to Major Watson in 1960 constituted notification of the allegations to the respondent: CA [83]-[86], [89] (CAB

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1 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [81], [84].
2 Affidavit of Luke Geary dated 28 May 2021 (**Geary Affidavit**) at [105]-[107] (ABFM 64-65); ex LG-58 (RBFM 33); ex LG-59 (RBFM 35-36).
3 Geary Affidavit at [98] (ABFM 63); see PJ [111] (CAB 40); ex LG-52 (RBFM 32).
4 Geary Affidavit at [95(a)] (ABFM 59); ex LG-37 (RBFM 13-15).
5 A matter that was of significance to the respondent in considering subsequent claims made after Lt Swift's death: see ex LG-40 (RBFM 31). See also Geary Affidavit, ex LG-40 (RBFM 31).

85-87). That finding is not the subject of any ground of appeal. Hence, the applicant is bound by the concurrent finding that the first time the respondent became aware that the applicant alleged he had been sexually abused by Lt Swift was on 10 February 2014: CA [89] (CAB 87).

10. As to AS [18], the allegations notified on 13 July 2018 were not particularised beyond the bare description of "multiple incidents of sexual abuse from September 1959 to 31 September 1960" by Lt Swift.[6] More detailed particulars of the alleged abuse were first provided in the Statement of Claim filed 2 May 2019.[7]

11. As to AS [26]-[28], the statements of Cmr Tidd and Mr Brewin need to be read as a whole, and their significance understood in the light of their limited deployment before the primary judge and the Court of Appeal's treatment of them.

12. Cmr Tidd's statement was not relied on by the applicant before the primary judge, other than one reference to it in the Royal Commission's report outlining the respondent's managerial structure: CA [107]-[109] (CAB 92-93).[8] Ground 4 of the applicant's appeal to the Court of Appeal was that the primary judge erred in failing to have regard to Cmr Tidd's report: CA [58(4)], [167] (CAB 79, 108). In dismissing that ground, the Court of Appeal observed that there was no submission before the primary judge that Cmr Tidd's statement served as an admission against interest by the respondent regarding the prejudice (or lack thereof) it would suffer in having to defend the applicant's claim: CA [174] (CAB 110).

13. The Court of Appeal in addition correctly observed that Cmr Tidd's statement only concerned the respondent's policies and procedures, described at a general level, from a time before his involvement in the organisation, and did not concern the applicant's specific allegations: CA [176] (CAB 110).

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6 Geary Affidavit, ex LG-7 (RBFM 12).

7 ABFM 5.

8 Footnote 94 in the Court of Appeal's reasons (CAB 93) is a reference to footnote 44 of the applicant's written submissions before the primary judge filed 22 October 2021, which in turn referred to Annexure RL-4 of Ms Littlefair's affidavit dated 8 October 2021. Annexure RL-4 is a copy of the Royal Commission's report in relation to Case Study No 33, "The response of The Salvation Army (Southern Territory) to allegations of child sexual abuse at children's homes that it operated" (RBFM 37). That report (at RBFM 77-78) refers to Cmr Tidd's explanation of the managerial structure of the respondent's institutions, as set out in his statement beginning at ABFM 78, in particular at [87]-[89] (ABFM 97).

14. As to Mr Brewin, who was the respondent's solicitor before the Royal Commission {CA [93] (CAB 88)}, his statement was not relied on by the applicant before the primary judge. The Court of Appeal made no findings about it other than an apparent acceptance that it indicated that prior to 1997 the respondent had no "formal system or policies dealing with the protection of children" and complaints by children were "too often" disbelieved or ignored: CA [93]-[94], [118] (CAB 88, 95). Similarly to Cmr Tidd's statement, Mr Brewin's statement was in general terms and did not concern the applicant's specific allegations.

15. Having regard to the generalised nature of the statements, the Court of Appeal found the primary judge did not err in placing no weight upon Cmr Tidd's statement: CA [178], [180] (CAB 110-111). In addition to that foundational point concerning the evidentiary value of Cmr Tidd's statement, the particular uses sought to be made of Cmr Tidd's and Mr Brewin's statements in the applicant's submissions in this Court are addressed in the further submissions on Ground 1 below.

