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
SYDNEY REGISTRY

BETWEEN:

GLJ
Appellant

and

THE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF LISMORE
ABN 72863788198
Respondent

APPELLANT'S SUBMISSIONS

PART I – CERTIFICATION

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

PART II – ISSUES ARISING

2. In order for this Court to overturn the decision of the Court of Appeal to grant a permanent stay, is it necessary for the appellant to demonstrate *House v The King* error?

3. In a claim against an institution arising from an allegation of historical child sexual abuse, is it sufficient to warrant a permanent stay that the alleged abuser is now dead and the institution did not have an opportunity to obtain instructions from the alleged abuser during their lifetime?

4. Does the grant of a permanent stay on such a basis subvert the policy of legislative amendments across Australia in response to the Royal Commission into Institutional Responses to Child Sexual Abuse?

PART III – SECTION 78B NOTICE

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

PART IV – CITATIONS

6. The primary judgment is unreported. The medium neutral citation is: *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204.

7. The judgment of the Court of Appeal is unreported. The medium neutral citation is: *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78.

PART V – FACTS

8. The appellant was born in Lismore in 1954 (CAB 10; SC[13]). She claims that in 1968, when she was 14 years old, she was sexually assaulted by Father Clarence Anderson, then a priest of the Roman Catholic Diocese of Lismore. The alleged forcible sexual assault occurred in private at the appellant's family home, in the context that Anderson was a priest allocated to provide pastoral care to her family after her father was injured (CAB 7, 10; SC[2], [13]–[14]; CAB 43; CA[17]–[19]).[1]

9. The respondent (the **Diocesan Trust**) is a statutory corporation representing the Diocese of Lismore, made a body corporate by the *Roman Catholic Church Trust Property Act 1936* (NSW) s 4 (CAB 7; SC[1]; CAB 41; CA[6]).

10. Anderson was ordained in 1963 and was laicised in 1971 (CAB 9; SC[9]; CAB 46–7; CA[31]–[32]). As early as 1965, he was observed to exhibit a sexual interest in children, on which he was prepared to act (CAB 9; SC[10]; CAB 48; CA[37]). Anderson died in 1996 (CAB 7; SC[4]; CAB 42; CA[11]). No notice of the appellant's claim was given to the Diocesan Trust before Anderson's death, nor did anything suggest the allegations had been put to Anderson informally before his death (CAB 7; SC[4], [30]; CAB 42; CA[11]).

11. The appellant instituted proceedings on 31 January 2020.[2] By reason of s 6A of the *Limitation Act 1969* (NSW), no limitation period applies to her claim. It is put on two bases: a direct claim in negligence based on the diocesan authorities' prior knowledge of Anderson's proclivities; and vicarious liability on its part for Anderson's abuse (CAB 7; SC[3]; CAB 41; CA[9]).

12. By notice of motion dated 17 November 2020, the Diocesan Trust sought a permanent stay of the proceedings pursuant to s 67 of the *Civil Procedure Act 2005* (NSW), or

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1 Affidavit of Samuel Alexander Tierney dated 11 February 2021, exhibit SAT1 (ABFM p 24) (**Tierney Affidavit**).

2 Statement of Claim filed 31 January 2020 (ABFM p 4); Amended Statement of Claim filed 11 March 2021 (ABFM p 646).

alternatively that the proceedings be dismissed pursuant to Rule 13.4(1)(c) of the *Uniform Civil Procedure Rules 2005* (NSW) (CAB 8; SC[6]; CAB 64; CA[95]).[3]

13. In response to the notice of motion, the appellant filed documentary material by way of a solicitor's affidavit with exhibits. This included evidentiary statements from five alleged victims of Anderson (including the appellant) and documentary material produced by the Diocese, the Brisbane Archdiocese, and the NSW/ACT Professional Standards Office of the Church (CAB 9, 13–15; SC[9], [26]–[29]; CAB 46–7; CA[29]–[34]).[4]

14. On 24 September 2021, the primary judge (Campbell J) refused the stay (CAB 21; SC[47]). That decision was reversed on 1 June 2022 by the Court of Appeal (Macfarlan, Brereton and Mitchelmore JJA) (CAB 75–6; CA[133]).

PART VI – ARGUMENT

1 – Stay of proceedings for abuse of process does not involve the exercise of a discretion. It is not necessary to establish House v The King *error on appeal.*

15. The first issue in the appeal concerns whether the decision to stay the proceedings is properly understood as involving the exercise of a 'discretion' and the need, accordingly, to demonstrate *House v The King* error to interfere with it on appeal. As the Court of Appeal noted at CA[79] (CAB 79–80), the position in this regard is unsettled, and has been previously left unresolved by that Court since at least 2010.[5] The same doubt about 'whether or not a discretion is actually being exercised' in such cases has also been noted in other jurisdictions.[6]

16. It was not necessary for the Court of Appeal to resolve that uncertainty because it identified *House v The King* error in the decision of the primary judge. But the issue now arises — and should be resolved — in this Court, for this reason. The Court of Appeal re-exercised the 'discretion'. The appellant challenges that re-exercise in this Court. If it is a discretion, the appellant must demonstrate *House v The King* error by the Court of

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3 Defendant's Notice of Motion filed 17 November 2020 (ABFM p 20).

