HIGH COURT OF AUSTRALIA

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

RC APPLICANT

AND

THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST RESPONDENT

RC v The Salvation Army (Western Australia) Property Trust
[2024] HCA 43
Date of Hearing: 7 & 8 May 2024
Date of Judgment: 13 November 2024
P7/2023

ORDER

1. *Special leave to appeal granted.*

2. *Appeal allowed with costs, to be taxed if not agreed.*

3. *Set aside orders 2, 3, 4 and 5 of the Court of Appeal of the Supreme Court of Western Australia made on 17 February 2023 and, in their place, order that:*

    (a) *The appeal be allowed.*

    (b) *The orders of the District Court of Western Australia made on 1 December 2021 be set aside and, in their place, order that:*

        (i) *the defendant's application of 25 May 2021 that the plaintiff's action be permanently stayed be dismissed; and*

        (ii) *the defendant pay the plaintiff's costs of the application forthwith, to be taxed if not agreed.*

(c) The respondent pay the appellant's costs of the appeal, to be taxed if not agreed.

On appeal from the Supreme Court of Western Australia

Representation

M D Cuerden SC with T J Hammond SC and L D Coci for the applicant (instructed by Bradley Bayly Legal)

D F Villa SC with R Young SC and H C Cooper for the respondent (instructed by Mills Oakley)

CATCHWORDS

RC v The Salvation Army (Western Australia) Property Trust

Courts – Abuse of process – Permanent stay of proceedings – Where claim for damages for personal injury for alleged sexual abuse occurring in 1959 and 1960 – Where no limitation period in respect of child sexual abuse actions under s 6A of *Limitation Act 2005* (WA) – Where deaths of alleged perpetrator and other potential witnesses – Where absence of documentary evidence – Whether trial necessarily unfair – Whether continuation of proceedings an abuse of process justifying permanent stay.

Words and phrases – "abuse of process", "child sexual abuse", "exceptional circumstances", "fair trial", "limitation period", "non-delegable duty", "permanent stay", "prejudice", "unfairness".

Limitation Act 2005 (WA), s 6A.

1 GAGELER CJ, GORDON, JAGOT AND BEECH-JONES JJ. On 15 November 2018, the applicant ("RC") commenced an action against the respondent ("the Salvation Army") in the District Court of Western Australia claiming damages for sexual abuse. He alleged that a Lieutenant Frank Swift had abused him between August 1959 and April 1960,[1] when RC was 12 and 13 years old and in the care of the Nedlands Boys' Home ("the Home"). The Home was owned and operated by the Salvation Army. Lt Swift was a Salvation Army Officer at the Home.

2 The Salvation Army applied for a permanent stay of the proceedings on the basis that it could not meaningfully defend the proceedings. The primary judge granted the permanent stay. RC's appeal to the Court of Appeal of the Supreme Court of Western Australia was dismissed.

3 RC's application for special leave to appeal to this Court was heard immediately following the appeal in *Willmot v Queensland*.[2] In this matter, and in *Willmot*, the Court was required to consider the intersection between the principles relating to a permanent stay and a provision that lifted the time-bar on commencing proceedings for a claim for child sexual abuse.

4 In this case, s 6A(2) of the *Limitation Act 2005* (WA), which is in substantially similar terms to equivalent provisions in other States and Territories,[3] provided that "[d]espite anything in this or any other Act, no limitation period applies in respect of a child sexual abuse action".[4] By s 6A(5), the *Limitation Act* preserved a court's ability to control such proceedings as follows:

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1 The Statement of Claim alleges that RC was placed in the Home for a period of approximately eight months in 1957, when he was aged 12. That cannot be correct as RC turned 12 in 1959.

2 [2024] HCA 42.

3 *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 of Actions Act 1974* (Qld), s 11A; *Limitation Act 1981* (NT), s 5A; *Limitation Act 1985* (ACT), s 21C.

4 A "child sexual abuse action" is defined to mean "an action on a child sexual abuse cause of action"; "child sexual abuse cause of action" is defined to mean "a cause of action that relates, directly or indirectly, to a personal injury of the person to whom

"This section does not limit –

(a) any inherent, implied or statutory jurisdiction of a court; or

(b) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.

Note for this subsection:

For example, this section is not intended to 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."

5 The principles are addressed in *Willmot*.[5] Applying those principles to the unique facts of RC's claim, the Court of Appeal was wrong to conclude that there could be no fair trial of these proceedings. The Salvation Army's application for a permanent stay of the proceedings should have been dismissed and the proceedings should proceed to trial.

Issues joined

6 There is no dispute that: the Home was owned and operated by the Salvation Army; the Home provided residential care for boys; the Home accommodated wards of the State as well as private admissions; the accommodation for boys was of a dormitory style and accommodated approximately 120 boys; the Home was a "subsidised institution" for the purposes of ss 14 and 15 of the *Child Welfare Act 1947* (WA); and the Salvation Army promoted itself as an organisation that accommodated and supported boys who were in need of care. The Salvation Army accepts that Lt Swift was stationed at the Home from 15 January 1959 until 6 September 1962.[6] Lt Swift retired in September 1989 when he was 65 years old. He died in October 2006. The officer in charge of the Home during the period of the alleged abuse was a Major Watson. Maj Watson died in August 1968.

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the cause of action accrues, where the injury results from child sexual abuse of the person": *Limitation Act*, s 6A(1).

5 [2024] HCA 42 at [15]-[32].

6 The Salvation Army has Lt Swift's personnel records.

7 RC was born in 1947. The following allegations are drawn from RC's Statement of Claim. RC alleges that in 1957, at the age of 12 and after his parents' marriage had broken down, he was placed into care at the Home for a period of approximately eight months ("the Placement"). RC alleges he was sexually assaulted and sexually abused by Lt Swift ("the Nedlands Sexual Assaults and Abuse") during the Placement. RC divides the Nedlands Sexual Assaults and Abuse into four categories.

8 First, when at the Home, RC would be required to line up for the shower whilst naked and, during that time, Lt Swift would regularly come into the showering area and look at RC and the other boys.

9 Second, approximately six weeks after the Placement began, Lt Swift lured RC into the Recreation Hall at the Home at night. Lt Swift began to cuddle RC, told RC that he loved him and then proceeded to place his hand on RC's crotch area, as well as demanding that RC perform oral sex on and masturbate him. These assaults then occurred multiple times each week during the Placement.

10 Third, RC was regularly required to collect broken biscuits from the Mills and Wares factory in a truck driven by Lt Swift. RC was routinely ordered by Lt Swift to sit next to him whilst Lt Swift was driving and Lt Swift would touch RC's knee under the pretence of missing the gear stick whilst changing gears.

11 Fourth, some weeks before the end of the Placement, Lt Swift anally raped RC whilst RC was alone in his dormitory on a Sunday after being dropped back to the Home early by one of his parents. RC alleges that he reported the rape to Maj Watson, who ignored what RC said.

12 RC's Statement of Claim pleaded three causes of action against the Salvation Army: first, a claim for breach of a "non-delegable duty to exercise reasonable care for the safety of [RC]"; second, a breach of a statutory duty of care pursuant to the *Child Welfare Act* that he would not be harmed by reason of a breach of that Act and its regulations by the Salvation Army, its servants or agents; and third, a claim that the Salvation Army was vicariously liable for Lt Swift's intentional torts inflicted on RC. RC also alleged that the Salvation Army's "conduct fell so far short of [the] acceptable standard for ensuring the proper care and welfare of children under its care as to constitute a contumelious disregard for [RC's] rights to care and protection resulting in a violation to [RC's] right to bodily integrity".

13 The Salvation Army joined issue in its Defence on a number of matters. It pleaded that it did not know and could not admit the allegation that RC was at the Home on the basis that it had searched for but does not possess any records

concerning RC. It did not admit that RC was in fact sexually assaulted or abused by Lt Swift because: (1) it does not know if RC was subjected to the Nedlands Sexual Assaults and Abuse; and (2) the allegations were "not properly particularised in that they involve the alleged conduct of a deceased former officer of the [Salvation Army] on unspecified occasions and as a result, the [Salvation Army] does not know the case it is to meet at trial". The Salvation Army also does not admit that RC told Maj Watson that he had been raped by Lt Swift. The Salvation Army pleaded that it had searched for but does not possess any records concerning RC or any reports made by RC.

