SUPREME COURT OF QUEENSLAND

CITATION:	*Willmot v State of Queensland* [2023] QCA 102
PARTIES:	**JOANNE EDITH WILLMOT** (appellant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 11247 of 2022 SC No 6251 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2022] QSC 167 (Bowskill CJ)
DELIVERED ON:	16 May 2023
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2023
JUDGES:	Mullins P and Gotterson AJA and Boddice AJA
ORDERS:	**1. Appeal dismissed.** **2. The appellant is to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO STAY OR DISMISS ORDERS OR PROCEEDINGS GENERALLY – where the appellant sought damages from the State for negligence in failing to properly monitor and supervise her and those into whose care she was placed while she was a State Child as defined in the *State Children Act 1911* (Qld) – where the appellant's claim was permanently stayed because the consequences of the passage of time since the alleged events occurred meant that a fair trial was not possible – where primacy is not accorded to the absence of a limitation period over the discretion to stay permanently, or *vice versa* – where it was unnecessary to resolve the question whether the rule in *House v The King* is applicable to appellate review of an exercise of the discretion to permanently stay a proceeding – where there was an absence of means by which the State could investigate, lead evidence or cross-examine about the foundational facts underlying the foundational allegations because the relevant persons (except NW) are deceased – where the appellant submitted that the learned primary judge erred in treating the absence of

"foundational witnesses" as being determinative – where the appellant submitted that it was against the evidence for the learned primary judge to find that it would be "insurmountably difficult" to extricate the impact of the alleged assault by NW from the impacts of the alleged mistreatment by other persons – where the appellant submitted that the learned primary judge failed to acknowledge that the evidence which the appellant's former foster sibling would give forms a basis for the State to investigate and substantiate the foundational allegations – whether the learned primary judge erred in exercising the discretion to permanently stay the proceedings

Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld), s 9
Limitation of Actions Act 1974 (Qld), s 11A
State Children Act 1911 (Qld), s 10, s 11, s 61

Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256; [2006] HCA 27, cited
Chalmers v Leslie (2020) 6 QR 547; [2020] QSC 343, cited
GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2022] HCATrans 206, cited
GMB v UnitingCare West [2020] WADC 165, cited
Gorman v McKnight [2020] NSWCA 20, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, considered
Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, considered
Moubarak by his tutor Coorey v Holt (2019) 100 NSWLR 218; [2019] NSWCA 102, considered
Murakami v Wiryadi (2010) 109 NSWLR 39; [2010] NSWCA 7, cited
Newcastle City Council v Batistatos (2005) 43 MVR 381; [2005] NSWCA 20, cited
Page v The Central Queensland University [2006] QCA 478, cited
Purkess v Crittenden (1965) 114 CLR 164; [1965] HCA 34, cited
The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ [2022] NSWCA 78, considered
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, cited
Ward v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2019] NSWSC 1776, considered
Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34, cited

COUNSEL: B W Walker SC and G R Mullins KC, with S D Anderson and P M Nolan, for the appellant
C C Heyworth-Smith KC, with D J Schneidewin and K E Slack, for the respondent

SOLICITORS: Littles Lawyers for the appellant

[1] **MULLINS P:** I agree with Gotterson AJA.

[2] **GOTTERSON AJA:** By a Claim filed on 11 June 2020,[1] Joanne Edith Willmot commenced a proceeding against The State of Queensland ("the State") for damages of $1,764,620.83 for negligence, interest and costs. The Statement of Claim, as amended on the 20 August 2021,[2] alleges that Ms Willmot was born on the 6th of April 1954; that until about September 1966, she was a State Child as defined in the *State Children Act 1911* (Qld) ("SCA");[3] and that during that period and until her 18th birthday, the State was responsible for her care by virtue of the operation of the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) ("APA").[4]

[3] The following chronology is pleaded in the Amended Statement of Claim: that as a young infant Ms Willmot was placed in the Mothers and Babies quarters at the Cherbourg Girls' Dormitory ("Girls' Dormitory") at the Cherbourg Settlement; that she was placed in foster care with Mr Jack[5] and Mrs Tottie Demlin, an indigenous couple at Cherbourg, between 1957 and 1959; that she was removed from the care of the Demlins in around May 1959 on account of her becoming severely malnourished and emaciated; that she was then placed in the Girls' Dormitory where she remained until March 1960 when she was sent to reside with her mother in Nanango; that she was readmitted to the Girls' Dormitory in August 1960; that she was finally discharged from the Girls' Dormitory in September 1966; and that she turned 18 years old on the 6th of April 1972.[6]

[4] Ms Willmot's claim is on the basis of psychiatric injury which she alleges she developed as a result of sexual abuse and/or serious physical abuse she suffered during the time covered by the chronology. She alleges that whilst in the foster care of the Demlins, Jack Demlin sexually abused her "on a weekly to a fortnightly basis".[7] As well, she was regularly subjected to beatings by the Demlins for minor infractions of their rules.[8]

[5] Ms Willmot also alleges that she was twice given permission by the Cherbourg Superintendent to leave Cherbourg and visit her grandmother who lived at One Mile near Ipswich. The first occasion was in about 1960 when she was about six years old. The second was in about 1967 when she was about 13 years old. On the first occasion, an uncle, NW, who, it was pleaded, was 19 or 20 years old, sexually assaulted her to a point of trying to force his erect penis inside her vagina;[9] and, on the second occasion, her great uncle, known as "Uncle Pickering", sexually assaulted her. The assaults included penetration of her vagina with his finger.[10]

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1 AB 29 – 31.
2 AB 59 – 72.
3 Para 1(a), (b).
4 Para 2(h).
5 Erroneously referred to in paragraph 1(d) of the Amended Statement of Claim as Mr "Frank" Devlin.
6 AB 59 – 60.
7 Amended Statement of Claim para 7; AB 62.
8 Amended Statement of Claim para 7; AB 65.
9 Amended Statement of Claim para 10; AB 63 – 64.
10 Amended Statement of Claim para 11; AB 64 – 65.

[6] There are also allegations of physical mistreatment while Ms Willmot was a resident of the Girls' Dormitory. The alleged offender was Maude Phillips, the Girls' Dormitory supervisor[11] who, it is pleaded, subjected Ms Willmot to severe floggings in the presence of others for being late for school.

[7] In summary, Ms Willmot's claim against the State is on the basis of a failure by it properly to monitor and supervise her and those into whose care she was placed by the State, including foster parents, her grandmother and the Girls' Dormitory. There is no allegation that the State is vicariously liable for the conduct of individuals.

[8] Although the alleged sexual abuse or severe physical abuse occurred many years ago when Ms Willmot was a child, an action for damages for personal injury resulting from the same is not subject to a limitation period: s 11A(1) *Limitation of Actions Act 1974* (Qld). That provision came into force in March 2017 in response to a recommendation made by the Royal Commission into Institutional Responses to Child Sexual Abuse that the limitation period that would otherwise apply, be removed; but that the removal "should, however, be balanced by expressly preserving the relevant courts' existing jurisdictions and powers to stay proceedings where it would be unfair to the defendant to proceed".[12]

[9] The latter qualification accounts for the enactment of s 11A(5) as follows:–

> "(5) This section does not limit—
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> (a) any inherent, implied or statutory jurisdiction of a court; or
>
> (b) any other powers of a court under the common law or any other Act (including a Commonwealth Act), rule of court or practice direction.
>
> Example—
>
> This section does not limit a court's power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible."

The stay application

[10] Having delivered an Amended Defence on 21 October 2021,[13] the State filed an application on 14 December 2021.[14] The principal relief sought in the application was that the proceeding be stayed. The application was heard in the Trial Division on 14 July 2022. By that time, considerable affidavit material had been filed.

[11] Ms Willmot swore an affidavit. She relied on it as well as an affidavit sworn by one RS concerning the period when Ms Willmot was fostered with the Demlins, affidavits sworn by four others who lived or worked at the Girls' Dormitory at Cherbourg, namely, Ms Joan Nielsen, Ms Aileen Watson, Ms Ruth Hegarty and Ms Eva Collins, and affidavits sworn by her solicitors, including Ms K Ross. The State

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11 Amended Statement of Claim para 13; AB 65 – 66.

12 Explanatory Notes for the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amended Bill* 2016, at p 6; and Royal Commission Report Recommendation 87.

13 AB 73 – 83.

14 AB 84.

relied on affidavits sworn by two senior officers of the Crown Solicitor's Office. Its principal affidavit was sworn by Ms J Mills.

[12] Having reserved her decision, the learned primary judge made an order on 22 July 2022 permanently staying the proceeding. In reasons for judgment published that day, her Honour said that she would hear the parties in relation to costs. No order as to costs has yet been made.

The appeal

[13] On 19 September 2022, Ms Willmot filed a notice of appeal[15] against the decision at first instance. The orders sought are stated as that the appeal be allowed and that the State pay Ms Willmot's costs of the appeal and at first instance. Presumably an order dismissing the stay application is also sought.

