SUPREME COURT OF QUEENSLAND

CITATION:	*Willmot v State of Queensland* [2022] QSC 167
PARTIES:	**JOANNE EDITH WILLMOT** (Plaintiff) **v** **STATE OF QUEENSLAND** (Defendant)
FILE NO:	BS 6251 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	22 August 2022
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2022
JUDGE:	Bowskill CJ
ORDER:	**The proceeding is permanently stayed.**
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 plaintiff brings proceedings seeking to recover damages from the State for negligence, on the basis of psychiatric injury alleged to have developed as a result of sexual abuse and/or serious physical abuse of her whilst she was in the care of the State as a "State child" in the period 1957-1959, whilst placed in foster care; in or about 1959, whilst at the girls' dormitory at Cherbourg; and in about 1960 and 1967, when visiting her grandmother's house – where the plaintiff's claim is on the basis of a failure to properly monitor and supervise the plaintiff, and those into whose care she was placed by the State – where all but one of the perpetrators of the alleged abuse, as well as others who may have been able to provide instructions in relation, for example, to the supervision or monitoring in place at the girls' dormitory, are deceased, and died many years before the claims were first made by the plaintiff – where the plaintiff relies upon the evidence of another child who was in foster care with her, who says she too experienced sexual abuse, and witnessed the abuse of the plaintiff – whether the consequences of the passage of time since the alleged events occurred, in particular the death of the persons from whom instructions or evidence may have been obtained, is such as

to lead to the conclusion that there is no means by which there could be a fair trial of the plaintiff's claim

Civil Proceedings Act 2011 (Qld), s 7(4)
Limitation of Actions Act 1974 (Qld), s 11A
Uniform Civil Procedure Rules 1999 (Qld), r 16(g)

Anderson v Council of Trinity Grammar School [2018] NSWSC 1633
Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256
Chalmers v Leslie (2020) 6 QR 547
Connellan v Murphy [2017] VSCA 116
GMB v Uniting Care West [2020] WADC 165
Jago v District Court of New South Wales (1989) 168 CLR 23
Longman v The Queen (1989) 168 CLR 79
Moubarak by his tutor Coorey v Holt (2019) 100 NSWLR 218
Oram v BHP Mitsui Coal Pty Ltd [2015] 2 Qd R 357
The Council of Trinity Grammar School v Anderson (2019) 101 NSWLR 762
The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ [2022] NSWCA 78
Ward v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2019] NSWSC 1776

COUNSEL: SD Anderson for the plaintiff
C Heyworth Smith QC with D Schneidewin for the defendant

SOLICITORS: Littles Lawyers for the plaintiff
Crown Law for the defendant

Introduction

[1] By these proceedings the plaintiff seeks to recover from the defendant (the **State**) damages for negligence in an amount of $1,764,620.83. Her claim is on the basis of psychiatric injury which she says she developed as a result of sexual abuse and/or serious physical abuse she experienced whilst she was in the care of the State as a "State child" in the period from 1957 to 1959 (whilst she was placed in the care of foster parents), in or about 1959 (whilst at the girls' dormitory at Cherbourg) and in about 1960 and about 1967 (when visiting her grandmother's house). The plaintiff's claim against the State is on the basis of a failure to properly monitor and supervise the plaintiff, and those into whose care she was placed by the State, including foster parents, her grandmother and in the girls' dormitory at Cherbourg.

[2] By virtue of s 11A(1) of the *Limitation of Actions Act 1974* (Qld), an action for damages relating to personal injury resulting from the abuse (relevantly, sexual

abuse or serious physical abuse) of a person when they were a child may be brought at any time and is not subject to a limitation period. 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. The Commission also recommended that removal of the limitation period "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".[1]

[3] Reflecting that recommendation, s 11A(5) of the *Limitation of Actions Act* provides:

> "(5) This section does not limit –
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> (a) any inherent, implied or statutory jurisdiction of a court; or
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> (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 –*
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> 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."