16. Further relevant facts are that:

(a) despite extensive inquiries, the respondent is not able to identify any other officers who worked at the Home between 1959 and 1962 who are still alive and able to provide any relevant information: PJ [54] (CAB 21); CA [6(4)], [40], [79], [131] (CAB 61, 73, 84-85, 98);

(b) the respondent possesses evidence that Lt Swift was a Salvation Army Officer appointed to the Home from 1959 to 1962, but it possesses no evidence as to the precise role of Lt Swift or the scope of his duties at the Home: PJ [148] (CAB 49); CA [53] (CAB 77);

(c) the respondent does not possess critical evidence relevant to questions of actual authority, power, trust, control and the ability to achieve intimacy with the victim which would arise in the vicarious liability inquiry: see CA [164] (CAB 107).

Part V ARGUMENT

A. The Authority of *GLJ*

17. In *GLJ* this Court unanimously held that the applicable standard of appellate review of a decision to permanently stay proceedings on the basis that a trial would be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process is the "correctness standard" explained in *Warren v Coombes* and not that specified in *House v The King*.[9]

18. In *GLJ*, it was uncontested that if a fair trial cannot be held or would be so unfairly and unjustifiably oppressive as to constitute an abuse of process then the proceedings should be permanently stayed.

19. By majority, the Court further held that in a civil claim for damages that relates to the death of, or personal injury to, a person resulting from an act or omission that constitutes child abuse, the question of whether or not a fair trial could be held falls to be evaluated in a "new legal context" established by the abolition of the limitation period, so that the mere effluxion of time and inevitable impoverishment of evidence cannot attract the quality of exceptionality required to justify the extreme remedy of granting a permanent stay.[10]

20. Beyond those holdings, the majority affirmed that each case in which a stay is sought will depend on its own facts,[11] and the reasons of the majority in *GLJ* are otherwise referable to the specific facts of that case.

B. Ground 1 – was the stay properly granted?

21. The applicant does not challenge the concurrent finding of fact that the respondent did not know of the allegations (and therefore *could not* have investigated those allegations) until after Lt Swift's death on 3 October 2006: CA [89] (CAB 87). The applicant's challenge is limited to the conclusion that the stay was justified where the applicant contends there was no evidence that the respondent *would have* investigated those

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9 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; 97 ALJR 857 (***GLJ***) at [15], [24], [26], [95], [161].
10 *GLJ* at [40]-[43], [47], [52].
11 *GLJ* at [64].

allegations even if it had been made aware of them prior to Lt Swift's death on 3 October 2006.

22. That contention rests on two propositions that it is submitted are wrong.

23. ***First,*** the applicant contends that the respondent bore an onus requiring it to prove that had the respondent been notified of the applicant's allegations against Lt Swift it would have investigated those allegations (the **onus of proof issue**).

24. ***Second,*** the applicant contends that the evidence in fact adduced before the primary judge demonstrated to the contrary (i.e. the evidence affirmatively established that the respondent would *not* have investigated the applicant's allegations) (the **evidence issue**).

The onus of proof issue

25. It is uncontroversial that the onus is on the respondent to prove that any prospective trial of the applicant's proceedings will be unfair or involve such unfairness or oppression so as to constitute an abuse of process.[12] Both the primary judge and the Court of Appeal recognised this: PJ [15(i)], [18] (CAB 11-12); CA [30(1)], [60], [63] (CAB 69, 79-80). However, contrary to AS [48]-[50], that does not mean that the onus is on the respondent to prove each and every hypothetical step it would have taken had it known of the allegations prior to Lt Swift's death, and the likely outcome of those steps, so as to demonstrate the relevant unfairness.

