SUPREME COURT OF QUEENSLAND

CITATION:	*Arthur v State of Qld* [2004] QSC 456
PARTIES:	**LILY ARTHUR** (plaintiff) **v** **STATE OF QUEENSLAND** (defendant)
FILE NO/S:	S 3772 of 2001
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	22 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2004 – 4 November 2004
JUDGE:	Byrne J
ORDER:	**The claim is dismissed**
CATCHWORDS:	EQUITY – FIDUCIARY OBLIGATIONS – PARTICULAR CASES – guardian and ward – adoption – where plaintiff claims that she was coerced to execute a consent to the making of an adoption order – where plaintiff claims against the State equitable compensation for breach of a fiduciary duty EQUITY – DEFENCES – WAIVER, DELAY AND LACHES – where there was considerable delay in commencing litigation – where evidence is no longer available *Baburin v Baburin (No 2)* [1991] 2 Qd R 240 *KLB v British Columbia* [2003] 2 SCR 403 *Orr v Ford* (1989) 167 CLR 316 *The Duke Group Ltd (in liq) v Alamain Investments Ltd & Ors* [2003] SASC 415 *Tusyn v Tasmania* [2004] Tas SC 50 *Webber v New South Wales* [2004] 31 Fam LR 425
COUNSEL:	K N Wilson SC for the plaintiff A M Daubney SC and K Philipson for the defendant
SOLICITORS:	McInnes Wilson for the plaintiff Crown Law for the defendant

A breach of fiduciary duty is claimed

[1] Shortly before 10pm on 1 September 1967, the plaintiff, then aged 17 and in the care and control of the Director of Children's Services, gave birth to her son. A week later, in the presence of Jay Whalley, a child-care officer employed by the Department of Children's Services, she gave her written consent to the making of an adoption order for the boy. He was later adopted and raised by adoptive parents. Contending that Ms Whalley coerced her to execute the consent by threats and intimidation, the plaintiff claims against the State equitable compensation for breach of a fiduciary duty said to be owed to her by the State to act in her best interests.

[2] The plaintiff's story, as she recounted it, should first be told.

Mrs Arthur's story

[3] The plaintiff was born in England in March 1950. When she was nine, she came to Australia with her parents and six siblings. After the family reached Australia, two more children were born.

[4] After two years in the Townsville area, the family came to Brisbane. They lived in impoverished circumstances. In 1961, the plaintiff's father, sometimes a binge drinker who became abusive when drunk, returned to England, leaving his family without support. In 1962, the children were placed in State care. The plaintiff remained a State ward until early 1964.

[5] The plaintiff left school shortly before her 14th birthday. At first, she helped her mother at home, looking after her brothers and sisters. Within a few months, she was in employment.

[6] About the middle of 1966, the plaintiff's father returned to Australia after learning that his wife wanted a divorce. He came to the house where the plaintiff was living with her mother and a man the plaintiff calls her step-father, to whom her mother was not married. The plaintiff was close by when her father stabbed her step-father. As the police were about to take her father away, he asked: "Which one of them are you?". "Lily", she replied. He was imprisoned. She never saw him again.

[7] The plaintiff's mother remained fearful of her husband. So she decided to move to Sydney with the plaintiff's step-father. By this time, the 19 year old[1] Stephan Benko was the plaintiff's boyfriend. The plaintiff decided to remain in Brisbane. By the end of October 1966, she and Mr Benko were living together at Lillian Street, Rocklea.[2]

[8] In January 1967, the plaintiff discovered that she was pregnant. She lost her job when her morning sickness became apparent at work.

[9] Late at night on 15 February 1967, the plaintiff was at home in bed when two policemen arrived. They interrogated her about the pregnancy. When she acknowledged it, she was taken to the watchhouse. Mr Benko witnessed the incident.

[10] Next morning, the plaintiff appeared before the Children's Court, charged with being exposed to moral danger. An order was made placing her in the care of the Director of Children's Services. The plaintiff told the police[3] that her mother and step-father had

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1 He was born in December 1947.

2 In documents created in 1967, the suburb is given as Salisbury.

3 and perhaps the Children's Court too.

moved to a caravan park at Bankstown. She mentioned that her father was in prison. While the police tried to find her mother, the plaintiff was removed to the Holy Cross Home at Wooloowin. Four days later, having been locked in a dormitory in the meantime, she returned to the Children's Court. Mr Benko was not there. No member of her family attended. The police told the Court that they had not located her mother.

[11] The plaintiff was returned to the Home. She stayed there for all but a week of the next eight months. While she was at the Home, Mr Benko saw her once. Her sister met with her once.[4] She wrote to her mother, and received an occasional letter in reply. But her mother did not visit. The plaintiff did not get any mail from Mr Benko.

[12] The plaintiff had not been at the Home long when she was presented with papers "applying … to get married" to Mr Benko. The documents had been signed by his father and her mother. A nun asked her to sign the papers. She did so, but heard nothing more about them or the idea of marrying Mr Benko.

[13] On 1 September 1967, the plaintiff went into labour. She was taken to the Brisbane Women's Hospital. She gave birth to her child hours later. Hospital staff told her the baby was a boy. She was not allowed to see him. She had not suggested to anyone at the hospital that the child was available for adoption.