[14] Before turning to the grounds of appeal, I propose to refer to, and draw upon, the reasons for judgment of the learned primary judge in order to give context to those grounds. Where, in these reasons, I have quoted extracts from the reasons at first instance and from judgments in other cases, I have included footnotes, unless otherwise stated. The numbering of the quoted footnotes accords with the footnote numbering in these reasons.

The reasons at first instance

[15] After introductory observations, the reasons at first instance are set out under the following four headings:

1. Factual context;
2. The pleaded case;
3. Relevant principles and authorities; and
4. Application of the principles to the circumstances of this case.

Reasons – Factual context

[16] The learned primary judge reviewed in detail the factual context within which the claim was made. Her Honour noted that by s 10 SCA, the Director of the Department had "the care, management and control of the person of all State children" until they were 18. The Director could "deal with" a State child by placing them in an institution or in the custody of "some suitable person": s 11. A remunerated foster parent had to be licensed by the Department for that purpose: s 61.[16]

[17] Her Honour also noted that the APA authorised the removal of Aboriginal people in Queensland to, and being "kept" within, an area of land known as a "reserve": s 9. A statutory system of permits enabled Aboriginal people to leave the reserve, including for work.[17]

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15 AB 1 – 3.
16 *Willmot v State of Queensland* [2022] QSC 167 at [6] ("Reasons").
17 Reasons [7].

[18] **Allegations of sexual abuse by Jack Demlin:** The learned primary judge observed that three other children were fostered with the Demlins at the time that Ms Willmot was there. They were RS, her sister CS and brother AS. The four of them shared the one bedroom.[18]

[19] Her Honour summarised the evidence before her concerning sexual abuse by Jack Demlin as follows:

> "[10] The plaintiff alleges that, whilst she was in the foster care of the Demlins, Jack Demlin sexually abused her. She says she also witnessed him sexually assaulting RS and CS. In her affidavit sworn in these proceedings the plaintiff says that she has an independent recollection of the abuse she suffered whilst living with the Demlins. She describes Mr Demlin coming into their bedroom at night, putting his hand under the blankets and touching her vagina, digitally penetrating her and, later, forcing her hand onto his penis for male masturbation. As described in her affidavit, the sexual assaults were repeated over many months. In the amended statement of claim, they are alleged to have occurred on a weekly or fortnightly basis throughout the time she was in the care of the Demlins.[19] The plaintiff says in her affidavit that she has some limited memory of essentially the same sexual assaults occurring to RS and CS, but nothing specific other than it occurred on numerous nights in the same bedroom where they all slept.
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> [11] RS has also brought a claim against the State, for damages for personal injury as a result of sexual abuse at the hands of Jack Demlin. The material relied upon by the plaintiff in opposing the State's application for a stay includes an affidavit from RS, in which she describes being repeatedly sexually assaulted by Jack Demlin during the two years she was living with the Demlins, from 1957-1959. She also says she saw her little sister, CS, and the plaintiff being sexually assaulted in the same way by Jack Demlin. RS says the assaults involved Demlin forcing his fingers into their vaginas and forcing them to masturbate his penis. She also says this occurred on a weekly or fortnightly basis, over the time they were in foster care. In her affidavit, RS speaks about the circumstances in which the children were removed from the Demlins house and returned to Cherbourg, with the Matron from Cherbourg (Matron Pascoe) and Maude Phillips, who was a supervisor at the girls' dormitory, commenting on how skinny and sick they looked. RS also says that, a short time after returning to Cherbourg, she tried to tell Maude Phillips what Jack Demlin had been doing to her, CS and the plaintiff. She says "Maude Phillips then became instantly cranky and said that we were 'little liars' and that we must 'stop saying such lies'. She then said that 'Jack Demlin is a Christian man' and that we 'shouldn't talk about older people like that!'." RS says she

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18 Reasons [8].

19 Amended Statement of Claim para 7.

specifically asked Maude Phillips to tell Matron Pascoe, but does not know if she did.

[12] It appears from the material that, prior to a conversation the plaintiff had with RS in 2016, the plaintiff did not have a recollection of the sexual abuse she now describes. As part of the pre-proceeding procedures, the plaintiff was referred, jointly by her solicitor and the State's solicitor, to a psychiatrist, Dr Khoo, for the preparation of an independent psychiatric medico-legal report. The plaintiff was interviewed by Dr Khoo on 11 February 2020. In Dr Khoo's report dated 11 February 2020, she notes the following:

> "[The plaintiff] stated that her earliest memories were of being in the girls' dormitory at Cherbourg, feeling 'alone and afraid I didn't belong as the other girls all had brothers and sisters'. She stated that her first memory of her mother was when she was aged 6, when her mother took them out of Cherbourg to live for a period of six months. She stated that she remembered the Demlins and the house over the years, but did not realise why. She grew up thinking that she always lived in the dormitory. However, her friend, [RS], a number of years ago brought up the Demlins and she recalled saying '*why ... I thought I was always in the dormitory*'. [RS] then responded by saying '*don't you remember that we were sexually abused?*' She stated that she responded by thinking '*I didn't want to know, I was always vulnerable and scared and that this comment disturbed me for a long time*'. She stated that hearing the others speak of being sexually abused at some level resonated with her and that she did recall fragmented memories of a blue house. Her daughter, [K], who was present when [RS] made this comment burst into tears. She stated that since this conversation (which she agreed was likely to have been in 2016 as there is documentation in her general practitioner's notices of her cousin contacting her with some disturbing news about her childhood) that she had developed some flashbacks '*of lying on a bed, not being able to connect it at all.*' She also stated '*I used to be really scared sleeping alone particularly on the verandah which was really exposed and getting into bed with the others because I was fearful*'. On reflection she considered she was aged 5 to 6 at the time.
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> On repeated questioning over the next 2 3/4 hours [the plaintiff] did not proffer experiencing additional symptoms that she could recollect connected to Mr Demlin. However, towards the end of the interview when asked again if there was anything else that she could recall with respect to the alleged abuses, she proffered that '*at the back of my mind I know something happened to me*

> *because of my profound fear. I have little snippets of memory of being touched associated with fear*'. Towards the end of the interview when again asked about any direct memories associated with the abuses, she proffered a fragmented memory of blankets being lifted, following the statement of [RS]. Subsequent to the alleged abuse and prior to [RS's] statement, she did not recall directly experiencing any psychological or emotional symptoms, additional neurovegetative symptoms or post traumatic symptoms.[20]""

[20] **Allegations of physical abuse whilst living in the Girls' Dormitory:** As to the evidence of this abuse, the learned primary judge said:

> "[14] The plaintiff also describes suffering physical punishment and abuse whilst living at the girls' dormitory, including being locked in the "women's prison" as a child, for "something silly that I had done". The plaintiff describes receiving "severe floggings" from Maude Phillips, who was an Aboriginal lady who was the supervisor of the girls' dormitory while the plaintiff lived there. In her report of February 2020, Dr Khoo records that:
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> > "[The plaintiff] stated that life in the girls' dormitory was harsh as it was run by an indigenous woman called Maudie Phillips. She was the supervisor. She stated that as a child she felt targeted by Maudie, but as she grew older came to realise that Maudie was a harsh disciplinarian to all the girls. For minor infractions such [as] arguments, asking for more food, not wanting to eat food or being late they would be hit by a switch, made to stand on one foot for two hours or locked in the women's prison. [The plaintiff] stated that as a punishment for putting her foot down, she would be locked in the pantry for one to two hours. However, she stated that until today she loved the smell of the tea leaves and washing powder that was in the pantry, so that this was not a punishment as far as she was concerned. She stated that they were punished on a daily basis as far as she could recall by this woman. Their biggest fear was being placed in the women's jail for being naughty. Maudie would place five or six of the girls including the claimant, overnight in the jail which had a bucket and as far as she could recall a couple of blankets. They would become hysterical and terrified particularly when it got dark as the windows were very high up. However, she stated that from Year 6 when she began to attend school at Murgon, that the punishments by Maudie seem[ed] to reduce, possibly

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20 Affidavit of Mills, at pp 242-243 of the exhibits.