[4] The State applies for an order that the proceeding be permanently stayed, on the basis that the lapse of time since the alleged conduct occurred, and the consequential effects of that, have had a burdensome effect on the State that is so serious that a fair trial is not possible.[2]

Factual context

[5] The plaintiff was born in April 1954. She was a "State child" within the meaning of s 4 of the *State Children Act 1911* (Qld) from when she was an infant until about September 1966. Under that Act, the term "State child" was defined to mean:

> "[a] neglected child, convicted child, or any other child received into or committed to an institution or to the care of the Department, or placed out or apprenticed under the authority of this Act".

[6] By s 10 of the *State Children Act*, the Director of the Department had "the care, management and control of the person of all State children" until they were 18. By s 11, the Director could "deal with" a State child by, among other things, placing them in an institution or placing them in the custody of "some suitable person who is willing to take charge of such child". The plaintiff emphasises s 61 of this Act, which provided that a person could not act as a foster mother, for gain or reward, to any State child without being licensed by the Department for that purpose.

[7] The plaintiff, being an Aboriginal person, was also, at the relevant times, subject of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld). That

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1 Explanatory Notes to the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016,* at p 2.

2 Adopting the language in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [69], which is reflected in the example given in s 11A(5).

Act purported to make provision for the protection and care of Aboriginal people in Queensland, by authorising their removal to, and being "kept" within, an area of land known as a "reserve" (s 9). The Act provided for a system of permits, to enable people to leave the reserve, including to work.

[8] As an infant, the plaintiff was placed in the mothers and babies quarters at the Cherbourg girls' dormitory. A few years later, between 1957 and 1959, she was placed in foster care with Jack and Tottie Demlin, an indigenous couple who lived in the Cherbourg settlement. The plaintiff says that whilst she was living with the Demlins, there were also three other foster children there, two sisters and a brother who I will refer to as RS, CS and AS. The plaintiff says she would have been about three or four years of age when she went to the Demlins; RS was a bit older, being about eight; CS was about four or five; and their brother, AS, was about the same age as the plaintiff. The children all shared a bedroom at the Demlins' house.

[9] The plaintiff was removed from the care of the Demlins in about May 1959 because of reports of concerns that she was malnourished.[3] The plaintiff says she was returned to the Cherbourg girls' dormitory (then aged 5) and remained there until about September 1966 (other than a period from March to August 1960, when she lived with her mother).[4]

Allegations of sexual abuse by Jack Demlin

[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.[5] 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.

[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,

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3 The matters set out so far are the subject of admissions by the State, save for the specific date of removal from the Demlins, which the plaintiff pleads as May 1959, but the State does not specifically admit.

4 These matters are also admitted, albeit not the specific dates.

5 Para 7 of the amended statement of claim.

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 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 2¾ 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."[6]

[13] In addition to the alleged sexual abuse, in the amended statement of claim the plaintiff says that, while in the care of the Demlins, she was regularly subjected to beatings by the Demlins for minor infractions of the rules.[7]

Allegations of physical abuse whilst living in the girls' dormitory

[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:

> "[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 because she was spending more time away from the settlement."[8]

[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

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[6] Affidavit of Mills, at pp 242-243 of the exhibits.
[7] Para 12 of the amended statement of claim.
[8] Affidavit of Mills, at p 243 of the exhibits.

subjected to at the hands of the supervisor of the girls' dormitory, Maudie Phillips".[9]

[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."[10]

An objection to some of the evidence relied upon by the plaintiff

[17] In opposing the State's application, in addition to her affidavit and the affidavit of RS, the plaintiff also sought to rely on affidavits from four other people who lived or worked at the Cherbourg girls' dormitory:

(a) Joan Nielsen, who lived in the dormitory at Cherbourg from about 1953 until about 1961;

(b) Aileen Watson, who lived in the dormitory from when she was very young (she was born in 1951) until the family left in 1963;

(c) Ruth Hegarty, who is about 25 years older than the plaintiff, and lived at Cherbourg at a much earlier time. It is unclear from her affidavit, but appears to have been from about the time she was an infant (she was born in 1929), until she was sent away to work at the age of 14 years, although she says she would return, on and off, after that. She married her husband in 1951 and moved from the dormitory into the surrounding camp area.