14 In answer to the claim of a non-delegable duty, the Salvation Army's response is no more than a response to a simple claim for negligence. The Salvation Army admits that it owed a duty of care to children residing at the Home; that that duty required the Salvation Army to take such precautions as a reasonable person in its position would have taken, in accordance with the standards of the day, in response to risks of harm that were foreseeable and not insignificant; but denies that it breached any duty of care it owed RC. The Salvation Army does not admit the existence of any statutory duty. The Salvation Army denies that it is vicariously liable to RC. The Salvation Army also denies that RC sustained any injury, loss and damage as a consequence of any tort for which it is vicariously liable or any breach of duty.

15 RC's pleaded case and the Salvation Army's defence to that claim that has just been summarised is the case the Salvation Army sought to permanently stay. It is by a close analysis of the pleadings at the date of the hearing of the stay application that the factual and legal issues in dispute between the parties are identified. A stay application is not a trial. It is the disputed issues, revealed by that analysis of the pleadings, that are considered in determining whether there can be a fair trial of the issues joined between the parties. The evidence adduced by the parties on the stay application must be relevant to that question.[7]

Evidence filed on application for stay

16 Annexed to an affidavit filed by the Salvation Army in support of its application for a stay was a 73-page statement given to the Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission") by Commissioner Tidd, Territorial Commander Australia Southern Territory of

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7 *Willmot* [2024] HCA 42 at [31]-[32].

The Salvation Army,[8] dated 17 September 2015. That statement addressed the way in which the Southern Territory of The Salvation Army ("TSAS") had conducted boys' homes in Eden Park in South Australia, Box Hill and Bayswater in Victoria, and the Home in Nedlands in Western Australia. Commissioner Tidd recorded that, having come to Australia and assumed the role of Territorial Commander in 2013, he had acquainted himself with the fact that "a large number of former residents of homes run by TSAS had suffered severe sexual, physical and emotional abuse while residents at these homes". That evidence was admitted without restriction before the primary judge.

17 The statement was divided into four sections: (I) Institutional Structure; (II) Relationship between TSAS and the South Australian, Victorian and Western Australian Governments; (III) Response to Allegations of Child Sexual Abuse at TSAS Institutions (including the Home); and (IV) Criminal Investigations and Proceedings. It set out, in detail, an historical analysis of each of these topics, as well as a summary of the position of TSAS in 2015, when the statement was provided to the Royal Commission.

18 Under the third heading – Response to Allegations of Child Sexual Abuse at TSAS Institutions – Commissioner Tidd records the conclusions he reached about the way in which TSAS had conducted the Home as well as boys' homes in Eden Park, Box Hill, and Bayswater. That is, before the Royal Commission in 2015, the Salvation Army considered that it was able to form conclusions about what it had done and not done to protect children and what it had done and not done in response to complaints of abuse.

19 It is not appropriate or necessary to set out each of the conclusions reached by Commissioner Tidd. In considering the Salvation Army's application for a stay, it is sufficient to refer to the fact that Commissioner Tidd states that "it seems clear that there were care leavers [children in the care of a home operated by TSAS] who told officers or other staff that they were being abused at TSAS homes. It seems that in most cases nothing was done about these allegations" and that "[m]ost ... claims of abuse have arisen in more recent times, after the homes have all been closed". No less significantly, Commissioner Tidd records that he "agree[s] entirely with the conclusion" of a Mr Walker that TSAS "failed to adequately explore and investigate claims of abuse and it failed to appropriately respond to such claims". Commissioner Tidd then states that "[i]t is nothing short

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8 Commissioner Tidd defined the Southern Territory to cover Victoria, South Australia, Western Australia, the Northern Territory and Tasmania. The respondent was part of the Southern Territory of The Salvation Army.

of tragic that these poor children's pleas for help went unanswered. There are so many lives that could have been so different had the pleas for help been answered."

20 The reference to Mr Walker is important. As Commissioner Tidd records in his statement, after a Major Roberts appeared before the Victorian Inquiry,[9] TSAS asked Mr Walker, a former detective of the New Zealand Police Force and a then member of TSAS's Professional Standards Unit ("PSU"), to undertake a "detailed independent investigation" into TSAS's "cultural practices" and "whether any kind of culture prevailed that enabled child abuse to occur".

21 Mr Walker had been the director of the Territorial PSU for TSAS between April 2014 and December 2018, and had been involved in the settlement of other claims in relation to Lt Swift. A copy of Mr Walker's report entitled "Investigation into whether The Salvation Army's historical responses to child sexual abuse were affected by cultural, endemic or systemic failings of the organisation", dated 20 August 2015, had been given to the Royal Commission. Commissioner Tidd unreservedly accepted Mr Walker's findings and conclusions. Commissioner Tidd further gave evidence that by not reporting allegations of child sexual abuse to the police, it had the effect of concealing child sexual abuse and protecting alleged perpetrators of child sexual abuse.

22 Of course, the allegation made by RC relates only to the conduct of one officer towards RC. But RC alleges that the Salvation Army owed him a non-delegable duty to ensure that reasonable care was taken of him, which included a duty to protect him from abuse, including sexual abuse, by officers of the Salvation Army. And, as will be described below, the Salvation Army had settled claims against Lt Swift, including by issuing apologies many years prior to the Royal Commission. This raises a question as to the case the Salvation Army might have made for a permanent stay if the claim had been made before Lt Swift or Maj Watson had died. Whether the Tidd statement or the Walker report are admissible at a trial of RC's claim is irrelevant. What those documents reveal is that, by no later than August 2015, the Salvation Army has been able to identify relevant material from which it has been able to draw conclusions about what the Salvation Army did and did not do during the relevant period but also to

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9 The Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, which conducted hearings in 2012 and 2013. The final report was published 13 November 2013: Victoria, Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013).

acknowledge that Lt Swift did assault boys during the same period. It is not clear what, if anything, has changed since then.

23 Finally, an affidavit sworn by RC's solicitor and filed in response to the stay application refers to at least ten men who alleged they suffered abuse by Lt Swift in the 1950s and 1960s when they were staying at one of the homes, including the Home. Each person is identified as well as the details of: their alleged physical or sexual abuse by Lt Swift; when they first raised their allegations (one made a complaint about Lt Swift as early as 1961[10]); and if the Salvation Army had waived reliance on a pre-existing limitation period and received and settled any claims of alleged sexual abuse by Lt Swift (the earliest claim having been notified in 2003). That list is not exhaustive. Again, whether that evidence is admissible at a trial of RC's claims (whether as tendency evidence or on some other basis) is irrelevant to the application for a permanent stay. The uncontradicted affidavit evidence reinforces that the Salvation Army has been aware of allegations against Lt Swift for years, if not decades; has been able to draw conclusions about what the Salvation Army did and did not do during the relevant period; and has acknowledged that, during that same period, Lt Swift did assault boys. Again, it is not clear what, if anything, has changed since then.

24 Something needs to be said about RC's affidavit which was filed in response to the Salvation Army's stay application. As explained in *Willmot*, in determining whether there can be a fair trial of the pleaded claim, it is the disputed legal and factual issues revealed by the pleadings that are sought to be stayed by a defendant.[11] The defendant bears the onus and makes forensic decisions about how it frames its arguments for a stay and that, in turn, determines the evidence that is relevant to the question of whether there can be a fair trial of the pleaded claims. Affidavit evidence filed by both the plaintiff and the defendant may address, and would be expected to address, matters relevant to the question of whether or not there can be a fair trial of the disputed factual and legal issues. The affidavit evidence cannot be used to expand the scope, or change the nature, of the underlying allegations. In the present matter, there are discrepancies between the Nedlands Sexual Assaults and Abuse as pleaded and how the abuse is described in RC's affidavit. No application was made to amend RC's Statement of Claim.

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10 A contemporaneous note of the incident of alleged physical abuse and the complaint was prepared by the alleged victim, which is undated but was created prior to 10 May 1961.

11 *Willmot* [2024] HCA 42 at [31].

The application for a stay is to be considered on the basis that RC's claims are those pleaded as the Nedlands Sexual Assaults and Abuse.

A fair trial?

25 Consistent with the Defence filed in the proceedings, the Salvation Army submitted that there could not be a fair trial of the Nedlands Sexual Assaults and Abuse because: (1) the death of Lt Swift deprived it of the ability to confront him with the claims, and also the possibility that he would be a witness at the trial; (2) Maj Watson died in 1968, and he was the sole recipient of an alleged report made by RC whilst Lt Swift was still alive and where there is no record of that report; (3) there was an absence of other officers who were assigned to and worked at the Home during the relevant period who are still alive and could provide relevant information; and (4) there was an absence, following comprehensive searches, of relevant documentary evidence.

26 These allegations of prejudice must be considered in light of the issues joined between the parties in relation to each cause of action: non-delegable duty, statutory duty and vicarious liability.

