HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPLICANT'S REPLY

PART I: CERTIFICATION

1. This reply is in a form suitable for publication on the internet.

PART II: CONCISE REPLY TO THE ARGUMENT OF THE RESPONDENT

Factual issues

2. **RS [7]** is agreed.[1] As to **RS [9]**, the applicant does not rely on the alleged reporting to Maj Watson in 1960 as notification to the respondent. Contrary to **RS [21]**, however, that cannot be turned into a positive finding of lack of knowledge in 1960. The CA merely concluded that the applicant could not rely on his alleged notification to Maj Watson in 1960 in the context of the permanent stay application.

3. As to **RS [12]** and **[14]**, the applicant's submissions before the PJ were put by reference to the report of the *Royal Commission* rather than the statements of Cmr Tidd and Mr Brewin. Nevertheless, the applicant has always accepted that the issues the subject of ground 1 were not squarely put to the PJ as they were in the CA.

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[1] See AS [41]-[43].

Ground 1

4. Contrary to **RS [25]**, the applicant's argument is not that the onus was on the respondent *'to prove each and every hypothetical step it would have taken …'*. Proof of the existence of irremediable prejudice caused by the delay was a necessary condition for the grant of a permanent stay.[2] Lt Swift's death was central to the respondent's application.[3] The onus was accordingly on the respondent to prove that Lt Swift's death prior to it being aware of the allegations caused it (irremediable) prejudice. If it did not, then it could not form the basis of (or otherwise be relevant to) the grant of a permanent stay.

5. Contrary to **RS [26]-[33]**, there is no difference in principle between the position of a respondent who failed to take up an actual opportunity to investigate, and one who would never have taken up an opportunity if it existed. A defendant who alleges it has been prejudiced through being denied an opportunity to investigate is necessarily asserting (even if implicitly, and as a matter of inference) that had they had that opportunity they would have taken it up. Otherwise, the lost opportunity is irrelevant.

6. The fallacy in **RS [28]** is that the suggested 'catch-22' only arises because of the evidence in this case to the effect that the respondent would not have investigated the allegations even if it had been made aware of them prior to Lt Swift's death. Absent such evidence, a court might readily infer that had a defendant been aware of allegations of serious wrongdoing, it would have investigated them, such that prejudice through the loss of the opportunity to do so would readily be inferred.[4] The difficulty to which the respondent alludes exists in this case only because the evidence of the respondent's practice of turning a blind eye to such allegations negatives the availability of such an inference. What the respondent in truth says is that the passage of time now makes it harder for it to prove that this case may have been the exception to its practice of ignoring complaints. If that were the case (and there is no evidence it was), that is the result, with respect, of the faithful application of the burden of proof, not a reason for an unprincipled departure from it.

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[2] See AS par 30.
[3] See **Geary pars 124-129**, identifying the reasons why it was said the applicant's claim should be permanently stayed **{ABFM 71-72}**.
[4] See AS [49].

7. **RS [13], [15], [34]-[41]** impermissibly downplay the significance of Cmr Tidd's statement to the Royal Commission. Cmr Tidd was the Territorial Commander and spoke for the respondent at the Royal Commission.[5] He *'agree[d] entirely with'*[6] and *'unreservedly accepted'*[7] the findings and conclusions of Mr Walker, who in turn described the respondent's failures to investigate as *'systemic and cultural'*.[8]

Ground 2

8. The respondent's contention is not that the point could have been met by evidence,[9] but that had it appreciated the implications of its own evidence it might not have led it: see **RS [47]**. It is also suggested that additional *'clarifying'* evidence could have been led from Mr Walker: **RS [48]**.

9. References in Mr Geary's affidavit to the statements of Cmr Tidd and Mr Brewin were inextricably bound up with his evidence as a whole. For example, in the third sentence of par 59,[10] Mr Geary referred verbatim to Tidd par 100 (although without citing the paragraph number). At par 60[11] he referred to Tidd par 106 and (without citing the paragraph number) par 107, and at pars 63, 64,[12] he referred to Brewin pars 90, 94, 95. It is fanciful to suggest that discrete passages could or would have been excised and not read.

10. In any event, the parties put on their affidavits, and *then* made written and oral submissions by reference to the affidavits. There was no prior articulation of either party's case or the arguments to be put.

