HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **RC**
Applicant

and

THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST
Respondent

APPLICANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: CONCISE STATEMENT OF THE ISSUES

2. Insofar as the respondent sought a permanent stay of the applicant's action on the basis that the respondent did not become aware of the applicant's allegations of child sexual abuse until after the death of the alleged perpetrator (**Lt Swift**), should a permanent stay have been granted (a) without proof that the respondent would have investigated the allegations had it been aware of them prior to Lt Swift's death; or (b) given that the evidence was affirmatively to the effect that the respondent would not have done so?

3. Should a permanent stay otherwise have been granted?

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The applicant does not consider that notice is required under s 78B of the *Judiciary Act*.

PART IV: JUDGMENTS OF THE COURTS BELOW

5. The reasons of the primary judge (**PJ**) are unreported: ***RC v The Salvation Army (Western Australia) Property Trust*** [2021] WADC 117 **{CAB 5}**.

6. The reasons of the Court of Appeal (**CA**) are unreported: ***RC v The Salvation Army (Western Australia) Property Trust*** [2023] WASCA 29 **{CAB 56}**.

PART V: THE RELEVANT FACTS FOUND OR ADMITTED BELOW

7. On 15 November 2018, the applicant commenced an action against the respondent in the District Court of Western Australia claiming damages for sexual abuse alleged to have been committed against him by Lt Swift while the applicant was in the care of the Nedlands Boys' Home (**the Home**) between August 1959 and April 1960.[1] The applicant alleges he reported the abuse on two occasions to the officer in charge of the Home, Major Watson.[2] The respondent applied for, and was granted, a permanent stay of the proceedings.

8. The applicant was born on 24 March 1947.[3]

9. The respondent owned and operated the Home.[4]

10. Lt Swift was a Salvation Army Officer appointed to the Home.[5]

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[1] PJ [24], [25] **{CAB 14}**; CA [1], [6(2), (9)-(11)] **{CAB 60, 61-62}**.

[2] PJ [26] **{CAB 15}**. The PJ there said that the applicant said that some weeks before the end of his placement at the Home, immediately after being anally raped by Lt Swift, he reported the rape to Major Watson, who ignored him, and that the applicant referred in his evidence to a second report a few weeks later. In fact, although the PJ correctly recorded the fact that the applicant's evidence was that he had made two contemporaneous reports to Major Watson, he misstated the effect of that evidence. The applicant's evidence was that he made his first report to Major Watson of sexual abuse by Lt Swift about *'half way'* through his stay at the Home, following an incident where Lt Swift had forced the applicant to perform oral sex on him, which occurred *before* the first instance of anal rape, not afterwards as the PJ said. The applicant's evidence was that he made his second report to Major Watson a few weeks later, after Lt Swift had anally raped him the second time. According to the applicant, Lt Swift was to go on to anally rape him a third and final time, after his second report to Major Watson, and within about a month before the applicant left the Home. The applicant's evidence was to the effect that on both occasions Major Watson dismissed out of hand his reports of the abuse, accusing the applicant of lying, and on the second occasion Major Watson threatened the applicant with *'the strap'* if he maintained the allegations: applicant pars 113-121 **{ABFM 355-356}**; and see CA [66] **{CAB 80-81}**.

[3] CA [6(1)] **{CAB 61}**.

[4] PJ [2], [35(a)] **{CAB 8, 18}**; CA [16] **{CAB 65}**.

[5] PJ [35(b)] **{CAB 18}**, and see PJ [115] **{CAB 41}**; CA [16] **{CAB 65}**.

11. Lt Swift was placed at the Home from 15 January 1959 to 6 September 1962,[6] ie over a period of time which covered the period during which the applicant claimed to be at the Home.

12. The respondent still has Lt Swift's personnel records.[7]

13. The officer in charge of the Home during the relevant period, ie from August 1959 to April 1960, *'appeared to be'* a Major Watson.[8]

14. The person whom the respondent *'believed to be'* the Major Watson referred to by the applicant died on 20 August 1968.[9]

15. Lt Swift retired in 1989 when he was 65 years old.[10]

16. Lt Swift died on 3 October 2006.[11]

17. Leaving aside the applicant's alleged contemporaneous reports of the abuse to Major Watson (which were not admitted), the first time the respondent became aware that the applicant alleged he had been sexually abused by Lt Swift was when police contacted the respondent on 10 February 2014.[12]

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[6] PJ [35(c)] **{CAB 18}**, and see PJ [115] **{CAB 41}**; CA [16] **{CAB 65}**.

[7] CA [160]-[161] **{CAB 106-107}**. See **{ABFM 74-77, 201-339}**.

[8] PJ [26] **{CAB 15}**; CA [6(3)] **{CAB 61}**. Although couched in these terms, there was no serious dispute that Major Watson was the officer in charge of the Home at the relevant time. See **{ABFM 151-152}** and see also the following footnote.