26. The difficulty with the applicant's analysis is that it misdirects the temporal nature of the relevant inquiry. The source of the power to permanently stay proceedings where a fair trial cannot be held and where the trial will involve unfairness or oppression to a party is the necessity to maintain the integrity of the adversarial system of justice and the maintenance of the rule of law.[13] The inquiry is directed towards "the congruence or otherwise of the holding of a trial and rendering of a verdict with the fundamental

[12] *GLJ* at [21].
[13] *GLJ* at [20].

norms underlying [the Australian] legal system."[14] The focus is not upon the mere *fact* of the effluxion of time, but upon the *effect* of that effluxion of time.[15]

27. Considered in that light, the proper inquiry looks to the present, focussing on whether in all of the circumstances a fair trial is possible, having regard to that fact that the proceedings have been commenced now, and not at an earlier point in time. The focus is on the existence of prejudice at the time of the proposed trial, and not the absence of prejudice at an earlier point in time.

28. The capacity of a respondent to meet the burden sought to be imposed upon it by the applicant's argument is itself a matter that becomes more burdensome and difficult with the effluxion of time. The capacity of a respondent to prove that it would have adopted a particular course of action had earlier notice of allegations been provided is itself prejudiced by the death of witnesses who could speak to what action would have been taken, and the loss of documents recording steps taken by the respondent in other similar circumstances. If the applicant's argument were to be accepted, the longer the period of time that passes between the alleged wrong and the making of the allegations, the more difficult it becomes to obtain a stay of proceedings.

29. The backward-looking inquiry contended for by the applicant was correctly eschewed by the Court of Appeal in the present case because it would have led to a hypothetical inquiry, imposing a vague and uncertain burden on the respondent, to prove what it would have done at all points in history from the date of the claimed wrong to the present: CA [114] (CAB 94). This, in and of itself, amounts to oppression.[16]

30. None of this, of course, in any way denies the relevance of evidence adduced in the hearing of an application for a stay of proceedings as to the steps in fact not taken in any particular case, for example evidence that demonstrated that a particular defendant had chosen not to take up an opportunity to investigate allegations while an adequate body of evidence may have been available: see, e.g., *GLJ* at [79]; CA [116] (CAB 94-95).

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14 *GLJ* at [22].
15 *GLJ* at [41]-[42]
16 See *The Council of Trinity Grammar v Anderson* (2019) 101 NSWLR 762 at [489].

31. The present case is not like *GLJ*, where importance was placed on the fact that the respondent, through the laicisation process (undertaken at a time when it was on notice of the alleged perpetrator's paedophilia) had an opportunity to make whatever inquiries it saw fit about him having sexually abused children: *GLJ* at [79]. That was in the context where the Diocese had been on notice of Father Anderson having allegedly sexually abused children well before his death. In *GLJ*, there was no hypothetical analysis: the specific opportunity as to when it could have investigated matters, and the fact of it having not done so, were identified.

32. Similarly, in *The Council of Trinity Grammar v Anderson* (2019) 101 NSWLR 762, the issue was whether the Council's decision not to investigate when the civil claim was statute barred and Police were investigating the plaintiff's allegations constituted grounds for refusing the stay. Ultimately, it was found the Council's failure to investigate was not unreasonable.

33. In both of those cases, the inquiry was not hypothetical. It was grounded in known facts about the opportunity to have investigated, the known facts as to whether the investigation occurred or not, and the reasons why no investigation was undertaken. Those facts are not known in this case and cannot be known by reason of the effluxion of time.

The evidence issue

34. The evidence does not establish error in the Court of Appeal's failure to find that had the respondent been notified of the applicant's allegations concerning Lt Swift prior to his death, it would not have investigated those allegations (as is suggested at AS [38], [44], [52], [60]). The Court of Appeal correctly found that the evidence showed that in 1994 (or perhaps 1997) the respondent established a formal scheme for handling complaints of sexual abuse: CA [92], [177] (CAB 88, 110). Prior to the establishment of that formal scheme, individual officers dealt with such complaints on an *ad hoc* basis: CA [92] (CAB 88).[17]

[17] Statement of Commissioner Floyd John Tidd delivered to the Royal Commission dated 17 September 2015 (**Tidd Statement**) at [100] (ABFM 99-100); Investigation Report regarding Child Sexual Abuse authored by Trevor Walker dated 20 August 2015 (**Walker Report**) at [9.1]-[9.2] (ABFM 463-464).