> because she was spending more time away from the settlement."[21]

[15] Whilst Dr Khoo describes the plaintiff's memories of the sexual abuse by Mr Demlin as "fragmented", she says in her report that the plaintiff "was able to provide a clear and coherent history of the verbal and physical abuse that she was subjected to at the hands of the supervisor of the girls' dormitory, Maudie Phillips".[22]

[16] The plaintiff was subsequently assessed by another psychiatrist, Dr Pant. Asked to comment in relation to Dr Khoo's opinion regarding the plaintiff's recollection of abuse, Dr Pant said:

> "[The plaintiff] reports that some memories from the time of her stay in the Demlin's house have been validated since she came in contact with her room mate at the time, [RS] who was also subjected to similar abuse. I am of the opinion, that [the plaintiff] does have some memory of the first episode of sexual abuse by Mr Demlin but it is patchy in nature as expected based on her age at the time. She has some memory of the sexual assault she was subjected to at the age of 6 while visiting her grandmother. I agree to some extent with Dr Khoo's statement that childhood memories are often fragmented up until the age of 8 and 9.
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> She however clearly remembers the physical and emotional abuse she was subjected to in Cherbourg girls dormitory over the years. She also remembers clearly the sexual assault she suffered as a 13 year old in her grandmothers house.[23]""

[21] **Objection to some of the evidence relied on by Ms Willmot:** The learned primary judge ruled on an objection by the State to the admissibility of the affidavits of the four deponents who had also lived and worked at the Girls' Dormitory. Her Honour admitted the affidavits of Ms Nielsen and Ms Watson as relevant to the adequacy of the system of monitoring and supervising children in the dormitories.[24] She summarised their evidence as follows:

> "[18] Two of these witnesses (Joan Nielsen, Aileen Watson) also describe being subject to, and witnessing, physical abuse at the Cherbourg dormitories, at the hands of Maude Phillips. Aileen Watson describes Maude Phillips as a "nasty woman" who hit her, and others, with a "switch" (a tree branch), among other harsh punishments. Joan Nielsen also refers to an incident of what she describes as sexual abuse, which involved Maude Phillips making a group of girls pull up their dresses and pull

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21 Affidavit of Mills, at p 243 of the exhibits.
22 Affidavit of Mills, at p 257 of the exhibits.
23 Affidavit of Mills, at pp 291-292 of the exhibits.
24 Reasons [24].

> down their pants to expose their genital areas; and an occasion on which she says she was denied medical treatment. Aileen Watson also describes being sexually abused whilst at Cherbourg, on two separate occasions, both involving teenage boys who lived in the boys' dormitory."

[22] Her Honour was also minded to admit Ms Collins' affidavit evidence to the extent that some parts of it might have been relevant to the issue of the "system".[25]

[23] **Allegations of sexual abuse when visiting grandmother:** As to these allegations, the learned primary judge observed:

> "[25] The plaintiff also alleges that she suffered sexual abuse on two further occasions. Both occurred when she visited her grandmother's house in Ipswich. On the first occasion, which the plaintiff says was when she was about 6 years old (so approximately 1960), she alleges she was sexually assaulted by her mother's brother, Uncle NW, who was then about 15 or 16.[26] The plaintiff says Uncle NW suddenly grabbed her, took her into the grandmother's bedroom, and forcefully threw her onto the bed. He removed her underwear, and lay on top of her attempting to force his penis inside her vagina. She does not believe he succeeded, because her grandmother came into the room and screamed loudly at him and he ran away. The plaintiff says in her affidavit that her grandmother "gave me as much support as she could, but I do not believe anything further eventuated" regarding this person.
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> [26] Although the State had thought that NW was no longer alive, the plaintiff's solicitors recently discovered that in fact he is. He is aged about 78. In July 2022, the plaintiff's solicitor telephoned NW and spoke to him and his wife. According to her diary note, she told him she acted for "Derek and Joanne Willmot in relation to a historical claim", but did not tell him that the plaintiff had commenced proceedings involving allegations of sexual abuse by him, before engaging him in conversation. From what he is recorded to have told the plaintiff's solicitor in this conversation, NW also spent most of his childhood and adolescence in the boys' dormitory at Cherbourg and was himself the victim of sexual abuse there.
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> [27] The second occasion occurred, again whilst the plaintiff was visiting her grandmother's house in Ipswich, when she was about 13 years of age (so in about 1967). By this time, she had left Cherbourg, and says, in her affidavit "I/we were temporarily staying/holidaying with my grandmother". She was no longer a State child. On this occasion, the plaintiff says that her cousin/great uncle Pickering, then about 50-60

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25 *Ibid*.

26 The estimates of NW's age at the time vary in the material. This is what appears in Dr Khoo's report (affidavit of Mills, at p 243 of the exhibits), and aligns with the date of birth for NW in the material annexed to the affidavit of Ross sworn 14 July 2022.

> years of age, sexually assaulted her by grabbing her and holding her, standing behind her, putting his hand up under her pyjama shirt and touching her breasts, before then putting his hand down inside her pyjama pants, touching her vagina and digitally penetrating her. There was no one else home at the time this occurred. The plaintiff did not tell anyone what had occurred. This person, Pickering, is assumed to be deceased, given the age the plaintiff estimates he was in 1967. In addition to the matters otherwise addressed in these reasons, there are obvious difficulties with the plaintiff's case in so far as these allegations are concerned, as they occurred when she/her family were staying, or holidaying with her grandmother, after having left Cherbourg, and no longer being a State child. The basis upon which the more general *Aboriginal Protection … and Restriction of the Sale of Opium Act 1897* could give rise to liability to monitor or supervise in this situation is not explained in the pleading."

[24] **When were the allegations raised?:** At this point, the learned primary judge recorded that allegations of sexual abuse by Jack Demlin were first raised with the State in June 2019 in a notice of claim under the *Personal Injuries Proceedings Act 2002* (Qld);[27] that the allegations of physical abuse at the Girls' Dormitory appear to have been first raised with the State in 2008 for the purposes of a Queensland Department of Communities' Redress Scheme;[28] and that the allegations of sexual abuse at the grandmother's residence were first raised in January 2020.[29]

[25] Relying on information in Ms Mills' affidavit, her Honour then observed that Jack Demlin had died in September 1962 and Tottie Demlin in December 1965[30] and that Maude Phillips had died in October 1982.[31] Further, the matron, Mrs Pascoe, and others who may have been able to give relevant information in relation to Ms Willmot's allegations, including Mr Sturgess, the Superintendent at Cherbourg from 1954 to 1961, were also deceased.[32] Given his age at the time of the alleged offending, her Honour thought it reasonable to assume that Uncle Pickering was deceased.[33] Finally, the learned primary judge reminded that, as she had already noted, NW was still alive.[34]

[26] **Factual investigations and enquiries made by the State:** The learned primary judge noted that Ms Mills deposed to various searches, requests for documents and enquiries that the State had made to obtain such documentary evidence as might be available relevant to Ms Willmot's claim. Speaking to the results of those measures, Ms Mills further deposed that there is no record in any of the documents of any abuse of Ms Willmot whilst she was at Cherbourg, living with the Demlins or visiting her grandmother.[35]

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27 Reasons [28].
28 Reasons [29].
29 Reasons [30].
30 Reasons [31].
31 Reasons [32].
32 *Ibid*.
33 Reasons [33].
34 *Ibid*.
35 Reasons [35].

[27] Whilst there were no documents recording any complaints made about the Demlins, there were, however, some documentary records of complaints in relation to Maude Phillips including an anonymous letter written in January 1951, the allegations in which were reported as having been investigated and found to be "completely unfounded".[36]

[28] Her Honour then set out the following conclusion to Ms Mills' affidavit:

> "107. There are no investigative materials available to the defendant. After an exhaustive search of the archival records none have been found that bear on the alleged abuse in the Amended Statement of Claim, said to have occurred in the period from 1957 to 1960. That was not less than 60 years ago and 59 years before the 2019 PIP notice of claim when the complaint was first raised.
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> 108. I reiterate Ms Phillips died in 1982. Searches have indicated that many other employees are dead – in fact or inevitably given their age – or infirm. The defendant has no access to them – as adult employees to test the plaintiff's allegations.
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> 109. Jack and Tottie Demlin are dead and I reiterate that there are no documents available from the plaintiff or other persons indicating that complaints of sexual or physical abuse occurred while the plaintiff and other persons were resident in the Demlin household.
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> 110. The plaintiff has stated to Dr Khoo and in the Redress Records that she had no recollection of the alleged sexual abuse by Jack Demlin prior to being advised by [RS] in 2016.
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> 111. It has not been possible for the State to locate any persons who were at the Cherbourg Dormitories at the same time as the plaintiff says she experienced the physical [abuse], as she has provided no dates of when any of the alleged abuse occurred and it is known from the endowment records that residents came and went at all times for various reasons."[37]

[29] At the hearing of the appeal, senior counsel for Ms Willmot described the factual context as having been "thoroughly expounded by her Honour" and in a way that did not warrant detraction or require addition.[38]

Reasons – The pleaded case

[30] The learned primary judge undertook a detailed analysis of the pleadings. Her Honour noted that the pleaded non-delegable duty owed by the State to Ms Willmot was to take all reasonable care to avoid her suffering harm and, in particular, harm in the form of psychiatric injury as a result of physical and sexual abuse whilst she was a State child or was subject to the APA. That duty, it was further pleaded, required the State to:

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36 Reasons [37], [38].
37 Reasons [39].
38 Transcript 1 – 5 ll37 – 39.

