

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
INSTITUTIONAL LIABILITY LIST

Not Restricted

S ECI 2022 01270

BETWEEN:

HM (a pseudonym) Plaintiff

v

SISTER MARY MONAGHAN Defendant

THE STATE OF QUEENSLAND Third Party

JUDGE: Daly AsJ
WHERE HELD: Melbourne
DATE OF HEARING: 20 December 2024
DATE OF JUDGMENT: 25 February 2025
CASE MAY BE CITED AS: HM (a pseudonym) v Sister Mary Monaghan
MEDIUM NEUTRAL CITATION: [2025] VSC 51

PRACTICE AND PROCEDURE – Historical child abuse claims – *Limitation of Actions Act* 1958 (Vic) ss 27O, 27P, 27R – Plaintiff alleges sexual, physical, and psychological abuse while residing at a children’s home in the 1960s – Defendant seeks permanent stay of allegations of sexual abuse on grounds of forensic prejudice by reason of the passage of time – Plaintiff unable to identify alleged perpetrators – Defendant argues impossibility of fair trial due to loss of evidence and death of key witnesses – Plaintiff contends forensic disadvantage arises from defendant’s own failure to investigate historical complaints – Whether identified forensic prejudice constitutes ‘exceptional circumstances’ justifying a stay – Effect of legislative abolition of limitation periods – Whether passage of time and loss of evidence justify permanent stay – Death and incapacity of key witnesses – Loss of contemporaneous records – Impact of plaintiff’s inability to identify alleged perpetrators – Institutional response to prior complaints – Relevance of prior claims – Consideration of judicial techniques in mitigating evidentiary disadvantage – High threshold for stay applications following abolition of limitation periods – Whether loss of evidence amounts to ‘exceptional circumstances’ precluding a fair trial – *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 414 ALR 635, applied – *Willmot v State of Queensland* [2024] HCA 42 and *RC v Salvation Army (NSW) Property Trust* [2024] HCA 43, considered and applied – *Weiden v YZ (a pseudonym) (No 2)* [2023] VSCA 294, *CM v Trustees of the Roman Catholic Church for the Diocese of Armidale* [2023] NSWCA 313 and *Colbert v Trustees of the Christian Brothers*

[2024] VSC 309, referred to – Stay application dismissed – Application to strike out statement of claim dismissed.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Dr G Boas of counsel with
Mr D Carolan of counsel

Ken Cush & Associates

For the Defendant

Mr S Hay KC with Mr C
Morshead of counsel

Wotton & Kearney

For the Third Party

Mr M Edwards, solicitor

Clayton Utz

HER HONOUR:

Introduction and background

- 1 The plaintiff in this proceeding ('HM') is a woman in her late sixties. The defendant is the nominated representative of the Sisters of Nazareth ('Sisters'). Until 1982 the Sisters operated Nazareth House in the suburbs of Brisbane ('home'), which provided care for children and the elderly. HM was a resident at the home between 1961 and 1967 ('relevant period'), having been made a ward of the State of Queensland ('State') when she was five years old. She was 11 years old when she left the home, and has had a difficult life since. She contends that many of those difficulties are as a consequence of the mistreatment and abuse she suffered at the home while under the care of the Sisters and the State.

- 2 This proceeding was commenced on 13 April 2022. The allegations in the amended statement of claim were summarised in an affidavit sworn by the defendant's solicitor, Mr Richard Leder on 19 February 2024 ('first Leder affidavit'), as follows:

In the ASOC,¹ the plaintiff alleges that she was sexually, physically and emotionally² abused and falsely imprisoned during her placement at Nazareth House in Brisbane in the State of Queensland (the Home) between approximately July 1961 and late 1967 (the Relevant Period).

In relation to the alleged sexual abuse, the plaintiff alleges at paragraphs 10 to 13 of the ASOC that:

- (a) she was sexually abused by three priests employed at the Home by the Sisters of Nazareth (the Sisters);
- (b) the abuse occurred on an unidentified number of occasions between 1964 and 1967;
- (c) immediately prior to the abuse, the plaintiff would be taken to the Nuns' quarters at the Home by servants and/or agents of the Sisters, including (but not limited to) Sisters Gregory, Giles and Philomena, after Mass on Sundays;
- (d) the plaintiff would then be left in the Nuns' quarters with the priest who had conducted the Mass; and

¹ Amended Statement of Claim filed on 16 February 2024.

² The further amended statement of claim substituted the term 'emotional abuse' with 'psychological abuse'. Nothing turns upon the distinction for present purposes.

- (e) the plaintiff would then be sexually abused by three unidentified priests.

In relation to the alleged physical abuse, the plaintiff alleges at paragraph 14 of the ASOC that she was subject to serious physical abuse, including the following:

- (a) being repeatedly struck on an unidentified number of occasions and time period with a feather duster, cane or belt with a buckle, all over her body by staff employed at the Home including (but not limited to) Sister Philomena;
- (b) having methylated spirits put on the welts caused by the above physical abuse and being belted further with a feather duster, cane or belt with a buckle, in the event she cried. This alleged abuse occurred on an unidentified number of occasions and time period and was perpetrated by an unidentified individual(s);
- (c) having another child's urine-soaked underwear rubbed in her face and then being made to stand in a corner with the urine-soaked underwear on her head on a regular and routine basis. This alleged abuse occurred on an unidentified number of occasions and time period and was perpetrated by an unidentified individual(s); and
- (d) being caned when a child resident whom the plaintiff was charged to look after and who allegedly had kidney problems wet herself. This alleged abuse occurred on an unidentified number of occasions and time period and was perpetrated by an unidentified individual(s).

In relation to the alleged emotional abuse, the plaintiff alleges at paragraph 15 of the ASOC that:

- (a) the plaintiff would be told to wait in the recreational room on the basis her mother was attending the Home to visit her despite this being untrue. This alleged abuse occurred on an unidentified number of occasions and time period and was perpetrated by an unidentified individual(s); and
- (b) the plaintiff was told she was the Devil's child or spawn, useless and stupid. This alleged abuse occurred on an unidentified number of occasions and time period and was perpetrated by an unidentified individual(s).

3 HM alleged that the Sisters owed her a duty to protect her from the reasonably foreseeable risk of harm from sexual, physical and psychological abuse, and breached that duty by, among other things, failing to adequately supervise HM, the Sisters and the three unidentified priests ('three priests').³ HM claimed that she has suffered psychiatric injury as a consequence of the sexual, physical and psychological abuse

³ HM also originally claimed that the Sisters were vicariously liable for the conduct of the priests, but that claim was no longer pressed in the further amended statement of claim filed on 23 April 2024.

she experienced at the home, including post-traumatic stress disorder, persistent depressive disorder and substance use disorder. In her particulars of special damage filed on 1 February 2024, HM claimed damages for future medical treatment of \$71,378.66, damages for past loss of earnings of \$1,418,621, damages for future loss of earnings of \$147,514, and past and future superannuation benefits of \$249,551. She also claimed general damages for pain and suffering, aggravated damages, exemplary damages and interest.

4 In her amended defence to the further amended statement of claim dated 6 May 2024, the defendant says she does not know and therefore cannot admit the allegations of sexual abuse, and that she requires further and better particulars of the identity of the three priests, and of the orders and/or diocese to which they belonged.

5 While the proceeding was commenced in April 2022, it seems that the parties did not embark upon intensive preparation for trial (which was originally scheduled for April 2024) until about late 2023, when the first round of discovery was completed. In a letter from her solicitors dated 7 November 2023 and in her defence filed on 5 December 2023, the defendant sought particulars of the three priests, the religious order or institution to which the three priests belonged, and the identity of the nuns who allegedly took HM to the nuns' quarters where the sexual abuse allegedly occurred.⁴

6 On 1 March 2024, the defendant served interrogatories for the examination of HM, seeking her response to questions concerning, among other things:

- (a) the physical appearance of the three priests;
- (b) the religious order(s) to which the three priests belonged and the duties they carried out at the home;

⁴ Subsequently in these reasons, for ease of reading, I will refrain from using the words 'allegation', 'alleged', and/or 'allegedly', save where the context requires.

- (c) the identity of the sisters who took HM to the nuns' quarters to meet the three priests;
- (d) whether there were any other people present in the nuns' quarters when the sexual abuse occurred;
- (e) whether HM ever witnessed others being sexually abused in the nuns' quarters;
- (f) her past disclosures of sexual abuse; and
- (g) HM's application to the Forde Redress Scheme.

7 In her answers to the interrogatories, HM responded as follows regarding the physical characteristics of the three priests:

To the best of my recollection, and from my perspective as a little girl, I believe that at the time of the abuse each of the Priests were aged somewhere in their 40's. I am guessing this noting I did not grow up with a father so could not reference their age to any older male figure in my life at the time.

I recall that one of the Priests had brown hair, and another of them had black hair. One of the Priests had an elongated nose and another had ears which were hairy. I recall that the Priests smelt funny and it made me feel sick as a child although I cannot place the smell. It may have been aftershave or body odour.

I used to shut my eyes during the abuse because I was so scared, and I recall that on one occasion one of the Priests asked "Why are your eyes closed?". Each of the three priests wore different coloured girdles on their white robes which they wore around their waist, one being yellow, another red, and the third was purple. I have always liked colours, and I still do, and that is why I remember the bright colours of red, yellow and purple. When conducting a Mass, the Priests wore these sashes in each colour over their white robes.

8 HM said that the three priests were Catholic priests, but she could not identify the order or congregation to which they belonged. She said the three priests would come to give Mass at the home at around 8.00am on Sundays, and remain at the home thereafter. They would abuse her and other girls in the nuns' quarters after Sunday Mass. The Sisters who took HM to the nuns' quarters were Sr Gregory, Sr Philomena, and Sr Giles.

9 HM objected to answering the interrogatory regarding whether any others were present in the nuns' quarters when the sexual abuse occurred on the basis that the sole purpose of the interrogatory was to ascertain the identity of witnesses. As for whether HM witnessed others being sexually abused, HM objected to answering this interrogatory on the basis that it did not relate to any question in dispute between the parties.

10 In relation to a question about the physical layout of the nuns' quarters, HM responded as follows:

The Nun's quarters were accessible through a side entrance into the Church. The residents used the main entrance to the Church. The side entrance was used by the Priests and the Nuns.

The Nuns' quarters were located to the left of the Church through a courtyard and a veranda. Inside the Nun's quarters, there was a communal room with a lounge and a sink. Further up the veranda were the Nuns' quarters where there were individual rooms where the Nuns resided. I do not now recall whether there were windows.

11 Following correspondence between the solicitors for the parties, on 26 August 2024, HM filed further answers to interrogatories. In relation to the question of whether there were any witnesses to the sexual abuse, HM responded as follows:

On the occasions when I was sexually abused, I was taken to a different room within the Nun's quarters. I do not know if any of the other children would have remained in the Nun's quarters as I was taken to a separate room.

12 HM stated that she did witness others being subjected to sexual abuse in the nuns' quarters, but refused to provide particulars of their names or any other identifying details.

13 Over the course of 2024, both before and after the issue of the applications which are the subject of these reasons ('stay application'), the parties undertook a number of investigations which might, among other things, identify the three priests, and potential witnesses ('2024' investigations'). Some of the 2024 investigations bore some fruit: others seem to have reached a dead end. However, the 2024 investigations have not enabled HM to identify and provide further particulars of the three priests.

The current applications

- 14 On 19 February 2024, the defendant issued the stay application, seeking, among other things, a partial stay of the proceeding insofar as it concerns HM’s allegations of sexual abuse. In the alternative, the defendant sought orders striking out the paragraphs of the amended statement of claim in which the claims of sexual abuse were made. I do not propose to deal at length with the strike out application in these reasons, as I consider, for reasons which will be explained later that the applications rise and fall together.⁵
- 15 The defendant says that HM’s claims of sexual abuse should be stayed because HM’s inability to identify the three priests means that it is not possible for the defendant to have a fair opportunity to respond to and to defend those claims.
- 16 In response, HM says that, in the current legal context (including the High Court’s recent consideration of the effect of the abolition of limitation periods upon the principles governing applications of the current kind),⁶ the defendant must clear a very high bar in order to persuade the Court that HM’s sexual abuse claims should be stayed. The defendant has not cleared that bar, and while the inability of HM to identify the three priests creates a forensic impediment to both parties, the other evidence and information available to the parties as a consequence of their investigations will enable the parties to have a fair, if not perfect trial. In any event, to the extent that the lapse of time between HM’s residence in the home and the issue of this proceeding has caused the defendant prejudice, part of that prejudice is attributable to the defendant’s own failure to promptly investigate claims of abuse at the home made by other former residents of the home (‘claimants’) since 1999 and HM’s claims, which were notified to the defendant in late 2019.

⁵ The State, which was joined to the proceeding as a third party on 26 April 2024, supports the stay application, but has not taken an active part in the stay application.

⁶ The three recent High Court decisions which have considered these principles are *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 414 ALR 635 (‘GLJ’), *Willmot v Queensland* [2024] HCA 42 (‘Willmot’) and *RC v The Salvation Army (WA) Property Trust* [2024] HCA 43 (‘RC’), with *Willmot* and *RC* delivered in the month prior to the hearing of the stay application. See also *Weiden v YZ (a pseudonym) (No 2)* [2023] VSCA 294 (‘Weiden (No 2)’), *CM v Trustees of the Roman Catholic Church for the Diocese of Armidale* [2023] NSWCA 313 (‘CM’), and *Colbert v Trustees of the Christian Brothers* [2024] VSC 309 for recent applications of the decision of the High Court in *GLJ*.

17 The defendant's application for a stay is unsurprising, given the forensic difficulties associated with the lapse of time since HM resided at the home, and HM's inability to identify the three priests. However, I am not satisfied that the defendant does not have sufficient information and evidence available to her to enable her to fairly defend HM's claims in this proceeding. Accordingly, the stay application will be dismissed.

18 My reasons follow.

The legislative context

19 This proceeding was issued in April 2022, some 55 years after HM left the home. Prior to the enactment of the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic), HM's claims against the Sisters would have been time barred.

20 Section 27O(1) of the *Limitations of Actions Act 1958* (Vic) ('LAA') provides as follows:

27O Application of Division

- (1) This Division applies to an action if the action –
 - (a) is in respect of a cause of action to which this Part applies or extends; and
 - (b) is founded on the death or personal injury of a person resulting from –
 - (i) an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and
 - (ii) psychological abuse (if any) that arises out of that act or omission.

21 Section 27P of the LAA provides as follows:

27P No limitation period for certain actions

- (1) An action to which this Division applies that is not an action that arises under Part III of the **Wrongs Act 1958** may be brought at any time after the date on which the act or omission alleged to have resulted in the death or personal injury has occurred.
- (2) Subsection (1) applies whether the act or omission alleged to have resulted in the death or personal injury occurs before, on or after the commencement of section 4 of the **Limitation of Actions Amendment (Child Abuse) Act 2015**.

22 Section 27R of the *LAA* provides as follows:

27R Interaction with other powers of court

Nothing in this Division limits –

- (a) in the case of the Supreme Court, the court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or
- (b) in the case of a court other than the Supreme Court, the court's implied jurisdiction or statutory jurisdiction; or
- (c) 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.

23 The impact of the abolition of the limitation period in child abuse cases upon the principles which traditionally governed the application of the Court's inherent power to stay a proceeding on the grounds that the passage of time would render the trial unfair is discussed in a later section of these reasons.

The evidence

24 The evidence filed on behalf of both parties with respect to the application was detailed and voluminous, with the material running to some thousands of pages. While I will not reproduce all of this evidence in these reasons, it is necessary to summarise that evidence in some detail, given the fact-specific nature of the current inquiry. I will conclude this section of the reasons by summarising the factual conclusions relevant to the stay application that can be drawn from the evidence.

25 The stay application was accompanied by the first Leder affidavit, in which Mr Leder deposed as to the following matters:

- (a) in a notice of claim provided to the Sisters by HM's then-solicitors⁷ in 2013 ('2012 claim'),⁸ HM made reference to allegations of physical and emotional abuse, but made no reference to allegations of sexual abuse;

⁷ These solicitors had also acted for many of the claimants from about 1999.

⁸ This claim was actually made in about 2012.

- (b) there were no references to sexual abuse in any of the clinical records discovered by HM to date;
- (c) the defendant instructed him that the first time the Sisters had been notified of HM's claims of sexual abuse was when the Sisters were served with the statement of claim in April 2022;⁹
- (d) he detailed the steps taken by the defendant and her solicitors to investigate HM's claims, in particular, the identity of the three priests, including enquiries made of four male religious orders and/or congregations known to have had some association with the home ('other Catholic orders'), and deposed as follows:

As at the date of swearing this affidavit, the defendant has undertaken enquiries of multiple Catholic religious congregations and orders but has been unable to obtain any information or documents identifying any priests who may have had any involvement at the Home between 1964 and 1967;

- (e) he referred to the discovery made by the parties to date in relation to HM's time at the home, and noted that none of the discovered documents refer to any complaints, claims or reports of any abuse having been suffered by HM at the home; and
- (f) he deposed as follows:

I have identified the following further categories of potential documents that would potentially be relevant to the present proceeding:

- (a) records identifying persons who assisted at the Home during the Relevant Period, including Sisters and individuals not affiliated with the Sisters;
- (b) records from the Home relating to the role, if any, performed by male priests, fathers, brothers or friars, at the Home during the Relevant Period;

⁹ Mr Leder corrected this evidence in a later affidavit. HM's solicitors sent a letter to the Sisters making allegations of sexual abuse by three priests in November 2019, but more detailed particulars were provided in the statement of claim served in April 2022.

- (c) any documents relating to the operation of the Home, including any monitoring of the Home by the leadership of the Sisters, such as annual reports, visitations or meeting minutes; and
- (d) contemporaneous documents or photographs which would reveal the physical layout of the Home and particularly the Nun's quarters during the Relevant Period where the alleged sexual abuse occurred.

(the **Further Relevant Documents**)

However, after making enquiries of the defendant, I understand and believe that due to the lapse of time since the alleged abuse occurred, the fact that the Sisters ceased operating the Home as a care facility for children in about 1982 and the absence of details of the identities or identifying particulars of the three priests said to have perpetrated the sexual abuse:

- (a) the Further Relevant Documents have not been located;
- (b) it is unclear whether the Further Relevant Documents were ever previously in the possession, custody or power of the defendant;
- (c) if the Further Relevant Documents were ever previously in the possession, custody or power of the defendant:
 - (i) what those documents were;
 - (ii) who prepared those documents;
 - (iii) when those documents came into existence;
 - (iv) what happened to such documents; and/or
 - (v) when or how those document[s] became unavailable.
- (g) Mr Leder referred to the three Sisters referred to in the statement of claim, and deposed that Sr Giles died on about 16 May 2017, Sr Philomena died on about 5 April 1992, and further enquiries regarding the status and whereabouts of Sr Gregory were underway; and
- (h) he deposed that the three Superiors of the home in the relevant period died in 1988, 2009, and 1989 respectively, and that both Regional Superiors of the Sisters during the relevant period are both deceased.