[9] PJ [51] **{CAB 21}**; CA [40] **{CAB 73}**. Despite the references to *'believed to be'*, there was no difficulty in identifying the Major Watson who died on 20 August 1968 as the officer in charge of the Home at the relevant time. The PJ did not find (and the respondent did not suggest) that it was under any difficulty in this respect. The PJ recorded merely that the applicant was unable to provide Major Watson's first name or his *'title'*. This was not to suggest that the applicant was unable to identify Watson by his rank of 'Major'. Indeed, both par 4(e) of the applicant's statement of claim (filed 30 April 2019) **{ABFM 7}** and his affidavit sworn 7 October 2021 eg pars 24-27, 39-41, 66, 113-121 **{ABFM 345, 346-347, 351, 355-356}** referred to Major Watson by his rank. Rather, the suggested inability of the applicant to provide Major Watson's *'title'* is a reference to answer 6 of his further and better particulars of the statement of claim, dated 14 August 2019, in which the applicant said he was 'not privy to Major Watson's full name or *full* title': **{ABFM 18-19}**.

[10] CA [95] **{CAB 88}**. Lt Swift's date of birth was 21 August 1924: **{ABFM 201}**.

[11] PJ [50] **{CAB 21}**; CA [6(5)] **{CAB 61}**.

[12] PJ [50] **{CAB 21}**; CA [6(7)] **{CAB 62}**.

18. On 13 July 2018 the specific allegations of sexual assault were first put by the applicant, through his solicitors, to the respondent.[13]

19. Lt Swift's widow died on 17 May 2019, although for the two years or so prior to that she appears to have been in care suffering from significant memory issues.[14] She went into care in around 2017.[15]

20. The applicant'a causes of action with respect to the alleged sexual abuse originally became statute-barred when the applicant turned 24 years of age, on 24 March 1971, and were thereafter statute-barred until 1 July 2018 when the former limitation period was removed by s6A of the *Limitation Act 2005* (WA).[16]

21. The applicant could not be criticised for the delay.[17]

22. The two surviving children of Lt Swift which the respondent's solicitors were able to contact were not able to provide any substantive information which would have assisted the respondent to properly deal with the allegations made by the applicant.[18]

23. Despite extensive inquiries, the respondent has been unable 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.[19] All other relevant witnesses who could be called from the respondent's perspective are deceased.[20]

24. The contemporaneous documents the respondent had been able to obtain neither recorded allegations of sexual assault by Lt Swift against the applicant, nor the existence of any relevant investigation by the respondent into Lt Swift.[21] In particular, the respondent had been unable to ascertain whether a 'Z file' – a type of

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[13] PJ [50] **{CAB 21}**; CA [6(8)] **{CAB 62}**.
[14] PJ [52] **{CAB 21}**; CA [40] **{CAB 73}**.
[15] PJ [137] **{CAB 46}**.
[16] PJ [10] **{CAB 9}**; CA [6(12)] **{CAB 62}**. In Western Australia at all times prior to the introduction of s6A of the *Limitation Act 2005*, there was no ability to obtain an extension of the limitation period.
[17] PJ [136]-[137] **{CAB 46}**; CA [118] **{CAB 95}**.
[18] PJ [53] **{CAB 21}**; CA [40] **{CAB 73}**.
[19] PJ [54] **{CAB 21}**; CA [6(4)] **{CAB 61}**, [40] **{CAB 73}**.
[20] PJ [142] **{CAB 48}**; CA [44] **{CAB 74}**.
[21] PJ [55] **{CAB 22}**; CA [6(6)] **{CAB 61}**, CA [45] **{CAB 74}**.

Salvation Army file dealing with sensitive disciplinary matters – had been opened by Major Watson in relation to Lt Swift.[22]

25. There were no other meaningful inquiries which the respondent could make either to ascertain potential witnesses or obtain contemporaneous documents.[23]

26. In support of its application for a permanent stay, the respondent, through its solicitor,[24] adduced evidence of evidence it gave to the ***Royal Commission*** *into Institutional Responses to Child Sexual Abuse*, in the form of statements on oath by Commissioner Floyd Tidd and Mr Philip Brewin, each dated 17 September 2015.[25] Cmr Tidd was the Territorial Commander for the former Salvation Army Australia Southern Territory (**TSAS**),[26] which included Western Australia. Mr Brewin was the solicitor for the TSAS with direct responsibility for establishing the respondent's scheme for addressing claims for compensation for sexual (and physical) abuse and for managing claims for compensation made under that scheme.

