

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, STEWARD, GLEESON AND JAGOT JJ

GLJ

APPELLANT

AND

THE TRUSTEES OF THE ROMAN CATHOLIC
CHURCH FOR THE DIOCESE OF LISMORE

RESPONDENT

*GLJ v The Trustees of the Roman Catholic Church for the Diocese of
Lismore*

[2023] HCA 32

Date of Hearing: 8 June 2023

Date of Judgment: 1 November 2023

S150/2022

ORDER

1. *Appeal allowed.*
2. *Set aside orders 3-5 made by the Court of Appeal of the Supreme Court of New South Wales on 1 June 2022 and, in lieu thereof, order that:*
 - (a) *the appeal be dismissed; and*
 - (b) *the applicant pay the respondent's costs of the appeal.*
3. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

P D Herzfeld SC with J A G McComish for the appellant (instructed by Ken Cush & Associates)

B W Walker SC with E Bathurst for the respondent (instructed by Hannigans Solicitors)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore

Courts – Abuse of process – Permanent stay of proceedings – Where appellant commenced claim for damages for personal injury against respondent 52 years after alleged sexual assault by priest employed by respondent occurred – Where no limitation period for claims resulting from child sexual abuse under s 6A of *Limitation Act 1969* (NSW) – Whether death of alleged perpetrator and other critical witnesses is exceptional circumstance so trial of proceedings would be necessarily unfair – Whether proceeding in such circumstances an abuse of process justifying permanent stay of proceedings.

Courts – Appeals – Applicable standard of appellate review – Where party seeking permanent stay of proceedings – Where grant of permanent stay of proceedings requires determination of whether trial will be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process – Whether question of abuse of process involves exercise of discretion and error of principle to be identified in accordance with *House v King* (1936) 55 CLR 499 – Whether question of trial constituting abuse of process has one correct answer and "correctness standard" in *Warren v Coombes* (1979) 142 CLR 531 applies.

Words and phrases – "abuse of process", "adversarial system", "applicable standard of appellate review", "child sexual abuse", "correctness standard", "discretion", "exceptional circumstances", "fair trial", "inherent, implied, or statutory jurisdiction of courts", "irreducible minimum standards of fairness", "limitation period", "necessary unfairness", "permanent stay of proceedings", "unfairly and unjustifiably oppressive", "unfairness or oppression".

Civil Procedure Act 2005 (NSW), s 67.

Limitation Act 1969 (NSW), s 6A.

Uniform Civil Procedure Rules 2005 (NSW), r 13.4(1)(c).

1 KIEFEL CJ, GAGELER AND JAGOT JJ. This appeal raises two issues. The first issue is the applicable standard for appellate review of an order of a court permanently staying proceedings on the ground that a trial will be necessarily unfair or so unfair or oppressive to the defendant as to constitute an abuse of process. As will be explained, the applicable standard for appellate review of such an order is the "correctness standard" identified in *Warren v Coombes*¹. An error of principle by the court below, as applied to appellate review of a discretionary decision in accordance with *House v The King*², is not required to be identified.

2 The second issue is whether the appellant's proceedings against the respondent, the Trustees of the Roman Catholic Church for the Diocese of Lismore ("the Diocese"), involve an abuse of process justifying a permanent stay of the proceedings. In the proceedings, the appellant claims damages from the Diocese for personal injury said to have resulted from a priest incardinated in the Diocese of Lismore³ sexually assaulting her in 1968 when she was 14 years old. The Diocese sought a permanent stay of the proceedings as an abuse of process on the basis that any trial of the proceedings 55 years after the time of the alleged sexual assault would be necessarily unfair to the Diocese in all of the circumstances, given the death of the priest said to have perpetrated the sexual assault⁴. The primary judge in the Supreme Court of New South Wales (Campbell J) dismissed the Diocese's application for a permanent stay⁵. The Court of Appeal of the Supreme Court of New South Wales (Macfarlan, Brereton, and Mitchelmore JJA) granted the Diocese leave to appeal, allowed the appeal, and permanently stayed the proceedings⁶.

3 As will be explained, the grant of a permanent stay to prevent an abuse of process involves an ultimate decision that permitting a matter to go to trial and the rendering of a verdict following trial would be irreconcilable with the administration of justice through the operation of the adversarial system. That

1 (1979) 142 CLR 531 at 552.

2 (1936) 55 CLR 499 at 504-505.

3 That is, formally attached to the Diocese of Lismore. See fn 8.

4 The respondent disavowed any contention that the proceedings otherwise would be unfairly oppressive to it.

5 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204.

6 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78.

ultimate decision must be one of last resort on the basis that no other option is available. This is why only an exceptional case justifies the exercise of the power of a court to permanently stay proceedings. If a court refuses to exercise its jurisdiction to hear and decide cases in other than exceptional circumstances and as a last resort to protect the administration of justice through the operation of the adversarial system, that refusal itself will both work injustice and bring the administration of justice into disrepute.

- 4 In the present case, the abolition of the limitation period that would have applied to and precluded the appellant's proceedings before the enactment of the *Limitation Amendment (Child Abuse) Act 2016* (NSW)⁷ has created a new legal context within which the alleged abuse of process must be evaluated. In this new legal context, the Diocese's contention that any trial of the proceedings would be necessarily unfair must be rejected. As the Diocese acknowledged that its case for a permanent stay for abuse of process was based only on necessary unfairness of a trial and not undue oppression or unfairness otherwise, no permanent stay is justified. The proceedings must go to trial.

Background

- 5 The appellant, GLJ, was born in Lismore in 1954. On 31 January 2020, the appellant filed a statement of claim in the Supreme Court of New South Wales. The statement of claim records that GLJ was raised in the Catholic faith to believe that Catholic priests were God's representatives on earth. GLJ's family worshipped at St Carthage's Cathedral in Lismore. GLJ alleges that in 1968, when she was 14 years old, her father was seriously injured in a motorcycle accident, following which a Catholic priest, Father Anderson, was directed by the Diocese to attend GLJ's family home to provide pastoral and spiritual support and guidance. She alleges that, at this time, Father Anderson sexually abused her by holding her down on the bed and penetrating her vagina with his fingers and penis. She alleges that, as a result, she suffers from complex post-traumatic stress disorder, chronic and recurrent depressive disorders, generalised anxiety disorder, panic disorder, sexual

7 In response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, the *Limitation Amendment (Child Abuse) Act* inserted s 6A into the *Limitation Act 1969* (NSW) enabling an action for damages that relates to the death of or personal injury to a person resulting from an act or omission that constitutes child abuse of the person to be brought at any time. Equivalent provisions were enacted in each State and Territory: see *Limitation Act 1985* (ACT), s 21C; *Limitation Act 1981* (NT), s 5A; *Limitation of Actions Act 1974* (Qld), s 11A; *Limitation of Actions Act 1936* (SA), s 3A; *Limitation Act 1974* (Tas), s 5B; *Limitation of Actions Act 1958* (Vic), ss 27O, 27P; *Limitation Act 2005* (WA), s 6A.

3.

disorder, enduring post-traumatic personality change, and harmful alcohol use. She claims damages, including aggravated and exemplary damages, based on the Diocese both breaching a duty of care it owed to her to protect her from the reasonably foreseeable risk of harm of sexual abuse by Father Anderson and being vicariously liable for Father Anderson's sexual abuse of her.

6 On 8 May 2020, the Diocese filed a defence to the statement of claim. The Diocese admitted that: (a) it, by its servants and agents, was responsible for and had the care, management, and control of Catholic churches in the Diocese of Lismore, and, in particular, a Catholic church in Lismore, St Carthage's Cathedral; (b) Father Anderson was a priest in the Roman Catholic Church, incardinated in the Diocese of Lismore; (c) Father Anderson was a priest appointed by the Diocese of Lismore to conduct religious services at St Carthage's Cathedral and within the Diocese of Lismore; and (d) Father Anderson's duties as a priest at St Carthage's Cathedral and in the Diocese of Lismore included the provision of pastoral guidance and support, and spiritual guidance to members of the congregation who worshipped at St Carthage's Cathedral and churches within the Diocese of Lismore at the direction of the Diocese. According to the *Code of Canon Law*, a priest being "incardinated in the Diocese" means that the priest was formally instituted as the (or a) priest in and of, and was accepted as such by, the Diocese of Lismore⁸.

7 In its defence, the Diocese did not admit, relevantly, any of the allegations concerning: (a) GLJ and her family; (b) Father Anderson sexually assaulting GLJ; (c) what it knew or should have known; (d) what a reasonable person in its position would or should have done; or (e) the existence or breach of any duty of care it owed to GLJ. The only matters the Diocese pleaded that it "does not know and therefore cannot admit" were the allegations concerning: (a) what Father Anderson knew or should have known; (b) the existence of a duty of care owed by Father Anderson to GLJ; (c) breach of the alleged duty of care by Father Anderson; and (d) GLJ's injuries being caused by the Diocese and Father Anderson breaching their duties of care to her.

8 On 17 November 2020, the Diocese filed a notice of motion in which it sought orders either that the proceedings be permanently stayed pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) or dismissed pursuant to r 13.4(1)(c) of

8 *Code of Canon Law* (promulgated on 25 January 1983), Book 2, Canon 265 ("Every cleric must be incardinated either in a particular church or personal prelature, or in an institute of consecrated life or society endowed with this faculty, in such a way that unattached or transient clerics are not allowed at all") and Canon 266 §1 ("Through the reception of the diaconate, a person becomes a cleric and is incardinated in the particular church or personal prelature for whose service he has been advanced").

4.

the *Uniform Civil Procedure Rules 2005* (NSW). Section 67 of the *Civil Procedure Act* provides that "[s]ubject to rules of court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day". Rule 13.4(1)(c) of the *Uniform Civil Procedure Rules* provides that the court may order proceedings to be dismissed if it appears to the court that the proceedings are an abuse of the process of the court.

9 The Diocese's notice of motion was supported by two affidavits of Gregory Isaac, the current Secretary and Business Manager for the Diocese of Lismore. The effect of the affidavits, as summarised by the primary judge, is that: (a) the Diocese did not receive a complaint relating to GLJ's allegations until 2019; and (b) virtually all senior people who could have provided instructions and given evidence in the proceedings had died. These people included: (i) Father Anderson, who died in 1996; (ii) Bishop Farrelly, Parish Priest and Bishop of Lismore, who died in 1974; (iii) Reverend Brown, Secretary (Chancellor) of the Bishop of Lismore, who died in 2005; (iv) Most Reverend O'Donnell, Archbishop of Brisbane, who died in 1980; (v) Reverend Douglas, Chancellor of the Brisbane Archdiocese, who died in 1984; and (vi) Monsignor Ryan, Parish Priest of Kyogle, who died in 1987. The Diocese submitted that, in these circumstances, there could not be a fair trial.

10 The primary judge dismissed the Diocese's notice of motion⁹. His Honour reasoned that: (a) a fair trial need not be a perfect trial; (b) child sexual abuse, of its nature, occurs in private and eyewitness evidence is rarely available; and (c) the Diocese had made detailed submissions indicating that it could contradict GLJ's claims¹⁰, including the following matters¹¹:

- "(a) having regard to the chronology of Father Anderson's various appointments within the Diocese, the uncertainty about the date on which the assault was said to have taken place;
- (b) the evidence of Mr Isaac to the effect that an assistant priest would not be assigned to the type of pastoral care described by the plaintiff;

9 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204.

10 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204 at [45].

11 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204 at [34].

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- (c) the very limited opportunity for Father Anderson to provide that pastoral care, and indeed to offend in the manner alleged given the relatively short time, perhaps only two months, he served directly in the Lismore parish;
- (d) the plaintiff stated that the assault occurred when she returned home from netball. It was submitted this is a winter sport and Father Anderson was appointed to Lismore during summer months;
- (e) Father Anderson was not available to deny the assault; and
- (f) the extant material, while demonstrating that Father Anderson had a sexual interest in boys, there was no direct suggestion of a sexual interest in young teenage girls. The interest in boys was expressed through sport including football, fishing, shooting and surfing. This interest seemed to have been associated with significant grooming which appeared to be absent in the plaintiff's case".

11 His Honour also reasoned that, in respect of the *Limitation Act 1969* (NSW), "the Parliament has determined, according to the terms of s 6A as a whole, that child abuse actions should be permitted to proceed despite the effluxion of even long periods of time and an inevitable resulting degree of impoverishment of evidence, provided a fair, not perfect, trial can be had"¹².

12 The Diocese appealed on the ground that the primary judge erred in principle and misapplied his discretion in failing to permanently stay the proceedings. In granting leave to appeal and allowing the appeal¹³, the Court of Appeal noted the controversy about the applicable standard of appellate review but reasoned that it did not need to decide that issue given that the Diocese accepted that the primary judge's decision was discretionary¹⁴ and alleged error within the scope of the principles in *House v The King*¹⁵. The Court of Appeal identified error

12 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204 at [46].

13 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78.

14 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [79].

15 (1936) 55 CLR 499 at 504-505.

of principle in the reasoning of the primary judge¹⁶ and thereby re-exercised the power to grant a permanent stay, deciding that such a stay should be granted as no fair trial could be held¹⁷. Accordingly, the Court of Appeal set aside the primary judge's orders and ordered that the proceedings be permanently stayed.

- 13 In the Court of Appeal, Macfarlan JA agreed with Mitchelmore and Brereton JA¹⁸. Brereton JA also agreed with Mitchelmore JA and added that "[t]here were only two potential witnesses to the alleged assault, GLJ and Father Anderson. Deprived of the ability to obtain any instructions from Anderson by his death, the [Diocese] has no means for investigating the facts."¹⁹ Relevantly to the re-exercise of the discretion, Mitchelmore JA reasoned that: (a) "without any account from Father Anderson (or other priests in the parish), the [Diocese] was at a significant disadvantage on the issue of whether Father Anderson sexually assaulted GLJ"²⁰; (b) on the issue of the alleged sexual assault of GLJ, there is no available contradictor and, contrary to the primary judge's conclusion, "everything does depend upon the acceptance of [GLJ's] account"²¹; (c) there could be no response from Father Anderson, denial or otherwise, the credibility of which could be evaluated²²; (d) although Father Anderson is not a defendant, he is a critical witness, he died before any inquiries could be made, and there is no other material that sheds light on his putative response to GLJ's claims²³; (e) without Father

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- 16 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [101]-[109].
- 17 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [115]-[126].
- 18 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [1].
- 19 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [4].
- 20 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [100].
- 21 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [101].
- 22 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [102].
- 23 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [120].

7.

Anderson, the Diocese is "utterly in the dark" on the central issue²⁴; and (f) the difficulty Father Anderson's death creates in this case is highlighted by the foreshadowed tendency evidence (being evidence from four other people who each allege they were sexually abused by Father Anderson), as the detail of these allegations also had not been put to Father Anderson before he died²⁵.

14 GLJ applied for and was granted special leave to appeal to this Court on the ground that the Court of Appeal erred in permanently staying the proceedings on the basis that a fair trial could no longer be had such that the proceedings were an abuse of process. The Diocese filed a notice of contention which it did not press.

15 As explained below, an exercise of power under s 67 of the *Civil Procedure Act* to permanently stay proceedings on the ground that they are an abuse of process as any trial will be necessarily unfair or "'so unfairly and unjustifiably oppressive' as to constitute an abuse of process"²⁶ is an evaluative but not a discretionary decision. Proceedings either are or are not capable of being the subject of a fair trial or are or are not so unfairly and unjustifiably oppressive as to constitute an abuse of process. Accordingly, the applicable standard of appellate review is not that specified in *House v The King*²⁷, but the "correctness standard" as explained in *Warren v Coombes*²⁸. Further, on the undisputed facts in the present case, the Diocese did not prove that there could be no fair trial (and did not contend otherwise that a trial would be so unfairly and unjustifiably oppressive as to constitute an abuse of process). Accordingly, the Diocese did not prove that the proceedings involved an abuse of process. The Court of Appeal's contrary conclusion was wrong. GLJ is entitled to have the proceedings heard and determined.

24 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [121], quoting *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 250 [158].

25 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [123].

26 *Walton v Gardiner* (1993) 177 CLR 378 at 392.

27 (1936) 55 CLR 499 at 504-505.

28 (1979) 142 CLR 531 at 551-552.

Appellate review

16 The reasoning in *House v The King* applies to judicial decisions involving an exercise of discretion²⁹. It has been said that the concept of a "discretion" is "apt to create a legal category of indeterminate reference"³⁰, but the presently relevant essential characteristic of a discretionary judicial decision is that it is a decision where more than one answer is legally open. In *Norbis v Norbis*³¹, for example, the power of a court to make an order altering the interests of parties to a marriage was characterised as a judicial discretion because the decision called for "value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right"³². The line separating discretionary decisions (in which appellate review is confined to the *House v The King* standard) and other decisions (in which the "correctness standard" applies) was identified as that between questions lending "themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions" in which event "it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance"³³, and questions to which there is but one legally permissible answer, even if that answer involves a value judgment³⁴.

