HIGH COURT OF AUSTRALIA

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Details of Filing

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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

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: ISSUES ARISING

2. Did the Court of Appeal grant a permanent stay on the "*sufficient*" basis that the alleged abuser is dead and the respondent did not have an opportunity to obtain instructions from him?

3. Is the scope of the power to permanently stay proceedings in historical child sexual abuse claims affected by the removal of the statutory limitation period for such claims?

4. To succeed on appeal, does the appellant have to show *House v The King* error in the Court of Appeal's decision?

Part III: SECTION 78B NOTICE

5. No notice is required under s78B of the *Judiciary Act 1903* (Cth).

Part IV: FACTUAL ISSUES IN CONTENTION

6. There are no factual issues in contention.

Part V: ARGUMENT

7. The appellant has not demonstrated error – *House v The King* error or otherwise – by the Court of Appeal. The two errors alleged by the appellant rest on the premise that the Court of Appeal granted a permanent stay on the "*sufficient*" basis that the alleged abuser is dead and that he died before the respondent had an opportunity to obtain instructions from him on the allegation {AS[3], [4]}. The Court of Appeal made no such finding.

8. The Court of Appeal granted a permanent stay of the proceedings pursuant to s 67 of the *Civil Procedure Act 2005* (NSW), applying the well-settled principles for the exercise of that power as summarised in *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 {CAB64 CA[95]; CAB71 CA[115] – CAB74 CA[126]}. The appellant does not challenge the correctness of those principles.

Issue 1 – the Court of Appeal took into account more than simply the death of Anderson in granting a permanent stay

9. Consistent with the well-settled principles, the Court of Appeal's focus was on the *effect* of the passage of time, some 54 years, since the events the subject of the appellant's claim {CAB71 CA[118]}.[1] The Court considered the consequences of the effluxion of time on the evidence available to determine the claims and on the ability for the respondent to have at least an opportunity to investigate and respond to the claims {CAB71 CA[118] – CAB74 CA[126]}.

10. In this respect, the Court began its analysis by identifying that the appellant's claims in negligence and in vicarious liability both rested upon the allegation that Anderson had sexually assaulted the appellant in 1968. The sexual assault was the "*foundational*" issue to both causes of action {CAB71 CA[120]; see also CAB72 CA[121] ("*the central issue*")}; and that to succeed at trial, the appellant would first have to establish that Anderson had sexually assaulted her as alleged {CAB40 CA[4]}.

11. The Court found that the *only* available evidence on the "*foundational issue*" was the appellant's own account {CAB66 CA[101]; CAB71 CA[119]}. There was no

[1] *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 235-237 [76]-[87] (Bell P).

available contradictor and "*everything does depend upon the acceptance of the plaintiff's account*" {CAB66 CA[101]; see also CAB40 CA[4]}.

12. In that context, the Court of Appeal found the respondent faced the following difficulties in meeting the central allegation of sexual assault, in addition to the absence of Anderson:

(a) there were no documents dating back to or around the time of the alleged assault that detail or otherwise refer to what the appellant alleges occurred {CAB71 CA[119]};

(b) the respondent was not on notice of the allegation of sexual assault before 2019 {CAB71 CA[119]} – i.e. not during Anderson's lifetime, and not during the lifetime of any of the priests with whom Anderson had worked,[2] nor during the lifetime of the priest investigating Anderson's application for dispensation;[3]

(c) there was no other material that shed light on how Anderson would have responded to the appellant's allegation {CAB71 CA[120]}; and

(d) the appellant relied on the unsworn statements from four witnesses alleging sexual assault by Anderson, to provide a foundation that, at the relevant time, Anderson was disposed to paedophilia {CAB73 CA[125]}. Anderson was not on notice of those allegations before he died and so the respondent did not have a meaningful opportunity to engage with the allegations there {CAB73 CA[123]; CAB73 CA[125]}.