35. Contrary to AS [35]-[43], a careful reading of the statement by Cmr Tidd given in September 2015 by the respondent to the Royal Commission into Institutional Responses to Child Sexual Abuse (in part relying upon a report by Mr Trevor Walker), and the statement by the respondent's solicitor (Mr Brewin) to the Royal Commission, does not positively establish that the respondent would not have investigated the applicant's allegations had they been notified to it before Lt Swift's death in 2006.

36. Mr Walker was engaged by the respondent to undertake a detailed investigation into the respondent's cultural practices.[18] He prepared a report[19] which appears to have been the source of much of Cmr Tidd's written statement to the Royal Commission in relation to this issue.

37. The relevant portion of Cmr Tidd's evidence was that "some children had told officers and/or employees that they were being abused" and that "tragically, these children were too often not believed and their pleas were ignored or they were dismissed as lies."[20] Properly understood (particularly having regard to Mr Walker's report),[21] this is a statement about reports made by children at or about the time of the commission of the offences, and says nothing at all about what investigation might have been carried out subsequently upon allegations being notified to the respondent (and in particular, in the context of a claim for civil damages). At its highest, Cmr Tidd's evidence established that prior to the mid-1990s, contemporaneous allegations of abuse were "too often" (but not always) not believed or ignored, and "in most cases" (but not all) nothing was done about the allegations: CA [91] (CAB 87); see also CA [92] (CAB 88).

38. Cmr Tidd also pointed to evidence of employees being challenged by officers in response to abuse allegations, and employees being dismissed or otherwise not returning to work following such challenges.[22] This evidence shows that some allegations were recorded and investigated – that is the essence of the "*ad hoc*" nature of the respondent's practice during this period.

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18 Tidd Statement at [99], [118]-[121] (ABFM 99, 111-112).
19 Walker Report (ABFM 440).
20 Tidd Statement at [94] (ABFM 98). See also Tidd Statement at [98] (ABFM 99).
21 Walker Report at [9.1], [9.3] (ABFM 463, 465).
22 Tidd Statement at [101] (ABFM 100). See also Walker Report at [9.2] (ABFM 463-464).

39. Contrary to AS [40], Mr Brewin's evidence was not that investigations which were carried out were "limited and somewhat perfunctory", nor that "limited importance" was placed on the alleged perpetrator's response. The cited portions of Mr Brewin's evidence[23] provide no support for that submission. That evidence, which concerned post-1994 practices, shows that the respondent had a general practice of gathering information in response to abuse claims, including by contacting the alleged perpetrator. Understandably, whether or not that in fact occurred depended upon the particular circumstances of the case.

40. Importantly, that process of gathering information included contacting other officers appointed to the relevant institution at the time of the alleged abuse for the purposes of obtaining information as to the operation or practices of the institution.[24] That is of course evidence of what investigations and inquiries Mr Brewin, as an external advisor to the respondent, undertook as part of the formal process instituted in the mid 1990s. It says nothing at all of the *ad hoc* practices that existed prior to that period, nor anything at all about the internal investigations and inquiries that were undertaken by the respondent prior to that period.

41. Against that evidentiary background, the Court of Appeal was correct to conclude that while complaints were "too often" ignored, there was no foundation for a positive finding as to how a hypothetical complaint by the applicant at an unspecified point in time would have been handled: CA [118] (CAB 95).

C. Ground 2 – failure to put argument squarely to the primary judge

42. The Court of Appeal rejected the argument advanced by the applicant under Ground 1 of this appeal not only on its merits, but also because the applicant's argument was not raised before the primary judge: CA [110]-[111] (CAB 93).

43. The applicant does not challenge the finding by the Court of Appeal {CA [110] (CAB 93)} that the argument advanced by Ground 1 in this Court was not "squarely put" to the primary judge. The applicant's Ground 2 is directed only to whether or not the

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[23] Statement of Philip Harry Brewin dated 17 September 2015 (**Brewin Statement**) at [90]-[95] (ABFM 171-172).

[24] Brewin Statement at [90] (ABFM 171).

Court of Appeal ought to have considered that point, even though it had not been put to the primary judge.