[14] She felt "scared" and as if her "head was in another place" for most of her time in hospital. Drugs were administered: "tablets, injections and some medicine", including a lactation suppressant.

[15] While in hospital, the plaintiff had one visitor: Mr Benko, once, on an occasion she "vaguely" recalls. The two of them went to the nursery. They stood there, looking at babies lined up along the back wall. The plaintiff did not know which child was hers, and did not ask.

[16] At this time, the plaintiff expected to resume her life with Mr Benko on discharge from hospital. In her mind, marriage was "a foregone conclusion … because we loved each other." But they had not discussed their future.

[17] On 8 September, a woman came to her bedside and introduced herself as "from the department". Her name, the plaintiff later learned, was Jay Whalley. She was there, she said, to find out what the plaintiff was going to do with the baby. The plaintiff told her that she wanted to marry Mr Benko and keep the child. Ms Whalley remonstrated with her, telling her that she had no right to contact Mr Benko, and that by doing so she risked being sent to Karrala House – an institution with a reputation as a hard, maximum security, girls' home. The plaintiff told Ms Whalley that she wanted the boy put into foster care until she left the Home. Ms Whalley deprecated the idea, saying that the child could be in foster care for four years, and that, even if the plaintiff and Mr Benko did marry, the child might not be released from foster care. Ms Whalley said that it could take the plaintiff a long time to prove that she was capable of looking after the child, and that, if she put him in foster care and left him there for years before taking him away from the only people he had ever known, "he will hate you". Ms Whalley also said that she could keep the plaintiff locked up until she turned 18.

[18] Although the plaintiff remembers "very little about the adoption stuff", she recalls Ms Whalley's telling her that the boy needed a "permanent home". She understood Ms

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[4] On the plaintiff's account, Mr Benko and her sister came to the Home more often but were turned away.

Whalley to be proposing that he be looked after. Ms Whalley, however, did not explain what adoption involved, and the plaintiff had no concept of it: "I come from a large family. We don't just give away our children …".

[19] During their 15 minute conversation, the plaintiff told a "dominating" Ms Whalley, who had bombarded her with information or requests, that she was in love with Mr Benko and that they were to be married. Towards the end, Ms Whalley produced a printed form of consent to the adoption. In the handwritten section, the plaintiff's name appears as "Lillian Josephine McDonald".[5] Her address is shown as Canleyvale Rd, Canley Heights, New South Wales, where her mother lived. She did not supply Ms Whalley with that address.

[20] The form included printed statements that:

> "(1) I understand the nature and effect of an Adoption Order …
> (2) In particular I understand that the effect of such order will be to deprive me permanently and totally of my parental rights in relation to the said child.
> (3) I hereby consent to the making of an Adoption Order in respect of the said child …".

[21] The fifth printed statement was: "I desire the said child to be brought up in the …faith". Ms Whalley deleted the second "the", replaced it with "any", and added "Christian" before "faith". The plaintiff, however, had told Ms Whalley that the boy "was to be brought up as a Catholic".

[22] The plaintiff was told to sign the document using the name "Lillian". Protesting that her name was "Lily", she did as she was told, and signed "Lillian Josephine McDonald."[6] She was not given a copy of the consent form.

[23] By executing the form, the plaintiff supposed that she was agreeing that her son be given to somebody else. She did not appreciate that she was consenting to losing him forever. She thought that someone else would look after the child until she got out of the Home.

[24] After the plaintiff had signed the consent, Ms Whalley asked her whether she wanted to see the baby. She did. As Ms Whalley left, she told the plaintiff that she had 30 days in which to change her mind about the adoption.

[25] Ms Whalley arranged for the nurse to give the plaintiff a card to take to the nursery with her name on it. She held the card to the window. A nurse showed her the child. A card on his bed read: "Baby McDonald, not to be shown". That afternoon, she returned to the Home.

[26] Towards the end of October 1967, the plaintiff was told that she was to be sent to live with her mother in Sydney. This angered her. "I was quite happy to stay [at the Home] until I was 18", she testified. "I didn't see any point in going out. There wasn't

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5 The handwriting looks to be that of the certifying witness, Ms Whalley.

6 The plaintiff's birth certificate (Ex 10), shows her mother's name as Lily Ivy McDonald. Yet her mother's name is shown as Lillian Ivy in documents brought into existence in February, 1967 (Authority to Receive a Child in Care; Register of Children in an Institution: Ex 2). Presumably, that information was supplied by the plaintiff. If so, this might suggest that the plaintiff thought it proper to substitute Lillian for Lily for formalities. However, this possibility was not explored in evidence or address and should, therefore, be ignored.

anything out there for me." Asked whether by this time she still had hopes of marrying Mr Benko, "I don't know", she said.

[27] The plaintiff made her way to Sydney to live with her mother and step-father. She was most unhappy there. She disliked her stepfather, who pressed her to get a job and blamed her for causing her mother so much worry.

[28] Soon after arriving in Sydney, the plaintiff wrote to Mr Benko. She did not know where he was living. So she wrote to an address where she supposed he worked. She did not receive a reply. She was not to have any communication with him for 23 years.

[29] In March 1968, the plaintiff met Jeffrey Fuller. Before long, she had moved into a house with him, his parents, and other relatives of his. On 26 October that year, she married Mr Fuller. She had not told him about her son.