Ground 3

11. As to **RS [53]**, the respondent's reliance on ***Brisbane South Regional Health Authority v Taylor***,[13] is misplaced. The observations in that case concerned the rationales for the existence of limitation periods, and were made in the context of an

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[5] Tidd pars 1-8 **{ABFM 82-83}**.
[6] Tidd pars 100-102 **{ABFM 99-100}**.
[7] CA [167] **{CAB 108}**; Tidd pars 122, 128 **{ABFM 103-104, 105}**.
[8] CA [51] **{CAB 76}**; Tidd par 122 **{ABFM 103}**.
[9] ***Coulton v Holcombe*** (1986) 162 CLR 1 at 7.
[10] **{ABFM 45}**.
[11] **{ABFM 45}**.
[12] **{ABFM 47}**.
[13] (1996) 186 CLR 541 at 551.

application by the plaintiff to extend a limitation period, not an application by a defendant for a permanent stay.[14] Further, and more fundamentally, ***GLJ*** at [46]-[47] makes clear that the fact that the legislatures have removed any limitation period with respect to claims for child sexual abuse necessarily renders those observations inapplicable in the present context.

12. As to **RS [54]**, it is not open to the respondent to suggest there has been an actual loss of relevant evidence. The CA's conclusions were limited to the possibility of such loss.[15] There is no notice of contention.

13. The respondent points to nothing more than (at highest) the inevitable impoverishment of evidence occasioned by the passage of time, and to nothing approaching the required *'exceptionality'* in the sense required by ***GLJ***. Contrary to **RS [60]-[64]**, nothing in the reasons of the majority in ***GLJ*** at [65] (or elsewhere) suggests that the required *'exceptionality'* may be found in the cumulative effect of the impoverishment of evidence through the passage of time. Such a conclusion cannot be reconciled with the reasons of the majority in ***GLJ***. The loss of evidence after many decades in this context will ordinarily be *'cumulative'*; that is expected, not *'exceptional'*.

14. At **RS [59], [62], [68]-[71]**, the respondent places reliance on the decisions in ***Moubarak***[16] and ***Connellan v Murphy***,[17] having regard to the observations of the majority in ***GLJ*** at [65] and the apparent approval of those cases. Both were completely different to the present case. Each involved a claim against an individual defendant. The circumstances in ***Moubarak*** were qualitatively different to those in the present case.[18] Further, in ***Connellan v Murphy*** it was *not* held that there could not be a fair trial.[19] However, the respondent's case is confined to the proposition that it cannot receive a fair trial;[20] it does not seek to support the permanent stay on

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[14] Although McHugh J did refer to the power to stay proceedings at 552 (footnote 25).
[15] AS [66(c), (d)], [73]-[76].
[16] ***Moubarak by his tutor Coorey v Holt*** (2019) 100 NSWLR 218 (***Moubarak***).
[17] [2017] VSCA 116.
[18] In ***Moubarak*** the defendant was an individual who, as a result of suffering dementia, could not speak, understand or communicate, let alone instruct or give evidence, in circumstances where decades had passed and he had never been confronted with the detail of the allegations.
[19] See ***GLJ*** at [17] (footnote 37).
[20] RS [2]; and see PJ [151] **{CAB 50}**.

any other basis. Accordingly, nothing in either of those two cases, or the majority's approval of them in ***GLJ*** at [65], assists the respondent in any way.

15. The respondent's suggested inability to deal with the issue of vicarious liability assumes prominence in its submissions (see **RS [6], [16(c)], [55](a), (c)], [56], [64]**).

16. Three further things can be said about this beyond the last sentence of **AS [78]**.[21] First, given the evolution of the jurisprudence relating to circumstances in which vicarious liability might exist outside of an employment relationship,[22] the evidence in this case provides a clear indication that the issue of vicarious liability could be dealt with at trial.[23]

17. Secondly, there was no *evidence* at all that the respondent would be unable to deal with the issue of vicarious liability at trial. It was not one of the matters identified at pars 124-130 of Mr Geary's affidavit.[24]

18. Thirdly, the absence of any evidence (or complaint) of prejudice by Mr Geary in that respect is consistent with the fact that Cmr Tidd's evidence to the Royal Commission was to the effect that the respondent would not plead a defence of vicarious liability.[25] There was no evidence explaining the respondent's apparent departure from that position.

Dated: 15th April 2024

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[21] As to which see Geary pars 49-52, 70 **{ABFM 40-42, 48}**; Littlefair pars 22-23 **{ABFM 418}**.
[22] ***Bird v DP*** [2023] VSCA 66 (***Bird***) at [104], [114], [115], [121], [122]-[130], [146]-[148], [153], [163] (decided approximately six weeks after the CA's decision in this case).
[23] Evidence to support the first stage of the vicarious liability enquiry as articulated in ***Bird*** is found at Geary pars 68, 70, 71, 72 **{ABFM 48 - 49}** and attachments referred to therein. Evidence in relation to the second stage of the vicarious liability enquiry is found at pars 61-65 and 71-110 of the applicant's affidavit **{ABFM 349-350, 351-355}**.
[24] **{ABFM 71-72}**.
[25] Tidd pars 306, 307 **{ABFM 140}**.