27. In Cmr Tidd's statement to the Royal Commission, he referred to a report by a Mr Trevor Walker into the TSAS's policies, practices and procedures dated 20 August 2015,[27] which the TSAS had commissioned Mr Walker in 2013 to prepare.[28] Cmr Tidd expressed his complete agreement with Mr Walker's conclusions.[29]

28. This evidence is referred to further below in Part VI (see pars 36-44), but the CA accepted that it indicated that, prior to 1997, the respondent had no formal system or policies dealing with the protection of children and complaints of sexual abuse, and that the complaints of children were *'too often'* disbelieved or ignored.[30]

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[22] PJ [51] **{CAB 21}**, CA [56(d)] **{CAB 22}**; CA [6(6)] **{CAB 61}**.
[23] PJ [144] **{CAB 48}**; CA [46] **{CAB 74}**.
[24] PJ [128] **{CAB 44}**; CA [25] **{CAB 67}**.
[25] PJ [25] **{CAB 67}** (Cmr Tidd); CA [93] **{CAB 88}**. See also **{ABFM 78 – 150}** (Cmr Tidd's statement) and **{ABFM 153 – 200}** (Mr Brewin's statement).
[26] PJ [127] **{CAB 44}**.
[27] Tidd pars 119, 120 **{ABFM 102-103}**. Mr Walker's report, although referred to in Cmr Tidd's statement, was put into evidence by the applicant's solicitor, Ms Littlefair: PJ [123] **{CAB 43}**; CA [26] **{CAB 68}**; **{ABFM 437}**.
[28] Tidd par 99 **{ABFM 99}**
[29] Tidd pars 102, 128 **{ABFM 100, 105}**; CA [167] **{CAB 108}**.
[30] CA [118] **{CAB 95}** and see CA [91]-[95] **{CAB 87-88}**.

PART VI: ARGUMENT

Ground 1

29. The party seeking the permanent stay bears the onus of proving that the trial will be unfair or will involve such unfairness or oppression as to constitute an abuse of process. While the onus is the civil standard of the balance of probabilities, the onus has rightly been described as a heavy one, and the power rightly said to be exercisable only in an exceptional case. This is because it is always an extreme step to deny a person the opportunity of recourse to a court to have their case heard and decided.[31]

30. A necessary condition for a permanent stay in circumstances such as these is the existence of irremediable prejudice caused by the delay.[32] Prejudice in this context means actual, not presumptive prejudice.[33]

31. The suggested prejudice through Lt Swift's death which the PJ found to be significant and such as (with other circumstances) to justify the grant of a permanent stay, was *not* the fact that Lt Swift had died before the applicant commenced his action, but the fact that he had died before the respondent had first been notified of the applicant's allegations, such that the respondent had lost the opportunity to put the allegations to Lt Swift and investigate them during his lifetime.[34]

32. Accordingly, the relevant delay was not the delay in the plaintiff commencing the proceedings, but the delay[35] in informing the respondent of the allegations and, more particularly, not doing so prior to Lt Swift's death in 2006.

33. In that context, it was necessarily relevant to consider what the respondent would have done had it been aware of the applicant's allegations before Lt Swift's death in 2006. If it were shown that the respondent would not, in fact, have investigated the allegations (or, more correctly, since the onus of proof was on the respondent, if the respondent did not demonstrate that it *would* have investigated the allegations), the

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[31] ***GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*** (2023) 97 ALJR 857; [2023] HCA 32 (***GLJ***) at [21].
[32] ***R v Edwards*** (2009) 255 ALR 399; [2009] HCA 20 at [29], [34].
[33] ***Jago v District Court of New South Wales*** (1989) 168 CLR 23 at 33, 75, 78.
[34] PJ [50] **{CAB 21}**, PJ [141] **{CAB 47}**, PJ [146] **{CAB 48}**; CA [39] **{CAB 72}**, CA [62] **{CAB 80}**, CA [132] **{CAB 98}**.
[35] 'Delay' in the sense of the passage of time, not in a sense conveying pejorative connotations.

respondent suffered no prejudice as a result of the loss of any such opportunity to investigate.

34. There is no relevant unfairness or unjustifiable oppression to the respondent in being required to defend the proceedings on the basis that it lost the opportunity to put the allegations to Lt Swift and investigate them during his lifetime, if that 'opportunity' is not shown to have been of any value (and is affirmatively shown to have been of no value) because the respondent would not, in fact, have taken it up even if it had been aware of the allegations prior to Lt Swift's death.

35. For these reasons, the statements of Cmr Tidd and Mr Brewin were relevant.[36]

36. Cmr Tidd's statement was to the effect that claims of sexual abuse within TSAS homes were not investigated at all prior to in or about 1994 when (he said) a formal scheme for handling complaints of sexual abuse was established.[37] (The evidence of Mr Brewin, who had direct responsibility for the establishment and management of the formal scheme, was that it was not established until 1997.[38] The CA implicitly (and, with respect, correctly) preferred Mr Brewin's evidence on this point.[39] However, nothing turns on whether it was 1994 or 1997).