44. Contrary to AS [45] and [62], the basis for the Court of Appeal's finding does not "fall away" following the holding in *GLJ* that the "correctness standard" of appellate review applies in determining whether to grant a permanent stay. Through whatever prism the Court of Appeal was reviewing the primary judge's decision, the applicant was bound by the manner in which his case was presented before the primary judge.

45. In the Court of Appeal, the applicant accepted that the principles in *House v The King* applied: CA [28], [55], [57] (CAB 68, 78). In those circumstances the Court of Appeal correctly held it was sufficient for the respondent to identify that the argument had not been put to the primary judge: CA [111] (CAB 93).[25]

46. While it may now be accepted that the "correctness standard" applies, the applicant is nonetheless "bound by the conduct of his case"[26] on the basis articulated in *Suttor v Gundowda Limited* (1950) 81 CLR 418.[27] Under that approach, "[w]here a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards".[28]

47. Had the matters contended for by Ground 1 been advanced at the hearing before the primary judge, that hearing would have taken a different course. Most obviously, forensic decisions could have been made either to not read relevant parts of Mr Geary's affidavit, or to not tender relevant parts of the Royal Commission statements of Cmr Tidd or Mr Brewin.

48. In addition, or alternatively, having regard to the limited scope of the inquiries in fact made by Mr Walker in preparing his report,[29] additional evidence could have been adduced from him clarifying the limited scope of his stated opinions, and expanding

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25 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [120].

26 *University of Wollongong v Metwally (No 2)* [1985] HCA 28; 59 ALJR 481 at 483; quoted with approval in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [32].

27 See also *Coulton v Holcombe* (1986) 162 CLR 1 at 8 and 9; *Whisprun Pty Ltd v Dixon* (2003) 234 CLR 492 at [51].

28 *Suttor v Gundowda* (1950) 81 CLR 418 at 438.

29 Walker Report at [5] (ABFM 452-453).

upon the extent to which allegations made after a complainant had left the care of the respondent were investigated and acted upon. Similar, more detailed evidence could have been obtained from others with experience of the historical claims handling processes of the respondent such as Mr Brewin, Mr Graham Sapwell,[30] and Mr Geoff Webb.[31]

49. Accordingly, the Court of Appeal was correct to reject the argument advanced by the applicant under Ground 1 on the basis that the applicant's argument was not raised before the primary judge.

D. Ground 3 – grant of stay having regard to cumulative effects

50. In essence, Ground 3 raises the sufficiency of the multiple matters relied upon by the Court of Appeal in granting the permanent stay, particularly in the light of this Court's subsequent decision in *GLJ*.

51. Those multiple matters were:

(a) Lt Swift's death, which was "an important consideration relevant to the discretion" {CA [132] (CAB 98)};

(b) the death in 1968 of Major Watson, being the only person to whom the applicant alleges he reported the abuse (in circumstances where there is no documentary record of the report) {CA [6(3)], [40] (CAB 61, 73)};

(c) the absence of any other officers who worked at the Home during the relevant period of 1959 to 1962 who could provide relevant information {CA [6(4)], [40] (CAB 61, 73)}; and

(d) the absence, following comprehensive searches, of relevant documentary evidence {CA [6(6)], [45]-[46] (CAB 61, 74-75)}.

52. The Court of Appeal found that the "cumulative effect" of these features sufficiently hindered the capacity of the respondent meaningfully to conduct a defence to warrant

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[30] Mr Sapwell prepared a statement for the Royal Commission which was not in evidence before the primary judge, but it is clear from the Tidd Statement that Mr Sapwell's statement provided part of the basis for the opinions Cmr Tidd expressed: see Tidd Statement at [96], [105], [107], [108], [114], [145], [283], [287], [322], [323], [355], [361] (ABFM 99-102, 108, 130, 137, 142, 148-149).

[31] Who assisted Mr Sapwell: see Tidd Statement at [287] (ABFM 137).

a permanent stay: CA [165]-[166] (CAB 108). That finding was correct, even after *GLJ*, for the following reasons.