17 The extreme step of the grant of a permanent stay of proceedings demands recognition that the questions whether a trial will be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process each admit of but one uniquely right answer. As Leeming JA observed in *Moubarak by his tutor Coorey v Holt*, while the "distinction between a trial being necessarily unfair and a trial which is so unfairly and unjustifiably oppressive as to constitute an abuse of process is no doubt a fine one", the distinction exists and was the ratio in *Walton v Gardiner*³⁵ and the extant test for abuse of process when s 6A of the

29 (1936) 55 CLR 499 at 504.

30 *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138 [37].

31 (1986) 161 CLR 513.

32 (1986) 161 CLR 513 at 518.

33 *Norbis v Norbis* (1986) 161 CLR 513 at 518.

34 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 562-563 [46]-[49], 574-575 [85]-[87].

35 (1993) 177 CLR 378.

Limitation Act was enacted³⁶. Every case in which a fair trial cannot be held will also involve such unfairness to or oppression of a defendant as to constitute an abuse of process. But such unfairness to or oppression of a defendant as to constitute an abuse of process may exist even if a fair trial can be held³⁷. In both cases, while the answer to each question involves an evaluative process, the law tolerates but one correct answer.

18 While the understandable focus of the authorities in this area of discourse is the position of the party seeking the permanent stay, both concepts (necessary unfairness or such unfairness or oppression as to constitute an abuse of process) ultimately concern the congruence of the holding of a trial and rendering of a verdict with the fundamental norms underlying our legal system in the circumstances as they exist at the time of the application for the permanent stay. The position of the party seeking the permanent stay is relevant insofar as it exposes the congruence or incongruence of a trial and verdict with the normative structure of the Australian legal system. A trial which will be necessarily unfair or which acts as an instrument of unfairness and oppression to a defendant cannot yield a legitimate verdict within that system and thereby the holding of the trial and rendering of a verdict will bring the administration of justice into disrepute. The doctrine of abuse of process is one element in a court's armoury to protect the administration of justice, but it is to be understood as a measure of last resort to be exercised only in exceptional circumstances.

19 The normative structure of the Australian legal system is that it is adversarial in nature. The concept of judicial power which courts wield necessarily involves the "capacity to administer the common law system of adversarial trial", a defining characteristic of which is "the conduct of trial by an independent and impartial tribunal"³⁸. The independence and impartiality of the tribunal is protected, in part, by the confining of the tribunal's role to deciding the case on the basis of the evidence which each party elects to tender. The adversarial system of justice "leave[s] each party to bring forward the evidence and argument to establish [their] case, detaching the judge from the hurly-burly of contestation and so

36 (2019) 100 NSWLR 218 at 254 [190].

37 eg, *Connellan v Murphy* [2017] VSCA 116. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 58.

38 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64]. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3].

enabling [the judge] to view the rival contentions dispassionately"³⁹. The adversarial system does not "involve the pursuit of truth by any means" and does not permit the judge to engage in "an inquisitorial role in which [the judge] seeks ... to remedy the deficiencies in the case on either side"⁴⁰. The judge "hear[s] and determine[s] the issues raised by the parties" and does not "conduct an investigation or examination on behalf of society at large"⁴¹.

20 These constraints on a judge in the adversarial system, requiring the judge not to descend "into the arena" lest the judge's "vision [be] clouded by the dust of the conflict"⁴², place both the parties and the forensic decisions they make, and the impartial, independent, and dispassionate judge, at the centre of the common law system of dispute resolution. Accordingly, the adversarial system generally requires that a plaintiff be able to identify the claim made and the material facts on which the claim is based, and that a defendant be able to consider and respond to the claim in some meaningful way. If these requirements cannot be satisfied in some way or another then the adversarial system of justice, a principal means by which the rule of law in Australia is maintained, is unable to function. Confined to the exercise of judicial power as understood in a common law adversarial system, no judge can perform these essential functions of making and responding to the claim in the place of the plaintiff and the defendant. Understood in this context, the doctrine of abuse of process, at least insofar as it is concerned with ensuring that a fair trial can be held and the trial will not involve undue unfairness or oppression to a party, protects the integrity of the adversarial system of justice and the maintenance of the rule of law.

21 Neither necessary unfairness nor such unfairness or oppression as to constitute an abuse of process justifying a permanent stay of proceedings depends on a mere risk that a trial might be unfair⁴³. The party seeking the permanent stay bears the onus of proving that the trial will be unfair or will involve such unfairness or oppression as to constitute an abuse of process. While the onus is the civil standard of the balance of probabilities, the onus has rightly been described as a

39 *Waugh v British Railways Board* [1980] AC 521 at 535. See also *Baker v Campbell* (1983) 153 CLR 52 at 129.

40 *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.

41 *Jones v National Coal Board* [1957] 2 QB 55 at 63.

42 *Yuill v Yuill* [1945] 1 All ER 183 at 189.

43 A question left open in *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 237-238 [88].

heavy one, and the power rightly said to be exercisable only in an exceptional case. This is because it is always an extreme step to deny a person the opportunity of recourse to a court to have their case heard and decided⁴⁴. Lest the concept of "exceptional circumstances" be reduced to the formulaic, the power to grant a permanent stay, as Gaudron J explained in *Jago v District Court (NSW)*, is "a power to refuse to exercise jurisdiction" which operates "in the light of the principle that the conferral of jurisdiction imports a prima facie right in the person invoking that jurisdiction to have it exercised", it being "a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is 'amenable to the jurisdiction' of the courts"⁴⁵. This context underlies the requirement of exceptionality to enliven the power to grant a permanent stay.

22 Moreover, although it has been said that the question whether a permanent stay should be granted on abuse of process grounds "falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations"⁴⁶, the ultimate question is not "whether the unfairness to a moving party by reason of a stay outweighs the unfairness to a defending party by reason of the continuation of the proceedings"⁴⁷. It is difficult to conceive of a case in which a mere balancing of competing interests between the parties could justify a permanent stay of proceedings. The metaphor of a "balancing exercise" is best avoided⁴⁸. It cannot be applied to the concept of either the incapacity for a fair trial

44 *Williams v Spautz* (1992) 174 CLR 509 at 529, quoting *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 498; [1977] 2 All ER 566 at 582. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31, 75-76; *Walton v Gardiner* (1993) 177 CLR 378 at 392.

45 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, quoting *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 399; 72 ALR 1 at 12.

46 *Walton v Gardiner* (1993) 177 CLR 378 at 395-396. See also *Rogers v The Queen* (1994) 181 CLR 251 at 256; *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at 387 [164].

47 Contrary to *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 257 [205]. Also contrary to *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 at [34].

48 The metaphor is used, for example, in *Warren v Attorney General for Jersey* [2012] 1 AC 22 at 31-32 [21]-[26] in a context where it is clear the "balance" means only a

to be held, or a trial involving such unfairness or oppression as to constitute an abuse of process. It also tends to distract attention from the real issue – the congruence or otherwise of the holding of a trial and rendering of a verdict with the fundamental norms underlying our legal system – and impermissibly refocuses attention on considerations personal to the parties. Considerations personal to the parties are relevant only to the extent that they expose circumstances of the congruence or incongruence in the particular case of the holding of a trial and rendering of a verdict.

23 If a trial will be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process, a court must not permit the trial to be held. 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. It follows that it would be wrong in principle for the appellate court to decide the appeal in such a case on other than the general "correctness standard".

24 The terms of s 67 of the *Civil Procedure Act* do not speak to the contrary. The "may" in s 67 ("the court may ... stay any proceedings before it") is facultative and assumes that the exercise of the power will conform to applicable legal principles. The power in s 67 to order a stay of proceedings, either permanently or until a specified day, is not confined to cases of abuse of process. Nor are abuses of process confined to circumstances in which a fair trial can never be held or, if able to be held, will involve such unfairness or oppression to the defendant to amount to an abuse of process. One example is the bringing or maintaining of proceedings for an improper purpose. Section 67 is undoubtedly of sufficient breadth to provide "a means by which that Court can regulate its processes and manage cases before it"⁴⁹ and, accordingly, encompasses decisions which may be characterised as discretionary⁵⁰. If, however, the juridical foundation for an exercise of power to grant a permanent stay to prevent an abuse of process is that a trial will be necessarily unfair or involve such unfairness or oppression to a defendant as to constitute an abuse of process, or the proceedings are brought or maintained for an improper purpose, the decision whether to exercise the power in that case is not "discretionary" in the sense relevant to the applicable standard of appellate review.

determination of the need to protect the integrity of the criminal justice system in all of the circumstances of the case.

49 *Wigmans v AMP Limited* (2021) 270 CLR 623 at 654 [73] (emphasis in original).

50 eg, *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31, 75-76.

25 In *Batistatos v Roads and Traffic Authority (NSW)*⁵¹, Gleeson CJ, Gummow, Hayne, and Crennan JJ cited with approval the statement of Gaudron and Gummow JJ in *R v Carroll* that the label "discretionary" to describe the power to permanently stay proceedings as an abuse of process:

"does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not. However, as with discretionary decisions, properly so called, appellate review of its exercise looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration."

26 This reasoning was not critical to the decision in *Batistatos*, which was argued and determined at the level of the power to grant a permanent stay⁵². The difficulty with this reasoning is that a discretionary decision, properly so called, is one in respect of which the law permits reasonable minds to differ. If, as correctly recognised in *R v Carroll* and *Batistatos*, a judge must stay proceedings that are an abuse of process and must not stay proceedings that are not an abuse of process, it necessarily follows that the decision is not a discretionary one for the purpose of ascertaining the applicable standard of appellate review⁵³. Nor does the application of the standard applicable to discretionary decisions – "whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration" – reflect either the purpose of the power (to protect the integrity of the adversarial system) or the extreme consequences of an exercise of the power (a court declining to exercise its jurisdiction). That the classes of possible abuse of process are not closed because "notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case"⁵⁴ may be accepted, but does not dictate that a decision to grant a permanent stay is discretionary in nature.

51 (2006) 226 CLR 256 at 264 [7], quoting *R v Carroll* (2002) 213 CLR 635 at 657 [73].

52 (2006) 226 CLR 256 at 279 [59].

53 cf, for example, *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at 387 [164] and *UBS AG v Tyne* (2018) 265 CLR 77 at 105 [74].

54 *Ridgeway v The Queen* (1995) 184 CLR 19 at 75.

27 This said, because the circumstances of potential abuses of process are infinite, there may be cases in which a trial judge enjoys a significant advantage over an appellate court in the making of findings of fact or drawing of inferences including about the credibility of witnesses. In such a case, an appeal by rehearing under s 101 of the *Supreme Court Act 1970* (NSW)⁵⁵ may involve "making all due allowances for the advantages available to the trial judge"⁵⁶. In the present case, the courts below enjoyed no such advantage. The evidence was wholly documentary.

28 It follows that, in this appeal, the duty of this Court "is to decide the case – the facts as well as the law – for itself"⁵⁷.

A fair trial in child sexual abuse claims – a new world

Section 6A of the Limitation Act

29 In the Second Reading Speech introducing the *Limitation Amendment (Child Abuse) Bill 2016* (NSW), the Attorney-General for New South Wales recorded that the Bill responded to "recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse"⁵⁸. The Attorney-General said⁵⁹:

"Statutory limitation periods determine the time by which a claim for damages must be commenced. The royal commission found 'limitation periods are a significant, sometimes insurmountable, barrier to survivors pursuing civil litigation.' It is now widely understood that, due to the injuries inflicted on them by their abusers, survivors of sexual and other child abuse often take decades to understand and act on the harm arising from the abuse. The royal commission's research has revealed that the average time to

55 In the present case, the appeal was pursuant to a grant of leave by operation of s 101(2)(e) of the *Supreme Court Act*. Section 75A(5) of the *Supreme Court Act* provides that "[w]here the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing".

56 *Fox v Percy* (2003) 214 CLR 118 at 128 [29].

57 *Warren v Coombes* (1979) 142 CLR 531 at 552.

58 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6399.

59 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6399.

15.

disclose childhood sexual abuse is around 22 years. As the applicable limitation period is currently between three and 12 years, depending on when the abuse occurred, many survivors find the statutory period in which to commence a claim for damages has passed by the time they are able to commence proceedings. For those survivors who may be able to prove one of the exceptions to the standard limitation period, the process of proving an exception can be expensive, lengthy and traumatic. In essence, statutory limitation periods often mean that survivors of child abuse are unable to claim any compensation for the harm done to them."

30 The Attorney-General explained that⁶⁰:

"The bill removes the existing time limitations on commencing a child abuse action, including the 'ultimate bar', which is a statutory provision that prevents claims more than 30 years after the abuse occurred."

31 The Attorney-General also noted that the Bill applies retrospectively, "meaning there will be no limitation period for claims regardless of when the abuse occurred"⁶¹.

32 The Attorney-General said⁶²:

"It is a fundamental tenet of the rule of law that all parties receive a fair trial. These amendments preserve the existing powers of a court to safeguard the right to a fair trial. They do not restrict a court from dismissing or staying proceedings where it determines that a fair trial is not possible; for example, where the passage of time has led to a loss of evidence capable of establishing a case to be tried."

60 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6401.

61 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6402.

62 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6402.

33 The *Limitation Amendment (Child Abuse) Act* amended the *Limitation Act* by the insertion of s 6A which relevantly provides that⁶³:

- "(1) An action for damages that relates to the death of or personal injury to a person resulting from an act or omission that constitutes child abuse of the person may be brought at any time and is not subject to any limitation period under this Act despite any other provision of this Act.
- (2) In this section, ***child abuse*** means any of the following perpetrated against a person when the person is under 18 years of age:
 - (a) sexual abuse,
 - ...
 - ...
- (6) This section does not limit:
 - (a) any inherent jurisdiction, implied jurisdiction 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."

34 In providing in s 6A(6)(a) that s 6A does not limit any inherent, implied, or statutory jurisdiction of a court, as the Second Reading Speech discloses⁶⁴, Parliament intended that the existing powers of a court to safeguard the right to a fair trial, and without such unfairness or oppression as to constitute an abuse of process, be preserved. But the removal of any limitation period for the commencement of proceedings for death or injury resulting from child abuse, including the removal of the ultimate bar of 30 years from the accrual of the cause of action in s 51(1) of the *Limitation Act*, involves a fundamental change to the

63 See similar provisions in *Limitation Act 1985* (ACT), s 21C; *Limitation Act 1981* (NT), s 5A; *Limitation of Actions Act 1974* (Qld), s 11A; *Limitation of Actions Act 1936* (SA), s 3A; *Limitation Act 1974* (Tas), s 5B; *Limitation of Actions Act 1958* (Vic), ss 27O-27R; and *Limitation Act 2005* (WA), s 6A.

64 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6399.

legal context in which the power in s 67 of the *Civil Procedure Act* (and equivalent inherent jurisdiction of a court) is to be exercised.

35 To explain this fundamental change, it is necessary to recognise that temporal considerations have always been a significant aspect of common law conceptions of justice. While there is no common law right to a speedy trial⁶⁵, the maxim "justice delayed is justice denied" reflects deeply held values informing the common law.

36 In *Herron v McGregor*, McHugh JA, for example, recorded that⁶⁶:

"Throughout its history the common law has recognised the importance of the speedy trial of both civil and criminal proceedings. The importance of the speedy hearing of cases was expressly recognised in Magna Carta (1215), s 40. In vol 1 of his *First Institute* Coke declared (at 22) that Magna Carta was 'but a confirmation or restitution of the common law'. The importance attached to speedy justice had also been shown at an earlier period by the *Assize of Clarendon* 1166, s 4 and s 6, which required the sheriff to bring persons accused as robbers, murderers and thieves 'and receivers of them' before the justices 'immediately and without delay'. Magna Carta and the common law principles are the source of the United States Constitution's Sixth Amendment right to a speedy trial: *Klopfer v North Carolina* 386 US 213 (1967)."

37 McHugh JA also said in *Herron v McGregor* that a "limitation period represents the legislature's judgment as to what the public interest requires after taking into account the relevant factors including the prejudice which delay may create"⁶⁷. It followed that in the ordinary course, if the conduct of a party involves oppression of another party, including by delaying the commencement of proceedings to vindicate their rights, the fact that the proceedings are commenced within the limitation period (or the lack of any such period) is no bar to the power of a court to grant a stay to prevent such oppression⁶⁸.

65 *Jago v District Court (NSW)* (1989) 168 CLR 23.

66 (1986) 6 NSWLR 246 at 252.

67 (1986) 6 NSWLR 246 at 253.

68 *Herron v McGregor* (1986) 6 NSWLR 246 at 253.

38 As Bell P noted in *Moubarak*⁶⁹, Lord Sumption described the principle in these terms⁷⁰:

"Limitation reflects a fundamental and all but universal legal policy that the litigation of stale claims is potentially a significant injustice. Delay impoverishes the evidence available to determine the claim, prolongs uncertainty, impedes the definitive settlement of the parties' mutual affairs and consumes scarce judicial resources in dealing with claims that should have been brought long ago or not at all."