4 Tierney Affidavit (ABFM p 24 et seq).

5 *Murakami v Wiryadi* (2010) 268 ALR 377 at [32]–[35] (Spigelman CJ, McColl and Young JJA agreeing); *Gorman v McKnight* [2020] NSWCA 20 at [50] (Bell P; Payne JA and Emmett AJA agreeing).

6 *Ko Hon Yue v Chiu Pik Yuk* (2012) 15 HKCFAR 72 at [83] (Ma CJ; Bokhary, Chan and Ribeiro PJJ, and Sir Anthony Mason NPJ agreeing).

Appeal. If necessary, the appellant submits that the errors she identifies in the decision of the Court of Appeal are of that kind. But, for the following reasons, it is not necessary for the appellant to do so. The power to stay proceedings permanently as an abuse of process is not a 'discretion' to which the strictures of *House v The King* apply at all. The prevalence of appeals in cases of this kind means that the point is of significant practical importance.[7]

17. *First*, just as this Court held in *Minister for Immigration and Border Protection v SZVFW*[8] that there can be but one answer to the question whether an administrative decision is beyond power on grounds of legal unreasonableness, so too there can be but one answer to the question whether curial proceedings are an abuse of process and should be stayed because no fair trial can be had. That the question might be one involving 'evaluation' on which reasonable minds may differ is not to the point. Either proceedings are abusive or they are not.

18. *Second*, the 'occasion for appropriate appellate intervention' depends on the 'nature and scope' of the particular legal norm under review; and 'is not advanced by describing the overall decision making process' as being 'discretionary.'[9] *House v The King* is concerned with discretions which call for 'value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right', and which 'lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers'.[10] One does not depart from the 'correctness standard' of appellate review simply because the task of the primary judge can be labelled as being 'evaluative'.[11] Rather, the line 'is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies.'[12] Assessing whether a

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7 See, e.g. *The Council of Trinity Grammar School v Anderson* (2019) 101 NSWLR 762, reversing [2018] NSWSC 1633; *Connellan v Murphy* [2017] VSCA 116 reversing [2017] VCC 109; *Moubarak* (2019) 100 NSWLR 218; *Gorman v McKnight* [2020] NSWCA 20; *Smith v The Council of Trinity Grammar School* [2022] NSWCA 93; *GMB v Unitingcare West* [2022] WASCA 92; *JD v ZYX* [2022] WASCA 136.

8 (2018) 264 CLR 541 at 552 [18] (Kiefel CJ), 566 [56] (Gageler J), 574 [85]–[87] (Nettle and Gordon JJ), 593 [154] (Edelman J).

9 *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138–9 [40] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

10 *Norbis v Norbis* (1986) 161 CLR 513 at 518 (Mason and Deane JJ).

11 Cf *SZVFW* (2018) 264 CLR 541 at 562 [46] (Gageler J), 574 [85] (Nettle and Gordon JJ).

12 *SZVFW* (2018) 264 CLR 541 at 563 [49] (Gageler J).

proceeding is an abuse of process may be evaluative and contextual, but the outcome is binary. That means the ordinary standard of appellate review applies.[13]

19. *Third*, no other reason for appellate restraint arises. By definition, no trial has (yet) taken place, so there is no reason to defer to the trial judge's ruling on the basis that it might have been affected by credit findings or the atmosphere of trial.[14] Equally, since a decision to grant a stay results in the termination — rather than the management — of the proceeding, the reasons for appellate restraint in the review of interlocutory case management decisions are inapt.[15] By definition, there is no ongoing proceeding being managed, or capable of being interrupted by the appeal.

10 20. *Fourth*, while the issue has been referred to by members of this Court,[16] there is no decision of this Court where the *ratio* stands in the way of applying the ordinary standard of appellate review. For example, in *R v Glennon*,[17] the issue was not the subject of argument. Mason CJ and Toohey J recorded that it 'was common ground' that the 'established principles governing appeals from discretionary judgments' applied to the decision not to stay criminal proceedings on the ground that a fair trial could not be had.

21. In *R v Carroll*,[18] Gaudron and Gummow JJ observed that '[t]he power to stay *is said* to be discretionary' (emphasis added), in the sense that 'the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse'; but *not* in the
20 sense 'that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not.' That observation is, with respect, correct; but their Honours' later reference in that paragraph to *House v The King* is inconsistent both with the initial observation, and with this Court's decision in *SZVFW*. Further, it was unnecessary to their Honours' conclusion that the Court of Appeal had been correct to identify an error

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13 See generally Prince, "Recurring Issues in Civil Appeals – Part 1" (2022) 96 *Australian Law Journal* 203 at 213–215.

14 *Lee v Lee* (2019) 266 CLR 129 at 148–9 [55] (Bell, Gageler, Nettle and Edelman JJ); *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25]–[26] (Gleeson CJ, Gummow and Kirby JJ).

