

SUPREME COURT OF QUEENSLAND

CITATION: *DJW v State of Queensland* [2023] QSC 138

PARTIES: **DJW**
(Plaintiff/Respondent)

v

STATE OF QUEENSLAND
(Defendant/Applicant)

FILE NO: BS 8959 of 2021

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 October 2023

DELIVERED AT: Brisbane

HEARING DATE: 16 June 2023

JUDGE: Crowley J

ORDER: **1. The proceedings are permanently stayed.**
2. The Plaintiff is to pay the Defendant's costs of and incidental to this application and the proceedings 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 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 him whilst he was in the care of the State in the early 1960s – where the plaintiff's claim is on the basis of a failure to properly monitor and supervise the plaintiff, and those into whose care he was placed by the State – where all of the perpetrators and staff of the alleged abuse are deceased – whether the consequences of the passage of time since the alleged events mean a fair trial is not possible – whether the proceedings should be permanently stayed

Civil Proceedings Act 2011 (Qld), s 7(4)

Limitation of Actions Act 1974 (Qld), s 11A, s 48

Uniform Civil Procedure Rules 1999 (Qld), r 16(g)

Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256; [2006] HCA 27, cited

Coles Group Ltd v Costin [2015] QCA 140, distinguished

Conellan v Murphy [2017] VSCA 116, considered

Council of Trinity Grammar School v Anderson (2019) 101 NSWLR 762; [2019] NSWCA 292, applied

Gorman v McKnight (2020) 19 ASTLR 181; [2020] NSWCA 20, applied

Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, cited

Moubarak v Holt (2019) 100 NSWLR 218; [2019] NSWCA 102, applied

Page v The Central Queensland University [2006] QCA 478, cited

RC v The Salvation Army (Western Australia) Property Trust [2023] WASCA 29, considered

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

Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34, cited

Willmot v State of Queensland [2022] QSC 167, considered

Willmot v State of Queensland [2023] QCA 102, followed

COUNSEL: G R Mullins KC with P M Nolan for the Plaintiff/Respondent
R J Douglas KC with D J Kelly for the Defendant/Applicant

SOLICITORS: Littles Lawyers for the Plaintiff/Respondent
Crown Law for the Defendant/Applicant

- [1] DJW is a 65-year-old Aboriginal man who was born in Cherbourg. He has commenced proceedings against the State of Queensland, seeking damages for psychiatric injuries he claims he sustained due to alleged physical and sexual abuse he experienced while residing in the Cherbourg Girls' Dormitory and Cherbourg Boys' Dormitory as a young boy.
- [2] The State operated and controlled both dormitories.
- [3] DJW alleges the perpetrators of the sexual abuse were other, older residents of the dormitories. He claims his initial and main abuser was an older teenage girl named 'Aunty Marlene', who was a resident of the Girls' Dormitory. DJW further alleges the perpetrator of the physical abuse was one of the supervising staff from the Girls' Dormitory.
- [4] DJW's case is that the State owed him a non-delegable duty of care to protect him from suffering psychiatric injury as a result of physical and sexual abuse. He says the State breached its duty by, amongst other things, failing to provide adequate supervision within the dormitories and failing to have an adequate system in place to avoid placing him in a position where he would be sexually abused by other residents.
- [5] Further, DJW claims the State is vicariously liable for the alleged deliberate sexual assaults perpetrated upon him by Aunty Marlene. He contends that this abuse occurred at times when the State had placed him under the direct care and control of Aunty Marlene in the Girls' Dormitory.

- [6] The State denies liability. It says that it did not owe DJW a duty in the terms asserted by him and it denies it is vicariously liable for any acts of sexual abuse committed by Aunty Marlene. Further, it denies that any psychiatric injury sustained by DJW is causally related to any alleged acts of physical or sexual abuse.
- [7] The events that are at the heart of DJW's claim are said to have happened many years ago. The last of the alleged sexual assaults allegedly occurred some 60 years ago. All the alleged perpetrators are long since deceased. So too, are the persons who were employed by the State to manage the dormitories and supervise their residents.
- [8] In those circumstances, the State applies for a permanent stay of the proceedings on the basis that it is unable to enjoy a fair trial.
- [9] It is not in doubt that the Court has inherent jurisdiction to stay the proceedings if they amount to an abuse of process. The issue to be determined is whether the relevant circumstances of this case justify granting such an exceptional remedy.