53. ***First,*** *GLJ* does not require a defendant to demonstrate what the actual evidence would have been that has now been lost by the effluxion of time. As explained by McHugh J in *Brisbane South Regional Health Authority v Taylor*,[32] prejudice may exist without the parties or anybody else realising that it exists, for example, where there has been an unrecognisable deterioration in the quality of the evidence or the disappearance of physical evidence without anybody now knowing that it ever existed.

54. ***Secondly,*** the respondent in any event demonstrated both actual loss of evidence and prejudice of the kind explained in *Brisbane South Regional Health Authority v Taylor*.

55. The actual losses included the deaths of Lt Swift, Major Watson and other officers at the Home. There was thus a loss of evidence as to matters such as:

(a) the particular role to which Lt Swift was appointed by the respondent (relevant to the question of vicarious liability): PJ [148] (CAB 49); CA [53] (CAB 77);

(b) the nature and content of Lt Swift's responsibilities at the home (relevant to addressing the evidence of the applicant in his Affidavit at [63][33]): PJ [56(c)] (CAB 22);

(c) the circumstances by which Lt Swift came to be driving to Mills and Wares to pick up broken biscuits (relevant to vicarious liability, and addressing the evidence of the applicant in his Affidavit at [76]-[77][34]);

(d) the general routine at the home in relation to the use of the recreation room and of the dormitory (relevant to addressing the evidence of the applicant in his Affidavit at [79]-[111],[35] by presenting a circumstantial challenge to the applicant's account of the abuse).

56. As explained at [6] above, the respondent's position is that Lt Swift was an ordained minister of the respondent and not an employee. Any attempt to expand the reach of

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32 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551.
33 ABFM 350.
34 ABFM 352.
35 ABFM 352-355.

vicarious liability beyond relationships of employment (of the kind advocated for by the respondent in the appeal in this Court in *Bird v DP (A Pseudonym)*) would give rise to further factual inquiries in respect of which the respondent would be severely prejudiced. Even if Lt Swift were found to be an employee, the particular role to which Lt Swift was appointed by the respondent is unknown. No documents relating to his role or responsibility at the Home could be identified: PJ [56(c)] (CAB 22). In that circumstance, how Lt Swift came to be interacting with the applicant on the occasions on which he was alleged to have assaulted him, the extent to which that was consistent with any special role that the respondent had assigned to Lt Swift and thereby the extent to which Lt Swift took advantage of his position with respect to the applicant are unknown, and are now unknowable.

57. Nor can the respondent identify any other officer present at the Home during the relevant period who is still capable of providing information: CA [40] (CAB 73). Those witnesses are likely to have been able to give evidence as to the roles and responsibilities conferred upon Lt Swift in relation to residents at the Home in 1959 and 1960. The respondent has permanently lost the opportunity to make those inquiries, and adduce such evidence: see CA [135] (CAB 99).

58. Beyond the vicarious liability case, the respondent also has lost the ability to fairly test the applicant's evidence as to the fact of the abuse occurring. That goes beyond the absence of Lt Swift, but extends to evidence from others that would enable the respondent to test the reliability of the applicant's evidence. Evidence as to the general routine at the home in relation to the use of the recreation room where the applicant says he was assaulted, while other children were playing outside,[36] or on a Sunday when other children were not present,[37] or after the other children had left,[38] and the routine for cleaning or being in the dormitory room, where the applicant says he was assaulted while cleaning the room alone,[39] are all highly relevant to questions of the plausibility or otherwise of the applicant's allegations being true. Such evidence is commonplace in challenging allegations of sexual abuse, but is now denied to the respondent.

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36 Affidavit [80] (ABFM 352).
37 Affidavit [86]-[88] (ABFM 353).
38 Affidavit [95] (ABFM 354).
39 Affidavit [101], [106] (ABFM 354-355).

59. To dismiss the relevance of those lost opportunities as "speculative" wrongly ignores the self-evident proposition that proving the content of lost material will very seldom be possible. Moreover, the suggestion that such lost evidence may be dismissed as "speculative" is squarely at odds with this Court's apparent approval in *GLJ* at [65] of the outcomes in *Moubarak* and *Connellan v Murphy*.[40] In those cases, there was no suggestion that the contents and utility of the unavailable material was knowable at the time of the application, or had been (or had to be) proved by the defendant.

