

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

JOANNE EDITH WILLMOT

APPELLANT

AND

THE STATE OF QUEENSLAND

RESPONDENT

Willmot v Queensland
[2024] HCA 42
Date of Hearing: 7 May 2024
Date of Judgment: 13 November 2024
B65/2023

ORDER

1. *Appeal allowed in part, with the respondent to pay the appellant's costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 16 May 2023 and, in their place, order that:*
 - (a) *The appeal be allowed in part, with the respondent to pay the appellant's costs; and*
 - (b) *The order of the Supreme Court of Queensland made on 22 August 2022 be set aside and, in its place, order that:*
 - (i) *subject to para (ii), the defendant's application for a permanent stay of the proceeding is dismissed;*
 - (ii) *the claims pleaded in paras 9(b), 11 and 12 of the Amended Statement of Claim dated 20 August 2021 are permanently stayed; and*
 - (iii) *the defendant pay the plaintiff's costs of the application.*

On appeal from the Supreme Court of Queensland

Representation

B W Walker SC with G R Mullins KC, S D Anderson and P M Nolan for the appellant (instructed by Littles Lawyers)

C C Heyworth-Smith KC with D J Schneidewin and K E Slack for the respondent (instructed by Crown Law (Qld))

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CATCHWORDS

Willmot v Queensland

Courts – Abuse of process – Permanent stay of proceedings – Where claim for damages for personal injury for alleged child sexual abuse and serious physical abuse more than 50 years ago – Where no limitation period for claims resulting from child sexual abuse or serious physical abuse under s 11A of *Limitation of Actions Act 1974* (Qld) – Where deaths of certain alleged perpetrators and other potential witnesses – Where absence of documentary evidence – Whether trial necessarily unfair – Whether abolition of limitation period changed right to fair trial – Whether continuation of proceedings an abuse of process justifying permanent stay.

Words and phrases – "abuse of process", "child sexual abuse", "delay in bringing proceedings", "exceptional circumstances", "fair trial", "forensic disadvantage", "irreducible minimum standards of fairness", "limitation period", "manifest unfairness", "non-delegable duty", "oppressive", "permanent stay", "prejudice", "serious physical abuse", "unfairness".

Limitation of Actions Act 1974 (Qld), s 11A.

1 GAGELER CJ, GORDON, JAGOT AND BEECH-JONES JJ. The appellant ("Ms Willmot") was born in April 1954. In June 2020, Ms Willmot brought proceedings against the respondent, the State of Queensland ("the State"), seeking damages for sexual abuse and serious physical abuse she alleged that she had suffered more than 50 years ago.¹

2 There is no dispute² that Ms Willmot was a "State Child"³ within the meaning of s 4 of the *State Children Act 1911* (Qld) from when she was an infant until about September 1966. As a "State Child", the Director of the State Children Department had "the care, management, and control" of her;⁴ and she could be "dealt with" by, among other things, the Director detaining her in an institution or placing her "in the custody of some suitable person who [was] willing to take charge of" her.⁵

3 It is also not in dispute: that Ms Willmot, being an Indigenous person, was subject to the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) until she was 18 years old;⁶ that that Act made provision for the protection and care of Aboriginal people by authorising their removal to, and their being "kept" within, an area of land known as a "reserve";⁷ and that the Act provided for a system of permits to enable people to leave the reserve to work.

1 The proceedings were filed on 11 June 2020.

2 Based on the parties' current pleadings: an Amended Statement of Claim dated 20 August 2021 and an Amended Defence filed 21 October 2021.

3 A "State Child" was defined to mean "[a] neglected child, convicted child, or any other child received into or committed to an institution or to the care of the Department, or placed out or apprenticed under the authority of this Act".

4 *State Children Act*, s 10(1).

5 *State Children Act*, s 11.

6 For the relevant period from 6 April 1954 to 6 April 1972, this Act had been repealed and replaced by the *Aboriginals Preservation and Protection Act 1939* (Qld), which was in turn repealed and replaced by the *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld). Neither party adverted to these legislative changes in their pleadings or suggested that anything turned on them.

7 *Aboriginals Protection and Restriction of the Sale of Opium Act*, s 9.

2.

4 Further, there is no dispute that, as a young infant, Ms Willmot was placed in the Mothers and Babies Quarters near the Cherbourg Girls' Dormitory ("the Girls' Dormitory") at the Cherbourg Settlement, near the town of Murgon in south-eastern Queensland. Between 1957 and 1959, she was placed in foster care with Mr Jack and Mrs Tottie Demlin, an Indigenous couple at Cherbourg. In April 1959, at or about the time she turned five years old, she was removed from the care of the Demlins because there were reports of concerns that she was becoming severely malnourished and emaciated. She was then placed in the Girls' Dormitory until March 1960 when she was sent to live with her mother in Nanango. She was readmitted to the Girls' Dormitory in or about August 1960, but was finally discharged from the Girls' Dormitory in or about September 1966. She turned 18 years of age on 6 April 1972.

5 Ms Willmot makes four separate allegations. First, Ms Willmot alleges that whilst in the foster care of the Demlins, Mr Demlin sexually abused her "on a weekly to a fortnightly basis" between approximately October 1957 and May 1959, and that she was also regularly subjected to beatings by the Demlins for minor infractions of their rules ("the Demlins Allegations"). In relation to the Demlins, the State admits that the State: engaged the Demlins as foster parents whilst Ms Willmot was in their care and control; required Ms Willmot to live with, and be in the care and control of, the Demlins; allowed the Demlins to be the primary carers of Ms Willmot whilst she was resident with them; and was responsible for Ms Willmot's care whilst she was in the care and control of the Demlins, although only to the extent that the State was responsible for Ms Willmot's care as provided for by the *Aboriginals Protection and Restriction of the Sale of Opium Act*.

6 The second allegation concerns when Ms Willmot was a resident of the Girls' Dormitory. There is no dispute that the State operated and was in control of the Girls' Dormitory in the years during which Ms Willmot was there and that Ms Maude Phillips was the supervisor of the girls who were resident there between at least 1959 to 1966. Ms Willmot alleges, among other things, that in or about 1959 Ms Phillips physically mistreated her by subjecting her to beatings and severe floggings in the presence of others for minor infractions of the rules ("the Girls' Dormitory Allegations").

7 The third allegation is that in or about 1960, when she was about six years old, Ms Willmot was given permission by the Cherbourg Superintendent to leave Cherbourg and visit her grandmother who lived at One Mile near Ipswich. On that occasion, Ms Willmot alleges that an uncle, NW, who it was pleaded was 19 or 20 years old, sexually assaulted her by trying to force his erect penis inside her vagina ("the NW Allegation").

3.

8 The fourth allegation concerns an alleged second visit to Ms Willmot's grandmother's residence in 1967, when she was about 13 years old. On that occasion, Ms Willmot alleges that her cousin or great-uncle, known as "Uncle Pickering", sexually assaulted her including by penetrating her vagina with his finger ("the Pickering Allegation").

9 Ms Willmot alleges that, at the time of each of these events, the State owed her a "non-delegable duty" whilst she was a State Child or was subject to the *Aboriginals Protection and Restriction of the Sale of Opium Act*. The pleading describes the duty as a duty to take all reasonable care to avoid her suffering injury, and in particular, psychiatric injury. But read in isolation that would be no more than a simple allegation of negligence and not a non-delegable duty, which is a duty to ensure that reasonable care is taken. The State admitted that in its care and protection of Ms Willmot as a State Child it owed her a "non-delegable duty" to take reasonable care to protect her from any foreseeable risk of harm or injury that might be occasioned to her⁸ while she was a State Child or subject to the *Aboriginals Protection and Restriction of the Sale of Opium Act*. But, as counsel for the State accepted, the relevant non-delegable duty was a duty to ensure that reasonable care was taken for her safety. The State did not admit the pleaded content of the duty or that it breached its duty on the basis only that it could not ascertain the truth or falsity of the allegations of the abuse. There is no claim that the State was vicariously liable for the conduct of the individuals who committed the alleged abuse.

10 The State does not admit the allegations of sexual abuse by Mr Demlin, the NW Allegation or the Pickering Allegation. The State also does not admit the allegations of physical abuse the subject of the Demlins Allegations and the Girls' Dormitory Allegations, and pleads that even if Ms Willmot suffered the alleged physical abuse, it was not "serious physical abuse" or "psychological abuse" within the meaning of s 11A(6) of the *Limitation of Actions Act 1974* (Qld).

11 The reference to s 11A of the *Limitation of Actions Act* is important. Although the alleged abuse occurred more than 50 years ago, when Ms Willmot was a child, by s 11A(1) of the *Limitation of Actions Act* an action for damages relating to personal injury resulting from sexual abuse or serious physical abuse of a person when they were a child may be brought at any time and is not subject to

8 The State contended that Ms Willmot had failed to plead the material facts upon which she relied to establish that the State had the knowledge or ought to have had the knowledge she alleged in the Amended Statement of Claim, namely that there existed a foreseeable risk of harm.

a limitation period.⁹ That provision¹⁰ came into force in March 2017 in response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.¹¹ Section 11A(5) of the *Limitation of Actions Act*, also reflecting a recommendation of the Royal Commission,¹² provides that:

"This section does not limit –

- (a) any inherent, implied or statutory jurisdiction of a court; or
- (b) any other powers of a court under the common law or any other Act (including a Commonwealth Act), rule of court or practice direction.

Example –

This section does not limit a court's power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible."

- 12 In its Amended Defence, the State contended that "due to the effluxion of time, namely in excess of 60 years, [the State] cannot ascertain the truth or falsity of the allegations and is prejudiced in the defence of the claim accordingly in the sense that there cannot be a fair trial of the issues in dispute". Consistent with its Amended Defence, the State applied for an order that the proceedings be permanently stayed on the basis that the lapse of time since the alleged conduct

9 *Limitation of Actions Act*, s 11A(1), read with s 11A(6).

10 See also equivalent provisions in other States and Territories: *Limitation of Actions Act 1936* (SA), s 3A; *Limitation of Actions Act 1958* (Vic), ss 27O, 27P; *Limitation Act 1969* (NSW), s 6A; *Limitation Act 1974* (Tas), s 5B; *Limitation Act 1981* (NT), s 5A; *Limitation Act 1985* (ACT), s 21C; *Limitation Act 2005* (WA), s 6A.

11 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 53 [85]-[87]; Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 November 2016 at 4264; Queensland, Legislative Assembly, *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016*, Explanatory Notes at 2.

12 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 53 [87].

5.

occurred, and the consequential effects of that delay, had a burdensome effect on the State that is so serious that a fair trial is not possible of any of the allegations.

13 The primary judge granted a permanent stay of the proceedings. The Court of Appeal of the Supreme Court of Queensland dismissed Ms Willmot's appeal against the stay, in a decision delivered before this Court's decision in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*.¹³ Ms Willmot was granted special leave to appeal.

14 For the reasons that follow, the appeal should be allowed in part. The State's application for a permanent stay should be dismissed, except in relation to the Pickering Allegation¹⁴ and the allegations of physical abuse which were part of the Demlins Allegations.¹⁵

Permanent stay of proceedings?

15 The principles relating to a permanent stay of proceedings were conveniently summarised by Bell P in *Moubarak by his tutor Coorey v Holt* as follows:¹⁶

- "(1) the onus of proving that a permanent stay of proceedings should be granted lies squarely on a defendant ...
- (2) a permanent stay should only be ordered in exceptional circumstances ...
- (3) a permanent stay should be granted when the interests of the administration of justice so demand ...
- (4) the categories of cases in which a permanent stay may be ordered are not closed ...

13 (2023) 97 ALJR 857; 414 ALR 635.

14 Amended Statement of Claim, [9(b)], [11].

15 Amended Statement of Claim, [12].

16 (2019) 100 NSWLR 218 at 233-234 [71] (references omitted).

6.

- (5) one category of case where a permanent stay may be ordered is where the proceedings or their continuance would be vexatious or oppressive ...
- (6) the continuation of proceedings may be oppressive if that is their objective effect ...
- (7) proceedings may be oppressive where their effect is 'seriously and unfairly burdensome, prejudicial or damaging' ...
- (8) proceedings may be stayed on a permanent basis where their continuation would be manifestly unfair to a party ... , and
- (9) proceedings may be stayed on a permanent basis where their continuation would bring the administration of justice into disrepute amongst right-thinking people ..."

16 The relevant inquiry is whether any prospective trial will be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process.¹⁷ If a fair trial can be held and will not be so unfairly and unjustifiably oppressive as to constitute an abuse of process, a court ordinarily has a duty to hear and decide the case.¹⁸ If the trial will be necessarily unfair, a stay must be ordered.¹⁹

17 The extreme step of granting a permanent stay demands recognition that the question of whether a trial will necessarily be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process admits of only one correct answer.²⁰ The evaluative inquiry in each case is unique and highly fact-sensitive.²¹

17 *GLJ* (2023) 97 ALJR 857 at 868 [23]; 414 ALR 635 at 645. See also *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [24]-[25]; *Rozenblit v Vainer* (2018) 262 CLR 478 at 498 [66]; *UBS AG v Tyne* (2018) 265 CLR 77 at 127 [136].

18 *GLJ* (2023) 97 ALJR 857 at 868 [23]; 414 ALR 635 at 645.

19 *GLJ* (2023) 97 ALJR 857 at 868 [23]; 414 ALR 635 at 645.

20 *GLJ* (2023) 97 ALJR 857 at 866 [17], 868 [23]; 414 ALR 635 at 642-643, 645.

21 *GLJ* (2023) 97 ALJR 857 at 876 [64]; 414 ALR 635 at 656; cf *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264 [7].

7.

The correct answer in each case turns on its own facts and requires separate consideration of each claim – its nature, content, and the available evidence.²²

18 This Court in *GLJ* addressed for the first time the application of the stay principles in the context of the recent enactment of s 6A of the *Limitation Act 1969* (NSW).²³ The unique evaluative exercise in that appeal was the application of the stay principles, in the context of that provision, to the facts of *GLJ*.²⁴ During this appeal, and during the related matter of *RC v The Salvation Army (Western Australia) Property Trust*,²⁵ it was apparent that different views had been taken of what was required by the application of the approach of the majority of this Court in *GLJ* for the operation of the stay principles in the context of s 6A. Indeed, during argument in both matters, it became evident that the meaning and effect of some of the language of the reasons of the majority in *GLJ* has been understood in different ways. It is unsurprising then that the facts, matters and issues in this appeal, and in the related matter of *RC*, require this Court to consider further aspects of the intersection between the stay principles and s 6A of the *Limitation Act* and equivalent provisions.

19 The enactment of s 11A of the *Limitation of Actions Act*, and its equivalents, created a "new legal context",²⁶ a "radically new context",²⁷

22 *GLJ* (2023) 97 ALJR 857 at 869 [27], 887 [130], 893 [167]; 414 ALR 635 at 646, 671, 680; *Moubarak* (2019) 100 NSWLR 218 at 235 [77].

23 Section 6A was inserted into the *Limitation Act* by the *Limitation Amendment (Child Abuse) Act 2016* (NSW) in response to recommendations of the Royal Commission.

24 *GLJ* (2023) 97 ALJR 857 at 886 [123], cf 888 [137]; 414 ALR 635 at 669, cf 673.

25 [2024] HCA 43.

26 *GLJ* (2023) 97 ALJR 857 at 863 [4], see also 871 [40]; 414 ALR 635 at 638, see also 649.

27 *GLJ* (2023) 97 ALJR 857 at 871 [43]; 414 ALR 635 at 650.

a "fundamental change to the legal context",²⁸ a "new world",²⁹ a "new reality",³⁰ and a "new normative structure"³¹ in a number of distinct, but related, ways.

20 First, persons claiming damages for death or personal injury from child sexual abuse with claims that were previously time barred no longer face such a bar.³² The corollary is that such claims can now be brought at any time,³³ with the attendant reality that child sexual abuse claims may be commenced many years after the alleged abuse occurred.

21 Second, s 11A does not require a plaintiff to give an explanation for the delay in bringing proceedings.³⁴ The legislative change "presumptively removed any conception that a party is ordinarily expected not to sit on their rights and is taken to be responsible for any consequences adverse to their interests that doing so might have".³⁵ A plaintiff cannot be criticised for delay in commencing the action, "at least where it is not credibly suggested that the delay was deliberate or in some way colourable".³⁶ The enactment of s 11A and its equivalents directly addresses two facts: that many victims of child sexual abuse do not disclose their abuse until many years later, often when they are well into adulthood and long after the previous limitation periods expired;³⁷ and that regimes which allowed for extensions to a limitation period were and remain inadequate or unfair not only because the onus is on the plaintiff to explain the delay, but also because

28 *GLJ* (2023) 97 ALJR 857 at 870 [34]; 414 ALR 635 at 648.

29 *GLJ* (2023) 97 ALJR 857 at 869, 872 [45]; 414 ALR 635 at 647, 651.

30 *GLJ* (2023) 97 ALJR 857 at 871 [40]; 414 ALR 635 at 649.

31 *GLJ* (2023) 97 ALJR 857 at 871 [40], 872 [47]; 414 ALR 635 at 649, 651.

32 *GLJ* (2023) 97 ALJR 857 at 871 [41]; 414 ALR 635 at 649.

33 *GLJ* (2023) 97 ALJR 857 at 872 [47]; 414 ALR 635 at 651.

34 *GLJ* (2023) 97 ALJR 857 at 871 [42], 889 [140]; 414 ALR 635 at 649-650, 674, citing *Moubarak* (2019) 100 NSWLR 218 at 234-235 [75].

35 *GLJ* (2023) 97 ALJR 857 at 871 [42]; 414 ALR 635 at 650.

36 *GLJ* (2023) 97 ALJR 857 at 871 [42]; 414 ALR 635 at 649-650.

37 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Identifying and disclosing child sexual abuse* (2017), vol 4 at 30-34.

applications for extensions of time often involve cross-examination at length in relation to the abuse itself as well as psychiatric evidence.³⁸

22 Third, as *GLJ* explained, the introduction of s 11A of the *Limitation of Actions Act* and equivalent provisions has inevitably resulted in the commencing of proceedings long after the events alleged to give rise to the claims, often with greater effects on the trial process than had been the experience of the courts prior to their introduction. The "new reality" exposed by *GLJ* is that impoverishment of evidence is now to be encountered and expected in cases which would have been statute barred (and thus not have previously come before the courts) and the courts will need to deal with that impoverishment.³⁹

23 Fourth, the corollary, recognised by both *Moubarak* and *GLJ*, is that in dealing with the impoverishment of evidence, the mere passing of time, in and of itself, does not enliven the power to stay proceedings for abuse of process.⁴⁰ Something more than the mere passing of time was and is needed; the lapse of time must be shown to have a *burdensome effect* – in the sense of some forensic consequence – which is so serious that a fair trial is not possible.⁴¹ Framing the inquiry in these terms – by reference to "burdensome effect" – is deliberate. It reflects the note to s 11A of the *Limitation of Actions Act*, and its equivalents, that the provision "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*".⁴²

38 See, eg, *Moubarak* (2019) 100 NSWLR 218 at 234-235 [75]; *GLJ* (2023) 97 ALJR 857 at 869 [29], 881 [92]; 414 ALR 635 at 647, 663. See also New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6399.