Is it premature to determine the application?

- [10] DJW says it is premature to determine the State's application because:
 - (a) the Court should await the outcome of the appeal pending in the Queensland Court of Appeal from the judgment at first instance in the matter of *Willmot v State of Queensland*¹ and the appeal pending in the High Court of Australia from the judgment of the New South Wales Court of Appeal in *The Trustees of the Roman Catholic Church of Lismore v GLJ* ('*GLJ*');²
 - (b) both parties are still investigating further potential witnesses and sourcing relevant documents. There are potentially relevant documents that are still to be obtained. It is premature for the Court to determine whether a trial is so unfair and burdensome as to bring the administration of justice into disrepute. The application should await the finalisation of all interlocutory steps and investigations before the entitlement to a permanent stay is determined; and
 - (c) there are a number of witnesses who are still alive and available to give evidence about issues relating to allegations of direct and vicarious liability and the layout of the dormitories, staffing and supervision. It cannot be said that the loss of the evidence of the deceased witnesses renders the trial so unfair and burdensome as to bring the administration of justice into disrepute.
- [11] On 16 May 2023, the Court of Appeal delivered its judgment in the case of *Joanne Willmot*.³ Accordingly, awaiting the outcome of that appeal is no longer an impediment to the determination of the present application.
- [12] On 8 June 2023, the High Court heard the appeal in *GLJ* and reserved its decision.⁴ Notwithstanding that the Court is yet to deliver its judgment, I do not consider it necessary to await the outcome of that appeal before determining the present application. The outcome of *GLJ* has no direct bearing on DJW's case. It is an instance where a permanent stay was granted in respect of a civil claim for damages

¹ [2022] QSC 167. For convenience I will refer to that matter as the case of *Joanne Willmot*.

² [2022] NSWCA 78.

³ [2023] QCA 102.

⁴ Transcript of Proceedings, *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCATrans 76.

predicated upon alleged historical acts of child sexual abuse perpetrated upon a plaintiff. No argument was put by either party that the High Court's judgment might affect the principles that are to be applied by me in deciding this application.⁵

- [13] Points (b) and (c) above are not matters that preclude determination of the State's application at this stage of the proceedings. Rather, they are matters that must be considered as part of the facts and circumstances relevant to the question of whether a permanent stay of the proceedings is warranted.

DJW's claim against the State

- [14] On 29 November 2019, DJW served a Notice of Claim on the State, in accordance with the *Personal Injuries Proceedings Act 2002* (Qld) ('*PIPA*'). The Notice of Claim annexed a statement by DJW.
- [15] A compulsory conference under the *PIPA* was held on 7 June 2021. DJW's claim was not resolved at that time.
- [16] DJW subsequently commenced these proceedings on 5 August 2021. DJW's claim is now pleaded in an Amended Statement of Claim ('*ASOC*'), filed 6 January 2022.
- [17] What follows is a summary of the principal aspects of DJW's claim.

DJW, Cherbourg and the dormitories

- [18] DJW was born in 1958. From 1960, he was a 'state child' under the *Children Services Act 1965* (Qld) and thus a State Ward.
- [19] As an Aboriginal person, DJW was also initially subject to the protection of the Director of Native Affairs under the *Aboriginals Preservation and Protection Act 1939* (Qld), until 1966, and subsequently subject to assistance by the Director of Aboriginal and Island Affairs under the *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld).
- [20] The former Cherbourg settlement was a 'reserve for Aborigines' and was overseen and administered by the State. At a local level the Cherbourg settlement was under the control of an appointed superintendent or manager.
- [21] DJW was a resident of the dormitories from 1958 to 1967. He started in the Mothers and Babies Quarters in the Girls' Dormitory as an infant. He was later placed in the Girls' Dormitory, where he remained for several years, before being moved to the Boys' Dormitory in 1963 at the age of five. He remained a resident of the Boys' Dormitory until the age of nine.
- [22] The dormitories were supervised and managed by persons employed by the State. Matron Myra Pascoe was the manager of the Girls' Dormitory. Maude Phillips supervised its residents. Jack O'Chin was the supervisor of the Boys' Dormitory.
- [23] DJW alleges the State also used older female residents in the Girls' Dormitory as agents to supervise younger residents. This is of significance to his vicarious liability case. He claims Aunty Marlene was 'in charge' of him as he was placed under her 'direct care and control' by the State.