Death of Lt Swift

27 As already mentioned, the Salvation Army does not admit that the Nedlands Sexual Assaults and Abuse occurred. It, however, has failed to demonstrate that it has realistically lost valuable witnesses who might be called at any trial of these allegations. At best, where it has been confirmed that RC and Lt Swift were at the Home at the same time during the relevant period, the Salvation Army shows no more than that it has lost the possibility of a bare denial by Lt Swift. That all that the Salvation Army lost was the possibility of a bare denial is consistent with the description a legal practitioner of the firm which has acted for TSAS in relation to abuse claims since 1994 gave to the Royal Commission about the conduct of those claims. The practitioner said that in his experience "officers almost always den[ied] any allegations of abuse" and, even when officers did admit abuse, "the admissions [were] often partial and limited to particular types of abuse (ie occasional hitting as punishment, but not sexual abuse)". A cross-examiner who is only missing a denial from an alleged perpetrator can still participate in the trial.

Death of Maj Watson

28 The Salvation Army has not lost valuable evidence by the death of Maj Watson. At most, Maj Watson could deny that a report was made. His only other possible response – to acknowledge that a report was made in some form – would assist RC. Similarly, the absence of documents relating to that report is not

a relevant prejudice to the Salvation Army: either the documents are not known to exist (the current position), or the documents did exist, and that would probably assist RC.

Other officers

29 As to the absence of officers assigned to the Home at the relevant time who are still alive and could provide relevant information, two of the 14 officers assigned to the Home were identified as being alive with available contact details. One former officer, now 86 years of age, was in a nursing home. Her daughter was asked to help obtain answers to questions, but that did not eventuate. A second officer was contacted by telephone in 2020 and a file note was made but not reproduced.

30 Further, there is no suggestion that the Salvation Army attempted to seek information from Lt Swift's wife, Doris Swift, whilst dealing with the many allegations against her husband. Whilst Doris Swift died on 17 May 2019, and appears to have had memory issues for two or so years prior to her death, there is no suggestion that she was unavailable whilst the Salvation Army was dealing with claims against Lt Swift in the early 2000s. Doris Swift was also an officer of the Salvation Army and must have had a detailed understanding of Lt Swift's duties. Whilst the Salvation Army identified Doris Swift as a potential witness who is no longer available to it, no explanation is given as to why such information was not sought from her prior to her death.

RC and other alleged victims of abuse by Lt Swift

31 The Salvation Army is not in the dark about the precise nature of RC's allegations. Further, RC's affidavit is detailed and specific.[12] Whilst the passage of time may have had a negative impact on RC's memory, this can be the subject of cross-examination and a submission that the trial judge should not be satisfied that some or all of the abuse occurred as alleged. RC could also be cross-examined on any discrepancies between the alleged abuse as pleaded and his descriptions of that abuse in his affidavit and the redress application.

32 As for the absence of records relating to the complaints, it is unclear what evidence of a failure to make a complaint would add to the trial. Assume the evidence was strong enough to support a finding that it was more probable than not that the plaintiff *did* not complain: that *might* have some effect in judging the

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12 cf *Connellan v Murphy* [2017] VSCA 116 at [57]; *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 235 [77].

overall credit of RC, but the *fact* (if it be so) that there was no complaint would say little about whether the events RC described did or did not occur. The Salvation Army has not established that the trial of that claim will be unfair.

33 Moreover, RC identified at least ten potential male witnesses (other than RC) who describe being sexually or physically abused by Lt Swift when they were children at the Home or at the homes in Box Hill or Bayswater in Victoria. There are similarities between that evidence and that of RC, including that Lt Swift: hugged or cuddled them; touched their penis or masturbated them; required or attempted to require them to perform oral sex; attempted or did anally rape them; and sexually abused them in their dormitory. Again, the Salvation Army complained of an absence of records relating to these complaints. But these witnesses can be cross-examined on inconsistencies between their evidence in the ordinary course.

34 The Salvation Army does not dispute that evidentiary tools[13] are available to attempt to alleviate unfairness in a prospective trial. As explained above, the Salvation Army has had the opportunity to identify, with a reasonable level of specificity, contextual information. It has not uncovered anything which directly substantiates or casts doubt upon the account given by RC. Showing only that the Salvation Army has not found any external evidence which it might use to challenge RC's evidence does not show that a trial of RC's allegations would be unfair.

35 The Salvation Army rightly submitted that there is no principled basis on which a judge could realistically reject an apparently credible and coherent account given by a survivor of sexual abuse at any trial. But that submission assumes that, after applying the ordinary common law techniques described in *Willmot*, RC's evidence would be accepted as credible and coherent. Equally, as the Salvation Army also acknowledged, the bare fact of some variations in RC's account of relevant events does not foreclose that the trial judge might be persuaded that RC's evidence, taken as a whole, is credible and coherent, recognising that it is commonly understood that such variations will often arise in cases of abuse and, in particular, abuse that occurred long in the past. Each of those matters is a question for trial. A trial of the allegations is not unfair merely because a pathway to a successful challenge to RC's evidence has not been revealed. The Salvation Army has sufficient material available to it to make an informed response to RC's evidence.

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13 *Willmot* [2024] HCA 42 at [30].

Non-delegable duty

36 That preceding analysis is important because the Salvation Army did not assert prejudice in relation to RC's pleaded claim of a breach of a non-delegable duty other than whether the abuse had in fact occurred. That is, the Salvation Army's only answer is that none of the alleged assaults occurred. That answer can be given but could not be supported by evidence from the alleged perpetrator denying the assaults or by Maj Watson denying the making of a complaint. Evidence of the first kind must be looked at in light of the acknowledgements, by way of apologies in September 2004 (in relation to a complaint of sexual abuse at the hands of Lt Swift at the home at Box Hill) and then in September 2018 (in relation to a complaint about sexual abuse at the hands of Lt Swift at the Home), that Lt Swift committed other assaults at both the Home and other boys' homes. The availability of that evidence to RC diminishes the significance of the alleged perpetrator's unavailability as a witness at trial.

Other pleaded claims

37 In relation to the issues joined regarding the other pleaded claims, the analysis is the same. The Salvation Army denies breach on the basis that it does not know if the abuse occurred; the claims are not particularised; and it had no knowledge of predatory conduct by Lt Swift. It positively pleads, however, that it "did supervise and control staff at the Home in a manner which accorded with the standards of the time". Similarly, causation is "generally in issue". Again, whether the harm occurred is in issue because the abuse is not admitted on the basis that the allegations are "not properly particularised" and are against a "deceased former officer". The report and statement given to the Royal Commission show that the Salvation Army considered it right to make a formal submission saying that there was no safe system of supervision and investigation at the homes operated by it, including at the Home.

38 It may be accepted that the Salvation Army holds incomplete records relating to the operation of its homes during the relevant period of alleged abuse. The Salvation Army does not identify documents known to be lost.[14] Rather, it described the prejudice in a more limited way – as an inability to identify whether relevant records existed. The considered position taken before the Royal Commission indicates that any contemporaneous complaint of sexual abuse would likely not have been recorded or investigated because of systemic and cultural failings within the Salvation Army. In those circumstances the burdensome effect

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

of the passage of time on the capacity of the Salvation Army to refer to documentary evidence is limited.[15]

39 And as to vicarious liability,[16] the Salvation Army was able to advance a positive pleading that Lt Swift was not an employee, but rather was an ordained minister, a position presumably taken because it has a detailed historical understanding of its institutional structure and also Lt Swift's personnel file. Information is available as to the role that Lt Swift in fact undertook at the Home from August 1959 to April 1960, including that he was a "Boys' Officer" when stationed at the Home.

Onus not discharged

40 The Salvation Army contends that in the end a trial will be a contest where RC makes allegations that the Salvation Army says it can do no more than deny. That contention is an incomplete description of the Salvation Army's position as it has sufficient information to make a meaningful response to RC's allegations. In any event, as explained in *Willmot*,[17] cases where a party can do no more than deny the main allegation are tried in the criminal courts every day. In such cases, a trial judge ordinarily exercises care before accepting uncorroborated evidence of this kind, and the required *level* of impairment is that the trial would be unfair, even if the trial judge heeds the *Longman* warnings.[18] In all the circumstances, the Salvation Army has not discharged its heavy onus to obtain a stay because it has not identified that the trial of the joined issues would be unfair.