15 *Re Will of F B Gilbert* (1946) 46 SR (NSW) 318 at 323 (Jordan CJ); *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177–8 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

16 See, e.g., *UBS AG v Tyne* (2018) 265 CLR 77 at 105 [74] (Gageler J), 124 [123] (Nettle and Edelman JJ); *Puttick v Tenon Ltd* (2008) 238 CLR 265 at 272 [11] (French CJ, Gummow, Hayne and Kiefel JJ), 285 [50] (Heydon and Crennan JJ); *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 at 360 [97] (Callinan J).

17 (1992) 173 CLR 592 at 600 (Mason CJ and Toohey J).

18 (2002) 213 CLR 635 at 657 [73] (Gaudron and Gummow JJ).

of principle by the primary judge in declining to grant a stay. Whether the appeal to the Court of Appeal was governed by *House v The King* or a 'correctness standard', the error of principle by the primary judge justified appellate intervention. The other members of the Court in *Carroll* did not comment on this issue.

22. The remarks of Gaudron and Gummow JJ in *Carroll* were cited by four members of this Court in *Batistatos v Roads & Traffic Authority of New South Wales*[19] in a passage concerning '[t]he meaning of "abuse of process"'; not the standard of appellate review. If their Honours in *Batistatos* might be taken as suggesting that the power to stay proceedings as an abuse of process is a discretion to which *House v The King* applies, any such suggestion is (for the reasons above) wrong in principle. The suggestion has properly been described by Edelman J as being 'more controversial' than other examples (such as assessment of general damages) to which *House v The King* plainly applies.[20] In any event, again, the distinction between a *House v The King* standard and a 'correctness standard' was not essential to the reasoning. While the reasons refer to the absence of any 'error of principle' by the Court of Appeal in granting a stay, it is evident that they involved a conclusion that the Court of Appeal had been correct.[21]

23. *Fifth*, a 'correctness' standard of appellate review is applied in other comparable jurisdictions. In England, '[e]ither the proceedings are an abuse of process of the Court or they are not': the existence or otherwise of an abuse of process does not relevantly 'turn of the exercise of a discretion'.[22] Even in a decision 'involving a large number of factors', there can 'only be one correct answer to whether there is or is not an abuse of process.'[23] Thus, '[w]here there is abuse, the court has a duty, not a discretion, to prevent it'.[24] An appeal in such a case 'is a challenge to the judgment of the court below and not to the exercise of a discretion'.[25]

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19 (2006) 226 CLR 256 at 264 [7], cf at 262 [2] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

20 *SZVFW* (2018) 264 CLR 541 at 589 [145] (Edelman J).

21 *Batistatos* (2006) 226 CLR 256 at 279–282 [62]–[72].

22 *Stuart v Goldberg Linde* [2008] 1 WLR 823 at 832 [24] (Lloyd LJ; Sedley LJ agreeing).

23 *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748 at 762 [16] (Thomas LJ).

24 *Tinkler v Ferguson* [2021] 4 WLR 27 at [32] (Peter Jackson LJ; Dingemans LJ and Sir Richard McCombe agreeing) referring to *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 (Lord Diplock).

25 *Michael Wilson & Partners v Sinclair* [2017] 1 WLR 2646 at [48] (Simon LJ; Sir Ernest Ryder SPT and Patten LJ agreeing).

24. Equally, in Canada '[w]hether there has been an abuse of process is a question of law. Thus, the applicable standard of review is correctness.'[26] The Supreme Court of New Zealand has likewise observed that 'where the members of an appellate court conclude that they would have granted a stay in order to preserve the integrity' of the court's processes, 'it is not clear why they should defer to the trial judge's contrary assessment on the basis that such assessment was reasonably open to him or her'.[27] Rather, it was for the appellate court to 'approach the matter on its merits'.[28]

25. For each of these reasons, this Court should conclude that a decision to stay (or not stay) a proceeding on the grounds of abuse of process does not involve a discretion. It is subject to the ordinary standard of appellate review for the correction of error. That being so, it is open to this Court to overturn the conclusion of the Court of Appeal without the appellant's demonstrating *House v The King* error. It is sufficient for this Court to conclude that the conclusion of the Court of Appeal was wrong.

2 – The Court of Appeal made an error of principle in the significance it gave to Anderson's death.

26. The primary judge was satisfied that the material before the court showed 'that there is likely to be evidence available allowing a fair trial between the parties' (CAB 9–10; SC[12]). Critical to the Court of Appeal's contrary decision was, as Mitchelmore JA put it, that the Diocesan Trust 'did not have an opportunity to confront [Anderson] with the detail of GLJ's allegations and obtain instructions for the purposes of its defence of her claims, nor will it be able to call him as a witness if it so chose' (CAB 71–2; CA[120]). The central fact, in her Honour's view was that 'there was no response from Father Anderson, denial or otherwise, the credibility of which could be evaluated' (CAB 66; CA[102]). Brereton JA's equivalently stark conclusion was that '[d]eprived of the ability to obtain any instructions from Anderson by his death, the Lismore Trust has no means for investigating the facts', and thus the trial 'could not be a fair one' (CAB 40–1; CA[4]).

