HIGH COURT OF AUSTRALIA

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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 REPLY

PART I – CERTIFICATION

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

PART II – REPLY

2. ***Stay of proceedings and* House v The King *error.*** That s 67 of the *Civil Procure Act 2005* (NSW) uses the word 'may' tells one nothing (cf RS[32]–[33]). The use of that word to confer a power which must be exercised in certain circumstances, rather than a discretion, is well known.[1] A court could not conclude that a fair trial was impossible, yet exercise a 'discretion' to refuse a stay. For a decision to be 'discretionary' in the *House v The King* sense, it is not enough to assert that it is evaluative or contextual, or that it requires a court to 'assess' the existence of some state of affairs (cf RS[35]).[2] On its own terms, the test propounded by the Diocesan Trust is binary. Either 'unfairness' is, or is not, 'sufficiently cogent and compelling to justify the drastic remedy of a stay' (RS[35]). That is the quintessence of a test having a single legally correct answer. Even in the case of a limited or conditional stay (cf RS[37]), there is only one right outcome: either a fair trial is possible, or it is not. That is unlike the range of potentially correct answers that occur, for example, in criminal sentencing, in making family law property orders, or in the assessment of general damages, to which *House v The King* properly applies.[3]

3. Precisely because a 'permanent stay is a remedy of last resort' (RS[36]) and because the dichotomy of outcome is clear, the appropriateness of appellate intervention to correct error is manifest. An appellate court would not sit back if — to use the Diocesan Trust's own words — a 'remedy of last resort' had been granted when the relevant unfairness was *not* 'sufficiently cogent and compelling to justify the drastic remedy of a stay' (RS[35], [36]). The UK cases mentioned in RS[39](a) concerned prosecutorial misconduct in which the test for appellate intervention was conceded or assumed.[4] The UK position in civil cases is set out in AS[23]. Far from there being 'no analogous reasoning by reference to the discretionary / non-discretionary distinction' in Canada, the distinction exists, and was relied on by the dissentient in *Abrametz* (cf RS[39](b)).[5] In *Wilson*, the NZ Supreme Court did not need to resolve the issue, precisely because it considered itself free to determine

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1 See, eg, *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214; *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

2 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 552 [18] (Kiefel CJ), 566 [56] (Gageler J), 574 [85]–[87] (Nettle and Gordon JJ), 593 [154] (Edelman J).

3 Cf *Norbis v Norbis* (1986) 161 CLR 513; *Miller v Jennings* (1954) 92 CLR 190.

4 *R v Maxwell* [2011] 1 WLR 1837 at [33], [52]; *Warren v Attorney-General for Jersey* [2012] 1 AC 22 at [43].

5 *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at [170], [185] (Côté J, dissenting).

for itself whether the lower courts were correct (cf RS[39](c)).

4. ***Significance of Anderson's death.*** The Court of Appeal was explicit that Anderson's death was *the* central factor justifying the stay, because of his unavailability to give instructions (CAB 40–1, 66, 71–2; CA[4], [102], [120]). That was in circumstances where a lack of documents or witnesses did not otherwise prevent a fair trial of the issues of the Diocesan Trust's negligence or vicarious liability (CAB 74; CA[127]). A fair trial in a case such as this cannot be predicated on there being multiple eye witnesses or a direct written acknowledgement of the specific episode made during the offender's lifetime (cf RS[15], [17]). The very nature of child sexual abuse makes that kind of evidence unlikely; but the means of proof and challenge available at a trial such as this are not so impoverished as the Diocesan Trust would suggest. A court can be satisfied on the evidence of a complainant's account standing alone,[6] and facts may equally be proven by inferences drawn from documents or other evidence;[7] by tendency reasoning; or by expert opinion. Each of those modes of proof was potentially available in this case. It is therefore wrong to say that there is a 'total absence of material' (RS[13]).

5. It is equally wrong for the Diocesan Trust to claim that there was 'no reasonable basis on which to cross-examine or challenge' the appellant's account (RS[13]). Its own counsel articulated just such a basis in the Supreme Court (CAB 16–17, 21; SC[34], [45]). There is nothing unusual about a cross-examination focussing on the inherent probability or internal coherence of an account. A party will not always have prior inconsistent statements or other documents upon which to cross-examine. But here, the Diocesan Trust's own counsel indeed identified potential lines of cross-examination, including by reference to other documents, and to alleged dissimilarities between the appellant's account and those of Anderson's other victims (CAB 16–17; SC[34]).

