

## Case Note

### *The Supreme Court of Queensland again orders a permanent stay of proceedings in a child abuse claim, meanwhile the High Court of Australia overturns one*

In August 2022, the Supreme Court of Queensland granted a permanent stay of proceedings in the matter of [\*Willmot v State of Queensland\*<sup>1</sup>](#), which involved allegations of child sexual and physical abuse occurring between 1957 and 1967. Chief Justice Bowskill concluded that a fair trial was not possible due to the passage of time, as the events that gave rise to the claim, lacked available witnesses. For more information about this decision, please read our [Case Note here](#). In May 2023, the Queensland Court of Appeal dismissed the plaintiff's appeal of the decision.

In October 2023, the Supreme Court of Queensland again granted a permanent stay of proceedings in the matter of *DJW v State of Queensland*<sup>2</sup>, which involved allegations of a similar nature to *Willmot v State of Queensland*.

While these decisions demonstrate a trend in the approach of Queensland courts to such matters, by contrast, in November 2023 the High Court of Australia overturned a permanent stay of proceedings granted in *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ*<sup>3</sup> [2022] NSWCA 78. This could see a change in how courts consider the issue of a fair trial in historical abuse claims to come.

#### [\*DJW v State of Queensland\*](#)

#### Facts

DJW commenced proceedings in the Supreme Court of Queensland against the State of Queensland, seeking damages for psychiatric injuries he claimed to have sustained due to alleged physical and sexual abuse he experienced at Cherbourg Girls' Dormitory and Cherbourg Boys' Dormitory between 1958 and 1967. DJW was a young boy at the time.

The alleged perpetrators of the sexual abuse were older residents of the dormitories, the most significant being a teenage girl referred to as 'Aunty Marlene'. The alleged perpetrator of the physical abuse was a supervisor.

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<sup>1</sup> [2022] QSC 167

<sup>2</sup> [2023] QSC 138

<sup>3</sup> [2022] NSWCA 78

November 2023

DJW alleged that as the operator of the dormitories, the State:

- owed a non-delegable duty of care to protect him from suffering psychiatric injury as a result of physical and sexual abuse and breached that duty by failing to provide adequate supervision within the dormitories and failing to have an adequate system in place to avoid placing him in a position where he would be abused, and
- is vicariously liable for the alleged sexual assaults by Aunty Marlene, which he asserted, took place when the State had placed him under her direct care and control.

The State denied liability on the basis that:

- it did not owe DJW the alleged duty of care
- it was not vicariously liable for the alleged sexual assaults by Aunty Marlene, and
- the Plaintiff's psychiatric injury was not causally related to any alleged acts of physical or sexual abuse.

## Decision

In making his decision, Justice Crowley discussed recent similar matters in Australia including *Moubarak v Holt*<sup>4</sup> and *Willmot v State of Queensland*.

His Honour observed the comment in the Queensland Court of Appeal decision in *Willmot v State of Queensland* that where a plaintiff seeks damages for child sexual or physical abuse, proof that the alleged wrongful acts occurred is indispensable to the success of the plaintiff's claim.

With this in mind, Crowley J held that a permanent stay of proceedings was warranted because:

- DJW did not raise the allegations with the State before bringing his claim in 2019. The State was therefore unable to conduct investigations or enquiries before then
- notwithstanding that DJW had identified potential witnesses who may be available to prove aspects of his case (i.e. the general circumstances of the dormitories), all alleged perpetrators of the abuse and all relevant supervisory staff were deceased. The State was therefore unable to meaningfully investigate and respond to DJW's allegations by making enquiries with relevant persons, and
- there was a deficiency in the available documentary evidence relating to the alleged sexual abuse and, given that all relevant persons were deceased, only DJW would be available to give evidence about it. The State could not contradict DJW's testimony.

His Honour held that in these circumstances, the State had no way of determining whether the alleged wrongful acts occurred. In turn, it could not defend DJW's claim, nor meaningfully participate in a trial. His Honour concluded that the continuation of the proceeding would be an abuse of process, unfairly oppressive and prejudicial to the State and would bring the administration of justice into disrepute.

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<sup>4</sup> (2019) 100 NSWLR 218

[GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore \[2023\] HCA 32](#)

## Facts

GLJ commenced proceedings in the Supreme Court of New South Wales against The Trustees of the Roman Catholic Church (**Church**), seeking damages for psychiatric injuries she claims to have sustained due to alleged sexual abuse she experienced on one occasion in her family home in Lismore, New South Wales in 1968. GLJ was 14 years old at the time.

The alleged perpetrator was Father Clarence Anderson, a priest of the Roman Catholic Church who befriended GLJ's family and regularly visited their home.