26 Annexed to the first Leder affidavit were documents relating to the 2012 claim, the 2020 claim, and the current proceedings including:

- (a) a copy of the 2012 claim and psychological report dated 8 November 2011;
- (b) a statement prepared by HM in February 2020 outlining her allegations of abuse,¹⁰ and a medico-legal report prepared by Dr Michael Diamond dated 10 March 2020;
- (c) for the present proceedings, a supplementary report from Dr Michael Diamond dated 19 October 2023, a forensic report from Dr Alan Jager dated 12 April 2023, correspondence between the parties concerning a dispute over the production of some of HM's clinical records, the further and better particulars provided by HM on 4 December 2023, and correspondence between the defendant's solicitors and the other Catholic orders for the purpose of attempting to identify the three priests.

27 Mr Leder swore a further affidavit on 1 March 2024 ('second Leder affidavit'). In the second Leder affidavit, Mr Leder deposed, in summary, as follows:

- (a) he corrected some statements in the first Leder affidavit, noting that the Sisters first received notice of HM's claims of physical and psychological abuse in 2012, and later received a letter from HM's current solicitors on 3 December 2019 making allegations of sexual abuse;
- (b) he had been instructed that archival records held by the Sisters indicated that members of the Capuchin Friars may have attended the home during the relevant period, and that further enquiries were being made in that regard;
- (c) further inquiries had revealed the identities of 16 members of the Sisters who served at the home during the relevant period and are now deceased, as well as the identities of four other Sisters about whom further inquiries were being made;

¹⁰ It seems that HM's statement was not provided to the defendant until after the commencement of this proceeding.

- (d) he explained the reasons for the defendant's delay in making the stay application; and
- (e) he deposed to and exhibited the correspondence between the parties prior to the issue of the proceeding, and more recent correspondence with respect to the plaintiff's discovery and related issues.

28 On 6 March 2024, Ms Sangeeta Sharmin, HM's solicitor, affirmed an affidavit in response to the first Leder affidavit and second Leder affidavit ('first Sharmin affidavit'). While the first Sharmin affidavit was largely directed at the defendant's then-pending (and ultimately successful) application to vacate the trial date, in the first Sharmin affidavit Ms Sharmin also deposed as to certain matters relevant to the stay application, as follows:

- (a) there appears to have been no investigations conducted into the allegations of physical and psychological abuse notified by HM's previous solicitors to the Sisters in 2012 until November 2023;
- (b) there appears to have been no investigations conducted into HM's allegations of sexual abuse notified to the Sisters by HM's current solicitors in December 2019 until November 2023;
- (c) she has not been provided with any explanation of the further enquiries made by the defendant with respect to any further potential witnesses; and
- (d) she deposed as follows:

Throughout the entirety of the proceeding, the correspondence of which is largely contained in my affidavit, no mention was made to me that the Defendant could not meet the Plaintiff's claim or that the Defendant would or might apply for a partial stay of the Plaintiff's claim.

The Defendant mentioned for the first time that they were instructed to make an application to vacate the trial, apply for a stay and to add the State of Queensland as a Third Party (although the latter has not been sought) at the directions hearing on 3 February 2024.

29 Following orders being made on 18 March 2024 for the vacation of the trial date of 30 April 2024, on 6 May 2024, Mr Leder swore a further affidavit in support of the stay application ('third Leder affidavit'). In the third Leder affidavit, Mr Leder deposed as to the following matters:

- (a) in relation to Sr Gregory and the Sisters about whom further enquiries were to be made, two of the Sisters could not be located, and further enquiries were underway with the remaining three potential witnesses, being Sr Gregory, Sr Mary Finian, and Sr Mary Scholastica;
- (b) the further enquiries made with respect to the other Catholic orders and the results of those enquiries to date; and
- (c) he exhibited and commented upon documents produced to the Court pursuant to a subpoena directed to the Queensland Department of Child Safety, Seniors and Disability Services ('Department') including reports of monthly visits made by officers of the Department to the home in 1965 and 1966, and documents relating to HM's application to the Forde Redress Scheme on 28 May 2008.¹¹

30 HM affirmed an affidavit on 7 June 2024, in which she deposed as follows:

I understand that one issue raised by the Defendant is my inability to recall information about the Priests who sexually abused me at Nazareth House, Wynnum, ("the Home") between 1964 and 1967.

In around 28 May 2008, I made an application for an ex-gratia payment through the Queensland Government Redress Scheme. I understand that records from the Department of Child Safety, Seniors and Disability Services which [sic] (DCSSDS) show that on around 4 November 2008, a payment of \$7,000 was approved as an ex-gratia payment and that this was subsequently deposited into a bank account. However, I have no recollection of ever receiving a \$7,000 payment from the Redress Scheme. On around 8 September 2009, I accepted

¹¹ The Forde Redress Scheme was established by the Queensland Government in May 2007 to provide ex-gratia payments to child victims of abuse and neglect in Queensland institutions in response to the recommendations of a Commission of Inquiry established in 1998 ('Inquiry'). In the statement annexed to HM's application to the Forde Redress Scheme, there were some allegations made by HM about priests visiting the home sitting her on their knees and 'having their hands all over' her, but those allegations were not of the same character and specificity as set out in the statement of claim.

an amount of \$22,000 as a further ex-gratia payment. I recall receiving the payment of \$22,000.

These redress payments were for physical and psychological abuse I suffered at the Home during 1961 and 1967.

At the time I was not ready to discuss the specific details of the sexual abuse. However, the documents submitted to the Redress scheme do mention the Priests and that something of a sexual nature happened.

I also ticked yes to “sexual abuse” on the Redress Scheme Application. The definition of sexual abuse on the Redress Scheme Application was “suffering any act involving sexual penetration; suffering or being forced to person other sexual acts involving direct contact; any type of sexual touching by another person for their own or another person’s gratification (whether direct or though login); being forced, whether physically, emotionally or both, to touch another person sexually (whether direct or through clothing); exposure to another person’s sexual acts for their gratification.

I wrote a statement as part of the Redress application. In it I explained that Sunday was church day and all of the Nuns would sit at the back of the Church with their notebooks writing down the names of anyone who spoke or looked around. I talked about the visits by the priests. I said that they used to stay in the Nuns quarters that were off limits to everyone except I remember being there on many occasions, sitting on the Priest’s knees. having their hands all over me. The nuns were there so I thought it must have been okay.

In my statement I say “I know something awful happened to me over there but I can not remember I just remember that it was all wrong and I had no body to tell. Here were always the instructions “don’t tell anyone or you will be punished. There are so many blanks in my life at this time, I do not know why these things are blocked out of my head and I don’t want to know”...

This was my way of saying something happened without being explicit but without lying.

I did not report the sexual abuse explicitly because I was not ready at the time to disclose the sexual abuse perpetrated on me as a child. I felt embarrassed and disgraced for decades after the sexual abuse in a way which was different to the physical and psychological abuse. In this period, I did not feel able to disclose the sexual abuse to anyone.

31 HM also deposed that, to the best of her recollection, the matters set out in her statement made in February 2020, the history she provided to Dr Diamond for the purpose of his March 2020 report, the further and better particulars provided on 4 December 2023, and her answers to interrogatories dated 24 April 2024 are true and correct.

- 32 Ms Sharmin affirmed a further affidavit on 7 June 2024 ('second Sharmin affidavit'). In the second Sharmin affidavit, Ms Sharmin:
- (a) deposed as to correspondence between the solicitors for the parties regarding the adequacy of the defendant's discovery, and exhibited that correspondence;
 - (b) referred to a schedule prepared by the defendant's solicitors providing particulars of 22 claims brought against the Sisters since 1999 ('schedule');
 - (c) noted that Sr Gregory had mistakenly contacted her office on 23 April 2024 regarding an appointment she had with the defendant's solicitors;
 - (d) opined as to the adequacy of the defendant's investigations with respect to the other Catholic orders;
 - (e) referred to her queries to the defendant's solicitors regarding their investigations regarding other potential witnesses and the failure of the defendant's solicitors to respond to those queries, and exhibited the relevant correspondence;
 - (f) under the heading '*Investigations not undertaken*', Ms Sharmin referred to her review of the documents produced by the Archdiocese of Brisbane ('Archdiocese') in response to a subpoena ('subpoenaed documents') and identified 94 people and organisations who she asserted could be contacted by the defendant's solicitors, including past residents of the home, a number of whom were claimants;
 - (g) referred to some inconsistencies between the contents of the schedule and the subpoenaed documents;
 - (h) referred to communications she had with some claimants and summarised what those claimants had told her about their time at the home, and the attendance of priests at the home;

- (i) referred to the categories of documents identified in the first Leder affidavit as no longer being available (see paragraph 25(f) of these reasons) and deposited as follows:

In relation to the first and second category, I believe that there are extensive Sisters, teachers, and individuals not affiliated with the Sisters outlined in this affidavit with whom no contact has been made since 2012, when the Defendant first became aware of the Plaintiff's claim in relation to physical and psychological abuse and 4 December 2019, when the Defendant first became aware of the Plaintiff's claim in relation to sexual abuse.

In relation to the third and fourth categories, I believe that there has been no evidence served that this information cannot be obtained from the sources referred to in the first and second categories, including the archivist. I also refer to the correspondence from KCA to W&K dated 21 May 2024 (which appears at pages 32 to 34 inclusive of "SS-1") relating to inadequate discovery where we noted that the website which appears at pages 1122 to 1128 inclusive in the exhibit bundle produced to me and marked with the letter "SS-1" stated that the Sisters of Nazareth "Archive" holds documents from the 1850's to the present date including categories of documents such as including Books and Rule and Constitutions of the Congregation, General Government and Administration, Regional Government and Administration and Local Communities and Apostolates as well as biographical and employment information for individual Sisters and "photographs".

33 Exhibited to the second Sharmin affidavit were, among other things:

- (a) the schedule;
- (b) the subpoenaed documents; and
- (c) a bundle of documents provided to her by a claimant (who I will refer to as GR for the remainder of these reasons), which revealed, among other things, that Mr Leder acted for the Sisters in relation to the claim made by GR in 1999.

34 The schedule was based on a document originally prepared by the solicitors for the defendant in the context of the dispute between the parties regarding the adequacy of the defendant's discovery. The schedule identified 22 claimants (by number, not name),¹² the date on which each claim was made, the date it was resolved, the nature of the allegations, the alleged abusers, and the period during which the alleged abuse

¹² Later evidence suggests that the total number of claimants is around 25, not 22.

took place. Three claims were made on 11 January 1999, and a further eight claims were made on 25 January 1999. Sister Philomena featured throughout the schedule, and there were some similarities between the accounts of physical abuse provided by the claimants and the allegations made by HM in this proceeding.

35 Twelve of the claimants referred to in the schedule made claims of sexual abuse. Of this group, nine made their complaints in 1999, one made a complaint in or around 2002, another in 2007, and the other in 2018. Of the group of twelve claimants who made claims of sexual abuse:

- (a) five alleged they were sexually abused by an unnamed priest;
- (b) two alleged they were sexually abused by a named priest (Father O'Reagan);
- (c) one alleged they were sexually abused by an unnamed man;
- (d) one alleged they were abused by Sisters and other women working at the home; and
- (e) two alleged they were sexually abused but did not identify the name or gender of the perpetrator.

36 The version of the schedule prepared by the solicitors for the defendant had been edited by or at the direction of Ms Sharmin to highlight the thirteen claimants for whom HM's solicitors had been able to identify documents concerning those claims amongst the subpoenaed documents to create the schedule. Of the remaining nine claimants for which documents had not been identified, four of the claimants had made allegations of sexual abuse.

37 The subpoenaed documents were exhibited to the second Sharmin affidavit. The subpoenaed documents are voluminous, comprising some 939 pages, with some duplications. The vast bulk of the subpoenaed documents were documents regarding claims made by the claimants ('claim documents'). The claim documents had been provided to the Archdiocese because the solicitors for the claimants had threatened to

join the Archdiocese to proceedings that had either been issued or were to be issued by the claimants against the owner of the land upon which the Sisters operated the home. The Sisters also sought contributions from the Archdiocese towards settlement payments paid to claimants pursuant to a settlement process agreed between the Sisters and the claimants in or about 2000 ('settlement scheme').

38 The subpoenaed documents also included internal documents of the Archdiocese concerning the claims and the perceived legal risk to the Archdiocese (and the Sisters) arising from the claims. Given the volume of the subpoenaed documents, and in the interests of expedition, I will only refer to documents of particular relevance to the current proceeding and the stay application, as follows:

- (a) a file note dated 9 April 2013 refers to 18 claimants, six of whom referred to sexual abuse by priests. Only one claimant named a priest. The file note included a table identifying the sums paid to some of the claimants pursuant to the settlement scheme, which ranged between \$30,000 and \$75,000, with higher sums being paid where an allegation of sexual abuse was made;
- (b) letters of advice and correspondence between solicitors (including Mr Leder acting on behalf of the Sisters) regarding the settlement of the first tranche of claims in or about 2001 show that the Sisters' desire to settle the claims was based upon a 'pastoral and commercial decision'. The settlement sums were based upon recommendations made by David Habersberger QC (as his Honour then was), who met with all of the claimants along with an independent psychiatrist as part of the settlement scheme. It is also apparent from this correspondence that the claimants would face difficulties in overcoming statute of limitation issues and the 'Ellis defence';¹³
- (c) a letter of advice from Minter Ellison, the solicitors acting for the Archdiocese to the Archdiocese dated 10 June 1999 which stated, among other things, that

the plaintiffs do not intend to join the Capuchins or the Oblates because they consider joinder of the Archdiocese and the Archbishop to be

¹³ Given that the Sisters of Nazareth was an unincorporated association.

sufficient. We spoke to Corrs Chambers Westgarth¹⁴ who act for the Sisters of Nazareth to enquire as to whether they will join the Orders in the event that their client is joined as a third defendant. They indicated that their client would be disinclined to join the Orders for the same reasons that we were hesitant about doing so;

- (d) a letter from the Chancellor of the Archdiocese to the Archbishop dated 15 June 1999 regarding the claims stated 'Only one priest of the Archdiocese is named. An Oblate and two Capuchins are also named';
- (e) on 2 November 2004, Minter Ellison notified the Archdiocese that eight new claims had been issued by former residents of the home, and that one claimant alleged that she had been sexually abused by Father O'Reagan, a member of the Oblates, in the 1950s;
- (f) on 7 September 2004, QBE Insurance Ltd ('QBE') sent a letter to a firm of solicitors acting for the Archdiocese, Thynne & Macartney, regarding a new batch of claims (ten in total), which was somewhat critical of the efforts made by the Archdiocese to investigate the claims. This letter stated, among other things:

We have still not had an adequate response to issues raised following our visit in October 2003. For example, Jeremy Howes¹⁵ had agreed to investigate and identify matters in the pipeline. By our letter of 4 November 2003, we sought clarification of a limited response but have not heard anything further. We also made clear our need to have further particulars of Diocesan, and other, records dealing with appointments, transfer, discipline and so on of priests against whom claims have already been made - Frs. Stanaway, McLachlan and Derriman to name just three. To that we now add Fr. O'Reagan, who figures at least twice in the Nazareth House events, and all the other alleged offenders for whom the Archdiocese may have or be alleged to have a responsibility. The personnel files would be a good starting point - plus parish visitation reports, diaries etc. of the Bishop, Vicar General etc.

We also referred in correspondence to documentation provided by the reports derived from the Towards Healing processes. The Protocols provide for reports to church authorities. In the absence of independent investigation into complaints, those reports, however confidential, are an essential source of detail necessary to substantiate any claim and/or the Archdiocese's (or QBE's) defence to claims. Naturally, we respect

¹⁴ Mr Leder's former firm.

¹⁵ An officer of the Archdiocese.

the confidential nature of the reports but they appear likely to be the only reliable source weighing fact and fiction. May we see them please.

If indeed there are now at least thirteen new claims in the pipeline, maybe it would be appropriate for us to visit Brisbane again to look at whatever material you have. This time, we would hope to have, mutually, a more developed understanding so that material relative to the indemnity as well as liability issues is available for examination.

- (g) on 7 November 2007, Minter Ellison wrote to the Archdiocese in relation to the settlement negotiations underway between the Sisters and the second group of claimants, as follows:

Apparently, the matters that contain the more serious allegation of rape have not reached settlement. The plaintiffs' solicitors advised that this is because in the previous group of claims those entailing rape were offered \$75,000 but this time Nazareth House has limited its offer to \$36,000. No reason has been provided for the comparatively lower offers this time around.

- (h) on 17 May 2007, the Archdiocese sent a letter to the Oblates enclosing claim details concerning an allegation was made in 2004 that Fr O'Reagan sexually abused a resident of the home in 1955-1956; and

- (i) on 26 August 2009, the Archdiocese was notified of a complaint of sexual abuse by a priest made by a former resident of the home. Mr Howes of the Archdiocese wrote to the Catholic Professional Standards Office as follows:

I have no record of [redacted] in my records but I will check with Minters as they have all the details of all the writs issued against us in relation to Nazareth House.

From my records there have only been a few girls who have included allegations against priests (usually just the nuns). The two priests that have been named were Capuchins as they staff the Wynnum Parish. Neither were "Fr John's"

We have never had to contribute anything to any of the settlements with the various claimants - the Sisters of Nazareth have done all of this. I'm not sure whether they have ever gotten anything out of the Capuchins.

Further correspondence in the subpoenaed documents indicates that this claim was settled by the Sisters in around late-2009.