Allegations of abuse

- [24] DJW details three main categories of abuse in his *ASOC*: repeated sexual assaults in the Girls' Dormitory, a physical assault with a fire hose at the Girls' Dormitory, and

⁵ I note that the transcript of the appeal hearing before the High Court records that counsel for the appellant eschewed the notion that he was seeking 'a change of principle'.

a single instance of sexual assault while on a camp when he was a resident of the Boys' Dormitory.

Sexual assaults in the Girls' Dormitory

- [25] DJW alleges that when he was a resident of the Girls' Dormitory, he was principally cared for by older primary school or teenage girls, in particular Aunty Marlene. He claims that he was required to sleep in the same bed as Aunty Marlene.
- [26] He claims that from the age of four, he was repeatedly sexually assaulted by older female residents. He alleges the first occasion occurred one evening after lights went out and involved Aunty Marlene forcing him to perform oral sex upon her. He recalls that after the sexual assault, Aunty Marlene said words to the effect of 'good boy' or 'very good boy'.
- [27] Thereafter, DJW alleges that Aunty Marlene regularly sexually assaulted him by making him perform similar acts of oral sex upon her.
- [28] DJW further alleges that after some time, other older female residents began taking him to their beds as well and made him perform oral sex upon them in the same way. He does not name or further identify any of these older female residents.

Assault with the fire hose

- [29] Due to the alleged ongoing sexual assaults he experienced, DJW says that he developed the belief that in order to be a 'good boy' or to please a girl he should perform oral sex on them.
- [30] DJW claims that one afternoon he was near the stairs at the back of the Girls' Dormitory with 'CB', another resident of the Girls' Dormitory with whom he had become friends. He wanted to show CB that he liked her, so he laid down and started to perform oral sex upon her in the same way he would with other older female residents.
- [31] DJW alleges that whilst this was occurring, Maude Phillips found the pair and saw what was happening. He claims she became very cranky and abused both him and CB, telling them they were bad and dirty. He claims she then took them both to the rear of the Girls' Dormitory and used a large and powerful fire hose to directly spray their bodies until they were crying loudly in pain.
- [32] DJW further alleges that Maude Phillips then placed him and CB in the 'women's jail' at the rear of the Girls' Dormitory, where they remained for several hours in their wet clothing.

Sexual assault on camp

- [33] DJW claims that during the summer months of approximately 1962 or 1963, about twenty boys from the Boys' Dormitory, aged between 6 to 17, attended a camp at a place called 'The Weir'. The only adults at the camp were apparently Jack O'Chin and a cook named 'Nelly' Saunders.
- [34] DJW says that one afternoon, three older boys, including a boy DJW knew as Vincent Cheriko, led him into their tent. Once inside the tent, they closed the flap, threw DJW to the ground, rolled him onto his stomach and held him down. DJW alleges that Cheriko then anally raped him.

Duty of care

- [35] DJW claims that the non-delegable duty of care owed by the State included a duty to:
- (a) protect him from assault, including sexual assault, by females residing at the Girls' Dormitory;
 - (b) ensure that the sleeping arrangements in the Girls' Dormitory were such that:
 - (i) the residents had their own bed; and
 - (ii) the boys had access to adult supervision and assistance at night;
 - (c) ensure that building security was such that an adult was available at night to monitor and protect the residents of the dormitories; and
 - (d) ensure that an appropriate number of adults were available to assist and support the residents of the dormitories, including when the children were on camps.
- [36] DJW claims the State's duty arose from:
- (a) its assumption of control over him;
 - (b) his inability to fend for himself because he was a child;
 - (c) the State's knowledge of the number of adults available to supervise the residents of the dormitories; and
 - (d) the State's responsibilities pursuant to:
 - (i) s 5(1) of the Aboriginals Preservation and Protection Act, by which the State was to preserve and protect him;
 - (ii) s 18(1) of the Aboriginals Preservation and Protection Act, by which the Director of Native Affairs was the legal guardian of every Aboriginal child in the State and was empowered to 'exercise all or any powers of a guardian where in his opinion the parents or relatives are not exercising their own powers'; and
 - (iii) s 60(13) of the Aborigines' and Torres Strait Islanders' Affairs Act, by which the State was empowered to make regulations for the care of children of assisted Aborigines or assisted Islanders; and
 - (iv) s 4(a) of the Children Services Act, by which he was deemed to be a child in care subject to the care of the State Children Department.
- [37] DJW contends that the State knew, or ought reasonably to have known, he was at a real risk of harm by other residents of the dormitories because of:
- (a) the lack of adult supervision, particularly on the camp;
 - (b) the houseparent to child ratio at the dormitories; and
 - (c) the fact other child residents were allowed to supervise him.