Conclusion and orders

41 The Court of Appeal was wrong to conclude that there could be no fair trial of these proceedings. The Salvation Army's application for a permanent stay of the

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15 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 281 [69]-[70]; *Moubarak* (2019) 100 NSWLR 218 at 235 [77]; *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at 871 [42], 887 [132]; 414 ALR 635 at 650, 671.

16 *Bird v DP (a pseudonym)* [2024] HCA 41 at [44]-[46].

17 [2024] HCA 42 at [29].

18 *Longman v The Queen* (1989) 168 CLR 79 at 91, citing *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31-32, 42-44, 56-57, 71-72.

proceedings should have been dismissed and the proceedings should proceed to trial.

42 For those reasons, special leave to appeal is granted and the appeal is allowed. The Salvation Army is to pay RC's costs, to be taxed if not agreed. Orders 2, 3, 4 and 5 of the Court of Appeal of the Supreme Court of Western Australia of 17 February 2023 should be set aside and, in their place, order that:

1. The appeal be allowed.

2. The orders of the District Court of Western Australia of 1 December 2021 be set aside and, in their place, order that:

   (a) the defendant's application of 25 May 2021 that the plaintiff's action be permanently stayed be dismissed;

   (b) the defendant pay the plaintiff's costs of the application forthwith, to be taxed if not agreed.

3. The respondent pay the appellant's costs of the appeal, to be taxed if not agreed.

EDELMAN J.

Introduction

43 This application for special leave to appeal was heard by a Full Court as though it were an appeal. Special leave should be granted as the application raised the same questions of principle concerning abuse of process, with different perspectives offered by counsel, as were raised in the appeal heard immediately beforehand, *Willmot v Queensland*.[19] The decision in *Willmot v Queensland*[20] has now reaffirmed the well-established principles concerning abuse of process and confirmed that those principles continue to apply to cases such as the present where s 6A(2) of the *Limitation Act 2005* (WA) removes any limitation period for bringing particular actions.

44 In the application of the established principles of abuse of process following a substantial lapse of time in bringing a claim, the question in this proceeding is resolved by proper consideration of the onus of proof. The respondent ("the Salvation Army") failed to discharge its onus of proving that it suffered such prejudice, arising from the substantial period of time between the events alleged by the applicant, RC, and the claims commenced by the writ filed by RC in 2018, that a fair trial of RC's claims was not possible. The onus of proof includes a causal requirement that the Salvation Army establish that, due to the lapse in time, there was a loss of opportunities that would have been pursued or evidence that would have been led with such potential benefit (since the actual effect will be unknown) to its defence that any trial would be unfair.

45 For the reasons below, this appeal should be allowed, and orders made as proposed in the joint judgment of Gageler CJ, Gordon, Jagot and Beech-Jones JJ.

The parties, the facts, the claims, and the Salvation Army's onus of proof

The parties and the facts

46 The parties and the facts are set out comprehensively in the joint judgment. It suffices here to provide only a broad outline.

47 The respondent, the Salvation Army, although described as a trust, is the trustees, a statutory body corporate,[21] which carried out the Western Australian operations and activities of the former Southern Territory of the Salvation Army ("the Salvation Army Southern Territory") which was an unincorporated

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19 [2024] HCA 42.

20 [2024] HCA 42.

21 *The Salvation Army (Western Australia) Property Trust Act 1931* (WA), s 3.

association operating in Victoria, South Australia, Western Australia, the Northern Territory and Tasmania. On 1 January 2019, the Salvation Army Southern Territory was amalgamated with another Salvation Army entity to form the Salvation Army Australia Territory.

48 For most of the relevant period between August 1959 and April 1960, RC was a 12-year-old child in the care of the Salvation Army at the Nedlands Boys' Home ("the Home"), which the Salvation Army owned and operated. During that time, RC alleges that he was sexually assaulted on multiple occasions by Lt Swift, who was an officer of the Salvation Army appointed to the Home between January 1959 and September 1962. The final of those alleged sexual assaults, being anally raped by Lt Swift, occurred some weeks before the end of RC's placement at the Home. RC claims that he reported that rape, and an earlier assault, to Major Watson, who ignored RC.

49 RC was born on 24 March 1947. In 1960 the limitation period for a claim founded on the tort of negligence was six years,[22] and the limitation period for a tortious claim founded on battery was four years,[23] from the age of majority, which at that time was 21.[24] That would have meant that RC's claim founded on the tort of negligence would have been subject to a limitation defence after 24 March 1974 or alternatively, if the lowering of the age of majority to 18 applied retrospectively to his cause of action, after 31 October 1972, with the passage of the *Age of Majority Act 1972* (WA).[25] RC's claim founded on the Salvation Army's vicarious liability for "Swift's intentional tort", to the extent this claim is founded on the tort of battery (which, for the reasons below, is not clear on the face of RC's statement of claim[26]), would have expired on 24 March 1972.

RC's pleaded claims

50 The Salvation Army was notified of RC's legal claims on 13 July 2018 and the action brought against the Salvation Army in November 2018. His claims were described by the primary judge as being for negligence, breach of statutory duty under the *Child Welfare Act 1947* (WA), and vicarious liability for "[Lt] Swift's intentional tort". There is some confusion in these claims. The first is particularised as a breach of a non-delegable duty "to exercise reasonable care for the safety of

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22 *Limitation Act 1935* (WA), s 38(1)(c)(vi).

23 *Limitation Act 1935* (WA), s 38(1)(b).

24 *Limitation Act 1935* (WA), s 40.

25 See *Age of Majority Act 1972* (WA), s 6(2), Sch ("Limitation Act, 1935-1954"). But see also, s 5(8).

26 See below at [50].

[RC]." But a non-delegable duty is a duty to *ensure* that reasonable care is exercised. It is not sufficient that a defendant took reasonable care.[27] The third is described as a claim for vicarious liability for "[Lt] Swift's intentional tort". It is not entirely clear whether the expression "vicarious liability" is used (inaccurately) to describe a liability based on attribution of Lt Swift's actions to the Salvation Army or (accurately) to describe liability based on attribution of Lt Swift's liability. It may be that the label is used to describe a non-delegable duty to ensure that care is taken, albeit in circumstances of intentional wrongdoing.[28]

51 With one exception, the formulation of RC's claims can be put to one side in this application because the Salvation Army's assertions of prejudice, arising from the lengthy lapse of time between the alleged assaults and RC bringing his claims, were concerned with the underlying allegations rather than the nature of the claim. The exception is the plea of "vicarious liability" as to which the Salvation Army, treating the plea as one of "true" vicarious liability,[29] asserted that there was "a dearth of evidence available to enable the careful examination of the role that the [Salvation Army] actually assigned to Lt Swift".

52 The submission concerning prejudice to the Salvation Army arising from an inability to investigate the precise contours of Lt Swift's role should be rejected. First, as the joint judgment observes, it does not appear to be factually correct.[30] The Salvation Army has pleaded, possibly based upon knowledge of the relevant institutional structure and based on Lt Swift's personnel records at the time which the Salvation Army holds,[31] that Lt Swift was not an employee but was an ordained minister. Secondly, it is impossible to fathom how a claim of vicarious liability in the true sense for the liability of Lt Swift could ever be affected by the contours of Lt Swift's employment. There is no imaginable universe of employment in which Lt Swift's alleged sexual abuse of RC could be said to be in the course of his employment.[32]

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

28 See *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 569-570 [80]-[81]; 410 ALR 479 at 501; *Bird v DP (a pseudonym)* [2024] HCA 41 at [42].

29 *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 561-562 [51]; 410 ALR 479 at 491.

30 See joint judgment at [27], [39].

31 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [160]-[161].

32 *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 569 [80]; 410 ALR 479 at 501.

Onus of proof

53 The ultimate reason that this application must be granted, and appeal allowed, concerns the onus of proof that lies with an applicant who asserts that a proceeding should be stayed as an abuse of process due to a substantial lapse in time.[33] As I explained in *Willmot v Queensland*,[34] an applicant must show that the substantial lapse in time causes such forensic prejudice that a fair trial is not possible.

54 The Salvation Army submitted that although it bore the onus of proof, it was not required "to prove each and every hypothetical step it would have taken had it known of the allegations prior to Lt Swift's death, and the likely outcome of those steps, so as to demonstrate the relevant unfairness". This submission is correct in that an applicant for a permanent stay is not required to prove prejudice by establishing the precise detail of every step that it would have taken if the claim had been brought earlier. Nor is an applicant required to undertake the difficult or impossible task of proving what information it would, or even could, have obtained from a source that was lost due to the lapse of time. But an applicant is still required to prove the general nature of each aspect of prejudice that it suffered, which, in combination, is said to be so extreme that any trial would be unfair due to the lapse of time in bringing a claim. That will usually require proof of the general nature and content of steps that the applicant would have taken if the claim had been brought earlier and the general type of information that it might have obtained.