39 cf *GLJ* (2023) 97 ALJR 857 at 871 [43], read with 871 [38]; 414 ALR 635 at 649-650.

40 *Batistatos* (2006) 226 CLR 256 at 281 [69]-[70]; *Moubarak* (2019) 100 NSWLR 218 at 235 [77]; *GLJ* (2023) 97 ALJR 857 at 871 [41]; 414 ALR 635 at 649.

41 *Batistatos* (2006) 226 CLR 256 at 281 [69]-[70]; *Moubarak* (2019) 100 NSWLR 218 at 235 [77]; *GLJ* (2023) 97 ALJR 857 at 871 [42], 887 [132]; 414 ALR 635 at 650, 671; *CM v Trustees of the Roman Catholic Church for the Diocese of Armidale* [2023] NSWCA 313 at [76]-[77].

42 Emphasis added. See *Batistatos* (2006) 226 CLR 256 at 281 [69]-[70]; *GLJ* (2023) 97 ALJR 857 at 894-895 [170]-[171]; 414 ALR 635 at 681.

24 The right to a fair trial is a deeply rooted common law right.⁴³ That right was not changed by the introduction of s 11A of the *Limitation of Actions Act* (or its equivalents) or this Court's decision in *GLJ*. The provisions authorise and require the common law principles about stays to operate in a contemporary context in relation to a new category of case,⁴⁴ recognising that the attributes of a fair trial defy analytical definition.⁴⁵

25 Of course, the *application* of the concept of a fair trial will vary from case to case. As Gaudron J said in *Dietrich v The Queen*, what is fair "very often depends on the circumstances of the particular case" and "notions of fairness are inevitably bound up with prevailing social values".⁴⁶ The "inquiry as to what is fair must be particular and individual".⁴⁷ Or, as Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*, "[f]airness is not an abstract concept. It is essentially practical ... the concern of the law is to avoid practical injustice."⁴⁸

26 As a matter of statutory construction, the abolition of the limitation period does not change the principle of a right to a fair trial. So much is clear from s 11A(5) of the *Limitation of Actions Act*, its accompanying note, the recommendations of the Royal Commission,⁴⁹ and the principle of legality which would require any reduction to the fundamental common law right to a fair trial to be express or expressed with irresistible clarity.⁵⁰ The position remains that

43 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56-57; *Dietrich v The Queen* (1992) 177 CLR 292 at 299, 326; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298 [28]; *CM* [2023] NSWCA 313 at [72].

44 *cf Batistatos* (2006) 226 CLR 256 at 267 [14].

45 *Jago* (1989) 168 CLR 23 at 57; *Dietrich* (1992) 177 CLR 292 at 300.

46 (1992) 177 CLR 292 at 364.

47 *Dietrich* (1992) 177 CLR 292 at 364.

48 (2003) 214 CLR 1 at 14 [37]. See also *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156].

49 *GLJ* (2023) 97 ALJR 857 at 888-889 [137]; 414 ALR 635 at 673; Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 53 [87].

50 *Malika Holdings* (2001) 204 CLR 290 at 298 [28].

a stay is a "last resort" and requires an "exceptional" case.⁵¹ An exceptional case will remain one in which it is impossible for the irreducible minimum necessary for a fair trial to be satisfied. The irreducible minimum required to enable a fair trial is not an absolute or immutable concept; it is a conclusion about the individual case that is reached having regard to the statutory context and to the specific circumstances of the case. Ms Willmot's contention that the *Moubarak* principles needed to be recalibrated, or alternatively, a principle "added", to recognise that there has been a "radical alteration of that which is extreme or exceptional, with respect to the evidentiary possibilities" must be rejected. The change, as explained, is that certain classes of claims made long after the events in question are *prima facie* permissible when they were previously *prima facie* prohibited and the principle of a right to a fair trial is to be applied in that new statutory context.

27 The question remains: would the trial of the pleaded allegations be necessarily unfair?⁵² Any consideration of an application for a stay in the context of s 11A (or its equivalents) is undertaken in a new world where it is to be expected, rather than unusual, for claims of child sexual abuse to be made where there may not be documentary evidence or direct corroborating evidence. Why? Leaving aside the nature of child sexual abuse as a largely hidden or secret crime,⁵³ never before have cases of this age been able to be commenced and tried. The inevitable fading of memories and loss of evidence (whether it be from death, illness, infirmity, or the loss or destruction of documents), in the context established by s 11A, are properly to be understood as routine and expected.⁵⁴ That statement describes characteristics common among this category of cases which is no longer statute barred.

28 But limited or unavailable documentary or direct corroborating evidence of sexual abuse is not unique to cases concerning allegations of child sexual abuse that occurred long ago. As sexual abuse is typically perpetrated in secret,⁵⁵ it is not uncommon that there will be no witnesses or documentary evidence in existence

51 *GLJ* (2023) 97 ALJR 857 at 862-863 [3]; 414 ALR 635 at 638.

52 *GLJ* (2023) 97 ALJR 857 at 862-863 [3]; 414 ALR 635 at 638.

53 See, eg, Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Nature and cause* (2017), vol 2 at 45.

54 cf *GLJ* (2023) 97 ALJR 857 at 873 [50]; 414 ALR 635 at 652.

55 See, eg, Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Nature and cause* (2017), vol 2 at 45.

that would bear on the likelihood or otherwise of the alleged abuse.⁵⁶ And, in any case, the removal of a time-bar in the case of such child sexual abuse claims by operation of s 11A does not foreclose a defendant obtaining a stay by reason of the impoverishment of evidence in such a case if such impoverishment, in the circumstances, would (not might) prevent a fair trial irrespective of the potential application of the range of principles and techniques of the common law.⁵⁷ To hold to the contrary would depart from long-standing and established principles.⁵⁸

29 Further, limited evidence or unavailable evidence is not unique to cases where there has been a passage of time between the events alleged to give rise to the claims and the commencement of proceedings. As proceedings involving nominal defendants illustrate, it is not unusual for courts to deal with cases which might not involve delay but where the alleged defendant or perpetrator is missing and unidentified,⁵⁹ dead⁶⁰ or unknown⁶¹. In those cases the courts have adopted a cautious approach,⁶² recognising it is "necessary to establish as reasonably clear a case as the facts 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".⁶³ A related principle of evidence law is that, while corroboration will always assist in such cases, there is no rule of law that

56 *Ugle v Masters* (2021) 104 SR (WA) 361 at 384 [237]; *RC v Salvation Army (WA) Property Trust* (2021) 105 SR (WA) 14.

57 See below at [29]-[30]. See also *GLJ* (2023) 97 ALJR 857 at 874-876 [54]-[61]; 414 ALR 635 at 653-656.

58 cf *CM* [2023] NSWCA 313 at [75]. See also *Batistatos* (2006) 226 CLR 256 at 264 [7], of which the majority in *GLJ* (2023) 97 ALJR 857; 414 ALR 635 did not disapprove.

59 See, eg, *Holloway v McFeeters* (1956) 94 CLR 470.

60 See, eg, *West v Government Insurance Office of NSW* (1981) 148 CLR 62.

61 See, eg, *Guest v The Nominal Defendant* [2006] NSWCA 77.

62 See, eg, *Plunkett v Bull* (1915) 19 CLR 544 at 548-549; *Birmingham v Renfrew* (1937) 57 CLR 666 at 674, 681-682; *Nolan v Nolan* (2003) 10 VR 626 at 650-651 [146]-[156].

63 *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 397, approving dicta in *Lachmi Parshad v Maharajah Narendro Kishore Singh Bahadur* (1891) LR 19 Ind App 9.

there can be no claim without corroboration.⁶⁴ Indeed, criminal courts hear cases every day in which one party makes allegations that the accused says it can do no more than deny. *Longman v The Queen* was such a case,⁶⁵ and the Court's directions about the necessary warning to the jury⁶⁶ both reinforce that care must be shown before accepting uncorroborated evidence and demonstrate that the courts have developed principles and techniques for dealing with contests of this kind. As the references in *Longman*⁶⁷ to *Jago v District Court (NSW)*⁶⁸ show, the required *level* of impairment is that the trial must be unfair even if the trial judge were to direct the jury with the *Longman* warnings.

30 Fairness is to be evaluated in the context of principles and techniques available to trial judges to deal with evidentiary imbalances. Those principles and techniques have not changed because of the abolition of the limitation period or the decision in *GLJ*. What has changed is the legislative context, which carries the consequence that there are now likely to be more cases in which those principles and techniques will need to be deployed. For present purposes, it is sufficient to refer to five techniques. First, courts recognise that the degree of satisfaction required under the civil standard of proof may vary according to the gravity of the fact to be proved.⁶⁹ Second, all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.⁷⁰ Third, a court is not bound to accept uncontradicted evidence and the "facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may

64 See, eg, *Plunkett* (1915) 19 CLR 544 at 550; *In re Cummins, decd* [1972] Ch 62 at 68-69, 70.

65 (1989) 168 CLR 79.

66 *Longman* (1989) 168 CLR 79 at 91; *R v Spencer* [1987] AC 128 at 141.

67 (1989) 168 CLR 79 at 91.

68 (1989) 168 CLR 23 at 31-32, 42-44, 56-57, 71-72.

69 *Briginshaw v Briginshaw* (1938) 60 CLR 336; *GLJ* (2023) 97 ALJR 857 at 874-875 [57]; 414 ALR 635 at 654.

70 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]; *GLJ* (2023) 97 ALJR 857 at 875 [58]; 414 ALR 635 at 654.

reasonably be satisfied".⁷¹ Fourth, courts are mindful that ordinary human experience exposes that human memory is "fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time".⁷² And fifth, where a claim is based upon an interaction with a deceased person (or involving a deceased estate) the court will scrutinise the evidence very carefully.⁷³

31 The proceeding the Court is asked to stay is the proceeding in which the appellant (the plaintiff) has had to plead her claim. Ms Willmot did not ask to amend it. It follows that the Court must deal with the claim Ms Willmot made and articulated. The premise in the present hearing must be that Ms Willmot advanced her case in the best way that she could.⁷⁴ The reason that the parties can lead evidence on the application for a stay is not to establish the truth or falsity of the claims made in the proceeding.⁷⁵ The evidence that can be led on the application for a stay must be directed to whether the trial of the issues that have been joined in the proceedings will be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process. That evidence may go to such matters as the availability of witnesses, documents or other facts relevant to the stay.

32 That is, the application for a permanent stay is not, and is not to be treated as, a trial of the issues joined between the parties. The application proceeds on the basis that the plaintiff is in a position to produce evidence to support the case

71 *Jones v Dunkel* (1959) 101 CLR 298 at 305; *GLJ* (2023) 97 ALJR 857 at 875 [60]; 414 ALR 635 at 655.

72 *Watson v Foxman* (1995) 49 NSWLR 315 at 319. See also *Longman* (1989) 168 CLR 79 at 107-108; *GLJ* (2023) 97 ALJR 857 at 875 [59]; 414 ALR 635 at 655.

73 *Plunkett* (1915) 19 CLR 544 at 548-549; *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164 at 179 [66]; *GLJ* (2023) 97 ALJR 857 at 875-876 [61]; 414 ALR 635 at 655-656.

74 *cf Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368-369 [121].

75 *cf Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-130; *Edebone v Allen* [1991] 2 VR 659 at 661; *Wenlock v Maloney* [1965] 1 WLR 1238 at 1243-1244; [1965] 2 All ER 871 at 874; *Smith v Croft [No 2]* [1987] 3 WLR 405 at 419-422; [1987] 3 All ER 909 at 919-922.

pleaded and particularised.⁷⁶ It falls to the party seeking to stay the proceedings (here, the State) to identify what it says would make the trial of each set of allegations raised by the other party (here, Ms Willmot) unfair, including any unfairness arising from the nature of the evidence to be called.

33 It is by these principles that the appeal is to determined.

Appeal grounds and parties' submissions

34 Ms Willmot framed her notice of appeal as an appeal against a discretionary judgment. As this Court explained in *GLJ*, that is not the correct approach.⁷⁷ Whether a trial will necessarily be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process admits of only one answer.⁷⁸

35 Ms Willmot's appeal grounds may be divided into two broad groups. The first group – appeal grounds 3 and 5 – addressed specific allegations. Ground 3 relates to the Demlins Allegations and, in particular, the evidence of RS, another female foster child, who alleges she was sexually abused by Mr Demlin in a similar way to Ms Willmot and witnessed the abuse of Ms Willmot. The Court of Appeal held that there was no error in the primary judge finding that RS' evidence highlighted the unfairness faced by the State and rendered the trial "more unfair". In this Court, Ms Willmot challenges the reasoning of the Court of Appeal that the fact that RS would give evidence as to Mr Demlin's assaults did not "repair the State's inability to investigate, or obtain instructions, lead evidence or cross-examine about the foundational allegations". The evidence which would be led from RS is addressed below when considering the stay application in relation to the Demlins Allegations.

36 Ground 5 concerns the NW Allegation. Ms Willmot challenges the reasoning of the Court of Appeal that it was not significant that NW is alive. That appeal ground is considered below when addressing the stay application in relation to the NW Allegation.

37 The second group of Ms Willmot's appeal grounds (grounds 1, 2 and 4), and much of the parties' submissions in this Court, largely treat the four sets of

76 See, eg, *The Council of Trinity Grammar School v Anderson* (2019) 101 NSWLR 762 at 826 [446].

77 *GLJ* (2023) 97 ALJR 857 at 866 [17], 868 [23]; 414 ALR 635 at 642-643, 645.

78 *GLJ* (2023) 97 ALJR 857 at 866 [17], 868 [23]; 414 ALR 635 at 642-643, 645.

allegations of abuse⁷⁹ as if they are inextricably intertwined. That reflected the approach adopted by the primary judge and the Court of Appeal. Before addressing these general grounds, it is important to recall that each of the allegations is distinct and must be considered separately; they concern different time periods, different allegations, different actors and therefore different evidence.

38 Grounds 1 and 2 challenge the reasoning of the Court of Appeal that the fact that the investigation of a particular witness or other evidence that might have been undertaken by the State was unlikely to have yielded valuable evidence did not "justify a moderation of the significance of the State's inability to investigate foundational facts in the exercise of the discretion" (ground 1) and, relatedly, that the State did not need to establish that it would be in a "materially different" position if the perpetrators or the persons they would obtain instructions from were alive (ground 2). These grounds substantially overlap. The State did not directly address these grounds in their written submissions. But these grounds (grounds 1 and 2) ask an irrelevant question. As has been explained, the question before the primary judge (and the Court of Appeal) was not a question about the exercise of a discretion. It is not to the point to ask whether the State needed to establish that it would be in a "materially different" position if the perpetrators or the persons they would obtain instructions from were alive. The only question is whether, in relation to each allegation, there can be a fair trial. If the defendant seeks to persuade the court that the death of a witness means that there cannot be a fair trial, the defendant must show how and why that death makes the trial unfair.⁸⁰

39 Ground 4 was a challenge to the Court of Appeal's findings in relation to certain psychiatric evidence. Ms Willmot was jointly referred to an independent psychiatrist, Dr Khoo, to prepare a medico-legal report. Dr Khoo reported that Ms Willmot's earliest memories were of being in the Girls' Dormitory, feeling "alone and afraid [she] didn't belong"; that Ms Willmot "remembered the Demlins and the house over the years, but did not realise why"; and that when RS asked Ms Willmot "don't you remember that we were sexually abused?" (which was likely in 2016), she responded by thinking, "I didn't want to know, I was always vulnerable and scared and that this comment disturbed me for a long time". Dr Khoo also reported that Ms Willmot had said that RS' description of sexual abuse "at some level resonated with her" and she had "fragmented memories of a blue house"; and that she used to be "scared sleeping alone particularly on the verandah ... and getting into bed with the others".

79 See [5]-[8] above.

80 See *GLJ* (2023) 97 ALJR 857 at 879 [75]; 414 ALR 635 at 660.

40 Dr Khoo reported that over "repeated questioning" Ms Willmot "did not proffer experiencing additional symptoms that she could recollect connected to Mr Demlin". Dr Khoo reported that Ms Willmot said "at the back of my mind I know something happened to me because of my profound fear". Further, Dr Khoo documented that Ms Willmot said: that she did "not recall directly experiencing any psychological or emotional symptoms, additional neurovegetative symptoms or post-traumatic symptoms" prior to RS' statement; that she "first [became] aware of the possibility that she may have been sexually abused by Mr Demlin, when informed of this several years ago by [RS]"; and that she had "no memory of the first episode of sexual abuse" by Mr Demlin. Dr Khoo contrasted Ms Willmot's "fragmented" memories of the abuse by Mr Demlin with the "clear and coherent history" she gave "of the verbal and physical abuse" she was subjected to at the hands of Maude Phillips.

41 At her solicitors' request, Ms Willmot was then assessed by another psychiatrist, Dr Pant, who opined that Ms Willmot "does have some memory of the first episode of sexual abuse by Mr Demlin but it is patchy in nature as expected based on her age at the time". "She however clearly remembers the physical and emotional abuse she was subjected to in Cherbourg girls [sic] dormitory over the years." Dr Pant said:

"Ms Willmot provides a complex history and it is difficult to disentangle the events with absolute precision. The sexual abuse perpetrated on her at the Demlins, the physical and emotional abuse perpetrated onto her at Cherbourg girls [sic] dormitory and the sexual abuse perpetrated onto her by her cousin and great uncle have all contributed to her condition ...

The other life stressor events that have happened in her life were after the periods of childhood abuse and would have contributed to her ongoing psychological symptoms but I am unable to estimate the extent that each individual life stressor would have had on her conditions."

42 The Court of Appeal held that Dr Pant's evidence that it was difficult to disentangle the events with absolute precision supported the finding that it would be "insurmountably difficult" to disentangle the NW Allegation from the impacts of the Demlins Allegations and her other life events.

43 There are a number of difficulties with the approach adopted by the Court of Appeal to the psychiatric evidence. First, it is not clear why this evidence was adduced on the hearing of the application by the State for a stay of the four allegations made by Ms Willmot. As has been explained, the application for a stay is not a trial of the proceedings. The psychiatric evidence was directed to the truth

or falsity of the claims made in the proceeding including, whether the abuse occurred, causation and damage. The psychiatric evidence said nothing about whether the trial of the issues joined in the proceedings would be unfair. And, as will become evident, the psychiatric evidence did not support the findings made by the primary judge or by the Court of Appeal.

44 Second, there are dangers in drawing any conclusions, let alone making findings, from such psychiatric evidence in circumstances where: Dr Pant's report in fact stated, as has just been explained, that although Ms Willmot "provides a complex history and it is difficult to disentangle the events with absolute precision", the four sets of allegations of abuse "all contributed to her condition"; Dr Pant was not cross-examined on that report; and both Dr Khoo and Dr Pant respectively considered that Ms Willmot was a "reliable historian".