[30] In the almost 14 months between the birth and the marriage, the plaintiff was unable to come to terms with the loss of her son. She finds it hard to express her feelings during that period. She says: "The whole experience was like a dream … I just couldn't put anything together … I am thinking, 'What the hell happened there?' … I don't know what happened". She was also occupied with thoughts of her son. She was "constantly" thinking, "Where's the baby?"; "Where's Steve?"; "What happened?".

[31] From the beginning, there were stresses in the marriage. The plaintiff had hoped for a child but did not become pregnant to Mr Fuller. She obtained a public service position, working in an office. Mr Fuller resented her success in moving away from the factory floor. He became jealous in another way: he suggested to her that she was getting "all dressed up" for work because she hoped to "meet somebody to have an affair with". Her life had become a "nightmare".

[32] Shortly after her 21st birthday, the plaintiff left her husband and returned to Brisbane, intending to search for Mr Benko. While here, she formed another relationship. On the night she planned to return to Sydney, the plaintiff heard that Mr Benko had married. She did not try to contact him. She returned to Sydney with this new man, and quickly became pregnant by him. After four months together, they parted.

[33] When two months pregnant, the plaintiff told her husband of the pregnancy. He asked her to return, which she did. The circumstances that then confronted her were "very humiliating". A few months earlier, she had left him with only a note to say that she was heading for Queensland. A week or two after taking up with him again, Mr Fuller took her to live with his parents, so that somebody would always be watching her.

[34] In April 1972, the plaintiff gave birth to her daughter. She continued to be obsessed with her son. Thoughts of him played in her mind "like a tape with one… piece of material going around around and around in" her "head constantly". His birthdays were especially painful: on those anniversaries, she felt physically sick reflecting on him.

[35] The marriage remained unhappy. The plaintiff became a servant in her husband's family's household. He frequently went out at night on his own to play darts. He exposed her to "constant haranguing about [her] dirty past" – two children by other men. This and other "emotional abuse" perplexed her. The things he said to her made her feel ashamed. Yet she could not understand how her "wonderful" relationship with Mr Benko "could be turned into something so filthy".

[36] Her father-in-law's behaviour added to her misery. She was "constantly being sexually harassed" by him "because he thought that I was open slather, and I endured that every day. He couldn't walk past me without touching me and trying to do dirty things because I was the dirty woman that had had two kids to these men". She stayed because she had nowhere else to go. The "emotional abuse", as she characterises the conduct of her husband and father-in-law, continued for 18 years. She remained obsessed with thoughts of her son.

[37] In the early 1990s, the plaintiff heard that the adoption laws had been altered to allow a parent to learn where a child given up for adoption was living. She decided to find her son and "tell him what had happened and why he became adopted". First, she needed information because "I didn't know what happened".

[38] In June 1991, the plaintiff wrote to the Department of Family Services. In her letter,[7] she mentioned that, while she was at the Home, Mr Benko had obtained her mother's permission for them to marry, and that she too had signed the forms but heard nothing else. The letter continues:

> "I was not allowed contact with the outside by any means of communication. I gave birth to my son on 1-9-67. Whilst in hospital I contacted his father. This was reported to the social worker who was handling my case. I feel that I was placed in a hopless (sic) situation to sign the adoption papers after I was told that there was no definite date for me to be released from the home. I think you can imagine all the other reasons why I was coerced into the adoption. I was released from the home approx 5 weeks after I left hospital: long enough for the time limit on changing my mind to pass. I was returned to the custody of my mother in Sydney.
> … I am still suffering emotionally from this. I have applied for identifying information for my son and hopefully will one day get in contact with him. I would like if possible to get a copy of my files. I feel that there have been a lot of questions unanswered about what happened to me whilst I was in the home. … If I had the answers to some of the questions I may at least accept it."

[39] This letter, written more than 23 years after the birth, was the first complaint that something was amiss with the adoption.

[40] The Department's reply mentioned that the file concerning her time at the Home no longer existed. There was, however, a little information on index cards concerning her appearance before the Children's Court: that on 20 February 1967 she had been charged with being exposed to moral danger and was committed to care and control, from which she was discharged on 27 October 1967.

[41] The plaintiff continued to press the Department for material about her son. In response to an application for details about him, in August 1991, she received a reply telling her that he had lodged "an objection to contact and disclosure of identifying information". The letter also informed her that, while that objection remained in force, it was an offence to attempt to contact her son. The plaintiff was incredulous. She refused to

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[7] Ex 11.

believe that her son could have made the objection.[8] There must have been a mistake, or else fraud. And she was embittered by what she saw as a threat to punish her if she pursued her efforts to locate him. She would not be deterred. She knew that she must try to find him.

[42] The news that her son did not wish her to contact him, and that she could be punished for attempting to do so, affected the plaintiff very considerably. Her head felt as if she had been struck with an axe. Emotionally, she "lost it completely" and suffered a "major nervous breakdown", as she describes the condition.

[43] Desperate to "find out what happened" and "why didn't we get married", within a few weeks of receiving the letter, the plaintiff had set off for Queensland. She was in such a state that she had no firm plans. She just knew that she had to be here if she were to find her son.

[44] Soon after arriving in Queensland, the plaintiff met Mr Benko. After talking things through with him, she satisfied herself that their relationship was nothing to be ashamed of: it was not "so dirty that everybody around me could make my life miserable about it". She decided to return to her husband.