55 In many cases it might be a very simple matter to prove that if a hypothetical foreshadowed legal claim of sexual abuse had been made at an earlier time then many steps would have been taken relevant to defending the claim, including: seeking confirmation of aspects of the complainant's version of events; obtaining and scrutinising documentary records; interviewing potential witnesses; and obtaining a response from the alleged perpetrator. But proof by an applicant that those or other actions would have been taken after a hypothetical earlier foreshadowed legal claim becomes more difficult if at that earlier time the applicant had been told of the allegation or others like it and had not taken any action despite reasonably anticipated litigation. As Bathurst CJ said in *The Council of Trinity Grammar School v Anderson*:[35]

> "[I]f, in the face of reasonably anticipated litigation, timely steps were not taken to gather evidence, whether documentary or oral, and as a result, a

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33 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at 867 [21]; 414 ALR 635 at 644.

34 [2024] HCA 42 at [101]-[109].

35 (2019) 101 NSWLR 762 at 834 [494].

party lost the ability to meaningfully deal with the claim against it, then it would be contrary to the administration of justice to grant a stay."

56 There will also be obstacles to drawing inferences that an applicant would have taken various steps if litigation had been threatened if the applicant had taken no action when, even in the absence of expressly threatened litigation, it was told of the allegation or others like it. It may be that an applicant can establish that there were good reasons for no action to be taken in those circumstances and that it would have taken action if litigation had been anticipated. But the short point is that the applicant bears that onus of proof. And the fewer reasonable steps that an applicant took at the earlier time, the harder it will be for the applicant to discharge its onus that it would have acted differently in the face of litigation.

This appeal and the alleged prejudice

The approach of the Court of Appeal and by the parties in this Court

57 The Court of Appeal of the Supreme Court of Western Australia proceeded on the agreed basis before it, supported by some authority at the time,[36] that the issue on appeal was whether, exercising judicial restraint, it was open to the primary judge to reach the conclusion that a fair trial was not possible and, as such, that a permanent stay should be granted, rather than whether the primary judge was correct in reaching that conclusion.[37] That approach is now recognised to be incorrect. That appeal should have been, and this appeal (following the grant of special leave) should be, resolved by asking whether the primary judge was correct to find that the bringing of the claims after a substantial period of delay was an abuse of process.[38] Hence, it is appropriate to consider the asserted prejudice through the refined lens with which it was presented in this Court, to assess whether the lapse of time between the alleged events in 1959 and 1960 and the bringing of RC's action in 2018 caused such a degree of prejudice to the Salvation Army that there was no real possibility of a fair trial.

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

37 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [28], [55], citing *House v The King* (1936) 55 CLR 499 at 504-505.

38 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at 868-869 [26]. See also *UBS AG v Tyne* (2018) 265 CLR 77 at 124 [123]; *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 426 [295].

The prejudice relied upon by the Salvation Army

58 As explained above, the issue of vicarious liability can be put aside. So, too, can allegations of prejudice arising from the loss of documents concerning systems that the Salvation Army may have had in place that might have provided an answer to the claim of negligently exposing RC to abuse. The evidence supports the conclusion that no such documents were ever in existence. The evidence was that the Salvation Army Southern Territory did not have "specific policies or procedures relating to claims of child sexual abuse during the period from 1940 to 1990".

59 The only remaining prejudice upon which the Salvation Army relied concerns actions that it would have taken to ascertain whether the alleged events of abuse occurred if RC's claims had been brought at an earlier time. In written submissions, the Salvation Army neatly summarised the "multiple matters" of "cumulative effect" relied upon by the Court of Appeal which the Salvation Army asserted to be sufficient to establish that any trial of RC's allegations would be unfair:

1. The death of Lt Swift in 2006.

2. The death of the person most likely to be Major Watson in 1968.

3. The absence of an ability to obtain relevant information from other officers of the Salvation Army who worked at the Home between 1959 and 1962.

4. The absence, after comprehensive searches, of any relevant documentary evidence.

An obstacle for all categories relied upon by the Salvation Army

60 Each of these matters is considered below. However, a basic difficulty with the assertion of the Salvation Army that it was prejudiced by the loss of information that it might have obtained from any or all of these matters is the inability of a court to draw an inference that, if RC's claim had been brought many years earlier, then the Salvation Army would have pursued lines of enquiry related to these matters. As explained above, such an inference might readily be drawn in many cases. This would particularly be so in circumstances where, as the Salvation Army submitted, the evidence established that by 1994 (or perhaps 1997) the Salvation Army Southern Territory had established a formal scheme for handling complaints of sexual abuse and that prior to that scheme allegations of sexual abuse were dealt with on an ad hoc basis.

61 What sets this case apart is the statement of Commissioner Tidd in 2015 to the Royal Commission into Institutional Responses to Child Sexual Abuse which was an annexure to an affidavit tendered by the Salvation Army itself. As the joint judgment observes, this evidence was admitted without restriction before the

primary judge.[39] When the Salvation Army Southern Territory's scheme for handling complaints is seen in light of that evidence it takes on a very different perspective. Relevantly, as the joint judgment explains in detail, Commissioner Tidd concluded that complaints of abuse were made concerning officers and other staff at homes operated by the Salvation Army Southern Territory, most of which were made "in more recent times, after the homes have all been closed".

62 As the joint judgment also explains, the conclusion that complaints of abuse would not have been investigated is supported by a report (with which Commissioner Tidd agreed), prepared after thorough investigation by Mr Walker who was the director of the Territorial Professional Standards Unit for the Salvation Army Southern Territory between April 2014 and December 2018. In that report, Mr Walker concluded that the Salvation Army Southern Territory had "failed to fully explore and investigate claims of child sexual abuse" and it "failed to appropriately respond to [such] claims".

63 In the face of evidence of such apathy by the Salvation Army, RC submitted that it could not be readily inferred that, if RC's legal claim had been brought earlier, then the Salvation Army would have taken any action to pursue lines of enquiry with Lt Swift, Major Watson, or other officers of the Salvation Army, or to locate and preserve documentary evidence relating to claims of abuse. An apprehension of legal liability could not be assumed to have altered this attitude, since after 24 March 1974 at the latest,[40] and before the enactment of s 6A of the *Limitation Act 2005* (WA),[41] which took effect on 1 July 2018, the Salvation Army could have pleaded a limitation defence to any legal claim by RC of sexual assault without any court having the power to extend the limitation period.[42]

64 The Salvation Army submitted, however, that the evidence of Commissioner Tidd and Mr Walker could not be used by RC to deny an inference that it would have explored or investigated any legal claim of sexual abuse. The Court of Appeal had concluded that it appeared that this was not an issue before the primary judge;[43] and the Salvation Army submitted that if it had been an issue then the Salvation Army would have objected to the use of the reports of

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39 See joint judgment at [16].

40 See above at [49].

41 *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA), s 10.

42 *Limitation Act 1935* (WA), ss 38(1)(c)(vi), 40.

43 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [111].

Commissioner Tidd and Mr Walker. Even if that submission is accepted, there is other evidence before the Court that tends towards the same conclusion.

65 First, there is the evidence of RC that, while staying at the Home, he complained of the abuse to Major Watson and was ignored. Secondly, there is evidence of complaints by at least nine other men of physical and/or sexual abuse by Lt Swift, including two claims in 2000 which did not specifically mention Lt Swift at that time (but did subsequently) and another claim in 2003 which did specifically mention sexual abuse by Lt Swift between 1948 and 1955. No clear explanation, only speculation, was offered by the Salvation Army for why Lt Swift was not contacted. Instead, in 2004 a Deed of Settlement was entered between a Salvation Army entity and the man who was abused between 1948 and 1955 and a letter of apology was sent to the man in September 2004. Thirdly, there is the statement of Mr Brewin, a solicitor employed by the firm that acted for the Salvation Army Southern Territory for more than two decades, that even in the context of the formal scheme established by the Salvation Army Southern Territory for handling complaints of sexual abuse, the steps taken by the Salvation Army Southern Territory were limited. Mr Brewin said of claims made against living Salvation Army Southern Territory officers:

> "[the law firm] typically seeks instructions from [the Salvation Army Southern Territory] to contact that person. If the accused officer is unwell or elderly, or refuses to assist us in our investigation, our request to contact them may be refused [by the Salvation Army Southern Territory] ...
>
> In my experience, officers almost always deny any allegations of abuse. The only occasions on which I have seen officers admit abuse is after multiple claims have been made over a period of time and, even then, the admissions are often partial and limited to particular types of abuse (ie, occasional hitting as punishment, but not sexual abuse)."