6. RS[17]–[18] emphasise the artificiality of the Diocesan Trust's position. The law does not require corroboration of a complainant's account, whether by eye witnesses or otherwise;[8] but even the presence of an eye witness would not (on the Court of Appeal's reasoning) have cured the absence of instructions from Anderson himself. That highlights the error of the Court of Appeal's approach. Equally, the purported distinguishment (RS[18] fn 7) of

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[6] *Evidence Act 1995* (NSW) s 164; cf *MFA v The Queen* (2002) 213 CLR 606 at 629 [77] (McHugh, Gummow and Kirby JJ).

[7] *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at 279 (Lord Cairns LC), approved in *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 535 (Gibbs CJ and Mason J).

[8] *Evidence Act 1995* (NSW) s 164.

some (but not all) of the authorities referred to in AS[27]–[29] emphasises the point: in none of those cases was the absence of instructions from the primary wrongdoer decisive of the question of whether a fair trial was possible. And even if it were necessary to have some basis to infer what Anderson's instructions would have been — which it is not — his evidence during his laicisation provides it. It is a curious feature of this case that, in its desire to avoid a trial, the Diocesan Trust is driven to downplay the significance of that evidence (RS[14]–[15]), when the more natural position would be for it to rely upon that evidence in support of its defence.

7. ***Significance of legislative amendments.*** RS[19]–[30] do not engage with the appellant's point. One can entirely accept that 'the Court's power to grant a stay remains unaltered' (RS[26]). The issue is not whether the lower courts had *power* to grant a stay: it is whether that power was properly exercised. In that context, the unmistakable policy of the legislature — building on the work of the Royal Commission into Institutional Responses to Child Sexual Abuse — is that claims against institutional defendants for child sexual abuse may be brought even in circumstances where, before the legislature's intervention, they could not have been brought; and could succeed even in circumstances where they would not hitherto have succeeded. That is the legislative context in which the possibility of a fair, not perfect, trial must be assessed. Plainly, there is nothing in that legislative context that gives any credence to the Diocesan Trust's notion that only a trial involving direct evidence from the wrongdoer, or multiple eye witnesses, would be fair.

8. ***Notice of Contention: vicarious liability.*** The submissions concerning vicarious liability (ground 1(b)) reiterate the Diocesan Trust's impoverished view of the means by which facts may be proven at trial. Equally, they take an unrealistic view of the factual and legal significance of, and evidence potentially available in relation to, the role 'actually assigned' to Anderson (cf RS[42], [44]). The pleaded claim is straightforwardly that Anderson was a priest allocated to a particular congregation, and that the appellant and her family were parishioners of that congregation.[9] If there were any genuine doubt that the role of assistant priest in a country town might involve pastoral visits to parishioners (cf RS[45]), the Diocesan Trust's own conduct shows that it *is* possible to put forward evidence about what the role actually entailed. A fair trial was not impossible on that account.

9. On the Diocesan Trust's own records, it was incontrovertible that Anderson was indeed an

[9] Statement of Claim [4]–[8], [43]–[47] (ABFM pp 6, 10–11); Amended Statement of Claim [4]–[8], [63]–[69], [72]–[88] (ABFM pp 648, 655–6).

assistant priest assigned to the parish of Lismore.[10] The Diocesan Trust has itself already put forward and relied upon evidence about what that role involved (CAB 15–16; SC[30]–[31]; CAB 55, 75; CA[68], [132]). The substance of the Diocesan Trust's complaint concerns the alleged consequences of particular local office-holders being unavailable, and an alleged absence of documentation about specific pastoral appointments (RS[44]). The Diocesan Trust does not, and could not, claim that those office-holders, or those hypothetical documents, were the *only* potential sources of evidence about the role and duties of an assistant priest within the Catholic Church, whether in the Diocese of Lismore at that time or more generally. The complaint about the alleged absence of a written instrument of appointment is particularly unreal: the Diocesan Trust does not claim that a written appointment was somehow needed for an assistant priest in a country town to have had pastoral contact with parishioners. But even if such documents did once exist, their availability is not essential to a fair trial.[11]