[45] Mr Fuller met her at the airport. The look on his face made her think he was ready to kill her. "All that night, the next day", he abused her in the course of a heated argument. She finally said that he would never make her life miserable again: she was leaving. He threatened to tell her daughter that he was not her father. Four days later, having resigned her job, and taking everything she could manage, she drove to Queensland. The marriage was finished.

[46] At first she stayed with her sister. She got work as a cleaner. For a time, she shared a house with a dysfunctional, drug-addicted "bikie" with a psychiatric condition who threatened[9] to kill her. No effort was then made to find the child. "Paralysed" by the Department's August 1991 letter, she feared being put in jail if she looked for him.

[47] In May 1993, the plaintiff wrote to the Department asking for copies of her files. Questions included:

> "Why I was denied permission to marry the father of my child after having been given permission by my and his parents: what effort was made by the Department to obtain any kind of support to enable me to keep my child instead of sending a social worker to coerce me to adopt my child under the threat of keeping me in custody til I turned 18 yrs old."

[48] The reply pointed out that the only surviving records were some index cards.

[49] The plaintiff returned to Sydney in late 1993. She kept the Department informed of her changes of address so that her son could contact her if he wished. She got work as a housekeeper and a provider of care to disabled people.

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[8] The only information her son had agreed could be communicated was the dismissive "I have parents".

[9] She told her psychiatrist that the "bikie" attempted to kill her by cutting her throat and strangling her: Ex 7, p. 3.

[50] The plaintiff divorced Mr Fuller in 1994. By 1995, she had gynaecological problems. She underwent an hysterectomy in 1996 – the year in which she remarried.

[51] An injury at work in 1997 obliged her to look for other earning opportunities. She started a TAFE course in Community Welfare. The practical component required her to study a community organisation. She chose an adoption group. Discussions with the group's convenor were enlightening. She began to feel that "something wasn't quite right". As she attended more meetings, "bits and pieces started falling into a picture". Conversations with other women made her feel that her adoption experience was similar to theirs. She had to know more. And she was driven to find her son to tell him "what had happened". She contacted politicians, the media, the Governor-General, the British High Commissioner, a rabbi, an ombudsman, the Hospital, and the Department pleading for information that would help her find her son.

[52] She received,[10] as non-identifying information, her son's first name, Tim. With the assistance of her husband and daughter, she set about searching Queensland electoral rolls, looking for every Tim and Timothy who might be her son. Records of children who had started school in Queensland were consulted. Eventually, she discovered where he was living, went to the house, and spoke to his wife. He contacted her by phone not long afterwards. He told her that he thought he was her son, and that she could stop looking. They met about an hour later. They have had regular contact ever since. In May 1998, he withdrew his objection to contact.

[53] In 1998, the plaintiff began trying to find lawyers to act for her in a compensation claim. By this time, she had testified before a public inquiry and complained to the police of misconduct in connection with the adoption. Eventually, she found willing lawyers, and these proceedings were launched in April 2001.

[54] The plaintiff commenced a law course in 2000. In that year, she also started on psychiatric care. She has seen the psychiatrist, Dr Pickering, more than 120 times. She takes medication to alleviate a condition that Dr Pickering diagnoses as major depressive disorder superimposed on post-traumatic stress disorder[11].

Mr Benko's version

[55] Mr Benko's testimony may be mentioned now.

[56] He met the plaintiff in 1966 at a shop they frequented. She told him that she was looking for a place to stay. He found her a flat. She was not happy there. He asked if she would move into his place. She agreed. By early November, she was living at his house. Soon after that, a relationship developed.

[57] Mr Benko was working as a spray painter when he discovered that the plaintiff was pregnant. The news delighted him. Looking forward to the birth of his son, he expected that he and the plaintiff, "head over heels with each other", would marry.

[58] Mr Benko saw the police take the plaintiff away that night in February 1967. The police suggested that he contact the Moorooka station the next day. He did so and was informed that the plaintiff was at the Home.

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10 Ex 18.

11 Ex 7, pp 7 and 9.

[59] A few days later, Mr Benko got in touch with the plaintiff's sister, Jenny. Within the week, the two of them had gone together to see the plaintiff. He told the Mother Superior who supervised his five minutes with the plaintiff that he would get marriage papers. She "would not hear of" marriage. Nonetheless, he travelled to Sydney and procured her mother's and his father's written assent to the marriage.[12] He returned to the Home and gave the parental consents to the Mother Superior. He was not permitted to see the plaintiff. He made no further attempt to contact the plaintiff at the Home, although he still thought that they were to be married. He waited. Nothing happened. He does not know what became of the marriage papers.

[60] Mr Benko found out about the birth when the plaintiff's sister told him of the event. He was at the hospital "a couple of days" after the birth. The plaintiff seemed "totally different". In physical appearance, she looked very different. He was shocked at her bulk. Her personality had changed too: she was not the "bubbly", "happy-go-lucky" girl he had known. She struck him as "like sedated or something". Her presentation was so changed that it "just knocked my socks off, it did". He could not understand what had happened to her.