13. Thus, the overall effect of the effluxion of time was that the respondent faced a comprehensive *absence* of material. It was that total absence of material which precluded it from being able to engage in any way with the central allegation of sexual assault – the respondent was "*utterly in the dark*" {CAB72 CA[121]}. The respondent simply could not meaningfully interrogate the appellant's version of events, nor the events contained in the four proposed witness statements {CAB67 CA[105]; CAB73 CA[125]}. The respondent could have no reasonable basis on which to cross-examine or challenge the appellant on her version of the sexual assault, nor the other witnesses

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[2] Monsignor Vincent Ryan, parish priest of Kyogle, died 26 August 1987 {CAB47 CA[35]}; Father William O'Brien, parish priest of Macksville, died 16 August 2002 {CAB49 CA[41]}; Father Cranney, parish priest of MacLean, died 11 April 1980 {CAB49 CA[44]}; Bishop Farrelly, parish priest and Bishop of the Lismore Diocese, died 25 May 1974 {CAB51 CA[49]}; Reverend Paul Rex Brown, Chancellor of the Bishop of the Lismore Diocese, died 30 June 2005{CAB43 CA[17]}; Father Anthony Hoade, parish priest of Tweed Heads, died 28 June 2008 {CAB51 CA[51]}.

[3] Father Frank Douglas, Chancellor of the Brisbane Archdiocese, died on 18 September 1984 {CAB47 [32]}.

on the respective alleged sexual assaults.[4] The respondent's filed Defence comprised non-admissions and pleas that it did not know the facts on which the allegations rested {CAB45 CA[27]; cf. AS[38(g)]}. Indeed, the respondent was deprived of any opportunity to admit liability on an informed basis, if it should be right to do so.[5]

14. In this respect, the appellant asserts that it would be "*entirely unreal*" to suppose that Anderson would have admitted the abuse {AS[40]}. The appellant relies on the material available at the time of Anderson's laicisation to assert that the proper and inevitable inference was that Anderson would have denied the allegation of abuse by the applicant {AS[39]-[41]}. The appellant's assertion does not rise above guesswork and must be rejected.

15. Anderson's non-response to a question regarding chastity and a denial of having associated romantically with any girl in his examination for laicisation could not fairly support an inference that Anderson would have denied the *appellant's* allegation {AS[39]}. Anderson's petition for laicisation, the investigation into his petition and the subsequent laicisation, had nothing to do with the allegations raised by the appellant. Anderson's petition for laicisation arose following concerns with his "*homosexuality*" and involvement with young boys {CAB47 CA[33]}; CAB13 SC[26]}. That is the context in which his answers in his examination for laicisation must be understood.[6] Some of the materials disclose that those concerns had been brought to Anderson's attention {CAB47 CA[33]; CAB 48 CA[38]}. None of those concerns involved the appellant. None could be used to support an inference of denial, let alone, to elucidate whether Anderson might have provided an alibi, or other relevant information, for example, whether he was acquainted with the appellant and her family, whether he had been allocated as a support priest for the appellant's father. The Court of Appeal was correct to find that there was no material that shed light on Anderson's putative response {CAB72 CA[120]}.

16. In assessing the prejudice facing the respondent, there was equally no factual error by the Court of Appeal in overlooking the "*copious*" available evidence identified by the appellant at AS[38]. None of those materials concerned the central allegation of the

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[4] See, *Longman v The Queen* (1989) 168 CLR 79 at 108 (McHugh J), cited in *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 235 [80] (Bell P).

[5] *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 277-278 [54] (Gleeson CJ, Gummow, Hayne and Crennan JJ), citing *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 405-406 (Bryson JA).

[6] See, ABFM 80.

sexual assault. Rather, they concerned the other elements of the appellant's negligence claim, in particular, knowledge and foreseeability. The Court of Appeal took those matters into account to find the respondent would *not* be subject to manifest unfairness on the negligence claim {CAB74-75 CA[127]-[129]}.