39 This long-standing recognition of the importance of speed in the delivery of justice means that, in the ordinary course, the passing of time, in and of itself, may enliven the inherent or a statutory power of a court to prevent undue vexation or oppression of or unfairness to a party.

40 As s 6A(6) of the *Limitation Act* says, the section "does not limit" the inherent, implied, or statutory jurisdiction of courts, including to prevent abuses of process. It must be recognised, however, that the jurisdiction is now to be exercised in the new context created by s 6A(1). The jurisdiction preserved by s 6A(6) is not limited by the new reality created by s 6A(1), but nor is it unaffected by that new reality. Confronted with an existing limitation period that worked injustice to a vulnerable class of people (those claiming damages for death or personal injury resulting from child abuse), Parliament acted to ensure that people within that class may commence proceedings at any time. Parliament thereby imposed its own normative requirements on proceedings within this class. Judicial fidelity to this new normative structure is required.

41 The fundamental change wrought by s 6A of the *Limitation Act* is that, 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. In the face of s 6A, the mere passing of time, in and of itself, is no longer a potential aspect of the interests of justice relevant to the exercise of the power to permanently stay proceedings for damages for death or personal injury resulting from child abuse.

42 Accordingly, while it is certainly the case that the "absence of a limitation period for a particular type of claim ... means that a plaintiff with such a claim will generally not be able to be criticised for any delay in bringing such a claim (at least

69 (2019) 100 NSWLR 218 at 234 [72].

70 *Abdulla v Birmingham City Council* [2013] 1 All ER 649 at 666 [41].

where it is not credibly suggested that the delay was deliberate or in some way colourable)" and "no occasion arises for an explanation for any [such] delay"⁷¹, s 6A has a greater significance. Where, as here, a limitation period existed and was removed by a legislative act, the legislative act also 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. Having eradicated that conception for actions for damages for death or personal injury resulting from child abuse, the section also necessarily removes any requirement or even expectation of an explanation for the passing of time between the accrual of the cause of action and the commencement of the action. Absent proof of a forensic decision by a plaintiff to obtain some advantage from delay or some other relevant potentially disentitling circumstance, the mere fact of the passing of time is of no consequence.

43 In *Moubarak*, Bell P went a considerable distance towards this recognition in focusing on the "effect of delay on the trial process"⁷² and not the mere *fact* of the effluxion of time. But it also must follow from this recognition that the effect of the passing of time on the trial falls to be evaluated in this radically new context in which Parliament has chosen to abolish any period of limitation for the commencement of the action. Specifically, the effect of the passing of time in such a case is to be evaluated on the basis that it will be neither uncommon nor unexpected for the circumstances that the limitation period sought to avoid to be encountered. If, by exercise of the inherent, implied, or statutory jurisdiction of courts to prevent an abuse of process, a plaintiff claiming damages for death or personal injury resulting from child abuse were able to be confronted in each case with the common and expected effects of the effluxion of time, and those common and expected effects sufficed to constitute the "exceptional circumstances" justifying a court refusing to exercise jurisdiction, the operation of s 6A, and its capacity to fulfil its legislative purpose, would be rendered inutile.

44 In the Attorney-General saying, in the Second Reading Speech for the Bill, that "there will be no limitation period for claims regardless of when the abuse occurred"⁷³, and in Parliament providing to that effect in s 6A, it must be taken that Parliament did not intend that persons claiming damages for death or personal injury resulting from child abuse would be subjected to the same "expensive,

71 *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 234-235 [75].

72 *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 235 [77] (emphasis in original).

73 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6402.

lengthy and traumatic" process that they would have had to confront before the enactment of s 6A to bring themselves within one of the statutory exceptions to a limitation period. The fact that, by s 6A(6), s 6A does not limit the inherent, implied, or statutory jurisdiction of courts to prevent an abuse of process cannot be taken to mean that Parliament intended both: (a) on the one hand, to "lift one barrier to justice for survivors of child abuse" in recognition that such abuse "can forever alter the course of people's lives and continue to cause trauma and hardship for decades", and that "due to the injuries inflicted on them by their abusers, survivors of sexual and other child abuse often take decades to understand and act on the harm arising from the abuse"⁷⁴; and (b) on the other hand, for the common and expected effects of the passing of those years or decades, in and of themselves, to suffice to constitute the "exceptional circumstances" justifying a court refusing to exercise jurisdiction by permanently staying such proceedings.

45 The observations to which Bell P refers in *Moubarak*⁷⁵ expose the new world in which the doctrine of abuse of process must operate in respect of persons claiming damages for death or personal injury resulting from child abuse.

46 In *Brisbane South Regional Health Authority v Taylor*, a civil case, McHugh J made the point that "[p]rejudice may exist without the parties or anybody else realising that it exists"⁷⁶. In another civil case, *Batistatos*⁷⁷, which concerned a claim for damages for personal injury where the proceedings were commenced (just) within the ultimate bar of 30 years imposed by s 51 of the *Limitation Act*, Gleeson CJ, Gummow, Hayne, and Crennan JJ approved the statement of Bryson JA in the court below that⁷⁸:

"Delay is not what the [*Limitation Act*] authorises, literally or in substance. It operates in quite another way, by preventing proceedings being brought after prescribed times, irrespective of whether or not the proceedings can be fairly adjudicated ... The present case is one at the extremes, as almost three decades passed before the proceedings were

74 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6399.

75 *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 235-237 [78]-[86].

76 (1996) 186 CLR 541 at 551.

77 (2006) 226 CLR 256.

78 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 277-278 [54], quoting *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 405-406 [80].

commenced, and four decades will have passed before the proceedings ever go to trial. The [*Limitation Act*] cannot in my view close the court's eyes to the practical inability of reaching a decision based on any real understanding of the facts, and the practical impossibility of giving the defendants any real opportunity to participate in the hearing, to contest them or, if it should be right to do so, to admit liability on an informed basis."

47 These observations cannot be gainsaid. But, as observed in *Ridgeway v The Queen*, public confidence in the administration of justice depends on contemporary values⁷⁹. In the context of child abuse claims, Parliament has created the relevant framework of contemporary values. Parliament has accepted that, in the ordinary course, there is likely to be long delay in the bringing of such claims before the courts. It has acted to enable such claims to be brought at any time. It is for the courts now to evaluate contentions of abuse of process within this new normative structure.

48 *Jago*, a criminal case, is instructive. Despite the sensitivity of the common law to the position of an individual accused vulnerable to the power of the State, Mason CJ said that no stay of a criminal trial is to be granted unless there is "nothing that a trial judge can do in the conduct of the trial [to] relieve against its unfair consequences" such that, by the effects of the lapse of time, any conviction of the accused would be "necessarily unfair [and] would bring the administration of justice into disrepute"⁸⁰. Brennan J said that "although our system of litigation adopts the adversary method in both the criminal and civil jurisdiction, interests other than those of the litigants are involved in litigation, especially criminal litigation. The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society ... If permanent stay orders were to become commonplace, it would not be long before courts would forfeit public confidence. The granting of orders for permanent stays would inspire cynicism, if not suspicion, in the public mind."⁸¹ Brennan J noted that, in dealing with a criminal case in which there was a risk of unfairness to the accused (eg, by delay or pre-trial publicity), the "judge's responsibilities are heavy but they are not discharged by abdication of the court's duty to try the case. If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as

79 (1995) 184 CLR 19 at 75.

80 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34, quoting *Barton v The Queen* (1980) 147 CLR 75 at 111, and *R v Clarkson* [1987] VR 962 at 973.

81 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 49-50.

the courts can make it."⁸² Toohey J considered that, in cases of delay in prosecution, while "it is conceivable that delay has been so great and consequent prejudice to an accused so manifest that directions cannot ensure a fair trial", it will "often be possible to cure ... prejudice by evidentiary rulings and by directions to the jury regarding the way they should approach the evidence adduced"⁸³.

49 If this is so in respect of a criminal trial affected by long delay where the power of the State operates against an individual at the potential price of the individual's liberty, there is no reason to assume that common law techniques developed to deal with inferential reasoning in civil cases are not equally capable of enabling a judge to do justice according to law in that context. In the case of a claim for damages for death or injury resulting from child abuse, in enacting s 6A of the *Limitation Act*, Parliament decided that the value the law ordinarily places on the expeditious resolution of claims had to yield. It had to yield, as Parliament accepted the demonstrated fact that such abuse often causes life-long harm of a kind effectively disabling a person from bringing a claim for years or decades. As a result, Parliament ensured that the potential injustice to the person claiming to have suffered from child abuse of not being able to bring their claim, and the concomitant undermining of public confidence in the administration of justice from that circumstance, presumptively trumped the potential prejudice and injustice that might be caused by the passing of time. In enacting s 6A, Parliament also decided that both the margin for error in human recollection after the passing of years and even decades and a potential lack of opportunity for the defence to fully investigate the surrounding circumstances were not sufficient reasons to maintain the limitation period.

50 Accordingly, a person within the relevant class created by s 6A of the *Limitation Act* can "allow time to pass"⁸⁴ if that passing of time involves nothing more than the expected consequences of the types of psychological harm caused by the child abuse the subject of the claim (and not, for example, a deliberate forensic decision to try to obtain some advantage from delaying the making of the claim). Further, 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 6A, are properly to be understood as routine and unexceptional sequelae of the harm caused by the alleged act the subject of the claim.

82 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 49.

83 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 71-72.

84 *Herron v McGregor* (1986) 6 NSWLR 246 at 254.

51 By reason of s 6A of the *Limitation Act*, it also could never be said, as in *Batistatos*, that a case within the class to which the section applies is "at the extremes"⁸⁵ because three decades have passed since the cause of action accrued. Nor could a court accept that a defendant is practically unable to participate in a hearing on an informed basis merely because such time has passed. In this class of case, there can be no assumption that the proceedings are "stale" or "should have been brought long ago or not at all"⁸⁶. In enacting s 6A, Parliament ensured that no claim for damages for death or personal injury resulting from child abuse can be characterised as "historical". Just as there is no "historical murder" while a person is alive to mourn the victim, there is no "historical child sexual abuse" while there is someone alive claiming to have suffered harm from the abuse.

52 Nor, in this class of case, can any inevitable impoverishment of the evidence which the passing of time occasions be characterised as involving "exceptional circumstances". It is not that the concept of "exceptional circumstances" involves any quantitative assessment of the number of cases within the class which might meet the threshold of exceptionality. Mr Walker SC was right to debunk any such notion. The requirement of "exceptional circumstances" involves a qualitative, not quantitative, assessment. But that qualitative assessment is one now undertaken in the context set by s 6A which abolished any limitation period. In the face of s 6A, the mere effluxion of time and the inevitable impoverishment of the evidence which the passing of time engenders cannot attract the quality of exceptionality which is required to justify the extreme remedy of the grant of a permanent stay. If that were so, public confidence in the administration of justice in accordance with the law as enacted by Parliament would itself be undermined.

53 As Bell P observed in *Moubarak*, "the absence of a witness or witnesses who may be regarded by a party as important, whether through death, illness, loss of memory or inaccessibility ... will not mean that a fair trial cannot be obtained". Nor does the loss or unavailability of other evidentiary material mean that a trial will be unfair⁸⁷. Thus in *R v Edwards*, the Court said⁸⁸:

"Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things

85 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 277 [54], quoting *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 406 [80].

86 *Abdulla v Birmingham City Council* [2013] 1 All ER 649 at 666 [41].

87 *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 238 [89]-[90].

88 (2009) 83 ALJR 717 at 722 [31]; 255 ALR 399 at 405.

may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair."

54 For example, in *R v McCarthy*, Gleeson CJ (with whom Carruthers and Hunter JJ agreed) allowed an appeal where the trial judge had granted a permanent stay of criminal proceedings and had given no thought to the methods the common law had developed to ensure fairness despite the unavailability of witnesses and the loss of evidence. His Honour said⁸⁹:

"[The trial judge] appeared to have taken no account of a matter that has been mentioned as of great importance by the High Court and by this Court in considering applications for a stay of proceedings. That is the matter of the powers and discretions available to a trial judge to deal with problems such as missing documents or missing witnesses.

...

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. If the result of that were that nobody could obtain a fair trial, and the proceedings had to be permanently stayed, it would go a long way towards solving the problems of delay in the criminal lists in this State. However, the position is that it 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."

55 In the civil context, in *Holt v Wynter* Priestley JA observed⁹⁰:

"[F]or a trial to be fair it need not be perfect or ideal. That degree of fairness is unattainable. Trials are constantly held in which for a variety of reasons not all relevant evidence is before the court. Time and chance will have their effect on evidence in any case, but it is not usually suggested that that effect necessarily prevents a fair trial."

89 *R v McCarthy* (unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 12 August 1994) at 11-12, 14.

90 (2000) 49 NSWLR 128 at 142 [79] (emphasis in original).

56 One reason that missing witnesses or evidence do not necessarily make a civil trial unfair is that the adversarial system requires a plaintiff to prove its case. In New South Wales, in accordance with s 140 of the *Evidence Act 1995* (NSW):

- "(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account –
 - (a) the nature of the cause of action or defence, and
 - (b) the nature of the subject-matter of the proceeding, and
 - (c) the gravity of the matters alleged."

57 Section 140(2)(c) of the *Evidence Act* reflects the position of the common law that the gravity of the fact sought to be proved is relevant to "the degree of persuasion of the mind according to the balance of probabilities"⁹¹. By this approach, the common law, in accepting but one standard of proof in civil cases (the balance of probabilities), ensures that "the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved"⁹².

58 The common law incorporates other principles in recognition of the fact that, in the adversarial system, cases are always decided within the evidentiary framework the parties have chosen and are often decided on incomplete evidence. The legal maxim that "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"⁹³ acknowledges "the problem that in deciding issues of fact on the civil standard of proof, the court is concerned not just with the question 'what are the probabilities on the limited material which the court has, but also whether

91 *Rejfeck v McElroy* (1965) 112 CLR 517 at 521.

92 *Rejfeck v McElroy* (1965) 112 CLR 517 at 521, citing, amongst other cases, *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

93 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

that limited material is an appropriate basis on which to reach a reasonable decision"⁹⁴.

59 Common law courts have developed techniques addressing the problems in civil trials associated with the recollection of events which occurred long in the past. For example, the warning which *Longman v The Queen*⁹⁵ said may be required in a criminal trial involving events in the distant past has a civil law equivalent. *Watson v Foxman* is frequently cited because of its continuing importance in identifying 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"⁹⁶.

60 A court is not bound to accept uncontradicted evidence. Uncontradicted evidence may not be accepted for any number of reasons including its inherent implausibility, its objective unlikelihood given other evidence, or the trier of fact simply not reaching the state of "actual persuasion" which is required before a fact may be found⁹⁷. "To satisfy an onus of proof on the balance of probabilities is not simply a matter of asking whether the evidence supporting that conclusion has greater weight than any opposing evidence ... It is perfectly possible for there to be a scrap of evidence that favours one contention, and no countervailing evidence, but for the judge to not regard the scrap of evidence as enough to persuade him or her that the contention is correct."⁹⁸ The evidence must "give rise to a reasonable and definite inference" to enable a factual finding to be made; mere conjecture based on "conflicting inferences of equal degrees of probability" is insufficient⁹⁹. As Dixon CJ said in *Jones v Dunkel*¹⁰⁰, the law:

"does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable

94 *Cross on Evidence*, 13th ed (2021) at 47 [1215], quoting *Ho v Powell* (2001) 51 NSWLR 572 at 576 [14]-[16].

95 (1989) 168 CLR 79.

96 (1995) 49 NSWLR 315 at 319.

97 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.

98 *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164 at 176 [51].

99 *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

100 (1959) 101 CLR 298 at 305.

basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied."

61 Common law courts have also developed techniques to enable proceedings to be heard and determined despite the unidentifiability, death, or legal incapacity of a party¹⁰¹. It has been said, for example, that: (a) in the case of a claim in debt against a deceased estate, a court "scrutinizes the evidence very carefully to see whether it is true or untrue"¹⁰²; (b) "it is a mistake to think that because an event is unseen its cause cannot be reasonably inferred"¹⁰³; and (c) "[i]t is elementary that in a claim based on communications with a deceased person, the court treats uncorroborated evidence of such communications with considerable caution, and is entitled to regard as of particular significance any failure of the claimant to bring forward corroborative evidence which was, or ought to have been, available"¹⁰⁴.

62 It is also relevant that, in recommending the abolition of limitation periods throughout Australia, the Royal Commission said "[w]hile our recommendations relate to institutional child sexual abuse, we have no objection to state and territory governments providing for wider changes. However, if change is made we are firmly of the view that it should be consistent across jurisdictions."¹⁰⁵ Reflecting this recommendation, the meaning of "child abuse" in s 6A(2) of the *Limitation Act* includes sexual abuse of any person under 18 years of age, whether or not the abuse occurred in an institutional context.