Breach of duty

- [38] DJW's primary allegation is that the State breached its duty of care by failing to adequately monitor and supervise the residents of the dormitories at night and at the camp.

[39] DJW pleads that the State was negligent and in breach of its duty of care because, by its servants or agents it:

- (a) failed in its duty to protect him from older females and males residing at the dormitories;
- (b) failed to provide him with his own bed;
- (c) failed to monitor and supervise the Girls' Dormitories, which meant that residents were able to freely access him;
- (d) placed him in a position to be subjected to sexual abuse by:
 - (i) failing to provide appropriate supervision at night;
 - (ii) failing to provide adequate adult supervision on the camp; and
 - (iii) failing to prevent other residents from having unsupervised access to the younger children during the camp, including himself; and
- (e) failed to have any, or any adequate, system in place to avoid placing him in a position where he would be sexually abused by other residents of the dormitories; and
- (f) failed to ensure there were staff caring for him instead of leaving other children to do so.

Vicarious liability

[40] DJW claims that the degree of authority the State bestowed on Aunty Marlene establishes a sufficiently close connection to hold the State vicariously liable for her deliberate wrongful actions. DJW relies on the following factors in support of this aspect of his claim:

- (a) Aunty Marlene was in charge of him;
- (b) she was in complete control of his activities whilst he was in her bed;
- (c) he was placed under her direct care and control by the State;
- (d) the State allowed or fostered an environment where older female residents, such as Aunty Marlene, were allowed to be alone with children such as himself; and
- (e) Aunty Marlene required him to sleep in her bed and the nature and extent of control given to Aunty Marlene was such as to render it complete whilst he was in her bed.

Subsequent events and the effects of the abuse

[41] DJW claims that, after the alleged sexual assault at the camp, he lived in fear of the three boys involved. He says he suffered bad dreams and nightmares most nights and would not communicate or behave normally in social settings. He further says that he did not want to interact with anyone and believed everyone would hurt him.

[42] At or around the age of nine, DJW was removed from the Boys' Dormitory and began living with his mother in Brisbane. He says that thereafter, from about the ages of 10 to 13, he began to hate the world and started to mix with troublesome persons. He was arrested for break and enters on several occasions.

[43] DJW says that as a result of the physical abuse and sexual assaults he experienced when he was a resident of the dormitories he has suffered, and continues to

experience, trauma, depression, panic and fright, nightmares and withdrawal from others.

Psychiatric injuries, damage and causation

- [44] DJW claims that he has sustained psychiatric injuries, namely:
- (a) Alcohol Dependence Disorder;
 - (b) Gambling Disorder;
 - (c) Persistent Depressive Disorder with possible major episodes of Major Depressive Disorder, currently in remission; and
 - (d) Chronic Post-Traumatic Stress Disorder, with symptoms related to intrusion phenomena, avoidance, arousal and neurovegetative disturbance.
- [45] As a consequence of these injuries, DJW claims that he has endured and continues to endure pain, suffering, a reduction of the enjoyment of the amenities of life and loss of future earning capacity.
- [46] DJW was assessed by Dr Michael Beech, a specialist psychiatrist and by Dr Jon Steinberg, a consultant psychiatrist. Each has provided a medico-legal report setting out their opinions with respect to DJW's injuries.

Dr Beech

- [47] Dr Beech's diagnosis is that DJW suffers a range of psychological disorders, consistent with the pleaded psychiatric injuries.
- [48] Dr Beech opines:

I believe the disorders I have diagnosed above are referable to the one period of care at Cherbourg...

...

There are several external factors that have contributed to some of his conditions. In my opinion, the simple placement at Cherbourg away from his mother has been one of the factors that has affected his difficulties with self-esteem, identity and mood. The general circumstances at Cherbourg, and sense that he was disaffected from others at the school, has contributed to his symptoms. When he did go to live with his mother, there were very difficult circumstances as described in the body of the report. I think this added to his alienation, problems with self-esteem, and low mood. There is a possibility there may have been some role-modelling from the alcohol abuse to which he was exposed when living with his mother.