(d) Eva Collins, who is about 32 years older than the plaintiff, and also lived at the Cherbourg girls' dormitory at a much earlier time. She describes going there in about 1930, when she was aged 9, and living there until she had finished grade 7; but then returning to live and work in Cherbourg later on, including as a monitor/manager at the mothers and babies quarters. It is unclear from her affidavit when this was. She says it was while she was raising her children. It could be inferred, from the fact that she was married in November 1949, and had six children, walking away from her husband after 11 years, that it was during the 1950s. Later in her affidavit, she says

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9 Affidavit of Mills, at p 257 of the exhibits.

10 Affidavit of Mills, at pp 291-292 of the exhibits.

that she took over (I infer, in the girls' dormitory) after Maude Phillips left (which she says was in 1972).

[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 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.

[19] Although Ruth Hegarty refers to Maude Phillips being the manager of the girls' dormitory at some time, she says she does not recall her holding this position when she (Ms Hegarty) was in the dormitory. Ruth Hegarty describes an interaction with Maude Phillips when she, Ms Hegarty, was 30 years old, and Maude Phillips struck her with a stick for talking in church. She refers to things other people have told her about how cruel Maude Phillips was to the girls at the dormitory; but has no first-hand knowledge of that. Ruth Hegarty otherwise describes the harsh circumstances in the dormitory, including severe punishments meted out to the children who lived there and humiliating "inspections", including being required to lift up their dresses. Ruth Hegarty also describes sexual abuse, perpetrated by a Mr Crawford, who was the school's headmaster.

[20] Eva Collins describes how she came to be employed as the monitor/manager of the mothers and babies quarters at the Cherbourg dormitories, including that she had no qualifications, training or experience, and that no training was offered to her – she was just expected to get on with the job. She also describes the Matrons as only checking in very briefly, not making proper inspections or interacting with the children. I have mentioned above that Eva Collins' affidavit is unclear in terms of the dates when she started working in the dormitories. However, she says she took over Maude Phillips' job, when she left in 1972. She describes Maude Phillips as having been very harsh, including inflicting punishment with a piece of wood and a switch.

[21] Joan Nielsen and Aileen Watson recall the plaintiff living in the dormitory while they were there, but do not describe witnessing any physical abuse of her.

[22] The State objected to the admissibility of these four affidavits, on the basis that they are not relevant to any allegation in issue in the plaintiff's proceeding – as Ruth Hegarty and Eva Collins do not mention the plaintiff; and Joan Nielsen and Aileen Watson did not witness anything involving the plaintiff.

[23] For the plaintiff, it was submitted that each of these affidavits is relevant to proof of the fact alleged by the plaintiff, that there was no (or no adequate) system of monitoring and supervising children in the dormitories: on the basis that, if there was such a system, the things described by each of the witnesses could not have occurred; and, in relation to Eva Collins, that her evidence is probative of that fact directly. The plaintiff does not plead, or seek to plead, that any of the alleged perpetrators – Jack Demlin, Maude Phillips, NW or Uncle Pickering – had a

propensity or tendency to offend in the manner alleged; and does not seek to rely upon these affidavits, for example, by way of propensity evidence in relation to the allegations concerning Maude Phillips.

[24] For the purposes of the present application, I accept that the evidence of Joan Nielsen and Aileen Watson is admissible on this basis. I do not consider the evidence of Ruth Hegarty to be admissible, given the much earlier time she was living at the dormitory, and the fact that she does not have first-hand knowledge about Maude Phillips in that context. Whilst I am in two minds about the admissibility of Eva Collins' evidence, given the timing issue, for present purposes I proceed on the basis that some parts of it at least may be relevant to the issue of the "system".

Allegations of sexual abuse when visiting the plaintiff's grandmother.

[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.[11] 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.

[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.

[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 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,

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11 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.

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 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.

When were the allegations raised?

[28] The plaintiff first raised the allegations of sexual abuse by Jack Demlin with the State in June 2019, when a notice of claim was delivered under the *Personal Injuries Proceedings Act 2002* (Qld).