39 Also exhibited to the second Sharmin affidavit was a bundle of documents provided to HM's solicitors by GR ('GR documents'). The GR documents included:

- (a) a letter from GR's solicitor to GR dated 29 September 1998 advising GR that a detective hoped to interview Fr O'Reagan 'next week', that Sr Philomena was deceased, and Sr Bernard Mary was now living in London;
- (b) a collection of news articles regarding the home and the death of Fr O'Reagan in October 1998;
- (c) a photograph taken of residents of the home after a confirmation ceremony in 1966 and an attached list of names prepared by another former resident of the home (including HM);
- (d) an undated newspaper article which referred to a body set up by the Catholic Church in Queensland to investigate claims of abuse, the Provincial Professional Standards Resource group, and a survivor's support group established by a former resident of the home;
- (e) a document headed 'Response from Sister Bernard Mary' in relation to claims of abuse with a handwritten notation 'Feb 99';
- (f) some documents regarding the Inquiry and the Forde Redress Scheme; and
- (g) correspondence between GR's solicitor (who also acted for the other claimants) and Mr Leder between May and July 2000 referring to the settlement negotiations between the claimants and the Sisters which led to the appointment of Mr Habersberger QC (as his Honour then was) and an independent psychiatrist to assess the quantum of each claim. GR's solicitor reported that he attended a conference in May 2000 with Mr Leder, a solicitor representing the Archdiocese, and two senior members of the Sisters, being Sr Mary and Sr Bernard.

40 The document referred to at paragraph 39(e) above was a seven-page typed statement headed '*Response from Sister Bernard Mary*'.¹⁶ The statement identified five female residents of the home, their dates of birth and the dates upon which they were admitted to or discharged from the home. Sr Bernard Mary commented upon what she knew about each of the named residents and throughout the statement, she emphatically denied any allegations of mistreatment or sexual abuse, painted a somewhat idyllic portrait of life at the home, and referred to Sr Philomena with great admiration.

41 Mr Leder swore a further affidavit on 18 October 2024 ('fourth Leder affidavit'). In the fourth Leder affidavit, under the heading '*Additional investigations – Witnesses*', Mr Leder deposed, in summary, as follows:

- (a) Ms Ida Waite, formerly known as Sr Mary Scholastica ('Sr Scholastica') provided a witness statement. Mr Leder exhibited the witness statement dated 27 August 2024, and deposed that Sr Scholastica:
- (a) was placed at the Nazareth House in Wynnum in the State of Queensland (**the Home**) from 1966 to 1975;
 - (b) never witnessed any priests engage in sexual abuse of any children at the Home, nor did she ever hear of, or become aware of, any such allegations during her time at the Home;
 - (c) recalled that priests from both the Capuchin Friars and Oblates of Mary Immaculate would say mass at the Home;
 - (d) recalled that priests from both the Augustinians and Redemptorist Fathers may have also attended the Home in the context of providing retreats for the Sisters during her time at the Home;
 - (e) did not recall any child being taken into the parlour to meet with a priest or of any child ever being left alone in any room with a priest; and
 - (f) never witnessed (and nor was she aware of) any priest and/or child going to the convent at the Home where the nuns resided, with the sole exception for a priest attending the convent to administer last rites to a dying Sister.

¹⁶ There are other documents in the materials which suggest that this statement was submitted to the Inquiry in response to statements given to the Inquiry by former residents of the home.

- (b) further enquiries have identified four other Sisters who were involved with the home between 1959 and 1969 in addition to those referred to in his previous affidavits. Two of those Sisters are still alive, being Sr Margaret (see paragraph 58 of these reasons), and Sr Carmel Marie, who may be living in Queensland, but her identity and location have not been confirmed;¹⁷ and
- (c) Mr Leder deposed as follows:

As a result of the enquiries detailed above and in my previous affidavits, I am instructed by the archivist that, to the best of the defendant's knowledge:

- (a) all Sisters who were placed at the Home between 1959 and 1969 have been identified in the affidavit material; and
- (b) the defendant has no other information or documents within its possession, custody or power which identifies any other Sisters or staff at the Home during that period.

However, due to the lapse of time and the resultant loss of documentation and unavailability of witnesses, I am instructed by the archivist that it cannot be definitively confirmed as to whether there were any other individuals, being members of the Sisters or otherwise, who had involvement at the Home between 1959 and 1969.

42 Mr Leder deposed at some length as to the enquiries made regarding the other Catholic orders. In relation to the Capuchin Friars, Mr Leder deposed as follows:

On 29 August 2024, Peter Ivory of Makinson d'Apice Lawyers provided a further email response. Mr Ivory indicated that the Provincial Delegate had spent some time in the Provincial Curia archive of the Capuchin Friars performing a search for information on the Capuchin Friars in Wynnum from 1964 until the end of 1967 and their involvement with the Home. Mr Ivory indicated that he was instructed by his client that:

- (a) between 1964 and 1967 [being the period of the alleged sexual abuse of the plaintiff, as per paragraph 10 of the FASOC), there were two houses of Capuchin priests in Wynnum, with one in Wynnum North and one in Wynnum Central;
- (b) it was the Provincial Delegate's understanding that all the priests named in the list were now deceased, apart from Fr Bonaventure

¹⁷ In the fourth Leder affidavit, Mr Leder deposed at some length to the efforts made by his firm to locate Sr Carmel Marie. Two possible matches have been found with Sr Carmel Marie's birth name in Queensland, but telephone enquiries to date have been unable to confirm whether Sr Carmel Marie's identity and location.

Rodighiero who it was understood may be alive but had left the Capuchin Friars some time ago;

- (c) in the appointment of Capuchin priests to Wynnum, there was no mention of any appointment to ministry to the Home in any of the archives;
- (d) a noted characteristic of Capuchin priests between 1964 and 1967 was that priests who could grow a beard usually had one and their cassocks were dark brown. Neither of these characteristics were noted in the description of the three priests by the plaintiff;
- (e) although Capuchin priests wore dark brown cassocks on a day-to-day basis, when the priests conducted Mass they wore white albs or vestments over their cassock, sometimes tied with coloured, rope like cords; and
- (f) there were other priests who were not Capuchin priests who were living and working in Wynnum between 1964 and 1967, including priests of the Oblates.

Mr Ivory also provided a list and some images of the Capuchin priests residing in the houses in Wynnum North and Wynnum Central and who fell within the age description of the alleged perpetrators as provided by the plaintiff.

43 In relation to the Redemptorist Fathers, Mr Leder deposed as follows:

On 4 June 2024, Mr Lee of Carroll & O'Dea Lawyers provided an email response in which he indicated that he was instructed by the Redemptorist Fathers to provide the following information:

- (a) between 1964 and 1967, being the period of the alleged sexual abuse of the plaintiff, there were five priests of the Redemptorist Fathers who frequented the Home;
- (b) all five of those priests are now deceased; and
- (c) during the period of 1964 and 1967, four of the priests were aged in their sixties and one was in his fifties.

44 Mr Leder confirmed that the defendant had already completed all relevant enquiries regarding the Augustinians and the Oblates, and exhibited extracts from the website of the Oblates to show what outfits their priests wore while conducting Mass.

45 Mr Leder deposed as to further enquiries made of the Archdiocese, as follows:

On 20 August 2024, Dr Sean Gomes of the Archdiocese provided an email response. Dr Gomes provided a bundle of documents which included reference to the following matters, and confirmed that beyond that bundle, the Archdiocese did not hold any other documents relevant to the request:

- (a) a newspaper article from the Catholic Leader dated 11 June 1964 which refers to Fr Rudolf Blockinger of the Capuchin Friars as having said Mass at the Home in 1964;
- (b) letters to and from Rev. Francis Gleisner and the Archbishop's office dated 14 and 17 July 1965 which refer to the Archbishop granting permission and the Faculties of the Archdiocese to the priests of the Redemptorist Fathers to conduct missions and retreats within the confines of the Archdiocese, including retreats for Sisters or nuns;
- (c) a list of the priests of the Redemptorist Fathers residing at the community in Oxford Park as at July 1965; and
- (d) letters to and from the Archbishop of Brisbane and Mother Malachy dated 20 July 1966, 21 July 1966, 20 January 1967 and 26 January 1967 which refer to the Archbishop:
 - (i) granting permission and the Faculties of the Archdiocese for priests from the Redemptorist Fathers to give retreats to the children, old people and the Sisters at the Home in 1966;
 - (ii) granting permission and the Faculties of the Archdiocese for priests from the Oblates to give retreats to the children, old people and the Sisters at the Home in 1967; and
 - (iii) authorising priests from the Oblates to give a conference to the Sisters once a month at the Home in 1966 and 1967.

46 Mr Leder exhibited the bundle of documents provided to him by the Archdiocese, and deposited further as follows:

On 29 August 2024, Dr Gomes of the Archdiocese provided a further email response.

Dr Gomes indicated that there was a statement which was relevant to Wotton + Kearney's previous request. Dr Gomes provided a link to a website containing a statement dated 28 August 2002 of Father James Spencer, the Chancellor of the Archdiocese at that time. In Fr Spencer's statement, he stated that although the Archdiocese was aware of complaints against priests who ministered at the Home, all of those priests were deceased and were not priests from the Archdiocese but rather were from different religious orders.

47 Mr Leder referred to a document discovered by the defendant in her supplementary affidavit of documents on 3 May 2024, being what he described as the '*History of Foundation document*' ('Foundation document'), which was a 60-page handwritten document describing events and developments at the home. Mr Leder went on to itemise the numerous references in the Foundation document to priests of the other Catholic orders attending the home during the relevant period.

48 Mr Leder also referred to additional documents discovered by the defendant following correspondence between the solicitors for the parties which had been obtained from the Sisters of Nazareth Generalate Archives in London ('London archive'), and discovered by the defendant on 18 October 2024. These documents included visitation reports made during the relevant period that referred to members of the Oblate Fathers, Augustinian Fathers and Capuchin Fathers attending the home, and bundles of documents relating to Sr Philomena and Sr Giles.

49 Mr Leder commented upon the clinical records discovered by HM in May 2024, observing that while there was a reference in those records to 'abuse in the orphanage', there was 'otherwise no reference to particulars of the alleged sexual abuse, including as to the identity or identifying details of the alleged perpetrators'.

50 Mr Leder referred to the subpoenas issued in this proceeding to the Archdiocese, Catholic Church Insurance Ltd ('CCI'), the Department, QBE, and Ms Mundy, and went on to depose as follows:

Notwithstanding the further discovery of the plaintiff and defendant, the discovery of the third party and the various subpoenas issued, including those which sought documents detailing the identities of male priests who had involvement at the Home and/or who were subject to complaints of sexual abuse at the Home up to and including 1967, the plaintiff has not provided any further information or particulars as to:

- (a) the identity of any of the three priests who committed the alleged sexual abuse;
- (b) any further identifying details of the three priests who committed the alleged sexual abuse beyond the details already disclosed in the course of this proceeding; or
- (c) the identity of the religious order(s) or congregation(s) of which the three priests who committed the alleged sexual abuse were members.

Further, the defendant's legal team have reviewed these various documents and have not identified anything within this material which provides further information in relation to any of these three matters beyond what has already been exchanged in the proceeding and detailed in my previous affidavits.

51 Mr Leder also referred to HM's answers to interrogatories and further answers to interrogatories (see paragraphs 6 to 12 of these reasons), and the defence of the State to the defendant's third party notice, in which the State said that it required further

and better particulars of the three priests, and did not otherwise admit the allegations of sexual abuse.

52 As for HM's application to the Forde Redress Scheme, Mr Leder deposed as follows:

I am instructed by the defendant and the archivist of the defendant that the defendant:

- (a) has no documents in its possession, custody or power in relation to the plaintiff's application to the Forde Redress Scheme, other than what documents have been discovered in the course of this proceeding by the plaintiff and the third party, and produced by the [Department] pursuant to subpoenas;
- (b) was not a party to the Release, Discharge and Indemnity entered into between the plaintiff and the State of Queensland on 14 November 2008 in relation to the plaintiff's acceptance of redress through her application to the Forde Redress Scheme; and
- (c) otherwise has no documents or evidence to suggest that it was ever on notice of the particulars of the plaintiff's redress application.

In the documents relating to the plaintiff's application to the Forde Redress Scheme discovered by the plaintiff and the third party and which have been produced by the [Department] pursuant to subpoenas dated 23 February 2024 and 12 June 2024, there are no documents evidencing that any information, particulars and/or documents relating to the plaintiff's redress application were ever provided to the defendant.

53 Among the documents exhibited to the fourth Leder affidavit was a bundle of documents produced by the solicitors for the Capuchin Friars on 5 December 2023.

The covering email stated as follows:

Dear Richard

We act for the Capuchin Franciscan Friars who have referred to us your letter dated 7 November 2023.

Our client has undertaken enquiries in relation to the matters raised in your letter.

We attach a document received from our client which lists the Capuchin Priests (Friars) who were resident at St Laurence's Friary Wynnum North between 1963 and 1967. Unfortunately the record keeping during the period in question was less than perfect, but the provision of these names might trigger some memory for the Sisters. We are instructed there are no documents which record who attended Nazareth House, with what frequency and what role they had in relation to Nazareth House.

If you require any further information please let us know.

54 The list attached to this email indicates that between 1964 and 1967 there were between four and seven Capuchin Friars located in Wynnum at any given time. The black and white photographs provided were of large groups of men, and are of quite good quality. Many, but not all of the men portrayed were bearded, and they wore dark robes with girdles.¹⁸

55 Also exhibited to the fourth Leder affidavit was correspondence between the parties regarding the then extant discovery dispute between the parties, the Foundation document, and some of the documents obtained from the London archive.

56 The defendant also relied upon an affidavit sworn by Ms Michelle Rich, a solicitor, on 18 October 2024. Ms Rich deposed that on or around 19 February 2024 she was informed that Sr Nuala O'Byrne ('Sr Nuala') was formerly Sr Mary Finian. Sr Nuala lived at the home between July 1963 and February 1964. Ms Rich was later informed by the defendant that Sr Nuala was elderly and had a poor memory. In August 2024, Ms Rich was informed by the Sisters' archivist that Sr Nuala passed away on 10 July 2024.

57 Ms Rich conferred with Sr Nuala on 1 May 2024. Ms Rich deposed as follows:

Sr Nuala told me that she:

- (a) had a limited role with the children at the Home as she was in a relief role and undertook duties such as helping to clean up the kitchen;
- (b) had a recollection of there being several children at the Home who were sisters with the last name "[redacted]" but did not specifically recall the Plaintiff;
- (c) never witnessed any sexual abuse of children at the Home by a priest nor was she ever made aware of any such allegations;
- (d) never witnessed any physical abuse of residents by anyone at the Home. The only discipline which she witnessed was when children were put in a corner and told to be quiet; and
- (e) recalled that priests would attend the chapel at the Home to say Mass. However, she did not attend Mass and was unable to recall the names

¹⁸ While this was not the subject of direct evidence, during the course of the hearing of the stay application, counsel for HM confirmed that the provision of these photographs had not triggered any recollection by HM of the identity of the three priests or any of them.

of any of the priests or details as to which religious order or congregation they were from.

58 Ms Rich deposed further that Sr Margaret Catherine O'Keefe ('Sr Margaret') served at the home from August 1968 to February 1969. Ms Rich conferred with Sr Margaret in October 2024 and obtained a witness statement from her. Ms Rich exhibited Sr Margaret's witness statement and deposed as follows:

In Sister Margaret's statement, she states that, inter alia, that she:

- (a) was at the Home from 5 August 1968 to 27 February 1969;
- (b) was not at the Home at the same time as the plaintiff or Sister Mary Gregory;
- (c) did not have any role with children at the Home and therefore did not have much contact with them;
- (d) never saw a priest sexually abuse or behave inappropriately towards a child at the Home during her time there;
- (e) never received a complaint or notification of alleged sexual abuse during her time at the Home;
- (f) recalled that priests from the Capuchin Friars would visit the Home to conduct Mass;
- (g) the priests who conducted Mass wore a white vestment over the top of their brown habit; and
- (h) never witnessed or received a complaint of any child being physically or psychologically abused during her time at the Home.

59 The defendant also relied upon an affidavit sworn by Ms Samantha Saad on 18 October 2024. Ms Saad deposed that she and Ms Rich conferred with Ms Joan Mundy, (formerly Sr Mary Gregory, against whom allegations were expressly made in the amended statement of claim) on 23 April 2024 and 1 May 2024. Ms Mundy resided at the home between 3 January 1965 and 1 October 1967 and left the Sisters in around 1993.

60 Ms Saad deposed as follows:

Ms Mundy told us that during the period she resided at the Home:

- (a) she was primarily involved in caring for children under the age of 5 years, and collecting funds for the Congregation;

- (b) the Home was a two-storey building comprised of the children's section on the ground floor and an aged care section on the second floor. There were large doors and religious statues at its entrance, and two parlours where visitors such as parents and social workers would sit;
- (c) the children's section of the Home was comprised of a recreational room, a dining room, classrooms including a kindergarten for the younger children, and the children's dormitories. Ms Mundy resided in a small bedroom at the end of the dormitory where the younger children slept, so that she could attend to them if they required assistance during the night; and
- (d) here was also a convent and a chapel, which were separate from the main building, but connected to it via a passageway. The convent was known as the 'Sisters' quarters'.

61 Ms Saad deposed that she informed Ms Mundy of the identity of HM and the allegations she has made in this proceeding, including the allegation that Sr Gregory was a perpetrator of physical and psychological abuse, and as being complicit in sexual abuse. Ms Saad deposed as follows:

In response, Ms Mundy told us that:

- (a) she did not recall the name '[HM]' at all and that while it was possible that the Plaintiff had resided at the Home while she was placed there, she had no recollection of the Plaintiff;
- (b) she remembered Sr Philomena and Sr Giles;
- (c) Sr Philomena was her supervisor at the Home and taught in the school there; and
- (d) Sr Giles worked with the elderly women who resided on the second floor of the Home. Ms Mundy could not recall Sr Giles interacting with the children at all.

...

Ms Mundy told us that she denied that she had physically or psychologically abused the Plaintiff or any other child at the Home. She specifically denied:

- (a) using any corporal punishment on the children that she supervised;
- (b) striking or hitting any child, either with a feather duster, cane, belt or belt buckle;
- (c) using methylated spirits on a child's welts, or seeing any child with welts that had been caused by alleged physical abuse;
- (d) forcing any child to eat out of a pig's bucket. Ms Mundy told us that she could not recall there being any pigs or "pig's buckets" on the premises and that she only ever saw children eat from ordinary plates;

- (e) rubbing urine-soaked underwear in a child's face, or making a child stand in a corner with urine-soaked underwear on their head;
- (f) calling any child "useless", "stupid", or "the devil's spawn";
- (g) putting or locking any child in the scullery. Ms Mundy said that she could not recall the scullery door ever being locked; and
- (h) telling the Plaintiff to wait in the recreational room for her mother to visit, when no such visit had been arranged. Ms Mundy told us that she was a junior Sister during the period she resided at the Home and had no involvement in arranging visits for children.

Ms Mundy also told us that she:

- (a) never saw Sr Philomena, Sr Giles or any other Sister physically or psychologically abuse any child at the Home in the manner alleged by the Plaintiff or at all; and
- (b) never received any notice of, or otherwise was made aware of, any allegations of physical or psychological abuse of children during the period she resided at the Home.