17. In light of the above, it is apparent that the Court of Appeal considered much more than the death of Anderson and the respondent's inability to obtain instructions from him in granting a permanent stay. There was no suggestion by the Court of Appeal, nor was it contended for by the respondent, that proceedings must be stayed simply where the person responsible for the claim is deceased or is otherwise unavailable to give instructions {cf. AS[27]}. A non-fanciful example may be posited where there exist other witnesses to the alleged abuse, aside from the alleged victim and alleged abuser, who are alive and competent to give evidence. A permanent stay may well not be warranted in those circumstances, even if the alleged abuser had died before being confronted with the allegation.

18. This example illustrates the correctness of the Court of Appeal's approach. It is also consistent in principle with the authorities relied on by the appellant at AS[27]-[29].[7] That is, the decision by the Court of Appeal stands for no more than the simple proposition that each case turns on its own facts, as it must.[8]

Issue 2 – the removal of statutory limitation period for historical child abuse claims does not affect the Court's power to permanently stay proceedings

19. There has been no legislative intrusion into the broad statutory power under s 67 of the *Civil Procedure Act 2005* (NSW) nor the applicable principles governing the exercise of that power in the context of historical child sexual abuse claims. Quite the opposite – while s 6A of the *Limitation Act 1996* (NSW) removes limitation periods for child

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[7] The authorities relied upon by the appellant bear little factual similarity with the present appeal. The central factual issues to be resolved in those cases did not depend solely on the testimony of the claimant. For example, *Holloway v McFeeters* (1956) 94 CLR 47 (physical evidence, such as tyre marks, supported the finding of negligence); *Lahrs v Eichsteadt* [1961] Qd R 457 (the issue at hearing was the manner in which the plaintiff cyclist negotiated the decline, several witnesses gave evidence on the issue); *Sherman v Nymboida Collieries Pty Ltd* (1963) 109 CLR 580 (physical evidence of the gas lamp and ignition was available); *Sydney City Council v Dell'Oro* (1974) 132 CLR 97 (other eye witness evidence was available); *Perpetual Executors & Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185 (documentary evidence and a corroborating witness was available); *Cope v Keane* (1968) 118 CLR 1 (the underlying facts of the claim were not disputed); *Noonan v Martin* (1987) 10 NSWLR 402 (there was documentary evidence of the underlying transactions); *Page v Page* [2017] NSWCA 141 (no findings were made in relation to the sexual assault allegations).

[8] *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 255 [193] (Leeming JA).

abuse actions, it expressly preserves the power of the court to permanently stay proceedings as conferred by s 67 or by the Court's inherent jurisdiction. Section 6A(6) provides:

> (6) This section does not limit--
>
> (a) any inherent jurisdiction, implied jurisdiction or statutory jurisdiction of a court, or
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> (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.
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> **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.

20. There is no need to go any further than the clear statutory text. [9]

21. In any event, the descrying of legislative policy, with or without the background of the Royal Commission into Institutional Responses to Child Sexual Abuse, cannot be understood as altering the law concerning the Court's existentially important protective power to permanently stay proceedings.

22. The protective power to stay proceedings exists, and has existed, regardless of the imposition or otherwise of limitation periods. Limitation periods are entirely a matter of statute; at common law there is no principle of limitation.[10] Nonetheless, the common law has long recognised the potential injustice or unfairness that may result where actions are not commenced promptly – that is what gives rise to the court's supervisory jurisdiction to stay proceedings where the prejudicial effect of that delay is exceptional.[11]

23. Moreover, the Court's power to stay proceedings persists even where the legislature has imposed a limitation period. That proceedings are commenced within the statutory limitation period does not preclude a court from staying proceedings. Where the court's protective jurisdiction is invoked, the court has an obligation to consider

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[9] *Wigmans v AMP Limited* (2021) 270 CLR 623 at 668 [111] (Gageler, Gordon and Edelman JJ): "*It would be inappropriate to read s 67 with Pt 10 as conferring jurisdiction or granting power subject to limitations not found in their express words*".