63 The suite of legislative changes the New South Wales Parliament implemented in response to recommendations of the Royal Commission included s 6K of the *Civil Liability Act 2002* (NSW). By s 6K(1), "[c]hild abuse proceedings may be commenced or continue against an unincorporated organisation in the name of the organisation or in a name reasonably sufficient to identify the organisation as if the organisation had legal personality". GLJ's proceedings depend on s 6K(1) to be maintained. The Attorney-General for New South Wales explained in the Second Reading Speech for the *Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018* (NSW) that "[t]he Royal Commission into Institutional Responses to Child Sexual Abuse made profound

101 eg, *Patsantzopoulos by his tutor Naumov v Burrows* [2023] NSWCA 79 at [36].

102 *Plunkett v Bull* (1915) 19 CLR 544 at 549.

103 *Holloway v McFeeters* (1956) 94 CLR 470 at 480.

104 *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164 at 179 [66].

105 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 458.

revelations about our society. Over the five years of its inquiry, we learnt about the thousands of children in institutions who have been sexually abused", reflecting "society's failure to protect children across a number of generations"¹⁰⁶. The legislative response to those revelations included implementing "the royal commission's recommendation to enable survivors to identify a proper defendant to sue"¹⁰⁷.

64 There are likely to be differences between cases involving claims of child abuse arising from a private and domestic, as opposed to an institutional, context. Documentary records and evidence concerning relevant circumstances are more likely to exist in an institutional context than in a private and domestic context. An institutional context may be more likely than a private and domestic context to yield tendency evidence given the opportunities for an alleged perpetrator to access large numbers of children in an institutional setting. While claims of child abuse by a specific complainant may take decades to emerge, in an institutional context the institution may have been on notice of other claims made against the alleged perpetrator at a much earlier time. While each case of alleged abuse of process depends on its own facts, the context in which the alleged child abuse is contended to have occurred (domestic and private or institutional) is likely to be relevant to the questions whether a trial will be necessarily unfair or so unfair or oppressive to a defendant as to constitute an abuse of process.

65 Both *Moubarak* and *Connellan v Murphy*¹⁰⁸ (cases involving individual defendants to claims arising from a domestic and private setting) demonstrate that the effects of the passing of time (as opposed to its mere passing), of themselves or with other factors, might mean that a fair trial is no longer possible or that the proceedings otherwise involve an abuse of process by reason of oppression of or unfairness to the defendant. In *Moubarak*, the passing of time meant that the defendant's dementia rendered him incapable of providing any response to the case of child sexual abuse brought against him by his niece, by way of either evidence or instructions in circumstances where the claim was made with no forewarning when the defendant had legal capacity, and where the alleged abuse occurred in a domestic and private setting involving no creation or keeping of records of any

106 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 September 2018 at 20.

107 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 September 2018 at 21.

108 [2017] VSCA 116.

kind¹⁰⁹. In *Connellan v Murphy*, "the defendant [was] being asked to defend himself [from child sexual abuse claims] 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" and in circumstances where "neither side is in a position to investigate (or call evidence about) relevant surrounding circumstances and events" and "the vagueness of the plaintiff's own recollection of surrounding circumstances makes the investigation and defence of her allegations even more problematic"¹¹⁰. In *Connellan v Murphy*, as in *Moubarak*, the claims arose with no forewarning of any kind and, given the domestic and private setting of the claims, there was no relevant documentary evidence, nor any prospect of such evidence emerging¹¹¹.

The present case

66 In oral submissions, Mr Walker SC for the Diocese accepted that the only forensic disadvantage upon which it could rely to justify its contention that no fair trial could be held was the death of Father Anderson and "[w]ithout that, there would be no case for a stay". It was not, it was submitted, that there could never be a fair trial if an alleged perpetrator had died, but that, in this case: (a) Father Anderson had died before any allegation relating to GLJ could be put to him; (b) Father Anderson would have been a critical witness; (c) the Diocese could not confer with Father Anderson about the evidence he might give; and, (d) as the Court of Appeal said, the Diocese was "utterly in the dark" on the central issue"¹¹².

67 Even at this early stage, however, the Diocese was not "utterly in the dark" about the central issue whether Father Anderson sexually assaulted GLJ. To say otherwise is to expose what the appellant rightly described as the "confected bewilderment at the heart of the [Diocese's] case". Circumstantial evidence is still evidence. The Diocese knew: (a) the parishes to which Father Anderson had been attached included Lismore; (b) the dates of his attachment; (c) the nature of the work a priest in his position was likely to have performed and, according to the Diocese, that this would not have included the kind of pastoral care GLJ claimed

109 *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 250-251 [158], [163]-[171].

110 [2017] VSCA 116 at [57].

111 [2017] VSCA 116 at [56]-[58], [61]-[62], [65].

112 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [121], quoting *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 250 [158].

occurred; (d) the complaints which had been made about Father Anderson's sexual acts involving young boys (before 1968 when GLJ alleges Father Anderson sexually abused her); (e) the fact that Father Anderson had been referred to a psychiatrist for treatment of his "problem" as early as 1966; and (f) Father Anderson's response to allegations of sexual misconduct with boys before his laicisation.

68 The Diocese had also submitted to the primary judge that "the extant material, while demonstrating that Father Anderson had a sexual interest in boys, there was no direct suggestion of a sexual interest in young teenage girls. The interest in boys was expressed through sport including football, fishing, shooting and surfing. This interest seemed to have been associated with significant grooming which appeared to be absent in the plaintiff's case"¹¹³. There was ample material to support that submission. The material included the Diocese's own records relating to Father Anderson's laicisation including: (a) a report from the Archbishop of Brisbane, describing Father Anderson's "problem" as "homosexuality" [sic – paedophilia] and that "in every case young boys were involved"; (b) a report from the Bishop of Lismore that Father Anderson had to be relieved of his priestly obligations given his "recurring trouble in sexual matters" always involving young boys; (c) a report from Reverend O'Brien that Father Anderson was "far more interested in children and young people, especially those of the male sex" than anyone else; (d) a statement from Monsignor Ryan that: (i) he had seen Father Anderson "with a boy spreadeagled under him over the car bonnet, performing what seemed to be sexual movements upon the boy"; (ii) he had been told by a man that his son "had been used sexually by Fr Anderson" and that "it was common knowledge that other boys had been similarly used"; and (iii) the man had given Monsignor Ryan the names of six such boys; (e) a letter from Monsignor Ryan to his superiors imploring them "[f]or God's sake get the fellow out" (of the priesthood); and (f) a letter from Reverend Cranney referring to "the agony of some parents of young sons who had been taught sexual perversion by Father Anderson".

69 Moreover, the Diocese had evidence from Father Anderson on oath relating to his petition for laicisation. In that evidence, Father Anderson swore that he had not "associated romantically with any girl" while a priest but refused to answer if he suffered from "any sexual abnormalities" or had "any problems with chastity". The Diocese had also resolved a series of claims from 2001 accusing Father Anderson of sexual abuse of boys by finding the claims "substantiated" and the

113 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204 at [34(f)].

payment of reparations to the men those boys had become. The claims all relate to the same period while Father Anderson was a priest.

70 The fact is that, in the face of the multiple crimes Father Anderson is alleged to have committed before his laicisation in 1971, the Diocese had years before Father Anderson's death in 1996 to make whatever inquiries it wished. Indeed, the Diocese made those very inquiries as part of his laicisation only for Father Anderson to refuse to answer in respect of "sexual abnormalities" (which it might be inferred referred to a sexual interest in boys) and to deny any "romantic" interest in girls.

71 Further, even if GLJ's evidence at the trial could rightly be characterised as uncontradicted on the whole of the evidence, the trial judge would not be bound to accept that evidence¹¹⁴. It may be too vague or internally inconsistent or otherwise unconvincing to enable a positive inference to be drawn that it is more likely than not that Father Anderson sexually assaulted GLJ as claimed when she was 14 years old. As the primary judge also observed, in addition to the evidence which supported the Diocese's submissions that Father Anderson's sexual interest was in boys not girls, the Diocese had evidence available to it to enable it to make submissions about: (a) the chronology of Father Anderson's various appointments within the Diocese of Lismore; (b) the type of pastoral care an assistant priest would be assigned; (c) the relatively short time, perhaps only two months, Father Anderson served directly in the Lismore parish; and (d) Father Anderson being appointed to Lismore during summer months only¹¹⁵.

72 While it may be accepted that the Diocese had no opportunity to ascertain Father Anderson's response to the specific allegation that he sexually assaulted GLJ, it is not the case that there is no evidence (even at this early stage of the proceedings) of Father Anderson's response to other allegations of the sexual abuse of young boys that were put to Father Anderson before and during his laicisation. Father Anderson refused to answer such questions on oath and otherwise repeatedly refused to engage in any discussion about any "problem of priestly life and work". Father Anderson's refusal to engage extended to a refusal to agree to psychiatric treatment for his "problem", which the Diocese had arranged as early as 1966, on the basis that, in Father Anderson's reported words, "there was nothing wrong with him".

114 eg, *Cole v The Commonwealth* [1962] SR (NSW) 700 at 704; *Re Gear* [1964] Qd R 528 at 535; *Re Hope*; *Ex parte Carter* (1985) 59 ALR 609 at 611.

115 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204 at [34(a)-(d)].

73 Nor is Father Anderson "the" or "a" person who would be giving instructions to the lawyers for the Diocese. Unlike in *Moubarak*, Father Anderson is not the defendant to the proceedings. He is not the person who would give instructions. *Moubarak* was a case, moreover, in which it was significant that the defendant who was being sued was alive but unable to participate in any way in or give any instructions relevant to his own defence due to his dementia. There was no suggestion in *Moubarak* of any evidence at all that could be relevant to the central fact in issue but for that of the plaintiff and the defendant in that case¹¹⁶. Similarly, in *Connellan v Murphy*, the defendant being sued was alive and being asked to defend vague claims of a sexual assault said to have been perpetrated when he was 13 years old and in circumstances where the claims involved real confusion about the identity of the alleged perpetrators¹¹⁷.

74 The foreshadowed tendency evidence comprised four unsworn statements alleging that Father Anderson engaged in similar conduct with boys, the detail of which was not put to him before he died¹¹⁸. It is not the case that the Diocese would have no meaningful opportunity to engage with the question whether a tendency so identified (to groom and engage in sexual acts with boys) would have significant probative value to the facts in issue¹¹⁹. The Diocese would be able to submit to a trial judge that the foreshadowed tendency evidence does not have significant probative value on the same basis it put to the primary judge on the application for a permanent stay (that paedophilic conduct towards young boys is not good evidence of paedophilic interest in young girls). The tendency evidence may or may not be admitted. It may be subject to discretionary exclusion under s 135 of the *Evidence Act*. If admitted, it may be proved to be unreliable. The parties might call expert evidence about paedophilia. All this is speculation. Being speculation, none of this could support a conclusion that the trial could not be fair because Father Anderson has died.

75 What then remains in the present case? As explained, the fact that some 55 years have passed since the alleged sexual assault, in and of itself, is immaterial. The details of the alleged sexual assault are not vague and uncertain. The alleged

116 eg, *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 250-251 [162]-[171].

117 [2017] VSCA 116 at [57]-[58].

118 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [123].

119 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [125].

sexual assault occurred when the only two people in the house were GLJ and Father Anderson. The Diocese was aware of and had acted on the fact that Father Anderson had sexually abused boys while a priest well before the alleged sexual assault of GLJ occurred. There is documentary evidence that priestly colleagues and superiors of Father Anderson had repeatedly tried to engage with him about what was then described as his "problem" with boys, including by arranging for him to see a psychiatrist, and that Father Anderson consistently refused to recognise that he had a "problem", leading to his request for laicisation in 1971. What then has truly been lost to the Diocese by reason of Father Anderson's death? The answer is nothing but the opportunity of asking Father Anderson if he sexually assaulted GLJ and, depending on the Diocese's forensic decisions, the possibility of calling him as a witness if the case proceeded to trial, or otherwise settling the case. The loss of these opportunities does not make a trial of GLJ's claims unfair. This is particularly so in the following circumstances.

76 First, Father Anderson is not a defendant to the proceedings. The proposition that the Diocese might have "taken instructions" from Father Anderson had he been alive is untenable. If he had been alive, the Diocese would have had an opportunity to make forensic decisions which it does not have due to his death. The forensic decisions would have been sequential: (a) should Father Anderson be asked by the Diocese to respond to GLJ's allegations; and (b) if so, and depending on Father Anderson's response, should the Diocese settle the case or call him as a witness? While the opportunity to make these forensic decisions has been lost, their potential importance in the circumstances of the present case is wholly speculative. The documentary and other evidence about Father Anderson's sexual conduct means that this is not a case in which it may be presumed that the Diocese would have sought information from Father Anderson had he been alive or necessarily would have called him as a witness.

77 Second, while the specific allegations of GLJ were not put to Father Anderson when he was alive, there is evidence from which it could reasonably be inferred that, if required to answer, he would have denied the allegations. He denied any "romantic interest" in girls while under oath in 1971.

78 Third, it may be inferred from the documentary evidence both that other allegations of sexual abuse of boys had been put to Father Anderson while he was a priest, and that Father Anderson denied any wrongdoing or rebutted any suggestion of impropriety.

79 Fourth, the laicisation process gave the Diocese an opportunity to take whatever steps it saw fit to make further inquiries about Father Anderson having sexually abused children. It is not the point that this might or might not have exposed GLJ's claim. The point is that, unlike in *Moubarak* and *Connellan v Murphy* where the claims emerged without any prior hint of an issue, the Diocese

had been on notice of Father Anderson's having allegedly sexually abused boys well before the death of Father Anderson. It is also plain that the Diocese considered that Father Anderson's request to be relieved of his priestly duties was in the best interests of the Church because of his obvious sexual interest in boys and the wealth of credible evidence that he had acted on his interest by sexually abusing boys. Indeed, these matters were said to be "common knowledge" in the Kyogle parish at the time. Had the Diocese wished to fully inform itself about the extent of Father Anderson's alleged crimes at any time before his death in 1996, and the potential harm inflicted on victims who might need ongoing support, it had ample opportunity to do so (and might well have been reasonably expected to do so given the serious and shocking nature of the allegations which had been made against Father Anderson, and Father Cranney's advice to Diocese authorities of the apparent "agony" suffered by parents of boys who claimed to have been sexually abused by Father Anderson).

80 Fifth, the death of Father Anderson in 1996 did not prevent the Diocese from subsequently finding to its own satisfaction that complaints of sexual abuse by him while a priest had been substantiated and should be the subject of the payment of monetary compensation.

81 Sixth, there is already available a considerable body of documentary evidence of arguable relevance to the proceedings. Other sources of potential documentary records are also apparent including the psychiatrist to whom Father Anderson was referred.

Conclusion and orders

82 The Court of Appeal was wrong to conclude that there could be no fair trial of these proceedings. Accordingly, the proceedings should not have been the subject of an order for a permanent stay. They should proceed to trial.

83 The following orders should be made:

- (1) The appeal be allowed.
- (2) Set aside orders 3-5 made by the Court of Appeal of the Supreme Court of New South Wales on 1 June 2022 and, in lieu thereof, order that:
 - (a) the appeal be dismissed; and
 - (b) the applicant pay the respondent's costs of the appeal.
- (3) The respondent pay the appellant's costs of the appeal to this Court.

84 STEWARD J. In *R v Davis*, a case concerning a permanent stay of criminal proceedings, the Full Court of the Federal Court of Australia observed¹²⁰:

"It is more important to retain the integrity of our justice system than to ensure the punishment of even the vilest offender. We do not say this because the justice system is some precious preserve of the judges; it is not. We say this because the integrity of the justice system is a fundamental and essential element in the maintenance of a free society. Our society should not buy the conviction of its guilty at the cost of allowing trials which would inevitably risk convicting also the innocent."

85 The foregoing passage was cited with approval by Bell P in his Honour's seminal judgment in *Moubarak by his tutor Coorey v Holt*¹²¹, a case concerning the stay of civil proceedings principally due to gross delay. The reasons of Kiefel CJ, Gageler and Jagot JJ in this proceeding, with very great respect, risk weakening this fundamental principle of our common law. In *Moubarak*, a woman alleged that her uncle had sexually assaulted her on four occasions in 1973 or 1974, when she was 12 years old. The woman commenced proceedings in 2016, some 42 or 43 years after the alleged sexual assaults. By the time the proceedings were due to come on for trial in April 2019, her uncle was still alive but was suffering from severe dementia; he could neither give evidence nor provide instructions. At no time prior to the onset of his dementia had the niece confronted her uncle with her allegations. The Court of Appeal of the Supreme Court of New South Wales correctly ordered a permanent stay of the proceedings.

86 In this appeal, the Trustees of the Roman Catholic Church for the Diocese of Lismore ("the Church") are the respondent. But their key witness would have been a Mr Anderson, who – for a period of perhaps only two months in 1968 – served as an assistant priest at St Carthage's Cathedral in Lismore in New South Wales. The appellant, GLJ, alleges that Mr Anderson sexually assaulted her when she was a teenage girl one Saturday afternoon after returning home from netball, at which time no other members of her family were home.