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[26] *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at [30] (Rowe J; Wagner CJ, Moldaver, Karakatsanis, Brown, Martin, Kasirer and Jamal JJ agreeing).

[27] *Wilson v The Queen* [2016] 1 NZLR 705 at [28] (Arnold J; William Young, Glazebrook and Blanchard JJ agreeing).

[28] *Wilson v The Queen* [2016] 1 NZLR 705 at [29] (Arnold J; William Young, Glazebrook and Blanchard JJ agreeing).

27. These conclusions were wrong as a matter of principle. Across a range of areas, a claimant is entitled not only to proceed to but to succeed at trial, even though the person responsible for that claim is deceased, or is otherwise unavailable to give instructions.[29] Tort claims involving motor vehicle or industrial accidents provide frequent examples.[30] Other examples can be found in the law of property and trusts,[31] partnership,[32] deceased estates and testators' family maintenance.[33] Such cases may indeed involve disputed allegations of historical sexual abuse.[34] The fact that a claim was 'only brought forward after [a person's] death' and 'depends almost entirely on [the claimant's] own evidence' has never been a bar to a claim; although it may require the judge 'to be careful in accepting' the claimant's evidence.[35]

28. The very existence of judicial guidance both about the capacity to draw inferences in such cases,[36] and about the appropriate degree of caution to be exercised in determining claims asserted against deceased persons,[37] shows that such claims can indeed properly be brought, and are not *per se* incapable of fair trial simply because the deceased is unavailable to give instructions or evidence. In particular, there is no principle 'that all possible corroborating witnesses must always be called in a claim against a deceased estate.'[38] Rather, the only necessity is to 'establish as reasonably clear a case as the facts

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29 In the case of a claim directly against the deceased, see *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1), preserving such actions despite the defendant's death.

30 See, e.g. *Holloway v McFeeters* (1956) 94 CLR 470 (victim of road accident was deceased; responsible driver was unidentified; sufficient proof of negligence at trial); *West v Government Insurance Office of NSW* (1981) 148 CLR 62 (defendant driver was deceased; no sufficient proof of negligence at trial); *Lahrs v Eichsteadt* [1961] Qd R 457 at 461 (Dixon CJ; Windeyer J agreeing) (plaintiff cyclist had no recollection of collision; defendant driver's negligence sufficiently proven at trial); *Sherman v Nymboida Collieries Pty Ltd* (1963) 109 CLR 580 (deceased worker's negligence responsible for gas explosion); *Sydney County Council v Dell'Oro* (1974) 132 CLR 97 (deceased worker responsible for electrocution).

31 *Perpetual Executors & Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185; *Cope v Keene* (1968) 118 CLR 1; *Bridgewater v Leahy* (1998) 194 CLR 457; *Paul v Constance* [1977] 1 All ER 195; *Noonan v Martin* (1987) 10 NSWLR 402.

32 *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384.

33 *Birmingham v Renfrew* (1937) 57 CLR 666; *Palmer v Bank of New South Wales* (1975) 133 CLR 150; *Lippe v Hedderwick* (1922) 31 CLR 148.

34 *Jones (a pseudonym) v Smith (a pseudonym)* [2016] VSCA 178 at [13], [54], [67] (Ferguson JA; Whelan and Kaye JJA agreeing); *Page v Page* [2017] NSWCA 141 at [120] (Sackville AJA; Basten and Leeming JJA agreeing); *Lodin v Lodin* [2017] NSWCA 327 at [129] (Sackville AJA; Basten and White JJA agreeing).

35 *Noonan v Martin* (1987) 10 NSWLR 402 at 404 (Bryson J).

36 *Holloway v McFeeters* (1956) 94 CLR 470 at 480–1 (Williams, Webb and Taylor JJ).

37 *Plunkett v Bull* (1915) 19 CLR 544 at 548–9 (Isaacs J); *Perpetual Executors & Trustees Assn of Australia Ltd v Wright* (1917) 23 CLR 185 at 195 (Isaacs, Gavan Duffy and Rich JJ); *Birmingham v Renfrew* (1937) 57 CLR 666 at 674 (Latham CJ), 681–2 (Dixon J); *Lachmi Parshad v Maharajah Narendro* (1891) LR 19 Ind App 9.

38 *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431 at [67] (Campbell JA; Bergin CJ in Eq and Sackville AJA agreeing).

will admit of to guard against the danger of false claims being brought against a person who is dead, and thus is not able to come forward and give an account for himself.'[39]

29. In every case, the standard remains proof on the balance of probabilities, and the court is guided by the principle that 'all evidence is to be weighed according to the proof which it is in the power of one side to have produced and the power of the other to have contradicted'.[40] That includes having regard to the unavailability or incapacity of witnesses. However, the law nonetheless recognises that it is possible to uphold claims arising from the conduct of deceased persons — even very striking claims, about which the deceased's instructions would have been critical during their lifetime.[41]

30. Putting aside claims involving deceased persons, it is commonplace that institutional defendants may wish to obtain factual instructions from individuals involved in conduct the subject of proceedings but be unable to do so. An employer cannot compel a former employee to provide instructions relevant to the conduct of a defence. The employee may simply choose not to — highly likely where it is alleged that the employee has engaged in criminal conduct. While the employer could subpoena the employee without prior conference, that is unlikely. Even then, at common law, the employee might refuse to answer questions on grounds of self-incrimination. None of these circumstances would mean that proceedings against the employer must be permanently stayed.