45 Third, and no less importantly, the State's submission that there are two causation issues regarding the extent of contribution of the State to the pleaded loss or injury suffered by Ms Willmot – namely, (1) disentangling causation regarding the "index events" from each other (namely, the relative impact of each of the pleaded allegations of abuse); and (2) disentangling the "index events" from other adverse life events of Ms Willmot – and that that disentangling cannot be undertaken, is wrong factually and legally. Ms Willmot's claim is not "all or nothing". She has a number of separate allegations and, at trial, she may prove one or more of the allegations that are not permanently stayed.

46 The ultimate question will be whether each incident, as found on the facts, was *a* cause of the injury alleged by Ms Willmot. And, as we have seen, Dr Pant does not go as far as saying it would be "*insurmountably* difficult" to extract or isolate the impact of the alleged events on Ms Willmot from other mistreatment or life events she experienced; Dr Pant just adverts to the difficulty in doing so with "*absolute* precision" (emphasis added). Moreover, because Dr Khoo and Dr Pant were not cross-examined, the State's complaints were not put to either psychiatrist. Those issues are matters that can be raised and addressed at trial in the ordinary course. And the State has a range of independent documents which it could seek to use to disentangle the relative impact of other adverse life events on Ms Willmot, including general practitioner and hospital records, Pharmaceutical Benefits Scheme, Medicare and WorkCover claims histories.

47 Fourth, whilst Ms Willmot has the ultimate legal onus to establish each of her allegations, once she establishes a *prima facie* causal connection between one of the alleged wrongful acts and her loss, it is for the State to show at trial that her

loss or injury was wholly caused by some other independent circumstance,⁸¹ with some "reasonable measure of precision".⁸² A trial in which Ms Willmot merely has trouble disentangling past events from each of her allegations is not necessarily unfair for that reason alone.

Fair trial for the State?

48 As has been stated, the application for a permanent stay is not, and is not to be treated as, a trial of the issues joined between the parties. It was for the State to show how and why the absence of contemporaneous or other evidence would impede it answering the case against it such that the trial of a *particular claim* will be necessarily unfair.

49 As the analysis of the pleadings demonstrates,⁸³ the issues in dispute are narrow. Many of the most basic of facts are not in issue. And because Ms Willmot frames her case as a breach of a non-delegable duty,⁸⁴ and the State concedes that it owed Ms Willmot a non-delegable duty, the central issue for determination at a trial is whether each category of harm she alleges occurred and amounts to a breach of that duty. Recalling that a "non-delegable" or "personal" duty of care is "a duty ... of a special and 'more stringent' kind"⁸⁵ and not merely a duty to take care, but a "duty to *ensure that reasonable care is taken*";⁸⁶ to "ensure that the duty is carried

81 *Purkess v Crittenden* (1965) 114 CLR 164 at 168, 170-171; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 420-421; *Chappel v Hart* (1998) 195 CLR 232 at 257 [67]-[68], 270 [93], 273 [93]. See also Rolph et al, *Balkin & Davis Law of Torts* (6th ed), 415-416 [9.3].

82 *Purkess* (1965) 114 CLR 164 at 168.

83 See [9], [12] above.

84 See [9] above.

85 *Bird v DP (a pseudonym)* [2024] HCA 41 at [36]-[37]. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550, quoting *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686; *New South Wales v Lepore* (2003) 212 CLR 511 at 530 [25], 551-552 [101], 598 [254]; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 27 [6].

86 *Kondis* (1984) 154 CLR 672 at 686 (emphasis added). See also *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270-271; *Burnie Port Authority* (1994) 179 CLR 520 at 550; *Lepore* (2003) 212 CLR 511 at 551-552 [101], 598 [254].

out";⁸⁷ or to "procur[e] the careful performance of work [assigned] to others",⁸⁸ there is no question about what steps the State took or could reasonably have taken to prevent the alleged harm. Put another way, Ms Willmot's claims of breach do not call for an inquiry into the adequacy of the steps taken by the State to ensure that reasonable care was taken for Ms Willmot's safety while she was in foster care, at the Girls' Dormitory, or in the care of her relatives while away from Cherbourg. As Mason J observed, even in the context of a non-delegable duty owed by school authorities, "the duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It is a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated."⁸⁹

50 The State stood *in loco parentis*, or in the place of the parent, of Ms Willmot. The State's role was to be her substitute parent. As the competent authority with whom she resided, the State had the legal responsibility to perform all of the rights, duties, functions and responsibilities of her parent each day. Its authority over her was, in many respects, broader and deeper than the authority of a school authority over a student,⁹⁰ or hospital over a patient.⁹¹ The power of the State over Ms Willmot was derived from the relevant statutes giving the State authority over her. With that authority and the State's non-delegable duty to ensure that reasonable care of her was taken, it was never part of the State's duty to abuse her or allow her to be abused. It was never part of the power of the State to allow her to be abused.⁹² If abuse is established, the legal consequences that follow are matters that would remain to be determined at trial.

⁸⁷ *Lepore* (2003) 212 CLR 511 at 565 [144].

⁸⁸ *Woodland v Swimming Teachers Association* [2014] AC 537 at 573 [5].

⁸⁹ *Introvigne* (1982) 150 CLR 258 at 269-270; see also 271-272, 279.

⁹⁰ *Introvigne* (1982) 150 CLR 258 at 269-270, 274-275, 279-280.

⁹¹ See, eg, *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 561-562 [59]; *Introvigne* (1982) 150 CLR 258 at 270, 275; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 601-604. See also *Kondis* (1984) 154 CLR 672 at 687; *Burnie Port Authority* (1994) 179 CLR 520 at 550.

⁹² See Blackstone, *Commentaries on the Laws of England*, 4th ed (1899), bk 1, ch 16, at 394, 397, 399-400. See, eg, *Lepore* (2003) 212 CLR 511 at 594-595 [241]-[243].

51 It is against that background that the State's application for a permanent stay of any or all of the allegations is to be considered.

Demlins Allegations

52 The Demlins Allegations concern alleged sexual abuse by Mr Demlin and alleged physical abuse by the Demlins. Each is considered in turn.

Demlin sexual abuse allegations

53 Ms Willmot alleges that on a weekly to fortnightly basis throughout the time she was in the care of the Demlins, Mr Demlin would enter Ms Willmot's bedroom and sexually assault her after Mrs Demlin had gone to bed and was apparently sleeping. Ms Willmot alleges that the sexual assaults consisted of her waking in the night-time and seeing an adult male person standing beside her; her realising that it was Mr Demlin standing beside her bed (on the first occasion, she was confused and did not understand why he was there); Mr Demlin then sliding his hand under her blankets and starting to touch her lower stomach and upper thigh area; Mr Demlin then moving his hand and putting it under Ms Willmot's night clothes so that he was touching and fondling the outside of her vagina with his fingers; and Mr Demlin then proceeding to push his finger inside Ms Willmot's vagina and then grasping her hand and placing it on his penis and forcing her to stroke his penis in a masturbation action. Ms Willmot alleges that she witnessed Mr Demlin sexually assaulting two other girls who lived in the same bedroom during the same period.

54 The alleged events occurred between October 1957 and May 1959, when Ms Willmot would have been approximately three to five years old. Mr Demlin died in September 1962 and Mrs Demlin in December 1965 when Ms Willmot was still very young. The allegations were first raised with the State in June 2019. The allegations were not raised with the State nor put to Mr and Mrs Demlin prior to their deaths. There are no documentary records directly relating to the Demlin sexual abuse allegations, although it is possible that further documents may emerge before a trial.

55 Ms Willmot relied upon an affidavit sworn by RS who was born in 1949, spent time in the Girls' Dormitory in the 1950s to 1960s, and between 1957 and 1959 resided in the foster care home of the Demlins. RS' evidence is that she was "repeatedly sexually assaulted by [Mr] Demlin" whilst she was in the foster care of the Demlins and that she saw her little sister and Ms Willmot being sexually assaulted by Mr Demlin in the same way she was sexually assaulted. RS' evidence as to when, where and how she, her little sister and Ms Willmot were sexually assaulted in the same bedroom one after the other almost weekly or fortnightly

until they were removed from the Demlins in the winter of 1959 due to malnourishment is both detailed and graphic and includes allegations that Mr Demlin sexually assaulted each of them by forcing his fingers into their vaginas and forcing each of them to masturbate his penis.

56 As has been explained, the basic facts are not in dispute. What remains to be determined at trial is whether the abuse took place. Ms Willmot contends, in the context of the common law techniques applicable to evidence of this nature, that RS provides additional independent evidence that assists a court in deciding whether the abuse took place, that Ms Willmot and RS can be cross-examined, and that the trial judge is not bound to accept their evidence. The State does not seek to challenge these facts and matters.

57 Instead, in contending that there can be no fair trial of the Demlin sexual abuse allegations, the State relies first on the fact that Ms Willmot did not have a recollection of the alleged sexual abuse until she had a conversation with RS in 2016, and that in those circumstances, Ms Willmot's conscious awareness of the alleged events takes Ms Willmot outside the scope of the class of plaintiffs created by s 11A who "allow time to pass" consequent on the harm alleged to have been caused by the alleged abuse.⁹³ The State submitted that, as a consequence, this was not a case where the effect of the delay in commencing the proceedings and the subsequent impoverishment of evidence was "properly to be understood as routine and unexceptional";⁹⁴ the State's inability to investigate and respond to Ms Willmot's allegations was not caused by the alleged abuse but was a result of the timing of RS' disclosure of the abuse to Ms Willmot. The State further contends that Ms Willmot's reference to and reliance on RS' allegations of abuse perpetrated on her by Mr Demlin are an attempt by Ms Willmot to bolster her own allegations with the effect that the unfairness to the State is magnified, that RS is not an independent witness and that the possibility of unconscious reconstruction looms large.⁹⁵ Contrary to the State's submissions, these are matters that may or may not affect a trial judge's assessment of what findings should be made. They are not matters that go to whether a fair trial can be had.

93 See *GLJ* (2023) 97 ALJR 857 at 873 [50]; 414 ALR 635 at 652, quoting *Herron v McGregor* (1986) 6 NSWLR 246 at 254, in the context of the equivalent provision enacted in NSW (s 6A of the *Limitation Act*).

94 *GLJ* (2023) 97 ALJR 857 at 873 [50]; 414 ALR 635 at 652.

95 See, eg, *R v Davis* (1995) 57 FCR 512 at 522, quoted in *Moubarak* (2019) 100 NSWLR 218 at 239-240 [95].

58 As has been explained, one of the consequences of the enactment of s 11A and its equivalents is that a plaintiff no longer needs to explain the delay in commencing the proceedings. If, as is stated, Ms Willmot's memory of the events was prompted by RS, the fallibility of human memory and the capacity for ex post rationalisation of events long since passed will be an issue, and possibly a large issue.⁹⁶ The State is wrong to suggest that RS' evidence makes the trial unfair or, as it would have it, *more* unfair.

59 The question is whether there can be a fair trial of these allegations, not whether Ms Willmot's evidence or that of RS will be accepted at any trial. The allegations are not vague or uncertain.⁹⁷ Ms Willmot and RS can be cross-examined, and any inconsistencies exposed. The State can seek to defend the proceedings by suggesting that RS prompted Ms Willmot's recollection or that the psychiatric evidence of Ms Willmot's "fragmented memory" means that her uncontradicted evidence should not be accepted. RS can be cross-examined as to contextual matters. Of course, it is possible that the court may not be satisfied that the events occurred on the balance of probabilities having regard to Ms Willmot's and RS' evidence, and the common law technique of applying close scrutiny to their evidence insofar as it involves interactions with deceased persons.

60 Further, it is unlikely that contemporaneous documents ever existed which directly bear upon the likelihood of the abuse.⁹⁸ The State does not identify documents known to be lost.⁹⁹ Therefore the burdensome effect of the passage of time on the capacity of the State to refer to documentary evidence is limited.¹⁰⁰ The State admits that Ms Willmot was removed from the Demlins because of reports of malnourishment, but does not identify the records which lay behind that admission or explain why no further inquiry was conducted into the standard of care of the Demlins. And where it is admitted that the Demlins had care and control of Ms Willmot at the relevant time, it is unlikely that the State was deprived of

96 See, eg, *Moubarak* (2019) 100 NSWLR 218 at 235 [77].

97 See *GLJ* (2023) 97 ALJR 857 at 879 [75]; 414 ALR 635 at 660; cf *Connellan v Murphy* [2017] VSCA 116 at [57].

98 See [27] above.

99 cf *R v Davis* (1995) 57 FCR 512.

100 *Batistatos* (2006) 226 CLR 256 at 281 [69]-[70]; *Moubarak* (2019) 100 NSWLR 218 at 235 [77]; *GLJ* (2023) 97 ALJR 857 at 871 [42], 887 [132]; 414 ALR 635 at 650, 671.

much more than a bare denial by Mr Demlin upon confronting him with the allegations.¹⁰¹

Demlins physical abuse allegations

61 Ms Willmot alleges that "[w]hile in the care of the Demlins, [she] was regularly subjected to beatings by the Demlins for minor infractions of the rules". This is, at best, a bare allegation. The pleaded allegation provides no details of the alleged abuse, including, for example, the dates and location of the abuse, who was present during the alleged incidents, the nature of the "beatings", and whether it was one or both of the Demlins who engaged in the alleged conduct on any given occasion. The allegations are so vague that they are incapable of meaningful response, defence or contradiction.¹⁰² A similar allegation identified in the affidavit of RS does not provide further specificity. Nor does Ms Willmot's statement. The allegations cannot be meaningfully contradicted. There should be a permanent stay of these allegations.

Girls' Dormitory Allegations

62 Ms Willmot alleges that when she returned to live in the Girls' Dormitory in or about 1959, she was subjected to repeated physical abuse. Ms Willmot alleges that she was beaten for minor infractions of the rules. She alleges that on a number of occasions she was locked in the women's prison, which was a small unlit building with chicken wire on it. During her mid-primary school years, on a couple of occasions, she was forced to stand in the corner on one leg for many hours. When she was in late primary school, she was subjected to some severe floggings by Ms Phillips with the "switch", "until she had welts and was black and blue". She alleges she received punishments around mealtime, and the other girls were present, when Ms Phillips required her to bend forward and would hit her over the buttocks about six to ten times or more on each occasion resulting in her having large welts across her bottom and over the tops of her thighs for several hours after her "punishment" that then turned to black and blue bruise marks. She also alleges that she was required to observe other residents receiving similar punishments.

63 The pleading does not allege that Ms Phillips was the perpetrator of all of these punishments. However, the primary judge, after setting out the allegations in general terms, referred to the report of Dr Khoo that stated:

101 See, eg, *GLJ* (2023) 97 ALJR 857 at 879 [75]; 414 ALR 635 at 660.

102 See, eg, *Connellan* [2017] VSCA 116 at [57].

"[Ms Willmot] stated that life in the girls' dormitory was harsh as it was run by an indigenous woman called [Ms] Phillips. She was the supervisor. [Ms Willmot] stated that as a child she felt targeted by [Ms Phillips], but as she grew older came to realise that [Ms Phillips] was a harsh disciplinarian to all the girls. For minor infractions such [as] arguments, asking for more food, not wanting to eat food or being late they would be hit by a switch, made to stand on one foot for two hours or locked in the women's prison. [Ms Willmot] stated that as a punishment for putting her foot down, she would be locked in the pantry for one to two hours. However, she stated that until today she loved the smell of the tea leaves and washing powder that was in the pantry, so that this was not a punishment as far as she was concerned. She stated that they were punished on a daily basis as far as she could recall by [Ms Phillips]. Their biggest fear was being placed in the women's jail for being naughty. [Ms Phillips] would place five or six of the girls including [Ms Willmot], overnight in the jail which had a bucket and as far as she could recall a couple of blankets. They would become hysterical and terrified particularly when it got dark as the windows were very high up. However, she stated that from Year 6 when she began to attend school at Murgon, that the punishments by [Ms Phillips] seem [sic] to reduce, possibly because she was spending more time away from the settlement."

Dr Khoo's report stated that Ms Willmot "was able to provide a clear and coherent history of the verbal and physical abuse that she was subjected to at the hands of the supervisor of the girls' dormitory, [Ms] Phillips". As is apparent, each of the allegations refers to or relates to Ms Phillips' supervision of the Girls' Dormitory.

64 In relation to the Girls' Dormitory Allegations, Ms Willmot also adduced sworn affidavits from other people who lived or worked at the dormitory: from Joan Nielsen, who was born in 1947 and who lived in the dormitory from 1953 to 1962; from Aileen Watson, who was born in 1951 and lived in the dormitory from when she was very young until 1963; and from Eva Collins who is much older than Ms Willmot, and had lived in the dormitory at a much earlier time and then returned to work at the Cherbourg Mothers and Babies Quarters near the Girls' Dormitory during the 1950s.

65 Ms Nielsen's evidence is that she recalls a number of girls, including Ms Willmot, living in the Girls' Dormitory as well as the names of the staff members who worked there. Ms Nielsen describes the physical layout of the Girls' Dormitory, including by annexing a diagram illustrating where she and another girl slept. Ms Nielsen then sets out extensive evidence of alleged physical and sexual abuse perpetrated by Ms Phillips on her and on other girls that she witnessed. Ms Nielsen does not describe witnessing Ms Willmot being abused.

66 Ms Watson's affidavit also describes the physical layout of the Girls' Dormitory and recalls Ms Willmot, among others, being in the dormitory with her. She also recalls Ms Phillips and another staff member, Matron Pascoe. Ms Watson's affidavit then describes Ms Phillips' role within the Girls' Dormitory and the harsh punishments she was subjected to by Ms Phillips whilst living in the Girls' Dormitory and states that she witnessed a number of other children being subjected to similar abuse. She does not say that she witnessed Ms Willmot being abused. However, Ms Watson does describe in graphic detail how she and other children were hit by Ms Phillips with a "switch", which she explains was "a tree branch which was used specifically to hit children". She also describes other instances of physical abuse by Ms Phillips, including one child being hit with "a large thick wooden stick", children being hosed with cold water in winter to get them out of their beds in the mornings, children being forced to stand in the corners of rooms on one leg as punishment, and children going without food as punishment.

67 As set out above, Ms Collins returned to work in the Cherbourg dormitories in the 1950s. Her evidence was that in the period she worked there, Ms Phillips "could be very hard with the girls and would sometimes beat them and do similar harsh things". The example Ms Collins provided, based on her recollections, was of one time when Ms Phillips hit a "poor girl very heavily straight over the head with a nulla-nulla, which is a big heavy piece of wood, and the poor girl was knocked unconscious because she just lay there flat on her back and not moving for a few minutes". Ms Collins described this example as representative of "the level of discipline" that Ms Phillips would use on the girls, and referred also to her use of the switch, a belt or sometimes the fire hose. Whilst the State complained that it could not seek information from persons who worked at the Girls' Dormitory in the 1950s and who could give evidence as to Ms Phillips' conduct during that time, Ms Collins could give such evidence. In fact, she took over from Ms Phillips at the Girls' Dormitory when she left in 1972.