10. In addition to the documentary material already before the Court, and in addition to the course already adopted by the Diocesan Trust — namely, putting forward evidence from present-day officers of the Church — there are other obvious sources of potential evidence. So much was correctly recognised by the Court of Appeal (CAB 75; CA[131]–[132]). These included: (1) evidence from priests with personal experience of the relevant era; (2) expert evidence from other clerics, theologians, canon lawyers or historians; and (3) documentary evidence about canon law, papal encyclicals and other authoritative texts of the Church. Such evidence has been adduced at trial in comparable cases, in which neither the death of the perpetrator nor of the then-serving diocesan officers has prevented a fair trial, including on the question of vicarious liability.[12]

11. Faced with the plenitude of those potential materials, it is unreal to say that the Diocesan Trust is 'deprived of any meaningful opportunity to interrogate or investigate the appellant's vicarious liability claim' (RS[45]). The appellant's claim is simple: either the Diocesan Trust is vicariously liable for the tortious acts of an assistant priest against a parishioner in the circumstances pleaded, or it is not. Whether that claim will succeed is a matter for trial; but on no view can it be said that a fair, not perfect, trial is impossible.

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[10] *Clerus Lismorensis* (ABFM p 500).

[11] See similarly *TRG v Brisbane Grammar School* (2020) 5 QR 440 at 473 [64](b) (Fraser JA; Morrison and Mullins JJA agreeing); *R v Edwards* (2009) 83 ALJR 717 at 722 [31] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[12] *DP (a pseudonym) v Bird* [2021] VSC 850 at [225]–[261] (J Forrest J); *O'Connor v Comensoli* [2022] VSC 313 at [52], [159]–[246] (Keogh J).

12. ***Notice of contention: negligence.*** So far as the negligence claim is concerned, RS[48]–[52] is no more than a complaint that the available evidence could, hypothetically, be more complete; but that is true in almost every case. A 'reasonable and definite inference' can give rise to liability in negligence even 'where direct proof is not available'.[13] Conversely, the Diocesan Trust can seek to rely on the absence of the documentary records asserted as a basis that the claim against it should fail. Be that as it may, that absence does not preclude a fair trial. It is common that an institutional defendant would wish — but be unable — to have a more perfect knowledge of its former employees' or officers' actions or state of mind. But that has never been the test of whether there can be a fair trial.[14]

10 13. The Diocesan Trust does not deny that there is evidence of, among other things, its officers' knowledge of Anderson's harmful proclivities *before* the abuse of the appellant;[15] that they acted, however imperfectly, upon that knowledge;[16] and that Anderson was ultimately laicised in light of his persistent deviancy.[17] Equally, the Diocesan Trust does not (in light of its abandonment of ground 3 of the notice of contention) deny that there is evidence from other alleged victims of Anderson that *could* potentially be admissible as tendency evidence shedding light on what the Church authorities did, or knew, in relation to Anderson.[18] Nor does the Diocesan Trust deny that expert evidence might cast light on what Church authorities did in the relevant era, and what a reasonable defendant ought to have done in the circumstances. Whether any such evidence is sufficient to establish the
20 Diocesan Trust's liability is fundamentally a question for trial.

Dated 9 March 2023

	Perry Herzfeld	James McComish
T	(02) 8231 5057	(03) 9225 6827
E	pherzfeld@elevenwentworth.com	jmccomish@vicbar.com.au

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13 *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 (Dixon, Williams, Webb, Fullagar and Kitto JJ); cf *Holloway v McFeeters* (1956) 94 CLR 470 at 476–7 (Dixon CJ), 480–1 (Williams, Webb and Taylor JJ).

14 *R v Edwards* (2009) 83 ALJR 717 at 722 [31] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

15 CAB 9; SC[10]; CAB 48, 65; CA[37], [97]–[98]; ABFM pp 78–80, 92–3, 98–100, 592, 595–7.

16 CAB 9, 13–14; SC[10], [26]–[28]; CAB 47–8, 65,74–5; CA[33]–[34], [38]–[39], [97]–[98], [129]; ABFM pp 572–3, 578, 585, 587, 592, 595–7, 600, 618–20.

17 CAB 9, 13–15; SC[9], [26]–[29]; CAB 46–7; CA[31]–[32]; ABFM 78–82, 92–3.

18 CAB 10–13; SC[13]–[25]; CAB 54; CA[62]–[63]; Exhibits SAT1–SAT4 (ABFM pp 29–59). See similarly *TRG v Brisbane Grammar* (2020) 5 QR 440 at 473 [64](a) (Fraser JA; Morrison and Mullins JJA agreeing).