[29] The allegations of physical abuse whilst in the girls' dormitory appear to have first been raised with the State in 2008, as part of the Queensland Department of Communities' Redress Scheme for former residents of Queensland children's institutions, as a result of which the plaintiff received some compensation.[12]

[30] The further allegations of sexual abuse on two occasions when visiting the plaintiff's grandmother in Ipswich were first raised in January 2020.[13]

[31] Both Jack and Tottie Demlin have long been deceased: Jack Demlin died in September 1962; and Tottie Demlin died in December 1965.[14]

[32] Maude Phillips is also deceased; she died in October 1982.[15] The matron, Mrs Pascoe, is also deceased,[16] as are others who may have been able to give relevant evidence in relation to the matters alleged by the plaintiff, including Mr Sturgess, who was the Superintendent of the Cherbourg Settlement from 1954-1961.[17]

[33] Uncle Pickering is, reasonably, assumed to be deceased. As discussed above, NW is still alive.

Factual investigations and enquiries made by the State

[34] In support of the application for a stay the State also relied on evidence outlining the various searches, requests for documents and enquiries it has made to obtain such documentary evidence as may be available relevant to the plaintiff's claim. These are outlined in the affidavit of Ms Mills, to which a number of documents are annexed. I have had regard to these documents in preparing these reasons.

[35] The solicitor for the State, Ms Mills, deposes to having perused all of the documents which have been obtained as a result of the various searches which have been conducted, and says that there is no record in any of the documents of any abuse of

12 Plaintiff's statement dated 24 November 2008 (affidavit of Mills, at pp 66-68 of the exhibits).
13 Plaintiff's unsigned statement, provided to Ms Mills on 20 January 2020 (affidavit of Mills, at pp 71-91).
14 Affidavit of Mills, at pp 374 and 375 of the exhibits.
15 Affidavit of Mills, at p 346 of the exhibits.
16 Affidavit of Mills, at p 344 of the exhibits.
17 See paragraph 22(h) of the State's written submissions.

the plaintiff whilst she was at Cherbourg, living with the Demlins, or visiting her grandmother.

[36] There are no documents recording any complaints made about Jack and Tottie Demlin.

[37] There are some documentary records of complaint in relation to Maude Phillips. For example, in January 1951 an anonymous letter was written, with the signatory described as "women of Cherbourg". It is not clear to whom the letter was written, but it states:

> "Dear Sir:
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> In writing this letter to you, in asking you is it right for the manageress to flog the girls with great big sticks and grab them by the hair and bash them against walls and steps; the girls, they are all terrible in the face, all bruised and black around the eyes; it isn't fair to the girls; no wonder they run away with two bad managers; the matron Mrs Reese and Maud Phillips. The girls never got that from Nancy Chambers and Mrs Garvey and Mrs Semple or Mrs Pascoe, because they were fair and good, no doubt they were strict but they were good. And another think; Mrs Reese suppose to be the Matron in charge but it seems that Mr Reese also gets to the girls. I tell you why I know that they ain't fair is because some women goes down and ask for their girl and the matron won't let them come up but she let others go up so that isn't fair to all the girls; they are all single and they should be treated alike. That is why I am writing you this letter, so that you can see into this matter because we know that you will do it for us. Maud Phillips is no good in the dormitory because she is bad to the girls. They don't do that in Palm Island or Woorabinda because the boss won't allow it. So that should be stopped."[18]

[38] The material also includes a response to this anonymous letter, addressed to the Deputy Director of Native Affairs, which states that the claims have been investigated and found to be "completely unfounded", although it includes an acknowledgment that "[c]ertainly, Maud Phillips deals out a slap or two", before going on to say the author is sure in every case they were "thoroughly deserved".[19] Other records obtained refer in glowing terms to Mrs Maud Phillips.[20]

[39] Ms Mills concludes her affidavit saying:

> "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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[18] Affidavit of Mills, at p 353 of the exhibits.

[19] Affidavit of Mills, at p 354 of the exhibits.