87 Mr Anderson died in 1996. In October 1971, he was laicised – that is, his status as a priest was removed – following a petition he made to the Bishop of Lismore in December 1970. GLJ first made her complaint about his alleged conduct to the Church in 2019. She is suing the Church alleging, relevantly, that it was negligent because it knew that Mr Anderson abused other children or, alternatively, that the Church is vicariously liable for his conduct. The Church sought a permanent stay of her suit. At first instance this was refused, but it was unanimously granted on appeal. For the reasons which follow, the Court of Appeal

120 (1995) 57 FCR 512 at 521 per Wilcox, Burchett and Hill JJ.

121 (2019) 100 NSWLR 218 at 239 [95].

of the Supreme Court of New South Wales did not err in ordering a permanent stay.

88 There are two issues for determination:

- (1) To succeed on appeal, is it necessary for the appellant to demonstrate that the decision of the Court of Appeal was infected with *House v The King*¹²² error? If so, did the Court of Appeal err?
- (2) If not, was the Court of Appeal otherwise correct in ordering a permanent stay of GLJ's proceedings?

***House v The King* error**

89 Conventionally, the doctrine of "judicial restraint", comprising *House v The King*¹²³ error, is applied by an appellate court when reviewing the exercise by a trial judge of a discretionary power or function which calls for "value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right"¹²⁴.

90 The power exercised here by the Court of Appeal to grant a permanent stay is found in s 67 of the *Civil Procedure Act 2005* (NSW) ("the Procedure Act"). Section 67 provides:

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

91 That the source of the power is found in a statute is important. It means that whether "judicial restraint" is or is not to apply is an issue of statutory construction. As Edelman J observed in *Minister for Immigration and Border Protection v SZVFW*¹²⁵:

"Where the source of the power and grounds of review is statutory, then any requirement for judicial restraint should be implied from, or based upon, the terms of the statute."

122 (1936) 55 CLR 499.

123 (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

124 *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ.

125 (2018) 264 CLR 541 at 592 [151].

92 Section 6A(1) of the *Limitation Act 1969* (NSW) must also be mentioned. It permits an action for damages that relates to the death of or personal injury to a person resulting from "child abuse" to be brought "at any time". The term "child abuse" is defined in s 6A(2) to include, among other things, the sexual abuse of a person under 18 years of age. It is not in dispute that s 6A was introduced following the Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission"), headed by the Honourable Justice Peter McClellan AM, and the recommendations made by it in the "Redress and Civil Litigation Report"¹²⁶. As Mitchelmore JA correctly recognised below¹²⁷, s 6A reflects the observation of the Royal Commission that for a victim of child sexual abuse, "[i]t cannot be assumed, or expected, that considering whether to commence civil litigation will be their first priority"¹²⁸. It was not in dispute that s 6A(1) applied to GLJ's suit and that, because of it, GLJ is not to be "criticised" for the delay in making her claim for damages¹²⁹.

93 At the same time, there is s 6A(6) of the *Limitation Act*, which is in the following terms:

"This section does not limit:

- (a) any inherent jurisdiction, implied jurisdiction 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 example, this section does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible."

94 It was also not in dispute that, for the purposes of GLJ's claim, s 6A(6) preserved the operation of s 67 of the Procedure Act. I shall return to s 6A(6).

126 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6399.

127 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [116].

128 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 444.

129 *Moubarak* (2019) 100 NSWLR 218 at 234-235 [75] per Bell P.

95 I otherwise agree with the conclusion reached by Kiefel CJ, Gageler and Jagot JJ that the exercise of the power to grant a stay pursuant to s 67 of the Procedure Act does not involve the conferral of any discretion on a court. The better view is that if a trial can take place in accordance with the irreducible minimum standards of fairness (discussed below), then the court has a duty to hear and decide the case. If a trial cannot take place in accordance with these standards, then the court has a duty to stay the proceedings. Thus, the word "may" in s 67 operates to confer power on a court to grant a stay in circumstances where it otherwise has a duty to hear all those cases that come before it. In the context of s 67, "may" is a word denoting empowerment¹³⁰. That is a common use of the word. By way of illustration, Jervis CJ once said¹³¹:

"[W]e are of opinion, that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises."

96 It follows that when a court is satisfied for the purposes of s 67 that a stay should be granted, it *must* make such an order. It also follows that the issue on appeal is whether the Court of Appeal was correct to order a permanent stay.

The state of the evidence

97 The evidence before the Court of Appeal was lopsided.

98 The evidence relied upon by GLJ comprised her unsworn statement in which she alleged that following a motorcycle accident, which left her father injured, Mr Anderson was allocated as a support priest for her family. She said Mr Anderson regularly visited their home, quickly gained the trust of her family, and often enjoyed meals with the family. Indeed, it was normal for him to enter the house unannounced. Mr Anderson gave her gifts of jewellery and showed a lot of interest in her. GLJ alleges that Mr Anderson sexually assaulted her at their family home when no one else was about. GLJ says that she told a number of individuals about the assault, including her first boyfriend when she was 17, her first husband, and, she believes, one of her school friends. However, no witness statements from these people were supplied to the Court, and senior counsel for GLJ was unable to shed any light as to whether evidence would or could be forthcoming from them at a future trial.

130 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134 per Windeyer J.

131 *MacDougall v Paterson* (1851) 11 CB 755 at 773 [138 ER 672 at 679].

99 GLJ also relied on four unsworn witness statements from men who alleged that they were sexually abused by Mr Anderson when they were boys at a time when Mr Anderson was resident as a priest in the Macksville Parish from 1965. All of the witnesses have been granted pseudonyms, either in the context of this proceeding or other legal proceedings. Witness SJT alleges that he was sexually abused by Mr Anderson from the age of 12 on about 20 occasions over a three-year period. SJT's brother told him he had been abused as well. Witness SDA alleges that he was in Year 4 or 5 when Mr Anderson sexually abused him about 10 or 11 times. SDA says that Mr Anderson coached the school rugby team in which he played and that all but one of the incidents occurred while Mr Anderson drove him home from training. SDA alleges that his brother was also abused. Witness CSP alleges that he was sexually abused on three occasions by Mr Anderson in 1966 when he was in Year 6. Like SDA, he alleges the abuse took place in Mr Anderson's car on the drive home from rugby training. Witness CWA alleges that Mr Anderson took him on three trips to Scott's Head to engage in swimming and/or shooting. On the third such occasion, CWA says Mr Anderson sexually abused him.

100 Each of these unsworn witness statements was admitted into evidence by the primary judge over the objection of the Church, which contended that the requirements in s 97 of the *Evidence Act 1995* (NSW) for admitting tendency evidence had not been satisfied. The primary judge held that the contest about the admissibility of the evidence could only be resolved at trial, and the question at this stage was merely whether the available material establishes that a fair trial is possible. The primary judge further observed that the witness statements were potentially relevant in ways other than tendency evidence, including as to questions of foreseeability.

101 In addition, documents were produced to GLJ on subpoena from the Archdiocese of Brisbane detailing Mr Anderson's history as a clergyman in the 1960s up until his laicisation in 1971. They record that Mr Anderson was a "homosexual" and allegations that he had sexually abused boys. If the allegations as to sexual abuse are accurate, Mr Anderson was a monster, and the Catholic Church very greatly failed in its sacred duty to bring Mr Anderson to justice and to protect the children of its parishes. Instead, apart from sending him to a psychiatrist in Sydney, it merely moved him around to different towns in New South Wales, until he was laicised in 1971. No attempt of any kind was made to bring the allegations to the attention of the police. Even if those allegations are not true, that, in and of itself, was nonetheless a monumental failing.

102 The detailed narrative begins in 1963, when Mr Anderson was appointed to Kyogle Parish. The Parish Priest was Monsignor Ryan, who passed away in 1987.

In an undated letter¹³², Monsignor Ryan gave an account of Mr Anderson's behaviour for the purposes of the laicisation petition. For example, he said that from the upper floor of the Presbytery he observed Mr Anderson performing "what seemed to be sexual movements" upon a boy lying on a car bonnet. Monsignor Ryan also said that, in October 1965, a parishioner came to him and complained that his son had been "used sexually" by Mr Anderson. The boy also said Mr Anderson's behaviour was "common knowledge" and supplied the names of six other boys who had been similarly "used".

103 There was also material obtained under subpoena from the NSW/ACT Professional Standards Office ("the Standards Office"), which this Court was told is an office established by the Catholic Church. Those documents included details of a person claiming that when he was 11 years old he was sexually abused by Mr Anderson in Kyogle on multiple occasions. Monsignor Ryan eventually revoked Mr Anderson's appointment at Kyogle, and sent him home with a direction that he see a psychiatrist in Sydney. The psychiatrist recommended that Mr Anderson live in Sydney or at an establishment in Richmond. Instead, he was sent by the Catholic Church to Macksville. In a dramatic letter sent by Monsignor Ryan in January 1971 to Father Douglas, then the Chancellor of the Archdiocese of Brisbane, Monsignor Ryan wrote:

"For God's sake get the fellow out."

104 Father O'Brien, who died in 2002, was the Parish Priest in Macksville in 1965. In a letter written in 1971 to Father Douglas, who died in 1984, Father O'Brien did not refer to any allegations of sexual abuse. However, he said that Mr Anderson was "far more interested in children and young people, especially those [of] the male sex". The Standards Office holds two complaints that have been made against Mr Anderson that he sexually abused two male individuals in Macksville.

105 In 1966, Mr Anderson was moved to the Maclean Parish. Father Cranney was the Parish Priest in Maclean. He died in 1980. In a letter he sent to Father Douglas as part of the laicisation petition, Father Cranney wrote that it was only after Mr Anderson had left that he became aware of boys who "had been taught [s]exual perversion" by Mr Anderson and that the "problem" was "known to a large number of people". As a result, Father Cranney did not see how Mr Anderson could return to any neighbouring parish. The Standards Office

132 The primary judge inferred from the chain of correspondence that it was "reasonably clear" that it "must have been written in early 1971". Consistently with this, the Court of Appeal observed that the letter appears to have been sent under cover of a note dated 23 January 1971.

retains two complaints made against Mr Anderson whilst he was a priest in Maclean.

106 Crucially for present purposes, at some time in 1968 Mr Anderson was moved to the Diocese of Lismore. It is unclear how long he stayed there. There is some evidence that it was only for two months from December 1968. But it may have been longer. Bishop Farrelly was the Bishop for the Diocese of Lismore. He died in 1974. In the letter he sent as part of the laicisation petition, dated 15 January 1971, Bishop Farrelly said that he had known about Mr Anderson's "[rec]urring trouble in sexual matters, especially homosexuality" for about six years. He said that "in every case young [boy]s were involved".

107 Mr Anderson's final parish was Tweed Heads. Father Hoade was the Parish Priest at Tweed Heads. He died in 2008. In a letter dated 14 January 1971, prepared as part of the laicisation petition, Father Hoade does not refer to the sexual abuse of any children.

108 For the purposes of the laicisation petition, Mr Anderson was examined on oath. He declined to answer a question concerning his chastity. He denied having any romantic involvement with any girl during his time as a priest. In his petition for laicisation, Mr Anderson referred to "failures" that prevented him from carrying on as a priest. He was asked what these failures were when examined on oath and replied by saying that this would be a "spiritual matter between" him and the Bishop.

109 Father O'Donnell, the Archbishop of Brisbane, who died in 1980, prepared a report in 1971 in support of the laicisation of Mr Anderson. It referred to recurring trouble in sexual matters involving young boys. It stated that persistent efforts to help Mr Anderson to overcome "his problem" had failed. Mr Anderson was subsequently laicised.

110 GLJ also relied on another complaint made to the Standards Office to show that Mr Anderson had once been assigned to another family when a priest in the 1960s. The complaint records that Mr Anderson sexually abused a boy and his brother, when the boy was nine or ten years of age. The complainant alleged that Mr Anderson "came into [their] lives" after their mother was widowed, and that he sexually abused the children in his car and in their home. This complaint was made in 2001 and was found by the Standards Office to be "more likely than not" true. The Catholic Church made a payment of \$50,000.

111 The Court was referred to four other complaints received by the Standards Office about Mr Anderson involving the sexual abuse of boys for which the Catholic Church made aggregate payments of over \$250,000. The complaints were said to have been made variously before the death of Father O'Brien (the Parish Priest at Macksville), the death of the Father Brown (the Secretary to the Bishop of Lismore), and the death of Father Hoade (the Parish Priest at Tweed Heads).

112 Without diminishing the seriousness of these allegations, and save in the case of what Monsignor Ryan observed in the school playground, they are just that: allegations. They represent historical untested, and, for the most part, untestable, hearsay evidence. Whether they might have led to the discovery of credible and admissible evidence is both unknown and largely unknowable.

113 Other than the unsworn statement of GLJ, there was no direct evidence before the Court of the sexual assault alleged by her. Indeed, there are no documents from around the time of the alleged assault that in any way refer to it. As Mitchelmore JA observed below¹³³:

"The Lismore Trust was not on notice of GLJ's allegation of sexual assault before 2019. On her own account, there were no witnesses. There are no documents dating back to or around the time of the alleged assault that detail or otherwise refer to what GLJ alleges occurred."

114 Furthermore, the evidence upon which the Church could rely upon to contradict GLJ's allegation was exceptionally thin; indeed, it was the almost complete lack of available evidence that drove the case for a permanent stay. The Church had no opportunity to be a viable contradictor because Mr Anderson was dead, and (almost¹³⁴) all of the members of the Catholic Church who might have been able to shed light on Mr Anderson's role as a priest and his behaviour, such as Monsignor Ryan, Bishop Farrelly, Father Douglas, Father O'Brien, and Father Cranney, were also all dead. They had all died more than a decade before GLJ first made her claim against the Church in 2019.

115 The Church led evidence from Mr Isaac, the current Secretary and Diocese Business Manager for the Lismore Diocese, who: deposed to the dates when the foregoing priests had died; explained that the Diocese had been given no prior notice of GLJ's complaint before 2019; was unable to find any records which established that Mr Anderson had been appointed to assist any family; explained in generic terms the role of an assistant priest in a parish; and annexed an affidavit of Sister Rosemary Carroll, who was Principal of St Patrick's Primary School in Macksville from 1965 to 1968. Sister Carroll deposed that no one had ever expressed concerns to her about Mr Anderson and that she had no reason to suspect that Mr Anderson ever sexually abused children.

116 Whilst the Church did not dispute that it held records which suggested that Mr Anderson had sexually abused young boys, it otherwise had no actual knowledge of what Mr Anderson did or did not do when an assistant priest in the

133 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [119].

134 Sister Rosemary Carroll, referred to below, is the exception and is still alive.

Diocese of Lismore. It had no records which could shed any light, directly or indirectly, on the veracity of GLJ's complaint. And those members of the Catholic Church who might have been able to give evidence, or provide information, had all died before 2019¹³⁵. Crucially, the Church could not even obtain instructions from Mr Anderson as to whether to admit the claims made, or to maintain some form of defence. As Mitchelmore JA observed below¹³⁶:

"[O]n the issue of the alleged sexual assault of GLJ there is no available contradictor and 'everything does depend upon the acceptance of [GLJ's] account'."

117 As a result, to use an expression adopted by Mitchelmore JA from Bell P's judgment in *Moubarak*, without Mr Anderson's evidence the Church was left "utterly in the dark"¹³⁷.

118 Much was made by GLJ about the alleged failure of the Church to make inquiries about the behaviour of Mr Anderson given the suspicions held about him in the late 1960s and the fact of his laicisation. Reliance was also placed on the fact that there was no evidence that the Church had approached any surviving priests following the receipt, first in 2001 by the Standards Office, of complaints about Mr Anderson. Two things may be said about those matters. First, how the suspicions held in the late 1960s and early 1970s about Mr Anderson, or the complaints received from 2001 onwards, could have led to the discovery of GLJ's complaint was never explained in any meaningful way. It was no more than speculation elevated to a form of reasoning by fashionable prejudice. Secondly, no questions were put to Mr Isaac about this issue, even though he was well placed to give meaningful answers. Indeed, he was not cross-examined at all. This was a deliberate forensic choice. Nothing should be gained by those who are "[w]illing to wound, and yet afraid to strike"¹³⁸.

135 With the exception of Sister Rosemary Carroll.

136 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [101].

137 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [121], quoting *Moubarak* (2019) 100 NSWLR 218 at 250 [158].

138 Alexander Pope, *Epistle to Dr Arbuthnot*; see *Visy Packaging Holdings Pty Ltd v Federal Commissioner of Taxation* (2012) 91 ATR 810 at 846 [194] per Middleton J.

Moubarak

119 Remarkably, save in one important respect, the applicable principles were never in dispute. They were accurately described by Bell P in *Moubarak*¹³⁹ and followed by the Court of Appeal below¹⁴⁰. Those principles are as follows¹⁴¹:

- "(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 ...
- (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".