[61] The two of them walked to the nursery and looked at the babies. She could not point theirs out. He did not ask staff to identify the child because the plaintiff had said that she would be in trouble if "they" found out that he was there. She had told him of a threat to send her to Karrala House. As he understood it, the threat was the Mother Superior's.

[62] The last thing the plaintiff said to him was, "We'll find our baby one day". He thought that strange but imagined that she must know more than he did. He did not return to the hospital and next saw the plaintiff more than two decades later.

[63] During his visit at the hospital, Mr Benko told the plaintiff that he had left the signed marriage papers with the Mother Superior. The plaintiff said that she had signed them. But no wedding plans were made. Mr Benko waited for her to "get out and get in contact with me". He did not try to find out from the hospital when she was to be discharged. Although he expected her to go back to the Home, for that was what she had told him, he made no effort to contact her there. Nor did he contact the nuns, or anyone else, to find out when the plaintiff was to be released. He had not told her where he was living.

[64] Mr Benko replied to the only letter he got from the plaintiff. She did not answer it. In 1970, he married someone else, without ever trying to find her or the child.

Some apparent corroboration

[65] Aspects of the plaintiff's description of the encounter with Ms Whalley and the circumstances surrounding that event find support in other evidence. First, there is Mr Benko's testimony. He speaks of a shared expectation that he and the plaintiff would marry and raise the child together. He confirms that he once visited the hospital to see her and the baby. There are other points of convergence in their accounts. Secondly, that the plaintiff signed her name on the consent form as "Lillian Josephine McDonald", when her first name was Lily and only four days earlier she had signed the birth certificate[13] as "L J McDonald", support the idea that Ms Whalley directed

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12 "The idea of getting the marriage papers", Mr Benko testified, was to get the plaintiff out of the Home.

13 See Ex 6.

her to sign using her full name as it appeared in records. Thirdly, other child-care officers who took adoption consents at the Hospital in 1967 routinely told mothers that they had 30 days to change their minds, which accords with the plaintiff's recollection of Ms Whalley's parting comment. But there are good reasons to doubt her assertions of coercion by Ms Whalley.

Another impression emerges

[66] In identifying coercion as the explanation for her decision to execute the consent, the plaintiff, it seems, attaches significance to her insistence that she had "absolutely not" contemplated adoption before meeting Ms Whalley, and to her expectation that she would marry Mr Benko and raise the boy with him. The evidence, however, exposes a different picture.

[67] Mrs Elsie Robinson was a nurse who had qualified as a midwife. In 1967, she worked at the Hospital. It was part of her job to gather information from new mothers, partly to assist in birth registration. Her Report of Investigation is one of the few pertinent surviving records. It contains information the plaintiff supplied[14] to Mrs Robinson on 4 September, seemingly a day or so after Mr Benko's visit.

[68] Mrs Robinson wrote down particulars: name: *Lillian Josephine McDonald*; marital status: *S*; age and date of birth; religion: *R.C.*, address prior to birth: *Holy Cross*; address in future: *199 Canleyvale Street, Canley Vale* (a Sydney address where the plaintiff's mother lived); name by which she was known: again, *Lillian Josephine McDonald*; parents' names: *Felicia*[15]*and Maurice*; and their address: *as above* (a reference to the plaintiff's "future address" in Sydney). Information concerning the child was included: name: *Shane Stephan McDonald*; weight; and date of birth. Mrs Robinson also wrote down what the plaintiff said about the "Putative Father": Name: *Stephan Benko*; address: *unknown*; occupation: *casual worker*; age: *20*; religion: *R.C.*; and personal characteristics. The space for recording his "Financial standing" was left blank. Next to "Will he support child?", Mrs Robinson put *No*. Under "Remarks", she wrote *Baby for Adoption (?).*[16]

[69] Four entries in the report are difficult to reconcile with the notion that by 8 September 1967 the plaintiff still expected to marry Mr Benko, and with her testimony that she had not considered adoption before Ms Whalley broached the topic: the "Baby for Adoption (?)" remark; that Mr Benko's address was "unknown"; that he would not support the child; and that "in future" she would live with her mother in Sydney.

[70] Other factors indicate that the plaintiff and Mr Benko were not committed to one another or to raising the child. If Mr Benko is correct, his relationship with the plaintiff was about a month old when the child was conceived; and it had endured for about three months by the time she was sent to the Home. After leaving the hospital, the plaintiff returned to the Home for about six weeks. In that time, neither tried to contact the other. By late October 1967, when the plaintiff left the Home, she still did not

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14 The plaintiff has no recollection of the visit. She accepts, however, that she must have been the source of the information recorded in the report.

15 The plaintiff's mother's name is Lillian or Lily: see fn 6.

16 The "Baby for Adoption (?)" entry explains why Ms Whalley called on the plaintiff seven days after the birth. Mrs Robinson's reports were examined by child-care officers. If they showed that the mother was offering her child for adoption, a child-care officer would visit the mother after at least five days had elapsed since the birth, typically as the mother was about to be discharged from the hospital.

know where he lived. On leaving, she went to Sydney to stay with her mother, at the Canley Vale address she had given Mrs Robinson as her "in future" address. Before 1991, her efforts to contact Mr Benko consisted of one letter. She did not receive his reply. There things were left. A few years later, she came to Queensland, heard that he had married the best friend of an acquaintance of hers, did not try to get in touch with him, and returned to Sydney once more.