62 Ms Saad also deposed that she told Ms Mundy that HM had alleged that Ms Mundy had taken her to the nuns' quarters and left her there with the priests who then sexually abused her. Ms Saad deposed as follows:

Ms Mundy told us that she denied that allegation and further said that:

- (a) she never took any child to any part of the convent, which was the only area that was specially designated to the Sisters as it was not an appropriate area for children to be taken to;
- (b) she never left any child alone or unsupervised with any priest;
- (c) the only time that priests attended the Home was to give morning mass at the Chapel. She could not recall them attending the Home for any other reason or at any other time;
- (d) she thought the priests who attended might have been from the Capuchin Friars but she was not certain;
- (e) she could not recall the name of any priests who attended the Home to say Mass; and
- (f) she never had any direct contact with the priests as she was not permitted to interact freely with those priests or with any other persons who visited the Home.

Ms Mundy also told us that she never saw Sister Philomena, Sister Giles or any other Sister take a child into the convent, or to meet with a priest alone, and she was not aware of any child ever being left alone or unsupervised with a priest. Ms Mundy stated that during the period that she resided at the Home,

the children were not left alone in any circumstances, with there always being at least one Sister with them.

63 Ms Saad also deposed to discussions she has recently had with Ms Mundy's brother regarding Ms Mundy's health. Ms Saad deposed as follows:

On 5 September 2024, I spoke with Ken Mundy, Ms Mundy's brother and Power of Attorney, in relation to Ms Mundy's health and capacity. Mr Mundy told me that:

- (a) Ms Mundy suffers from Parkinsons Disease and has recently been experiencing memory loss issues;
- (b) Ms Mundy was admitted to hospital in Zurich, Switzerland on or around 13 June 2024, after having suffered a series of falls and sustaining fractures to her spine. Ms Mundy remained in hospital in Zurich for three weeks, before being transferred to the Alfred Hospital in Melbourne, Australia, and then to Box Hill Hospital on 17 July 2024;
- (c) Ms Mundy remains in Box Hill Hospital and is suffering from several medical issues. It is unclear when she will be released from hospital; and
- (d) Ms Mundy has provided a general Power of Attorney to Mr Mundy in relation to her medical and financial affairs.

64 Ms Saad exhibited a medical certificate from a doctor at Box Hill Hospital dated 19 August 2024, and deposed further as follows:

On 14 October 2024, I contacted Mr Mundy to enquire about Ms Mundy's health and capacity. Mr Mundy told me that:

- (a) Ms Mundy's physical health has not improved and her capacity is deteriorating. She has experienced some recent delusional episodes.
- (b) Ms Mundy remains at Box Hill Hospital. Her medical team are considering discharging Ms Mundy from Box Hill Hospital and arranging for her to be admitted to a transition facility for 3 months, though it is unclear when this will occur.

Given the deterioration in Ms Mundy's physical health and memory, Ms Mundy was unable to provide a signed statement as to the matters set out above.

65 HM relied upon a lengthy affidavit affirmed by Ms Sharmin on 9 November 2024 ('third Sharmin affidavit') in opposition to the stay application. Much of the third Sharmin affidavit was argumentative in nature, in that it made submissions to the effect that:

- (a) the defendant had failed to make adequate discovery;
- (b) the defendant had not explained whether steps had been taken to further investigate a range of matters, and if not, why not, and if so, why those investigations had not taken place at an earlier time;
- (c) the defendant's solicitors had not explained whether they had put to Ms Mundy, Sr Margaret, or Sr Nuala evidence derived from the claim documents which contradicted the evidence and instructions they had given to the defendant's solicitors;
- (d) the defendant had not explained whether the lawyers for the other Catholic orders were provided with documents evidencing the attendance of members of the other Catholic orders at the home during the relevant time; and
- (e) the defendant had failed to provide evidence to show that it has made adequate enquiries of potential witnesses, including any evidence regarding whether the sixteen Sisters identified by Mr Leder in the first Leder affidavit as now being deceased had been contacted by the defendant or her solicitors prior to their deaths.

66 Ms Sharmin noted that in the second Sharmin affidavit, she had deposed as to a number of investigations that she believed had not been undertaken by the defendant, and, to the best of her knowledge, had still not yet been undertaken. These investigations included:

- (a) contacting the people referred to in the list of claimants and other former residents of the home derived from the subpoenaed documents exhibited to the second Sharmin affidavit; and
- (b) contacting the legal firms and insurance companies involved in the settlement of the claims against the Sisters from 1999, noting that Mr Leder acted for the Sisters during this period; and

(c) Ms Sharmin deposed as follows:

To my knowledge at the time of affirming this affidavit, the Defendant has not:

- (a) made investigations or attempted contact with any of the residents or teachers depicted in the 1966 photograph or Sister Theresa Marie or Rita Bladstall;
- (b) made investigations or attempted contact with Patrician OC, Mother Malachi and Mother Malachi (Malacky);
- (c) made a request for documents related to the Argos Taskforce;
- (d) made a request for documents from the Provincial Professional Standard Resource Group; or
- (e) made investigations in relation to Archbishop Duhig, Father Alyounis / Aloushious and / or Friar Tuck.

67 Ms Sharmin referred to the claim documents, along with further documents regarding additional claimants produced by the Archdiocese in a further tranche of subpoenaed documents in September 2024, and documents produced by CCI in July 2024. Some of these documents referred to claims of sexual abuse by priests at the home. Ms Sharmin deposed as follows:

To my knowledge at the time of affirming this affidavit, the Defendant has not:

- (a) contacted these former claimants regarding the Plaintiff's allegations or regarding the Home more broadly such as the accessibility the Priests had to the Home and residents; or
- (b) made investigations with the Police as to which Priest was charged for abusing a resident at the Home.

In August 2024, Queensland Police produced records in relation to the Subpoena to Produce issued by the Plaintiff. These documents disclose that extradition proceedings were considered in relation to a Sister who was residing in the United Kingdom at the time in relation to the abuse she perpetrated against Victim KK, which by reference to other documents which exist in this matter is Sister Bernard Mary. To my knowledge at the time of affirming this affidavit the Defendant has not discovered any documents related to Sister Bernard Mary's involvement with Interpol or the Police in Australia or the United Kingdom in relation to allegations she sexually and physically abused residents at the Home.

68 Ms Sharmin referred to the discovery made by the State, which, among other things, referred to a number of officers of the Department who had visited the home, and

deposed that, to the best of her knowledge, the defendant has taken no steps to identify or contact those officers.

69 In the third Sharmin affidavit, Ms Sharmin also identified and exhibited a number of other documents that contained information that she considered could be the subject of further investigation by the defendant, including:

- (a) a letter to the Archbishop dated 14 July 1965 which identified a number of Redemptorist priests who had attended the home;
- (b) the documents discovered in the proceeding by the State;
- (c) documents provided to her by a claimant which referred to perpetrators of sexual abuse by name;
- (d) documents in the possession of QBE, to which the defendant objected to production;
- (e) the Foundation document;
- (f) documents, including photographs of Nazareth House, held by the Inquiry in its records;
- (g) documents produced by Queensland Police which refers to complaints made about Sr Philomena in March 1998 (that is, after her death), and those complaints having been referred to the Argos Task Force. Queensland Police held no records of any complaints being made against Sr Giles or Sr Gregory; and
- (h) a bundle of documents recording the participation of a group of former residents of the home in the Inquiry in late-1998, including a letter referring to the 'Nazareth House Support Group', and a rough sketch of the physical layout of the home prepared by a former resident of the home.

70 Mr Leder swore a further affidavit on 17 December 2024 regarding matters arising out of the defendant's further discovery in December 2024. In particular:

- (a) the defendant has discovered further claim documents. Mr Leder deposed as follows:

At no stage since the defendant's supplementary discovery in May 2024, and notwithstanding further discovery in December 2024 of material relating to unrelated complaints of abuse, has Wotton Kearney received any correspondence from the plaintiffs solicitors alleging that any of the male alleged perpetrators referred to in that material were the same as any of the three priests who the plaintiff alleges sexually abused her at the Home.

- (b) the defendant has obtained and discovered the file concerning the 2012 claim. Mr Leder deposed as follows:

Based on a review of the hard copy file relating to the plaintiffs prior civil claim against the defendant in approximately 2012/2013, I say that file does not contain any references to:

- (a) any allegations that the plaintiff was subject to sexual abuse during her time at the Home;
- (b) any allegations that the plaintiff was subject to sexual abuse or any other type of abuse or misconduct perpetrated by any priests or males during her time at the Home;
- (c) any priests or males being at the Home generally during the plaintiff's time there; or
- (d) the plaintiff's application to the Forde Redress Scheme in about 2008.

71 Finally, for completeness, the defendant and her successor, Sr Lusila Tautunu ('Sr Lusila') have sworn five affidavits of documents in this proceeding. In the first affidavit of documents sworn 16 October 2023, only a small handful of documents were discovered by the defendant.

72 In her supplementary affidavit of documents sworn 3 May 2024, the defendant discovered registry entries for Sr Philomena, Sr Gregory, and Sr Giles, and a personnel file for Sr Gregory. She also discovered files concerning 23 claimants who had made complaints against Sr Philomena. The defendant also deposed that she had not been

able to locate or otherwise confirm the existence of documents in the following categories of documents:

- (a) yearly reports on the overall operation of the home prepared by the Superior General of the Sisters during the relevant period;
- (b) contemporaneous documents or photographs which would reveal the physical layout of the home, including the nuns' quarters, during the relevant period;
- (c) policies and procedures relating to the operation and monitoring of the home; and
- (d) documents relating to HM's application to the Forde Redress Scheme.

73 The defendant deposed as follows:

Further, to the best of my knowledge, information and belief neither myself, the Sisters nor our solicitor nor any other person on our behalf has now, or ever had, in its or their possession, custody or power any documents relating to the following categories:

- (a) personnel files for Sister Giles or Sister Philomena;
- (b) a list (or any other form of document) identifying all persons, including priests, fathers, brothers or friars, who assisted, visited or had involvement at the Home during the Relevant Period but who were not a member of the Congregation/Sisters; and
- (c) records from the Home relating to the role, if any, performed by priests, fathers, brothers or friars, at the Home during the Relevant Period.

However, due to the lapse of time since the Relevant Period and the closure of the Home, I am unable to say or express with certainty and belief as to:

- (a) whether any further documents were ever previously in the possession, custody or power of the Sisters;
- (b) if any further documents were ever previously in the possession, custody or power of the Sisters:
 - (i) what those documents were;
 - (ii) who prepared those documents;
 - (iii) when those documents came into existence;
 - (iv) what happened to such documents; or

(v) when or how those document[s] became unavailable.

74 The defendant swore a further supplementary affidavit of documents on 18 October 2024. In the further supplementary affidavit of documents, the defendant discovered documents obtained from the London archive, documents regarding Sr Giles and Sr Philomena, the documents produced by the Capuchin Friars to the defendant's solicitors, and the documents produced by the Archdiocese to the defendant's solicitors referred to in the fourth Leder affidavit.

75 Sister Lusila swore a fourth affidavit of documents in response to HM's discovery application, which discovered various claim documents, but objected to the production of further claim documents on various grounds. Sr Lusila deposed as follows:

In the course of complying with my discovery obligations throughout this proceeding, the Sisters have undertaken all reasonable searches and enquiries, including:

- (a) searches of the physical archives of the Sisters at the Regional House in Camberwell, Victoria;
- (b) searches of electronic records held by the Sisters;
- (c) enquiries of the Generalate and related searches of the Generalate Archives; and
- (d) enquiries of the archivist of the Sisters.

I have caused for Wotton Kearney to request from Corrs Chambers Westgarth (Corrs), the law firm which previously represented the Sisters, to conduct searches of its electronic document holdings and hard copy archives to locate documents relevant to Claimants 4, 11, 12, 13, 15, 18, 19 and 22. Corrs has confirmed that it is conducting searches for materials and will provide any documents that it locates in relation to Claimants 4, 11, 12, 13, 15, 18, 19 and 22 to Wotton Kearney. Should there be any located by Corrs that are required to be discovered, I will swear a fifth affidavit of documents. I have also caused for Wotton Kearney to request that Corrs provide an estimate as to how long it will take for the searches to be conducted and the documents to be provided to Wotton Kearney. At the time of swearing this affidavit, no estimate has been provided by Corrs.

76 On 13 December 2024, Sr Lusila swore a fifth affidavit of documents discovering further claim documents obtained from Corrs Chambers Westgarth foreshadowed

above, including the hard copy file in relation to the 2012 claim, and objecting to the production of some of the claim documents on various grounds.

77 The following conclusions can be reached from the above summary of the evidence adduced by the parties in support of their respective positions with respect to the stay application:

- (a) there has been an impoverishment of evidence over the course of the period since HM resided at the home, in that most of the Sisters who lived and worked at the home during the relevant period are now deceased;
- (b) the defendant's ability to identify any members of the other Catholic orders who attended the home has been impaired over time, and, most of the priests from other Catholic orders that may have attended the home during the relevant period are almost certainly deceased;
- (c) the claimants, and also some other former residents of the home, are capable of being identified by the defendant from the discovered and subpoenaed documents, along with some officers of the Department who visited the home in the 1970s, although it is likely that many of the latter group may be deceased or infirm;
- (d) the potential witnesses interviewed by the solicitors for the defendant have all denied knowledge of any abuse of any kind at the home, and have been able to provide some evidence, albeit imperfect evidence;
- (e) none of the documentary evidence identified during the course of 2024, including the photos provided of the Capuchin Friars, has assisted HM to identify the three priests, or any of them, and it seems unlikely that further evidence will emerge that will enable her to do so;
- (f) while at the time the stay application was made, there were limited relevant documents available to the parties, it seems that the position has changed somewhat by reason of the 2024 investigations;

- (g) further to the above, in respect of the categories of documents identified by Mr Leder in the first Leder affidavit as being unable to be located, it seems that at least some documents within each category have been located and/or produced during the course of the 2024 investigations;
- (h) there may still be other potential sources of relevant documents, particularly further claim documents, that may be obtained from third parties, such as legal firms and insurance companies;
- (i) I cannot locate in the materials photographs of the home and/or the nuns' quarters. However, the defendant's solicitors have received some instructions about the physical layout of the home and who had access to the home and the nuns' quarters, and there are also descriptions of the home referred to in the claim documents and in statements provided to the Inquiry;¹⁹
- (j) while the Sisters were notified of HM's claims of sexual abuse in or about December 2019, the Sisters (at all relevant times represented by Mr Leder)²⁰ have been on notice of claims of sexual abuse by former residents of the home since no later than January 1999.²¹ It seems that limited or no investigations of the allegations made by the claimants of physical, sexual and/or psychological abuse were conducted by the Sisters, the Archdiocese, or their solicitors at that time.²² The failure to undertake such investigations from about 1999 is explicable, given the fundamentally different legal landscape facing the claimants at the time, and the expressed desire of the Sisters to settle, rather than litigate the claims brought by the claimants. However, as at 1 January

¹⁹ There is also no evidence before me as to whether the building from which the home operated and the nuns' quarters still exists, and if so, whether the property is accessible to the defendant.

²⁰ No criticism of Mr Leder is intended by this observation: rather, the relevance of this observation is that he would be in a position to know, with some degree of precision, what investigations were carried out (or not carried out) by the Sisters in response to the first tranche of claims being received by the Sisters in 1999. The absence of any evidence regarding what investigations were undertaken at that time, plus the evidence about the Sisters' agreement to participate in the settlement scheme supports an inference that limited or no investigations were undertaken at that time.

²¹ It seems that the Sisters may have been notified of allegations of physical abuse at the home in 1998, during the course of the Inquiry.

²² Including investigations of the kind referred to in the letter from QBE extracted at paragraph 38(f) of these reasons.

1999, now more than a quarter-century ago, eleven of the Sisters serving at the home between 1959 and 1969 who are now deceased were alive, and no doubt many of the members of the other Catholic orders would also still have been alive;

- (k) less explicable is the failure of the Sisters to undertake any further investigations between December 2019 and November 2023, although only two Sisters died during that period;
- (l) while this conclusion is not entirely free from doubt, it seems more likely than not that HM's inability to identify the three priests is not due to the passage of time. Rather, it seems that she never knew the names of the three priests; and
- (m) there is no evidence that HM disclosed the sexual abuse by the three priests to anyone prior to 2019, save for a rather vague reference to interactions with priests in her application to the Forde Redress Scheme in 2008. I accept that the Sisters did not become aware of HM's allegations of sexual abuse until December 2019.

Relevant legal principles

78 The principles governing the question of when a court will exercise its inherent jurisdiction to grant a stay on the basis that the defendant cannot receive a fair trial are well established, and were summarised by Bell P in *Moubarak by his tutor Coorey v Holt (No 1)*²³ ('*Moubarak*') as follows (omitting citations):

- (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 ...

²³ *Moubarak by his tutor Coorey v Holt (No 1)* [2019] NSWCA 102 ('*Moubarak*').

- (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 ...²⁴

79 Prior to the decision of the High Court in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*²⁵ (*GLJ*), the application of the principles above may well have resulted in HM’s claims of sexual abuse, and perhaps even all of her claims in this proceeding being permanently stayed, notwithstanding the abolition of the relevant limitation period in 2015. However, as stated by the majority in *GLJ*,²⁶ the abolition of the limitation period for claims of child abuse ‘has created a new legal context within which the alleged abuse of process must be evaluated’.²⁷ As a consequence, as observed by Leeming JA in *CM v Trustees of the Roman Catholic Church for the Diocese of Armidale*²⁸ (*CM*) the decision in *GLJ*²⁹ changed the law, and ... ‘there are cases which formerly would have been stayed which will now proceed to trial’.³⁰ His Honour also observed that:

The construction adopted by the majority reasons for judgment is to the effect that a permanent stay will only be granted in exceptional circumstances, but the class of what is “exceptional” is to be taken to have narrowed following the enactment of s 6A. Matters that were once considered “exceptional”, such as a forty or fifty year delay and the concomitant inevitable distortion of human recollection and impoverishment of documents, are not to be regarded as exceptional for the purposes of confining permanent stays of civil claims for child abuse to “exceptional” cases, at least in institutional settings.³¹

²⁴ As summarised in *Willmot* at [15], citing *Moubarak* [71].

²⁵ *GLJ* (2023) 414 ALR 635.

²⁶ *GLJ*.

²⁷ *GLJ* [44].

²⁸ *CM* [2023] NSWCA 313.