3 – The Court of Appeal's approach subverted the policy of legislative amendments in response to the Royal Commission into Institutional Responses to Child Sexual Abuse.

31. In addition to the error of principle discussed above, the Court of Appeal's conclusion is at odds with the legislative context — throughout Australia — governing claims against institutions for historical abuse of children in the wake of the Royal Commission into

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[39] *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384 at 397 (Isaacs J), approving *Lachmi Parshad v Maharajah Narendro* (1891) LR 19 Ind App 9 at 9–10 (Lord Morris).

[40] *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [36] (Gleeson CJ, Gummow and Callinan JJ), referring to *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970 (Lord Mansfield).

[41] See, e.g. *Eggins v Robinson* [2000] NSWCA 61 (successful claim against an estate under a 'most unlikely contract'); *Palmer v Dolman* [2005] NSWCA 361 (finding that deceased had committed fraud).

Institutional Responses to Child Sexual Abuse. That context includes:

(a) express removal of all limitation periods for claims of child sexual abuse;[42]

(b) conferral of a right to proceed against otherwise-unincorporated organisations;[43]

(c) imposition of a duty to take reasonable precautions to prevent an individual associated with the organisation from perpetrating child abuse;[44]

(d) imposition of vicarious liability for persons — such as priests — who are 'akin to an employee of the organisation';[45]

(e) imposition of statutory vicarious liability — in addition to any common law rules — on the part of organisations for child abuse committed by their employees (including those akin to employees);[46] and

(f) empowering the court to set aside prior settlement agreements and releases.[47]

32. The legislature's emphatic policy is that claims for historical child sexual abuse should be permitted to proceed to trial notwithstanding the lengthy passage of time; notwithstanding the organisational structure of the defendant; and notwithstanding any constraints in common law rules about vicarious liability. That legislative context gave rise to two matters with which the Court of Appeal did not grapple.

33. The *first* was that, as the primary judge observed, the abrogation of the limitation period showed that Parliament has determined 'that child abuse actions should be permitted to

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42 *Limitation Act 1969* (NSW) s 6A; *Limitation Act 1985* (ACT) s 21C; *Limitation Act 1981* (NT) s 5A; *Limitation of Actions Act 1974* (Qld) s 11A; *Limitation of Actions Act 1936* (SA) s 3A; *Limitation Act 1974* (Tas) s 5B; *Limitation of Actions Act 1958* (Vic) ss 27O, 27P; *Limitation Act 2005* (WA) s 6A.

43 *Civil Liability Act 2002* (NSW) s 6K, introduced by *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW). See *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) s 8(2); *Civil Liability Act 2003* (Qld), Chapter 1 Part 2A Div 3.

44 *Civil Liability Act 2002* (NSW) s 6F, introduced by *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW). See *Civil Liability Act 2003* (Qld) s 33D; *Civil Liability Act 1936* (SA) s 50E; *Civil Liability Act 2002* (Tas) s 49H; *Wrongs Act 1958* (Vic) s 91.

45 *Civil Liability Act 2002* (NSW) s 6G, introduced by *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW). See *Civil Liability Act 1936* (SA) s 50A(2)–(3); *Civil Liability Act 2002* (Tas) s 49I.

46 *Civil Liability Act 2002* (NSW) s 6H, introduced by *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW). See *Civil Liability Act 2002* (Tas) s 49J.

47 *Civil Liability Act 2002* (NSW) s 7D, introduced by *Civil Liability Amendment (Child Abuse) Act 2021* (NSW). See *Limitation of Actions Act 1958* (Vic) ss 27QD, 27QE; *Civil Liability Act 1936* (SA) s 50W; *Limitation Act 1974* (Tas) s 5C; *Limitation Act 2005* (WA) s 92.

proceed despite the effluxion of even long periods of time and an inevitable resulting degree of impoverishment of evidence, provided a fair, not perfect, trial can be had' (CAB 21; SC[46]). A common consequence of the effluxion of long periods of time is that witnesses, perhaps even the central witnesses, will be dead. So too, a common feature of historical child sexual abuse claims is that no complaint may have been made for many years including, relevantly, prior to the abuser's death.[48]

34. The *second*, of equal importance, was that claims for *institutional* liability for historical abuse are distinct from, and in important ways are to be treated more favourably than, claims against private individuals. Among other matters, the facts of this case illustrated the record-keeping abilities, institutional memory and organisational complexity of, and resources available to, the Diocesan Trust; which placed it in an entirely different position to private individuals faced with claims of historical abuse.[49] As the primary judge observed, 'the Church is an avid record keeper' (CAB 9; SC[9]).

35. The Court of Appeal's conclusion subverts the evident policy of the important national reforms prompted by the Royal Commission. That, too, involved an error of principle and a failure to take into account a material consideration.