66 The short answer to the Salvation Army's submissions is that whatever the strength of evidence concerning its apathy in relation to child abuse claims, at least some evidence from the Salvation Army was required to support inferences: (i) that the Salvation Army would have taken steps to investigate RC's claim if it had been notified many years earlier than 13 July 2018; and (ii) that steps of that general nature are no longer available. The Salvation Army did not lead that evidence. It therefore failed to discharge its onus to show causally related prejudice.

The death of Lt Swift

67 The first category of prejudice alleged by the Salvation Army concerns the death of Lt Swift. The primary judge described the death of Lt Swift as "a

significant factor in favour of the grant of a stay".[44] Lt Swift retired from the Salvation Army Southern Territory in 1989, suffering from Alzheimer's disease. Lt Swift died on 3 October 2006. The same conclusion applies to Lt Swift as expressed generally above: the Salvation Army failed to prove that it would have taken any steps in relation to Lt Swift to investigate RC's claim if it had been notified many years earlier than 13 July 2018.

68 There are further obstacles to the prejudice that the Salvation Army asserts that it suffered by RC's action being brought in 2018, many years after the alleged abuse. Even if it were assumed that the Salvation Army (if notified many years earlier) would have taken action such as to instruct its solicitors to discuss the claim with Lt Swift, the evidence of Mr Brewin suggests that the common response would have been a denial of the sexual abuse or a refusal to assist the Salvation Army. Further, in the 17 years before Lt Swift's death he was suffering from Alzheimer's disease which further reduces any prospect that he might have assisted the Salvation Army in any way during that period.

The death of Major Watson

69 The second category in which the Salvation Army alleged prejudice concerns the death of Major Watson. As explained above, RC says that Major Watson was the only person at the Home to whom he reported the abuse. One matter of prejudice upon which the Salvation Army relied was the asserted inability to obtain information from Major Watson, including as to his recollection of any report of abuse by RC.

70 The person who was said to have most likely been Major Watson died in 1968 before RC's (then existing) limitation period for bringing a claim had even expired. The lapse of substantial time between the alleged events and the action brought by RC in 2018 was not the cause of any prejudice to the Salvation Army arising from the loss of an ability to speak with, and to obtain information from, Major Watson.

The absence of information from other officers who worked at the Home

71 The third category of prejudice asserted by the Salvation Army was the absence of an ability to obtain relevant evidence from any officers who worked at the Home between 1959 and 1962. Once again, this assertion of prejudice confronts the difficulty that the Salvation Army failed to prove that it would have made contact with those (unnamed) officers if RC had brought a claim many years earlier. In particular, one such officer was Lt Swift's wife who only died in 2019. There was evidence of correspondence between the Salvation Army Southern

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44 *RC v Salvation Army (WA) Property Trust* (2021) 105 SR (WA) 14 at 46 [141].

Territory and her. But there was no suggestion that the Salvation Army took any steps to obtain any information from her.

72 There are further obstacles to an inference that if RC's claims had been brought before a substantial lapse of time then the Salvation Army would have taken steps to obtain information concerning RC's claims from officers working at the Home in 1959 or 1960. One obstacle is the presence of two living officers (one of whom was the Matron of the Home in 1960) from whom the Salvation Army could still obtain, but still has not obtained, information. Although some steps to obtain information from those living officers have been taken by the Salvation Army's solicitors since 2020, there was no evidence of any substantial steps taken by the Salvation Army to obtain information concerning RC's claims from the two identified officers or any other living officers in the 20 years before 2020.

73 During this long period of stasis in the two decades before 2020, the records of Salvation Army entities in evidence before the primary judge show: (i) from May 2000 until October 2018, the solicitors for the Salvation Army Southern Territory were notified of seven different residents of boys' homes operated by the Salvation Army Southern Territory, including one resident of the Home (whose claim was notified to the Salvation Army in October 2018), who had named Lt Swift as an alleged perpetrator in claims against Salvation Army entities; (ii) from August 2003 to August 2014, the Salvation Army and the Salvation Army Southern Territory were notified of three further allegations of abuse (including RC's allegations) in which Lt Swift was named as a "person of interest" by residents of boys' homes (including two residents of the Home); (iii) as such, from May 2000 to October 2018, the Salvation Army or the Salvation Army Southern Territory (either directly or through solicitors) were notified of at least ten claims where Lt Swift was named as the perpetrator of abuse by former residents of boys' homes, at least five of which involved claims of sexual abuse and three of which were made by residents of the Home; and (iv) the Salvation Army had been notified of RC's allegation of sexual assault in February 2014.

The absence of any documentary evidence

74 The fourth category of prejudice asserted by the Salvation Army was said to be the absence of any remaining documentary evidence. In some cases, such as *R v Davis*,[45] a fair trial might not be possible due to the prejudice arising from the destruction of crucial records during the lapse of substantial time before a claim is brought. But this is not such a case.

75 Again, putting to one side the failure of the Salvation Army to prove that it would have searched for relevant documentary evidence if RC's claim had been brought many years earlier, the difficulty with this assertion of prejudice is that the

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45 (1995) 57 FCR 512. See *Willmot v Queensland* [2024] HCA 42 at [109].

Salvation Army did not identify even in general terms what such documentary evidence might have been, how it might have been retained, or how it might have been lost during the lapse of time between the time of the alleged assaults and the time when RC brought his claims. In particular, as explained above, there was evidence that the Salvation Army Southern Territory did not have "specific policies or procedures relating to claims of child sexual abuse during the period from 1940 to 1990". Moreover, the evidence from the Salvation Army included a statement made by a Professional Standards Officer that in the 1950s there was a flood in the basement of the building where many of the Salvation Army Southern Territory records were kept. The officer continued:

> "Not only were documents damaged, but at the same time as cleaning up it was apparently decided that [the Salvation Army Southern Territory] would dispose of other records as their understanding was once records were more than seven years old they could be destroyed."

The effect of this evidence is that any document created in 1959 or 1960, concerning RC or Lt Swift's alleged sexual assaults of RC, would likely have been destroyed by 1967, before the lapse of a substantial period of time and prior to the expiry of the previously existing limitation period.

Conclusion

76 The appeal should be allowed and orders made as proposed in the joint judgment.

77 STEWARD J. I refer to and repeat the first four paragraphs of my reasons in *Willmot v Queensland*.[46]

78 Adopting with gratitude the description of the facts in the reasons of the plurality, I respectfully agree with the orders they propose. I generally agree with the plurality's reasons as well, save as follows.

79 First, I would emphasise that the respondent ("The Salvation Army") has yet to establish that it cannot obtain meaningful instructions or did not have an opportunity to do so following its realisation that appalling abuse had taken place in the past, including (it is alleged) by Lt Swift. The Salvation Army first learned of allegations concerning Lt Swift in 2003 (there was also an earlier complaint made in 1961) and first learned about RC's particular complaints in 2014. In 2014 Lt Swift's wife, who was also a Salvation Army Officer and may have had extensive knowledge of her husband's activities and behaviour, was still alive. She passed away in 2019 and was said to have suffered from memory issues two or so years beforehand. However, there was no suggestion that in 2014, or indeed earlier, she could not have given an account of Lt Swift's role during the period of alleged abuse of RC, or indeed, his other alleged victims. No excuse has been offered by The Salvation Army for why it never made such enquiries.

80 Then there are the ten men who have all made complaints about Lt Swift. Each of them has been identified. The Salvation Army has not approached any of them to determine whether they can, or cannot, give meaningful information about the allegations made by RC to enable The Salvation Army to understand the case it must meet. As such, I am not satisfied that The Salvation Army is necessarily "utterly in the dark".[47] That has yet to be established.

81 Other than to buttress the conclusion that The Salvation Army failed to demonstrate that it had reasonably not taken steps to investigate RC's claims, I would not place any great reliance upon the statement given by Commissioner Tidd to the Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission"). Commissioner Tidd only arrived in Australia from overseas, and assumed the role of Territorial Commander Australia Southern Territory of The Salvation Army, in 2013. His statement was based on hearsay evidence and other information that he discovered whilst preparing his statement. The same observation should be made about the report of Mr Walker and Commissioner Tidd's acceptance of it.

82 The contention that The Salvation Army lost only the opportunity of a "bare denial by Lt Swift" is, with respect, pure speculation. It is rejected. It is not

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46 [2024] HCA 42 at [138]-[141].

