HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	S150/2022
File Title:	GLJ v. The Trustees of the Roman Catholic Church for the Dio
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
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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 72 863 788 198
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

1. This outline is in a form suitable for publication on the Internet.

Part II: OUTLINE OF PROPOSITIONS

The respondent would be denied any real opportunity to participate in the hearing

2. A permanent stay will be appropriate where it is demonstrated, on the balance of probabilities, that it will not be possible to obtain a fair trial {RS[8]}. A fair trial does not mean a perfect or ideal trial. What is fair is relative – it will depend upon the parties in the case and the particular circumstances.

3. At a minimum, a defendant must be afforded a real opportunity to defend the claim: to decide on an informed basis what defence, if any, they will rely upon, and to make the defendant's versions of the critical facts known to their counsel and to the Court {RS[10]}. This is a concomitant of the fundamental principle of our system of justice that parties are afforded procedural fairness. Procedural fairness requires parties be

given an opportunity to present their evidence and to challenge the evidence led against them. A party can only do so if they are able to test and respond to the evidence.

4. In the present case, the consequence of the effluxion of time is that the respondent has been denied a real opportunity to defend the claims made against it{RS[13]}. The respondent has been deprived of any opportunity to consider and conduct a defence by reference to the crucial central factual allegation of sexual assault.

5. This may be distinguished from the case of an employer who cannot compel a former employee to provide instructions relevant to the conduct of a defence. At the least, the employer has the opportunity – the employer may ask the employee, and the employee may exercise their right not to cooperate, or the employer may take the risk to subpoena the employee without prior conference. Here, the respondent cannot even ask. The respondent has no choice but to rely upon a defence of non-admission.

6. That is so, not just because Anderson is dead and had died before the respondent could confront him, but because{RS[12]}:

   (a) each of the parish priests and senior clergy who had involvement with Anderson had died before the respondent was on notice of the appellant's allegations; and

   (b) there is an absence of documentary material or other evidence to shed any light on the appellant's allegation of sexual assault.

7. This total lack of opportunity leads to practical injustice in two vital ways.

8. ***First***, the respondent's ability to cross-examine the appellant is crippled {RS[13]}. The only avenue of cross-examination available to the respondent is to focus on the inherent improbability or internal incoherence of the appellant's account. That is not the result of true choice on instructions. It is because, as a consequence of the effluxion of time, the respondent has no opportunity to consider any other basis upon which to test the evidence.

9. ***Second***, where the Court is inclined to accept the appellant's version of events, the evidential burden commonly shifts to the respondent and the respondent has no means by which to rebut the appellant's evidence on the foundational issue. In this sense, "*everything does depend upon the acceptance of the plaintiff's account*"{CAB 66 [101]; RS[11]}.

10. Familiar directions and warnings to ward against risks where the alleged perpetrator is dead or the only testimony is from a single witness, cannot of their nature and function overcome the deficiencies in the respondent's capacity to participate in a way and to a degree necessary to render the trial fair.

No subversion of legislative intent

11. The legislative changes following the Royal Commission into Institutional Responses to Child Sexual Abuse do not reveal any legislative intent to alter the way in which the Court exercises its supervisory power to permanently stay historical abuse proceedings {RS[19], [25]-[28]}. In any event, the exercise of that power already requires the Court to consider the rights of the parties and the public interest in the resolution of such kinds of proceedings. Further, reliance on some imputed legislative intent cannot overcome the express words of s 6A of the *Limitation Act 1969* (NSW) and s 67 of the *Civil Procedure Act 2005* (NSW) {RS[19]-[20]}.

The House v The King standard applies

12. The exercise of the stay power requires firstly an analysis of whether the continuation of proceedings would result in an unfair trial, and secondly, where there is unfairness, what measure is appropriate to relieve against that unfairness{RS[35]}. Determining the appropriate measure to relieve against unfairness involves an exercise of discretion {RS[36]-[38]}.

Notice of contention

13. The respondent does not press any grounds of its notice of contention.

Dated: 7 June 2023

Bret Walker **Emma Bathurst**