[10] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 565 (Kirby J); *Blunden v Commonwealth* (2003) 218 CLR 330 at 350 [61] (Kirby J); A. McGee, *Limitation Periods* (Sweet & Maxwell, 2010), [1,003].

[11] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551-552 (McHugh J).

whether, although the claim is brought *within* time, it would amount to an unfair hearing.[12]

24. Thus, contrary to the appellant's submissions, the removal of limitation periods for claims of child sexual abuse cannot alter the task the Court undertakes when considering whether or not to grant a permanent stay.

25. There is equally no discernible "*emphatic policy*" of the legislature in respect of claims against institutions for historical child abuse that would lead to a different conclusion. The statutory provisions and legislative context relied upon by the appellant do not support the existence of the legislative policy as propounded by the appellant {cf. AS[32]}.

26. Rather, the legislative background to the removal of the limitation period confirms a deliberate legislative choice that the Court's power to grant a stay remains unaltered. This is expressly articulated in both the Royal Commission report – "*the courts' power to prevent unfair trials should not be limited*",[13] and the second reading speech for the *Limitation Amendment (Child Abuse) Bill 2016*, which introduced s 6A.[14]

27. The subsequent legislative amendments to the *Civil Liability Act 2002* (NSW) also do not reveal any legislative policy that alters the clear statutory text of s 6A of the *Limitation Act 1969* (NSW) nor the power under s 67 of the *Civil Procedure Act 2005* (NSW) {cf. AS[31]-[32]}:

(a) Section 6K provides that:

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[12] See, *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; *Jack Brabham Holdings v Minister for Industry Technology & Commerce* (1988) 85 ALR 640.

[13] "*Removing limitation periods may create a risk that courts will interpret the removal as an indication that they should exercise their powers to stay proceedings in a more limited fashion. We consider that it should be made clear that the removal of limitation periods does not affect the courts' existing powers. … the courts' power to prevent unfair trials should not be limited*": Royal Commission into Institutional Child Sexual Abuse, *Redress and Civil Litigation Report*, September 2015 at 458; Recommendation 87 provides: "*State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period*": at 459.

[14] "*It is a fundamental tenet of the rule of law that all parties receive a fair trial. These amendments preserve the existing powers of a court to safeguard the right to a fair trial. They do not restrict a court from dismissing or staying proceedings where it determines that a fair trial is not possible; for example, where the passage of time has led to a loss of evidence capable of establishing a case to be tried.":* Legislative Assembly, New South Wales, Limitation Amendment (Child Abuse) Bill 2016, Parliamentary Debates (Hansard), 16 February 2016, 6399; see also, *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 254 at [187] (Leeming JA).

(1) Child abuse proceedings may be commenced or continue against an unincorporated organisation in the name of the organisation or in a name reasonably sufficient to identify the organisation as if the organisation had legal personality.

Contrary to AS[32], the statute does *not* provide that claims for historical child sexual abuse should be permitted to proceed to trial notwithstanding the organisational structure of the defendant.

(b) Section 6G provides that:

6G Employees include persons exercising functions akin to employees

(1) In this Division--

"employee" of an organisation includes an individual who is akin to an employee of the organisation.

(2) An individual is "akin to an employee" of an organisation if the individual carries out activities as an integral part of the activities carried on by the organisation and does so for the benefit of the organisation.

(3) …

The work that s 6G does is through s 6H, the only other provision in the Division. Section 6H provides the circumstances where an organisation is vicariously liable for child abuse perpetrated against a child by an employee (where the meaning of "employee" is expanded by s 6G). However, s 6H only applies in respect of child abuse perpetrated *after* the commencement of the section, i.e. after 26 October 2018.[15]

Sections 6G and 6H therefore do not reveal any legislative policy that all claims for historical child sexual abuse should be permitted to proceed to trial notwithstanding any constraints in common law rules about vicarious liability: {cf. AS[32]}.