[20] Affidavit of Mills, at pp 359-361 of the exhibits.

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.

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.

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.

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."

The pleaded case

[40] The plaintiff's claim is brought on the basis of direct liability of the State for negligence; not vicarious liability (for example, for the alleged conduct of Maude Phillips). As already mentioned, the plaintiff's claim against the State is on the basis of a failure to properly monitor and supervise the plaintiff, and those into whose care she was placed by the State, including foster parents, her grandmother and in the girls' dormitory at Cherbourg

[41] The plaintiff pleads that, at the material times, the State owed a duty 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, while she was a State child or was subject to the *Aboriginals Protection and Restriction of Sale of Opium Act 1897*. In particular, the plaintiff pleads that duty required the State to:

(a) protect the plaintiff from sexual abuse when she was a foster child;

(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;

(c) monitor the health and wellbeing of the plaintiff;

(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;

(e) perform checks on households to which she was allowed to visit whilst a resident at the girls' dormitory; and

(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.[21]

[42] The plaintiff pleads that the State knew, or ought reasonably to have known, that there existed a foreseeable risk of harm to the plaintiff of psychiatric injury while she was a State child in foster care, in the girls' dormitory and whilst visiting her grandmother because:[22]

(a) the plaintiff was placed in the care of foster parents known to the State to be dangerous or unfit;

(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;

(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;

(d) the defendant failed to perform checks before she was allowed to visit her grandmother's house; and

(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.

[43] Particulars of the knowledge alleged in paragraph 5(a) of the amended statement of claim (that is, knowledge that the Demlins were "dangerous or unfit") were requested on 20 October 2021, but have not yet been provided. At the hearing, counsel for the plaintiff somewhat surprisingly said that they needed further disclosure in order to provide the particulars. When pressed as to what the basis was for the pleading in paragraph 5(a) was, counsel for the plaintiff said "recollections of an adult from a time when she was between three to five years of age". It is difficult to see how those recollections, presumably of the plaintiff, could be the basis of an allegation that the Demlins were "known *to the Defendant* to be dangerous or unfit". Counsel also pointed to the State's admission that the plaintiff was removed from the care of the Demlins because of malnourishment as supporting this pleading. However, there is a temporal difficulty with that, in terms of the plea of foreseeability. But as this is an application for a stay, not a strike out, it is unnecessary to say more about this.

[44] The State accepts, by admissions in its defence, that it:

(a) operated and was in control of the girls' dormitory in the years the plaintiff was there;

(b) required the plaintiff to live with, and be in the care and control of the Demlins;

(c) was responsible for the plaintiff's care whilst she was in the care and control of the Demlins, but only to the extent that the State was responsible for the

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21 Para 4 of the amended statement of claim.
22 Para 5 of the amended statement of claim.

plaintiff's care as provided for by the *Aboriginals Protection and Restriction of Sale of Opium Act 1897* (Qld);[23]

(d) gave the plaintiff into the care and control of the Demlins whilst she was resident with them;

(e) engaged the Demlins as foster parents whilst the plaintiff was in their care and control;

(f) allowed the Demlins to be the primary carers of the plaintiff whilst she was resident with them;

(g) employed a woman named Maude Phillips as supervisor of the girls resident in the girls' dormitory in the period from about 1959 to 1966; and

(h) was responsible for the plaintiff's care, in the period from 1954 to 1966 "to the extent provided for by the *Aboriginals Protection and Restriction of Sale of Opium Act 1897* (Qld)".[24]

[45] The State also admits that in its care and protection of the plaintiff as a State child it owed her a duty to take reasonable care to protect her 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 *Aboriginals Protection and Restriction of Sale of Opium Act 1897*. However, it does not admit the allegations as to the content of the duty, and the knowledge it is alleged the State had. As to the latter, that is said to be, in part, because "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".[25]

[46] The State does not admit the allegations of sexual abuse by Mr Demlin.[26] A similar non-admission is pleaded in respect of the later alleged sexual abuse, whilst at the home of the grandmother.[27] And also in relation to the allegations of physical abuse.[28] In addition, the State pleads that even if the plaintiff suffered the alleged physical abuse, it was not "serious physical abuse" or "psychological abuse" within the meaning of s 11A(6) of the *Limitation of Actions Act 1974*.[29]

[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;

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23 See paras 1(b)(iii) and (viii) of the amended defence.
24 See para 1 of the amended statement of claim and para 1(b) of the amended defence.
25 See para 3 of the amended defence.
26 Para 4 of the amended defence.
27 Para 5 of the amended defence.
28 Para 6 of the amended defence.
29 Para 7 of the amended defence.