[71] Next, hospital staff apparently understood[17] from as early as the birth that the plaintiff was not committed to keeping the child.[18]

[72] The plaintiff recalls that her son was taken from her immediately, and that she was not allowed to see him. These things conformed with the "usual practice" in 1967 for a mother intending to offer her child for adoption. In those days, it was felt that the pain of separation may be less for an adopting mother if she did not see the child. [19]

[73] The plaintiff remembers having been administered an anti-lactation drug. That would not have happened without a doctor's prescription.[20] A decision that the child was to be available for adoption would explain the prescription.[21]

[74] The idea that Ms Whalley threatened the plaintiff with being sent to Karrala House presents particular difficulties. The plaintiff wrote letters to the Department in 1991 and 1993 complaining about the adoption procedure. In 1991, she spoke of feeling pressured by the absence of a definite release date. The 1993 letter, however, says that Ms Whalley threatened her with detention until she turned 18. Neither letter mentions a Karrala House fate. Secondly, Mr Benko seems to recall that the plaintiff talked of being threatened with Karrala House on the day he came to the hospital. This was before she had met Ms Whalley. And Mr Benko thinks that the plaintiff attributed the threat to the Mother Superior at the Home, not to Ms Whalley.

[75] Also problematic are the claims that Ms Whalley did not explain the consequences of the adoption, and that the plaintiff supposed that, in consenting to it, she was agreeing only that someone should look after her child until she could care for him. Nothing of the sort was suggested in the 1991 and 1993 letters. There was no effort to get her son back – an odd omission if she believed that she had not parted from him permanently. And then there is Ms Whalley's certificate on the consent form:

> "Before the abovenamed Lillian Josephine McDonald signed the above instrument of consent, the effect of his/her signing the instrument was explained by me to him/her and it appeared to me that he/she understood the effect of signing the instrument."

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17 It is, I suppose, possible that the plaintiff did not tell this to the staff. The evidence, however, does not point to anyone else as the source.

18 At least this is so if it is true that her son was immediately removed, that she was not allowed to see him , and that an anti-lactation drug was administered. There are no extant records relating to the aftermath of the birth; and there are plenty of difficulties with the plaintiff's recollection. But she looks to be correct about those three things. Her evidence in these respects is consistent with Mrs Robinson's Report, as well as with her subsequent conduct (and that of Mr Benko).

19 Ex 21: 1 September 1998 letter from the Minister for Health to the plaintiff.

20 As evidence of Mrs Cattanach confirms.

21 There is no suggestion of any physical impediment to breast feeding, that the plaintiff was averse to the idea of it, or that there was any reason for a lactation suppressant to be prescribed other than a belief on the part of the treating practitioner that the child was to be given up for adoption.

[76] People who knew Ms Whalley in the 1960s speak highly of her character and professionalism as a child-care officer.

[77] In the late 1960s, Mrs Cattanach, a registered nurse, was a departmental child-care officer who took adoption consents at the Hospital. She testified to Ms Whalley's nursing background, training as a child-care officer, interest in her work, and personality. She came to know Ms Whalley when the two of them participated in an in-service training course to prepare them to become child-care officers. Altogether, she knew Ms Whalley for over 30 years. They became very good friends. She remembers Ms Whalley as a deeply religious, "very good, honest, reliable person". Responding to the proposition that Ms Whalley might have interviewed a birth mother by bombarding her with information and coercing her into signing a consent to adoption form she said, "That was not Jay Whalley's personality at all. She was a very kind, caring, considerate lady, and she wouldn't know how to be domineering".[22]

[78] Miss Feil was another of the Brisbane child-care officers who took consents to adoption.[23] She knew Jay Whalley, working with her from 1967 until 1984. They were friends. Miss Feil regarded Ms Whalley as a "very capable lady … a woman of integrity". In response to an invitation to comment on the suggestion that Ms Whalley was a dominating woman who might threaten a mother with bad things if she did not give up her baby for adoption, she disagreed, speculating that Ms Whalley would have read through the form, explained that the mother, in signing it, was giving up all parental rights, and asked whether the child was to be brought up in a particular faith.

[79] In 1967, Mr Zerk was a departmental child-care officer in Brisbane. He regarded Ms Whalley as "very professional in the way she went about her duties and the manner in which she discussed her cases and liaised with her colleagues". She appeared to him to be an "exceedingly friendly and likable person … who was thorough and concerned to meet the requirements of the Act and professional expectations".

Memory accuracy

[80] The quality of the plaintiff's memory obviously matters to the reliability of her account of the circumstances in which she came to sign the adoption consent.

[81] The plaintiff acknowledges lapses in recall about the episode:

> "I remember very little about the adoption stuff … I just get flash, flash … my recollection of being in the hospital is reasonably blurred … I don't remember much about what was happening in the hospital … I was given drugs and kept sedated. My whole hospital experience was one that was blurred by me being under medication, apart from the incidents that I have described."

[82] In his report of 1 December 2000,[24] Dr Pickering records that the plaintiff had said that she was pressured to adopt the boy out, "but this whole episode is a blur". The arrest

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22 Tasked with the suggestion that the Brisbane child-care officers who took adoption consents pressured unmarried new mothers to give up their children for adoption, she rejected the idea. Her denial is consistent with Mr Zerk's evidence that, in 1967, there was no shortage of children for adoption. "Lots" were available, he testified, but all were placed.