139 (2019) 100 NSWLR 218 at 233-234 [71].

140 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [1] per Macfarlan JA, [2] per Brereton JA, [95] per Mitchelmore JA.

141 *Moubarak* (2019) 100 NSWLR 218 at 233-234 [71] per Bell P (citations omitted). See also *Jago v District Court (NSW)* (1989) 168 CLR 23; *Williams v Spautz* (1992) 174 CLR 509; *Walton v Gardiner* (1993) 177 CLR 378; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256.

120 The foregoing principles have since been endorsed in *Willmot v Queensland*¹⁴², *RC v The Salvation Army (Western Australia) Property Trust*¹⁴³, *GMB v UnitingCare West*¹⁴⁴, *Smith v The Council of Trinity Grammar School*¹⁴⁵, *JD v ZYX*¹⁴⁶, and *Gorman v McKnight*¹⁴⁷.

121 These principles are directed at securing the irreducible minimum of what is a fair trial. Of course, no party is entitled to a perfect trial¹⁴⁸; but a trial should not proceed if it cannot be carried out in accordance with a minimum standard of necessary fairness. GLJ sought to qualify this requirement for cases of child sexual abuse. Kiefel CJ, Gageler and Jagot JJ have agreed with this qualification or amendment, called by their Honours "a new world", for all cases of "child abuse" brought under s 6A of the *Limitation Act*. For such cases, GLJ said, the bar should be lowered; there should, it was asserted, be a greater tolerance for imperfections in the available evidence. The impoverishment of evidence due to the effluxion of time should be no necessary barrier to the holding of a trial. Kiefel CJ, Gageler and Jagot JJ appeal to a "new normative structure" of law, said to be justified by the enactment of s 6A, as a reason for this change in the law. Practically, this means that in a case concerning an allegation of child abuse, the fact alone that some form of accusation has been made might be enough to justify a trial proceeding; but it has never been sufficient to proclaim, as Abigail Williams did: "I saw Goody Sibber with the Devil"¹⁴⁹, and no more.

122 Why the law should be distorted for such cases has not been persuasively explained. Moreover, the dilution of standards is, with respect, unsupported by authority or principle and sanctions trials which are unfair. For the reasons expressed below, it is not supported by s 6A in any way. And the plea for justice to conform to "contemporary values" is, with utmost respect, dangerous; these values, and the justification for them, are not identified. Moreover, there is always a risk that resort to "values" can become confused with personal beliefs. The law

142 [2023] QCA 102 at [38] per Gotterson AJA, Mullins P and Boddice AJA agreeing.

143 [2023] WASCA 29 at [30] per Murphy and Vaughan JJA and Bleby AJA.

144 [2022] WASCA 92 at [57] per Quinlan CJ, Beech and Vaughan JJA.

145 [2022] NSWCA 93 at [27] per Gleeson and Leeming JJA.

146 [2022] WASCA 136 at [13] per Fraser AJA, Buss P and Murphy JA agreeing.

147 (2020) 19 ASTLR 181 at 183 [5] per Bell P, Payne JA and Emmett AJA agreeing.

148 *Moubarak* (2019) 100 NSWLR 218 at 238 [89] per Bell P.

149 Arthur Miller, *The Crucible*, act 1, scene 1.

should not be developed in this way. The diminishment of the requirements of a fair trial is addressed in more detail below.

123 Five further relevant principles may be extracted from *Moubarak*. Neither party challenged the correctness of this decision.

124 *First*, as Bell P correctly observed, the concept of what is a fair civil trial is informed by what Smith J said in *R v Presser*¹⁵⁰. *Presser* has since been adopted by this Court. In *Kesavarajah v The Queen*, Mason CJ, Toohey and Gaudron JJ summarised the *Presser* test as follows¹⁵¹:

"In *R v Presser*, Smith J elaborated [on] the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice. Those standards, which are based on the well-known explanation given by Alderson B to the jury in *R v Pritchard*, require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge."

125 *Presser* concerned a criminal trial, but as Bell P correctly reasoned in *Moubarak*, much of what it says about the essence of a fair trial can apply in a civil proceeding. For example, a defendant to a civil suit must have the mental capacity to be able to give instructions, to follow what is happening, to decide what defence to plead and to make the defendant's case known¹⁵². Moreover, as Bell P observed, civil claims of sexual assault "bear a strong affinity with a criminal charge of sexual assault"¹⁵³.

150 [1958] VR 45.

151 (1994) 181 CLR 230 at 245 (footnotes omitted), quoted in *Moubarak* (2019) 100 NSWLR 218 at 240 [99] per Bell P.

152 *Moubarak* (2019) 100 NSWLR 218 at 241-242 [105]-[109] per Bell P; *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd* [2003] NSWSC 618 at [32]-[33] per Campbell J. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 26 per Mason CJ.

153 *Moubarak* (2019) 100 NSWLR 218 at 241 [106]. See also *BRJ v The Corporate Trustees of The Diocese of Grafton* [2022] NSWSC 1077 at [115] per Garling J.

126 Also in *Moubarak*, Emmett AJA said the following about the nature of a fair trial which is noteworthy¹⁵⁴:

"The notion of a fair trial involves a balancing exercise insofar as it is necessary to assess whether the unfairness to a moving party by reason of a stay outweighs the unfairness to a defending party by reason of the continuation of the proceedings. The question is whether the unfairness to the appellant outweighs the unfairness to the respondent in being deprived of the opportunity of compensation if she is able to establish that the alleged assaults occurred."

127 *Secondly*, unfairness will often be acute in a civil claim where the defendant is dead, or is affected by a great incapacity. As Bell P said in *Moubarak*¹⁵⁵:

"I am not aware of any authority which in terms suggests that a fair trial of a civil claim will always be possible notwithstanding the death or absence through incapacity of a defendant, at least where the defendant's oral evidence goes to a critical aspect of liability, as in the present case."

128 Mr Anderson is not the defendant in this matter. But, for all practical purposes, especially given the claim of vicarious liability, he would have both been a defendant, and have stood in the shoes of the Church, had he been alive. Only Mr Anderson could have given effective instructions as to what, on his version, had occurred; and only Mr Anderson could have given evidence that might have contradicted GLJ. Of course, Mr Anderson may have refused to cooperate with the Church. But whether he would or might have done so, if still alive, is a matter of speculation. Contrary to the submission of GLJ, one cannot infer from the answers given by Mr Anderson during the laicisation process in 1971 what he might have done or said years later. With his death in 1996, what the Church thus lost was the critical opportunity to have access to Mr Anderson.

129 *Thirdly*, there is the unfairness that arises from delay. The alleged assault took place 55 years ago. There has since been a compelling and incurable impoverishment in the evidence that is available. As Lord Sumption once observed¹⁵⁶:

"Delay impoverishes the evidence available to determine the claim, prolongs uncertainty, impedes the definitive settlement of the parties'

154 *Moubarak* (2019) 100 NSWLR 218 at 257 [205].

155 (2019) 100 NSWLR 218 at 238 [92].

156 *Abdulla v Birmingham City Council* [2013] 1 All ER 649 at 666 [41].

mutual affairs and consumes scarce judicial resources in dealing with claims that should have been brought long ago or not at all."

130 In *Moubarak*, Bell P recognised that the consequences of delay depend upon the nature of the dispute in question. A case that turns upon available documentary evidence may often withstand great delay; but a case which turns upon oral testimony, particularly conflicting oral testimony, stands in a different position. His Honour said¹⁵⁷:

"[T]he impoverishment of evidence will be more acute where a trial is exclusively or heavily dependent on oral evidence and the quality of witnesses' memory and recollection. The fallibility of human memory and the capacity of the human mind for *ex post* rationalisation of events long since passed are the subject of the frequently cited observations of McLelland CJ in Eq in *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319."

131 Relevantly, in the context of explaining the corrosive effect of the passage of time, and its consequences for the quality and integrity of the trial process, Bell P referenced¹⁵⁸ the following passage from the reasons of McHugh J in *Longman v The Queen*¹⁵⁹:

"The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to 'remember' is well documented. The longer the period between an 'event' and its recall, the greater the margin for error. Interference with a person's ability to 'remember' may also arise from talking or reading about or experiencing other events of a similar nature or from the person's own thinking or recalling. Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine: Hunter, *Memory*, rev ed (1964), pp 269-270."

132 In *Batistatos v Roads and Traffic Authority (NSW)*¹⁶⁰ it was the objectively burdensome effect of delay on the defendants which justified a permanent stay of proceedings. Gleeson CJ, Gummow, Hayne and Crennan JJ agreed with the Court

¹⁵⁷ *Moubarak* (2019) 100 NSWLR 218 at 235 [77].

¹⁵⁸ *Moubarak* (2019) 100 NSWLR 218 at 235-236 [80].

¹⁵⁹ (1989) 168 CLR 79 at 107-108.

¹⁶⁰ (2006) 226 CLR 256.

of Appeal of the Supreme Court of New South Wales that the delay in that case (29 years) "was so serious that a fair trial was not possible"¹⁶¹.

133 *Fourthly*, there is the likelihood of inutile cross-examination of the complainant. Here, it was suggested that any unfairness to the Church could be mitigated by the ability to cross-examine GLJ, and to have her answers tested and her demeanour examined. For example, it was said that GLJ's claim to have played netball on the day of the alleged assault could be contradicted by putting to her that netball is a winter sport, yet Mr Anderson was probably only posted to Lismore in summertime. But, in truth, in a case of this nature, without instructions of any kind from Mr Anderson, the opportunity to test GLJ's evidence would be extremely limited. Thus, in the case of the netball example, the Church cannot establish when, with any certainty, Mr Anderson was assigned to Lismore, and, critically, it cannot now confirm those dates with him or anyone else. In *Moubarak*, Bell P was also alive to the inadequacy of cross-examination when proper instructions cannot be obtained. His Honour said¹⁶²:

"Whilst it is correct that a number of forensic steps would have been open to the defendant's tutor in defending the proceedings, such as cross-examining the plaintiff, exploring potential inconsistencies in her accounts to the police, Ms Evans and her various doctors, cross-examining Ms Evans if she were called by the plaintiff, and himself giving evidence (for what it would be worth) to the effect that the defendant had never mentioned the plaintiff to him, none of these matters, in my opinion, would make up for the fact that the defendant was, because of his mental condition, at all relevant times utterly in the dark about the allegations made against him and quite unable to give instructions in relation to them. Nothing that a trial judge could do in the conduct of the trial could, in my opinion, relieve against these consequences."

134 The same can be said here. The Church remains, as already mentioned, "utterly in the dark about the allegations made against" Mr Anderson and there is nothing a trial judge could do to mitigate against that reality.

135 *Fifthly*, even in cases of alleged sexual abuse, one cannot assume that there is only one side to the story; "it is essential to have the facts surrounding [the]

161 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 281 [69], 282 [72].

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

case"¹⁶³. In *Moubarak*, Bell P referenced the following passage from the decision of the Full Court of the Federal Court in *Davis*¹⁶⁴:

"Some people, rightly anxious that sexual offenders be brought to account, may be disappointed by our decision. They may think that it allows a guilty man to escape justice. But that conclusion necessarily involves the assumption that Dr Davis is in fact guilty of the offences with which he has been charged. The correctness of that assumption could only be determined by a fair trial. It is not enough to say, as some might be tempted to do, that the allegations would not have been made unless Dr Davis was guilty. That argument assumes there can only be one side to the story. Everyday experience in the courts shows this is rarely so. Nor is the situation really changed by the number of the complainants – especially when it is remembered that all except one of them emerged as a result of a newspaper article. We do not for a moment suggest deliberate concoction, but there is always a possibility that the newspaper article induced a degree of unconscious reconstruction. Time, too, may have obliterated memories of inconsistent facts and qualifications, leaving a deceptively clear impression. That is why it is essential to have the facts surrounding each case."

136 Bell P concluded in favour of a stay of the civil claim in *Moubarak*. His Honour did so for nine reasons, each of which are equally applicable to this matter. The nine were¹⁶⁵:

- (1) The complainant had never confronted the defendant with the allegation of sexual assault before the onset of the defendant's dementia. The same is relevantly true here. GLJ never confronted Mr Anderson before his death.
- (2) The defendant had advanced dementia prior to the report of the alleged assaults to the police. Here, GLJ has made no complaint to the police.
- (3) The defendant had advanced dementia at the commencement of proceedings. Here, Mr Anderson was already dead.
- (4) There were no eyewitnesses to the alleged assaults. The same is true in this matter.

¹⁶³ *R v Davis* (1995) 57 FCR 512 at 522 per Wilcox, Burchett and Hill JJ.

¹⁶⁴ (1995) 57 FCR 512 at 522 per Wilcox, Burchett and Hill JJ, quoted in *Moubarak* (2019) 100 NSWLR 218 at 239-240 [95].

¹⁶⁵ *Moubarak* (2019) 100 NSWLR 218 at 250-251 [162]-[171].

- (5) Because of his dementia, the defendant could not give instructions. Again, the same is true in this matter.
- (6) Because of his dementia, the defendant would have been also "utterly unable" to give evidence in the proceedings. Again, the same is true in this matter.
- (7) Because of his dementia, the defendant would have been unable to give instructions "*during the course of the trial*". Again, the same is true here.
- (8) The events took place 45 years ago and "other potentially relevant witnesses are now dead or unavailable". Here, the alleged event took place 55 years ago and all potentially relevant witnesses are dead¹⁶⁶.
- (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. The same is true here, other than documents that put Mr Anderson in Lismore as an assistant priest for a period of time, and the untested allegations contained in the Catholic Church's records, described above, about the sexual abuse of boys (not girls).

The plea for a "greater tolerance for imperfection" and of "impoverishment of evidence"

137 Even though GLJ accepted the principles articulated in *Moubarak*, as already mentioned, she contended that when applied in the context of cases of child sexual abuse, there needed to be a "greater tolerance for imperfection" in the evidence. Practically, this expression of principle would result, when applied, in making it more difficult to stay proceedings, and more likely that a trial would ensue. The basis for this contention would appear to be twofold. First, the recognition by the Royal Commission that victims of child sexual abuse often take a great many years before they are able to publicly confront their tragic circumstances¹⁶⁷ and, secondly, the abolition of any statute of limitation for civil suits arising from child sexual abuse. This submission failed to grapple persuasively with s 6A(6) of the *Limitation Act*, also introduced as part of the changes recommended by the Royal Commission, which expressly preserves a court's power to stay proceedings involving claims of child sexual abuse.

¹⁶⁶ As already mentioned, GLJ was unable to say whether or not the first boyfriend, the first husband or the school friend would be available to give evidence.

¹⁶⁷ Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) at 23.

138 When asked to identify an authority in support of the notion of "greater tolerance", senior counsel for GLJ referred this Court to the following passage from the reasons of the primary judge in this matter¹⁶⁸:

"I accept fully that the enactment of s 6A, as the Chief Justice has pointed out, does not affect the principles governing the exceptional circumstances in which a permanent stay of proceedings will be granted. At the same time, while bearing that consideration firmly in mind, the abrogation of a limitation period in respect of such matters may be taken as an indication that, subject to those principles, as a matter of public policy, the Parliament has determined, according to the terms of s 6A as a whole, that child abuse actions should be permitted to proceed despite the effluxion of even long periods of time and an inevitable resulting degree of impoverishment of evidence, provided a fair, not perfect, trial can be had."

139 With great respect, the foregoing is unsustainable; it is not supported by principle or by authority. In fact, it is directly contrary to what Garling J said in *BTMI v Scout Association of Australia New South Wales Branch*¹⁶⁹:

"Accepting ... that following the Royal Commission, the Parliament made a policy decision to remove the limitation period to enable victims of sexual abuse to bring claims which would otherwise be out of time, there is no contradiction between such a policy and the specific preservation of the Court's ability to prevent an abuse of the process by permanently staying the proceedings. The two matters, that is the presence or the absence of a limitation period which permits or precludes the commencement of proceedings, and whether a defendant can in the circumstances obtain a trial which is fair and does not constitute an abuse of process, are entirely distinct. Proceedings commenced within a limitation period can, depending on the circumstances, constitute an abuse of process and may be stayed permanently."

140 Section 6A(1) of the *Limitation Act*, by its terms, abolishes the statute of limitations for cases of child abuse. Other than this, as Bell P pointed out in *Moubarak*¹⁷⁰, by implication it also removes any need for a complainant to give an explanation for the delay in bringing proceedings. Any such requirement is otiose

168 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204 at [46].

169 [2023] NSWSC 431 at [157].

170 (2019) 100 NSWLR 218 at 234-235 [75].

because time cannot run against a complainant of this kind. But s 6A(1) does no more than this.

141 The principle of "greater tolerance" is also unsupported by the Royal Commission. Instead of endorsing such a principle, the Royal Commission rejected it, with the Commissioners making the following observation¹⁷¹:

"Even if the limitation period is relaxed, the interests of the defendant are protected by the court's jurisdiction to stay proceedings if any delay has made the chances of a fair trial unlikely."