28. Thus, the statutory text of the amendments to the *Civil Liability Act 2002* (NSW) does not impose upon the Court an obligation to treat claims for institutional liability more favourably than those against private individuals {cf. AS[34]}. As the majority observed in *Batistatos v Roads and Traffic Authority of New South Wales*:[16]

> *It is a long, and impermissible, step to deny the existence of what may be the countervailing right of a defendant by imputation to the legislature of an intent, not manifested in the statutory text, to require the court to give absolute priority to the exercise by the plaintiff within the limitation period of the right to initiate proceedings*.

[15] *Civil Liability Act 2002* (NSW), Schedule 1, cl 44.

[16] (2006) 226 CLR 256 at 280 [63]-[64] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

29. In any event, none of those amendments to the *Civil Liability Act 2002* (NSW) was relied upon by the respondent in support of a claim of manifest unfairness so as to warrant a permanent stay. Equally, none of those amendments was a factor in the Court of Appeal's decision to grant a permanent stay in the present case. The amendments to the *Civil Liability Act 2002* (NSW) simply have no bearing on the task undertaken by the Court.

30. There was no legislative requirement for the Court of Appeal to do otherwise than apply the well-established principles governing s 67 of the *Civil Procedure Act 2005* (NSW) to the particular facts of the case. Even if such legislative policy existed that required the Court to favour claims against institutional defendants, legislative policy could not overcome the clear words of s 6A or the broad power conferred by s 67. In that sense, there could be no "*subversion*" of the legislative intent. To the contrary, the Court of Appeal's approach was entirely consistent with the conferral of power under s 67 and the removal of limitation periods for historical abuse claims {CAB70 CA[116] – CAB71 CA[117]}.

Issue 3 – The appellant must establish *House v The King* error on appeal

31. The applicable standard of appellate review of the exercise of s 67 power must derive from the terms of the statute and its context.[17] The appellant focuses on the determination of whether proceedings are an "*abuse of process*", asserting that the outcome of that determination is binary (a stay is granted or not).

32. Section 67 provides:

> **67 Stay of proceedings**
>
> Subject to the rules of the court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day.

33. The clear language of s 67 is that whether or not a stay is granted, when a stay is granted and for how long a stay is granted, are all discretionary ("*may*"). There is no obligation or requirement to grant a stay.

[17] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 592-593 [151]-[153] (Edelman J).

34. The power under s 67 is broad; the statute does not identify any particular criteria for the exercise of that power.[18] The scope of the power is to be determined by considering the text of s 67 in its context, including considerations mandated by case management provisions in Part 6 of the CPA.[19] It is of general application and applies to all causes of action and covers a range of varied and different circumstances where a stay may be granted, not only where proceedings may be unfair, but also where they may be oppressive or vexatious.

35. The exercise of the power under s 67 requires a two-step analysis. *First*, there is an evaluative assessment as to whether, if the proceedings were to continue, it would result in an unfair trial. *Second*, where there is unfairness, the Court must assess whether the unfairness is sufficiently cogent and compelling to justify the drastic remedy of a stay.

36. It is the second stage of the analysis that involves a discretionary decision to which *House v The King* applies. The second stage of the analysis does not result in a binary or unique outcome. Where a Court finds unfairness, it has a range of measures to address that unfairness.[20] A permanent stay is a remedy of last resort.[21] The Court must consider whether there are "*less draconian*" means to protect the integrity of the Court's processes[22] – "*the court may mould its order to meet the exigencies of the particular case*".[23]

37. The discretionary nature of that assessment is exemplified by the clear power for the Court to grant a limited or conditional stay,[24] or, for example, where there are a multiplicity of proceedings, the power of the Court to determine which, if any, of those proceedings are stayed.[25] That is consistent with the statutory context of the power –

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[18] *Wigmans v AMP Limited* (2021) 270 CLR 623 at 654 [72] (Gageler, Gordon and Edelman JJ); *Moubarak by his tutor Corey v Holt* (2019) 100 NSWLR 218 at 233 [69] (Bell P), quoting *State of New South Wales v Plaintiff* [2012] NSWCA 248 at [15] (Basten JA).