> "(a) protect her as plaintiff from sexual abuse when she was a foster child;
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> (b) ensure that reasonable screening and checks were carried out to assess the suitability of foster parents and in particular those who fostered the plaintiff;
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> (c) monitor the health and wellbeing of the plaintiff;
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> (d) supervise the plaintiff's placement with foster parents so as to avoid exposing her to harm of psychiatric injury from neglect, physical abuse and sexual abuse;
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> (e) perform checks on households to which she was allowed to visit whilst a resident at the Girls' Dormitory; and
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> (f) take reasonable steps to protect her from sexual and physical assaults whilst she was a resident at the Girls' Dormitory, whether she was physically present there or released to visit others."[39]

[31] That the State knew, or ought reasonably to have known, that there existed a foreseeable risk of psychiatric injury whilst she was a State child in foster care, in the Girls' Dormitory and whilst visiting her grandmother, was because, it was pleaded,

> "(a) the plaintiff was placed in the care of foster parents known to the State to be dangerous or unfit;
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> (b) the defendant had no procedures to screen prospective foster parents, or did not enforce existing procedures to screen prospective foster parents, before the plaintiff was placed with the Demlins;
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> (c) the State failed to monitor the plaintiff as a State child placed into care of foster parents which monitoring would have alerted them to the risk faced by the plaintiff;
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> (d) the defendant failed to perform checks before she was allowed to visit her grandmother's house; and
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> (e) the defendant failed to supervise or properly supervise the plaintiff when she was resident in the Girls Dormitory or at her grandmother's house."[40]

The learned primary judge noted that the State had requested particulars of (a) but that they had not as yet been provided.[41]

[32] Her Honour referred to a number of admissions made by the State relating to the placement of Ms Willmot with the Demlins and in the Girls' Dormitory and its responsibilities to her under the SCA and the APA.[42]

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39 Reasons [41]; Amended Statement of Claim para 4.
40 Reasons [42]; Amended Statement of Claim para 5.
41 Reasons [43].
42 Reasons [44]; Amended Defence para 1(b).

[33] As well, her Honour noted that the State also admits that it had a duty to take reasonable care to protect Ms Willmot from any foreseeable risk of harm and/or injury that might be occasioned to her while she was a State child or subject to the APA.[43] However, it does not admit the allegations as to the content of that duty. Nor does it admit the knowledge that it is alleged the State had. As to the latter, the State pleads that "due to the effluxion of time, namely in excess of 60 years, the defendant cannot ascertain the truth or falsity of the allegations and is prejudiced in the defence of the claim accordingly in the sense that there cannot be a fair trial of the issues in dispute".[44]

[34] The learned primary judge recorded that the State has not admitted the allegations of sexual abuse by Mr Demlin or at the grandmother's residence, or the allegations of physical abuse. Moreover, it pleads that the latter abuse, even if sustained by Ms Willmot, was not "serious physical abuse" or "psychological abuse" within the meaning of s 11A(6) of the *Limitation of Actions Act 1974* (Qld).[45] Hence any proceeding to recover damages in respect of it was statute-based.

[35] Her Honour made the following observations with respect to the pleading of negligence and breach of duty against the State:

> "[47] The plaintiff pleads that the State was negligent and in breach of its duty owed to the plaintiff because it:
>
> (a) failed to protect the plaintiff from Mr Demlin;
>
> (b) failed to monitor the plaintiff to ensure she was not subject to physical and sexual abuse whilst she was a State child or subject to the *Aboriginals Protection and Restriction of Sale of Opium Act 1897*;
>
> (c) failed to have in place any, or any adequate, system to ensure that people such as the plaintiff were not subjected to physical and sexual abuse;
>
> (d) failed to ensure the foster carers of the plaintiff were properly trained in the care and treatment of children and appropriate means of feeding children;
>
> (e) failed to prevent the neglect of the plaintiff whilst she was a foster child;
>
> (f) failed to ensure the plaintiff was properly supervised by a responsible adult whilst she was visiting her grandmother; and
>
> (g) failed to institute checks of the household to which the plaintiff was travelling when she was allowed to visit her grandmother, while she was a State child or subject to the *Aboriginals Protection and Restriction of Sale of Opium Act 1897*.[46]

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43 Reasons [45]; Amended Defence para 3.
44 *Ibid*.
45 Reasons [46]; Amended Defence para 7.
46 Amended Statement of Claim para 15.

> [48] It can be seen that the wrongful acts alleged – of sexual abuse by Jack Demlin; physical abuse at the girls' dormitory, principally at the hands of Maude Phillips; and sexual abuse by NW and Pickering at the grandmother's house – are critical to the plaintiff's case against the State.
>
> [49] Because of its pleaded inability to ascertain the truth or falsity of the allegations of sexual abuse and physical abuse, the State does not admit the allegations of breach of duty. The State also pleads that, even if it is established that it breached a duty of care owed to the plaintiff, causation cannot be shown, including because the steps the plaintiff alleges were required in order for the defendant to discharge its duty of care would not have prevented Demlin's alleged sexual assaults and the other sexual assaults (at the grandmother's house), if proven; and such failures as alleged by the plaintiff were not causative of the harm suffered by her.[47]"

[36] As to the pleading of harm caused, the learned primary judge noted:

> "[50] The plaintiff pleads that, as a result of the sexual assaults she experienced trauma, profound fear, anxiety, panic attacks, ongoing intrusive thoughts, dissociative periods particularly during school hours; impaired ability to concentrate, overwhelming feelings of fear and dread; nightmares, emotional and mental exhaustion and feelings so overwhelming that she had trouble breathing. She pleads that she has been diagnosed with a psychiatric injury, namely Post Traumatic Stress disorder and psychiatric symptoms.[48]
>
> [51] Each of the suffering of symptoms, the development of a psychiatric injury and causation are put in issue by the State."[49]

Reasons – Relevant principles and authorities

[37] The learned primary judge cited[50] the decision of the High Court in *Jago v District Court (NSW)*[51] for the proposition that the court has a broad discretion to stay a proceeding permanently as "an incident of the general power of a court of justice to ensure fairness".[52]

[38] Her Honour gained considerable assistance from the decision of Bell P (as the Chief Justice of New South Wales then was) in *Moubarak by his tutor Coorey v Holt*.[53] The President drew on a number of High Court decisions including *Jago* and also *Williams v Spautz*,[54] *Walton v Gardiner*[55] and *Batistatos v Roads and Traffic*

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47 Amended Defence para 8A.
48 Amended Statement of Claim paras 16, 17.
49 Amended Defence para 9.
50 Reasons [52].
51 (1989) 168 CLR 23.
52 Per Mason CJ at 31. Reference was also made to provisions which confirm the discretion: *Civil Proceedings Act 2011* (Qld) s 7(4) and *Uniform Civil Procedure Rules 1999* r 16(g).
53 (2019) 100 NSWLR 218 at [71].
54 (1992) 174 CLR 509.

Authority (NSW),[56] to formulate the principles governing permanent stays of proceedings which her Honour set out in her reasons, namely:

> "(1) the onus of proving that a permanent stay of proceedings should be granted lies squarely on a defendant;
>
> (2) a permanent stay should only be ordered in exceptional circumstances;
>
> (3) a permanent stay should be granted when the interests of the administration of justice so demand;
>
> (4) the categories of cases in which a permanent stay may be ordered are not closed;
>
> (5) one category of case where a permanent stay may be ordered is where the proceedings or their continuance would be vexatious or oppressive;
>
> (6) the continuation of proceedings may be oppressive if that is their objective effect;
>
> (7) proceedings may be oppressive where their effect is 'seriously and unfairly burdensome, prejudicial or damaging';
>
> (8) proceedings may be stayed on a permanent basis where their continuation would be manifestly unfair to a party; and
>
> (9) proceedings may be stayed on a permanent basis where their continuation would bring the administration of justice into disrepute among right-thinking people. [references omitted]"[57]

Her Honour also noted[58] that Bell P concluded[59] that "[o]ne circumstance in which a permanent stay will be appropriate is where it is demonstrated on the balance of probabilities, that it will not be possible to obtain a fair trial".

[39] The learned primary judge acknowledged that lengthy delay, of itself, does not justify a stay.[60] As Mason CJ had said in *Jago*, it need be shown that the lapse of time is such that any trial is necessarily unfair.[61]

[40] Her Honour then referred to a number of decided cases which, in her view, "emphasise the difficult, almost impossible, position that a defendant is placed in when, as a consequence of the passage of time, they are unable to give, or obtain, instructions in relation to the critical allegation(s), before or during the trial."[62] By way of illustration, she said:

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55 (1993) 177 CLR 378.
56 (2006) 226 CLR 256.
57 Reasons [53].
58 Reasons [54].
59 At [88].
60 Reasons [56].
61 At 34.
62 Reasons [58].