142 For the foregoing proposition, the Commissioners cited the decisions of this Court in *Jago v District Court (NSW)*¹⁷² and *Batistatos*¹⁷³. They expressly emphasised that the power to prevent "unfair trials" should not be "limited"; that, with respect, is no support for a "new world" which tolerates an "impoverishment of evidence". The Commissioners wrote¹⁷⁴:

"Removing limitation periods may create a risk that courts will interpret the removal as an indication that they should exercise their powers to stay proceedings in a more limited fashion. We consider that it should be made clear that the removal of limitation periods does not affect the courts' existing powers ...

We appreciate the changes we support will allow institutions to apply for a stay of proceedings. This may cause delay and extra expense for some plaintiffs. We consider that this is a necessary and acceptable risk: the courts' powers to prevent unfair trials should not be limited. Both the survivor and the institution are entitled to a fair trial."

143 GLJ's proposition is also inconsistent with the passage from *Davis*¹⁷⁵, set out at the commencement of these reasons, concerning the law's preference to preserve the integrity of our justice system over the punishment of the vilest of offenders. Let it be made clear: a stay should be granted if the looming trial is one which can only be carried out in breach of the irreducible minimum standard of

171 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 444 (footnote omitted).

172 (1989) 168 CLR 23.

173 (2006) 226 CLR 256.

174 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 458.

175 (1995) 57 FCR 512.

fairness mandated by the law; such a trial is "so unfairly and unjustifiably oppressive" as to constitute an abuse of process¹⁷⁶. In contrast, a stay should be refused if the looming trial can take place consistently with those minimum standards. It follows that a trial which falls short of the minimum required standard would be unfair; it would constitute nothing less than a "solemn farce[]"¹⁷⁷. Yet this is precisely what GLJ seeks; GLJ wants a dilution of what would otherwise be the minimum standard of fairness for cases of child sexual abuse. The dilution arises from the "greater tolerance for imperfection" in the available evidence. But the law must not tolerate any degradation of those minimum standards of fairness. That is particularly so where the "greater tolerance" is one-sided; it appears to be limited only to imperfections in a defendant's ability to defend adequately a claim.

144 In *Batistatos*, a majority of this Court said that the right of any plaintiff to commence proceedings is never at large. Gleeson CJ, Gummow, Hayne and Crennan JJ said¹⁷⁸:

"The 'right' of the plaintiff with a common law claim to institute an action is not at large. It is subject to the operation of the whole of the applicable procedural and substantive law administered by the court, whose processes are enlivened in the particular circumstances. This includes the principles respecting abuse of process."

145 The "principles respecting abuse of process" draw no distinction between one class of plaintiff over another. All plaintiffs are equally subject to the same principles. There is no favoured class.

146 Child sexual abuse is a manifest tragedy; when committed by men who claim to speak for God, it is an ineffably shameful disgrace. But its alleged victims can only relevantly be vindicated through the law by a trial which is fair. There can be no vindication from a trial which is an abuse of process.

Was the Court of Appeal correct?

147 This leaves for determination the correctness of the Court of Appeal's decision to grant a permanent stay. The Court of Appeal was correct to order a permanent stay for three essential reasons.

176 *Walton v Gardiner* (1993) 177 CLR 378 at 392 per Mason CJ, Deane and Dawson JJ; *Moubarak* (2019) 100 NSWLR 218 at 254 [189]-[190] per Leeming JA.

177 *Page v The Central Queensland University* [2006] QCA 478 at [24] per Keane JA, Williams JA and White J agreeing.

178 (2006) 226 CLR 256 at 280 [65].

148 *First*, the delay in bringing GLJ's claim is greatly significant. As Mitchelmore JA correctly observed, it is the consequence of that delay which must be considered. Her Honour said¹⁷⁹:

"The issue of whether Father Anderson sexually assaulted GLJ is foundational to the causes of action pleaded against the Lismore Trust. Accordingly, although Father Anderson is not a defendant, he is a critical witness. Father Anderson died in 1996, before the Lismore Trust was on notice of the allegations. It follows that the Trust did not have an opportunity to confront him with the detail of GLJ's allegations and obtain instructions for the purposes of its defence of her claims, nor will it be able to call him as a witness if it so chose ... In the present case, Father Anderson died before any inquiries could be made; and there is no other material that sheds light on his putative response."

149 It is the critical loss of an "opportunity" to defend the claim, due to the expiration of time, which is decisive. Without the opportunity of knowing what Mr Anderson might have said about GLJ's allegation, and without the opportunity of speaking to other members of the Catholic Church who had interactions with Mr Anderson when he was a priest, the Church is unable to defend the case made against it on an informed basis. It remains "utterly in the dark" and there is nothing any trial judge could do to shed light into that void.

150 *Secondly*, the absence of any realistic or meaningful "opportunity" to defend the claim means that the case, if it were to proceed to trial, would do so without any proper contradictor. It is true that the Church would still have an opportunity to interrogate, challenge or identify inconsistencies in aspects of the claim made by GLJ. It might be able to establish, for example, that it was unlikely that Mr Anderson, as an assistant priest in Lismore, would have undertaken any pastoral role with disadvantaged families. It would also have the ability to rely upon GLJ's answers and demeanour in cross-examination. But having no idea itself as to what did or did not happen, it could not put to GLJ any contrary factual scenario. Indeed, it could not even seriously put to GLJ that the sexual assault never occurred because it does not know, one way or the other, whether Mr Anderson committed the sexual assault. The Church has thus been denied any possibility of obtaining instructions on that "foundational" issue.

151 Ultimately, reduced to its essence, GLJ's case rests upon her allegation, the unsworn allegations of child sexual abuse of young boys, and the suspicions of dead men. In this regard, part of the difficulty facing GLJ is that she chose not to produce witness statements from a number of people she says she told about the sexual assault in the years following the alleged abuse – including her first

179 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [120].

boyfriend, her first husband and one of her school friends – even though that may have greatly assisted her case. And whilst there is some circumstantial evidence which could support a broader contention that Mr Anderson was an abuser of boys – such as the documents obtained on subpoena from the Archdiocese of Brisbane and the Standards Office – what is acutely unfair is that the Church's capacity to critically assess and respond to that material has been denied due to delay and the deaths of critical witnesses. As a result, the Church has no means of determining whether that suspected propensity could in any way bear upon the likelihood of Mr Anderson's particular alleged offending in the case of GLJ. In such circumstances, any trial would fall below the minimum standard of fairness which the law requires. To adapt the language from *Presser*¹⁸⁰, the Church is in no position to plead to the allegation put against it, nor to challenge the claim in an informed manner. The continuation of such a proceeding would be "so unfairly and unjustifiably oppressive" as to constitute an abuse of process¹⁸¹.

152 Notwithstanding the limitations of comparing individual features of different cases, the foregoing conclusion is buttressed by the reasoning of Bell P in *Moubarak*, the correctness of which was never disputed by GLJ. As explained above, each of the reasons given by his Honour justifying a stay in that case applies equally here.

153 The six reasons given by Kiefel CJ, Gageler and Jagot JJ for the proposition that GLJ's looming trial might be fair are, with respect, misconceived and proceed, for the reasons given above, from an untenable legal proposition concerning the operation of s 6A of the *Limitation Act*.

154 *First*, whilst Mr Anderson is not the defendant in these proceedings, as described already, he would have been the pivotal figure for the defence. Had he been alive, he would certainly have been the first named defendant.

155 *Secondly*, Mr Anderson's answer, given in 1971, denying any "romantic" interest in girls, with respect, could not possibly found an inference that today, if he had been alive, he would have denied GLJ's allegations. Such an inference is, in reality, no more than a guess in the service of an outcome.

156 *Thirdly*, the suggested inference that allegations of sexual abuse of boys had been put to Mr Anderson when he was a priest, and denied by him, is again only guesswork. It falls outside that which might be seen to be probable; it is only a possibility.

180 [1958] VR 45 at 48.

181 *Walton v Gardiner* (1993) 177 CLR 378 at 392 per Mason CJ, Deane and Dawson JJ; *Moubarak* (2019) 100 NSWLR 218 at 254 [189]-[190] per Leeming JA.

157 *Fourthly*, the proposition that the laicisation process gave the Church an "opportunity" to investigate other claims of sexual abuse is unsupported by the evidence; no part of the process involved the Church asking about the making of such claims. Nor, for the reasons given, can it be said that if such inquiries had been made, it might have led to the discovery of GLJ's allegations. Prior to 2019, there was no hint of any allegation concerning Mr Anderson and girls. As Mitchelmore JA explained¹⁸²:

"I accept the submission that the Lismore Trust made before the primary judge, and on the appeal, that the difficulty Father Anderson's death creates in this case is highlighted by the foreshadowed tendency evidence. For the purposes of the stay application, it is relevant that each of the unsworn statements from the additional four witnesses alleges that Father Anderson engaged in conduct the detail of which was not put to him before he died. The documents that were otherwise in evidence, however, provide some support that Father Anderson engaged in conduct of the nature that each alleges. As I have set out above, the petition for Father Anderson's laicisation relied on his homosexuality, which Bishop Farrelly described as involving young boys in every case of which he was aware."

158 *Fifthly*, it can be accepted that the death of Mr Anderson did not thereafter foreclose investigation of claims of abuse made against him. But the standard by which the Catholic Church decided to pay compensation, and why in individual cases claims were considered to merit payment, remains entirely unknown. And, in any event, it has nothing to do with whether GLJ's trial will be fair. That turns on the availability of evidence to address a recent claim concerning a crime alleged to have taken place 55 years ago. It does not turn on the now well-established, historical reality that the Catholic Church in Australia had on so many occasions failed to protect its flock.

159 *Sixthly*, as described above there was no "considerable body of documentary evidence": that is an important part of the very problem. As Mitchelmore JA so decisively observed, there was no documentary evidence that shed any light whatsoever as to whether GLJ's specific claim of abuse did or did not take place¹⁸³.

160 I would dismiss the appeal with costs.

182 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [123].

183 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [101], [105], [129].

GLEESON J.

Introduction

161 I agree with the other Justices that the standard of appellate review of the Court of Appeal's decision under appeal in this case is the correctness standard for the reasons given by Kiefel CJ, Gageler and Jagot JJ.

162 For the following reasons, I disagree with Kiefel CJ, Gageler and Jagot JJ that the appeal should be allowed. I agree with their Honours' statements about the principles governing a permanent stay of proceedings under s 67 of the *Civil Procedure Act 2005* (NSW), except to the extent stated below. I disagree as to the correct evaluation of whether a fair trial is possible in all of the circumstances. In my view, the Court of Appeal of the Supreme Court of New South Wales was correct to conclude that a fair trial would be impossible in this case and, accordingly, was correct to stay the proceedings permanently. I gratefully adopt the facts as stated in the reasons of the other Justices.

The concept of a fair trial

163 The requirement that a person be given a fair hearing, before a decision affecting that person is made, has been described as a principle of common sense and common decency shared by all democratic societies and their systems of jurisprudence¹⁸⁴. A trial must be fair to both sides¹⁸⁵, and an unfair trial, in civil proceedings no less than criminal proceedings, represents a miscarriage of justice¹⁸⁶. For this reason, the impossibility of a defendant obtaining a fair trial in the circumstances of the case is seen as an instance of abuse of process¹⁸⁷. A former Chief Justice of New South Wales, James Spigelman, wrote extra-judicially that¹⁸⁸:

184 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed (2022) at 399 [8.10], citing Woolf et al, *De Smith's Judicial Review*, 8th ed (2018) at 344-350.

185 Spigelman, "The truth can cost too much: The principle of a fair trial" (2004) 78 *Australian Law Journal* 29 at 44 and cases cited at fn 109.

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

187 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 276 [49].

188 Spigelman, "The truth can cost too much: The principle of a fair trial" (2004) 78 *Australian Law Journal* 29 at 33.

"[T]here can be no doubt that the principle of a fair trial is a core value of the administration of justice throughout Australia.

The matters that are encompassed by this principle are an integral part of the legal protection of personal freedom and a manifestation of the significance our polity has traditionally ascribed to restraint upon the exercise of public power."

164 The observance of procedural fairness is an "immutable characteristic" of the Australian judicial system. "A court cannot be required by statute to adopt a procedure that is unfair."¹⁸⁹ Nor may the processes and procedures of the court, "which exist to administer justice with fairness and impartiality", be converted into "instruments of injustice or unfairness"¹⁹⁰. A proceeding that would "clearly inflict unnecessary injustice upon the opposite party ... should be stopped"¹⁹¹. It is contrary to the public interest to allow public confidence in the administration of justice to be eroded by a concern that the court's processes may lend themselves to injustice¹⁹².

165 While the basic principle is not in doubt, the scope of its application is frequently contested. In relation to criminal trials, but of relevance to court proceedings generally, in *Jago v District Court (NSW)*, Deane J observed¹⁹³:

"The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case

189 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177]; *Magaming v The Queen* (2013) 252 CLR 381 at 400-401 [64]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 593-594 [39]; *SDCV v Director-General of Security* (2022) 96 AJLR 1002 at 1030 [106], 1042 [174]; 405 ALR 209 at 236, 252.

190 *Walton v Gardiner* (1993) 177 CLR 378 at 393. See also *Jago* (1989) 168 CLR 23 at 28; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607, 685, 703; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39]; *South Australia v Totani* (2010) 242 CLR 1 at 63 [132].

191 *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720.

192 *Moenvao v Department of Labour* [1980] 1 NZLR 464 at 481.

193 (1989) 168 CLR 23 at 57.

by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience."

166 In relation to administrative decision-making, but equally relevant to the judicial process, fairness has been explained as "essentially practical ... the concern of the law is to avoid practical injustice"¹⁹⁴. For example, a court proceeding is unfair if it has the capacity to result in an order against a person without affording that person a fair opportunity to respond to evidence on which that order might be made¹⁹⁵. More generally, a trial is unfair if it has the capacity to result in a judgment against a person although the losing party does not have a fair opportunity to respond to the case made by the winning party. In a criminal trial, a fair trial depends upon the fitness of the accused to plead to, and answer, the charge against them¹⁹⁶. In civil proceedings against an individual defendant, lack of capacity to give instructions is a disadvantage that has been found, in the circumstances of the case, to render a fair trial against the individual impossible¹⁹⁷.

167 Whether practical injustice may be occasioned to a litigant depends upon the nature of the proceedings and the rights and interests at stake¹⁹⁸. Where it appears that a trial may be unfair, it will be necessary to consider what means might be available to a trial judge to overcome the apprehended unfairness¹⁹⁹. Extensive laws of procedure and evidence are directed to the provision of fair civil trials. These include the rule that courts are free to refuse to accept uncontradicted evidence²⁰⁰ and the requirement to have regard to the gravity of the matters sought to be proved in determining whether a party's case is proved on the balance of

194 *Pompano* (2013) 252 CLR 38 at 99 [156], quoting *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37].

195 *Pompano* (2013) 252 CLR 38 at 105 [177]; *HT v The Queen* (2019) 269 CLR 403 at 416 [17], 430 [64]; *SDCV* (2022) 96 ALJR 1002 at 1035-1036 [139]-[143], 1037 [150]; 405 ALR 209 at 243-244, 246.

196 See, in New South Wales, *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), s 36; at common law, see *R v Presser* [1958] VR 45, as approved in *Kesavarajah v The Queen* (1994) 181 CLR 230 at 244.

197 *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 257 [205]-[206].

198 *SDCV* (2022) 96 ALJR 1002 at 1020 [54]; 405 ALR 209 at 222-223.

199 *Williams v Spautz* (1992) 174 CLR 509 at 519.

200 *Taylor v Ellis* [1956] VLR 457 at 463-465; *Parlux SpA v M & U Imports Pty Ltd* (2008) 21 VR 170 at 178 [30].

probabilities²⁰¹. In a given case, prejudice may also be overcome by the exclusion of, or limitations on the use of, evidence²⁰². In the criminal context, the potential unfairness of a prosecution of a sexual offence that occurred long ago, where the prosecution case is confined to the evidence of the complainant, may be addressed in New South Wales by s 165B of the *Evidence Act 1995* (NSW), where the defendant has suffered a significant forensic disadvantage because of the consequences of delay²⁰³. It can be assumed that a judge hearing a civil trial involving alleged historical assault would be cognisant of the risks that memories fade and can be distorted, and any assessment of reliability of evidence based upon memory must necessarily bear that fact in mind²⁰⁴. However, where the unfairness concerns impediments to the defendant's effective participation in a trial, rules of procedure or evidence may be insufficient to overcome the disadvantage facing the defendant.