37. More particularly, Cmr Tidd referred to Mr Walker's report and his conclusion that prior to that formal scheme being established, TSAS did not have any formal procedure for the investigation of claims of child sexual abuse, as a consequence of which claims of child sexual abuse were either not investigated, or not properly investigated, and Cmr Tidd expressed his entire agreement with Mr Walker's conclusion that the TSAS failed to adequately explore and investigate claims of abuse and failed to appropriately respond to such claims.[40] Mr Walker (with whom Cmr Tidd expressly agreed) described the respondent's failings in this respect as *'systemic'*.[41]

38. The proper conclusion, based on this evidence adduced by the respondent, was that the respondent's practice prior to the establishment of the scheme was to ignore

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[36] See CA [91]-[95] **{CAB 87-88}**.
[37] Tidd pars 94-156; **{ABFM 98-110}**.
[38] Brewin pars 7, 8, 22-23, 30, 31, 33, 133 **{ABFM 156-161, 179}**.
[39] CA [93] **{CAB 88}**, CA [94] **{CAB 88}**, CA [118] **{CAB 95}**.
[40] Tidd pars 100, 102, 122, 127 {**ABFM 99-100, 103-104, 105**}; CA [167] **{CAB 108}**.
[41] CA [51] **{CAB 76}**.

allegations of abuse and to fail to investigate them. As at the time of the alleged abuse and for decades thereafter (including and extending well beyond the original limitation period which expired on 24 March 1971) the respondent's systemic response was to turn a blind eye to allegations of abuse.

39. Nothing in the statements of either Cmr Tidd or Mr Brewin suggests that *allegations* of abuse, not amounting to claims for compensation, were investigated at all, even after the scheme was established in 1997 (or 1994), and nothing in either statement suggests that allegations of sexual abuse made before that time were thereafter retrospectively investigated (assuming a record was even made of such allegations having been reported at an earlier point in time, about which there was no evidence although the tenor of Cmr Tidd's evidence was that there was not).

40. Further, the tenor of Mr Brewin's evidence was that any investigations carried out, even in response to claims for compensation, were limited and somewhat perfunctory.[42] Mr Brewin's statement was to the effect that limited importance was placed on the alleged perpetrator's response to (including denial of) allegations of sexual abuse.[43] Mr Brewin said that *'In my experience, officers almost always deny any allegations of abuse'*.[44]

41. Further still, according to Mr Brewin, when the TSAS received a claim for compensation where the claimant was able to identify an alleged perpetrator, and the perpetrator was still an officer who was alive and their whereabouts known, his law firm typically sought instructions from TSAS to contact that person, but if the accused officer was unwell or elderly, or refused to assist in their investigation, their request to contact the officer may have been refused.[45]

42. That is relevant in this case, because Lt Swift retired in 1989 when he was 65 years old, from which time he was suffering from Alzheimer's disease.[46] This was 8 years before the compensation scheme was even introduced in 1997. When the respondent received a separate (unrelated) complaint of sexual abuse against Lt Swift from

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[42] Brewin pars 90-95 **{ABFM 171-172}**.
[43] Brewin pars 90-95 **{ABFM 171-172}**.
[44] Brewin par 92 **{ABFM 172}**.
[45] Brewin par 90 **{ABFM 171}**. Geary par 63 expressly referred to this evidence **{ABFM 47}**.
[46] CA [95] **{CAB 88}**; see Geary par 107 **{ABFM 65}**.

another person in August 2003, 3 years prior to Lt Swift's death, Lt Swift was not contacted in relation to those allegations.[47]

43. The respondent adduced no evidence to suggest that any report of sexual abuse from the applicant would ever have been investigated, whether by speaking with Lt Swift or at all, and there is no basis to think that after 1997 Mr Brewin's firm would have been authorised to contact Lt Swift about the allegations or that Lt Swift would have been capable of assisting in any investigation in any event.

44. Accordingly, the effect of the evidence was that the respondent would not have investigated the applicant's allegations even had it been made aware of them during Lt Swift's lifetime.

45. The CA appeared to accept this,[48] but held that it was irrelevant for two reasons. The first was a procedural one, namely that the ground raising this issue did not appear to have been *'squarely'* put to the PJ.[49] This falls away in light of the decision of this Court in ***GLJ*** that that the correctness standard of appellate review applied rather than the ***House v King*** standard,[50] but is otherwise addressed by ground 2 below.

46. As to the second, going to the substance of the point, the CA's reasons were brief. It first referred[51] to the way the question had been addressed in ***The Council of Trinity Grammar School v Anderson*** (2019) 101 NSWLR 762; [2019] NSWCA 292 (***Trinity Grammar***),[52] namely by reference to the position if an earlier investigation *had* been made after receiving notification, not *whether investigations would* have been made. The CA then said that there was no burden imposed on a defendant to prove what it would have done, on the basis that *'the hypothetical nature of the inquiry proposed ... would impose a vague and uncertain burden on a defendant, to prove what it would have done at all points in history from the date of the claimed wrong to the present'*.[53] The CA then expressed its view that the PJ *'was not bound, in the circumstances, to consider whether the respondent had proved what,*