"[58] … In *Moubarak*, for example, the plaintiff brought a civil claim for damages against Moubarak, her uncle, for sexual assault alleged to have occurred in 1973 or 1974, when she was 12 years old. The alleged assaults occurred some 42 or 43 years prior to commencement of proceedings. It was common ground that Moubarak had advanced dementia and could not participate in the proceedings, either through the giving of instructions or evidence. At no time prior to the onset of his dementia was the defendant ever confronted by the plaintiff with the detail of the allegations of sexual assault, and there was thus no record of his response to them.[63] As Bell P said:

> "158 Whilst it is correct that a number of forensic steps would have been open to the defendant's tutor [litigation guardian] in defending the proceedings, such as cross-examining the plaintiff, exploring potential inconsistencies in her accounts to the police, Ms Evans [a friend whom the plaintiff claimed she had told about the assaults, in about 1987] and her various doctors, cross-examining Ms Evans if she were called by the plaintiff, and himself giving evidence (for what it would be worth) to the effect that the defendant had never mentioned the plaintiff to him, none of these matters, in my opinion, would make up for the fact that the defendant was, because of his mental condition, at all relevant times utterly in the dark about the allegations made against him and quite unable to give instructions in relation to them. Nothing that a trial judge could do in the conduct of the trial could, in my opinion, relieve against these consequences.
>
> 159 Notwithstanding the existence of his tutor and his tutor's ability to participate in the trial in the way I have described above, in substance, on the particular facts of this case, the trial would be taking place in the defendant's involuntary absence and that would, in my opinion, produce manifest unfairness to the defendant and bring the administration of justice into disrepute, notwithstanding that it would result in the unfortunate consequence of the plaintiff not being able to pursue her claim.

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63 This may be contrasted with two of the cases referred to in *Moubarak*: *Estate Judd v McKnight (No 4)* [2018] NSWSC 1489 (in which, although the alleged perpetrator was dead, there was evidence of his instructions to his solicitor and from intercepted telephone conversations which revealed that he largely accepted that he had in fact engaged in the conduct alleged) (*Moubarak* at [136])) and *Anderson v Council of Trinity Grammar School* [2018] NSWSC 1633 (in which the central issue in the proceedings was not whether the alleged assaults had occurred, and indeed four of the assaults were admitted to have occurred and the teacher was convicted and sentenced in respect of them) (*Moubarak* at [137]).

> 160 Such a conclusion does not imply any level of culpability on the plaintiff's part in bringing her claim when she did or in making her complaint to the police at the time she did. But the (non-culpable) delay that s 6A of the *Limitation Act* retrospectively permits carries with it the possibility (realised, in my opinion, on the facts of the present case) that a fair trial will not be possible…."

[41] Reference was also made by the learned primary judge to four other decisions of courts in Australia in which permanent stays had been granted. They were the decision of the Court of Appeal of New South Wales in *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ*[64] and the decisions at first instance in *Ward v The Trustees of the Roman Catholic Church for the Diocese of Lismore*,[65] (Beech-Jones J of the Supreme Court of New South Wales), *Chalmers v Leslie*,[66] (Martin J of the Supreme Court of Queensland), and *GMB v UnitingCare West*,[67] (Bowden DCJ of the District Court of Western Australia).

[42] With regard to *GLJ*, her Honour observed:

> "[59] … [T]he plaintiff in January 2020, commenced proceedings for damages against the Lismore Trust, arising from an allegation that, in 1968, she was sexually assaulted by a priest of the Roman Catholic Church, Father Anderson. The claim was put on two bases: first, that the Lismore Trust was negligent, having breached a duty of care owed to the plaintiff in circumstances where members of the clergy within the Diocese knew, or ought to have known, that the priest had sexually abused other children; and, secondly, on the basis of vicarious liability for the priest's conduct. The priest died in 1996. At the time of his death, neither the priest, nor the Lismore Trust was on notice of the allegation of sexual assault on which GLJ's causes of action relied. Brereton JA observed that although it may be that the passage of time did not unduly compromise the Lismore Trust's ability to meet allegations that it was vicariously liable for whatever the priest may have done or that, being on notice of his paedophilic propensities (of which there was evidence in that case) it breached its duty of care in exposing young parishioners to him, that was not the point. As his Honour said, at [4]:
>
> > "Deprived of the ability to obtain any instructions from Anderson by his death, the Lismore Trust has no means for investigating the facts. The fact that Father Anderson may, by his own admission, have engaged in misconduct against young males, does not begin to establish that he assaulted GLJ [a young female] as alleged. Even if he

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64 [2022] NSWCA 78.
65 [2019] NSWSC 1776.
66 (2020) 6 QR 547.
67 [2020] WADC 165.

would not have been called as a witness, a matter which I would not regard as foreclosed, the circumstance that **the foundational allegation of the assault was one which the Lismore Trust had no way of investigating and ascertaining whether or not the alleged assault had taken place, let alone contradicting it, has the consequence that, regardless of the veracity and credibility of GLJ, the trial could not be a fair one**. [emphasis added]"

[60] Mitchelmore JA made the same point, at [100], [102] and [103], and also said:

> "118 The passage of time of some 54 years since the events the subject of GLJ's allegations does not of itself warrant the grant of a permanent stay. It is the **consequences of that passage of time which place the case in the exceptional category, having regard to the particular factual circumstances**.
>
> 119 The Lismore Trust was not on notice of GLJ's allegation of sexual assault before 2019. On her own account, there were no witnesses. There are no documents dating back to or around the time of the alleged assault that detail or otherwise refer to what GLJ alleges occurred.
>
> 120 The issue of whether Father Anderson sexually assaulted GLJ is **foundational to the causes of action pleaded** against the Lismore Trust. Accordingly, although Father Anderson is not a defendant, he is a **critical witness**. Father Anderson died in 1996, before the Lismore Trust was on notice of the allegations. It follows that the Trust did not have an opportunity to confront him with the detail of GLJ's allegations and obtain instructions for the purposes of its defence of her claims, nor will it be able to call him as a witness if it so chose. The latter was not perceived to present a difficulty in *Gorman*,[68] where the alleged perpetrator was also deceased. However, some inquiries were made of him before his death; and there was evidence of telephone conversations between him and one of the complainants, which had been recorded… In the present case, Father Anderson died before any inquiries could be made; and there is no other material that sheds light on his putative response. [emphasis added]"

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68 *Gorman v McKnight* [2020] NSWCA 20.

> [61] In *Lismore Trust v GLJ*, the plaintiff foreshadowed reliance on tendency evidence, in the form of unsworn statements from four witnesses, each of whom alleged that they had also been sexually abused by Father Anderson in the mid-1960s. As to that evidence, the Court of Appeal (Mitchelmore JA, MacFarlan and Brereton JJA agreeing) accepted that the difficulty the priest's death created in the case was highlighted by the foreshadowed tendency evidence, the details of which were also not put to the priest before he died. In light of other evidence available, it was accepted the statements from other witnesses may have been admissible, as tendency evidence, probative of the fact that the priest was disposed to paedophilia. But then in terms of whether that would support proof of a fact in issue in the proceedings commenced by GLJ, the priest's death before any of the allegations had been put to him meant that the defendant, the Lismore Trust, did not have "a meaningful opportunity to engage with that question or the material more generally" (at [125]).
>
> [62] Although at first instance the stay had been refused, the Court of Appeal concluded that it was not possible to have a fair trial and a permanent stay was granted."

[43] It is unnecessary for present purposes to refer to her Honour's discussion of the three decisions at first instance. It remains to note that the High Court had granted special leave to appeal in *GLJ* on 18 November 2022. At the hearing of the present appeal, neither party urged the Court to defer determination of it until the High Court has delivered judgment in *GLJ*.[69]

Reasons – Application of the principles to the circumstances of this case

[44] At the outset, the learned primary judge referenced a submission for the State to affirm that she had not approached the determination of the application from the perspective that Ms Willmot's prospects of success were a relevant consideration. Her Honour reiterated that in the cases in which a permanent stay had been granted due to the ***consequences*** of a lengthy passage of time, it had been concluded that a fair adjudication of the serious allegations made was not possible.[70] She also made the point that the abuse allegations are critical or "foundational" to establishing liability on the part of the State.[71]

[45] At this point, I propose to extract from the reasons for judgment, the process of reasoning applied by the learned primary judge in order to determine the application. It is convenient to do so in view of the focus in the submissions on appeal on certain steps in the reasoning.

[46] Her Honour continued:

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69 Transcript 1-18 ll39-40 (Appellant); 1-24 ll25-29 (Respondent).

70 Reasons [68]. Her Honour also referenced *Connellan v Murphy* [2017] VSCA 116 at [65] in this context. At the hearing of the appeal senior counsel for Ms Willmot submitted that it was correct for her Honour to have placed emphasis on the word "consequences": Transcript – 13 ll18 – 20.

71 Reasons [69].

"[70] The State goes on to submit, relevantly, that the passage of time is such that it cannot meaningfully respond to the allegations, and any trial would not be fair, because, inter alia:

(a) those alleged to have perpetrated abuse upon the plaintiff are long deceased, with the sole exception of NW, who was recently located and is aged 78;

(b) Ms Mills, the solicitor for the State, has reviewed all available relevant documentation relating to the plaintiff and the periods of time that she lived with the Demlins, at the girls' dormitory or when she visited her grandmother and she could not locate any record of any alleged abuse of the plaintiff;

(c) Ms Mills has also reviewed the Department of Communities (Office for Aboriginal and Torres Strait Islander Partnerships) (DATSIP) records in relation to the Demlins, and was unable to identify any complaint made about them by any person;

(d) the only document which has been found relating to a complaint about Maude Phillips significantly pre-dates the plaintiff's time at the girls' dormitory;

(e) extensive medical records for the plaintiff have been obtained, but none reveal any reference to the events the subject of the plaintiff's claim; and

(f) persons who otherwise might know something about the matters alleged by the plaintiff are also deceased.