68 If the State were to allege that Ms Willmot's allegations were recent invention, it would have to deal with the fact that the Girls' Dormitory Allegations were first raised by Ms Willmot in 2008 in the context of a redress scheme – the Queensland Government Redress Scheme for former residents of Queensland children's institutions. Under that redress scheme, after considering Ms Willmot's application and supporting documents, a panel of experts was satisfied that Ms Willmot had "suffered more serious harm to the extent needed" for her to qualify for what was described as "a Level 2 payment", in addition to a Level 1 payment she had already received. The letter informing Ms Willmot of the outcome of her application for a Level 2 payment recorded that the panel had considered a range of factors in relation to the harm she had suffered in the Girls' Dormitory, including the nature and extent of the harm; the nature,

frequency, duration and severity of the abuse or neglect; and the length of time in institutional care. The panel rated Ms Willmot's case as "Category 2 – Severe".

69 The summary of the panel's "Level 2" decision, dated 11 June 2009, refers to Ms Willmot's particulars of abuse consistently with her impact statement that she provided to the panel on or about 24 November 2008. Relevantly, the panel's decision records as "[p]articulars of act(s) of abuse stated" that while she was in the Girls' Dormitory for some 12 years Ms Willmot suffered neglect and a great deal of physical abuse, including being "flogged with a strap or switch and made to stand in the corner on one leg for hours on end". Ms Willmot's impact statement also refers to her being locked in a prison cell if she got into "big trouble". Although the State contends that the redress scheme was confidential, it did not establish or contend that it was not aware of the redress scheme or Ms Willmot's allegations in, and payments received under, that scheme.

70 The State contends that the Girls' Dormitory Allegations should be permanently stayed because, among other things, Ms Phillips died in 1982, the Superintendent of Cherbourg from 1954 to 1964 has died, the dormitory matron, Ms Pascoe, died in 1983, and the State has been unable to locate any persons who were at the dormitory when the alleged abuse occurred "because of the absence of particularity as to the timing of the alleged events" by Ms Willmot. Further, the State contends that there were no contemporaneous documents relevant to Ms Willmot's specific allegations.

71 However, there were contemporaneous documents addressing the conduct of Ms Phillips and her interactions with the children. The first is a complaint about Ms Phillips made by the women of Cherbourg in a letter dated 18 January 1951, about three years before Ms Willmot commenced living at Cherbourg. The complaint was about Ms Phillips being "no good in the dormitory because she is bad to the girls", about the "manageress [flogging] the girls with great big sticks" and "grab[bing] them by the hair and bash[ing] them against the walls and steps". The State's position is that the complaint was investigated and the Superintendent reported in a letter in early 1951 that while Ms Phillips "deals out a slap or two", the allegations were "completely unfounded". The second contemporaneous record of Ms Phillips' conduct was a separate document in which the matron of the Girls' Dormitory, Matron Rees, referred to Ms Phillips "caning" the children "at times".

72 The State's contention that these facts and matters cannot be relied upon in determining whether to grant a permanent stay is rejected. That evidence demonstrates that the State can understand Ms Phillips' alleged practice of corporal

punishment and make an informed response to the allegation.¹⁰³ The State's submission that this evidence adds nothing to the question whether the assaults on Ms Willmot actually occurred is not to the point. It is not unfair merely because a pathway to a positive challenge to Ms Willmot's evidence has not been revealed.¹⁰⁴

73 And contrary to the State's submission, Ms Willmot's pleading is detailed and particularised and there is no basis to say that the State's investigation of the allegations has been hampered by their generality.

74 The State bears the onus of establishing that there cannot be a fair trial of these allegations and it has not discharged that onus.

NW Allegation

75 Ms Willmot alleges that during a visit to see her maternal grandmother near Ipswich in or about 1960, when she was about six years old, an uncle NW who then was about 19 or 20 years of age, sexually assaulted her. At the time of the alleged offending, Ms Willmot pleads that she was on the verandah with NW, that only the two of them were present, and that NW suddenly moved towards her, picked her up and carried her to her grandmother's bedroom, forcefully threw her onto the bed and onto her back such that she was heavily stunned and winded. Ms Willmot alleges that NW closed or locked the door, removed her underwear, spread her legs, laid on top of her with an erect penis and tried to force his penis inside her vagina. Ms Willmot alleges that she struggled for about five to ten minutes but ultimately fought him off. Ms Willmot alleges that she was having trouble breathing under his weight, and that her grandmother came into the room, disturbed NW, screamed loudly at him with words of abuse and NW ran away. Ms Willmot first raised these allegations in January 2020.

76 The State admits that on occasions Ms Willmot was granted permission by the Cherbourg Superintendent to leave Cherbourg during school holiday periods to visit her grandmother near Ipswich, but does not know if the Superintendent gave permission for this visit in or about 1960. The State does not admit that the NW Allegation occurred on the basis that it "has undertaken reasonable enquiry and remains uncertain as to the truth or falsity of those allegations". The State also does not admit that Ms Willmot was sexually assaulted on the basis that: (i) Ms Willmot did not report the alleged sexual assault to any representative of the State at the time of the alleged assault, or at any time thereafter; (ii) there is no

103 See, eg, *GLJ* (2023) 97 ALJR 857 at 878 [73]; 414 ALR 635 at 659.

104 See [29] above.

record held by the State of Ms Willmot being sexually assaulted by NW as alleged, or at all; (iii) the State has undertaken reasonable inquiry and remains uncertain as to the truth or falsity of the NW Allegation; and (iv) due to the effluxion of time, namely in excess of 60 years, the State cannot ascertain the truth or falsity of the NW Allegation and is prejudiced in the defence of the claim in the sense that there cannot be a fair trial of the issues in dispute.

77 The State's contention that it cannot meaningfully participate in a trial of the NW Allegation is rejected. In particular, its contention that given the private context of the alleged assault, and the death of Ms Willmot's grandmother, the State's ability to meaningfully respond to the allegations is severely restricted is also rejected.

78 As at July 2022 (two years after Ms Willmot commenced the action), NW, aged approximately 78 years of age, was alive and contactable. There is no evidence that the State, or any representative of the State, has spoken to or attempted to interact with NW or take a statement from him. There is no suggestion that the State is incapacitated from doing so now. The State thus had a pathway to investigate and potentially defend the claim. Whilst the events happened a long time ago, and NW would have been a teenager at the time, the State did not allege or prove that NW would not be able to remember an event such as an alleged sexual assault committed against his niece. It follows that the State has not demonstrated that it is "in the dark" about NW. Whilst there remain difficulties concerning the age of the claim, and there are presently no documentary records directly bearing upon the events, the fact that the key witness was available for two years after the proceedings were instituted is sufficient to conclude that the trial is not unfair.

79 That conclusion is reinforced by the fact that the day before the hearing before the primary judge Ms Willmot's solicitors spoke by telephone with NW and his wife for approximately 15 minutes. A file note of that conversation was in evidence. The file note records, among other things, that NW confirmed that he was Ms Willmot's uncle, where he was born, his date of birth and the identity of his parents. NW confirmed that he and his eight siblings were taken from his mother's home and placed at Cherbourg. NW's wife said that two of his siblings are still alive. NW said that he was placed in the Boys' Dormitory at Cherbourg from about the age of three until 15 years of age. NW said his memory was "pretty good" and he did not suffer from any memory issues, Alzheimer's or dementia and that he would be happy to speak again with the solicitor.

80 A reason, if not the sole reason, given by the primary judge for granting a stay of the NW Allegation was that it would be "insurmountably difficult" to extract this one event from the other allegations referred to in the report from

Dr Khoo "in terms of causation". As has been explained,¹⁰⁵ that finding is not only not supported by the evidence but is wrong legally.

- 81 The onus is on the State to establish that this is an exceptional case which ought not proceed. It has not done so and the reasoning of the courts below is erroneous. The NW Allegation may be fairly tried.

Pickering Allegation

- 82 The Pickering Allegation is in a different category. Ms Willmot alleges that during a second visit with her mother to see her grandmother near Ipswich in or about 1967, when she was about 13 years old, her cousin or great-uncle, known as "Uncle Pickering", who was then about 50 to 60 years of age, sexually assaulted her including with the penetration of her vagina with his finger. At the time of the alleged offending, Ms Willmot was in the kitchen making breakfast, it was mid to late morning, she had slept in and was wearing pyjamas and no-one else was home except for Pickering. Ms Willmot first raised these allegations in January 2020. Pickering is assumed dead and was presumed dead in August 2020. There were no witnesses to the alleged assault. Ms Willmot does not recall if any of her siblings joined her on this visit to her grandmother's house. She cannot recall Pickering's full name.

- 83 Ms Willmot does not allege that she received permission, and the State does not know if it gave her permission, to leave the Girls' Dormitory for this visit by Ms Willmot to her grandmother. Like the NW Allegation, the State does not admit that Ms Willmot was sexually assaulted on the basis that: (i) Ms Willmot did not report the alleged sexual assault to any representative of the State at the time of the alleged assault, or at any time thereafter; (ii) there is no record held by the State of Ms Willmot being sexually assaulted by Pickering as alleged, or at all; (iii) the State has undertaken reasonable inquiry and remains uncertain as to the truth or falsity of the Pickering Allegation; and (iv) due to the effluxion of time, namely in excess of 60 years, the State cannot ascertain the truth or falsity of the Pickering Allegation and is prejudiced in the defence of the claim in the sense that there cannot be a fair trial of the issues in dispute.

- 84 The State does not have an ability to investigate the foundational facts. Even if Ms Willmot were able to recall Pickering's full name and the State could then use that information to ascertain whether Pickering lived in her grandmother's house temporarily in 1967, that would not assist the State to ascertain the foundational facts relevant to the alleged assault. In relation to that allegation,

105 See [44]-[45] above.

31.

the State's central complaint is that the bare facts are unremarkable: the vast majority of houses have kitchens, it would not be unusual for a person to remain in pyjamas while they made themselves breakfast and, while there are inconsistencies in Ms Willmot's various descriptions of the alleged assault, the inconsistencies do not impact the central allegation.¹⁰⁶ In those circumstances, the State's participation is limited to cross-examination of Ms Willmot about the apparent inconsistencies which are, at best, tangential to the central allegation. The result is that the Pickering Allegation could not be fairly tried.

85 In the circumstances, there should be a stay of the Pickering Allegation.

Conclusion and orders

86 For those reasons, the appeal should be allowed, in part, with the State to pay Ms Willmot's costs. The orders of the Court of Appeal of the Supreme Court of Queensland of 16 May 2023 should be set aside and, in their place, order that:

1. The appeal be allowed, in part, with the respondent to pay the appellant's costs.
2. The order of the Supreme Court of Queensland of 22 August 2022 be set aside and, in its place, order that:
 - (i) subject to para (ii), the defendant's application for a permanent stay of the proceeding is dismissed;
 - (ii) the claims pleaded in paras 9(b), 11 and 12 of the Amended Statement of Claim dated 20 August 2021 are permanently stayed;
 - (iii) the defendant pay the plaintiff's costs of the application.

106 cf *GLJ* (2023) 97 ALJR 857 at 873 [50], 874 [52]; 414 ALR 635 at 652-653.

EDELMAN J.

Introduction, fairness, and fashion sense

87 Fairness is not like fashion sense. Although the application of fairness, and the basic principles of justice which it informs, depends upon all of the particular circumstances of a case, fairness does not fade in and out with community attitudes, like flares or skinny jeans. When Lord Mansfield said in *Somerset v Stewart*¹⁰⁷ that "[t]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political", he was not saying that community attitudes to slavery had changed so that slavery, once fair, had become unfair. No matter what earlier or contemporary communities considered substantive fairness to require, legal rules concerning slavery were always contrary to the natural condition of human freedom.¹⁰⁸ So too, like rules based on substantive fairness, rules based on procedural fairness are concerned with natural justice not community attitudes. The judicial bribes that were tolerated in the seventeenth century¹⁰⁹ or the lengthy court delays that occurred in Chancery in the nineteenth century¹¹⁰ were unfair irrespective of whether they were tolerated by the community standards of those times. As some enlightened contemporary writers and government officials realised, it was the nature of those procedures that made them unfair.¹¹¹ Whatever the community might have thought or tolerated at the time, those procedures were naturally unjust.

88 Not only are the concepts of justice and fairness independent of prevailing fashion, but those concepts are not a zero-sum game.¹¹² A trial which is unfair—involving a high degree of substantive or procedural prejudice to a party caused by circumstances of injustice—does not become fair because the unfairness to that party provides an important countervailing benefit to another party or (as in criminal proceedings) to a complainant. If a trial would be manifestly unfair, in the

107 (1772) Lofft 1 at 19 [98 ER 499 at 510].

108 D 1.5.4.1 (Florentinus).

109 Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (1890) at 156-158; see also 178.

110 Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (1890) at 270-271; see also at 155-158, 178.

111 Parkes, *A History of the Court of Chancery* (1828) at 148-153, quoting *Observations concerning the Court of Chancery, presented to the Parliament* (1653); Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (1890) at 157. See also Dickens, *Bleak House* (1852), vol 1 at 4-6.

112 See *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 549.

sense that there would be no real possibility of a fair trial, then there is an inherent power for a Supreme Court, such as the Supreme Court of Queensland, to stay proceedings for abuse of process.¹¹³ Such a stay is a measure of last resort¹¹⁴ but does not require drawing "any nice distinction between notions of unfairness or injustice, on the one hand, and abuse of process, on the other hand".¹¹⁵

89 Subject only to extreme cases where there is no justification for converting courts into instruments of injustice to individuals,¹¹⁶ it is open to Parliament to change the rules of trials or to legislate to require trials to proceed even if they will be manifestly unfair. But such legislation could not convert unfair trials into fair trials any more than legislation could convert cats into dogs. The effect of such legislation might prevent a court from permanently staying a manifestly unfair trial but it would not make the trial fair. Hence, legislation would usually need to be expressed with great clarity before it could be interpreted to have such a surprising effect.¹¹⁷

90 The important question raised by the submissions on this appeal, and the application for special leave in *RC v The Salvation Army (Western Australia) Property Trust*,¹¹⁸ is whether there has been a legislative change to the content or application of principles which require a court to order a permanent stay of proceedings, as an abuse of process, if a trial cannot be conducted without manifest unfairness. The legislation in question, with counterparts in other States and Territories,¹¹⁹ is s 11A of the *Limitation of Actions Act 1974* (Qld).

91 I agree with the joint reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ that s 11A of the *Limitation of Actions Act 1974* (Qld) has not

113 *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 ("*Batistatos*") at 264 [6].

114 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 409 [248].

115 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 74. See also *Walton v Gardiner* (1993) 177 CLR 378 at 394.

116 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 323-328 [225]-[235].

117 *Hurt v The King* (2024) 98 ALJR 485 at 506 [106].

118 [2024] HCA 43.

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

changed the content or application of the well-established principles of abuse of process which their Honours set out. The provision ensures that actions for damages concerning child abuse are not subject to any limitation period under that Act. But s 11A(5) provides expressly that the provision "does not limit" any inherent, implied or statutory jurisdiction of the court, which includes the doctrine of abuse of process. A legislative note to s 11A provides:

"This section does not limit a court's power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible."

92 The intention of s 11A(5) to preserve unaffected the inherent power of courts to stay proceedings as an abuse of process is confirmed by reference to extrinsic materials. In the Second Reading Speech for the Bill that inserted s 11A into the *Limitation of Actions Act 1974* (Qld),¹²⁰ the Attorney-General and Minister for Justice and for Training and Skills said that the Bill gave effect to recommendations of the "Redress and Civil Litigation Report" of the Royal Commission into Institutional Responses to Child Sexual Abuse.¹²¹ That Report included a recommendation that legislation to remove limitation periods on child sexual abuse claims arising in institutional settings "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".¹²² Echoing this language, the Explanatory Notes to the Bill said that "[n]ew section 11A(5) expressly preserves the existing jurisdiction and powers of the court, for example, to stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible".¹²³

93 The result of this case therefore depends upon the application of orthodox principles concerning abuse of process, preserved unaffected by s 11A, to determine whether the burdensome effect of a substantial period of time between a claim arising and an action being brought precludes the possibility of a fair trial. There was properly no issue in this case concerning different circumstances where a trial might be fair but nevertheless would be unjustifiably oppressive to a

120 *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* (Qld).

121 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 November 2016 at 4264.

122 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 53, 76.

123 Queensland, Legislative Assembly, *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016*, Explanatory Notes at 7.

defendant.¹²⁴ For instance, in other cases there might be circumstances in which a lengthy but intentional delay in bringing proceedings in order to obtain forensic advantage might be unjustifiably oppressive to a defendant even if the forensic consequences of the delay on the conduct of the trial do not prove to be significant. Such extremely rare circumstances do not arise in this case and might be thought never to arise in the class of case with which s 11A is concerned.

94 The concept of unfairness arising from the conduct of one party must be distinguished from forensic disadvantage arising from misfortune generally. Many trials involve forensic disadvantage, sometimes extreme forensic disadvantage, to a plaintiff in prosecuting a claim or a defendant in defending the claim. The disadvantage might even be so extreme that a case cannot be proved or cannot be rebutted. For instance, in *Holloway v McFeeters*,¹²⁵ this Court divided on the question of whether the plaintiff could have proved her case against a nominal defendant for negligence allegedly caused by an unknown driver, at night, with no witnesses, in which the injured party was killed. Such forensic disadvantage, however extreme, is unfortunate but not unfair.

95 By contrast, where extreme forensic disadvantage arises from the substantial period of time between a claim arising and an action being brought, then issues of fairness can arise. The party who alleges that a trial would be manifestly unfair due to the effluxion of substantial time before the action is brought must establish that the delay has caused forensic disadvantage that is so extreme that, even with all the mechanisms of the law to compensate for forensic disadvantage, any trial that is conducted could not be fair.

96 The issues in this case concern whether it is possible to conduct a fair trial of allegations of sexual and other physical assaults on the appellant, Ms Willmot, to whom the respondent, the State of Queensland, owed a non-delegable duty. The allegations fall into four groups: (i) sexual and other physical abuse between 1957 and 1959 (while Ms Willmot was in the care of foster parents, Mr and Mrs Demlin); (ii) serious physical abuse in or around 1959 (while Ms Willmot was living in a girls' dormitory); (iii) sexual abuse in 1960 by an uncle, NW (while Ms Willmot was visiting her grandmother's house); and (iv) sexual abuse in 1967 by a great-uncle or cousin referred to in the proceedings as "Pickering" (while Ms Willmot was visiting her grandmother's house).

97 Ms Willmot's five grounds of appeal focused upon the different aspects of the reasoning process of the Court of Appeal of the Supreme Court of Queensland by which the Court of Appeal reasoned to the conclusion that none of

124 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 412 [258].

125 (1956) 94 CLR 470.