23 Miss Feil began taking such consents in or about 1970.

24 Ex 8.

was traumatic. The events around the adoption also traumatised her. Tracking down her son many years later

> "… made the memories come back. The memories however are unclear and this is the key to the whole thing. She was clearly dissociated during much of the time that she underwent traumatic experiences, and she cannot get enough recall of these things to be able to properly and fully work through them. This is a typical psychological traumatisation situation, one which involves dissociation."

[83] The plaintiff is inclined to attribute her memory lapses about the episode with Ms Whalley to medication-induced stupor. There are, however, better explanations, apart from any disassociation.[25]

[84] First, the passage of 37 years is a consideration.[26] Time tends to distort recollection.

[85] Secondly, Dr Pickering's treatment has involved many sessions of hypnotherapy in efforts to influence what he calls "the patchiness of her memories" through retrieval of emotionally-laden fragments of information. The therapy includes re-exposing her to events concerning the adoption, trying to have her reprocess them. Dr Pickering has been careful to avoid suggestions which might implant or induce false memory. He thinks that there is not a "significant danger" that his treatment has done so. But such hypnotherapy inevitably brings back emotion. And, as the psychiatrist, Professor Whiteford, has testified, the memory to which that emotion is connected, when it returns, is not always reliable. In Professor Whiteford's assessment, a "huge amount of emotion" has become attached to the traumatic events of 1967 – a view which accords with the plaintiff's presentation in court and a deal of her evidence.[27] He also considers[28] that the "insults" in her life after 1967 – some "extremely traumatic" – have "increasingly, over time, clouded and coloured the emotions associated with" the events of 1967.

[86] Thirdly, the plaintiff is left with profound regret at losing her son, dislike of those who ran the Home, and seething hostility towards the State Government, whose officers advised her of her son's objection to contact and that it was an offence to attempt to contact him – a course upon which she was fixated. She has become, as Professor

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25 It is highly unlikely that the plaintiff was under medication that adversely affected her capacity to give a free, informed consent during the interview with Ms Whalley. Ms Whalley, like the other Brisbane child-care officers who took consents in 1967, was a registered nurse, who by training and experience would have appreciated whether a mother was affected by medication. In any event, sedation a week after the apparently uncomplicated birth seems quite improbable, as evidence of Mrs Cattanach reveals.

26 cf *Longman v The Queen* (1989) 168 CLR 79, 108.

27 For example, this:

> "There wasn't a minute from the moment that I gave birth that I wasn't wondering about my son, where he was, what had happened to him. They took him away and hid him from me for 30-odd years. I begged and pleaded with this department and this State, 'Please tell me where my child is. Please tell me where my son is. Please tell me what happened to me.' … They have known everything about my life. They know the misery that I have been suffering because I couldn't find my son, and the letters that they sent me back, as if I was nothing, I didn't even deserve a decent reason for what they did. No explanation, nothing, just lock you up, forget about you, steal your child away from you and then tell you to, 'Get lost. We don't care about you any more.' I am sorry. There hasn't been a minute of my life over the past 37 years that I haven't wondered and loved and thought about my son and his father."

28 This opinion is also acceptable.

Whiteford puts it, "obsessively preoccupied with extracting what she believes to be appropriate retribution for the actions of those who removed her son. Anger is a predominant theme …".[29] Her perceptions, as she has related them, look to be appreciably influenced by such things.

Two more evidentiary issues

[87] The weight to be accorded to the factors that bear upon the reliability of the plaintiff's account varies. One facet merits discussion: the evidence about Ms Whalley's professionalism and character. The testimony[30] suggesting that she was not the kind of person to have engaged in the threats alleged is acceptable. However, I have not attached major significance to it. None of the witnesses who testified to her attitudes and attributes saw her deal with a mother. And some people behave differently when at work from the way in which they engage with colleagues in another context, work-related or social.

[88] Mention should also be made of Mr Benko's evidence. Where his recollection differs from the plaintiff's, his seems generally preferable. However, his memory for the critical events has dimmed, naturally enough. His conduct presents as a surer guide to his intentions; and it indicates that, by the end of his hospital visit at the latest, any romantic notion he may earlier have entertained about a life with the plaintiff was dispelled: consider his astonishment at her very different physique and personality, not telling her where he lived, not trying to contact her, not expressing interest in the fate of his son, and doing nothing to prepare for the plaintiff's eventual return to him, let alone making arrangements for the arrival of a baby in his household.

An unpersuasive case

[89] Mrs Robinson's "(?)" shows that she gathered that the plaintiff was uncertain about the adoption. That hesitation may well have been present when Ms Whalley met the plaintiff four days later. If so, the interview with Ms Whalley resolved the doubt in favour of adoption. But if whatever passed between them persuaded the plaintiff to choose adoption, that does not mean that her choice was coerced.

[90] On 8 September 1967, the plaintiff's predicament was grim. She was 17, about to leave hospital. She had no idea where Mr Benko was living: their relationship had not survived the eight months separation. He would not support the child,[31] as she had told Mrs Robinson four days earlier. She had no money, no job, no family support; and little financial assistance was available from government for an unmarried mother in those days. It was the 1960s: social stigma attached to illegitimate parenthood. She remained in the Director's care and control, and whenever released from the Home, she had nowhere to take a child, except, perhaps, to live with the mother she had not seen in a year. On a rational evaluation of what confronted the plaintiff the day she met Ms Whalley, threats would not have been needed to persuade her, however tearfully, to choose adoption. Her miserable situation was pressure enough.