[71] In short, the effect of the State's submissions is that it has no way of investigating or ascertaining whether or not the alleged assaults and/or abuse occurred, let alone contradicting the plaintiff's allegations in this regard, because there are no documents which address these allegations; and the pivotal witnesses – with capacity to provide instructions to the State – are, with only one exception (NW), deceased. Further, in relation to the allegation of a failure to monitor and supervise, the State submits that a fair trial cannot occur because the witnesses who may have been able to provide instructions or evidence in relation to the procedures which were (or were not) in place at the Cherbourg dormitories are deceased.

[72] The State also submits that further prejudice arises because of the nature of the plaintiff's claimed injury – being a psychiatric injury – because of what the State submits would be the insurmountable difficulty of "disentangling" the effects of the events which are the subject of the claim in this proceeding, from other life stressors identified in, for example, Dr Khoo's report.[72]

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72 A prejudice found to support, among other things, the refusal of an application to extend the limitation period: see *Oram v BHP Mitsui Coal Pty Ltd* [2015] 2 Qd R 357 at [100]-[101].

[73] For the plaintiff, significant emphasis is placed on the availability of evidence from RS, who says that she witnessed the sexual abuse of the plaintiff by Jack Demlin. The plaintiff submits this is a critical distinguishing feature, placing this case in a different category to those discussed above. The plaintiff submits this is an answer to the State's submission, that the death of Jack Demlin results in unfairness, and prejudice, because it cannot put the allegations to Jack Demlin. The plaintiff submits there is no unfairness, because there is a witness, RS, who can be cross-examined at a trial.

[74] The plaintiff also submits there is a "substantial body of evidence available from the [plaintiff] in this case", and that the State has within its means the ability to call evidence from other residents of the dormitories and other supervisors, such as Eva Collins, such that it cannot be concluded in this case that the passage of time has had the consequence that the defendant cannot have a fair trial. The plaintiff submits there is a public interest in enabling the present proceedings to continue, particularly having regard to the fact that the defendant is the State of Queensland, not an individual.

[75] Counsel for the plaintiff is critical of the State for the level of disclosure made to date. This was emphasised in particular by reference to records relating to NW. Counsel for the plaintiff refers to the discovery of NW, by the plaintiff's solicitor, as evidence of the fact that the State cannot say it has undertaken all possible enquiries.

[76] Whilst it remains somewhat unclear exactly what documents the State, in a particular capacity, is able to obtain and then to disclose in the context of a legal proceeding, I accept, having regard to Ms Mills' affidavit, that extensive searches have been undertaken of the archival records held by the State, and other records (including medical records of the plaintiff) over a long period of time. Those searches include specific documents in relation to Jack and Tottie Demlin. Of course it is possible that some further searches could be undertaken, and some further documents may emerge, as was the case in relation to NW. That *might* assist the plaintiff in relation to her allegations in so far as they concern the system (or lack of one) in place for care of State children. But that would not change the fact that the key witnesses, with the ability to provide instructions and, if necessary and appropriate, give evidence, in relation to the foundational allegations of abuse, have been long deceased (apart from NW, as already discussed).

[77] It is that factor which, having regard to the authorities discussed above, has ultimately persuaded me, after careful consideration, that this is a case in that exceptional category where a permanent stay is warranted. Deprived of the ability to obtain any instructions from Jack or Tottie Demlin, Maude Phillips or Uncle Pickering, in particular, the State has no

means for investigating the foundational facts underpinning the alleged wrongful acts which are critical to establishing liability on the part of the State. Those allegations were never put to any of the alleged perpetrators while there alive, and there is therefore no record of any response from them. There are no documents bearing upon the abuse allegations which could overcome this.

[78] It may have been possible, on the basis of documentary records, and evidence of others who were required to live, or worked, at the Cherbourg dormitories at the time the plaintiff lived there, for the State to deal with the allegations in so far as they concern the "system", or lack of one, for monitoring and supervising children, such that it could not be concluded, in that respect, that the trial was unfair. However, in so far as the critical facts, that is, the alleged wrongful conduct for which the plaintiff seeks to make the State liable, are concerned, the *consequences* of the passage of some 60 years since those events are said to have occurred, and the fact that the State now does not have any opportunity to confront the alleged perpetrators to obtain instructions for the purpose of defending the claim, let alone calling those persons as witnesses, are such that any trial would be fundamentally unfair, and there is nothing that a trial judge could do to overcome that unfairness.[73]

[79] The fact that NW is still alive does not, in my view, support a different conclusion. Whilst the State and the plaintiff are able to speak to him, and ask him about the allegations, he is a 78 year old man, who would be asked about something he is alleged to have done when he was a teenager, aged 15 or 16, more than 60 years ago.[74] It would, I accept, be insurmountably difficult to extricate this one event, from the allegations of what happened at the Demlins' house, and from the broader allegations of what the plaintiff says she endured whilst at the girls' dormitory, let alone the other subsequent life events referred to in Dr Khoo's report, in terms of causation.

[80] In so far as the plaintiff emphasises that there is, unusually, a witness to the abuse alleged at the hands of Jack Demlin, for the reasons given in *Lismore Trust v GLJ* at [100] and also in *Chalmers v Leslie* at [31], far from this overcoming the unfairness of the trial, which flows as a consequence of the lengthy passage of time since the alleged events occurred, and the death of Jack Demlin, the evidence of RS highlights the unfairness, and would, I accept, only render the trial more unfair. This is because the State is also deprived of the opportunity [of] obtaining instructions from Jack Demlin about the allegations made by RS. The ability to cross-examine the

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73 See *Moubarak* at [158].

74 See also *Connellan v Murphy* [2017] VSCA 116 at [57] and [59].

> plaintiff, and RS, does not cure this impediment. The State would be cross-examining in the dark. As Martin J said in *Chalmers v Leslie* at [33], "[a]n unfair trial cannot be made fair on the basis that something might emerge from cross-examination of another party".
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> [81] I reiterate that this conclusion is reached having regard to the *consequences* of the passage of time, and does not involve any criticism of the plaintiff, in circumstances where there is no limitation period which applies to a claim of the kind she seeks to bring. The consequence, that this decision results in the plaintiff not being able to pursue her claim, weighs heavily. However, the time that has passed, since the events in question, and the consequences of that passage of time for the availability of witnesses and evidence, is such that a fair trial is not possible and, accordingly, the exceptional step of granting a permanent stay of the proceedings is warranted."

[47] Six of the seven grounds of appeal are referenced to findings in certain of these paragraphs. However, the parties' written outlines also addressed several underlying issues of principle. I propose to consider those issues before turning to the specific grounds of appeal.

Constraint upon the discretion to stay a proceeding permanently

[48] In her Amended Outline of Argument, Ms Willmot accepted that the principles that apply to the grant of a permanent stay under the discretion confirmed by s 11A(5) are those set out by Bell P in *Moubarak*.[75] The State agreed that that was so.[76]

[49] However, there is a contention in the first-mentioned outline that the exercise of this discretion is, in effect, limited by an elevated constraint, namely, that it would be **unjustifiably oppressive** to the defendant to permit the proceeding to continue.[77] This contention is resisted by the State.[78]

[50] In my view, this contention cannot be sustained. The language in which s 11A is enacted neither expresses nor implies that such a constraint applies to the discretion to stay permanently confirmed by s 11A(5). Moreover, extrinsic material to which recourse may be taken for interpretive purposes, indicates that no such constraint was intended. In referring to Recommendation 87 of the Royal Commission into Institutional Responses to Child Sexual Abuse, the Explanatory Notes for the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016* state that "The removal of the time limits in no way impedes the court's power to stay proceedings".

[51] At the hearing of the appeal, Mr Walker SC who presented oral submissions for Ms Willmot but was not an author of the Appellant's Amended Outline of Argument, clarified that a category of an "acceptable oppressive trial" was not being posited.[79] Furthermore, he offered no criticism of the adoption by the learned

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75 Appellant's Amended Outline of Argument paras 40, 41.
76 Respondent's Amended Outline of Argument para 7.
77 Appellant's Amended Outline of Argument para 7(a).
78 Transcript 1-22; l44 – 1-23 l16.
79 Transcript 1-34 ll1-18.

primary judge of the principles set out by Bell P in *Moubarak* or of her Honour's analysis of relevant principles and authorities in her reasons for judgment.

[52] I would add that I consider that the discretion to stay permanently confirmed by s 11A(5) is not otherwise narrowed by its legislative context. The removal of the limitation period for actions for damages for child abuse effected by s 11A(1) does not, in my view, have the consequence that the discretion is not to be exercised in circumstances where it would otherwise be exercised, with the objective of permitting such an action to continue in order to let "claimants have their opportunity to tell their stories."[80] In other words, primacy is not accorded to the absence of a limitation period over the discretion to stay permanently, or *vice versa*.