36. That is so even though s 6A(6) of the *Limitation Act* preserves the power of the court to grant a stay. It provides:

> This section does not limit—
>
> (a) any inherent jurisdiction, implied jurisdiction or statutory jurisdiction of a court, or
>
> (b) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.
>
> Note — For example, this section does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

[48] New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 February 2016 (Gabrielle Upton, Attorney-General) (second reading speech on the Limitation Amendment (Child Abuse) Bill 2016, noting that 'it takes an average of 22 years to disclose childhood sexual abuse'); Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 434–56.

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

37. It is one thing to say that s 6A does not *limit* the power to grant a stay where a fair trial is not possible. But the deliberate legislative changes referred to in paragraph 31 above are matters to be taken into account in determining whether (to use the language of the Note) the 'burdensome effect' of the lapse of time is 'so serious' that a 'fair' trial is not possible. The legislative policy is subverted unless it is only in the most exceptional of circumstances that cases like the present are unable to proceed.

4 – The Court of Appeal's decision involved factual error.

38. Further to the two errors identified above, the Court of Appeal's decision involved factual error. The available evidence, both documentary and testimonial, was copious. Among other matters:

(a) The records of Anderson's laicisation in 1971 established that by at least 1965, he had — to the knowledge of the diocesan authorities — sexually abused other children (CAB 9; SC[10]; CAB 48; CA[37], [39]).[50]

(b) Those records include Monsignor Ryan's statement that, in addition to one boy said to have been abused by Anderson, six further victims were named by the father of that boy (CAB 14; SC[27]; CAB 48; CA[37]).[51]

(c) The NSW/ACT Professional Standards Office recorded complaints from five persons who claimed to have been sexually abused when a child by Anderson, including:

(i) one individual while Anderson was in Kyogle Parish (CAB 48; CA[40]);[52]

(ii) two individuals while Anderson was in Macksville Parish (CAB 49; CA[43]);[53] and

(iii) two individuals while Anderson was in Maclean Parish (CAB 50; CA[46]).[54]

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[50] Tierney Affidavit, exhibit EXSAT1 (ABFM pp 80, 92, 99).

[51] Tierney Affidavit, exhibit EXSAT1 (ABFM p 99).

[52] Tierney Affidavit, exhibit EXSAT2 (ABFM pp 326–39).

[53] Tierney Affidavit, exhibit EXSAT2 (ABFM pp 146–60, 241–49).

[54] Tierney Affidavit, exhibit EXSAT2 (ABFM pp 382–91, 436–45).

(d) In addition to those complaints, the appellant was one of four plaintiffs, each of whom claimed that they were sexually abused by Anderson in the 1960s who gave evidentiary statements for the purpose of this proceeding (CAB 10–12; SC[13]–[22]).[55] Two of those victims additionally gave evidence of Anderson's abuse of their siblings (CAB 11; SC[18], [20]; CAB 52–4; CA[54]–[61]).[56]

(e) A fifth victim, who was not a plaintiff, also gave an evidentiary statement in this proceeding (CAB 12–13; SC[23]–[25]; CAB 54; CA[62]–[63]).[57]

(f) The appellant's three siblings are alive (CAB 72; CA[121]).[58]

(g) The Diocesan Trust's solicitor had sufficient instructions to certify that the defence to the appellant's statement of claim had reasonable prospects of success (CAB 45–6; CA[27]).[59]

39. Critically, on the point that most concerned the Court of Appeal — namely, what instructions Anderson would give on the critical question of whether he had abused the appellant — the material showed that at the time of Anderson's laicisation:

(a) Anderson declined to answer whether he had 'any problems with chastity', but denied that he had ever 'associated romantically with any girl' (CAB 51–2; CA[53]).[60]

(b) The Bishop of Lismore was on notice of Anderson's 'recurring trouble in sexual matters, especially homosexuality', and that 'in every case young boys were involved' (CAB 51–2; CA[33]).[61]

40. The inference was inevitable: Anderson denied, or would have given instructions denying, the abuse of the appellant, a girl. Accordingly, it is incorrect to state, as Mitchelmore JA did, that 'there is no other material that sheds light on [Anderson's]

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55 Tierney Affidavit, exhibits SAT1–SAT4 (ABFM pp 29–59).

56 Tierney Affidavit, exhibits SAT2 at [32] (statement of SJT; ABFM p 48), SAT3 at [33] (statement of SDA; ABFM p 53).

57 Tierney Affidavit, exhibit SAT5 (ABFM p 60).

58 Tierney Affidavit, exhibit SAT1 at [6]–[8] (ABFM p 29).

59 Defence filed 8 May 2020 (ABFM p 17). The Diocesan Trust has not yet filed a defence to the appellant's more detailed Amended Statement of Claim: CAB 45–6; CA[27].

60 Tierney Affidavit, exhibit EXSAT1 (ABFM p 90).

61 Tierney Affidavit, exhibit EXSAT1 (ABFM pp 80, 92).

putative response' (CAB 71–2; CA[120]). It is entirely unreal to suppose that Anderson would have given instructions admitting the abuse. Testing the matter another way, if Anderson were alive but simply refused to cooperate with the Diocesan Trust, it would be in precisely the same position with respect to his instructions as it is now.