(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*.[30]

[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.[31]

[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.[32]

[51] Each of the suffering of symptoms, the development of a psychiatric injury and causation are put in issue by the State.[33]

Relevant principles and authorities

[52] The court has a broad discretion to permanently stay a proceeding as "an incident of the general power of a court of justice to ensure fairness".[34]

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30 See para 15 of the amended statement of claim.

31 Para 8A of the amended defence.

32 Paras 16 and 17 of the amended statement of claim.

33 Para 9 of the amended defence.

34 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31 per Mason CJ. See also s 7(4) of the *Civil Proceedings Act 2011* (Qld) and r 16(g) of the *Uniform Civil Procedure Rules 1999* (Qld).

[53] In *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at [71] Bell P (as the Chief Justice then was) helpfully summarised the principles governing permanent stays of proceedings, drawn from a number of High Court decisions:[35]

> "(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]

[54] As Bell P concluded, at [88], "[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".

[55] In relation to the significance of delay or passage of time, in particular, as Bell P observed in *Moubarak* at [74], the unfairness that may be generated as a consequence of the passage of time between the events giving rise to a civil claim and the resolution of that claim by a court proceeding may manifest itself in different ways. But the relevant form of potential unfairness in a case such as this, in which no limitation period applies, and in which there ought not be any criticism of the plaintiff, is the *effect* of delay on the trial process, as a result of the "impoverishment of the evidence available to determine the claim". And, as Bell P said, at [77], "the impoverishment of evidence will be more acute where a trial is exclusively or heavily dependent on oral evidence and the quality of witnesses' memory and recollection". Although there are some documentary records available in this case, in so far as the critical element – whether the wrongful acts occurred – is concerned, this is a case which would be heavily dependent on oral evidence.

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35 *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Williams v Spautz* (1992) 174 CLR 509; *Walton v Gardiner* (1993) 177 CLR 378; and *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256.

[56] Lengthy delay of itself does not justify a stay. Adopting what Mason CJ said in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34, where delay is the sole ground of complaint, an applicant seeking a permanent stay must be "able to show that the lapse of time is such that any trial is necessarily unfair". A stay is warranted only where the delay and, importantly, the consequences of that delay on the available evidence, is such that any trial is so unfair as to bring the administration of justice into disrepute.[36]

[57] An important factor in this context is where, as a consequence of the passage of time, the person or persons who could give evidence, or instructions, on a critical aspect of liability, are no longer available, which might 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".[37] Whilst it has been said that a fair trial is not synonymous with a perfect trial, and that the absence of a witness(es) who may be regarded by a party as important, whether through death or otherwise, will not necessarily mean a fair trial cannot be obtained, where that witness is the *defendant* (as in *Moubarak*) or otherwise the only person able to provide instructions on a critical aspect of the case (as in *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78, discussed below), the position is quite different.

[58] A number of the decided cases 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. 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.[38] 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

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36 *The Council of Trinity Grammar School v Anderson* (2019) 101 NSWLR 762 at [427]-[429] per Bathurst CJ.

37 *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 405-406; cited with apparent approval by the High Court in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [54]; see also *Moubarak* at [85].

38 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]).

> 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.
>
> 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…"

[59] Similarly, in *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78, the 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 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,*[39] 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]

[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

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

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.