In my opinion, the onset of the psychological symptoms commenced in childhood at Cherbourg. He describes the development of an acute stress disorder, anxiety and childhood dysthymia in Cherbourg. I think that these disorders formed the antecedents for the development of his adult conditions. He started drinking when he was 13 years old and that became problematic soon after. His gambling commenced in his adult years and has persisted. It is likely that the dysthymia (PDD) has deteriorated at times into Major Depressive Episodes during his adult years.

...

It is difficult to know if there were any pre-existing conditions. He appears to have been simply taken from his mother and placed in the Dormitory as an infant. I think that in itself would have contributed to some of the difficulties with self-esteem, identity and family connection that he reports. It may have caused some of the difficulties with intimacy and expressing affection and emotion. It is difficult though to quantify this. I think that the traumatic incidents he describes – the sexual and physical abuse – are more likely to have caused his persisting problems.

The other life experiences he has suffered since the abuse was the time he lived with his mother and step-father. He was exposed to neglect, emotional abuse, violence and alcohol abuse. I think this added to his mood disturbance, aggravated his sense of alienation and disaffection, and facilitated his engagement in juvenile delinquency. On the other hand, by the time he went to live with his mother, he had been an anxious boy prone to fights and had been generally withdrawn and depressed. I think that his progress and future prognosis would not have been different because I believe that the traumatic experiences at Cherbourg have been one of the more prominent causes of his conditions.

...

Had the alleged sexual abuse not occurred, I think it is less likely he would have become alcohol dependent. He would not have been so withdrawn as a child, and so his education after leaving Cherbourg may have been better. He may have been less itinerant and restless at an earlier age. There would have been the capacity to enjoy intimate relationships and form long-term intimate relationships. He would have been less likely to abuse alcohol so persistently.

- [49] Dr Beech assessed DJW's permanent impairment, according to the PIRS Rating Scale, as 6%.

Dr Steinberg

- [50] Dr Steinberg's diagnosis of DJW's conditions is:
- (a) Post-Traumatic Stress Disorder, chronic – in partial remission;
 - (b) Major Depressive Disorder – in full remission;
 - (c) alcohol abuse; and
 - (d) pathological gambling – in remission.
- [51] Dr Steinberg agrees with Dr Beech's diagnosis of Post-Traumatic Stress Disorder and Major Depressive Disorder. However, he does not think DJW has Alcohol Dependence. Rather, he considers DJW has alcohol abuse with no evidence of dependency. Further, Dr Steinberg does not believe that DJW has a Persistent Depressive Disorder, as it appears that his Major Depressive Disorder has been successfully treated with medication.

- [52] With respect to the extent to which DJW's current condition is attributable to the allegations that are the subject of his claim, Dr Steinberg stated:

[DJW] has symptoms consistent with Posttraumatic Stress Disorder which he claimed are associated with alleged sexual abuse which occurred at the Cherbourg Dormitory. He was subjected to violence at the Cherbourg Dormitory and he was also subjected to his mothers' physical assaults after he left the Cherbourg Dormitory.

He does not appear to have developed Posttraumatic Stress Disorder due to his mother's violence or the physical assaults at the Cherbourg Dormitory. Therefore in my opinion the Posttraumatic Stress Disorder is caused by the sexual assaults at Cherbourg Dormitory.

...

In my opinion 100% of the causation of Posttraumatic Stress Disorder is due to his sexual assaults that he claims to have experienced at the Cherbourg Dormitory.

He was predisposed to developing Major Depressive Disorder because of the abandonment by his mother, abandonment by his father in his early childhood, severe emotional neglect by his mother. Posttraumatic Stress Disorder may also predispose him to episodes of Major Depressive Disorder.

Therefore approximately 75% of the causation of the causation of [sic] predisposition to Major Depressive Disorder is the abandonment, neglect and violence caused by his mother in combination with the abandonment by his father in early childhood and 25% of the causation of Major Depressive Disorder is due to Posttraumatic Stress Disorder he has suffered since the alleged sexual abuse at Cherbourg Dormitory.

...

[DJW] does not appear to have developed a psychiatric condition caused by the alleged physical abuse.

...

It is possible that [DJW] might have developed episodes of Major Depressive Disorder, used alcohol excessively or been predisposed to pathological gambling if the alleged sexual abuse had not occurred because he is predisposed to Major Depressive Disorder and Alcohol or other substance use disorders predominantly related to his family history of these conditions and to the abandonment by his parents when he was born.