[19] *Wigmans v AMP Limited* (2021) 270 CLR 623 at 654 [73]-[74] (Gageler, Gordon and Edelman JJ).

[20] *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at 415 [266] (Edelman J).

[21] *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at 409 [248] (Edelman J).

[22] *Walton v Gardiner* (1992) 177 CLR 378 at 395-396 (Mason CJ, Deane and Dawson JJ); *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at 373 [115] (Gageler J); 409 [248], 415 [264] (Edelman J).

[23] *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 32 (Mason CJ); at 56 (Deane J); at 77 (Gaudron J).

[24] *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 32 (Mason CJ): "*The court may grant a limited or conditional stay and it might even order that a proceeding be stayed and not proceeded without an order of the court".*

[25] *Wigmans v AMP Limited* (2021) 270 CLR 623.

"*it is a means by which that Court can regulate its processes and manage cases before it in accordance with the principles set out in Pt 6 of the CPA*".[26] It is a matter which tolerates a range of outcomes.[27]

38. In the present case, the Court of Appeal found that "*there is nothing a trial judge could do in the conduct of the trial to relieve against its unfair consequences*" {CAB72 CA[122]}. That was a matter within the Court of Appeal's discretion and the *House v The King* standard applies to the appellate review of that decision. None of the alleged errors identified now by the appellant is of the *House v The King* kind.

39. Finally, it may be added that limited guidance can be drawn from the English, Canadian and New Zealand authorities identified by the appellant {cf. AS[23]-[25]}:

(a) there are equally English authorities that indicate that the decision whether or not to grant a stay is a discretionary decision and the appellate court must determine whether the decision was one that was reasonably open, all relevant factors considered.[28]

(b) in the Canadian authority cited by the appellant, the Court was considering the standard of review applicable to statutory appeals.[29] The settled Canadian case law dictates that where there is a statutory appeal, questions of law are subject to the correctness standard, and whether there is an abuse of process is a question of law.[30] There was no analogous reasoning by reference to the discretionary / non-discretionary distinction for appellate review.

(c) in the New Zealand authority cited by the appellant, the Court declined to resolve the issue as to whether the question was discretionary or not.[31]

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[26] *Wigmans v AMP Limited* (2021) 270 CLR 623 at 654 [74] (Gageler, Gordon and Edelman JJ).
[27] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 563 [49] (Gageler J).
[28] *R v Maxwell* [2010] UKSC 48; *Warren v Attorney-General for Jersey* [2012] 1 AC 22.
[29] *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at [26] (Rowe J; Wagner CJ, Moldaver, Karakatsanis, Brown, Martin, Kasirer and Jamall JJ agreeing).
[30] *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at [29]-[30] (Rowe J; Wagner CJ, Moldaver, Karakatsanis, Brown, Martin, Kasirer and Jamall JJ agreeing).
[31] *Wilson v The Queen* [2016] 1 NZLR 705 at [29] (Arnold J; William Young, Glazebrook and Blanchard JJ agreeing).

Part VI: NOTICE OF CONTENTION

<u>Ground 1</u> – The respondent would be denied a fair trial in respect of the appellant's vicarious liability claim and the negligence claim

40. The Court of Appeal's decision to grant a permanent stay rested upon the finding that the "*foundational issue*" – i.e. the sexual assault – could not be established by a fair trial. However, the Court of Appeal did *not* accept there would be manifest unfairness on the "*negligence and vicarious liability aspects*" of the appellant's claims warranting a permanent stay {CAB74-75 CA[127]-[132]; CAB40 CA[4]}.