The rule in *House v The King*

[53] The question whether the rule in *House v The King*[81] is applicable to appellate review of an exercise of the discretion to stay permanently a proceeding, has been adverted to in several of the appeals in New South Wales. In *Murakami v Wiryadi*,[82] the rule was applied in the absence of elaboration by counsel for the appellant of a submission that it did not apply.[83] In *Gorman v McKnight*,[84] counsel for the appellant took the position that he needed to demonstrate a *House v The King* error in order to succeed.[85] A like position was taken by counsel for the appellant in *GLJ*.[86]

[54] In the present appeal, the written outlines for Ms Willmot merely note the scope for debate on the topic.[87] However, the State submits that error of a kind described in *House v The King* must be shown.[88]

[55] Any need for this Court to resolve the question has been averted by the submission advanced by Mr Walker SC at the hearing that appealable errors in the *House v The King* sense could be identified in the reasons at first instance.[89] They were errors on which this Court should act, it was submitted.

The Grounds of Appeal

[56] The notice of appeal contains the following grounds of appeal:

> "1. The learned trial judge erred in law in attributing excessive weight in the determination of whether a permanent stay should be granted to the availability or capacity of the perpetrators to provide instructions to the defendant or give evidence at trial as opposed to the purpose of the provisions of s11A of the *Limitation of Actions Act* 1974 (Qld) and the importance of providing access to justice for survivors of serious physical and sexual abuse.

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80 Appellant's Amended Outline of Submissions para 34.
81 (1936) 55 CLR 499.
82 [2010] NSWCA 7; (2010) 109 NSWLR 39.
83 At [35].
84 [2020] NSWCA 20.
85 At [49].
86 At [79]. The applicant for special leave in that case seeks to challenge that proposition: [2022] HCATrans 206 at 182-215.
87 Appellant's Amended Outline of Argument para 70; Appellant's Amended Reply para 12.
88 Respondent's Amended Outline of Argument para 10.
89 Transcript 1-12 ll23-26; 1-19 ll20-22.

2. The learned trial judge erred in concluding at paragraph [78] of the Reasons for Judgement ("the Reasons"), that the inability of the defendant to confront the alleged perpetrators to obtain instructions or to give evidence in relation to the allegations of the plaintiff was a sufficient basis to determine that any trial would be fundamentally unfair.

3. The learned trial judge erred in concluding at paragraph [77] of the Reasons, that the defendant had no means for investigating the foundational facts underpinning the alleged wrongful acts which were critical to establishing liability against the defendant as the finding was against the evidence and the weight of evidence.

4. The learned trial judge erred in finding at paragraph [79] of the Reasons, that the defendant did not have the capacity to confront the alleged perpetrators to obtain instructions or to give evidence in relation to the allegations of the plaintiff relating to NW, as NW was still alive, had been interviewed by the plaintiff's solicitor and NW had allegedly recalled abuse that he had suffered in the boy's dormitory at Cherbourg.

5. The learned trial judge erred in finding at paragraph [79] of the Reasons that it would be "insurmountably difficult to extract [the event relating to NW] from the allegations of what happened at the Demlin's house, and from the broader allegations of what the plaintiff says she endured at the girl's dormitory, let alone the other subsequent life events referred to in Dr Khoo's report, in terms of causation", as the finding was against the evidence and the weight of evidence.

6. The learned trial judge erred in finding at paragraph [80] of the Reasons that the evidence of RS as witness to the abuse of the plaintiff by Jack Demlin "highlights the unfairness" faced by the defendant and serves to "render the trial more unfair" because the defendant was deprived of taking instructions from Jack Demlin, as the finding fails to acknowledge that the evidence is supportive of the plaintiff's evidence that she was abused by Demlin and forms a basis for the defendant to investigate and substantiate the plaintiff's allegations.

7. The learned trial judge erred in the exercise of the discretion to order a permanent stay of the plaintiff's proceedings in that the exercise of that discretion miscarried as the learned trial Judge did not take into account a relevant material consideration or mistook the facts as described in paragraphs 1 to 6 above."[90]

[57] Grounds 1 to 3 are dealt with together in the Appellant's Amended Outline of Argument whereas the other grounds are dealt with separately in that document. The Respondent's Amended Outline of Argument follows a similar pattern. It is convenient to consider the grounds in that sequence.

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90 AB 1 – 2.

Grounds 1 to 3

[58] In developing the argument in favour of these grounds, the submissions for Ms Willmot take up the factor which the learned primary judge identified as the one that placed the proceeding in the category of cases that warrant a permanent stay. That factor is the absence of means whereby the State could investigate the foundational facts underlying the alleged wrongful acts, arising from its inability to obtain instructions from the Demlins, Maude Phillips or Uncle Pickering. Furthermore, her Honour noted that those allegations were never put to those individuals while they were alive; that there is, therefore, no record of any response from them; and that there are no documents bearing upon the abuse allegations which could overcome that.[91]

[59] The submissions then propose that at least four categories of case involving allegations of sexual abuse exist where a permanent stay might be considered. The present case is within the fourth category, namely, a civil claim for damages based on direct negligence alone where an institution is the defendant.[92] In such a case, it is submitted, proof of the allegation of abuse is "just one of a number of factual issues" that a plaintiff must prove in order to succeed in proving causation and damage.[93] It is further submitted that because, in this case, there is no allegation of vicarious liability on the part of the State, evidence from the Demlins, Phillips and Uncle Pickering would "form only a component part of" Ms Willmot's case.[94] These submissions culminate in a proposition that the learned primary judge erred in treating the absence of these "foundational witnesses" as being determinative.[95]

[60] I am disinclined to accept those submissions insofar as they contend that the identity of the individual or institution whom it is sought to make legally liable for damages for child sexual or other physical abuse determines whether or not proof of an allegation of the same is critical to the claimant's case. That is not so. If damages are sought for abuse of that kind, then proof that it occurred is indispensable to success whether or not the individual who committed it is a party to the proceeding.

[61] Furthermore, the ultimate proposition is apt to misstate what the learned primary judge did. Her Honour did not rely on the absence of "foundational witnesses" of itself as categorising the case as exceptional. It was to "foundational allegations" and "factual facts" to which her observations were addressed. In her Honour's analysis, what was relevant for categorisation was the State's inability to respond in a trial to such allegations because it had no means for investigating such facts. It could not now obtain instructions and, if necessary, call evidence from those key witnesses. Nor had the then-unmade allegations been put to them while they were alive and their responses recorded.[96]

[62] In oral submissions, it was argued for Ms Willmot that it was unrealistic to assume that persons against whom allegations of sexual or other physical abuse are made, would facilitate the investigation of underlying facts. They might invoke a right to silence or privilege against self-incrimination and not participate in any

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91 Appellant's Amended Outline of Argument paras 42, 43; Reasons [77].
92 Appellant's Amended Outline of Argument para 44.
93 *Ibid* para 46.
94 *Ibid* para 57.
95 *Ibid* para 48.
96 Reasons [76], [77].

investigation. Furthermore, they might decline to testify or, if they did, their answers to questions might be so tailored by the exercise of judicial discretions as not to add anything of substance to the evidence.[97]

[63] It may be accepted that in a particular instance, an individual against whom such allegations are made might invoke such a right or privilege, decline to testify, or fail to add to the substance of the evidence. However, that does not, in my view, warrant an assumption that such is likely to occur. Nor does it justify a moderation of the significance of the State's inability to investigate foundational facts in the exercise of the discretion.

[64] An allied criticism made orally of paragraph 78 of the reasons for judgment is that it asserts an irrelevance, namely, that the State lacked the opportunity to confront the alleged perpetrators to obtain instructions for the purpose of defending the claim. That circumstance is irrelevant as a matter of principle, it is submitted, unless it can be seen that a defendant in that circumstance would be in a materially different position were the perpetrators alive.[98] This criticism invites the court to engage in speculation as to what individual alleged perpetrators who are deceased persons might have done whether or not there is a sufficient evidentiary basis to speculate reliably in that regard. I would reject the criticism on that account. Furthermore, insofar as it implies that there is some onus on a defendant to prove such a material difference, it is unsupported by authority.

[65] A further oral submission was to the effect that proceedings routinely proceed to trial where a negligent wrongdoer has died in the incident that caused the plaintiff harm. It would be a "gruesome irony", it was submitted, if the inability of the wrongdoer's estate or insurer to obtain instructions from the deceased about the incident was considered to be sufficient to prevent the institution of such proceedings or their continuation to trial.[99] It was further submitted that such an irony would bring the administration of justice into disrepute.

[66] That submission has appeal where the proceeding is brought within a limitation period of several years and there is a sufficiency of contemporaneous evidence, including evidence in a physical form, to permit a fair trial. However, as the decision of the High Court in *Batistatos* demonstrates, even a proceeding brought within the applicable limitation period (in that case brought in the 29th year of a 30 year limitation period) will be stayed if, as a consequence of delay, the continuation of the proceeding would be oppressive to the defendant. Thus, the submission loses attraction when oppression of that kind is established.