60. ***Thirdly***, as the Court of Appeal recognised, it was the cumulative effect of these matters that gave rise to the exceptional circumstances warranting the grant of a permanent stay: CA [190], [197], [205] (CAB 112, 115, 117).

61. The Court of Appeal did not reason that any one of these factors was sufficient to give rise to the unfairness, but it was their cumulative effect that went beyond the "inevitable" impoverishment of the evidence (*GLJ* at [52]) and the "routine and unexceptional sequelae" of the alleged abuse (*GLJ* at [50]).

62. Whilst clarifying that such "inevitable" and "routine" consequences of the passage of time will not of themselves suffice for the grant of a permanent stay, the majority in *GLJ* did not deny that there will be cases — of which it is submitted the present one is an example — where the cumulative effect of the loss and impoverishment of the evidence is so exceptional that it sufficiently hinders the defendant's ability meaningfully to defend itself as to warrant a permanent stay: cf AS [69], [71]. As recognised by the majority in *GLJ,* certain exceptional cases demonstrate that *the effects of* the passing of time, "of themselves or with other factors, might mean that a fair trial is no longer possible": *GLJ* at [65].

63. The multiple matters which led the Court of Appeal to the conclusion that the trial would be unfair were not just speculative possibilities of loss.

64. ***Fourthly,*** there is no rigid difference in principle between, on the one hand, cases of alleged abuse in a private and domestic setting and, on the other hand, cases in an institutional context. It may be accepted that in many cases of institutional abuse there is likely to be additional evidence available to a defendant than will ordinarily be the

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[40] *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 (***Moubarak***); *Connellan v Murphy* [2017] VSCA 116 (***Connellan v Murphy***).

case of abuse in a domestic context: *GLJ* at [64]. However, the mere fact that abuse occurs within an institutional context does not support the making of *a priori* assumptions concerning the availability of evidence and the ability of the defendant meaningfully to defend itself. Moreover, abuse in an institutional context also raises additional liability issues that are not present in a domestic context (such as breach of duty and vicarious liability) that broaden the scope of the issues for determination and in respect of which the defendant may be prejudiced by the effluxion of time.

65. Each case will depend upon its own facts (*GLJ* at [64]), and will depend upon the particular allegations being made against the defendant (which will ordinarily be identified by reference to the pleadings, but may additionally be identified by reference to the evidence proposed to be adduced by a particular plaintiff). In a case such as the present one where the evidence demonstrates that an absence of relevant witnesses and records and other information is such that a fair trial cannot be achieved, the remedy of a stay remains available, even to an institution, in order to prevent an abuse of process.

66. In this case the respondent, while an institution, has incomplete records (see [51] above), and an absence of relevant witnesses. There is only one other complaint by a care leaver in which allegations of assault by Lt Swift were notified to the respondent before his death (but 14 years after his retirement suffering from Alzheimer's disease), and these allegations related to a different home, in a different State. For the reasons given at [8] above, understandably, no relevant documents came into existence or witnesses were spoken to at this time.

67. Considering the above four matters, the respondent is in a much more disadvantageous position than the Diocese in *GLJ*: cf AS [79]-[83]. Importantly, in the present case:

(a) there is no evidence of any complaints having been made against Lt Swift prior to the alleged abuse of the applicant, in contrast to the Diocese's knowledge that complaints had been made about Father Anderson having sexually assaulted young boys at a time before the alleged assault on GLJ: see *GLJ* at [67], [70], [72], [75], [79];

(b) there is no evidence that Lt Swift was dealt with in any way as a result of complaints about sexual abuse, in contrast to the Diocese's knowledge that

Father Anderson had been referred for treatment for his "problem": see *GLJ* at [67]-[69], [72], [75];

(c) there is no documentary evidence from which Lt Swift's response to child sexual abuse allegations could reliably be inferred, compared to Father Anderson (who had given responses to such allegations before his laicisation): see *GLJ* at [67], [76]-[78];