41. In reaching that conclusion, the Court of Appeal erred by failing to consider the essential elements of the respective claims and by failing to then consider the effect of the effluxion of time, absence of records and death of material witnesses on the ability of the respondent to meaningfully investigate or defend those elements.

The vicarious liability claim

42. The essential question for the Court to determine the vicarious liability claim was whether the respondent had assigned Anderson to any "*special role*" and the position in which Anderson was thereby placed vis-à-vis the appellant, and whether the apparent performance of that role may be said to have given rise to the "*occasion*", not just the opportunity, for the alleged assault.[32] The resolution of that issue required a "*careful examination*" of the role that Anderson was "*actually assigned*" vis-à-vis the appellant.[33] The Court of Appeal failed to identify this essential and material element of the vicarious liability claim.

43. Had the Court of Appeal correctly identified the issue to be resolved for the vicarious liability claim, the Court of Appeal would have found that, as with the allegation of sexual assault, the *only* available evidence was the appellant's own account – that is, the appellant's recollection that Father Brown allocated Anderson to her family as a

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[32] *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134 at 159-160 [81]-[84] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

[33] *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134 at 160-161 [84]-[85] (French CJ, Kiefel, Bell, Keane and Nettle JJ); *The Council of Trinity Grammar School v Anderson* (2019) 101 NSWLR 762 at 775 [46] (Bathurst CJ).

support priest after her father was involved in a motorcycle accident {CAB43 CA[17] CAB10 SC[13]}.[34]

44. The relevant inquiry for the vicarious liability claim was what role Anderson was "*actually assigned*". It was therefore not to the point that the respondent might have available to it generalised evidence as to the role an assistant priest might have had {cf. CAB75 CA[131]-[132]}. As to the actual role Anderson was assigned:

(a) the only other witnesses, aside from the appellant, who could shed light on that question were Father Brown, Anderson, and Bishop Farrelly, the Parish Priest and Bishop of Lismore Diocese during Anderson's appointment to the Lismore Parish {CAB15 SC[30]}. Each of these witnesses had died before the appellant's claim was known to the respondent.[35]

(b) there were no documents regarding Anderson being appointed to assist the appellant's family, or for that matter, any family {CAB55 CA[68]}.

(c) there were also no documents or other material that shed any light on the tasks Anderson was assigned at Lismore Parish. Bishop Farrelly's letter on Anderson's request for dispensation does not refer to Anderson's time at Lismore Parish at all {CAB50 CA[49]}. There was also no record that Father Brown provided a letter as part of Anderson's laicisation process (which could have potentially provided insight into Anderson's time at Lismore Parish).

45. The respondent was thus deprived of any meaningful opportunity to interrogate or investigate the appellant's vicarious liability claim. As a consequence of the passage of time, the respondent was unable to make any meaningful enquiries as to whether Anderson was allocated to the appellant's family as a support priest, what tasks (if any) Anderson was required to carry out as a support priest for the appellant's family, whether Anderson had received any directions not to attend the appellant's family.

46. The respondent was simply not in a position to contest or admit the appellant's recollection. There was no other order available to the Court that could relieve against

[34] ABFM 33[25].
[35] Father Brown died on 30 June 2005 {CAB43 CA[17]} and Bishop Farrelly died on 25 May 1974 {CAB51 CA[49]}.

that unfairness. It would not be possible for the respondent to obtain a fair trial and a stay on the vicarious liability claim was warranted.

The negligence claim

47. The essential elements required for the Court to determine the negligence claim related to the issues of reasonable foreseeability of the risk of sexual abuse by Anderson, the knowledge of the respondent of that risk, and what the respondent did or did not do in response to that risk.