Ms Willmot's allegations could be fairly tried. The trial judge,¹²⁶ whose decision was upheld by the Court of Appeal,¹²⁷ held that in relation to the allegations in groups (i), (ii) and (iv), "the State has no means for investigating the foundational facts underpinning the alleged wrongful acts which are critical to establishing liability on the part of the State"¹²⁸ and, consequentially in relation to (iii), it would "be insurmountably difficult to extricate this one event, from the allegations [in (i) and (ii)]".¹²⁹ The trial judge and the Court of Appeal proceeded from the correct premise, namely that an abuse of process is established where the effect of a substantial lapse of time between events and an action is that the defendant has no means to investigate the foundational facts establishing liability.¹³⁰ But, in circumstances in which the existence of an abuse of process is a matter upon which there can be only one correct answer, even if reasonable minds might differ on it, the trial judge and Court of Appeal erred in their conclusions in relation to groups (i) and (ii), and therefore also in relation to (iii). Their conclusion on group (iv) should be upheld.

The effect of s 11A of the *Limitation of Actions Act 1974* (Qld)

The suggestions in submissions

98 In this appeal, and in the application in *RC v The Salvation Army (Western Australia) Property Trust*¹³¹ which was heard sequentially after this appeal, it was submitted that the principles recently set out by the majority of this Court in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*¹³² ("GLJ") departed in some respects from previous orthodoxy concerning the principles of abuse of process. In particular, at various points in submissions, it was suggested, contrary to the reasoning set out in the introduction above, that the majority in *GLJ* had held that the New South Wales Parliament changed the meaning, or the application of the concept, of a fair trial in 2016 when it enacted s 6A of the

¹²⁶ *Willmot v Queensland* [2022] QSC 167.

¹²⁷ *Willmot v Queensland* [2023] QCA 102 at [88]-[89].

¹²⁸ *Willmot v Queensland* [2022] QSC 167 at [77].

¹²⁹ *Willmot v Queensland* [2022] QSC 167 at [79].

¹³⁰ *Willmot v Queensland* [2022] QSC 167 at [56]-[57]; *Willmot v Queensland* [2023] QCA 102 at [38]-[40].

¹³¹ [2024] HCA 43.

¹³² (2023) 97 ALJR 857; 414 ALR 635.

Limitation Act 1969 (NSW) which is the counterpart to s 11A of the *Limitation of Actions Act 1974* (Qld). That submission should not be accepted.

The decision in GLJ

99 On one view of the majority reasoning in *GLJ*, consistently with the approach explained in the introduction to these reasons (which was taken in the Court of Appeal in this case by Gotterson A-JA (with whom Mullins P and Boddice A-JA agreed)), the power of a court to grant a permanent stay for abuse of process is confirmed by provisions such as s 6A(6) of the *Limitation Act 1969* (NSW) (the counterpart to s 11A(5) of the *Limitation of Actions Act 1974* (Qld)) and "is not otherwise narrowed by its legislative context".¹³³ But on another view of the majority reasoning in *GLJ*, expressed in typically lucid terms in the Court of Appeal of the Supreme Court of New South Wales by Leeming JA (Payne JA and Harrison CJ at CL agreeing), the introduction of provisions such as s 6A moved the goalposts. Some trials that would previously have been stayed as manifestly unfair should, after the introduction of s 6A, now be permitted to proceed.¹³⁴ On that view, s 6A changed the meaning or application of the concept of fairness.

100 There are statements in the reasons of the majority in *GLJ* that, read alone, might be thought to support the view of the Court of Appeal: a heading entitled "A fair trial in child sexual abuse claims – a new world"; reference to a "new reality created by s 6A(1)"; the description of s 6A(1) as an imposition by the New South Wales Parliament of a "new normative structure"; and reference to the effect of s 6A as a "fundamental change" and as creating a "radically new context".¹³⁵ If those passages were to be understood as they were understood by the Court of Appeal then I would emphatically dissent from them.

101 But I do not consider that the majority in *GLJ* fell into such error. The majority recognised that, as s 6A(6) of the *Limitation Act 1969* (NSW) says, the section "does not limit" the inherent, implied or statutory jurisdiction of a court, which includes the power to stay proceedings for abuse of process.¹³⁶ Further, the

133 *Willmot v Queensland* [2023] QCA 102 at [52].

134 *CM v Trustees of the Roman Catholic Church for the Diocese of Armidale* [2023] NSWCA 313 at [74]-[75].

135 *GLJ* (2023) 97 ALJR 857 at 869 [29], 870 [34]-[35], 871 [40]-[41], [43], 872 [47]; 414 ALR 635 at 647-651.

136 *GLJ* (2023) 97 ALJR 857 at 871 [40], 872 [44]; 414 ALR 635 at 649-651.

"new normative structure"¹³⁷ and the "fundamental change wrought by s 6A"¹³⁸ were described by the majority as follows:¹³⁹

"in the case of an action for damages for death or personal injury resulting from child abuse, it can no longer be maintained that the passing of time alone enlivens the inherent power or any statutory power of a court to prevent an abuse of its process".

The point being made was that s 6A is an emphatic prohibition upon the mere passage of time, however long that might be, being sufficient by itself to amount to an abuse of process. It is an entirely different question, to be resolved by reference to the long-established authorities, whether, on the facts of a particular case, the proved *consequences* of the passage of substantial time, being forensic disadvantage, are sufficient to deny the possibility of a fair trial to a defendant. That is a causal question which requires consideration of the position that the defendant would have been in if the substantial lapse in time had not occurred.

Forensic disadvantage, causation, and manifest unfairness

102

In trials around Australia nearly every day there are instances where, for forensic reasons, one party is at a disadvantage. A central witness that a defendant might otherwise have called may be deceased or unable to be located. The memory of the central witness for the defendant might be impaired or the central documents that would have been relied upon by the defendant might have been lost or destroyed. None of these matters, by itself, is sufficient to make a trial manifestly unfair.¹⁴⁰ The defendant is placed in an unfortunate position but not an unfair one. Courts have techniques to address and minimise the forensic disadvantage of a party in such cases.¹⁴¹ As Gleeson CJ said in *R v McCarthy*,¹⁴² in remarks which are equally apt to civil proceedings:

137 *GLJ* (2023) 97 ALJR 857 at 871 [40], 872 [47]; 414 ALR 635 at 649, 651.

138 *GLJ* (2023) 97 ALJR 857 at 871 [41]; 414 ALR 635 at 649.

139 *GLJ* (2023) 97 ALJR 857 at 871 [41]; 414 ALR 635 at 649.

140 *R v Edwards* (2009) 83 ALJR 717 at 722 [31]; 255 ALR 399 at 405; *Stringer* (2000) 116 A Crim R 198 at 200 [11].

141 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Jones v Dunkel* (1959) 101 CLR 298 at 305; *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 98 ALJR 719 at 747-748 [130]-[132]. See also *GLJ* (2023) 97 ALJR 857 at 875-876 [61]; 414 ALR 635 at 655-656.

142 Unreported, New South Wales Court of Criminal Appeal, 12 August 1994 at 12.

"Time and time again it happens in criminal proceedings that for any one of a variety of reasons witnesses who may be regarded as important by one side or the other die, or become ill, or lose their memory, or lose documents ... [I]t is well recognised that an occurrence of that kind does not of itself mean that a person cannot obtain a fair trial or that proceedings need to be stayed."

103 The issue of the fairness of a trial only arises when the *cause* of the forensic disadvantage to a defendant gives rise to unfairness.¹⁴³ Like an applicant for an extension of time who must establish a lack of sufficient prejudice to the respondent, the applicant who seeks a stay of proceedings on the basis of lapse of time must establish that sufficient prejudice has resulted "*by reason of* the effluxion of time" before the claim was brought.¹⁴⁴ The applicant for a permanent stay in such cases must show that the forensic prejudice that has arisen "*by reason of* delay" is so extreme that any trial would necessarily be manifestly unfair, no matter what other precautions are taken.¹⁴⁵

104 It is impossible to identify with precision the period of time which qualifies as substantial, beyond which time the proved forensic prejudice may cause manifest unfairness. A limitation period that might exist for bringing the claim is not determinative. Depending on the reasons for the delay or the nature of the claim, the period of time might be shorter than a limitation period or (in the case of a power to extend the limitation period) longer than a short limitation period. As was said in the context of delayed criminal proceedings, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge".¹⁴⁶

143 Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (2006) at 55.

144 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 547 (emphasis added). See also *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 ("*Moubarak*") at 235 [77] ("*arise from*"); *The Council of Trinity Grammar School v Anderson* (2019) 101 NSWLR 762 at 823 [427] ("*result from*").

145 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 71-72; see also at 77-78. See also Sawoniuk [2000] 2 Cr App R 220 at 230-231; Henchcliffe, "Abuse of process and delay in criminal prosecutions—Current law and practice" (2002) 22 *Australian Bar Review* 1 at 7.

146 *Watson v Attorney-General for New South Wales* (1987) 8 NSWLR 685 at 697-698, quoting *Bell v Director of Public Prosecutions* [1985] AC 937 at 951 and *Barker v Wingo* (1972) 407 US 514 at 531. See also *Herron v McGregor* (1986) 6 NSWLR 246 at 253-255.

105 The decision of this Court in *Batistatos* is an instance where the forensic disadvantage caused by a substantial period of time elapsing between a claim arising and an action being brought might not have been thought sufficient to prevent a fair trial. In that case, an appeal was brought to this Court from a decision of the Court of Appeal of the Supreme Court of New South Wales to permanently stay personal injury proceedings brought by a mentally impaired plaintiff, against the Roads and Traffic Authority of New South Wales ("the RTA") and Newcastle City Council, as an abuse of process. The plaintiff alleged negligence by the RTA or the Council in relation to an accident that had occurred 29 years earlier.¹⁴⁷ The alleged negligence involved various matters: design or construction of the road; maintenance, marking, lighting and signage of the road; and cutting of the adjacent grass.¹⁴⁸ The plaintiff had provided affidavit evidence from three deponents who said that they were familiar with the street in 1965 and could "give evidence as to its configuration, the height and location of [the] grass, control measures provided by the Council, maintenance provided by the Council, and lighting provided in the vicinity of the accident site".¹⁴⁹

106 This Court in *Batistatos* was not asked to revisit the issue of whether the forensic disadvantage to the defendants was so extreme that the trial would be manifestly unfair. On the issues before the Court, however, a majority reiterated the conclusion of the Court of Appeal (which had overturned the decision of the primary judge) that the effect of the effluxion of 29 years was "that no useful evidence is available upon which to conduct a trial into the question whether the plaintiff's injuries were caused by negligence of the defendants, and no further search or inquiry is in any way likely to locate any such evidence".¹⁵⁰ The effect was said to be that "[n]o more than a formal enactment of the process of hearing and determining the plaintiff's claim could take place".¹⁵¹

107 Although (contrary to some earlier expressed views¹⁵²) the question of abuse of process is now acknowledged as one for which only one right answer

147 *Batistatos* (2006) 226 CLR 256 at 272 [33]-[35].

148 *Batistatos* (2006) 226 CLR 256 at 314 [205].

149 *Batistatos* (2006) 226 CLR 256 at 275 [47].

150 *Batistatos* (2006) 226 CLR 256 at 278 [55], quoting *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 405 [79].

151 *Batistatos* (2006) 226 CLR 256 at 278 [55], quoting *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 406 [80].

152 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 387 [164]; *UBS AG v Tyne* (2018) 265 CLR 77 at 105 [74]; *Moubarak* (2019) 100 NSWLR 218 at 232-233 [66]-[67], 253 [182], 257 [207].

exists,¹⁵³ the answer of the Court of Appeal in *Batistatos*, that the circumstances involved an abuse of process, was nevertheless one upon which reasonable minds might, and did, differ. There was considerable force to the three dissents in this Court. In dissent, Kirby J pointed to the appellant's submission that "his legal representative had been able to turn up relevant evidence but the respondents, by inference, with much larger resources, had failed to pursue lines of inquiry that were obvious, might have been fruitful and could still be explored".¹⁵⁴ And as Callinan J (with whom Heydon J agreed¹⁵⁵) said in dissent:¹⁵⁶

"Any trial that may take place would be an imperfect one factually. But this must be so in many cases brought long after the event by persons under a disability. There are some records that are just as likely to have been destroyed after seven years as after twenty-nine years."

In short, there appeared to have been little consideration by the Court of Appeal of the Supreme Court of New South Wales in *Batistatos* as to: (i) whether the particular aspects of prejudice to which the defendants pointed had been caused by the substantial lapse of time in bringing the proceedings or whether those matters of prejudice would have existed even a short period of time after the accident occurred; or (ii) whether, in light of the other available evidence, the prejudice to the defendants was nevertheless so great that a fair trial was not possible.

108 On the other hand, *Moubarak by his tutor Coorey v Holt*¹⁵⁷ ("*Moubarak*") is a case which clearly involved such extreme forensic disadvantage to the defendant caused by effluxion of a substantial period of time before a claim was brought that any trial would have necessarily been manifestly unfair. In that case, the respondent had sought damages arising from alleged sexual assault by her uncle over 40 years earlier. There were no eyewitnesses and no living or otherwise available witnesses who could give evidence that was potentially relevant. By the time of trial, the uncle had severe dementia and was unable to participate in any trial by giving evidence or instructions to counsel. Prior to the onset of his dementia the uncle had not been confronted with the allegations either by the complainant

153 *GLJ* (2023) 97 ALJR 857 at 868-869 [26]; 414 ALR 635 at 646. See also *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 426 [295]; *UBS AG v Tyne* (2018) 265 CLR 77 at 124 [123].

154 *Batistatos* (2006) 226 CLR 256 at 287 [99].

155 *Batistatos* (2006) 226 CLR 256 at 326 [238].

156 *Batistatos* (2006) 226 CLR 256 at 323 [227].

157 (2019) 100 NSWLR 218.

or by the police. The Court of Appeal of the Supreme Court of New South Wales held that the proceedings should be permanently stayed as an abuse of process.¹⁵⁸

109 Another example involving extreme forensic disadvantage, from which the Court of Appeal drew an analogy,¹⁵⁹ is the circumstances of *R v Davis*.¹⁶⁰ In that case, criminal proceedings were stayed as an abuse of process because by the time of the trial there had been an innocent destruction of medical records with the effect that it was said to be impossible for the accused to defend himself against allegations that he had committed assaults in his treatment of the complainants between (approximately) 20 and 35 years earlier.¹⁶¹

110 An assessment of abuse of process in these proceedings requires consideration of the effect of delay in bringing a claim on each allegation separately. The adjudication of each allegation will involve different degrees of forensic unfairness caused by the effluxion of substantial time before the action was brought. For instance, the trial of the allegation concerning Mr Pickering would involve a level of extreme forensic difficulty where, like *Moubarak*, it would be manifestly unfair for the State of Queensland to be required to defend a trial. But any forensic difficulty caused by the lapse of time in bringing the claims based on the other allegations can be managed by the court without the trial becoming manifestly unfair.

Ms Willmot's claims and the associated forensic disadvantage by substantial delay

Ms Willmot's claims generally

111 Ms Willmot was born in 1954. The bases of her claims against the State of Queensland were raised with the State of Queensland in 2019 and 2020, although aspects of her claim were also raised in the context of the Queensland Department of Communities' Redress Scheme in 2008. Ms Willmot's claim is based upon four groups of allegations concerning sexual and other physical abuse, which are set out above.¹⁶²

¹⁵⁸ *Moubarak* (2019) 100 NSWLR 218 at 250-251 [162]-[171], 253 [181], 256 [196], 257 [207].

¹⁵⁹ *Moubarak* (2019) 100 NSWLR 218 at 238-240 [93]-[96].

¹⁶⁰ (1995) 57 FCR 512.

¹⁶¹ *R v Davis* (1995) 57 FCR 512 at 520-521.

¹⁶² At [96].

112 Ms Willmot's claim for damages (including exemplary damages, however the claim is pleaded¹⁶³) is based upon an asserted non-delegable duty of care owed to her as a person who "was a State Child or was subject to the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld)". A non-delegable duty is a direct duty which is not merely to take reasonable care but to ensure that reasonable care is taken in relation to a person or to their property.¹⁶⁴ The non-delegable duty can be breached by a defendant's or a third party's intentional wrongdoing,¹⁶⁵ although one formal view would require that breach of the non-delegable duty be pleaded as, or formally based upon, a failure by the defendant or the third party to take reasonable care rather than their intentional act of wrongdoing.¹⁶⁶ On that formal view, the abuses alleged by Ms Willmot would be a failure by the alleged perpetrators of the abuse to take reasonable care, with the effect that there would be a breach of the State of Queensland's duty, irrespective of whether the State of Queensland itself took all due care; it did not ensure that care was taken. The State of Queensland properly admits that it owed Ms Willmot a non-delegable duty, although misdescribing the duty as one "to take reasonable care to protect her from any foreseeable risk of harm and/or injury that might be occasioned to her while she was a State Child or subject to the Protection Act".

113 The only real issue in this aspect of the proceeding concerning liability based on the non-delegable duty of the State of Queensland is therefore whether the claims by Ms Willmot of abuse took place. There is undoubtedly serious forensic disadvantage to the State of Queensland in attempting to answer Ms Willmot's claims. But the extent of that forensic disadvantage, and the extent to which it is attributable to the effluxion of substantial time before the action was brought, varies between the different claims.

The sexual abuse allegations against Mr Demlin

114 The State of Queensland pleads, in relation to the allegations of sexual assault against Mr Demlin, that it "cannot ascertain the truth or falsity of the allegations" due to the effluxion of time. Whether or not the State of Queensland is capable of ascertaining the truth or falsity of Ms Willmot's claims, I do not

163 See *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 9-10 [22]. See also *New South Wales v Lepore* (2003) 212 CLR 511 at 572 [162].

164 *Bird v DP (a pseudonym)* [2024] HCA 41 at [36] and the authorities cited.

165 *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, discussed in *Port Swettenham Authority v T W Wu & Co (M) Sdn Bhd* [1979] AC 580 at 591, *Armes v Nottinghamshire County Council* [2018] AC 355 at 375 [51], and *Bird v DP (a pseudonym)* [2024] HCA 41 at [52].

166 *New South Wales v Lepore* (2003) 212 CLR 511 at 601 [265]. Compare at 572 [162].

accept that the forensic disadvantage to the State of Queensland caused by the effluxion of substantial time before the action was brought is so great that any trial of Ms Willmot's claims regarding Mr Demlin would be manifestly unfair.

115 The evidence of sexual abuse by Mr Demlin concerns events alleged by Ms Willmot to have occurred on a weekly to fortnightly basis between October 1957 and May 1959 while she was between three and five years old and in the care of Mr and Mrs Demlin. The events were alleged to have occurred during the night, in Ms Willmot's bedroom, while Mrs Demlin was asleep. Ms Willmot also witnessed Mr Demlin sexually assault two sisters who, together with their brother, occupied the same bedroom as Ms Willmot. Ms Willmot's allegations in her affidavit evidence in this proceeding concerning Mr Demlin's sexual abuse of her, and its consequences and effects upon her, are comprehensive and detailed. Her recollection of the abuse of the two sisters who shared a bedroom with her is much more limited.