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[47] Geary par 95(a) **{ABFM 59}**.
[48] CA [91]-[95] **{CAB 87-88}**, CA [118] **{CAB 95}**.
[49] CA [110]-[111] **{CAB 93}**.
[50] ***GLJ*** at [1], [15], [23], [28] (per Kiefel CJ, Gageler and Jagot JJ), at [96] (per Steward J), at [161] (per Gleeson J).
[51] CA [113] **{CAB 94}**.
[52] At [493], [498]-[505].
[53] CA [114] **{CAB 94}**.

hypothetically, it would have done and when, had, hypothetically, it been notified of the allegations at an unspecified earlier time'.[54]

47. With respect, the CA's decision on this point was wrong, and its reasoning inconsistent with basic principles concerning the grant of a permanent stay which were reiterated in ***GLJ*** (see par 29 above).

48. Once it is accepted that the onus (a 'heavy' one) of establishing the grounds for a permanent stay lies upon the applicant for the stay (here, the respondent), it necessarily fell upon the respondent to prove the existence of any prejudice alleged to have been caused by the applicant's delay in informing it of the allegations (in the context of the concurrent findings that the applicant could not be criticised for that delay) or (as said above) that the *'opportunity'* which it claims to have been denied, ie to have put the allegations to Lt Swift and investigate them during his lifetime, was one which had value in the sense that it was one which it would have taken up. If the delay in informing the respondent of the allegations was not shown to have made any difference, then there was no prejudice caused by that delay. A mere risk of unacceptable injustice or unfairness is insufficient.[55]

49. That burden is not a *'vague and uncertain'* one as the CA said.[56] It concerns matters entirely within the defendant's own knowledge. The burden of proof often requires proof of a past hypothetical; there is nothing exceptional in that.[57] And like any burden, it need not require direct evidence; it can, in an appropriate case (this not being one), be discharged through inference.

50. But even if it were thought to be a difficult burden to discharge, that is no reason for excusing a defendant from the obligation to discharge it, particularly given the extreme and exceptional nature of the order being sought, namely a permanent stay of the applicant's claim. As this Court has said, *'principles governing the onus and standard of proof must faithfully be applied'*.[58]

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[54] CA [115] **{CAB 94}**.
[55] ***GLJ*** at [21], [76]; ***R v Edwards*** (supra) at [23]-[24].
[56] CA [114] **{CAB 94}**.
[57] Cf CA [114], [115] **{CAB 94}**.
[58] ***Australian Securities and Investments Commission v Hellicar*** (2012) 247 CLR 345; [2012] HCA 17 at [165].

51. In any event, this case does not turn on the respondent's failure to discharge its burden of proof, since the evidence was positively to the effect that the respondent would not have investigated the applicant's allegations even if it had been made aware of them at any time during Lt Swift's lifetime.

52. Three things can be said about the CA's reliance on what was said in ***Trinity Grammar***. First, ***Trinity Grammar*** was decided before, and was not referred to in, ***GLJ***. It should, with respect, be considered in that context.

53. Secondly, the observations in ***Trinity Grammar*** necessarily took their significance from the facts of the case. The evidence in that case did not (as here) establish that the defendant would never have investigated the allegations even if it had been made aware of them at any time during the alleged perpetrator's lifetime.

54. Thirdly, to the extent ***Trinity Grammar*** is said to be authority for the proposition that it is irrelevant whether the defendant institution would in fact have carried out an investigation during the alleged perpetrator's lifetime such as to demonstrate the existence of actual prejudice caused by the delay, it is, with respect, contrary to principle and wrong, and should be overruled.

55. The CA then, by reference to observations in ***Trinity Grammar*** at [494], [495]-[505], drew a distinction between *knowledge* of allegations and *'reasonably anticipated litigation'*.[59] The CA said there was no *'reasonably anticipated litigation'* in the period prior to April 1971 (ie the point that the applicant's claims initially became statute-barred – strictly 24 March 1971) because there was *'no letter before action or other threat of litigation'*, and that in the period of more than four decades which followed from April 1971 to July 2018 any claims were statute-barred such that there could have been no prospect of civil liability on the part of the respondent requiring investigation.[60]

56. That distinction was, with respect, both irrelevant and wrong.

57. It was irrelevant because the distinction between knowledge of the allegations and *'reasonably anticipated litigation'* was not a distinction drawn by the PJ and was not

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[59] CA [116]-[120] **{CAB 94-96}**.
[60] CA [118] **{CAB 95}**. In Western Australia at the time, there was no ability to extend the limitation period.

the basis of the PJ's decision. To the contrary, the PJ found that what was *'significant'* was that Lt Swift died well before the respondent was *first made aware* of the applicant's allegations, not that he died before there was *'reasonably anticipated litigation'*. There was no notice of contention in the CA to the effect that there was no *'reasonably anticipated litigation'*.[61] In the absence of a notice of contention, the CA should not, of its own motion, have decided the case on a factual basis different than that found by the PJ.