[63] *Ward v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2019] NSWSC 1776 is another case in which it was held that a permanent stay must be granted. In that case, the plaintiff commenced proceedings in 2018 against the Church for damages in negligence, and on the basis of vicarious liability, on the basis of an allegation that she had been sexually assaulted by a priest "during 1945 or 1946". The priest died in 1957. After referring to the evidence, Beech-Jones J said, at [22]:

> "A consideration of the evidence summarised above reveals that with more than 70 years having elapsed since the sexual abuse complained of is said to have occurred there is simply no means by which there could be a fair trial of the plaintiff's claim. There were only two potential eyewitnesses to the sexual assault, namely the plaintiff and Father Curran. Father Curran has been dead for over sixty years. There is nothing to suggest that during his lifetime he was confronted with the plaintiff's allegations. There are no documents currently in existence bearing on the allegations and nor is there anything to suggest that there ever were any such documents. There is no suggestion that any complaint or report was made to anyone about the plaintiff being sexually abused in the immediate years that followed its occurrence. Leaving aside Father Donnelly, there is nothing to suggest that any third person, party or agency was ever given the opportunity to investigate the plaintiff's allegations or any allegation of sexual abuse against Father Curran during his lifetime or even after he died. The position so far as a fair trial is concerned is much worse than that which was considered in *Moubarak*. The Trustees are "utterly in the dark about the allegations made" against Father Curran themselves and there does not exist any means by which the conduct of the trial could relieve the consequences of the effect of the passage of time (*Moubarak* at [158]). It follows that it is not possible for there to be a fair trial of the plaintiff's allegations. 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" (*Newcastle City Council v Batistatos; Roads and Traffic Authority NSW v Batistatos* [2005] NSWCA 20 at [80])."

[64] The facts in *Chalmers v Leslie* (2020) 6 QR 547, in which a permanent stay was also granted, are almost indistinguishable from *Moubarak.* The plaintiff commenced in proceedings in 2020, seeking damages for personal injuries for consequential loss as a result of sexual assaults alleged to have been committed upon him by the first defendant, his grandfather. The evidence established that the

grandfather, appearing through a Litigation Guardian, suffered severe dementia, the symptoms of which had begun in at least 2009. He was unable to provide instructions, give evidence or be cross-examined, and could not participate in a trial. There was evidence which may have been able to be admitted as similar fact, or tendency evidence. The grandfather had pleaded guilty in 2003 to three charges of indecent assault, whilst he was a teacher at a school. However, as Martin J observed, at [31]:

> "Similar fact evidence is admissible in civil proceedings. But where, as here, the circumstances of the first defendant have rendered a trial impossible of being conducted fairly, the admission of evidence about which the first defendant can give no instructions, would only render the trial more unfair."

[65] Another case in which a permanent stay was granted is *GMB v Uniting Care West* [2020] WADC 165. In this case the plaintiff alleged that, between 1958 and 1961, whilst a resident of a "child residential facility" called Mofflyn House, he was sexually abused on multiple occasions by the "cottage mother" who was employed by the defendant as supervisor, and that this supervisor also introduced him to men at the church, who also sexually abused him. The plaintiff brought proceedings against the defendant for damages, on the basis of, among other things, vicarious liability (for its employee, the supervising "mother") and directly, for breach of duty in failing to provide safe living arrangements, and failing to take adequate steps to prevent the plaintiff being exposed to sexual abuse. The allegations were first raised by the plaintiff in 2017, in a statement to the Royal Commission into Institutional Responses to Child Sexual Abuse. The cottage mother was deceased by then, the allegations never having been raised with her during her lifetime. The defendant had undertaken searches for documents, but none could be found bearing directly on the plaintiff's allegations. The plaintiff did rely on a statement from another person who made similar allegations to the plaintiff, in relation to the abuse said to have been perpetrated by the cottage mother. However, the Court was satisfied that the passage of time, and the fact of the perpetrator having died before the allegations were ever raised with her, meant that there was unfairness to such a degree that a permanent stay was warranted. As Bowden DCJ said, at [155]:

> "The first defendant cannot investigate the allegations, they cannot investigate Ms Moy's [the cottage mother] response to the allegations. The first defendant cannot admit or deny the plaintiff's allegations. Ms Moy cannot give evidence or give instructions to the first defendant and the continuation of the proceedings would be unfairly and unjustifiably oppressive because the first defendant cannot make a meaningful defence."