(d) it cannot confidently be said that Lt Swift's response would have been a bare denial and rebutting of any suggestion of impropriety: see *GLJ* at [78];

(e) because the respondent was not on notice of the allegations by the applicant at any time prior to Lt Swift's death, the respondent did not fail to take advantage of an inquisitorial process available to it (like the laicisation process available to the Diocese in *GLJ*) through which allegations of impropriety could have been put to Lt Swift: see *GLJ* at [79];

(f) the respondent does not have "a considerable body of documentary evidence of arguable relevance", with the prospect of obtaining further potential records: cf *GLJ* at [81].

68. Rather, this case, as the Court of Appeal correctly recognised, bears similarities to and sits comfortably with the outcome and reasoning in both *Moubarak* and *Connellan v Murphy*: CA [44] (CAB 74). Those similarities are readily apparent from the description of those cases (with evident approval) in *GLJ* at [65]. Their Honours in the majority there pointed to the fact that in *Moubarak*:

(a) the alleged perpetrator (who was the defendant, represented by his tutor) was suffering from dementia which rendered him incapable of responding to the allegations or otherwise giving instructions for his defence;

(b) there were no relevant documentary records; and

(c) the claim arose without any forewarning before the dementia diagnosis.

69. The same or at least highly analogous circumstances exist in the present case:

(a) the respondent only learned of the allegations after Lt Swift's death {CA [6(7)], [89] (CAB 62, 87)};

(b) following comprehensive searches, no relevant documentary evidence has been found {CA [6(6)], [45]-[46] (CAB 61, 74-75)}; and

(c) the claim arose without forewarning such that there was no opportunity to investigate during Lt Swift's lifetime {CA [89] (CAB 87)}.

70. As for *Connellan v Murphy*, in *GLJ* at [65] their Honours in the majority again pointed to the lack of forewarning and consequent absence of relevant documentary records, as well as the inability of both sides to investigate (or call evidence about) relevant surrounding circumstances and events. This case presents as a considerably stronger candidate for a permanent stay than *Connellan v Murphy*, having regard to the fact that in *Connellan v Murphy* all of the "principal protagonists", including the defendant and two alleged witnesses, were alive and capable of giving evidence: *Connellan v Murphy* at [56].

71. Considered in the light of the apparent approval of the result of these cases by the majority in *GLJ*, and the recognition that there will be cases where the impoverishment or loss of evidence will be of such an extent as to render any trial necessarily unfair and therefore to warrant a permanent stay, it is submitted that the result reached by the Court of Appeal in the present case was correct and not relevantly undermined by the decision in *GLJ*. The present case sits comfortably with those authorities where the circumstances are so exceptional, and the prejudice to the respondent so great, that a permanent stay is necessary to prevent an unfair trial.

72. Each abuse of process case will depend on its own facts,[41] and on any view the present case is different in significant respects from the facts in *GLJ*. Those differences lie at the heart of the reasons this Court gave for reversing the permanent stay ordered in that case. Contrary to the applicant's submissions, that reversal does not impugn the Court of Appeal's decision in the present case. The Court of Appeal correctly found, based on the cumulative effect of various factors, that this case is in that exceptional category of cases where the absence of available material is so profound as to deprive the

[41] *GLJ* at [64]; *Moubarak* at [193] per Leeming JA.

respondent of the ability to respond to the applicant's allegations in any meaningful way, thus enlivening the jurisdiction to grant a permanent stay.

Part VI ARGUMENT ON NOTICE OF CONTENTION OR CROSS-APPEAL

73. Not applicable.

Part VII ESTIMATE FOR ORAL ARGUMENT

74. The respondent estimates that up to 1.5 hours will be required for its address.

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DOMINIC VILLA SC
(02) 9151 2006
villa@newchambers.com.au

RACHAEL YOUNG SC
(08) 6217 4709
rachael.young@fourthfloor.com.au

HENRY COOPER
(02) 9151 2012
cooper@newchambers.com.au

ANNEXURE

No Constitutional provisions, statutes and statutory instruments are referred to in respondent's submissions.