116 Many of the matters of forensic disadvantage asserted by the State of Queensland were not shown to have any causal connection with the effluxion of time before the action was brought. First, the State of Queensland complained that the alleged sexual assaults occurred in a private context and that there is no record of any sexual assault by Mr Demlin upon Ms Willmot. But, with one exception, the State of Queensland did not identify what any such record of sexual assault might have been and did not establish any likelihood of it existing. Subject to that exception, there was no suggestion that with the passage of time any documents concerning Mr Demlin's sexual abuse had been lost. Ms Willmot's evidence was that while she was living with the Demlins she did "not remember any government person, inspector, social worker or any similar person of that nature coming to talk to me". The exception was the assertion that a documentary record of complaint made orally by another girl, RS (one of the sisters who lived with Ms Willmot at the Demlins), to Ms Phillips may have been lost. But such a record is unlikely ever to have existed in light of RS's evidence about the complaint being made orally and being met by an emphatic refusal to believe RS.

117 Secondly, the State of Queensland relied upon the deaths of Mr and Mrs Demlin and an asserted loss of the ability to conduct enquiries into the allegations of Ms Willmot. But those deaths did not occur after the effluxion of a substantial time period following the alleged assaults. Mr Demlin died in 1962 and Mrs Demlin died in 1965. And the State of Queensland did not identify what enquiries it would have conducted, or to whom those enquiries would have been directed, or what might have been the outcome of those enquiries if there had not been a substantial period of time between the alleged sexual assaults by Mr Demlin on Ms Willmot and her claim.

118 One matter of forensic disadvantage caused by the effluxion of time before the action was brought is the death in 2008 of the brother who occupied the same room as Ms Willmot at the Demlins' house. There is no evidence concerning the

availability, or lack of availability, of one of the sisters to give evidence. But the other sister, RS, who was said to be between eight and ten years of age at the time, provided an affidavit in these proceedings concerning Mr Demlin's sexual abuse of her and her sister as well as Mr Demlin's sexual abuse of Ms Willmot. Like the evidence of Ms Willmot, this evidence from RS also includes great detail of the sexual abuse and its effects and consequences.

119 Other matters relied upon by the State of Queensland in support of its submission that no fair trial is possible are really matters upon which it *could* rely in questioning whether Ms Willmot had established her case on the balance of probabilities. These matters include Ms Willmot's delay in recalling the abuse until it was raised with her by RS in 2016.

120 A fair trial concerning the allegations of sexual abuse by Mr Demlin is possible.

Generalised allegations of physical abuse against the Demlins and at the Cherbourg Girls' Dormitory

121 The State of Queensland relied upon two further, related grounds for asserting that Ms Willmot's generalised allegations of other physical abuse by the Demlins and at the Cherbourg Girls' Dormitory were an abuse of process. Those allegations were that she was "regularly subjected to beatings by the Demlins for minor infractions of the rules" and "subjected to beatings for minor infractions of the rules" while at the Cherbourg Girls' Dormitory. The grounds relied upon by the State in each case were the assertion of an "inability to respond to this vague, uncorroborated, yet uncontradicted allegation" and the allegations not being "particularized sufficiently to investigate surrounding or contextual circumstances".

122 The vagueness of Ms Willmot's generalised claims of physical abuse by the Demlins and at the Cherbourg Girls' Dormitory is most unlikely to be the consequence of the effluxion of a substantial period of time between the abuse and her claim. It would be astonishing if even in her early adulthood Ms Willmot had been able to remember precise particulars of the minor rule infractions for which she was regularly beaten or the precise manner in which she was beaten while living at the Demlins, when she was only a child aged between three and five years old. In any event, however, the vagueness of these allegations, by itself, is not a basis for the grant of a permanent stay on the ground of abuse of process due to the effluxion of a substantial period of time. Vagueness could arguably be a ground

upon which those allegations could be struck out, with leave to replead.¹⁶⁷ But no issue of striking out was raised in this Court.

123 The State of Queensland's submission concerning vagueness is not assisted by the authority upon which it relies, *Connellan v Murphy*.¹⁶⁸ In that case, vagueness of an allegation was not said by the Court of Appeal of the Supreme Court of Victoria to be sufficient to constitute an abuse of process. Rather, the Court explained that the abuse of process arose from: (i) the burdensome and oppressive task of the defendant "being asked to defend himself at the age of 62 for actions he is alleged to have committed as a 13 year old in respect of a person he can only have known (on the plaintiff's case) for little more than a week";¹⁶⁹ and (ii) the existence of "significant issues of causation and quantum, the investigation of which has been made more difficult by the substantial elapse of time".¹⁷⁰ The "vagueness of the plaintiff's own recollection of surrounding circumstances" was no more than a factor considered in the assessment of (i).¹⁷¹

Particular allegations of physical abuse at Cherbourg Girls' Dormitory

124 In addition to the generalised allegation of physical abuse for minor infractions of the rules while she was at the Cherbourg Girls' Dormitory, Ms Willmot makes four particular allegations of serious physical assaults at the Cherbourg Girls' Dormitory, as well as an allegation of being required to observe other residents receiving similar punishments. In two of those incidents, the alleged perpetrator of the abuse was Ms Phillips, who was employed "as the supervisor of the girls resident in the Girls Dormitory between at least 1959 and 1966".

125 The most significant forensic disadvantage to the State of Queensland occasioned by the significant effluxion of time between these alleged events and Ms Willmot bringing her claim is that Ms Phillips died in 1982. The State also relies upon: (i) the assumed deaths of Mr Sedgwick and Mr Sturgess (born in 1907 and 1905 and Superintendent of the Cherbourg Settlement in 1951 and from 1954 to 1964 respectively), with the latter said to be the only other person (aside from the Dormitory Matron) in a position of authority at the time of the alleged events;

¹⁶⁷ *Uniform Civil Procedure Rules 1999* (Qld), r 171(1). See also *Munnings v Australian Government Solicitor [No 2]* (1994) 68 ALJR 429 at 430; 120 ALR 586 at 589.

¹⁶⁸ [2017] VSCA 116.

¹⁶⁹ *Connellan v Murphy* [2017] VSCA 116 at [57].

¹⁷⁰ *Connellan v Murphy* [2017] VSCA 116 at [58].

¹⁷¹ *Connellan v Murphy* [2017] VSCA 116 at [57].

(ii) the death in 1983 of Ms Pascoe, the Dormitory Matron of the Cherbourg Girls' Dormitory; (iii) the death in 1986 of Mr Pascoe, a Hygiene Officer at Cherbourg; (iv) the death in 1985 of Ms Rees, the Manager of the Cherbourg Girls' Dormitory; and (v) the deaths of two residents of the Cherbourg Girls' Dormitory in the 1950s who were able to be identified by the State.

126 With the effluxion of a substantial period of time between the date of the alleged events and Ms Willmot's action being brought, the deaths, or assumed deaths, of these numerous potential witnesses are matters of serious forensic prejudice to the State of Queensland. If these people were the only source of substantial evidence apart from Ms Willmot, then I would have concluded that the trial of the claims in relation to the particularised allegations of abuse at the Cherbourg Girls' Dormitory should be permanently stayed as an abuse of process. But there are numerous other sources of evidence.

127 Ms Willmot provided comprehensive affidavit evidence from two women who were girls living at the Cherbourg Girls' Dormitory over periods of time which included the period of the alleged events in 1959. Ms Willmot also provided affidavit evidence from a woman who had lived at the Cherbourg Girls' Dormitory at a time prior to the alleged events but had been working in the Cherbourg Mothers and Babies Quarters at the time of the alleged events in 1959, and who eventually replaced Ms Phillips as supervisor of the Cherbourg Girls' Dormitory. All of these witnesses gave detailed evidence of the conduct of Ms Phillips and the circumstances and physical abuses that took place at the Cherbourg Girls' Dormitory over periods including 1959 and the early 1960s. Ms Willmot also provided evidence from RS who described Ms Phillips' summary rejection of her claims of abuse by Mr Demlin. Further evidence is likely to be available. One further witness, whose evidence was not accepted as admissible by the trial judge, provided detailed evidence of events at the Cherbourg Girls' Dormitory, albeit at a different time from the time of the events alleged by Ms Willmot.

128 Further, contrary to the submissions of the State of Queensland, there are documents relevant to Ms Willmot's specific allegations, even if the documents do not directly address those allegations. For instance, Ms Willmot provided evidence of a letter dated 18 January 1951 from the "Women on Cherbourg" which asked "is it right for the manageress to flog the girls with great big sticks and grab them by the hair and bash them against the walls and steps; the girls, they are all terrible in the face, all bruised and black around the eyes". The letter said that "Maud Phillips is no good in the dormitory because she is bad to the girls". A reply by the Superintendent, Mr Sedgwick, denied the allegations as "completely unfounded", although acknowledging that Ms Phillips "deals out a slap or two". And a statement by the matron of the Cherbourg Girls' Dormitory asserted that the letter was a "gross insult" but accepted that "[t]he children certainly receive a caning at times from Maud Phillips".

129 The evidence adduced by Ms Willmot is sufficient for a fair trial of Ms Willmot's allegations concerning the instances of physical abuse suffered at the Cherbourg Girls' Dormitory despite the forensic disadvantage to the State of Queensland occasioned by the significant effluxion of time between the alleged events of 1959 to around 1966 and Ms Willmot's action being brought.

Allegations against the uncle, NW

130 Ms Willmot's allegation about her uncle, NW, was that around 1960, when she was six years old, NW sexually assaulted her at her grandmother's house during a school holiday period when Ms Willmot was given permission by the Superintendent of Cherbourg to visit her grandmother. The sexual assault occurred initially while only Ms Willmot and NW were present but NW was disturbed by Ms Willmot's grandmother who screamed loudly at NW with words of abuse, causing NW to run away.

131 There are matters of undoubted prejudice to the State of Queensland due to the effluxion of time between the alleged sexual assault in around 1960 and Ms Willmot's claim. First, NW was 15 or 16 years old at the time of the assault. Secondly, Ms Willmot's grandmother is likely now to be deceased. Importantly, however, NW may be able to give relevant evidence because, based on a file note from a solicitor for Ms Willmot, in July 2022 the solicitor for Ms Willmot was told that NW had spent most of his childhood and adolescence in the boys' dormitory at Cherbourg and was the victim of sexual abuse there. NW described his memory as "pretty good" and said that he was prepared to speak again with the solicitor for Ms Willmot. The fact that it is open to the State of Queensland to speak to NW about the allegations precludes the conclusion that a fair trial is not possible. As the State recognises in its submissions, the forensic prejudice to the State caused by the lapse of time between the alleged assault and the time when Ms Willmot's claim was brought can be addressed by standard judicial rules of evidence and presumptions.¹⁷²

132 The trial judge and the Court of Appeal properly acknowledged the relevance of NW being available to speak to the State of Queensland but, as explained above, concluded that for reasons of causation it would be insurmountably difficult to extricate this one event from the Demlin allegations and the allegations concerning the events in the Cherbourg Girls' Dormitory which were held to be an abuse of process. That reasoning cannot apply in circumstances in which different conclusions have been reached on abuse of process concerning the allegations against the Demlins and those concerning the Cherbourg Girls' Dormitory.

172 Such as, eg, *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]. See above at fn 141.

133 In any event, as a matter of law, if liability of the State were established only for the allegation against NW, it may be very difficult, but it would not be impossible, to assess the extent to which the sexual assault by NW increased or exacerbated Ms Willmot's pleaded pecuniary and non-pecuniary losses. In circumstances where one wrong exacerbates a single, but divisible, injury, these difficult issues of apportionment of causative effect, sometimes confusingly described as "material contribution" in this context,¹⁷³ do not preclude courts from conducting an assessment of damages. Further, where multiple wrongs combine to cause a single injury, courts commonly assess causation of the loss by asking whether, but for the particular wrong for which the claim is brought, the loss would have *lawfully* resulted in any event.¹⁷⁴

The allegation against Mr Pickering

134 The last of Ms Willmot's allegations upon which her claim against the State of Queensland for breach of a non-delegable duty rests is a claim of sexual assault by a cousin or great-uncle called "Pickering". Ms Willmot alleges that Mr Pickering sexually assaulted her around 1967, when she was about 13 years old and visiting her grandmother's house. One relevant detail of Ms Willmot's description of the alleged sexual assault is that no other person was present at the time of the assault. She says that Mr Pickering was 50 to 60 years old at the time. It is extremely likely that Mr Pickering was deceased at the time Ms Willmot's claim was brought against the State of Queensland in 2020.

135 The lack of any other witnesses and the lack of any documentary record concerning the alleged sexual assault means that there is extreme forensic prejudice to the State of Queensland caused by the likely death of Mr Pickering during the period of time of more than 50 years between the alleged assault and the time when Ms Willmot's claim was brought. The effect of that effluxion of time is that the State of Queensland is unable to assess whether it could defend the claim. A fair trial of this allegation is not possible.

173 See, for instance, *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620 and Foster, "Material Contribution in *Bonnington*: Not an Exception to 'But For' Causation" (2022) 49(1) *University of Western Australia Law Review* 404.

174 *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 261 [178]. See also the examples given by Lord Hamblen and Lord Leggatt JJSC in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] AC 649 at 723-724 [182]-[185] and Lord Burrows JSC in *Davies v Bridgend County Borough Council* [2024] 2 WLR 1237 at 1257 [81]; [2024] 3 All ER 641 at 660.

Conclusion

136 For these reasons, in relation to two of the four allegations that are the subject of Ms Willmot's claim against the State of Queensland (with consequential effect on a third), I differ from the trial judge and the Court of Appeal as to whether a fair trial could not occur due to the extent of forensic prejudice caused by the effluxion of time between the alleged events and the time when Ms Willmot's claim was brought. Although the question of whether a fair trial is possible is one for which only one right answer exists, the assessment will usually be heavily dependent upon the facts of a particular case. The conclusion reached by an assessment based upon the well-established principles that were not altered by provisions such as s 6A of the *Limitation Act 1969* (NSW) or s 11A of the *Limitation of Actions Act 1974* (Qld) might be a matter upon which reasonable minds differ. It will not usually be a matter with which this Court would interfere.

137 Orders should be made as follows:

1. The appeal be allowed in part.
2. The orders of the Court of Appeal of the Supreme Court of Queensland made on 16 May 2023 be set aside and, in their place, it be ordered that:
 - (i) appeal allowed, in part, with costs;
 - (ii) the order of the Supreme Court of Queensland made on 22 August 2022 be set aside and, in its place, it be ordered that:
 - (a) subject to para (b), the defendant's application for a permanent stay of the proceeding is dismissed;
 - (b) the claim pleaded in paras 9(b) and 11 of the Amended Statement of Claim dated 20 August 2021 is permanently stayed; and
 - (c) the defendant pay the plaintiff's costs of the application.
3. The respondent pay the appellant's costs.

138 STEWARD J. I am very grateful to Gageler CJ, Gordon, Jagot and Beech-Jones JJ for, and very much agree with, the statement of principles set out in their reasons concerning when a court should stay a proceeding where s 11A of the *Limitation of Actions Act 1974* (Qld) ("the Limitation Act") applies to permit an action for damages to be brought in cases of child abuse. However, I would not agree with the statement of Gaudron J in *Dietrich v The Queen*,¹⁷⁵ quoted by the plurality,¹⁷⁶ that "notions of fairness are inevitably bound up with prevailing social values". With respect, notions of fairness are immutable.

139 I thus also cannot agree with the observation of the plurality that the irreducible minimum required to enable a fair trial is not an absolute or immutable concept,¹⁷⁷ although, whilst that standard will not change, I agree that its application must depend on the specific circumstances of a given case. One otherwise cannot have a standard which is both irreducible in nature and also in a state of flux. The standard should never be the subject of judicial fad or fashion. In that regard, I respectfully agree with Edelman J.

140 As the plurality has correctly observed, the enactment of s 11A, and its equivalents in other States and territories,¹⁷⁸ in response to a recommendation made by the Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission") has resulted in a "new world" where claims have and will be made that in the past would have been statute barred.¹⁷⁹ But, as the plurality has decisively demonstrated, that "new world" has not otherwise led to a change in the traditionally accepted "irreducible minimum" necessary to enable a fair trial.¹⁸⁰ So much so accords with my own reasons in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*,¹⁸¹ which I refer to and adopt. I also agree with the plurality¹⁸² that the dispositive principles were aptly

175 (1992) 177 CLR 292 at 364.

176 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [25].

177 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [26].

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

179 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [19]-[20].

180 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [26].

181 (2023) 97 ALJR 857 at 880-892 [84]-[160]; 414 ALR 635 at 661-678.

182 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [15].

summarised by Bell P in his Honour's seminal judgment in *Moubarak by his tutor Coorey v Holt*.¹⁸³

141 As the plurality has also observed, the "evaluative inquiry in each case is unique and highly fact-sensitive".¹⁸⁴ As such, and with some reluctance, I am not able to agree with all of the conclusions reached by the plurality.

The claims in respect of the Demlins

142 I would stay the claims against the Demlins. That conclusion does not – in any way – involve a rejection of the appellant's claims. The allegations are highly serious. In particular, her claim of sexual abuse in respect of Mr Demlin comprises acts and episodes of inestimable horror. But whether her claims can be fairly tried in a court is another matter. However sympathetic one might be to the plight of the appellant, if her claims are to result in an enforceable legal entitlement to damages against the State of Queensland, that can only relevantly be the outcome of a trial which is able to take place concordantly with the irreducible minimum of fairness that the plurality rightly declares to be a "deeply rooted common law right".¹⁸⁵

143 *Moubarak* concerned a claim by an individual that she had been sexually abused by her uncle in 1973 or 1974.¹⁸⁶ The complainant commenced proceedings in 2016, some 42 or 43 years after the alleged sexual assaults. By then, the uncle had severe dementia. The Court of Appeal of the Supreme Court of New South Wales ordered a permanent stay of the proceedings.¹⁸⁷ Relevantly, Bell P gave nine reasons for granting that stay. I summarised those reasons in *GLJ* as follows:¹⁸⁸

- (1) The complainant had never confronted the defendant with the allegation of sexual assault before the onset of the defendant's dementia.

183 (2019) 100 NSWLR 218 at 233-234 [71].

184 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [17], citing *GLJ* (2023) 97 ALJR 857 at 876 [64]; 414 ALR 635 at 656; cf *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264 [7].

185 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [24].

186 (2019) 100 NSWLR 218.

187 *Moubarak* (2019) 100 NSWLR 218 at 221 [2]-[3], [5], 222 [8].

188 *GLJ* (2023) 97 ALJR 857 at 888 [136]; 414 ALR 635 at 672-673, citing *Moubarak* (2019) 100 NSWLR 218 at 250-251 [162]-[171].