[91] More importantly, several factors[32] combine to call very seriously into question the plaintiff's account of the meeting with Ms Whalley. Her evidence of the episode is, in a word, unreliable.

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29 Ex 33, p 3.

30 That of Mrs Cattanach, Miss Feil and Mr Zerk.

31 Mr Benko's contrary testimony is not acceptable: it does not fit with proved facts.

32 Those mentioned in earlier sections.

[92] All considered, the evidence does not justify, on the preponderance of probabilities, a conclusion that Ms Whalley threatened, intimated or otherwise coerced the plaintiff into signing the consent. So her claim fails.

[93] Mrs Arthur's plight deserves sympathy. But, in a court of justice at any rate, compassion cannot substitute for proof.

[94] In the circumstances, it is unnecessary to consider the legal obstacles which may stand in the way of her case.[33] Nor is it necessary to consider laches. But as questions of fact arise in relation to this defence, it is as well to examine it.[34]

Laches

[95] The delay in commencing the litigation is very considerable. The first complaint of misconduct was made about 24 years after the adoption. The litigation did not begin for another decade. In relating the encounter with Ms Whalley, the plaintiff was testifying to an event 37 years ago. More importantly, potentially valuable evidence is no longer available, seriously prejudicing the prospects of a fair trial. Prospective witnesses are dead or cannot be located. Many potentially relevant records were destroyed long ago.

[96] Ms Whalley is dead.[35] So is Mrs Robinson, whose evidence about the interview on which the Report of Investigation was founded, though it would have been pertinent, presumably would not have been as important as Ms Whalley's testimony.

[97] Both the Mother Superior and the other nun who ran the Home are dead. The statement of claim suggests that their evidence might have been material: the pleading alleges that "the plaintiff was persuaded and induced to sign the consent" to adoption "by the conduct of the Sisters of Mercy in … informing her that her only choice was to agree to have her child adopted".[36]

[98] The doctor who attended the birth cannot be found. Had hospital records survived, his evidence might have mattered.

[99] The hospital records were destroyed in the ordinary course of things 25 years after the plaintiff's hospitalisation.[37] Those records would have included her drug regime – information bearing upon, among other things, the plaintiff's contention that she was not in a fit state to give a free, informed consent. Information concerning when and why the lactation suppressant was prescribed could have had significance for her assertion that she had not considered adoption before Ms Whalley saw her. Any report

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33 The notion that Ms Whalley's conduct may be sheeted home to the State as its breach of its duty to act in the plaintiff's best interests deriving from her having been placed in the Director's care and control does, however, confront substantial difficulties: see, generally, *KLB v British Columbia* [2003] 2 SCR 403; *Webber v New South Wales* [2004] 31 Fam LR 425; *Tusyn v Tasmania* [2004] Tas SC 50.

34 It is not suggested that the limitations statute should be applied by analogy: cf *Meagher, Gummow & Lehane's Equity Doctrines and Remedies*, 4th ed, (2002), 34-075; ICF Spry, *Equitable Remedies*, 6th ed, (2001), p 419.

35 She died in 1995, aged 61.

36 Para 14 c. of the statement of claim filed 27 April 2001 – an allegation against the former second defendant, the Corporation of the Trustees of the Order of the Sisters of Mercy in Queensland. The claim against that other defendant was not pursued to trial, for unexplained reasons. Incidentally, because this allegation was neither explored in evidence nor mentioned in address, I have left it out of account in evaluating the reliability of the plaintiff's testimony.

37 Ex 17.

by the social worker the hospital employed – not a fanciful possibility – has been lost. Notes by nursing staff have all gone.[38]

[100] If, which given the practices of Mrs Cattanach and Miss Feil seems most unlikely, Ms Whalley had made case notes of her meeting with the plaintiff, they would have been placed on the departmental adoption file. If so, they are lost.

[101] The Department's Family file was lost many years ago. Probably, it would have included information on departmental contact: for example, notes by a social worker of discussions with the plaintiff at the Home or the Hospital.[39]

[102] Had a different view of the merits of the case prevailed, the delay and the related loss of evidence with a considerable potential to have "cast a different complexion on the matter"[40] would have meant that that any judgment for the plaintiff would have been unjust. In short, had the alleged fiduciary duty been established, and its breach proved, the claim would nonetheless have been defeated by laches.

Disposition

[103] The claim is dismissed.

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38 Only two documents survived: the birth register journal and a "Patient Index" card showing that the birth was at the Hospital: Ex 17.

39 The plaintiff's 1991 letter speaks of a "social worker … handling the case" to whom the contact she wrote that she made with Mr Benko from hospital was reported: Ex 11.

40 *Orr v Ford* (1989) 167 CLR 316, 330; cf *Baburin v Baburin (No 2)* [1991] 2 Qd R 240, 244-245, 254, 256, 258; *The Duke Group Ltd (in liq) v Alamain Investments Ltd & Ors* [2003] SASC 415 [151]-[159].