[66] Judge Bowden noted the distinction, also relevant in this case, between proof of the scope and duties of employment of Ms Moy [and, one may extrapolate, the "system" of supervision or monitoring that was, or was not, in place], and the wrongful act alleged to have been done. As His Honour said, at [134]:

> "Nothing in the material satisfies me that the first defendant are not able to establish through other witnesses and other evidence the scope and duties of employment of Ms Moy as a house mother. It is the issue of whether a wrongful act occurred that is crucial."

[67] It was in respect of the alleged wrongful act that the fact that the defendant was not able to obtain instructions from Ms Moy was critical. In so far as there was, in that case, evidence of similar things being done to others, Bowden DCJ said this "only highlights that the first defendant cannot make a meaningful defence", because Ms Moy could not provide instructions about that evidence either (at [139]).[40]

Application of the principles to the circumstances of this case

[68] For the State, it was submitted that, because of the plaintiff's lack of recall of the circumstances surrounding the allegations of sexual abuse by Jack Demlin, before speaking to RS in 2016, the plaintiff has "parlous prospects" of success in her claim, which is a "significant consideration going against the exercise of the discretion in her favour". No doubt, if there was to be a trial, the issue of the plaintiff's memory would be a significant one, both in cross-examination of the plaintiff herself, but also in terms of expert evidence, from the psychiatrists and possibly others. At a trial, considerations such as those addressed in *Longman v The Queen* (1989) 168 CLR 79 at 107-8, as to the effect of delay on memory, might loom large. However, I have not approached the determination of this application from the perspective that the plaintiff's prospects of success are a relevant consideration in terms of whether a permanent stay should be granted. To adopt what Bell P said in *Moubarak* at [53], that does not appear to me to logically be capable of bearing on whether the *defendant* will (or can) get a fair trial. As the authorities discussed above have made clear, the conclusion, if it be reached, that because of the passage of time a trial which is fair to the defendant is not possible, does not carry with it criticism of the plaintiff, for delay in bringing the proceeding, nor of her credibility or veracity.[41] The conclusion, in those cases in which a permanent stay has been granted, due to the *consequences* of the lengthy passage of time, is that a fair adjudication of the serious allegations made is not possible.[42]

[69] The State also submits that, although the plaintiff does not allege that it is vicariously liable for any of the alleged abuse, the State is "nevertheless entitled to test the veracity of the abuse allegations, particularly in circumstances where the Plaintiff has previously acknowledged she has no independent recollection of some of those matters… and where she, in effect, relies on the distant recollections of a third party witness to establish the basal facts upon which her claim depends". In my respectful view, this submission slightly misses the point. The point is that the "abuse allegations" are critical, or "foundational" (to use the word used in *Lismore Trust v GLJ*) to establishing liability on the part of the State. That is, in order to succeed at trial, the plaintiff would have to establish, against the State, first, that she was assaulted and/or abused by Jack Demlin, by Maude Phillips and/or by the assailants at her grandmother's house; and, second, that the State is legally responsible, by way of direct liability in negligence. If the plaintiff cannot establish what she alleges occurred at the Demlins, at the girls' dormitory and/or when she was visiting her grandmother's house, her claim cannot succeed. The fact that there is no claim on the basis of vicarious liability does not affect this.

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40 Referring to *Chalmers v Leslie*, discussed above.

41 See, for example, *Moubarak* at [74]-[76] per Bell P and at [184] per Leeming JA; *Lismore Trust v GLJ* at [3] per Brereton JA and at [116] per Mitchelmore JA

42 See also *Connellan v Murphy* [2017] VSCA 116 at [65].

[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.[43]

[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.

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43 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].

[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.[44]

[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.[45] 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 to obtaining instructions from Jack Demlin about the allegations made by RS. The ability to cross-examine the 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".

[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.

[82] I will hear the parties in relation to costs.

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44 See *Moubarak* at [158].

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