- (2) The defendant had advanced dementia prior to the report of the alleged assaults to the police.
- (3) The defendant had advanced dementia at the commencement of proceedings.
- (4) There were no eyewitnesses to the alleged assaults.
- (5) Because of his dementia, the defendant could not give instructions.
- (6) Because of his dementia, the defendant would have been also "utterly unable" to give evidence in the proceedings.
- (7) Because of his dementia, the defendant would have been unable to give instructions "during the course of the trial".
- (8) The events took place 45 years ago and "other potentially relevant witnesses are now dead or unavailable".
- (9) There was no credible suggestion that some documentary evidence may be in existence that would bear upon the likelihood or otherwise of the alleged sexual assaults having occurred.

144 Accepting that the foregoing reasons in *Moubarak* are fact specific, nonetheless if one applies them to the appellant's claim of sexual abuse in respect of Mr Demlin (the details of which I adopt gratefully from the reasons of the plurality) there is only one possible outcome: any trial of those claims would fail to meet the irreducible minimum of fairness that is required.

145 Here, and in essence: the appellant never confronted the State of Queensland before the death of Mr Demlin; no complaint has ever been made to the police (although the relevance of this factor is less compelling on the facts here); Mr Demlin died well before the commencement of proceedings (indeed almost 60 years before); the State of Queensland is unable to obtain instructions from Mr Demlin, and, as a result, has pleaded that it is unable to admit or to concede the allegations; Mr Demlin is unable to give evidence in the proceedings; and, save in one instance, all other potential witnesses, such as Mrs Demlin, are now dead.

146 The one possible exception here to the reasons given by Bell P is the evidence of "RS". That evidence, which took the form of an affidavit, is described in the reasons of the plurality.¹⁸⁹ RS may no longer be able to be a witness, but if she is able, she will give evidence that not only was she sexually abused by

189 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [55].

Mr Demlin, she also saw Mr Demlin sexually assault the appellant. The description given by RS of what she said occurred is both graphic and detailed. In addition, there is the evidence of the appellant herself. Whilst not as detailed as the proposed testimony of RS, it would be wrong to characterise the appellant's evidence as vague or as lacking in sufficient particulars. It represents what one might expect of a person trying to recall trauma suffered almost 70 years ago, when they were aged somewhere between three and six years old.

147 Yet what can the State of Queensland do with this evidence in order to have a sufficiently fair opportunity of defending the claims made against it? It is said that the appellant's evidence and the testimony of RS can be tested and probed with cross-examination. With very great respect, that proposition is hollow. That is because the State cannot put to either witness that her testimony is wrong or mistaken; the State simply cannot get the necessary instructions to do this. It does not know what happened; it does not know whether the claims made against it are, or are not, true. In such circumstances the State remains "utterly in the dark".¹⁹⁰ Due to the very great expiration of time, and the passing away of the essential witnesses, there is a complete incapacity to obtain meaningful instruction which might be used to defend the claims made.

148 The evidence that RS might give does not alter this outcome. RS prompted the appellant's memory of Mr Demlin's sexual abuse. At the time when the primary judge determined the State's application for a permanent stay, RS was suing the State for the abuse she alleges she has suffered from Mr Demlin. As a result, it would be greatly unfair for her to be a proper source of instructions for the State in its defence against the appellant. The State could not reasonably be confident in RS as a source of objective information. It would be unfair on the State to be dependent on such a witness.

149 At best, the State could submit that the appellant could not discharge her onus of proof in reliance on her testimony and that of RS (if RS were to give evidence; it was not clear whether she would do so). It could point out the age of the appellant when the alleged abuse took place, and the lapse in time since then. It might be able to demonstrate inconsistencies in the evidence of RS and the appellant. And it might also rely on the fact that the appellant's recollection only arose comparatively recently. But, with great respect, unless the State is able to squarely put to the appellant that the claim made is wrong or false, what is left is so lame a defence as to deny to the State a fair trial. A just trial cannot proceed unless the State is given a fair opportunity to put its case, and it cannot do so hampered in the way described. It is illusory to consider that the State can properly defend itself when it cannot deny that the claim made is true.

190 *Moubarak* (2019) 100 NSWLR 218 at 250 [158].

150 This outcome is problematic. As the plurality has pointed out, much child sexual abuse takes place in secret, it often occurs without any witnesses, and it frequently occurs without documentary evidence which corroborates, or otherwise sheds light on, what has taken place;¹⁹¹ and, as the Royal Commission confirmed, the memory of what had occurred might only resurface many years later, when witnesses, including the abuser, have long since died.¹⁹² But these horrible difficulties are not answered by lowering the standard of what is a fair trial. The very problems that blight a complainant's ability to prove historical child sexual abuse blight also an accused person's ability to defend him or herself.

151 The foregoing reasoning does not mean that there cannot be a sufficiently fair trial where the alleged perpetrator is unavailable. Depending on the circumstances, it may be possible for a defendant, such as the State of Queensland, to obtain meaningful instructions in other ways, such as from other surviving witnesses or from available documentary material. But that is not possible in this instance.

152 I otherwise respectfully agree with the plurality's conclusion concerning the appellant's allegations of physical abuse by the Demlins.

The claims concerning the Cherbourg Girls' Dormitory

153 Once again, I gratefully adopt the description of the appellant's claims made concerning the Cherbourg Girls' Dormitory, and in particular Ms Phillips, given by the plurality.¹⁹³ Many of the concerns set out above concerning the Demlin allegations apply equally here given that Ms Phillips and a number of other key witnesses have long since passed away. However, there is a decisive difference. That difference is the evidence to be given by Ms Nielsen, Ms Watson and Ms Collins. Unlike RS, they are not suing and have not sued the State. And in the case of Ms Collins, she worked at the Cherbourg Girls' Dormitory during the 1950s. They each had a fairly detailed recollection of the behaviour of Ms Phillips, although none could, it would seem, corroborate the specific claims made by the appellant about what had happened to her. Nonetheless, the State of Queensland did not demonstrate that it could not obtain instructions about the conduct of Ms Phillips at the dormitory, in particular from Ms Collins. The State had not approached any of these witnesses. It follows that it would be inappropriate at this stage to stay the appellant's claims in relation to the Cherbourg Girls' Dormitory.

191 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [28].

192 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Identifying and disclosing child sexual abuse* (2017), vol 4 at 30-31.

193 Reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [62]-[67].

The claims in relation to NW and Pickering

154 I agree with the plurality that the claim against NW should not at this stage be stayed. Whether the State is able to obtain any form of meaningful instruction from NW is presently unknown. It follows that at this stage this claim should not be stayed. I otherwise agree with the plurality that the claim against Pickering must be stayed.

GLEESON J.

Overview

155 Subject to what is set out below, I agree with the reasoning in the joint judgment. I write separately for two main reasons. First, in my view, the principles governing when it is appropriate to award a permanent stay of historical child abuse claims require closer scrutiny of how specific adverse impacts of the passage of time before bringing the claim add to the inherent unfairness to the defendant of being required to respond to that claim long after the alleged events. Secondly, I do not agree with the analysis in the joint judgment concerning the State's non-delegable duty.

Principles

156 Subject to the following observations, I agree with the statement of the relevant principles and approach in the joint judgment.

The significance of "impoverishment of evidence" to a fair trial

157 The common law does not impose time bars on the commencement of actions to vindicate common law rights. In this respect, common law causes of action are different from equitable claims that may be defeated pursuant to the equitable doctrine of laches. Historically, there has been little impetus for the common law to develop principles to protect defendants from oppression by "stale claims"¹⁹⁴ because, since the *Limitation Act 1623*,¹⁹⁵ defendants in England and Wales were generally afforded a six-year limitation defence for actions on the case (which included actions in tort for assault).¹⁹⁶ The 1623 statute applied to actions brought in the colony of New South Wales, which included the area that is now the State of Queensland.¹⁹⁷ Since 1867, the Parliament of Queensland has passed limitation statutes including the *Statute of Frauds and Limitations Act 1867* (Qld), the *Law Reform (Limitation of Actions) Act of 1956* (Qld), the *Limitation Act 1960* (Qld) and the *Limitation of Actions Act 1974* (Qld). As a result, defendants have been protected by statute from the inherently likely serious prejudice of defending cases about events alleged to have occurred many years or decades earlier. In turn, courts have been unused to balancing the competing interests of plaintiffs in

194 *Stage Club Ltd v Millers Hotels Pty Ltd* (1981) 150 CLR 535 at 548; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 457, 465, 494; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 24, 47.

195 21 Jac I c 16.

196 Dal Pont, *Law of Limitation*, 2nd ed (2021) at 8 [1.8].

197 Dal Pont, *Law of Limitation*, 2nd ed (2021) at 9 [1.10].

securing relief and defendants in having a reasonable opportunity to defend themselves, in cases which would formerly have been statute-barred and where the evidence is impoverished by the passage of time. Moreover, the courts have been unused to protecting their own processes from the risk that, by reason of the effluxion of time, they may be unable to deliver an adequate "quality of justice".¹⁹⁸

158 Accepting that courts must not refuse to exercise their jurisdiction to hear and decide cases except in exceptional cases,¹⁹⁹ courts must also be astute to protect the integrity of their own processes which, historically, have been substantially protected by legislative choices about limitation periods to achieve a balance between the irreconcilable, but legitimate, interests of plaintiffs and defendants.²⁰⁰ In favouring the important policy of allowing actions for damages for child sexual abuse to be brought at any time, legislatures have left it to the courts to protect both litigants and the court system from actions in which it is not possible to have a fair trial for reasons that arise out of the long passage of time between the alleged events and the bringing of the action.

159 The impoverishment of evidence available for the adjudication of a claim is an important aspect of the unfairness of a trial conducted many years after the event. Evidence may be impoverished in quantity or quality, or both. The impoverishment of evidence by the passage of time may prejudice the plaintiff or the defendant or, more likely, both parties. On the one hand, evidence corroborative of the plaintiff's own evidence may have been lost. On the other, the defendant may not be able to marshal evidence that might otherwise have contradicted or cast doubt upon the plaintiff's evidence. Additionally, the impoverishment of evidence compromises the capacity of the court to make robust decisions that demonstrate the due administration of justice.

160 While, as the joint judgment notes, the impoverishment of evidence may be routine and expected in cases of historical child sexual abuse, because of the likelihood that a plaintiff will not be ready to bring court proceedings until many years after the alleged events, that impoverishment may nevertheless produce or contribute to a situation in which a fair trial is not possible. In an application for a permanent stay of proceedings as an abuse of process because of the passage of time, it is important to identify with specificity the impacts of the passage of time upon the quantity or quality of evidence available to be adduced at a trial.

198 cf *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551, quoting *R v Lawrence* [1982] AC 510 at 517.

199 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 ("*GLJ*") at 862 [3]; 414 ALR 635 at 638.

200 See Dal Pont, *Law of Limitation*, 2nd ed (2021) at 18 [1.31].

161 Whether there can be a fair trial involves a balancing of the interests of the plaintiff and the defendant, in the context of the public interest in allowing the prosecution of civil claims for damages arising from historical child abuse involving allegations of sexual abuse or serious physical abuse, or psychological abuse perpetrated in connection with sexual abuse or serious physical abuse.²⁰¹ That public interest is demonstrated by the removal of the previous limitation period. In this particular case, the public interest is heightened by the fact that the alleged wrongdoer is the State.

162 For the plaintiff, the absence of a limitation period enables access to the courts regardless of the long passage of time unless the claim is an abuse of process. The plaintiff will generally be able to give evidence of the alleged facts, although the credibility and reliability of that evidence will be scrutinised having regard to the length of time since the relevant events occurred. The plaintiff may also have had significant opportunities to gather evidence well before the defendant becomes aware of the plaintiff's claims.

163 For the defendant, an action brought several decades after the alleged events can be expected to involve significant unfairness and impose a heavy burden. Accordingly, and while both parties may be prejudiced by the reduced quality of a trial long after relevant events, the focus must be upon the burdensome effect for the defendant of the effluxion of time upon the defendant's capacity to participate in the proceeding.²⁰²

Fair civil trial standard

164 While the content of a fair trial "defies analytical definition",²⁰³ s 11A of the *Limitation of Actions Act 1974* (Qld) does not suggest that there is any respect in which the content of the common law requirement of a fair trial has changed. Accordingly, the contention made on behalf of the appellant, Ms Willmot, that cases that may once have threatened an abuse of process in the absence of s 11A no longer do so, is incorrect.

165 Changes in social standards may affect the content of procedures that are part of a fair civil trial. One example concerns the public interest in the efficient administration of justice, which has led to the imposition upon litigants in several Australian jurisdictions of duties to the court to facilitate the just, quick and cheap

201 *Limitation of Actions Act 1974* (Qld), s 11A(6).

202 *GLJ* (2023) 97 *ALJR* 857 at 871-872 [42]-[43], 887 [132]; 414 *ALR* 635 at 650, 671.

203 *Jago v District Court (NSW)* (1989) 168 *CLR* 23 at 57.

disposition of proceedings.²⁰⁴ Thus, in *Aon Risk Services Australia Ltd v Australian National University*,²⁰⁵ this Court addressed the problem of late pleading amendments. Gummow, Hayne, Crennan, Kiefel and Bell JJ referred to the previous approach of leaving it "largely to the parties to prepare for trial and to seek the court's assistance as required".²⁰⁶ Stating that those times were "long gone", the plurality referred to case management by the courts as "now an accepted aspect of the system of civil justice administered by courts in Australia".²⁰⁷

166 No relevant change in social standards was pointed to on behalf of Ms Willmot that might affect the assessment of whether a fair trial of her claims of historical child abuse is possible many decades after the alleged events. Important considerations remain whether the respondent ("the State") has lost opportunities to make inquiries, investigate alleged facts or preserve relevant evidence, and whether the State can inform itself from its own sources, or from sources independent of Ms Willmot, to make an informed decision about whether to admit or deny the alleged facts.

The impediments to a reasonable opportunity to defend Ms Willmot's claims

The primary judge's findings

167 The primary judge found that the key witnesses, who had the ability to provide "instructions"²⁰⁸ to the State and, if necessary and appropriate, give evidence in relation to the foundational allegations of abuse (apart from NW), were long deceased.²⁰⁹ The primary judge identified the alleged perpetrators of the physical and sexual assaults upon Ms Willmot as the key witnesses.²¹⁰ Where the State had been deprived by the long passage of time of the means for investigating the foundational facts which are critical to establishing liability, the primary judge

204 See, eg, *Federal Court of Australia Act 1976* (Cth), ss 37M, 37N.

205 (2009) 239 CLR 175.

206 (2009) 239 CLR 175 at 217 [113].

207 (2009) 239 CLR 175 at 211 [92], 217 [113].

208 cf *GLJ* (2023) 97 ALJR 857 at 878 [73]; 414 ALR 635 at 659.

209 *Willmot v Queensland* [2022] QSC 167 at [76].

210 *Willmot v Queensland* [2022] QSC 167 at [77].

concluded that this was a case "in that exceptional category where a permanent stay is warranted". As to NW, the primary judge then reasoned:²¹¹

"The fact that NW is still alive does not, in my view, support a different conclusion. Whilst the State and the plaintiff are able to speak to him, and ask him about the allegations, he is a [78-year-old] man, who would be asked about something he is alleged to have done when he was a teenager, aged 15 or 16, more than 60 years ago. It would, I accept, be insurmountably difficult to extricate this one event, from the allegations of what happened at the Demlins' house, and from the broader allegations of what the plaintiff says she endured whilst at the girls' dormitory, let alone the other subsequent life events referred to in Dr Khoo's report, in terms of causation."

168 The primary judge found that there was additional unfairness to the State resulting from the availability of evidence from RS because the State was deprived of the opportunity to obtain instructions from Jack Demlin about the allegations made by RS that he also sexually assaulted her.²¹²

The Court of Appeal's findings

169 The judgment of the Court of Appeal of the Supreme Court of Queensland was delivered before this Court's judgment in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*, in which it was held that the power of the Supreme Court of New South Wales to stay proceedings permanently, of the kind referred to in s 11A(5), is evaluative rather than discretionary.²¹³

170 Relying on *Moubarak by his tutor Coorey v Holt*,²¹⁴ Gotterson A-JA (with whom Mullins P and Boddice A-JA agreed) proceeded on the incorrect premise that the permanent stay power involved the exercise of a discretion.²¹⁵ Consequently, Gotterson A-JA addressed the question of whether the primary judge had erred in the exercise of her discretion and concluded that Ms Willmot

211 *Willmot v Queensland* [2022] QSC 167 at [79] (citation omitted).

212 *Willmot v Queensland* [2022] QSC 167 at [80].

213 (2023) 97 ALJR 857 at 865 [15], 881 [95], 892 [161]; 414 ALR 635 at 641, 663, 678.

214 (2019) 100 NSWLR 218.

215 *Willmot v Queensland* [2023] QCA 102 at [48].

had not established an error or errors that would vitiate the exercise of that discretion.²¹⁶

171 Even so, Gotterson A-JA drew several inferences from the evidence which are of relevance to the burdensome effect of a trial of Ms Willmot's claims on the State. In particular, Gotterson A-JA rejected a contention that there was "sufficient useful evidence" available for a trial. His Honour considered that the availability to Ms Willmot of evidence that might well assist to establish her claim does not assure a fair trial between the parties, and that the relevant evidence did not "repair the State's inability to investigate or obtain instructions, lead evidence or cross-examine about the foundational allegations".²¹⁷ Gotterson A-JA concluded that a trial in this case would involve no real opportunity for the State to participate in the hearing, or to contest the hearing or to admit liability on an informed basis, with the consequence that any hearing would be no more than a formal enactment of the process of hearing and determining Ms Willmot's claim and would risk being a "solemn farce".²¹⁸

172 Concerning Ms Willmot's case based on the alleged sexual assault by NW, Gotterson A-JA rejected a contention that the primary judge erred in her assessment of the difficulties of conducting a trial on the issue of causation. Gotterson A-JA found that the primary judge did not err in that assessment and accepted implicitly that the finding that it would be "insurmountably difficult" to extricate the impact of NW's alleged assault from Ms Willmot's other claims (which would have been permanently stayed) was relevant to whether there should also be a permanent stay of this aspect of Ms Willmot's proceeding.²¹⁹

173 Finally, concerning the availability of RS to give evidence in respect of the alleged sexual abuse by Jack Demlin, Gotterson A-JA concluded that this did not "repair the significant disadvantage to the State arising from the unavailability to it of a contradictor with respect to the critical factual issue of whether Jack Demlin sexually assaulted Ms Willmot".²²⁰ Rather, the prospect of RS giving evidence served "to illustrate the significant forensic disadvantage that the State would face were RS to give evidence and the unfairness to it that would result".²²¹

216 *Willmot v Queensland* [2023] QCA 102 at [87].

217 *Willmot v Queensland* [2023] QCA 102 at [68].

218 *Willmot v Queensland* [2023] QCA 102 at [70].

219 *Willmot v Queensland* [2023] QCA 102 at [77].

220 *Willmot v Queensland* [2023] QCA 102 at [84].

221 *Willmot v Queensland* [2023] QCA 102 at [84].