²⁹ *GLJ* (2023) 414 ALR 635.

³⁰ *CM* [68].

³¹ *CM* [82].

80 For the purpose of the hearing of the stay application, the parties provided a bundle of authorities which included a number of decisions where successful applications for permanent stays had been made in child abuse cases notwithstanding the abolition of the relevant limitation period. However, I agree with the submissions of counsel for HM that drawing analogies with the findings made in the decisions which pre-dated the decision of the High Court in *GLJ*³² is of limited utility given the change in the legal landscape effected by the reasoning of the majority in *GLJ*³³ (and reinforced by the decisions in *Willmot v Queensland*³⁴ (*'Willmot'*) and *RC v The Salvation Army (WA) Property Trust*³⁵ (*'RC'*)), and most, if not all of those cases would now be decided differently.

81 In *GLJ*,³⁶ the High Court, by a 3:2 majority, overturned a decision of the New South Wales Court of Appeal to grant a permanent stay in a proceeding brought, like the current case, some 55 years after the alleged sexual abuse occurred. While the alleged perpetrator ('priest') and the senior people from whom the defendant could have taken instructions from were long deceased, the majority held that the defendant was not 'utterly in the dark' about the question of whether the abuse occurred. The majority acknowledged that this was the central issue in the proceeding, but found that the defendant held relevant information about the priest and his movements, and the defendant had been on notice of the priest's sexual interest in children 25 years before his death. All that the defendant had lost by the passage of time was the opportunity to ask the priest whether he had abused the plaintiff, and the opportunity of calling the priest as a witness.

82 The majority considered the impact of the abolition of the limitation period in child abuse cases upon the proper approach to applications of the current kind under the heading '*A fair trial in child sexual abuse claims – a new world*'. The majority stated as follows (omitting footnotes):

³² *GLJ* (2023) 414 ALR 635.

³³ *GLJ*.

³⁴ *Willmot* [2024] HCA 42.

³⁵ *RC* [2024] HCA 43.

³⁶ *GLJ* (2023) 414 ALR 635.

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.

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.

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 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”, 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.

In *Moubarak*, Bell P went a considerable distance towards this recognition in focusing on the “effect of delay on the trial process” 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.³⁷

83 The majority referred to a number of authorities to the effect that a fair trial does not mean a perfect trial, and that the absence of witnesses and the loss or destruction of documents and other evidence does not necessarily render a trial unfair, noting that it is not exceptional for criminal trials to proceed where the relevant events took place a long time ago. The majority went on to say as follows:

Common law courts have also developed techniques to enable proceedings to be heard and determined despite the unidentifiability, death, or legal incapacity of a party. 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”; (b) “it is a mistake to think that because an event is unseen its cause cannot be reasonably inferred”; 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”.³⁸

84 Relevantly for the purposes of the current application, the majority made the following observations:

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.³⁹

³⁷ GLJ [40]-[43].

³⁸ GLJ [61].

³⁹ GLJ [64].

85 The decision in *GLJ*⁴⁰ was also the subject of consideration and application by the Court of Appeal in *Weiden v YZ (a pseudonym) (No 2)*,⁴¹ where the Court summarised the reasons of the majority of the High Court as follows:

In relation to permanent stays generally, the majority said:

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 unfair. 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 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 decided.

Under the heading, ‘A fair trial in child sexual abuse claims – a new world’, the majority referred to the Second Reading Speech which introduced the *Limitation Amendment (Child Abuse) Bill 2016* (NSW), and which ultimately resulted in the insertion of s 6A into the *Limitation Act 1969* (NSW). Their Honours said that the removal of any limitation period for the commencement of proceedings for death or injury resulting from child abuse involved ‘a fundamental change to the legal context’ in which powers to permanently stay a proceeding were to be exercised.⁴²

86 The Court of Appeal then referred to the following statement by the majority in *GLJ*:

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’; 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.⁴³

87 The Court of Appeal then went on to say as follows:

In considering applications for a permanent stay, the majority said that it is now for the courts to evaluate contentions of abuse of process within a ‘new

⁴⁰ *GLJ* (2023) 414 ALR 635.

⁴¹ *Weiden (No 2)* [2023] VSCA 294.

⁴² *Weiden (No 2)* [51]-[52], citing *GLJ* [21].

⁴³ *Weiden (No 2)* [53], citing *GLJ* [44].

normative structure’ where Parliament has accepted that, in the ordinary course, there is likely to be a long delay in the bringing of child abuse claims, and has acted to enable such claims to be brought at any time.

In relation to ‘the inevitable fading of memories and loss of evidence (whether it be from death, illness, infirmity, or the loss or destruction of documents)’, the majority said that, in the newly established statutory context, these matters were ‘properly to be understood as routine and unexceptional sequelae of the harm caused by the alleged act the subject of the claim’.⁴⁴

88 The Court of Appeal went on to refer to the techniques developed by common law courts to ameliorate the consequences of missing witnesses or other evidence, and distilled the following principles governing applications of the current kind from the reasons of the majority in *GLJ*⁴⁵ (omitting footnotes):

- the party seeking a permanent stay bears the onus of establishing more than a mere risk that a trial may be unfair – that party must establish that the trial will be unfair or will involve such unfairness or oppression as to be an abuse of process;
- it can no longer be maintained that the passing of time alone enlivens the inherent power or any statutory power of a court to prevent an abuse of its process;
- the effect of the passing of time 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;
- the common and expected effects of the effluxion of time are not sufficient to constitute the ‘exceptional circumstances’ which would justify a court granting a stay and refusing to exercise its jurisdiction; and
- any inevitable impoverishment of the evidence which the passing of time occasions cannot attract the quality of exceptionality which is required to justify the extreme remedy of the grant of a permanent stay.⁴⁶

89 In *Weiden (No 2)*⁴⁷ the Court of Appeal upheld decisions made by an associate judge and a trial division judge to refuse to stay a proceeding where allegations of sexual assault were made against a youth group leader. The assaults were said to have taken place at a holiday camp operated by a youth organisation, at a private home, and near a golf course in the summer of 1974-75. A police complaint was made by the plaintiff

⁴⁴ *Weiden (No 2)* [54]–[55].

⁴⁵ *GLJ* (2023) 414 ALR 635.

⁴⁶ *Weiden (No 2)* [66].

⁴⁷ *Weiden (No 2)* [2023] VSCA 294.

in 2015, and the alleged abuser was still alive, but some material witnesses and documents (including medical records regarding other possible causes of the plaintiff's poor mental health) were no longer available. The defendants also contended that a number of the allegations of abuse were vague and inconsistent, and that they had lost the opportunity to explore the relevant surrounding circumstances.

90 The Court of Appeal dismissed the appeal, observing that the matters relied upon by the defendants to contend that the trial would be unfair 'cannot attract the quality of exceptionality which required to justify the extreme remedy of the grant of a permanent stay'.⁴⁸ The Court also, in response to the asserted impact of the loss of medical records upon the ability of the Court to determine questions of causation, observed that:

It must steadily be borne in mind that at the end of the day it is for [the plaintiff] to prove his case on liability and his entitlement (if any) to damages; and that the question of whether [the plaintiff] has in fact proved his case needs to be assessed in the light if any gaps or other deficiencies in the evidence. [The defendant] is not required to prove anything.⁴⁹

91 In *Colbert v Trustees of the Christian Brothers*⁵⁰ ('*Colbert*'), O'Meara J refused an application to stay a proceeding brought in 2020 by an 83 year old plaintiff against the operators of a school in Ballarat where the plaintiff claimed to have suffered repeated physical and sexual abuse by two brothers between 1952 and 1955. One brother had died in 1960 and the other in 1997, and there was no prior history of complaint against one brother and only one complaint had been made regarding the conduct of the other brother. The defendant sought to distinguish the circumstances in the case from the circumstances in *GLJ*,⁵¹ contending that there was not merely an impoverishment of evidence, but rather the complete elimination of evidence.

92 His Honour reject that submission, finding that the circumstances in the case before him amounted to no more than the unexceptional consequences of the passage of time. His Honour observed that the plaintiff had been able to identify his claim with some

⁴⁸ *Weiden (No 2)* [68].

⁴⁹ *Weiden (No 2)* [73].

⁵⁰ *Colbert v Trustees of the Christian Brothers* [2024] VSC 309 ('*Colbert*').

⁵¹ *GLJ* (2023) 414 ALR 635.

specificity, including the names of the alleged perpetrators of the abuse. After an extensive survey of the evidence likely to be available and likely to be no longer available (or which may never have existed), his Honour concluded as follows:

Overall, the situation seems to be as follows -

- (a) *GLJ* has changed the applicable principles - as the majority stated, it is a 'new world';
- (b) in that regard, as Leeming JA noted in *CM*, there will be trials that must now proceed which would once have been regarded as unfair;
- (c) in the present instance, all or most of the features relied upon by the defendant amount to no more than the inevitable impoverishment of evidence occasioned by the passage of time - which the majority in *GLJ* stated cannot amount to 'exceptional circumstances';
- (d) the 'real issue' is whether holding a trial and rendering a verdict would not be congruent with the fundamental norms of the adversarial system;
- (e) in that regard, the plaintiff has identified his claim with sufficient specificity;
- (f) a significant amount of relevant documentary material remains available;
- (g) aspects of that material are able to be deployed in different ways, by both parties;
- (h) if the opinions of Associate Professor Doherty are accepted, the plaintiff's claim may fail;
- (i) it is possible that the alleged perpetrators would have been called to give evidence - if they were alive and if they denied the allegations made - but there are many reasons why such a witness might not be called to give evidence;
- (j) it is possible, but not likely, that if the other more significant potential witnesses had been available they would not have been called by the defendant to give evidence;
- (k) the defendant prepared an early defence and has sworn answers to interrogatories that are indicative of a substantive defensive case;
- (l) when the defendant comes to plead to the plaintiff's further amended statement of claim, it may well also deny the plaintiff's allegations of abuse and injury in the nature of complex post-traumatic stress disorder;
- (m) the plaintiff is vulnerable to challenge as an unreliable witness;

- (n) for various reasons, the trier of fact would need to scrutinise the plaintiff's evidence with the very greatest of care as well as remaining mindful of the various features and techniques applicable to the adversarial system and emphasised by the majority in *GLJ*;
- (o) there is no 'principle' that prevents the defendant from making enquiries of former students of the College, particularly concerning the arrangements relating to the Royal parade in Ballarat in 1954 as well as the location and features pertaining to the 'main office' at the College;
- (p) if the defendant were to make such enquiries, such evidence could likely be obtained;
- (q) it follows that the defendant is not irretrievably 'in the dark' about those issues, or likely to be unable to meet those allegations should it choose to obtain such evidence; and
- (r) with respect to the potential 'tendency' evidence of Mr Vaughan, Mr Clarke and Mr Harris, the defendant has a series of points available to it that may ultimately see the proposed evidence not admitted or excluded.

It will be evident that in a contest at trial -

- (a) it cannot be accepted that the defendant has no practical possibility of participating in the hearing;
- (b) to the contrary, the defendant has a range of meaningful points available to it;
- (c) indeed, its points could be enhanced if it were to take further steps to obtain relevant evidence that is likely to be available.⁵²

93 On 13 November 2024, the High Court delivered its decisions in *Willmot*⁵³ and *RC*.⁵⁴ Both proceedings involved appeals by plaintiffs in proceedings involving claims of child abuse that had been permanently stayed. The appeals were from decisions of intermediate appellate courts made before the delivery by the High Court of the decision in *GLJ*.⁵⁵ In *Willmot*,⁵⁶ the appeal was allowed in part, and in *RC*,⁵⁷ the appeal was allowed in full.

⁵² *Colbert* [2024] VSC 309 [170]-[171].

⁵³ *Willmot* [2024] HCA 42.

⁵⁴ *RC* [2024] HCA 43.

⁵⁵ *GLJ* (2023) 414 ALR 635.

⁵⁶ *Willmot* [2024] HCA 42.

⁵⁷ *RC* [2024] HCA 43.

94 In the reasons of the plurality in *Willmot*,⁵⁸ the Court observed that during the course of argument before it in both appeals, it had become evident that the meaning and effect of the decision in *GLJ*⁵⁹ had been ‘understood in different ways’, and thus considered it was necessary for the Court to ‘consider further aspects of the intersection between the stay principles and s 6A of the *Limitation Act* and equivalent provisions’.⁶⁰

95 The plurality observed that the abolition of limitation periods had created ‘a new legal context’, a ‘radically new context’, a ‘new world’, a ‘new reality’ and a ‘new normative structure’ within which applications for permanent stays of child abuse cases are to be evaluated.

96 The plurality observed, in summary, as follows:

- (a) the abolition of the limitation period in child abuse cases means that many child abuse cases that were previously time-barred may now be commenced many years after the alleged abuse occurred;⁶¹
- (b) a plaintiff is not required to give an explanation for the delay in bringing proceedings, and generally cannot be criticised for any delay in commencing proceedings;⁶²
- (c) ‘[t]he “new reality” exposed by *GLJ* is that impoverishment of evidence is now to be encountered and expected ... and the courts will need to deal with that impoverishment’;⁶³
- (d) the mere passing of time does not enliven the power to stay proceedings, rather, the lapse in time must be shown to have a forensic consequence of such burdensome effect that a fair trial is not possible;⁶⁴

⁵⁸ *Willmot* [2024] HCA 42.

⁵⁹ *GLJ* (2023) 414 ALR 635.

⁶⁰ *GLJ* [18].

⁶¹ *Willmot* [2024] HCA 42 [20].

⁶² *Willmot* [21].

⁶³ *Willmot* [22].

⁶⁴ *Willmot* [23].

- (e) a stay is a last resort, and requires an exceptional case. While '[a]n exceptional case will remain one in which it is impossible for the irreducible minimum necessary for a fair trial to be satisfied', the change in the legislative regime means that '... certain classes of claims made long after the events in question are *prima facie* permissible when they were previously *prima facie* prohibited and the principle of a right to a fair trial is to be applied in that new statutory context';⁶⁵
- (f) any application for a stay to be considered '...where it is to be expected, rather than unusual, for claims of child sexual abuse to be made where there may not be documentary evidence or direct corroborating evidence', and '[t]he inevitable fading of memories and loss of evidence ... are properly to be understood as routine and expected';⁶⁶
- (g) limited or unavailable evidence is not unique to cases involving delay, noting 'it is not unusual for courts to deal with cases ...where the alleged defendant or perpetrator is missing and unidentified, dead, or unknown';⁶⁷
- (h) the principles and techniques available to trial judges to deal with 'evidentiary imbalances' have not changed, but the change in the legislative context means that there are likely to be more cases where they will need to be deployed;⁶⁸
- (i) the Court must deal with the claim as pleaded, and on the premise that the plaintiff has advanced their case as best they could;⁶⁹
- (j) the evidence in an application for a stay must be directed at the question of whether the trial can proceed fairly, and the Court must proceed on the basis that the plaintiff can adduce evidence to support their case;⁷⁰ and

⁶⁵ *Willmot* [26].

⁶⁶ *Willmot* [27].

⁶⁷ *Willmot* [29].

⁶⁸ *Willmot* [30].

⁶⁹ *Willmot* [31].

⁷⁰ *Willmot* [31]-[32].

(k) the onus is on the party seeking to stay the proceeding to establish what would render the trial of the pleaded allegations unfair, 'including any unfairness arising from the nature of the evidence to be called'.⁷¹

97 As for the facts of the case, the plaintiff, a ward of the State and a former resident of a dormitory for indigenous children in Queensland ('girls' home'), brought a proceeding in 2020 against the State in relation to physical and sexual abuse said to have been suffered by her when she was in the care of the State. The plaintiff made four separate allegations: that she was sexually abused and beaten while in foster care between October 1957 and May 1959; that she was physically mistreated by a supervisor of the girls' home between 1959 and 1966; that she was sexually assaulted by an identified uncle while visiting her grandmother in about 1960; and she was sexually assaulted by another male relative during another visit to her grandmother in 1967.

98 The Court allowed, in part, an appeal from the decision of the Queensland Court of Appeal to grant a permanent stay of the proceeding on the grounds that the State could not receive a fair trial. The plurality observed that many of the factual issues were not in dispute between the parties, and the State had conceded that, as it was *in loco parentis*, it owed the plaintiff a non-delegable duty of care.

99 In relation to the allegations of sexual abuse while in foster care, the plurality noted that the allegations were not vague or uncertain, there was a living witness to the alleged abuse, and there would be unlikely to have ever been any documents in existence that would shed any light on the allegations. The stay was lifted on those claims, but the claims of physical abuse were stayed, as they were 'so vague that they are incapable of meaningful response, defence or contradiction'.⁷²

100 The plurality also rejected the State's contention that the plaintiff's claims of physical mistreatment while living at the girls' home could not receive a fair trial by reason of the death of the alleged perpetrator (in 1982) and other staff of the girls' home and the

⁷¹ *Willmot* [32].

⁷² *Willmot* [61].

absence of any contemporaneous documents, and lifted the stay on those claims. The plurality observed that the allegations were detailed and particularised, and there were a number of witnesses who could give evidence as to the treatment of the plaintiff and other residents of the girls' home. Further, the plaintiff had made a complaint to the Forde Redress Scheme in 2008, and any inconsistencies in her accounts of events could be tested in cross-examination.

101 Finally, in relation to the alleged sexual assaults at the grandmother's home, the stay on one claim was lifted, and the stay on another claim ('Pickering allegations') was left in place. In the first claim, the alleged perpetrator was alive, contactable, had no memory issues, and had indicated that he would be happy to speak with Ms Willmot's solicitor. There was no evidence that the State had made any attempt to contact him or that there was any impediment to doing so. However, the stay on the Pickering allegations was left in place because Ms Willmot could not recall the alleged perpetrator's full name, and there were no witnesses to the alleged assault. The plurality stated as follows:

The State does not have an ability to investigate the foundational facts. Even if Ms Willmot were able to recall Pickering's full name and the State could then use that information to ascertain whether Pickering lived in her grandmother's house temporarily in 1967, that would not assist the State to ascertain the foundational facts relevant to the alleged assault. In relation to that allegation, the State's central complaint is that the bare facts are unremarkable: the vast majority of houses have kitchens, it would not be unusual for a person to remain in pyjamas while they made themselves breakfast and, while there are inconsistencies in Ms Willmot's various descriptions of the alleged assault, the inconsistencies do not impact the central allegation. In those circumstances, the State's participation is limited to cross-examination of Ms Willmot about the apparent inconsistencies which are, at best, tangential to the central allegation. The result is that the Pickering Allegation could not be fairly tried.⁷³

102 The application for special leave to appeal in *RC*⁷⁴ was heard immediately after the hearing of the appeal in *Willmot*.⁷⁵ The Court allowed an appeal from the decision of the Court of Appeal of the Supreme Court of Western Australia to grant a permanent stay of the claims made by a former resident of a boys' home operated by the Salvation

⁷³ *Willmot* [84].