...

[DJW] has alcohol abuse and pathological gambling which is in partial remission.

In my opinion 75% of the causation of alcohol abuse and pathological gambling is that he is predisposed to these conditions because of a family history of alcohol dependency...

25% of the causation of his alcohol abuse has been because he might have been trying to self-medicate (misguidedly) symptoms of Posttraumatic Stress Disorder.

- [53] Dr Steinberg assessed DJW's permanent impairment, according to the PIRS Rating Scale, as 1%.

Damages and relief claimed

- [54] In support of his claim for general damages, DJW claims that the alleged abuse he experienced has severely affected him since he was a young boy. He claims that he reacted to the abuse by having disability in every area of his life. He further claims he is unable to form a fulfilling relationship with intimate partners or develop his working life and that he has suffered disruption in all aspects of his life as a result of the alleged abuse.
- [55] In addition to a claim for general damages, DJW also makes claims for past and future economic loss, future treatment expenses and exemplary and aggravated damages.
- [56] In total, DJW claims the following relief:
- (a) \$6,231,435.77 in damages for negligence,
 - (b) exemplary damages of \$250,000;
 - (c) interest pursuant to s 58 of the *Civil Proceedings Act 2011* (Qld); and
 - (d) costs.

The State's case

- [57] The State does not admit to the occurrence of any of the alleged physical abuse or sexual assaults. In each instance it contends that 'despite reasonable enquiry, it is unsure of the truth or falsity' of the allegations.
- [58] In any event, the State denies it owed DJW a duty of care of the kind pleaded. Instead, it pleads that it owed a non-delegable duty to DJW to take reasonable care to prevent a foreseeable risk of injury to him and that such a non-delegable duty did not extend to the conduct of persons engaged in criminal conduct.
- [59] Furthermore, the State contends:
- (a) it did not know and ought not to have known of any risk to DJW from assault, including sexual assault by female children residing in the Girls' Dormitory;
 - (b) it did not know and ought not to have known that not providing a child of DJW's age with his own bed would expose him to a risk of sexual assault from female children;
 - (c) at all materials times there was access to adult assistance at night, but denies that such access to assistance and supervision would have detected or prevented the alleged assaults of DJW;
 - (d) it was not required to provide security at night to protect the residents of the dormitories against a risk of assault, including sexual assault, from the girls in the dormitories when such a risk was not reasonably foreseeable; and

- (e) it was not required to provide adults to assist and support the residents of the dormitories against a risk of assault, including sexual assault from the girls in the dormitories or when on camp, when such risks were not reasonably foreseeable.
- [60] The State denies the general allegation that it used older residents as its agents to supervise DJW and the specific allegations in respect of charging Aunty Marlene with DJW's care and control. It denies it is vicariously liable for her actions. It contends that staff in both dormitories, not other residents, supervised DJW, and that sufficient and proper staff were in place to supervise residents.
- [61] Furthermore, the State denies DJW incurred the injuries and damage alleged as a result of the physical abuse and sexual assaults as pleaded. It disputes that DJW suffers from Post-Traumatic Stress Disorder. In addition, in respect of each of the alleged psychiatric injuries suffered by DJW and their sequelae, the State disputes causation and contends that each is variously attributable to DJW's:
- (a) family history, background and upbringing;
 - (b) abandonment when he was born; and
 - (c) ill-treatment by his mother and stepfather after leaving the Boys' Dormitory.
- [62] The State denies DJW is entitled to the relief he seeks.
- [63] Of particular relevance to the present application, the final paragraph of the State's Amended Defence pleads:

Further:

- (a) The Plaintiff has commenced and conducts this proceeding towards trial in circumstances whereby, by reason of the matters canvassed below in this paragraph, it constitutes an abuse of process.
- (b) The events alleged occurred in the 1960s;
- (c) All relevant persons, whether perpetrators or staff, as witnesses or sources of relevant facts and instructions as to the Plaintiff's allegations, are dead, infirm or not locatable, and were so prior to the first complaint to the Defendant in 2019, they including Marlene Willmot (died 1995), Maude Phillips (died 1982), Myra Pascoe (died 1983), Jack O'Chin (died 1978) and Vincent Cheriko (died 2008);
- (d) Relevant records have been lost or mislaid;
- (e) In the premises of this paragraph:
 - (i) The defendant cannot enjoy the possibility, or alternatively is at real risk of not enjoying, a fair trial (including adjudication) of this proceeding;
 - (ii) The proceeding ought be permanently stayed.