47 *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 250 [158].

otherwise supported by the experience of a lawyer who said that Salvation Army Officers "always den[ied] any allegations of abuse". With respect, unless the lawyer in question was referring to denials made by Lt Swift himself, and there is no suggestion that he was, the evidence does not logically convert speculation about that man into a probable inference about what he might have said. Any such course of reasoning is, with respect, unacceptable.

83 Applying the reasoning in *Moubarak by his tutor Coorey v Holt*:[48] it is not the case that RC never confronted the Salvation Army before the death of Lt Swift in circumstances where RC alleged that he complained at the time to Major Watson that he had been raped, although no complaint was made to the police until 2014; Lt Swift died well before the commencement of proceedings; nonetheless, for the reasons given above, the Salvation Army has not demonstrated at this stage that it is unable, or has been unable, to obtain instructions about the conduct of Lt Swift (although it is obviously disadvantaged in that it cannot obtain instructions directly from Lt Swift); and it is not the case that all other potential witnesses are now dead. It follows that I am not satisfied that The Salvation Army has met the high onus that would justify a permanent stay of this proceeding.

84 I agree with the orders proposed by the plurality.

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48 (2019) 100 NSWLR 218 at 250-251 [162]-[171].

GLEESON J.

Overview

85 I have explained my understanding of the correct approach to determining an application for a permanent stay of historical child abuse claims in *Willmot v Queensland*.[49] In this case, the alleged assaults occurred between 1959 and 1960, and were first notified to the respondent ("the SAWA") in 2014 at a time when a claim for damages by the appellant ("RC") would have been statute-barred. After the limitation period was lifted on 1 July 2018,[50] RC commenced his proceeding in the District Court of Western Australia in November 2018 and served his statement of claim in May 2019. Thus, there was a period of approximately 60 years between the alleged events giving rise to the claim and the service of the statement of claim by which RC informed the SAWA of the alleged facts. On any view, this passage of time gives rise to a presumption that the SAWA would be significantly prejudiced in defending the claim by the loss of opportunities to investigate the facts, especially circumstantial facts, and to adduce relevant evidence.

86 Even so, and subject to the following observations, I agree with the conclusion in the joint judgment that the Court of Appeal of the Supreme Court of Western Australia erred in finding that: (1) there could be no fair trial of the whole of the proceedings; and (2) there should be a permanent stay of the whole of the action brought by the appellant.

The Court of Appeal's reasons

87 As in *Willmot*, the Court of Appeal (Murphy and Vaughan JJA, Bleby A-JA) proceeded on the incorrect assumption that it was necessary for RC to show *House v The King*[51] error on the part of the primary judge in deciding to order a permanent stay.[52] The issues considered by the Court of Appeal were whether the primary judge erred in the following four respects: (1) in finding that the SAWA did not have an opportunity to investigate RC's allegations because the alleged perpetrator, Lt Swift, had died well before the SAWA was first made aware of his allegations; (2) in failing to find that, if it did have an earlier opportunity to investigate the allegations, the SAWA would not have taken up that opportunity;

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49 [2024] HCA 42.

50 See the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA).

51 (1936) 55 CLR 499.

52 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [28], [55].

(3) in finding that the SAWA was prejudiced through the loss of documents and the inability to call witnesses; and (4) in failing to have regard to the statement, in 2015, by Commissioner Tidd to the Royal Commission into Institutional Responses to Child Sexual Abuse as evidence relevant to alleged prejudice and containing admissions against the SAWA's interests.

88 As to the first issue, the Court of Appeal found that the primary judge did not err in finding that the SAWA first became aware of RC's allegations against Lt Swift on 10 February 2014 and therefore did not have an opportunity to investigate the allegations until after Lt Swift died.[53]

89 The Court of Appeal found that the second issue was not raised before the primary judge with the result that there was no relevant error.[54] Further, the Court of Appeal concluded that there was no obligation on a party in the position of the SAWA to prove what it would have done if it had been notified of allegations at an unspecified earlier time.[55] The Court of Appeal also observed that, where a limitation period has expired and, consequently, litigation cannot reasonably be anticipated, it is not unreasonable not to investigate the underlying merits of a claim even if it is one of which a defendant then has notice.[56]

90 As to the third issue, the Court of Appeal found that, apart from evidence pointed to by RC, there was a dearth of evidence some 60 years after the alleged abuse. That dearth was said to derive from the following four matters: (1) the death of Lt Swift in 2006; (2) the death of Major Watson (the manager of the Nedlands Boys' Home ("the Home") at the time of the alleged assaults, to whom RC allegedly spoke about Lt Swift while residing at the Home) in 1968; (3) the absence of other officers who worked at the Home where RC allegedly resided at the time of the alleged abuse and to whom inquiries could have been directed; and (4) the inability of the SAWA to investigate whether there existed relevant documentary records. The Court of Appeal considered that the cumulative effect

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53 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [89].

54 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [111].

55 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [115].

56 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [117], citing *The Council of Trinity Grammar School v Anderson* (2019) 101 NSWLR 762 at 834-836 [495]-[505].

of these matters was "highly damaging to the capacity of the [SAWA] to conduct a defence in any meaningful way".[57]

91 Finally, the Court of Appeal did not accept that the primary judge had erred by failing to take into account Commissioner Tidd's statement to the Royal Commission into Institutional Responses to Child Sexual Abuse, and found that any admission incorporated into the statement is of "such a general nature that it does not ... overcome the deficit of information facing the [SAWA] with respect to the particular situation at the Home in 1959 and 1960".[58] The Court of Appeal concluded that the SAWA was "unable to investigate any steps that Major Watson took in response to any report he received, anything by way of admission or denial said by Lt Swift, and what duties [the SAWA] authorised or acquiesced in Lt Swift performing at the Home".[59]

Burdensome effects of the passage of time in this case

92 There is no challenge to the Court of Appeal's finding that the cumulative effect of the four matters it identified in response to the third ground of the appeal is "highly damaging" to the SAWA's capacity to conduct a meaningful defence of RC's claims. It would be perverse to deny the likelihood of significant prejudice to the SAWA in attempting to defend RC's claims after such a long time, with the attendant likelihood of loss of opportunities to investigate both the alleged facts and circumstantial facts. Pursuant to the joint judgment in *Willmot*,[60] it is necessary to identify the burdensome effects of the passage in time to determine whether a trial of the proceedings would be unfair.

Lt Swift

93 An important issue in the proceedings is whether RC resided at the Home during a time when Lt Swift was there. The SAWA has been able to ascertain when Lt Swift was located at the Home, which is when RC alleges that he resided there. The SAWA has no apparent lines of inquiry to verify or contradict this aspect of RC's claim. While RC has a cousin who has given a statement corroborating RC on this point, there was no evidence about whether the SAWA can obtain instructions to verify or contradict the cousin's statement. The SAWA is

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57 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [165]-[166].

58 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [178].

59 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [179].

60 [2024] HCA 42 at [23].

significantly disadvantaged in its effective participation in any future trial by the passage of time in relation to this issue because it is reasonable to assume that the facts concerning RC's residence at the Home could have been readily established closer to the alleged events.

94 Further, like Steward J, I do not agree that the SAWA can be taken to have lost no more than the possibility of a bare denial by Lt Swift because of his death. For example, Lt Swift may have been able to shed light on whether he and RC were at the Home at the same time. Although this is a case in which the only direct evidence about the allegations of sexual abuse could have come from RC and Lt Swift (because RC does not suggest that any of those incidents occurred in the presence of others), it is not reasonable to assume that Lt Swift would have been unable to contradict or cast doubt on some aspects of the particulars given by RC of the alleged sexual abuse.

Major Watson

95 I do not accept the reasoning in the joint judgment that the significance of Major Watson's death is limited to whether he could address RC's claim to have approached Major Watson about Lt Swift's conduct, included in RC's statement of claim.

96 Major Watson might also have given relevant instructions about the manner in which the Home was operated, including its record keeping practices, Lt Swift's role and Lt Swift's conduct. This may have included whether Major Watson had opened a "Z file" in relation to Lt Swift. The primary judge found that a "Z file" was a type of SAWA file dealing with sensitive disciplinary matters.[61] Major Watson died in 1968, before the limitation period that previously existed had ended.[62] The Court of Appeal observed that, had RC's action been brought within the limitation period, Major Watson's death would have been most unlikely to have led to a permanent stay of the proceeding. Even so, it is still relevant that the SAWA may have lost an opportunity to make inquiries of Major Watson in response to a claim which might have been made by RC against the SAWA prior to Major Watson's death.