41. The plenitude of surviving evidence — including the proper inference that Anderson denied the abuse of the appellant — meant that there was no factual impediment to a fair trial of the appellant's claim. As Dixon J observed in *Cox v Journeaux (No 2)*,[62] '[a] litigant is entitled to submit for determination according to the due course of procedure a claim which he believes he can establish, although its foundation may in fact be slender.' Whether the evidence will be sufficient to establish the claim is properly a matter for trial; but on no view is the available evidence so slender as to preclude a trial at all.

5 – The Court of Appeal's decision should be reversed.

42. The Court of Appeal's conclusion was at odds with other cases on permanent stay of proceedings. Taking only the cases expressly referred to by the Court of Appeal in which a stay was ordered (CAB 64–5; CA[95]–[96]):

(a) Unlike *Batistatos*,[63] there was no lack of a competent witness capable of giving evidence of the circumstances in which the abuse allegedly occurred.

(b) Unlike *Moubarak by his Tutor Coorey v Holt*,[64] the Diocesan Trust had available to it copious internal records, including evidence of Anderson's history of abuse, the circumstances of the appellant's claim, and a proper inference about Anderson's likely instructions (even assuming that to be a necessary consideration).

(c) Unlike *Williams v Spautz*,[65] there was no suggestion that the appellant's claim was motivated by an improper purpose.

[62] (1935) 52 CLR 713 at 720 (Dixon J).

[63] (2006) 226 CLR 256.

[64] (2019) 100 NSWLR 218.

[65] (1992) 174 CLR 509.

(d) Unlike *Walton v Gardiner*,[66] there was no oppression through multiple proceedings in respect of the same subject-matter.

(e) Unlike *The Council of Trinity Grammar School v Anderson*,[67] the Court of Appeal found that there was no impediment to a fair trial on the Diocesan Trust's vicarious or direct liability (CAB 74; CA[127]).

43. In the present case, one is driven back to the Court of Appeal's conclusion that an abuse of process arose because the absence of Anderson meant that any trial could not be a fair one (CAB 40–1, 42, 71–2; CA[4], [11], [120]). No decision of this Court endorses such a stark claim. That the Diocesan Trust might not have as full a defence as it would wish did not warrant the conclusion that a fair trial was impossible. A fair trial is not synonymous with a perfect trial.[68] Still less does a fair trial — and the avoidance of abuse of process — require that a defendant have access to all the information it might wish in order to run its defence. The law has never required that trials meet such a standard of perfection.

44. For the reasons above, the Court of Appeal's decision to stay the proceedings was wrong. That is sufficient reason for this Court to overturn that decision. If it is necessary, each of the matters above demonstrate *House v The King* error, requiring a re-exercise of the 'discretion' by this Court. Either way, the decision of the Court of Appeal should be reversed and the decision of the primary judge restored.

6 – The Notice of Contention must be rejected.

45. Turning finally to the Notice of Contention, none of the grounds should be accepted.

46. The *first ground* of the Notice of Contention stands or falls with the appellant's ground of appeal. Either the 'effluxion of time, absence of records, and the death of material witnesses' prevents the respondent from obtaining a fair trial of the proceeding, or it does not. The Diocesan Trust relied the absence of the same witnesses in respect of each aspect of the claims against it (CAB 15; SC[30]; CAB 55; CA[67]). There was nothing

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66 (1993) 177 CLR 378.

67 (2019) 101 NSWLR 762.

68 See, e.g., *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84 at 90 (Brooking J); *Holt v Wynter* (2000) 49 NSWLR 128 at 142 [79] (Priestly JA); *Moubarak by his Tutor Coorey v Holt* (2019) 100 NSWLR 218 NSWLR 218 at 238 [89] (Bell P).

distinctive about the evidentiary gaps to which it pointed in respect of its alleged negligence or vicarious liability.

47. Among other matters, the Diocesan Trust itself put forward evidence about the nature of the role of an Assistant Priest (CAB 55; CA[68]). It seems extraordinary to doubt that the role might involve pastoral visits to parishioners; but the Court of Appeal rightly pointed to potential additional sources of evidence (CAB 75; CA[130]–[132]). In any event, this Court would not lightly overturn the concurrent finding (CAB 20; SC[41]–[42]; CAB 74; CA[127]) that in light of the available evidence, the absence of certain witnesses was not productive of such manifest unfairness that there could not be a fair trial of the questions in the proceeding other than that dealt with in the appellant's appeal.[69]

48. The *second ground* of the Notice of Contention raises a false issue, and is based on an inaccurate premise. Whether the Court of Appeal 'fail[ed] to differentiate between the effects of the delay upon the different claims' could only be relevant if the 'differentiation' would lead to one (but not the other) of those claims being an abuse of process because no fair trial was possible; but the Diocesan Trust's position is that there could equally be no fair trial of *any* issue. In any event, the Court of Appeal expressly and separately addressed the effects of delay 'as to negligence' (CAB 74–5; CA[128]–[129]) and '[o]n the issue of vicarious liability' (CAB 75; CA[130]–[132]).