⁷⁴ *RC* [2024] HCA 43.

⁷⁵ *Willmot* [2024] HCA 42.

Army ('boys' home'). The plaintiff alleged that he was subject to multiple sexual assaults by a named officer of the Salvation Army ('perpetrator') in 1959 and 1960 when the plaintiff was 12 years old. The perpetrator died in October 2006, and the officer in charge of the boys' home (to whom the plaintiff said he had made a contemporaneous complaint of rape) died in 1968. Since about 2003, the Salvation Army had received and settled claims made by at least ten men who made allegations of abuse against the perpetrator.

103 The plurality referred to the evidence before it, which included a report provided to the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') to the effect that a senior leader of the Salvation Army, following internal investigations, had in about 2013 reached the conclusion that physical and sexual abuse within institutions operated by the Salvation Army was widespread, and that when former residents told officers or other staff of the Salvation Army that they had been abused in those institutions, nothing was done about those allegations. The current leadership had reached the view that there was a systemic culture of non-investigation.

104 The plurality rejected the contention that the Salvation Army was 'in the dark' about the precise nature of the plaintiff's claims.⁷⁶ They observed that the affidavit sworn by the plaintiff was 'detailed and specific', and he could be cross-examined upon any discrepancies between the allegations as pleaded and the allegations made in his affidavit and in his redress application. The absence of any records of any complaint made by the plaintiff went to an issue which was of limited forensic significance. Furthermore, the plaintiff has identified at least ten other witnesses who made complaints against the perpetrator, who could also be cross-examined in the usual way.

105 In relation to the nature and quality of the evidence available to the Salvation Army, the plurality said as follows (omitting footnotes):

⁷⁶ See also RC [80] per Steward J.

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

The Salvation Army rightly submitted that there is no principled basis on which a judge could realistically reject an apparently credible and coherent account given by a survivor of sexual abuse at any trial. But that submission assumes that, after applying the ordinary common law techniques described in *Willmot*, RC's evidence would be accepted as credible and coherent. Equally, as the Salvation Army also acknowledged, the bare fact of some variations in RC's account of relevant events does not foreclose that the trial judge might be persuaded that RC's evidence, taken as a whole, is credible and coherent, recognising that it is commonly understood that such variations will often arise in cases of abuse and, in particular, abuse that occurred long in the past. Each of those matters is a question for trial. A trial of the allegations is not unfair merely because a pathway to a successful challenge to RC's evidence has not been revealed. The Salvation Army has sufficient material available to it to make an informed response to RC's evidence.⁷⁷

106 In relation to the prejudice to the Salvation Army by reason of the absence of contemporaneous documents, the plurality stated as follows (omitting footnotes):

It may be accepted that the Salvation Army holds incomplete records relating to the operation of its homes during the relevant period of alleged abuse. The Salvation Army does not identify documents known to be lost. Rather, it described the prejudice in a more limited way - as an inability to identify whether relevant records existed. The considered position taken before the Royal Commission indicates that any contemporaneous complaint of sexual abuse would likely not have been recorded or investigated because of systemic and cultural failings within the Salvation Army. In those circumstances the burdensome effect of the passage of time on the capacity of the Salvation Army to refer to documentary evidence is limited.⁷⁸

107 An interesting issue (and, for the purpose of the current application, a relevant issue) arises out of the particular facts of this case and the High Court's determination in *GLJ*⁷⁹ regarding the Court's determination regarding the standard of appellate review in applications of this kind. As noted in the headnote of *GLJ*:

Whether the proceedings are or are not capable of being the subject of a fair trial, or are or are not so unfairly and unjustifiably oppressive so as to constitute

⁷⁷ RC [34]-[35].

⁷⁸ RC [38].

⁷⁹ *GLJ* (2023) 414 ALR 635.

an abuse of process is an evaluative, not a discretionary, decision, the applicable standard of appellate review is the ‘correctness standard’.⁸⁰

108 This is because, as stated by the majority:

The extreme step of the grant of a permanent stay of proceedings demands recognition that the questions [of] 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.⁸¹

109 On one view, the Court’s statement to the effect that there is only a right or a wrong answer to the question of whether a fair trial is possible suggests that any delay or failure by the defendant in conducting investigations, interviewing witnesses or preserving records is largely irrelevant to determining that issue. Either a fair trial is possible or not, and conduct which might be relevant to the exercise of a discretion in determining an application of the current kind should arguably not be particularly influential in the reasoning process underpinning what is ultimately a binary decision.

110 However, the reasoning of the majority in *GLJ*,⁸² and the plurality in *RC*,⁸³ implicitly acknowledges the relevance of the defendant’s conduct in the period between the alleged abuse and the making of a complaint or the bringing of a claim to the question of whether the impoverishment of evidence was caused by the passage of time. By way of example, in *GLJ*,⁸⁴ the majority said that:

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.⁸⁵

111 And further:

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

⁸⁰ *GLJ*, Headnote (i).

⁸¹ *GLJ* [17].

⁸² *GLJ*.

⁸³ *RC* [2024] HCA 43.

⁸⁴ *GLJ* (2023) 414 ALR 635.

⁸⁵ *GLJ* [70].

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.

...

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...⁸⁶

112 In *RC*,⁸⁷ the plurality described the evidence regarding the Salvation Army's past failures to investigate or address allegations of abuse in institutions as 'significant', and went on to make the following observations regarding the relevance of that evidence to the determination of the appeal:

This raises a question as to the case the Salvation Army might have made for a permanent stay if the claim had been made before Lt Swift or Maj Watson had died. Whether the Tidd statement or the Walker report are admissible at a trial of *RC*'s claim is irrelevant. What those documents reveal is that, by no later than August 2015, the Salvation Army has been able to identify relevant material from which it has been able to draw conclusions about what the Salvation Army did and did not do during the relevant period but also to acknowledge that Lt Swift did assault boys during the same period. It is not clear what, if anything, has changed since then.

Finally, an affidavit sworn by *RC*'s solicitor and filed in response to the stay application refers to at least ten men who alleged they suffered abuse by Lt Swift in the 1950s and 1960s when they were staying at one of the homes, including the Home. Each person is identified as well as the details of: their alleged physical or sexual abuse by Lt Swift; when they first raised their allegations (one made a complaint about Lt Swift as early as 1961); and if the Salvation Army had waived reliance on a pre-existing limitation period and received and settled any claims of alleged sexual abuse by Lt Swift (the earliest claim having been notified in 2003). That list is not exhaustive. Again, whether that evidence is admissible at a trial of *RC*'s claims (whether as tendency evidence or on some other basis) is irrelevant to the application for a permanent stay. The uncontradicted affidavit evidence reinforces that the Salvation Army has been aware of allegations against Lt Swift for years, if not decades; has been able to draw conclusions about what the Salvation Army did and did not do during the relevant period; and has acknowledged that, during that same period, Lt Swift did assault boys. Again, it is not clear what, if anything, has changed since then.⁸⁸

⁸⁶ *GLJ* [79].

⁸⁷ *RC* [2024] HCA 43.

⁸⁸ *RC* [22]-[23].

113 And further, when commenting upon the impact of the passage of time regarding the availability of witnesses, the plurality stated as follows:

Further, there is no suggestion that the Salvation Army attempted to seek information from Lt Swift's wife, Doris Swift, whilst dealing with the many allegations against her husband. Whilst Doris Swift died on 17 May 2019, and appears to have had memory issues for two or so years prior to her death, there is no suggestion that she was unavailable whilst the Salvation Army was dealing with claims against Lt Swift in the early 2000s. Doris Swift was also an officer of the Salvation Army and must have had a detailed understanding of Lt Swift's duties. Whilst the Salvation Army identified Doris Swift as a potential witness who is no longer available to it, no explanation is given as to why such information was not sought from her prior to her death.⁸⁹

114 Therefore, the conduct of a defendant in making an application to stay a proceeding on the ground that it is unable to receive a fair trial by reason of the passage of time, and in particular, what steps it had taken to investigate the plaintiff's claim and other claims of abuse made against it in the past, is a matter relevant to causation, being whether the impoverishment of evidence was caused by the passage of time, or was caused by past inaction on the part of the defendant. While the decision whether or not to grant a stay does not involve the exercise of a discretion, conduct which might also be relevant to the exercise of a discretion in another context may still be relevant to the question of whether the defendant has discharged its burden of proof.

115 The relevance of the past conduct of a defendant in evaluating whether the passage of time has rendered a fair trial impossible was expressly considered by Edelman J in his concurring reasons in *RC*.⁹⁰ His Honour's reasons commenced as follows (omitting introductory remarks):

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

⁸⁹ *RC* [30].

⁹⁰ See *RC* [43]-[76].

*the actual effect will be unknown) to its defence that any trial would be unfair.*⁹¹

(emphasis added).

116 After summarising the facts and making some observations regarding the plaintiff's vicarious liability claim (which are not relevant for present purposes) his Honour continued as follows:

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

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

"[I]f, in the face of reasonably anticipated litigation, timely steps were not taken to gather evidence, whether documentary or oral, and as a result, a party lost the ability to meaningfully deal with the claim against it, then it would be contrary to the administration of justice to grant a stay."

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

⁹¹ RC [44].

*reasonable steps that an applicant took at the earlier time, the harder it will be for the applicant to discharge its onus that it would have acted differently in the face of litigation.*⁹²

(emphasis added).

117 His Honour observed that the allegations of prejudice arising from the loss of documents concerning systems that the Salvation Army may have had in place to prevent abuse could be put to one side, because the evidence established that no such documents ever existed. His Honour went on to say as follows:

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

...

As the joint judgment also explains, the conclusion that complaints of abuse would not have been investigated is supported by a report (with which Commissioner Tidd agreed), prepared after thorough investigation by Mr Walker who was the director of the Territorial Professional Standards Unit for the Salvation Army Southern Territory between April 2014 and December 2018. In that report, Mr Walker concluded that the Salvation Army Southern Territory had "failed to fully explore and investigate claims of child sexual abuse" and it "failed to appropriately respond to [such] claims."⁹³

118 While his Honour's analysis was not the subject of express consideration by the plurality, in my view, this analysis is compelling and is supported by the reasoning and conclusions of the plurality, which repeatedly referred to what the Salvation Army had lost the opportunity to do by reason of the passage of time, and the plurality's conclusion regarding the outcome of the appeal was clearly influenced by the evidence demonstrating that even if the plaintiff had made his complaint at an earlier time, the Salvation Army would have taken no action to investigate or respond to the complaint.

⁹² RC [54]-[56].

⁹³ RC [60],[62].

119 For completeness, while the authorities, including the recent High Court decisions, make it clear that the resolution of applications of the current kind is a highly fact-specific exercise, there are notable similarities between the present case and the circumstances in *GLJ*⁹⁴ and subsequent decisions, including *CM*,⁹⁵ *Weiden (No 2)*,⁹⁶ *Colbert*,⁹⁷ *Willmot*⁹⁸ and *RC*.⁹⁹ Each of these cases involved institutional defendants, although in *Weiden (No 2)*¹⁰⁰ and *Willmot*¹⁰¹ some of the alleged abuse took place in a domestic setting.¹⁰² All of the proceedings involved allegations of abuse said to have taken place many decades ago, ranging between the 1950s and 1970s. In some, but not all of the cases, the perpetrators were known to have been the subject of other allegations of abuse. In all cases save *Weiden (No 2)*,¹⁰³ the alleged perpetrators were long deceased, as were those concerned with managing the institutions at the relevant time, and to varying degrees, the documentary record had been impaired.

120 However, in all cases, the claims were permitted to proceed, save for certain allegations made by the plaintiff in *Willmot*,¹⁰⁴ including the Pickering allegations. The distinguishing feature of the current case is that HM is unable to identify the three priests, and the defendant does not possess sufficient information to enable her to do so.

The parties' submissions

121 Prior to the hearing of the stay application, the parties filed comprehensive and helpful written submissions, and filed supplementary submissions addressing the decisions of the High Court in *Willmot*¹⁰⁵ and *RC*.¹⁰⁶ In addition to making submissions regarding the merits of the stay application, the submissions canvassed

⁹⁴ *GLJ* (2023) 414 ALR 635.

⁹⁵ *CM* [2023] NSWCA 313.

⁹⁶ *Weiden (No 2)* [2023] VSCA 294.

⁹⁷ *Colbert* [2024] VSC 309.

⁹⁸ *Willmot* [2024] HCA 42.

⁹⁹ *RC* [2024] HCA 43.

¹⁰⁰ *Weiden (No 2)* [2023] VSCA 294.

¹⁰¹ *Willmot* [2024] HCA 42.

¹⁰² In *Willmot*, one claim in relation to alleged abuse in a private setting by an imprecisely identified perpetrator was stayed.

¹⁰³ *Weiden (No 2)* [2023] VSCA 294.

¹⁰⁴ *Willmot* [2024] HCA 42.

¹⁰⁵ *Willmot*.

¹⁰⁶ *RC* [2024] HCA 43.

the evidence in the applications in some detail, along with the relevant legal principles. As the evidence adduced by the parties and the relevant legal principles have been canvassed quite extensively in the preceding sections of the reasons, I do not propose to repeat the parties' written submissions in any detail, save where necessary for explaining the conclusions I have reached, given that the salient points were comprehensively and ably canvassed in the oral submissions made at the hearing of the application.

122 Senior counsel for the defendant opened his submissions at the hearing of the stay application by observing that applications of the current kind are very fact-specific, with decisions concerning other cases providing limited assistance for the purposes of resolving the stay application.

123 In the current case, the chronology of events is important. The first time the defendant became aware of any claim by HM against the Sisters was in 2012. Similarly, allegations in the letter sent by HM's solicitors to the Sisters in December 2019 (which first raised allegations of sexual abuse) were cast in rather vague and general terms. No real particulars of HM's claim were provided until the statement of claim was filed and served in April 2022. The defendant does not rely upon any prejudice that has accrued beyond that time.

124 However, had the claim been made earlier, a substantial number of Sisters who served at the home between 1959 and 1969 would have been available to the defendant, as evidenced by the annexure to the defendant's written outline of submissions filed on 21 October 2024 ('witness schedule'). Most of the Sisters referred to in the witness schedule are now deceased, and others are unable to be located. Ms Mundy is alive, but is in poor health, and another Sister located by the defendant's solicitors, Sr Margaret, did not serve at the home during the relevant period.

125 As for the members of the other Catholic orders, all but one of the Capuchin Friars serving in the Wynnum area during the relevant period are deceased, and all of the Redemptorist Fathers who attended the home during the relevant period are

deceased. All but one of the Augustinian priests are deceased, and the surviving priest does not recall any Augustinians attending the home between 1964 and 1967. The Oblates hold no documents in relation to the names and positions of any priests of the Oblates who attended the home between 1964 and 1967, or concerning the nature and/or extent of any religious services provided by the Oblates to the home during the relevant period.

- 126 Senior counsel for the defendant submitted that the inability of HM to identify the three priests or any of them prevents the defendant from being able to investigate the foundational issue in this proceeding, that is, whether the sexual abuse actually occurred. The defendant has lost the opportunity to make any enquiries of Sisters who served at the home during the relevant period, and to make enquiries of members of the other Catholic orders and other people in positions of authority in order to attempt to identify the three priests. The information HM was able to provide about the three priests (such as the colour of the girdles they wore) did not assist in identifying which of the other Catholic orders the three priests belonged.
- 127 Senior counsel for the defendant submitted that HM's claims concerning the three priests were somewhat analogous to the Pickering allegations, where the plaintiff alleged she was abused by an older male relative (who she was unable to precisely identify and now must be deceased) when she visited her grandmother while in the care of the State. The Court found that, owing to the passage of time, the State was not in a position to investigate the foundational fact, being whether the abuse actually occurred, and a stay of that part of the plaintiff's claim was granted.
- 128 Senior counsel for the defendant submitted that the inability of HM to identify the three priests has particular relevance in an institutional setting, where investigations can be carried out to determine whether a person against whom allegations have been made had a track record of engaging in abusive conduct, tendency notices can be issued, and there are means by which a plaintiff's claims can be tested.

129 Senior counsel for the defendant submitted that the pre-trial evidence gathering process has largely been exhausted, and the defendant is simply not in a position to identify whether in fact HM was sexually abused by the three priests at the home.

130 Senior counsel for the defendant referred to the evidence concerning his instructors' discussions with Ms Mundy and her current state of health, noting that Ms Mundy could not recall HM, could not recall the names of the priests who attended the home, or the other Catholic orders to which they belonged, although they may have been Capuchin Friars. Ms Mundy has Parkinsons disease, and memory issues. It is open to this Court to have regard to the quality of the evidence that Ms Mundy would be able to give at trial and her ability to contradict the evidence of HM when evaluating whether the defendant can receive a fair trial.

131 Senior counsel for the defendant referred to the recent High Court authorities regarding the impact of the abolition of limitation periods on the approach to be taken in applications of the current kind, and submitted as follows:

We accept that in circumstances where the legislature has allowed plaintiffs to bring a claim without any limitation period applying, then the consequences of the effluxion of time are taken to be accepted. As we must we accept that that's the stated position by the High Court and this court has to apply that, of course. However, it's exacerbated in this case by the failure to identify [the three priests] because we don't have those other sources of material that we might otherwise have had: for example, records where we can have a look at individuals and say, 'What do we know about Priest Smith, what do we know about Priest Jones'?

We don't have any of that and we are left without any what one might call sort of indirect or extrinsic way to throw some light on the foundational facts. And why are we in that position? Again no criticism but we are in this position because of the effluxion of time. If this had happened earlier we could have spoken to people in positions of authority and asked them which priests were at the home at the relevant time. We can't do any of that.

132 Senior counsel for the defendant acknowledged that claims of child abuse had been made against the Sisters since about 1999, but submitted that there was no basis for any submission that the Sisters should have taken steps to preserve evidence or make enquiries at that time, because HM had not made a claim at that time. Given that the three priests had not been identified by HM, what evidence would have been capable

of being preserved? He submitted that even if the alleged abuse had occurred much more recently, or claims had been made by HM much earlier, there would still be particular prejudice to the defendant by reason of HM's inability to identify the three priests.