Other witnesses

97 The evidence about the SAWA's capacity to make inquiries of other witnesses was inconclusive as to the extent of its impact upon the SAWA's opportunity to participate effectively in a trial of RC's claims. Lt Swift's wife,

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61 *RC v The Salvation Army (WA) Property Trust* (2021) 105 SR (WA) 14 at 26 [51].

62 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [133].

Doris Swift, could have provided relevant information. She was alive when RC commenced proceedings but died less than six months later on 17 May 2019. The primary judge found that Mrs Swift appeared to have been suffering from significant memory issues for two or so years before her death. I do not accept that the SAWA could reasonably have been expected to have made inquiries of Mrs Swift concerning Lt Swift's conduct prior to being informed of RC's allegations in 2014 when any claim would still have been statute-barred, nor do I accept that the SAWA could reasonably have been expected to have made any such inquiries before RC filed his proceedings shortly after the removal of the limitation period on 1 July 2018 by s 6A of the *Limitation Act 2005* (WA). By that time, it is reasonable to infer that any inquiries directed to Mrs Swift would have been fruitless. In the circumstances that I have set out, I do not accept that the SAWA was required to explain why it did not seek relevant information from Mrs Swift before her death.

98 The position concerning other officers was that two of 14 officers were alive when RC commenced his proceeding. The evidence suggested that inquiries of those officers were unlikely to shed further light on the facts in issue given the age of the former officers and their apparent unwillingness to cooperate.

99 However, the SAWA could readily have adduced more evidence about these potential sources of information to demonstrate the extent of available relevant information. Accordingly, the position concerning other officers is that the SAWA is apparently prejudiced by the loss of opportunities to make inquiries of 12 former officers but may have obtained relevant information from two former officers. The primary judge found that there were no other meaningful inquiries that the SAWA could make to identify potential witnesses, and no issue was taken with that finding.

Documentary records

100 As to the loss of opportunity to locate relevant documentary records, the Court of Appeal noted the primary judge's finding that, by the extended passage of time, the SAWA had been denied the opportunity to investigate meaningfully whether there were documents relevant to the issues in RC's action.[63] The primary judge also found that there were no other meaningful inquiries that the SAWA could make to obtain contemporaneous documents. The primary judge accepted that the SAWA was not in a position to ascertain whether it acquiesced in or authorised Lt Swift's engagement in the activities in the course of which it was alleged that the assaults took place. That finding was unchallenged.

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63 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [46].

101 The lack of documents was said to be prejudicial to the SAWA's ability to identify systems that may have existed at the Home at the relevant times, and the scope of Lt Swift's role and authority at the Home. I disagree with the assumption that any documents that may previously have existed would probably have assisted RC's case.[64] Further, the potential prejudice is less than might otherwise have been the case in the light of the report of Mr Walker, whose investigation into the practices of The Salvation Army Australia, Southern Territory concluded that that body, whose operations included the Home, had failed systemically to protect children in its care from sexual abuse.

The remaining opportunities to respond to RC's claim at a trial

102 RC's claim alleges sexual assaults in relation to which the opportunity to investigate the alleged facts was always limited because of the nature of the allegations, and in particular because RC does not suggest that any person other than Lt Swift was present to witness what happened. In that context, the possibility of significant evidence available to be adduced to contradict or cast doubt upon those allegations was always remote. What is sufficient for effective participation in a trial must be decided in that context.

103 As the Court of Appeal noted, RC and a number of other individuals who claim to have been assaulted by Lt Swift (some physically, some sexually) can be cross-examined if they give evidence at a trial. These individuals have given histories to medical practitioners, police and other witnesses so that they may be cross-examined on any relevant inconsistencies or implausibilities. While this evidence is a limited basis on which to address RC's claim, it is not significantly different from what would have been the position if RC's claim had been brought earlier in the absence of any suggestion that there were witnesses to the alleged sexual abuse. If anything, the identification of the other individuals appears to have provided opportunities for the SAWA to investigate circumstantial facts through inquiries directed to them. There was no evidence about whether the SAWA had pursued these lines of inquiry.

104 As to the claim based on vicarious liability, as is noted in the joint judgment, the SAWA has been able to advance a positive pleading that Lt Swift was not its employee. The numerous complaints made to the SAWA of mistreatment by Lt Swift from men who were formerly in the care of the Salvation Army provide possible opportunities to obtain information from those individuals about the role and conduct of Lt Swift at the relevant times. Nevertheless, the substantial passage of time has deprived the SAWA of most opportunities to investigate Lt Swift's actual role and conduct.

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64 Joint judgment at [28].

105 Since any action by RC against the SAWA was statute barred at the time, I do not accept that allegations concerning Lt Swift in 2003 (and in following years) that did not involve RC provided the SAWA with an opportunity to investigate facts relevant to this proceeding leading to a burden on the SAWA to demonstrate that it could not have obtained relevant instructions or made relevant inquiries before 2014, when it was first notified of RC's allegations. For the same reason, I do not accept that the SAWA should have made inquiries about RC's allegations in the period between when it was first notified of them and when RC filed his proceeding in 2018.

106 Without any greater similarity between RC's allegations and the evidence of a complaint about a physical assault by Lt Swift upon another boy at the Home in 1961 than that Lt Swift was the alleged perpetrator in each case, I do not accept that the latter complaint has ever given rise to any realistic opportunity for the SAWA to obtain instructions or make inquiries relevant to RC's allegations. In that regard, I do not consider that the SAWA was in a position to take steps to investigate RC's allegations before 2014 at the earliest.

107 Having regard to all these matters, I do not consider that the SAWA can do any more than put RC to proof of his allegations of sexual abuse. That situation is a severe limitation upon the SAWA's capacity to participate in a trial of the facts of the alleged abuse. The situation is not analogous to an accused in a criminal trial who says that they can do no more than deny the alleged offence, because that person can be taken to know the true facts and can present themselves to the court as a person who should be believed in that denial. The situation of the SAWA is also not analogous to a nominal defendant because such a defendant is created for the purpose of adjudicating claims in the absence of information about the alleged wrongdoer. This undoubted and severe limitation upon the SAWA's capacity to participate in a trial of the issues of the alleged abuse is, in large part, a consequence of the nature of RC's allegations but it is also the result of the passage of time insofar as evidence has almost certainly been lost concerning whether RC and Lt Swift were both at the Home at the time of the alleged abuse.

108 It is then necessary to consider whether the burdensome effects of the passage of time have deprived the SAWA of a reasonable opportunity to participate in a trial of the issues of direct and vicarious liability.

109 In this Court, the SAWA did not rely on any prejudice or inability to meet the claim based on breach of a non-delegable duty. Accordingly, the scope of the SAWA's common law duty did not arise for consideration on the appeal. Nor did the SAWA put a separate case directed to the claim based on breach of statutory duty. For the reasons I have given above, and having regard to the Court of Appeal's observations concerning the dispute between the parties about the scope

of the SAWA's common law duty,[65] and my observations in *Willmot*,[66] I disagree with the conclusion in the joint judgment that the SAWA's only answer to that aspect of RC's claim can be that none of the alleged assaults occurred.

110 As to the vicarious liability claim, the SAWA can be taken to have lost many opportunities to investigate Lt Swift's actual role at the Home with a view to determining whether it could defend the claim on the basis that Lt Swift acted outside the scope of his employment in committing the alleged assaults. In my view, it would be unjustifiably oppressive to require the SAWA to defend that aspect of the claim so many decades after the alleged events when it has lost the chance to make inquiries of Lt Swift and Major Watson, and 12 of the 14 officers who may have been able to supply information about those matters. The SAWA's apparent capacity to mount a positive case that Lt Swift was not an employee does not address the prejudice of its lost opportunities to participate in a trial about the scope of Lt Swift's employment, if he was an employee.

Orders

111 Accordingly, I would make the following orders:

(1) Special leave to appeal be granted.

(2) The appeal be allowed, in part, with the respondent to pay the appellant's costs.

(3) Order 2 of the Court of Appeal of the Supreme Court of Western Australia made on 17 February 2023 be set aside and, in its place, it be ordered that:

(i) the appeal be allowed, in part;

(ii) the orders of the District Court of Western Australia of 1 December 2021 be set aside and, in their place, order that:

(a) subject to para (b), the defendant's application for a permanent stay of the proceeding is dismissed; and

(b) the claim pleaded in para 11(b) of the statement of claim filed 2 May 2019 be permanently stayed.

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65 *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [20]-[21].

66 [2024] HCA 42 at [190]-[192].