49. The basis of the *third ground* is opaque. The so-called 'tendency' material was put forward for the limited and preliminary purpose of identifying the range of evidential material potentially available at trial. So much was correctly recognised by the lower courts (CAB 9–10; SC[12]; CAB 73–4; CA[123]–[125]). Plainly, it was not put forward to prove a fact in issue at trial: the very nature of the Court of Appeal's ruling is that, unless this Court intervenes, no trial will be held at all. Accordingly, it was not put forward as 'tendency evidence' within the meaning of the *Evidence Act*, because it was not 'evidence of a kind referred to in subsection 97(1) *that a party seeks to have adduced for a purpose referred to in that subsection*' (emphasis added).[70] It was sufficient for the

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[69] Cf *Baffsky v Brewis* (1976) 51 ALJR 170 at 172 (Barwick CJ; Stephen, Mason, Jacobs and Aickin JJ agreeing); *South Australia v Johnson* (1982) 42 ALR 161 at 167 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ); *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 434–5 (Deane J); *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 618 [39] (McHugh J); *Bridgewater v Leahy* (1998) 194 CLR 457 at 471 [43]–[45] (Gleeson CJ and Callinan J); *Collins v Tabart* (2008) 82 ALJR 1521 at 1522 [9] (Kirby J; Gleeson CJ, Hayne, Crennan and Kiefel JJ agreeing).

[70] *Evidence Act 1995* (NSW) Dictionary, definition of 'tendency evidence'.

courts below, and for this Court, to find that the material in question *might* be admitted at trial (CAB 9–10; SC [12]).

50. Equally, it is inapt to criticise the Court of Appeal for accepting the Diocesan Trust's own submissions: namely, that the so-called tendency material showed that there were dissimilarities between the appellant's allegations and those of other alleged victims; and that the various accounts highlighted the 'difficulty Father Anderson's death creates' (CAB 72–3; CA[123]). For those reasons, there can be no criticism of the Court of Appeal for 'failing to make a decision' or to 'treat adequately' an evidentiary objection that could only be raised at an eventual trial; and when the Diocesan Trust itself made use of the material for its own preliminary purposes in asserting that there should be a stay.

PART VII – ORDERS

51. The appeal be allowed.

52. Paragraphs 3 to 5 of the orders of the Court of Appeal made 1 June 2022 be set aside, and in their place it be ordered that the appeal to that Court be dismissed with costs.

53. The respondent pay the appellant's costs in this Court.

PART VIII – TIME ESTIMATE

54. It is estimated that up to 2 hours will be required for the appellant's oral argument (including reply).

Dated 20 January 2023

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ANNEXURE

Pursuant to para 3 of *Practice Direction No 1 of 2019*, the particular constitutional provisions and statutes referred to in the appellant's submissions are as follows.

	Title	Version	Provisions
1.	*Civil Liability Act 2002* (NSW)	Current, at 16 June 2022	ss 6A, 6F, 6G, 6H, 6K, 7D
2.	*Civil Liability Act 2003* (Qld)	Current, at 2 March 2020	Ch 1 Part 2A Div 3, s 33D
3.	*Civil Liability Act 1936* (SA)	Current, at 1 August 2022	ss 50A, 50E, 50W
4.	*Civil Liability Act 2002* (Tas)	Current, at 1 May 2020	ss 49H, 49I, 49J
5.	*Civil Procedure Act 2005* (NSW)	Current, at 1 December 2021	s 67
6.	*Evidence Act 1995* (NSW)	Current, at 25 November 2022	s 97, Dictionary
7.	*Law Reform (Miscellaneous Provisions) Act 1944* (NSW)	Current, at 7 December 2007	s 2(1)
8.	*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic)	Current, at 1 May 2020	s 8(2)
9.	*Limitation Act 1985* (ACT)	Current, at 10 December 2022	s 21C
10.	*Limitation Act 1969* (NSW)	Version at 1 July 2018	s 6A
11.	*Limitation Act 1981* (NT)	Current, at 20 November 2020	s 5A
12.	*Limitation Act 2005* (WA)	Current, at 1 July 2018	ss 6A, 92
13.	*Limitation of Actions Act 1974* (Qld)	Current, at 1 July 2021	s 11A
14.	*Limitation of Actions Act 1936* (SA)	Current, at 1 July 2021	s 3A
15.	*Limitation Act 1974* (Tas)	Current, at 1 May 2020	ss 5B, 5C
16.	*Limitation of Actions Act 1958* (Vic)	Current, at 1 July 2021	ss 27O, 27P, 27QD, 27QE
17.	*Roman Catholic Church Trust Property Act 1936* (NSW)	Current, at 1 July 2018	s 4
18.	*Uniform Civil Procedure Rules 2005* (NSW)	Version at 1 July 2021	Rule 13.4(1)(c)
19.	*Wrongs Act 1958* (Vic)	Current, at 6 April 2020	s 91