Burdensome effect of lapse of time

168

In *Batistatos v Roads and Traffic Authority (NSW)*²⁰⁵, this Court upheld the permanent stay of Mr Batistatos' claim for damages for personal injury where there was a delay of 29 years between the injury and the commencement of proceedings. Mr Batistatos alleged that he was severely injured, including by sustaining quadriplegia, in an accident caused by the design and marking of the road²⁰⁶. The majority concluded that there was no error of principle in the New South Wales Court of Appeal's decision, a critical holding of which was that "[n]o more than a formal enactment of the process of hearing and determining the plaintiff's claim

201 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 170-171; 110 ALR 449 at 449-450. See also *Helton v Allen* (1940) 63 CLR 691 at 701; *Hocking v Bell* (1945) 71 CLR 430 at 500; *Rejcek v McElroy* (1965) 112 CLR 517 at 519-521. See further the rule in *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]: "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".

202 *Evidence Act 1995* (NSW), ss 101, 135-137.

203 *Jarrett v The Queen* (2014) 86 NSWLR 623 at 635-638 [51]-[64]. Section 165B of the *Evidence Act 1995* (NSW) is affected by s 294 of the *Criminal Procedure Act 1986* (NSW).

204 cf *Brown v The Queen* [2022] NSWCCA 116 at [40], [46].

205 (2006) 226 CLR 256.

206 (2006) 226 CLR 256 at 272 [33].

could take place"²⁰⁷. That holding (by Bryson JA, Mason P and Giles JA agreeing) was based upon findings that included "the practical inability of reaching a decision based on any real understanding of the facts, and the practical impossibility of giving the defendants any real opportunity to participate in the hearing, to contest them or, if it should be right to do so, to admit liability on an informed basis"²⁰⁸.

169 It was accepted that Mr Batistatos might be in a position to give evidence about the relevant events²⁰⁹. However, the majority in this Court described the particulars of negligence as "broad-ranging", alleging negligence in "design, construction or maintenance of the road, together with failure to provide adequate warning of the bend" in the road in the vicinity of the accident, and "permitting the road to be used whilst in an unsafe condition"²¹⁰. In the Court of Appeal, Giles JA (who wrote additional concurring reasons with which Mason P agreed) concluded that the absence of a "meaningful account from the plaintiff of how he came to run off the road, or an expert report identifying material deficiencies in the design, construction, maintenance or state of the roadway" provided the particular background against which "it would be unfair and oppressive on the defendants to require them to attempt to meet such a generous case under the difficulties brought about by the lapse of time"²¹¹.

170 The dispositive question in *Batistatos* was whether the burdensome effect upon the defendants of the situation that had arisen by lapse of time was so serious that a fair trial was not possible²¹². The language of that question, which reflects the more general requirement that a defendant must have a fair opportunity to respond to a case against them, appears in the note beneath s 6A(6) of the *Limitation Act 1969* (NSW) which records:

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

207 (2006) 226 CLR 256 at 278 [55], quoting *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 406 [80].

208 (2006) 226 CLR 256 at 277-278, quoting *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 406 [80].

209 *Batistatos* (2006) 226 CLR 256 at 277 [52].

210 *Batistatos* (2006) 226 CLR 256 at 272 [34].

211 *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 381-382 [3].

212 *Batistatos* (2006) 226 CLR 256 at 281 [69].

171 The note is a legislative acknowledgement of the basic principle that the legislature cannot require the courts to adopt a procedure that is unfair to the defendant.

172 Long delay gives rise to a general presumption of prejudice²¹³. Any substantial delay, by which I mean no more than the substantial passage of time, is apt to occasion a decrease in the quality of justice²¹⁴. The precise disadvantages arising from being asked to deal with an accusation about long past conduct may vary from case to case and may be more or less able to be overcome or mitigated. However, the tendency for the passage of a long delay between an alleged event and a court's determination as to the truth concerning the alleged event to be productive of serious injustice should not be overlooked²¹⁵. In relation to a criminal trial, the Victorian Court of Appeal recently considered that the passage of about 55 years between the commission of alleged offences and the criminal trial "must surely be at the outer end of what could credibly be regarded as acceptable"²¹⁶.

173 As McHugh JA (as his Honour then was) explained in *Herron v McGregor*, the centuries-long policy of the law to fix definite time limits for prosecuting civil claims (usually a maximum of six years²¹⁷) addresses, among other things, the problem that delay creates prejudice and injustice²¹⁸. A decade later, McHugh J further observed in this Court that²¹⁹:

"The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates'. ... The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."

213 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 556 per McHugh J, Dawson J agreeing at 544; *Cox v Keys* [2012] NSWCA 268.

214 *UBS AG v Tyne* (2018) 265 CLR 77 at 96 [45]; *Bauer (A Pseudonym) v The Queen* (2015) 46 VR 382 at 402 [96], 403 [100].

215 See *Hermanus (A Pseudonym) v The Queen* (2015) 44 VR 335 at 344 [43]-[44] per Priest JA, Maxwell P agreeing at 336 [1].

216 *McGee (A Pseudonym) v The Queen* [2020] VSCA 146 at [149].

217 *Limitation Act*, s 14.

218 *Herron v McGregor* (1986) 6 NSWLR 246 at 255.

219 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551.

174 Apart from the impact of delay on the parties to litigation, delay may make it more difficult for courts to "vouchsafe a just conclusion"²²⁰. Other things being equal, this risk is more pronounced where the critical factual allegation is sought to be proved by the uncorroborated evidence of the plaintiff.

Circumstances that may deprive a defendant of a reasonable opportunity to meet a case

175 A defendant may suffer prejudice affecting the fairness of a civil trial by the loss of witnesses. The relative importance of an absent witness' evidence to the issues in the trial must be considered to assess the level of prejudice to the defendant from their absence. The Diocese cannot point to any missing witnesses because it does not know what Mr Anderson or any other person who might have had knowledge relevant to the alleged sexual assault would have said or what evidence they might have been able to give on that critical issue.

176 A defendant may also suffer prejudice by the loss of real evidence, including records, documents and other exhibits²²¹. The Diocese is not in a position to point to the loss of any such evidence, because it does not know of its existence or previous existence.

177 In relation to a criminal trial, although it has been held that it is not enough for an accused to speculate that a police investigation leading to the bringing of a charge was defective, there may be cases in which deficiencies in an investigation, such as a failure to identify a witness capable of giving evidence exculpatory of the accused, might be of such significance that the accused is entitled to an acquittal or a retrial²²². In a civil trial, there is no relevant prosecutorial duty. The most that can be observed with respect to this case is that, in the absence of a police investigation of the alleged sexual assault that might have produced relevant evidence, the Diocese did not have the benefit of any information or witnesses that might have been uncovered by such an investigation.

178 The Court of Appeal found that the Diocese was "utterly in the dark" on the central issue in the appellant's case, namely the alleged sexual assault²²³. This finding, with which I agree, is relevant to the opportunity of the Diocese to respond to the case brought against it, encompassing but going beyond any question of

220 *Smith v Central Asbestos Co Ltd* [1973] AC 518 at 547.

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

222 *Penney v The Queen* (1998) 72 ALJR 1316 at 1319-1320 [18]-[21]; 155 ALR 605 at 609-610.

223 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [121], quoting *Moubarak* (2019) 100 NSWLR 218 at 250 [158].

"impoverishment"²²⁴ of evidence about the true facts. It concerns the Diocese's apparent lack of knowledge about the alleged sexual assault of the appellant and the Diocese's lack of capacity to inform itself from its own sources, or at least from sources independent of the appellant. Those matters affect the capacity of the Diocese to respond to a critical aspect of the appellant's claim, by admitting or denying the alleged assault.

179 Speaking generally, child abuse in an institutional setting occurs when the abuser takes advantage of a position of authority or trust that has been created by the institution²²⁵. Necessarily, there will be cases in which the institution, having failed to establish systems to protect vulnerable children or simply unable to control a determined abuser, can never inform itself from sources independent of the victim as to the true facts. Procedural fairness will not necessarily produce a substantive benefit for the institution, in the form of verification or corroboration of a plaintiff's account, or evidence that tends to contradict the plaintiff. However, the passage of many decades, as in this case, is obviously liable to erode a defendant's opportunity to make inquiries and investigate alleged facts.

A trial in this case would be so unfair as to warrant a permanent stay

180 The critical fact on which the appellant's case is founded is an alleged sexual assault in 1968. The particular risk of injustice in this case is that a judge will find the Diocese liable (either directly or vicariously) for a serious sexual assault against the appellant, contrary to the true facts (which cannot be assumed to accord with the appellant's account in advance of any adjudication of that matter). On the appellant's account, the only people who know or knew the true facts are the appellant and Mr Anderson, the alleged perpetrator of the assault, who is deceased. In a case such as this, circumstantial facts are likely to be determinative of the appellant's credibility and reliability. As explained below, the passage of time means that the Diocese has lost any realistic capacity to explore and test those circumstantial facts, most notably by asking Mr Anderson for an account.

181 The appellant does not allege that the Diocese knew or should have known of the alleged sexual assault prior to the appellant's complaint in 2019. The passage of time between the alleged assault and the Diocese being informed of the allegation deprived the Diocese of opportunities to make inquiries of Mr Anderson, members of the Diocese who engaged with Mr Anderson, parishioners who engaged with Mr Anderson, the appellant or members of her family, which

²²⁴ *Moubarak* (2019) 100 NSWLR 218 at 235 [77], citing *Abdulla v Birmingham City Council* [2013] 1 All ER 649.

²²⁵ *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 159-160 [81].

inquiries might have produced information shedding light on the alleged sexual assault.

182 The Diocese acknowledged that Mr Anderson's death, and the consequent inability to obtain information from him about the alleged assault, was critical to establishing its contention that a fair trial is no longer possible. However, the Diocese's argument did not depend on that matter in isolation, but rather in the context of the whole of the circumstances in which the appellant's claim has been brought. The Diocese's fundamental contention was that, because of the passage of time during which, most significantly, Mr Anderson died, it does not know and is unable to know the true facts concerning the alleged sexual assault. It is unable either to deny or admit the alleged facts.

183 I agree with Mitchelmore JA's finding²²⁶ that there is no material that sheds light on Mr Anderson's putative response to the assault allegation. The possible inference that Mr Anderson would have denied the allegation does not assist in understanding the extent of any prejudice suffered by the Diocese. He might have denied it and said nothing more, or he might have denied it and given an exculpatory account that could have led to the production of evidence in defence of the claim against the Diocese.

184 In effect, the Diocese has lost every realistic opportunity that previously existed to inform itself of the true facts. It is not to the point that those opportunities may have been entirely uninformative, either to validate or contradict the appellant's allegation. The Diocese is no better off in meeting the appellant's foundational claim than an individual defendant alleged to have abused a plaintiff, but who lacks capacity, and whose representative has no source of information about the alleged abuse apart from the plaintiff themselves. If required to participate in a trial, the Diocese would be limited in its cross-examination to questions concerning the inherent improbability or internal incoherence of the appellant's account. In that respect, it would be in no better position than the trial judge to test the evidence on a critical fact in the case. If the trial judge is inclined to accept the appellant's account, the Diocese will have no capacity to rebut the appellant's evidence.

185 Information about alleged misconduct by Mr Anderson available to the Diocese prior to his death in 1996, to the extent that it was identified to this Court, cannot reasonably be expected to have put the Diocese on notice in a way that would have prompted it to make contemporaneous inquiries from Mr Anderson about the alleged sexual assault, or to obtain relevant information from other sources. At best, it provided a foundation for inquiries about specific allegations of misconduct unrelated to the appellant, and more general inquiries about whether

226 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [120].

Mr Anderson had engaged in criminal sexual acts, that might have assisted in determining whether evidence of such acts might be relevant as tendency evidence in the appellant's claim. There is no firm basis for believing that inquiries of this kind might have elicited information or evidence relevant to the specific assault alleged by the appellant. Without more, the existence of the information about Mr Anderson's previous alleged misconduct would not remove the identified prejudice to the Diocese in defending the appellant's claim.

186 Finally, the appellant did not suggest that the trial judge would be able to take steps to remove the unfairness to the Diocese of facing this allegation so many decades after the alleged event by, for example, refusing to admit the appellant's evidence of the alleged assault in the exercise of the general discretion to exclude evidence that is unfairly prejudicial²²⁷.

187 Lacking the opportunities that existed in earlier years to investigate the alleged assault, and in the absence of any police investigation, the burdensome effect upon the Diocese of the circumstances in which any trial might be conducted is so severe that the proceeding should be permanently stayed. It is manifestly unfair²²⁸ to require the Diocese to respond to the appellant's uncorroborated claim without any realistic opportunity of informing itself as to the true facts concerning the alleged sexual assault, including circumstantial facts, in circumstances where opportunities that previously existed have been lost by the long passage of time. The Court of Appeal was correct to conclude that a trial in this case will involve manifest unfairness to the Diocese, and that there is nothing a trial judge could do in the conduct of the trial to relieve against that unfairness²²⁹.

188 Accepting that proceedings brought within time should only be stayed before a trial in exceptional circumstances²³⁰, the circumstances of this case are fairly described as exceptional because of the combination of the following matters: the serious nature of the allegation that founds the appellant's claim against the Diocese; the fact that the case is brought against the Diocese of which the alleged offender was formerly a member, and not the alleged offender himself; the absence of any contemporaneous corroboration of the appellant's account; the lack of any police investigation of the alleged sexual assault; the death of the

227 *Evidence Act*, s 135. See also *Jago* (1989) 168 CLR 23 at 47, 74.

228 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536, quoted in *Walton* (1993) 177 CLR 378 at 393; *Batistatos* (2006) 226 CLR 256 at 264 [6].

229 *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [122].

230 *Jago* (1989) 168 CLR 23 at 76; *Williams v Spautz* (1992) 174 CLR 509 at 529; *Walton* (1993) 177 CLR 378 at 399.

alleged offender prior to the appellant's complaint about the alleged sexual assault; the extreme length of time between the alleged assault and the appellant's complaint to the Diocese; and the loss of all realistic opportunities for the Diocese to investigate the alleged assault over the period of approximately 50 years between the assault and the complaint.

The absence of a limitation period

189 Section 6A of the *Limitation Act* expresses a tolerance for delay on the part of claimants for damages for harm suffered because of child abuse, leaving it to the courts to address problems of prejudice and injustice as they arise in individual cases²³¹. Section 6A recognises that victims of child abuse may take decades to understand and act on the harm arising from the abuse²³². In comparison with other civil claims for damages for severe personal injury, or more generally with claims brought in Australian courts, the passage of time between the alleged events and a hearing may be extraordinarily lengthy, although not through any fault on the part of the plaintiff.

190 By removing the previous statutory time limit for commencing actions of this kind²³³, the New South Wales legislature recognised the importance for victims of child abuse²³⁴ of an entitlement to bring civil proceedings seeking damages for harm suffered because of the abuse. That entitlement promises the possibility of not only financial compensation, but also judicial findings that will validate the successful plaintiff's experience of injury, pain and suffering. Civil proceedings permit a claim to be determined against an entity who may be legally liable for harm resulting from child abuse on the balance of probabilities (always taking into account the gravity of the allegations made²³⁵), in contrast with a criminal trial which necessarily requires the presence of the alleged perpetrator as the accused and proof of the case beyond reasonable doubt.

231 It follows, as the Court of Appeal in this case recognised, that the plaintiff was not required to explain the lapse of time: *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 at [3] and [116], applying *Moubarak* (2019) 100 NSWLR 218 at 234-235 [75].

232 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 February 2016 at 6399.

233 *Limitation Act*, s 6A as inserted by the *Limitation Amendment (Child Abuse) Act 2016* (NSW).

234 As defined in s 6A(2) of the *Limitation Act*.

235 *Evidence Act*, s 140(2)(c).

191 Section 6A reveals neither a legislative tolerance for unfair trials, nor a legislative direction to the courts to modify their application of the principles by which courts protect the administration of justice from abuses of process. *Batistatos* illustrates the irrelevance of the absence of a limitation period to the assessment of whether a fair trial is impossible so as to render proceedings an abuse of process. Prior to the appeal to the High Court, the case had proceeded upon the basis that the claim was subject to the ultimate bar of 30 years fixed by s 51(1) of the *Limitation Act*²³⁶. The defendants ultimately argued that, so long as the plaintiff remained disabled, he could bring his claim at any time²³⁷. The majority in *Batistatos* did not resolve the question whether the plaintiff's claim was subject to any limitation period²³⁸, and did not regard the existence or otherwise of a limitation period as relevant to the conclusion that there was an abuse of process. Holding that an action commenced in time may attract the exercise of a power to stay it for abuse of process²³⁹, the majority observed that "limitation periods operate by reference to temporal limits which are indifferent to the presence or absence of lapses of time which may merit the term 'delay'"²⁴⁰.

Conclusion

192 The appeal should be dismissed.

236 *Batistatos* (2006) 226 CLR 256 at 271 [28]-[29].

237 *Batistatos* (2006) 226 CLR 256 at 271 [30].

238 (2006) 226 CLR 256 at 271 [30].

239 *Batistatos* (2006) 226 CLR 256 at 271 [30].

240 *Batistatos* (2006) 226 CLR 256 at 280 [64].