[67] I now turn to a submission made on behalf of Ms Willmot to the effect that there is sufficient useful evidence available now on which to conduct a trial.[100] In regard to the alleged sexual and other physical abuse by the Demlins, reference is made to direct evidence from Ms Willmot and also evidence of RS who describes repeated sexual offending by Jack Demlin against her during the two years that she lived with them from 1957 to 1959 and her observations of similar assaults by him inflicted on her younger sister CS and on Ms Willmot.[101] As to Maude Phillips'

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97 Transcript 1 – 7 ll7 – 44; 1 – 14 l45 – 1-15 l11.
98 Transcript 1 – 15 l42 – 1-16 l24.
99 Transcript 1 – 9 ll20 – 31.
100 Appellant's Amended Outline of Argument para 49.
101 *Ibid* para 50.

alleged offending, the submissions refer to the evidence of Ms Willmot, the received evidence of Ms Nielsen, Ms Watson and Ms Collins, and to the correspondence in 1951.[102]

[68] This is evidence that would be called in the plaintiff's case. It might well assist Ms Willmot to establish her claim. However, the availability of it to her does not assure a fair trial to both parties. It does not repair the State's inability to investigate or obtain instructions, lead evidence or cross-examine about the foundational allegations.

[69] For these reasons, I am unpersuaded that Ms Willmot has, by these grounds of appeal, established error on the part of the learned primary judge. Her Honour correctly identified,[103] by reference to applicable authority, that the unavailability of persons who could give instructions and/or evidence about critical aspects of liability can result in the:

> "…practical inability of reaching a decision based on any real understanding of the facts, and the practical impossibility of giving the defendants any real opportunity to participate in the hearing, to contest them or, if it should be right to do so, to admit liability on an informed basis."[104]

[70] Were a trial to proceed here, the State would be in a position akin to that in which the Trustees in *Ward* were placed as described by Beech-Jones J thus:

> "…The Trustees would not have any "real opportunity to participate in the hearing, or contest them, or…to admit liability on an informed basis" with the consequence that any hearing would be "[n]o more than a formal enactment of the process of hearing and determining the plaintiff's claim"."[105]

To adopt the terminology of Keane JA in *Page v The Central Queensland University*,[106] such a trial would risk being "a solemn farce".

Ground 4

[71] There is a difficulty with this ground of appeal as formulated in that it is apt to imply that the learned primary judge was under the misapprehension that NW, like the Demlins, Maude Phillips and Uncle Pickering, was deceased. Clearly that was not so. Her Honour acknowledged numerous times in the reasons for judgment that NW was alive.[107]

[72] The written submissions advanced for Ms Willmot in support of this ground take a different tack. They contend that her Honour ought to have found that a permanent stay should not be granted until such time as the State had established that NW was wholly incapable of providing a version of events.[108]

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102 *Ibid* para 51.
103 At Reasons [57].
104 *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 405 – 406; cited with apparent approval by the High Court in *Batistatos* at [54] and by Bell P in *Moubarak* at [85].
105 At [22], citing from the decision in *Batistatos* in the New South Wales Court of Appeal at [80].
106 [2006] QCA 478 at [24].
107 For example at [26], [71], [75], [76] and [79].
108 Appellant's Amended Outline of Argument para 63.

[73] The learned primary judge did provide a rationale for granting the stay notwithstanding the lack of enquiry by the State as to, in the first place, instructions that could be obtained from NW with regard to the foundational allegations against him. That line of reasoning is the subject of challenge in Ground 5. It is convenient to turn to that ground now. If the challenge fails, then the approach to a permanent stay urged by the written submissions to which I have referred, cannot prevail.

Ground 5

[74] This ground of appeal challenges the acceptance by the learned primary judge of the proposition that, in terms of causation, it would be "insurmountably difficult" to extricate the impact of the alleged assault by NW from the impacts of the alleged mistreatment of Ms Willmot by the Demlins, of what she allegedly endured at the Girls' Dormitory, and of other events in her life referred to by Dr Khoo.[109]

[75] The ground contends that a finding by her Honour to that effect is against the evidence and the weight of evidence. However, the written submissions advance a different contention. It is that it was a matter for expert evidence. Neither expert briefed by the parties gave evidence which supported the proposition accepted by her Honour; nor were they cross-examined on it, it is submitted.[110]

[76] Contrary to this submission, there was expert evidence before the learned primary judge on this issue. Dr Milind Pant, a psychiatrist engaged by Ms Willmot's solicitors, provided a report dated 20 May 2021.[111] It is Dr Pant's opinion that "[it] is difficult to disentangle the effects of the individual abuse incidents as they are so entwined".[112] Dr Pant said:

> "Ms Willmot provides a complex history and it is difficult to disentangle the events with absolute precision. The sexual abuse perpetrated on her at the Demlins, the physical and emotional abuse perpetrated onto her at Cherbourg girls dormitory and the sexual abuse perpetrated onto her by her cousin and great uncle have all contributed to her condition. …
>
> The other life stressor events that have happened in her life were after the periods of childhood abuse and would have contributed to her ongoing psychological symptoms but I am unable to estimate the extent that each individual life stressor would have had on her conditions".[113]

[77] In view of this evidence, I am unpersuaded that the proposition accepted by the learned primary judge was against the evidence or the weight of evidence. Clearly there was expert evidence before her Honour that supported the proposition.

[78] I note that in oral submissions, reference was made to the shifting evidentiary onus explained by the High Court in *Purkess v Crittenden*.[114] It was submitted that where the evidence indicates that a range of causes, for some, or one only, of which

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109 At Reasons [79].
110 Appellant's Amended Outline of Argument paras 64, 65.
111 Affidavit J Mills Exhibit JM – 19; AB 482 – 527.
112 *Ibid* p 14; AB 494.
113 *Ibid* pp 29 – 30; AB 509 – 510.
114 (1965) 114 CLR 164.

the defendant is legally liable, has contributed to a plaintiff's condition, then the burden shifts to the defendant to adduce evidence that disentangles the respective contributions of the causes to the condition.[115]

[79] There is no reason to doubt the potential application of this rule as to evidentiary onus to this case. However, in my view, the insurmountable difficulty which the learned primary judge found would exist, ought not have any less relevance for present purposes on account of its having arisen in a factual context where the evidentiary onus as to causation has shifted to the State.

[80] This ground of appeal cannot succeed. The challenge in it having failed, Ground 4 also cannot succeed.

Ground 6

[81] This ground of appeal concerns the evidence that RS would potentially give at trial. As formulated, the ground contends that the learned primary judge failed to acknowledge that her evidence is supportive of evidence that Ms Willmot would give of abuse by Jack Demlin and forms the basis for the State to investigate and substantiate Ms Willmot's allegations. This failure, the ground further contends, gave rise to an erroneous finding by her Honour that the evidence of RS "highlights the unfairness" faced by the State and serves to "render the trial more unfair".[116]

[82] In support of this ground, the submission is made that her Honour should have perceived the evidence of RS as being additional independent evidence that would be available to the court to determine whether Ms Willmot's allegations were true or otherwise.[117]

[83] I consider that the characterisation of the evidence of RS as being independent is unrealistic in context. She has commenced her own proceeding against the State in which she alleges sexual assaults by Jack Demlin against her. The State cannot itself obtain instructions from RS with respect to the current proceeding.

[84] The availability of RS to give this evidence does not repair the significant disadvantage to the State arising from the unavailability to it of a contradictor with respect to the critical factual issue of whether Jack Demlin sexually assaulted Ms Willmot or not. Were RS to give the foreshadowed evidence, the State would be in a position of having to challenge it in cross-examination without the assistance of a contradictor or any other individual who could give relevant instructions, or of any relevant contemporaneous documentary evidence. As her Honour said, the State would be "cross-examining in the dark".[118] This serves to illustrate the significant forensic disadvantage that the State would face were RS to give evidence and the unfairness to it that would result.

[85] I conclude that the learned primary judge did not err as this ground of appeal contends.

Ground 7

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115 Transcript 1 – 14 ll1 – 30.
116 At Reasons [80].
117 Appellant's Amended Outline of Argument para 68.
118 Reason [80].

[86] This ground of appeal is reliant upon those that precede it. It contends that the exercise of the discretion to stay permanently by the learned primary judge miscarried in that her Honour did not take into account a relevant material consideration or mistook the facts as asserted in Grounds 1 to 6.

[87] For the reasons given, I am not persuaded that the learned primary judge erred as alleged in those grounds. An error or errors which would vitiate the exercise of the discretion by her Honour has not been established, in my view.

Disposition

[88] As none of the grounds of appeal has succeeded, this appeal must be dismissed.

Orders

[89] I would propose the following orders:

1. Appeal dismissed.

2. The appellant is to pay the respondent's costs of the appeal on the standard basis.

[90] **BODDICE AJA:** I agree with Gotterson AJA.