58. It was otherwise wrong, for two reasons. First, the observation in ***Trinity Grammar*** about *'reasonably anticipated litigation'* was an observation of fact, necessarily rooted in the facts of that case. The Court in ***Trinity Grammar*** did not suggest that the existence of *'reasonably anticipated litigation'* is always a necessary prerequisite to a finding that a failure to investigate was unreasonable. The Court in ***Trinity Grammar*** used that expression once, in the context of identifying a circumstance in which it would be contrary to the administration of justice to grant a permanent stay on the basis that the party had lost the ability to meaningfully deal with the claim against it, namely if, in the face of reasonably anticipated litigation, timely steps were not taken to gather evidence.[62] The CA appears to have elevated that observation to a general principle.

59. Secondly, nothing in ***Trinity Grammar*** supports the (with respect, remarkable) proposition that knowledge of allegations of child sexual abuse *within* the applicable limitation period would not give rise to *'reasonably anticipated litigation'* unless accompanied by a letter before action or other overt threat of litigation. Not only is that proposition wrong in principle, but it is contrary to what was said in ***Trinity Grammar*** which was concerned only with knowledge of allegations *after* the claim had become statute-barred. Significantly, it is also contrary to the tenor of observations in ***GLJ*** at [79].

60. In this case, as said above, the evidence was that the respondent would never have investigated the allegations if it had been aware of them at any point during Lt Swift's lifetime, *even before April 1971, ie before any claims became statute-barred.*

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[61] Nor did the CA even put the applicant on notice that it might deal with the issue on a different factual basis to that found by the PJ.

[62] ***Trinity Grammar*** at [494].

Ground 2

61. The CA said the issue raised by ground 1 above did not appear to have been *'squarely'* put to the primary judge.[63] In this respect the CA appears to have had in mind the observations of this Court in ***Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand***[64] (***Macedonian Church***) at [120].

62. This issue falls away in light of the decision of this Court in ***GLJ*** that the correctness standard of appellate review applies.

63. In any event, the observations in ***Macedonian Church*** were directed to the identification of discretionary considerations, not the absence of evidence of a matter which was necessary for the respondent to establish. In the absence of any suggested concession by the applicant, he was not precluded, on appeal, from pointing to the absence of such evidence. In any event, the absence of evidence of prejudice to the respondent caused by the delay would be a matter which was *'fundamental and obvious'*.[65]

64. Further, the respondent did not assert (or identify) the existence of prejudice through the ground not having been *'squarely put'* to the PJ (noting that the respondent had put on its evidence in support of its stay application in advance of submissions being made to the PJ, and it did not suggest that it was influenced as to the evidence put on by the submissions ultimately made at the hearing) or that it might have put on any further evidence on the subject.

Ground 3

65. Having found that the fact Lt Swift died well before the respondent was first made aware of the applicant's allegations was a significant factor in favour of a stay,[66] the PJ then referred to the absence of witnesses and documents.[67] As the CA said, the PJ held that all other relevant witnesses who could be called from the respondent's

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[63] CA [110]-[111] **{CAB 93}**.
[64] (2008) 237 CLR 66; [2008] HCA 42.
[65] ***Macedonian Church*** (supra) at [120].
[66] PJ [141] **{CAB 47}**.
[67] PJ [142]-[149] **{CAB 48-49}**.

perspective are deceased, and that due to the passage of time the respondent had been denied the opportunity to meaningfully investigate whether there were documents relevant to the issues in the action.[68]

66. The CA considered that the cumulative effect of the following matters supported the grant of a permanent stay:[69]

(a) the fact that Lt Swift died well before the respondent was first made aware of the applicant's allegations and the respondent was therefore unable to respond[70] (the CA said that *'the death of Lt Swift remains an important consideration relevant to the discretion'*, ie the so-called *'discretion'* to grant a permanent stay[71]);

(b) the death of Major Watson in 1968;[72]

(c) the fact that the respondent had been denied the opportunity to make meaningful inquiries into what *'if anything'* potential witnesses *'might'* have been able to contribute;[73] and

(d) the fact that the respondent was unable to investigate *'whether'* there previously existed relevant documentary records.[74]

67. The sufficiency of these matters to support the grant of a permanent stay necessarily falls to be considered in light of this Court's decision in ***GLJ***.

68. ***GLJ*** identifies the new legal context, following the abolition of limitation provisions applicable to claims for child sexual abuse, in which an application for the grant of a permanent stay of a claim for so-called[75] *'historical'* sexual abuse against a child is to be determined.[76] Amongst other considerations, the courts have well-developed

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[68] CA [122] **{CAB 96}**.
[69] CA [165] **{CAB 108}**.
[70] CA [39] **{CAB 72-73}**, CA [62] **{CAB 80}**.
[71] CA [132] **{CAB 98}**.
[72] CA [133]-[134] **{CAB 98}**.
[73] CA [135] **{CAB 99}**.
[74] CA [165] **{CAB 108}**.
[75] See ***GLJ*** at [51].
[76] ***GLJ*** at (especially) [4], [34], [40]-[65].

techniques for dealing with evidentiary imbalances[77] (a point advanced before the CA,[78] but not addressed in its reasons).