GLJ alleged that the Church breached its duty of care and was vicariously liable for the alleged sexual abuse by Father Anderson.

Father Anderson died in 1996. There was documentary evidence available, including that the Church was aware of allegations that Father Anderson had sexually abused other children when he was a priest (tendency evidence).

The Church sought a permanent stay of the proceedings, which Justice Campbell refused.

The Church appealed, and in June 2022 the New South Wales Court of Appeal granted a permanent stay of proceedings on the basis that:

- the issue of whether Father Anderson sexually assaulted GLJ was central to the causes of action pleaded against the Church, and Father Anderson was a critical witness
- Father Anderson passed away before the Church was notified about GLJ's allegations of sexual assault. The Church was therefore unable to obtain Father Anderson's instructions to inform its defence, and
- notwithstanding that GLJ had identified potential witnesses who might be available to assist her case, without Father Anderson's account, the Church was 'utterly in the dark' about the central issue (the alleged sexual abuse).

In November 2022, the High Court of Australia granted GLJ's application for leave to appeal the decision.

## High Court Decision

In a majority decision, Justices Gageler, Gleeson and Jagot allowed GLJ's appeal, concluding that it was wrong for the New South Wales Court of Appeal to find that there could be no fair trial. They held that a trial should proceed.

Their Honours found that:

- the Church was not 'utterly in the dark' about whether Father Anderson sexually assaulted GLJ because there was circumstantial evidence, including the documentary evidence of Father Anderson's history of abusing children

November 2023

- with Father Anderson’s death, nothing has been lost but the opportunity to ask him if he sexually assaulted GLJ and the possibility of calling him as a witness if the case proceeded to trial. The loss of these opportunities does not make a trial of GLJ’s claim unfair, particularly in circumstances where:
  - the Church may not have sought information from Father Anderson if he was alive given the documentary evidence about his sexual conduct
  - it could be reasonably inferred that Father Anderson would have denied the allegations, noting that he denied the prior allegations of sexual abuse of young boys and denied any ‘romantic interest’ in young girls while under oath in 1971
  - the Church had ample opportunity to fully inform itself about the extent of Father Anderson’s alleged crimes at any time before his death, particularly during the laicisation<sup>5</sup> (de-frocking) process
  - Father Anderson’s death did not prevent the Church from subsequently finding to its own satisfaction that complaints of sexual abuse by him were substantiated and should be the subject of the payment of monetary compensation, and
  - there is a considerable amount of documentary evidence available.

### Implications of these two recent decisions

With the removal of the limitation period in respect of actions for damages relating to child abuse, defendants may continue to seek a permanent stay where the passage of time potentially impedes a fair trial. These recent decisions confirm that the consequences of the passage of time are most significant, and whether there is an abuse of process turns on the facts of the particular case. Australian courts have continued to acknowledge that a permanent stay should only be ordered in exceptional circumstances.

The decision in *DJW v State of Queensland* follows last year’s decision in *Willmot v State of Queensland*. The Supreme Court of Queensland granted a permanent stay of proceedings for similar reasons; namely deficiencies in the evidence about the matters in issue. In both cases, critical witnesses were deceased and there was a lack of documentary evidence about the alleged abuse. It was held that both defendants could not overcome these obstacles and effectively respond to the claims brought against them.

The High Court has now made significant observations in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* regarding the issue of a fair trial in child abuse claims. It has recognised that missing witnesses or evidence do not necessarily make a trial unfair, as cases are always decided within the evidentiary framework the parties have chosen and are often decided on incomplete evidence. The fading of memories and loss of evidence are understood to be routine and unexceptional in litigation. The High Court acknowledged that a court is not bound to accept evidence that is uncontradicted (for example, the testimony of the plaintiff) and inferences may be able to be made from the information available.

Ultimately, in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*, the stay of proceedings was overturned because it was held that there was sufficient evidence to enable a fair trial. This decision suggests that the unavailability of a critical witness and/or the alleged perpetrator to give

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<sup>5</sup> Under Canon Law, laicisation renders a cleric for ecclesiastical purposes the equivalent of a layman.

November 2023

instructions, while important, may not be enough to render a trial unfairly prejudicial to a defendant. If inferences can be drawn from other available circumstantial evidence (and in particular prior but unrelated offending), it may be held that the matter should proceed.

We expect that the High Court's observations in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* will be considered in future applications for permanent stays of proceedings in child abuse claims in Queensland (and other jurisdictions).

Otherwise, we may see an appeal from DJW in the near future...

**Meridian Lawyers regularly acts in abuse matters. This Case Note was written by Principal [Scott Ames](#) and Senior Associate [Sheridan Kersey](#). Please contact Scott or Sheridan if you have any questions or for further information.**



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