48. In concluding there was no manifest unfairness on the negligence claim, the Court found that the documentary record arguably showed that senior clergy knew Anderson was engaging in "*deviant behaviour*" during the period of his first appointment and that it was arguably known that Anderson was resistant to treatment {CAB74 CA[129]}. The difficulty with the Court of Appeal's analysis is that it does not give sufficient consideration to the chronology of events, nor how those records fail to elucidate who in the respondent had the requisite knowledge, when that knowledge was acquired, and with whom that knowledge was shared.

49. It may be accepted that in 1965, Bishop Farrelly was aware that Anderson had "*recurring trouble in sexual matters, especially homosexuality*" and "*in every case young boys were involved*" {CAB 47 CA[33]; CAB 48 CA[39]}. However, Anderson's appointment as Assistant Priest at Kyogle Parish was then revoked by Monsignor Ryan and Anderson was directed to attend a psychiatrist in Sydney for treatment {CAB 48 CA[38]}. After this direction in 1965, there remains an absence of evidence as to whether anyone in a senior position within the respondent had knowledge of abuse by Anderson after 1965 and before 1968, or that the treatment by the psychiatrist was unsuccessful. The records do not disclose any knowledge on the part of the respondent of complaints of abuse between 1965 and 1968 {CAB49 CA[42]; CAB49 CA[45]}. The complaints identified in the material produced by the Professional Standards Office were not made before 1968 {CAB49 CA[42]; CAB50 CA[46]; cf. AS[38(c)]}.[36]

50. The Court of Appeal relied on Monsignor Ryan's recollection of events recorded in 1971 to conclude that it was arguably known that Anderson was resistant to treatment

[36] The complaints relied upon by the appellant at AS[38(c)] were respectively made on 16 October 2007, 27 June 2001, 27 July 2001, 14 August 2009 and 14 August 2009.

{CAB75 CA[129]}. That finding does not address the lacuna of evidence as to the timing of that knowledge or events that may have superseded the basis for Monsignor Ryan's belief (assuming that belief formed before 1968). It also does not address the issues of by whom it was known, aside from Monsignor Ryan, and whether that was a person sufficiently senior within the respondent such that the respondent could be impugned with that knowledge.

51. The documentary record does in fact suggest that there were other measures undertaken by the respondent to address Anderson's behaviour. In his letter of January 1971, Bishop Farrelly refers to "*persistent efforts to help [Anderson] overcome his problem*" {CAB51 CA[49]}. However, no detail is given as to what those efforts entailed {CAB51 CA[49]}. In light of the absence of any witnesses that could shed light on those measures, it is simply not knowable what those efforts were, whether they were subsequent to the efforts made by Monsignor Ryan, and ultimately, whether those efforts could be sufficient to discharge the respondent of its alleged duty of care.

52. Thus, even with the documentary record, there remained a fundamental absence or deficiency of evidence that could not be overcome. The respondent was placed in the position that it could not defend the appellant's claim in negligence, particularly with respect to breach, even though there were matters upon which some favourable inference could be drawn. Without the witnesses to shed light on those matters, any potential defence the respondent could raise would be nothing more than speculation. The respondent would necessarily be relegated to a defence of non-admission. That would be manifestly unfair and warrant a permanent stay.

Grounds 2 and 3

53. The respondent does not press grounds 2 and 3 of its Notice of Contention.

Part VII: TIME ESTIMATE

54. It is estimated that up to 1.5 hours will be required for the respondent's oral argument.

Dated 15 February 2023

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ANNEXURE

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

	Title	**Version**	**Provisions**
1.	*Civil Liability Act 2002* (NSW)	Current, at 16 June 2022	ss 6G, 6H, 6K Sch 1, cl 44
2.	*Civil Procedure Act 2005* (NSW)	Current, at 1 December 2021	s 67 Part 6, Div 1
3.	*Limitation Act 1969* (NSW)	Version at 1 July 2018	s 6A