69. ***GLJ*** clearly identifies what will *not* amount to the necessary *'exceptional circumstances'*, namely the fact that many decades have passed since the abuse is alleged to have occurred[79] or the *'inevitable impoverishment of the evidence which the passing of time occasions'*.[80] Neither the absence of a witness or witnesses who may be regarded by a party as important, whether through death, illness, loss of memory or inaccessibility, nor the loss or unavailability of other evidentiary material, will mean that a trial will be unfair.[81] Something more must be shown.

70. There is a difference in the application of the relevant principles in (as here) a case involving a claim against an institutional defendant than in one involving a claim against a defendant who is an individual.[82]

71. ***GLJ*** demonstrates that the matters identified by the PJ and the CA, even cumulatively, were wholly inadequate to justify the *'extreme'*[83] step of granting a permanent stay of the applicant's claim. At highest, they were no more than the *'common and expected effects of the effluxion of time'*[84] or *'routine and unexceptional sequelae'* thereof,[85] falling well short of the necessary *'exceptionality'* required to justify the extreme remedy of the grant of a permanent stay.[86] The respondent adduced no evidence of anything more than (at highest) the *'inevitable impoverishment of the evidence which the passing of time occasions'*.

72. The CA correctly recognised that Major Watson's death was of limited significance of itself to the grant of a permanent stay given that he died in 1968, before even the original limitation period had expired,[87] such that had an action been brought between 1968 and 1971 Major Watson's death would, of itself, be most unlikely to

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[77] ***GLJ*** at [56]-[61].
[78] See CA [126] **{CAB 97}**, CA [133] **{CAB 98}**.
[79] ***GLJ*** at [51], [75].
[80] ***GLJ*** at [52].
[81] ***GLJ*** at [53].
[82] ***GLJ*** at [62]-[65].
[83] ***GLJ*** at [17], [21], [52].
[84] ***GLJ*** at [43], [44].
[85] ***GLJ*** at [50].
[86] ***GLJ*** at [52].
[87] CA [133] **{CAB 98}**.

have stood in the way of the action proceeding.[88] But the CA then said that *'consistently with the analysis above, however, it was not an error, when considering whether it was possible for the respondent to have a fair trial, to take into account the death of Major Watson. ...'*[89] It is not clear to which *'analysis above'* the CA was referring, although it appears to have included reference to a *'balancing exercise'* of the type referred to at **CA [34]** which, as the majority in ***GLJ*** said, is wrong and *'best avoided'*.[90] Further, the CA said that it was not an error to take into account the death of Major Watson in considering the totality of circumstances where a considerable period of time has passed *'and witnesses are no longer available'*.[91] That reasoning necessarily directed attention to the question of what other evidence, if any, was shown to have been lost, in the context of the evidence that the respondent would not have investigated the applicant's allegations during Lt Swift's lifetime even if it had had the opportunity to do so (see ground 1 above).

73. With respect to the issue of other potential witnesses, the CA said it was *'not persuaded'* that the PJ was required to identify the evidence that could have been given by the alleged potential witnesses now deceased relevant to the allegations of abuse, saying it was enough that the respondent is now unable to make meaningful inquiries into what those witnesses *'might'* have been able to contribute.[92]

74. Lt Swift's wife was specifically identified in this context as a potential witness who was now dead,[93] even though she did not die until 17 May 2019.[94] There was no evidence as to attempts by the respondent to speak with her after learning of the applicant's allegations on 10 February 2014, nor any explanation for not doing so. As said above (par 19), she did not go into care until around 2017.

75. With respect to documents, neither the PJ nor the CA found that relevant documents had previously existed but had since been lost or destroyed.[95] Rather, the CA held

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[88] CA [134] **{CAB 98}**.
[89] CA [134] **{CAB 98}**.
[90] ***GLJ*** at [22], see in particular footnote [47] which expressly refers to **CA [34] {CAB 71}** as an example of this error.
[91] CA [134] **{CAB 98}**.
[92] CA [135] **{CAB 99}**.
[93] CA [131], [135] **{CAB 98, 99}**.
[94] PJ [52] **{CAB 21}**.
[95] No such finding could have been made given the respondent's own evidence: see Geary par 62 **{ABFM 46}**, by reference to Brewin par 68 **{ABFM 168}**.

that what was relevant was that the respondent was now unable to investigate *'whether'* there (previously) existed relevant documentary records.[96]

76. The CA's conclusions that the respondent had been denied (ie through the effluxion of time) the opportunity to make meaningful inquiries into what *'if anything'* potential witnesses *'might'* have been able to contribute[97] and to investigate *'whether'* there previously existed relevant documentary records[98] were, in their terms, entirely speculative.