133 In her written outline of submissions filed on 21 October 2024, the defendant submitted that the present case is distinguishable from cases such as *GLJ*¹⁰⁷ and *Colbert*,¹⁰⁸ where the relevant plaintiffs were able to identify their claims with specificity, and could identify the alleged perpetrators. The defendant submitted as follows:

The allegations of sexual abuse are foundational to the causes of action which have been pleaded against the defendant. In circumstances where the plaintiff has been unable to identify the alleged perpetrators and/or the religious order or congregation of which they were members, the defendant has no way of investigating or forming an informed position as to a critical element of the plaintiffs case against it. In the absence of being able to investigate this issue, the defendant will necessarily be constrained in testing the allegations, including in gathering potential rebuttal evidence and/or seeking to effectively cross-examine the plaintiff at trial. Flowing from this, the defendant is greatly inhibited in her ability to investigate and conduct a defence on liability and is prevented from joining as a third party the religious congregation or order of which the alleged perpetrators were members.

134 In her supplementary written submissions filed on 17 December 2024, the defendant submitted, similarly, that the present case can be distinguished from the factual circumstances in *Willmot*¹⁰⁹ and *RC*.¹¹⁰ In the case of *Willmot*,¹¹¹ the proceeding involved:

- (a) some alleged offenders who were alive and capable of giving evidence;
- (b) other alleged offenders who had been subject to contemporaneous written complaints which had been investigated by the respondent; and
- (c) allegations which had been partly corroborated by affidavit evidence of other alleged victims of abuse.

¹⁰⁷ *GLJ* (2023) 414 ALR 635.

¹⁰⁸ *Colbert* [2024] VSC 309.

¹⁰⁹ *Willmot* [2024] HCA 42.

¹¹⁰ *RC* [2024] HCA 43.

¹¹¹ *Willmot* [2024] HCA 42.

135 The defendant noted that in *Willmot*,¹¹² there was a basis for a stay of the Pickering allegations, where the plaintiff was unable to identify the perpetrator's full name, the perpetrator was deceased, and no direct witnesses had been identified. Similarly, claims of physical abuse were stayed where the allegations were 'so vague that they are incapable of meaningful response, defence or contradiction'.

136 The defendant submitted as follows:

[I]n light of the plaintiffs consistent inability to provide further detail of the foundational fact of who sexually abused her and/or which religious organisation/congregation they were affiliated with, the defendant is unable to meaningfully test the plaintiff's allegations during cross-examination at trial;

[W]hile the plaintiff places emphasis in the affidavit material of her instructing solicitor upon allegations of abuse occurring at the Home involving unrelated victims and alleged male perpetrators, such allegations are of no real relevance in the present application in circumstances where:

- i) there is no suggestion by the plaintiff that any of the male perpetrators identified in the affidavit material was one of the perpetrators of the sexual abuse she alleges in this proceeding; and
- ii) these various unrelated allegations of abuse do not form part of the plaintiff's claim as made and articulated in her pleadings.

137 The defendant submitted that the present case could also be distinguished from the circumstances in *RC*.¹¹³ The defendant submitted as follows:

- (a) the allegations in *RC* related to an alleged offender who was identified and had been subject to a significant number of separate allegations of sexual abuse with the earliest of those claims having been made in 2003, prior to the death of the alleged offender in 2006. Here, the alleged perpetrators of sexual abuse are unidentified. We know nothing about them;
- (b) there were several relevant witnesses in *RC* who could have been contacted by the respondent after the applicant's allegations were first raised, including the alleged perpetrator's wife. In the present case, as detailed at [44]-[46] and Annexure 1 of the original submissions, the majority of relevant witnesses are deceased or unidentified. The witnesses identified as alive by the defendant were interviewed but could provide little information of probative value, including no details as to the identities of the alleged perpetrators;

¹¹² *Willmot* [2024] HCA 42.

¹¹³ *RC* [2024] HCA 43.

- (c) there was evidence in *RC*, in the form of a report commissioned by the respondent itself, that previous complaints of abuse had not been investigated properly by the respondent such that it supported a position that it was unlikely that the respondent would have pursued available lines of enquiry even had the applicant raised his allegations earlier. There is no such evidence in the present matter; and
- (d) the majority concluded in *RC* that while the alleged perpetrator was deceased, the evidence indicated that the respondent had only “lost the possibility of a bare denial” of the allegations. That can be distinguished from the present matter where had any of the three alleged perpetrators been identified and available to give evidence, they may have given evidence on a number of matters ...

138 In response, counsel for HM submitted that the proposition that the defendant cannot receive a fair trial because HM cannot identify the three priests cannot be correct in circumstances where the High Court has been very clear that the inevitable consequences of the effluxion of time upon the availability and quality of evidence are to be considered to be typical and ordinary.

139 Counsel for HM submitted that, contrary to the defendant’s submissions, there is nothing vague or uncertain about the allegations of sexual abuse made by HM. HM’s inability to identify the three priests is a typical consequence of the facts and circumstances of this case in an institutional setting of this nature.

140 Counsel for HM submitted that the defendant has mischaracterised the foundational issue in the current case. The foundational issue in this case is not the identity of the three priests, but whether Sr Philomena, Sr Giles, and Sr Gregory facilitated the sexual abuse carried out by the three priests.

141 Counsel for HM submitted that some of the difficulties facing the defendant can be alleviated by the Court deploying the techniques which have been developed by common law courts to enable proceedings to be heard and determined notwithstanding the unidentifiability, death, or legal incapacity of a party, as discussed in *GLJ*¹¹⁴ and *Willmot*.¹¹⁵ The difficulties facing the defendant ‘are not so prejudicial that they reach the extraordinary threshold of depriving a litigant of the

¹¹⁴ *GLJ* (2023) 414 ALR 635.

¹¹⁵ *Willmot* [2024] HCA 42.

right to have their case tested in a Court in circumstances where Parliament has intervened to ensure that, in unusual causes of this nature, that does not occur’.

142 Counsel for HM rejected the proposition that evidence of the complaints made by the claimants since 1999 are not relevant, noting that some of the claimants referred to in the schedule had made claims of sexual abuse at the home before, during and after the relevant period, in circumstances ‘strikingly similar’ to those described by HM in the current proceeding. Counsel for HM said that the claims made by the claimants are relevant because:

...it should have enlivened a process within this institution to undertake a proper investigation of the kinds of what was happening in that place over the preceding decades, and it did nothing. Or what it did, by reference to the documents that we’ve been able to obtain, is it swept those claims largely under the carpet, or undertook very limited investigation of them.

143 Counsel for HM submitted further that the claim documents include evidence which could be used by both parties to ameliorate the prejudice claimed by the defendant. That evidence could be deployed by HM as tendency evidence: not in the sense that a specific perpetrator has a tendency to commit sexual abuse, but rather the Sisters had a tendency to facilitate the sexual abuse of children by unidentified males, noting that a number of the claimants did not identify the alleged perpetrators of the sexual abuse. Conversely, there may be features of the claimants’ accounts that might be used by the defendant as a basis for challenging HM’s evidence.

144 Counsel for HM submitted that the evidence regarding Ms Mundy is fatal to the stay application. While Ms Mundy could not recall HM, she did deny that abuse of the kind alleged by HM ever occurred at the home. As for Ms Mundy’s deteriorating health, there are a number of techniques available to the defendant to have her evidence put before the Court. In any event, it is improper for the defendant to rely upon this issue in the stay application given that she had been on notice of HM’s claim insofar as it concerned Ms Mundy since 2019, but her solicitors only first spoke with Ms Mundy in 2024.

145 Counsel for HM submitted that the institutional context in which the abuse took place is important to the resolution of the stay application, as the defendant has substantial evidence available to her, and to the extent that she does not, that is as a consequence of the Sisters' own failure to undertake appropriate investigations of claims of abuse in a timely manner.

146 As for the inability of HM to identify the three priests, counsel for HM submitted that while the identity of the three priests was a significant fact, it is not the only relevant fact. He queried whether the situation facing the defendant would have been materially different had HM named the three priests when she made her complaint in 2019.

147 Counsel for HM submitted that the defendant's focus on the identity of the three priests is a distraction from the principles the High Court says must be applied in applications of the current kind. In any event, the three priests are almost certainly deceased, which is an ordinary consequence of the effluxion of time. In any event, even if they were alive, all they could do would be either to admit or deny the abuse, which would be of some assistance to the defendant, but would not be determinative of the issues in the proceeding.

148 In her written outline of submissions filed on 11 November 2024, HM made the following observations regarding the asserted prejudice said by the defendant to have flowed from the passage of time:

The defendant's submissions rely heavily on the alleged prejudice said to flow from the fact that the priests referred to in paragraphs 10-13 of the FASOC are unidentified by the plaintiff. In this specific context, and despite the disparaging remarks the defendant makes in written submissions, it is both entirely understandable and consistent with the nature of her claim and the class of claim under which it falls, that the plaintiff is unable to identify the relevant priests. That context includes the following matters:

- a. at the time she was sexually abused, the plaintiff was a child aged about 8-11 years, resided at the Home and was entirely dependent on the defendant's care;
- b. the sexual abuse was perpetrated by visiting priests who were present at the Home for a limited period of time, having said Mass;

- c. the plaintiff was able to identify features including locations, aspects of the priest's appearance and conduct, and those nuns that she was familiar with. The identity of those nuns is pleaded in the FASOC, namely Sister Gregory, Sister Philomena and Sister Giles, and other particulars are provided in answers to interrogatories;
- d. it is feasible, and likely, that a visiting priest that chose to commit sexual offences against children at the Home might not readily disclose their identity to the child that they sexually abused;
- e. the traumatic nature of the sexual abuse itself, well founded in the psychiatric expert material served; and
- f. subsequent to the above, there were other complaints of sexual misconduct by visiting priests at the Home (discussed further below).

Put simply, the reasons that the plaintiff cannot identify the priests are commonplace to the institutional setting the plaintiff found herself in at the time she was abused. It is because of that setting, her age and her absolute vulnerability and dependence, that the plaintiff was able to be abused and with impunity. Adopting the language of the High Court, in a real sense the plaintiffs inability to identify the priests amounts to "routine and unexceptional sequelae of the harm caused by the alleged act the subject of the claim".

149 In his submissions in reply, senior counsel for the defendant emphasised that the foundational issue concerning HM's claims of sexual abuse is whether or not the alleged abuse occurred, and the identity of the perpetrators is relevant to that inquiry, and given that the three priests cannot be identified, the defendant cannot make proper inquiries about whether the abuse actually occurred.

Discussion

150 I accept that both parties, and in particular, the defendant, will face substantial difficulties at trial by reason of the inevitable impoverishment of evidence caused by, among other things, the passage of time. Nearly all of the potential witnesses who were adults during the relevant period are deceased or cannot be located, or, in the case of the three priests, cannot be identified. There are relatively limited documents which evidence how the home was conducted at the relevant time, or which evidence the precise nature of the involvement of members of the other Catholic orders in the affairs of the home, and in particular, the access they had to the residents of the home, whether that access was supervised or unsupervised, and what access they had to the nuns' quarters. That said, the documents obtained by the parties during the course of

the 2024 investigations have revealed more of what might be described as relevant contextual information than was available to the parties than at the time the stay application was issued in February 2024.

151 However, I do not consider that the impoverishment of the evidence *by reason of the passage of time alone* is so substantial, and so prejudicial to the defendant, such as to justify the exceptional step of staying the proceeding. The new regime created by the abolition of the limitation periods in child abuse cases and given effect by the recent High Court decisions means that matters such as the death or incapacity of witnesses (including the alleged perpetrators of abuse), and the absence of documents, are to be taken to be unexceptional. The fact that most of the Sisters and the priests of the other Catholic orders are deceased is an inevitable consequence of the passage of time.

152 Further, as discussed in more detail later in these reasons, I do not accept that the defendant is entirely precluded from testing at trial what I accept is a foundational issue (but not necessarily *the* foundational issue), being whether HM was sexually abused by the three priests. And, while I accept that the defendant has acted quite diligently and reasonably in pursuing her inquiries since late-2023, I also accept HM's submissions that the discovered documents, the subpoenaed documents, and documents produced by other third parties during the course of the 2024 investigations contain information that opens up further potential lines of inquiry, in particular the claim documents and documents identifying other residents of the home during the relevant period (many of whom may still be alive and be capable of giving evidence).

153 It seems to me that the real difficulty facing the defendant in this proceeding is not her inability to locate *relevant* evidence: rather, I accept that it would be difficult for the defendant to locate *exculpatory* evidence given the passage of time. I accept that most of the readily accessible potential witnesses are the claimants, given that the defendant must know their identities. Any testimony by them is more likely than not to undermine the testimony of the Sisters to whom the solicitors for the defendant has been able to confer with the effect that no physical or sexual abuse occurred at the

home, that the children at the home were under the supervision of the Sisters at all times, and the members of the other Catholic orders never had unsupervised access to the residents of the home.

154 However, it cannot be that difficulties in adducing exculpatory evidence amounts to relevant prejudice. The impoverishment of evidence must be such that the evidence available to the defendant, having regard to the other techniques capable of being deployed by common law courts which can ameliorate the difficulties caused by that (unexceptional) impoverishment, is incapable of facilitating a fair, if not perfect trial.

155 That the ability of the defendant to obtain evidence which she might be able to use to challenge HM's evidence has been impaired does not, of itself, require a conclusion that the trial must necessarily be unfair is clear from the statement of the majority in *RC*¹¹⁶ that:

A trial of the allegations is not unfair merely because a pathway to a successful challenge to *RC*'s evidence has not been revealed.¹¹⁷

156 Rather, the question is whether the defendant has sufficient material to her to make an 'informed response' to HM's claims.¹¹⁸ In my view, largely by reason of the documents and other evidence obtained during the 2024 investigations, she does have sufficient material to make an informed response to HM's claims, and has the opportunity to make further enquiries if she and those advising her choose to do so.

157 I shall now turn to the issues and evidence regarding the availability or otherwise of witnesses, the state of the documentary evidence, the potential techniques available to the court to overcome the evidentiary difficulties in this case, and the primary issue raised by the defendant, being the inability of HM to identify the three priests, in more detail below.

158 Turning first to the availability of witnesses, the evidence is that most of the Sisters who served at the home in the relevant period are deceased. However, the defendant

¹¹⁶ *RC* [2024] HCA 43.

¹¹⁷ *RC* [35].

¹¹⁸ *RC*.

has, in 2024, been able to take instructions from three of the Sisters, all of whom deny emphatically that any abuse of any kind ever took place at the home, during the relevant period or otherwise.

159 Those denials can of course be put to HM and any other witnesses she calls to give evidence about what occurred at the home. What may well be more useful for the defendant's purposes is the evidence they can give about the physical layout of the home and the way in which the spaces within the home were used, and what access to the home and the residents of the home the members of the other Catholic orders had. Those instructions could well be put to HM to support a proposition that the sexual abuse did not occur, and, by reason of the manner in which the home was conducted, could not have occurred. I note that there are mechanisms by which the evidence of Sr Nuala, Ms Mundy, Sr Margaret and possibly even the statement of Sr Bernard Mary provided to the Inquiry could be adduced by the defendant at trial.¹¹⁹

160 As for the fact that most, if not all of the members of the other Catholic orders that attended the home, including most likely the three priests, are deceased, again this is simply an expected and unremarkable consequence of the passage of time. Further, it seems more likely than not that HM never knew the identity of the three priests. The members of the other Catholic orders who attended the home during the relevant period, which may have been in the dozens, means that while the passage of time may have impaired the ability of the defendant to conduct investigations into the identity of the three priests, it is by no means certain that those investigations would have borne fruit even if conducted decades ago. After all, it would be unlikely that the three priests would have come forward to identify themselves if enquiries had been made by the Sisters at an earlier time. Any prejudice to the defendant of HM's inability to identify the three priests may have worsened by the passage of time, but it was not necessarily wholly attributable to the passage of time, and, as discussed later in these reasons, it is not necessarily fatal to the defendant's ability to make an informed response to HM's claims.

¹¹⁹ *Evidence Act 2008 (Vic)*, s 63.

161 However, the death of most of the Sisters and the members of the other Catholic orders does not mean there are no living witnesses to what transpired at the home in the relevant period. The subpoenaed documents and the GR documents identify a number of residents at the home in the relevant period, including, but also in addition to the claimants. While one might expect many claimants may be reluctant to assist the defendant, and many of the other residents may be difficult to find, it is not unconceivable that many of the residents of the home are still alive, able to be located, amenable to approaches by the defendant's solicitors, and may have evidence which is of assistance to the defendant one way or another. At the very least, one might expect the former residents of the home to be able to provide information about the physical layout of the home, and what parts of the home and the nuns' quarters the priests and the residents were and were not able to access in the relevant period.

162 I accept that pursuing such enquiries may be expensive and time consuming. However, these are forensic choices that are open to the defendant to make. The statements in the authorities to the effect that a defendant is not required to follow up any avenue of enquiry available, however remote, may carry less weight in the wake of the recent High Court decisions, at least for the purpose of evaluating whether it is possible to have a fair trial. The need for defendants, particularly institutional defendants, to undertake difficult and burdensome investigations is arguably an inevitable consequence of the new legal landscape created by the Parliament when it abolished limitation periods in child abuse cases.

163 The position of the defendant in making enquiries of former residents of the home is somewhat different than defendants to claims in other institutional settings. By way of illustration, it may well be considered to be unreasonable for the operators of a school to be expected to make enquiries of all of their former students who attended the school in a given period many decades ago, who might have numbered in the thousands. On the other hand, the number of residents of the home during the relevant period would be considerably less than the number of students at a school,

and it appears from the materials many of the residents lived at the home for a substantial part of their childhood.

164 As for the unavailability of documents, it seems to me that the significance of this issue is overstated, by reason of the very nature of this case. It is not contended by the defendant that an absence of relevant documents has unduly hampered her ability to defend the allegations of physical and psychological abuse made by HM. The instructions given by the defendant to her solicitors concerning HM's allegations indicate that no reports of abuse were ever made by her to the Sisters prior to 2012, and indeed, even without those instructions, it seems to me to be highly unlikely that any such documents ever existed.

165 The first Leder affidavit referred to four categories of potentially relevant documents which have never been or no longer are available, being:

- (a) records identifying Sisters and others who worked at the home;
- (b) records relating to the role played at the home by members of the other Catholic orders;
- (c) records relating to the operation and management of the home during the relevant period; and
- (d) documents, including photographs, showing the physical layout of the home and the nuns' quarters.