Ms Willmot's grounds of appeal

174 The notice of appeal did not bring the substance of Ms Willmot's appeal into clear focus, not least because it was not amended to address the effect of this Court's decision in *GLJ*.²²² The single ground of appeal, based on the incorrect premise that a power to order a permanent stay of proceedings is discretionary, was that the Court of Appeal erred by determining that the primary judge had not erred in the exercise of that discretion.

175 Even so, the State contended that both the primary judge and the Court of Appeal had approached the case on an evaluative basis, and the issue argued by the parties was whether the Court of Appeal erred in rejecting Ms Willmot's appeal from the primary judge's evaluative assessment that her proceeding should be permanently stayed. That question was examined by reference to five alleged errors by the Court of Appeal.

"Material difference" errors

176 The first alleged error concerned the significance of the State's inability to investigate foundational facts in the exercise of the primary judge's discretion, in the light of Ms Willmot's claim that investigation by the State of those facts at an earlier time was unlikely to have yielded valuable evidence. The second alleged error challenged the Court of Appeal's rejection of Ms Willmot's contention that the State bears an onus of demonstrating that the State's capacity to obtain instructions for the purpose of defending a claim would have been materially different if Ms Willmot's proceeding had been commenced earlier and, specifically, at a time when the alleged perpetrators, or persons who could have given "instructions", were alive.

177 The passage of time diminishes the prospect of a fair trial: "[w]here there is delay the whole quality of justice deteriorates".²²³ The idea that "[d]elay impoverishes the evidence available to determine [a] claim"²²⁴ is that, over time, the quality of evidence tends to become deficient or insufficient for the purpose of resolving disputes about questions of fact. The dilemma pointed to by Ms Willmot is that, in some cases, there will be a paucity of evidence available to the defendant even if the proceedings are commenced very shortly after the alleged events. If it is accepted to be possible to conduct a fair trial in such a case, why should it be any less possible to conduct a fair trial several decades after the event? Ms Willmot

²²² (2023) 97 ALJR 857; 414 ALR 635.

²²³ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551, quoting *R v Lawrence* [1982] AC 510 at 517.

²²⁴ *Abdulla v Birmingham City Council* [2012] ICR 1419 at 1436 [41].

submits that the present matter is a case in which the State almost inevitably faced the forensic disadvantage of a paucity of evidence because of the nature of the alleged assaults, and her young age and other circumstances at the time of the alleged events.

178 The burdensome effects of the passage of time that may make it impossible to conduct a fair trial concern the loss of forensic opportunities. The effect of lost opportunities must be considered in the circumstances of the case. If an opportunity never existed in the first place, the disadvantage resulting from that absence of opportunity cannot be attributed to the passage of time. However, the fact that some forensic opportunity never existed may render the loss of other opportunities more burdensome.

179 These observations are particularly relevant to the State's inability to investigate the so-called foundational facts alleged by Ms Willmot. Jack Demlin died in 1962 and Tottie Demlin (his wife and Ms Willmot's foster mother) died in 1965, while Ms Willmot was still a child and, accordingly, well before she was in a position to commence proceedings against the State for damages for the alleged harm that she suffered at the Demlins' hands. The State therefore lost no real opportunity to make inquiries of the Demlins about Ms Willmot's allegations by reason of the time that it has taken for Ms Willmot to commence her proceeding.

180 In conclusion, the first alleged error assumes incorrectly that the primary judge was exercising a discretion. Further, the Court of Appeal's reasons incorrectly assumed that any inability on the part of State to investigate the foundational facts because of the non-availability of the alleged perpetrators was relevant to whether a permanent stay should be granted, without considering the circumstances in which that disadvantage arose and, consequently, whether that disadvantage resulted in a burdensome effect upon the State's participation in a trial that has arisen by the lapse of time. As to the second alleged error, the Court of Appeal was correct that the State did not have to prove a material difference in its capacity to defend the proceedings by reference to the hypothetical position that, had the complaint been brought earlier, the alleged perpetrators or persons who could have given the State instructions about the alleged facts would have been alive. In the circumstances, that hypothetical position was not capable of establishing a lost forensic opportunity.

The availability of RS to "repair" the State's inability to address the allegations of sexual abuse by Jack Demlin

181 The third alleged error challenges the Court of Appeal's finding that the availability of evidence in support of Ms Willmot's claim, in addition to her own evidence about the alleged assaults, "does not repair the State's inability to investigate or obtain instructions, lead evidence or cross-examine about the

foundational allegations".²²⁵ The finding is challenged by Ms Willmot by reference to the evidence of a single witness, RS. It was argued that RS's evidence should have been perceived as additional independent evidence available to the Court to determine the truth of Ms Willmot's allegations. The argument did not go so far as to contend that any forensic disadvantages facing the State by reason of the effluxion of time were fully offset by the availability of RS. Rather, the argument was to the effect that RS's availability and asserted direct knowledge of the alleged facts provided the State with a sufficient opportunity to make inquiries and investigate the alleged facts from a source independent of Ms Willmot.

182 The State did not suggest that RS had a relationship with Ms Willmot that affected her status as an independent witness. However, the State submitted that, as RS was a claimant against the State for damages arising from the matters about which she would give evidence, the Court of Appeal's reasoning was correct because RS had an interest in her evidence being accepted that went beyond that of a disinterested witness.

183 RS's availability does afford the State with an opportunity of the kind identified by Ms Willmot. Inquiries directed to RS may assist the State to make an informed decision about whether to admit or deny the alleged facts. It is relatively unusual (although by no means unheard of) for allegations to be made about sexual abuse that occurred in the presence of a third party. The availability of an alleged eyewitness is an important source of information about the veracity of the alleged facts. As Edelman J has noted, another relevant matter is that RS's younger brother, who slept in the room where the alleged sexual assaults took place, died in about 2008.²²⁶ The finding that RS's availability does not amount to a "repair" of the prejudice suffered by the State is not false, but it is flawed to the extent that the finding is not directed to an evaluation of the State's situation having regard to all of the known facts.

Alleged sexual abuse by NW

184 The fourth alleged error challenges the Court of Appeal's finding, concerning Ms Willmot's case on causation, that the evidence of Dr Pant, a psychiatrist, supported the primary judge's finding that it would be "insurmountably difficult" to extricate the impact of the alleged assault of Ms Willmot by NW from the impacts of Ms Willmot's alleged physical and sexual abuse while in the care of the Demlins, physical abuse at the Girls' Dormitory at Cherbourg ("the Girls' Dorm") and of other life events. The argument about causation arose on the case concerning NW on the basis that, in contrast to

²²⁵ *Willmot v Queensland* [2023] QCA 102 at [68].

²²⁶ Edelman J at [118].

Ms Willmot's other claims, the State was not precluded from investigating the alleged facts of his sexual assault upon Ms Willmot because NW was still alive.

185 As explained in the joint judgment,²²⁷ Dr Pant's evidence was an insufficient basis for the primary judge's finding of insurmountable difficulty.

The significance that the State had not sought to interview NW about his alleged sexual assault of Ms Willmot

186 The fifth and final alleged error also concerns Ms Willmot's case based on her alleged sexual abuse by NW. In the light of the Court of Appeal's error in upholding the finding of "insurmountable difficulty" of establishing causation, Gotterson A-JA's conclusion that that the primary judge did not err in failing to place weight on the State's lack of inquiry directed to NW cannot stand.²²⁸

Conclusion as to alleged errors by the Court of Appeal

187 In the light of this Court's decision in *GLJ*, the Court of Appeal erred by approaching its appellate task as involving the question whether the primary judge had erred in the exercise of her discretion. Additionally, the Court of Appeal made the errors identified above concerning Ms Willmot's claim based upon the alleged sexual assault by NW. The consequences of these errors for the disposition of the appeal to this Court are discussed below.

The State's non-delegable duty owed to Ms Willmot

188 Ms Willmot's amended statement of claim alleges that the State owed her a "non-delegable duty ... to take all reasonable care to avoid her suffering harm" while she was a "State Child" within the meaning of the *State Children Act 1911* (Qld) or was subject to the *Aboriginals Protection and Restriction of Sale of Opium Act 1897* (Qld) ("the 1897 Act"). The State has admitted that it owed Ms Willmot a non-delegable duty "to take reasonable care" to protect Ms Willmot from any foreseeable risk of harm and/or injury that might be occasioned to her while she was a State Child or subject to the 1897 Act.

189 The precise content of the State's non-delegable duty was not directly in issue on the appeal, and is a matter for determination at trial. As the joint judgment observes, a non-delegable duty is not merely a duty to take care, but a duty to ensure that care is taken.²²⁹ Currently, Ms Willmot does not allege a duty upon the

²²⁷ Joint judgment at [46].

²²⁸ *Willmot v Queensland* [2023] QCA 102 at [71]-[72], [80].

²²⁹ *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270-271; *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686.

State to ensure that reasonable care was taken for her. If she intends to base her claims upon breach of such a duty, she will need to amend her pleading.

190 As classically expressed, a non-delegable duty owed by the owner of a party wall to the adjoining owner "went as far as to require [the defendant] to see that reasonable skill and care were exercised in [the relevant] operations".²³⁰ This expression reflects the liability of the holder of a non-delegable duty of care if a person engaged to perform the duty on their behalf acts without due care.²³¹ For example, in the case of the non-delegable duty of care owed by a school authority, its scope extends to require "reasonable steps to protect the pupil against risks of injury which should reasonably have been foreseen".²³²

191 The stringency of a non-delegable duty lies in the inability of the defendant to avoid liability simply by delegating a task (that is required to be performed pursuant to the duty) to a third party.²³³ A non-delegable duty does not give rise to strict liability in the sense of liability that is imposed regardless of fault on the part of the person to whom the performance of the defendant's task was delegated ("the third party").²³⁴ That is, a non-delegable duty does not require the defendant to ensure that no harm is suffered by the person to whom the non-delegable duty is owed.

192 Thus, in any case where it is alleged that a defendant has breached a non-delegable duty, issues may arise both about the scope of the defendant's duty to take reasonable care for the plaintiff and about whether the third party failed to take reasonable care. In a case such as this, there is an issue about whether the non-delegable duty extends to the prevention of intentional criminal conduct by the third party (bearing in mind that the existence of such a duty was denied by five

230 *Hughes v Percival* (1883) 8 App Cas 443 at 445-446, quoted with approval in *Woodland v Swimming Teachers Association* [2014] AC 537 at 575 [10].

231 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270-271; *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686.

232 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 280.

233 *Hughes v Percival* (1883) 8 App Cas 443 at 446; *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685-686; *New South Wales v Lepore* (2003) 212 CLR 511 at 530 [26], 599 [257].

234 *Hughes v Percival* (1883) 8 App Cas 443 at 445-446, quoted with approval in *Woodland v Swimming Teachers Association* [2014] AC 537 at 575 [10]; *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270, 280; *New South Wales v Lepore* (2003) 212 CLR 511 at 533 [34], 552 [101], 601-602 [266].

Justices in *New South Wales v Lepore*²³⁵). There may also be an issue about whether the scope of the alleged non-delegable duty is affected by the statutory liberty under the laws of Queensland conferred upon a person in the place of a parent to engage in "[d]omestic discipline".²³⁶

Conclusion

193 In the exercise of its appellate jurisdiction, this Court may affirm, reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance.²³⁷ Having identified error, the Court may apply the principles governing permanent stays of civil proceedings to the facts as found.

Claims in respect of Uncle Pickering, NW and physical abuse by the Demlins

194 I agree with the joint judgment that Ms Willmot's claim should be permanently stayed in relation to the alleged sexual abuse by her cousin or great-uncle, known as "Uncle Pickering". The claim was first notified to the State in 2020, 53 years after the alleged event. That effluxion of time gives rise to a general presumption that the State would be significantly prejudiced in defending the claim by the loss of opportunities to investigate the facts, especially circumstantial facts, and adduce relevant evidence.²³⁸ As the joint judgment states, the State has no ability to investigate the foundational facts. For example, the effluxion of time appears to have deprived the State from ascertaining such basic information as the full name of the alleged perpetrator, who was living at or staying in the house where the alleged assault occurred and how Ms Willmot came to be at the house at the relevant time.

195 I also agree with the joint judgment that Ms Willmot's claim in relation to the alleged sexual abuse by NW should proceed at this time because the State has a pathway to investigate the claim by making inquiries of NW. Contrary to the Court of Appeal's view, and while difficulties in testing causation several decades after an event may impair the fact-finding capacity of a court, the available evidence does not show that this impairment would operate to the disadvantage of the State rather than Ms Willmot, nor that the difficulty is "insurmountable".

235 (2003) 212 CLR 511 at 533 [34], 547 [79], 552-553 [103]-[105], 562 [134], 601-603 [264]-[271], 624 [340].

236 *Criminal Code* (Qld), s 280. See also *White v Weller; Ex parte White* [1959] Qd R 192.

237 *Judiciary Act 1903* (Cth), s 37.

238 See, eg, *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 556.

However, contrary to the joint judgment, I do not accept that the apparent availability of NW for two years after the proceeding was instituted is a sufficient basis for a conclusion that a trial would not be unfair. More information would be required about the State's capacity to evaluate and respond to this aspect of Ms Willmot's claims.

196 Concerning the allegations of physical abuse by the Demlins, I also agree with the joint judgment that the allegations are so vague as to be incapable of meaningful response, defence or contradiction.²³⁹ Ordinarily, the appropriate remedy for an allegation in a pleading that is so vague that the other party is not given notice of the real substance of the claim is to strike out the allegation as disclosing no reasonable cause of action, or likely to cause prejudice.²⁴⁰

Claim in respect of sexual abuse by Jack Demlin

197 I also agree with the joint judgment that Ms Willmot's claim in relation to sexual abuse by Jack Demlin should proceed. The alleged events occurred between 1957 and 1959, and were notified to the State in 2019, approximately 60 years later. This passage of time gives rise to a strong general presumption that the State would be significantly prejudiced in defending the claim by the loss of opportunities to investigate the facts, especially circumstantial facts, and adduce relevant evidence.²⁴¹

198 However, this is one of those claims where the opportunity to investigate the alleged sexual assaults was always limited because of the nature of the allegations, and the possibility of significant evidence available to be adduced to contradict or cast doubt upon Ms Willmot's allegations was always remote. There is no dispute that Ms Willmot was placed in the Demlins' care. The State has not identified any lost opportunity to rely on documentary evidence concerning Jack Demlin's performance of his role as Ms Willmot's foster parent. The deaths of Jack and Tottie Demlin did not involve any substantial relevant prejudice where those deaths each occurred well before any claim might realistically have been brought by Ms Willmot.²⁴² Although the relevant limitation period was not identified, the State did not suggest that the deaths of the Demlins occurred after the expiry of the previous limitation period. There is no reason to think that the State might have obtained a permanent stay of proceedings if they had been brought before that

²³⁹ Joint judgment at [61].

²⁴⁰ *Uniform Civil Procedure Rules 1999* (Qld), r 171.

²⁴¹ See, eg, *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 556.

²⁴² See the *Law Reform (Limitation of Actions) Act 1956* (Qld), s 5.

limitation period expired. Nor is there any reason to think that the State was denied any realistic opportunity to make inquiries of the Demlins, which might or might not have produced a bare denial of the alleged facts.

199 Conversely, and unusually, the State has a significant opportunity to investigate the alleged facts by making inquiries of RS, who, on Ms Willmot's account, was in the room at the time of the alleged assaults. In those circumstances, the State did not demonstrate that the undoubted burdensome effect upon it of a trial so long after the alleged events would be so serious that a fair trial is not possible.

The claim in respect of physical abuse at the Girls' Dorm

200 Finally, as the joint judgment has identified, the State has lost many opportunities to investigate the alleged facts concerning the alleged physical abuse at the Girls' Dorm as the result of deaths of people who worked at or managed the dorm. The alleged events occurred in 1959 and were first notified to the State in 2008, approximately 50 years later. Most relevantly, the alleged perpetrator, Maude Phillips, appears to have died in 1982, when Ms Willmot was about 28 years old. The parties did not make submissions about whether Ms Willmot's claim concerning her mistreatment by Ms Phillips was statute-barred before Ms Phillips' death. I accept that the State has suffered significant forensic disadvantage by reason of the death of Ms Phillips, as well as the later deaths of the dorm matron, Myra Pascoe, and the hygiene officer, Jack Pascoe, as a result of the passage of time between 1982 and 2020, when Ms Willmot commenced proceedings against the State. That forensic disadvantage is amplified by the State's inability to locate any other person who worked at the Girls' Dorm at the relevant times, and other people who lived at the dorm as children at the times of the alleged assaults.

201 The State would not be materially assisted in its participation in a trial by a 1951 letter, complaining about Ms Phillips, and another document which is said to refer to Ms Phillips caning the children "at times". Those documents are fragments that provide no useful information about the precise allegations made by Ms Willmot. In particular, even if it is assumed that Ms Phillips had a practice of corporal punishment while Ms Willmot resided at the Girls' Dorm, the mere fact of such a practice would say nothing about the precise allegations.

202 However, I am not persuaded that the State is so disadvantaged by the loss of opportunities to investigate Ms Willmot's allegations of physical abuse at the Girls' Dorm that a fair trial of that aspect of her case is not possible. Principally, this is because there are two witnesses who have given statements about the treatment of children at the Girls' Dorm by Ms Phillips, at around the time when Ms Willmot was also residing at the dorm. Those witnesses are a potential source of direct and indirect information about Ms Willmot's alleged physical abuse. In addition, the State has not demonstrated that there are no other people who resided at the Girls' Dorm who might assist the State in investigating Ms Willmot's

allegations of physical abuse. The evidence does not demonstrate that Ms Willmot's inability to provide dates of when the alleged physical assaults occurred precludes investigation of the alleged facts.

203 Ultimately, the State's opportunity to participate in a trial in respect of Ms Willmot's claims of physical abuse at the Girls' Dorm is undoubtedly restricted by the time that has passed since the alleged assaults. However, having regard to the policy of the legislature discerned in s 11A of the *Limitation of Actions Act 1974* (Qld), that restricted opportunity is not so burdensome so as to render the trial unfair. In contrast with the position in *GLJ*, witnesses are still known to be available to address inquiries about the facts of the claims and circumstantial facts.

Orders

204 The following orders should be made:

- (1) The appeal be allowed, in part, with the respondent to pay the appellant's costs.
- (2) The orders of the Court of Appeal of the Supreme Court of Queensland made on 16 May 2023 be set aside and, in their place, it be ordered that:
 - (i) the appeal be allowed, in part, with the respondent to pay the appellant's costs;
 - (ii) the order of the Supreme Court of Queensland of 22 August 2022 be set aside and, in its place, order that:
 - (a) subject to paras (b) and (c), the defendant's application for a permanent stay of the proceeding is dismissed;
 - (b) the claim pleaded in paras 9(b) and 11 of the amended statement of claim dated 20 August 2021 is permanently stayed;
 - (c) the claim pleaded in para 12 of the amended statement of claim is struck out; and
 - (d) the defendant pay the plaintiff's costs of the application.