77. As ***GLJ*** demonstrates, even the *actual* loss of such evidence would not support the grant of a permanent stay; still less the *speculative possibility* of such loss.

78. For example, it was entirely speculative (and improbable) that Major Watson made a written record of the applicant's alleged complaint to him about Lt Swift's abuse; there was no evidence to suggest that such a document even *might* have previously existed. Further, it was a known fact, because admitted by the respondent to the Royal Commission, that it had no relevant policies, practices and procedures at the time,[99] so again there was no basis to think that such documents even *might* have existed. The CA's conclusion at **CA [164]**[100] as to a suggested inability to deal with the issue of vicarious liability was also, with respect, speculative given that the respondent had relevant organisational knowledge as to the role of an officer in Lt Swift's position and how appointments were made (as evidenced by its evidence to the Royal Commission), and the fact that it still has Lt Swift's personnel records.[101]

79. It is not to the point to refer to what the respondent does not *now* have to answer the applicant's claim. What is relevant (although still insufficient of itself to justify the grant of a permanent stay) is to identify what, if anything, the respondent previously had which has since been lost. Accordingly, as in ***GLJ*** at [75], it may be asked: what has truly been lost to the respondent by reason of Lt Swift's death?

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[96] CA [165] **{CAB 108}**.
[97] CA [135] **{CAB 99}**.
[98] CA [165] **{CAB 108}**.
[99] CA [50], [51] **{CAB 76}**, CA [104] **{CAB91}**, CA [118] **{CAB 95}**, CA [167] **{CAB 108}**, CA [177] **{CAB 110}**.
[100] **{CAB 107}**.
[101] **{ABFM 74-77, 201-339}**; CA [160]-[161] **{CAB 106-107}**. See also PJ [117] **{CAB 41}**.

80. At one level, the answer is: nothing more than was lost in ***GLJ***, ie nothing more than the opportunity of asking Lt Swift if he sexually assaulted the applicant and, depending on the respondent's forensic decisions, the possibility of calling him as a witness if the case proceeded to trial, or otherwise settling the case.[102]

81. In this case, however, the respondent did not assert prejudice through the loss of the ability to call Lt Swift as a witness. As said above in the context of ground 1 (par 31), the asserted prejudice was said to be the loss of the opportunity to investigate the applicant's allegations during Lt Swift's lifetime.[103] As in ***GLJ***, this was not *'exceptional'* and did not make a trial of the applicant's claim unfair in any relevant sense such as to justify the grant of a permanent stay.

82. Moreover, for the reasons submitted above in the context of ground 1, even *this* suggested prejudice must be seen in the context of the evidence being positively to the effect that the respondent would not have investigated the applicant's allegations during Lt Swift's lifetime even if it had been made aware of them and had had the opportunity to do so. Accordingly, the suggested prejudice through loss of the opportunity to investigate the allegations during Lt Swift's lifetime was not merely speculative;[104] it was positively imaginary or *'confected'*.[105]

83. Further, Mr Brewin's evidence referred to at pars 40, 41 above means that (as in ***GLJ***), this is not a case in which it may be presumed that the respondent would have sought information from Lt Swift had he been alive or necessarily would have called him as a witness, even if he had still been alive.[106] That conclusion is further reinforced, if necessary, by the existence of 10 other complainants of sexual abuse against Lt Swift who could give similar fact evidence.[107]

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[102] ***GLJ*** at [75].
[103] CA [39] **{CAB 72-73}**.
[104] As in ***GLJ*** at [76].
[105] To use the expression in ***GLJ*** at [67].
[106] ***GLJ*** at [76].
[107] PJ [110]-[112] **{CAB 39-40}**; CA [37] **{CAB 72}**, CA [47] **{CAB 75}**, CA [127]-[130] **{CAB 97-98}**.

PART VII: ORDERS SOUGHT

84. The appeal be allowed.

85. Orders 2, 3, 4 and 5 of the orders of the Court of Appeal made on 17 February 2023 be set aside, and in lieu thereof it be ordered that:

    (a) the appeal to the Court of Appeal be allowed;

    (b) the orders made by Gething DCJ on 1 December 2021 be set aside and in lieu thereof it be ordered that:

        (i) the respondent's application filed on 25 May 2021 for orders that the applicant's action be permanently stayed, be dismissed; and

        (ii) the respondent pay the applicant's costs of the application forthwith to be taxed if not agreed;

    (c) the respondent pay the applicant's costs of the appeal to be taxed if not agreed.

86. The respondent pay the applicant's costs in this Court, to be taxed if not agreed.

PART VIII: ESTIMATE OF ORAL ARGUMENT

87. The applicant's estimate is 1.5 hours.

Dated: 13th March 2024

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ANNEXURE

Pursuant to par 3 of *Practice Direction No 1 of 2019*, the following statutes are referred to in the applicant's submissions:

	Statute	Version	Provision(s)
1.	*Limitation Act 2005* (WA)	Current	Section 6A