166 The evidence in the first Leder affidavit pre-dated the 2024 investigations, which involved the production of the subpoenaed documents, the completion of the enquiries regarding the other Catholic orders, the discovery by the State, the production of the GR documents and documents provided to HM's solicitor by other claimants, and documents discovered by the defendant following searches of the London archive. Each of these exercises resulted in the production of some documents in each of the above categories. Indeed, the defendant has now been able to identify many, if not all, of the Sisters who served at the home during the relevant period

through its investigations, albeit most of whom are now deceased. Accordingly, while the documentary record has been impoverished by the passage of time, the cupboard is not completely bare.

167 And, of course, there are the claim documents. While the claim documents may not be of particular assistance to the defendant, given that they most likely record accounts of events which undermine the Sisters' denial of allegations of abuse, they also provide a means by which the evidence of HM can be tested against the accounts of others.

168 I repeat my earlier observation that the inability of the defendant to obtain exculpatory evidence, as opposed to *any* evidence, is unlikely to be relevant prejudice. Rather, the evidence in the claim documents, along with the evidence of any claimants and other former residents of the home, will assist the defendant to make an informed response to HM's claims. By way of illustration, the information in the claim documents may assist the defendant and those advising her as to the likelihood or otherwise of the evidence of the three Sisters who have conferred with the defendant's solicitors, if admitted, is likely to be accepted. The fact that HM makes no claim that any of the priests against whom allegations of sexual abuse have been made by some of the claimants does not render the evidence of the claimants and in the claim documents valueless. How helpful that evidence is to either HM or the defendant is a matter for trial.

169 As for the techniques available to the Court to attempt to overcome or ameliorate the difficulties created by the passage of time, as observed by the plurality in *Willmot*,¹²⁰ the techniques available to trial judges to address imbalances and deficiencies in the evidence have not changed, but, in the new legal landscape formed by the abolition of limitation periods in sex abuse cases, they will need to be deployed more frequently.¹²¹ Principles and techniques likely to be of particular relevance in any trial of the current proceeding include the principles arising from the decisions in *Briginshaw v*

¹²⁰ *Willmot* [2024] HCA 42.

¹²¹ *Willmot* [31].

Briginshaw,¹²² *Jones v Dunkel*,¹²³ and *Watson v Foxman*.¹²⁴ Further, a court is required to scrutinise any claim based upon an interaction with a deceased person very carefully,¹²⁵ and a court is not bound to accept uncontradicted evidence. And, while the failure of HM to make a complaint about the sexual abuse until 2019 is not something that can be the subject of criticism in the context of the stay application, it can be the subject of cross-examination and submissions at trial.

170 Finally, I accept that the inability of HM to identify the three priests or any of them distinguishes the present case from the circumstances in *GLJ*¹²⁶ and the other cases which postdated the High Court's decision in *GLJ*,¹²⁷ necessarily prejudices the defendant, although the strength of HM's case is not assisted either. However, as indicated earlier in these reasons, while the matter is not entirely free from doubt, it seems from the materials that this is not prejudice caused by the passage of time: it seems that HM never knew the names of the three priests. That is, even if HM had brought her claim within the original limitation period applicable to her claims of abuse (that is, by about 1980), she would not have been able to identify the three priests, although, given that the home was operating as a children's home until 1982, and Sr Philomena was still alive, the Sisters would have been in a better position to make further enquiries of its own members and members of the other Catholic orders. However, whether those enquiries would have borne fruit is a matter of speculation. In any event, as observed by the High Court in both *GLJ*¹²⁸ and *Willmot*,¹²⁹ citing cases involving nominated defendants in motor vehicle accident claims,¹³⁰ the courts have been able to deal with claims involving missing, unidentified and/or unknown defendants or perpetrators.

¹²² *Briginshaw v Briginshaw* (1938) 60 CLR 336.

¹²³ *Jones v Dunkel* (1959) 101 CLR 298.

¹²⁴ *Watson v Foxman* (1995) 49 NSWLR 315.

¹²⁵ *Willmot* [30].

¹²⁶ *GLJ* (2023) 414 ALR 635.

¹²⁷ *GLJ*.

¹²⁸ *GLJ* (2023) 414 ALR 635.

¹²⁹ *Willmot* [2024] HCA 42.

¹³⁰ *Holloway v McFeeters* (1956) 94 CLR 470; *Guest v The Nominal Defendant* [2006] NSWCA 77.

171 I accept that the question of whether the abuse actually occurred is a foundational issue, and that the identity of the three priests is necessarily relevant to that inquiry. But I doubt that knowing the identity of the three priest is *critically* relevant to that inquiry. First, the evidence of the Sisters with whom the defendant's solicitors have been able to confer is not just that they were unaware of any sexual abuse having occurred at the home: they say that it could not have occurred, because the residents of the home were under the constant supervision of the Sisters, the members of the other Catholic orders did not have unsupervised access to the residents of the home, and neither the residents of the home or the members of the other Catholic orders visited the nuns' quarters. There is evidence that Sr Giles worked in the aged care facility at the home, not with the children. If that evidence is accepted, this evidence would undermine the veracity of HM's account of sexual abuse, keeping in mind the other techniques capable of being deployed to test and assess the veracity of HM's evidence.

172 That the defendant has lost the opportunity to attempt to identify and take instructions from the three priests, which has been consistently referred to in the recent decisions as being an expected and unremarkable consequence of the passage of time. The defendant has also lost the opportunity to make an informed response to HM's claims based upon her knowledge of whether the alleged perpetrators 'had form'. However, practically speaking, that seems to me to be more relevant to the defendant's appraisal of her potential exposure to HM's claims in the context of any settlement discussions than to the question of whether there can be a fair trial. And, in any event, the forensic impediments caused by HM's inability to identify the three priests will be borne by HM as well: not only will her inability to identify the three priests detract from the credibility and reliability of her evidence, but she has lost any ability to rely upon any tendency evidence had one or more of the three priests had a track record of sexually abusing children, at the home or elsewhere.

173 The defendant relied upon the Pickering allegations, which were stayed, as being analogous to the current case, given that the alleged perpetrator was not properly

identified, there were no witnesses, and the State had no way of investigating whether an elderly relative lived with the plaintiff's grandmother at the relevant time. However, I consider that an important distinction between the Pickering allegations and HM's allegations of sexual abuse is that the Pickering allegations concerned allegations of abuse made in a domestic setting, not an institutional setting such as the home. I also repeat my earlier observations regarding what information the defendant has and the evidence she may be able to adduce about what occurred and did not occur.

174 There is also another critical distinction between the ability of the defendant to scrutinise and test HM's claims in the current case compared with the ability of the State to investigate the Pickering allegations, arising from the institutional context in which the claims have been made, being the potential availability of witnesses. HM says that no other resident of the home was present in the room in the nuns' quarters where she was subjected to sexual abuse by one or more of the three priests. However, there may be other residents of the home who witnessed HM being taken to the nuns' quarters by one or more of the three Sisters identified by HM. Conversely, if HM is unable to produce a witness or witnesses who can give evidence to that effect, at trial the defendant can ask the trier of fact to draw an inference from the absence of such evidence that the sexual abuse did not occur. In contrast, in *Willmot*,¹³¹ the absence of any potential witnesses, and the domestic setting in which the alleged abuse occurred, means that the State had absolutely no means by which it could test the plaintiff's account of events in relation to the Pickering allegations.

175 Accordingly, I am unconvinced that, in light of the observations made by the High Court in *Willmot*,¹³² the inability of HM (and, as a consequence, the defendant) to identify the three priests, whether owing to the passage of time or some other reason, or a combination of reasons, could be considered to be an exceptional circumstance justifying a stay, given the institutional context in which HM's claim is brought. As discussed during the course of the hearing of the application, one might expect that,

¹³¹ *Willmot* [2024] HCA 42.

¹³² *Willmot* [2024] HCA 42.

in a school or parish or sporting club setting, victims of child sexual abuse would generally be able to identify their abusers by name, unless they were very, very young at the time. However, it seems to me to be quite unremarkable that in the setting of the home, where it is apparent from the materials, including the Foundation document, that there were a lot of comings and goings by numerous members of the other Catholic orders, that the members of the other Catholic orders would not necessarily be known to their victims by name. Indeed, the information in the schedule, which is no doubt sourced from the claim documents, indicates that most of the claimants who made claims of sexual abuse did not identify their abusers by name.

176 The institutional context is also relevant to the question of whether a trial is likely to be unfair by reason of the passage of time, as observed by the majority in *GLJ*¹³³ in the passage extracted at paragraph 84 of these reasons. The proposition that parties to a claim arising from conduct in an institutional context are likely to have access to documentary and other evidence regarding relevant contextual matters has been borne out by what has been produced and/or revealed by the 2024 investigations.

177 The institutional context in which HM's claims have been made is also relevant to the question of causation: that is, in the words of Edelman J in *RC*,¹³⁴ has the defendant established '...that, due to the lapse in time, there was a loss of opportunities that would have been pursued or evidence that would have been led with such potential benefit ... to its defence that any trial would be unfair'.¹³⁵

178 The claim documents are also relevant to the question of causation, in that they raise the issue of whether the impoverishment of evidence has been caused by the passage of time, or was caused or at least contributed to by the conduct of the defendant.

179 Contrary to the submissions of the defendant, the analysis of whether the defendant can receive a fair trial cannot be divorced from the evidence of what actually occurred

¹³³ *GLJ* (2023) 414 ALR 635.

¹³⁴ *RC* [2024] HCA 43.

¹³⁵ *RC* [44]. However, I note the remarks of the plurality to the effect that a defendant to a child abuse claim is not entitled to a stay merely because the avenues to obtain evidence favourable to its defence of the plaintiff's claim have been closed off. See the passages extracted at paragraph 105 of these reasons.

in the decades after HM left the home. The evidence shows that the Sisters were alerted to claims of sexual abuse made by some of the claimants no later than January 1999. And, while the evidence regarding this issue is not entirely clear, it seems that the Sisters may well have been made aware of allegations of abuse by former residents of the home in 1998, when the Inquiry was established by the State. However, it seems that limited, if any, investigations were carried out at the time. As indicated earlier in these reasons, the failure of the Sisters to carry out such investigations was explicable, given the much more unforgiving legal landscape facing the claimants at the time, and the Sisters' decision to engage in the settlement scheme for pastoral and commercial reasons.

180 However, the Sisters' failure to investigate the claims made by the claimants when they were made renders somewhat hollow the defendant's submissions as to what investigations could have been undertaken by the Sisters had HM made her claims at an earlier time. The best evidence available is that had HM made her claims at an earlier time, the Sisters would have done no more than what they did in response to the claims made by the claimants, that is, very little apart from inviting her to participate in the settlement scheme, or some equivalent process.

181 In some respects, the defendant's position is somewhat analogous to the position of the defendant in *RC*.¹³⁶ In that case, there was evidence that, despite establishing a formal scheme for handling complaints of abuse in the 1990s, the practices and conduct of the Salvation Army were such that, realistically speaking, any complaints of abuse made contemporaneously or even decades after the abuse occurred would not have been investigated. As observed by Edelman J in his concurring reasons:

The short answer to the Salvation Army's submissions is that whatever the strength of evidence concerning its apathy in relation to child abuse claims, at least some evidence from the Salvation Army was required to support inferences: (i) that the Salvation Army would have taken steps to investigate RC's claim if it had been notified many years earlier than 13 July 2018; and (ii) that steps of that general nature are no longer available. The Salvation Army

¹³⁶ *RC* [2024] HCA 43.

did not lead that evidence. It therefore failed to discharge its onus to show causally related prejudice.¹³⁷

182 Of course, each case turns on its own facts, and there is no evidence to suggest that the Sisters were afflicted with the ‘apathy’ said by the High Court to have inhibited the Salvation Army in relation to past reports of sexual abuse. The Sisters did do something in response to the claims made in 1999: they entered into the settlement scheme. But, in the absence of any evidence that, if HM had notified the Sisters of her claims of sexual abuse significantly earlier than 2019, the Sisters would have undertaken the types of investigations that the defendant now says she needs to undertake and says that she cannot now undertake, the Sisters have not discharged the onus of establishing that, by reason of the passage of time, the defendant is unable to receive a fair trial. There is no basis to conclude that the claims made by HM would have been treated any differently than the claims made by the claimants had she made her claim significantly earlier than she did. Accordingly, the defendant has not established the necessary causal link between the passage of time and an impoverishment of evidence that is exceptional in nature by reason of that passage of time. The defendant has simply lost the opportunity to do what all the evidence suggests would not have been done had the opportunity arisen at an earlier time.

183 In her written outline of submissions filed on 21 October 2024, the defendant identified some degree of precision on what steps she said could have been undertaken by the Sisters had HM made her complaint at an earlier time. The defendant says she has been precluded from investigating:

- (a) whether the alleged sexual abuse occurred, including by:
 - i) obtaining evidence as to the response of the three priests to the allegations of sexual abuse, including as to whether they denied the allegations and/or had potential alibis;
 - ii) obtaining evidence as to whether the three priests have ever been subject to other claims of sexual abuse and/or been charged or convicted in that respect;

¹³⁷ RC [66].

- iii) obtaining evidence as to the response of Sister Philomena and Sister Giles to the allegation that they would leave the plaintiff alone in the Nun's quarters with priests; and
 - iv) determining whether there were any other witnesses to the alleged abuse and, if so, whether they are available to give evidence and/or to make enquiries of them of matters such as whether they witnessed the plaintiff being abused, whether they themselves were abused and/or whether they can identify the alleged perpetrators;
- (b) the identity of the specific priests who attended the Home during the Relevant Period;
 - (c) confirmation of all the male religious orders and congregations which had involvement at the Home during the Relevant Period and the extent of such involvement (including whether it extended to the conducting of Mass), particularly in circumstances where there is evidence that any arrangement between the Sisters and male religious orders and congregations in this respect was "informal";
 - (d) whether there had ever been any prior complaints of alleged sexual abuse or improper conduct by priests at the Home, or concerns more generally about priests at the Home, particularly in light of the allegation at paragraph 19 of the FASOC that the defendant had direct knowledge of a risk of sexual abuse to the plaintiff;
 - (e) other matters relevant to the allegations of sexual abuse, including as to whether priests were ever taken to the Nuns' quarters and/or left alone with residents, whether residents were ever taken to the Nuns' quarters and what occurred after Mass was held on Sundays at the Home;
 - (f) matters relevant to the claim in negligence, including as to what systems were in place at the Home for the supervision of residents (including the plaintiff), Sisters and any visiting priests, and as to the nature and extent of any such supervision; and
 - (g) matters relevant to the nature and particulars of any formal or informal arrangement whereby priests from unrelated religious entity(/ies) conducted Mass at the Home including as to whether the priests were "employees" of the defendant, particularly in light of the allegations at paragraphs 10 and 45 of the FASOC.

184 All of the enquiries enumerated above are enquiries that any party in the position of the defendant would, acting prudently and responsibly, want to make in response to

a *bona fide* claim of child sexual abuse unimpeded by traditional obstacles to relief such as the existence of a limitation period and the availability of the Ellis defence. No doubt the Sisters would have been better able to make such enquiries had HM brought her claims within the original limitation period, or perhaps even some decades later, when the other claimants brought their claims. But the best evidence available is that those enquiries would not have been made had she done so. It can also be inferred that Parliament, when it enacted the legislation abolishing the limitation period applicable to child abuse claims, did so knowing that many, many institutions would have conducted themselves in a similar way when faced with claims or complaints. Indeed, the ineffective response of many institutions to claims of historic child abuse identified during the course of the Royal Commission, along with the unforgiving legal landscape facing victims of child abuse, were what precipitated the legislative reforms of recent years, including the abolition of limitation periods for plaintiffs bringing claims of child abuse.

185 For completeness, the defendant says she is prejudiced by an inability to bring any third party claim against one or more of the other Catholic orders by reason of the inability of HM to identify the three priests. However, again, the evidence of concerning what transpired after the Sisters received the first tranche of claims in January 1999 casts doubt upon whether, even if HM had made her claims at an earlier time, and was in a position to identify the three priests or any of them, that the Sisters would have made any third party claim. There is reference in the subpoenaed documents to claims of sexual abuse having been made by claimants against members of the Capuchin Friars and the Oblate Fathers. However, reference was also made to the fact that the Sisters were reluctant to join those orders as third parties to the proceeding brought by the claimants, but that the Sisters were ‘disinclined’ to join those orders for unspecified reasons.¹³⁸ Once again, the only opportunity that the defendant has lost is the opportunity to do something that the evidence demonstrates

¹³⁸ See the letter of 10 June 1999 to the Archdiocese extracted at paragraph 38(c) of these reasons. In another letter dated 26 August 2009 (extracted at paragraph 38(i) of these reasons, Mr Howes of the Archdiocese wrote ‘I’m not sure whether [the Sisters] have ever gotten anything out of the Capuchins’ (during the course of the settlement scheme).

what would almost certainly not been done had HM been able to identify the three priests, or any of them, or had brought her claims at an earlier time.

186 Finally, as for the position of the State, it has provided brief submissions supporting the defendant's position in the stay application, but has not filed any evidence to identify any particular prejudice by reason of the passage of time. The State has adopted this position notwithstanding the fact that it has admitted in response to the defendant's allegation in her third party notice dated 26 April 2024 that the State owned HM a non-delegable duty of care, that it owed HM a duty to avoid foreseeable, but not insignificant risk of harm and to exercise reasonable care for her safety.¹³⁹

187 Accordingly, the stay application will be dismissed.

The strike out application

188 I will now turn briefly to the defendant's alternative application, being the application to strike out those paragraphs of the statement of claim where HM makes her claims regarding the sexual abuse perpetrated by the three priests. The defendant says that those paragraphs are embarrassing, in that ' they are vague and ambiguous and lack the requisite material facts so as to establish a reasonable cause of action'.

189 In any other context, I would probably agree. I take no issue with the legal principles relied upon by the defendant to support its application to strike out the relevant paragraphs of the further amended statement of claim, or the defendant's submission that there is a paucity of material facts and particulars provided to support HM's claims. However, as I observed during the course of the hearing of the stay application, the function of pleadings is to aid a fair trial. It seems to me that in circumstances where HM has said that she has done the best she can in providing particulars of her allegations of sexual abuse, the defendant cannot achieve, through the vehicle of the strike-out application, what she has been unable to achieve via an application for a stay by reason of the new legal landscape. Substance must prevail over form.

¹³⁹ Defence to third party notice dated 1 July 2024 [12].

190 Accordingly, the applications in the defendant's amended summons filed on 14 August 2024 will be dismissed. I will hear further from the parties on the question of costs.

CERTIFICATE

I certify that this and the 86 preceding pages are a true copy of the reasons for judgment of Daly AsJ of the Supreme Court of Victoria delivered on 25 February 2025.

DATED this twenty fifth day of February 2025.



.....
Associate