Relevant legal principles

- [64] Following recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse, Parliament amended the *Limitation of Actions Act 1974* (Qld) to insert a new s 11A. Section 11A abolishes any limitation period in

respect of an action for damages relating to the personal injury of a person resulting from the abuse of the person when the person was a child.

- [65] Section 11A operates retrospectively. Its application to this case means that there is no limitation period for DJW's claim.
- [66] Nevertheless, as s 11(5) of the *Limitation of Actions Act* confirms, the Court retains its discretion to order a permanent stay of a proceeding in the exercise of its inherent jurisdiction in an appropriate case.
- [67] The Court's broad discretion to permanently stay a proceeding is 'an incident of the general power of a court of justice to ensure fairness'.⁶
- [68] In *Batistatos v Roads and Traffic Authority of New South Wales*,⁷ the Court considered the principles that apply to a permanent stay of proceedings on account of abuse of process. The majority stated that what amounts to abuse of court process is insusceptible of a formulation comprising closed categories.⁸ Their Honours endorsed the observations of McHugh J in *Rogerson v The Queen*, where his Honour had stated:⁹

Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute.

- [69] The principles applicable to the exercise of the Court's discretion have recently been considered in several cases involving circumstances similar to the present case where there has been lengthy delay between the alleged occurrence of acts of child sexual abuse and the commencement of proceedings.
- [70] In *Moubarak v Holt* ('*Moubarak*'),¹⁰ Bell P (as his Honour then was),¹¹ summarised the principles relevant to an application to permanently stay proceedings that may be derived from High Court authorities:¹²
 - (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;

⁶ *Willmot v State of Queensland* [52] (Bowskill CJ), citing *Jago v District Court (NSW)* (1989) 168 CLR 23, 31 (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).

⁷ (2006) 226 CLR 256.

⁸ *Ibid* [9], [15] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

⁹ (1994) 181 CLR 251 at 286.

¹⁰ (2019) 100 NSWLR 218.

¹¹ *Ibid* 232–3 [71].

¹² Citing *Jago v District Court (NSW)* (1989) 168 CLR 23; *Williams v Spautz* (1992) 174 CLR 509; *Walton v Gardiner* (1993) 177 CLR 378; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256.

- (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 amongst right-thinking people.

- [71] *Moubarak* concerned an application for a permanent stay of a civil claim brought in the District Court of New South Wales. The plaintiff alleged that her uncle had sexually assaulted her on four occasions in the 1970s when she was twelve years old. By the time the proceedings commenced, her uncle had severe dementia and was incapable of giving evidence or instructions to counsel, and his tutor brought a motion seeking a permanent stay of the proceedings.
- [72] Bell P considered the significance of the 40-year delay between the alleged assaults and commencement of the proceedings and the potential unfairness to the defendant, in circumstances where there was no applicable statutory limitation period. His Honour identified and discussed two forms of unfairness that may arise where there has been significant delay in such a case.¹³ The first was the unfairness to a defendant in prolonging uncertainty, whether commercial or personal or both, in relation to unresolved claims and as yet unarticulated future claims. The second was the effect of delay on the trial process.
- [73] As to the first form of unfairness, his Honour observed that it cannot be complained of in circumstances where the legislature has seen fit not to impose any limitation period on such actions.
- [74] As to the second form of unfairness, his Honour noted that it concerned ‘the impoverishment of the evidence’ available to determine the claim and that its consequence and significance will inevitably vary from case to case. His Honour observed that in cases where the resolution of a case turns predominantly on documentary evidence, it was less likely to be a critical factor, irrespective of the length of the delay. However, in cases where a trial would be exclusively or heavily dependent on oral evidence and the quality of witnesses’ memory and recollection, it was more likely to be an acute factor.
- [75] The Court of Appeal of Western Australia endorsed the principles distilled by Bell P in *Moubarak* in *RC v The Salvation Army (Western Australia) Property Trust*.¹⁴ In that case, the appellant commenced a claim against the respondent, alleging that in 1959 and 1960, an officer of the respondent, had sexually abused him while he was

¹³ Ibid 234–5 [73]–[77].

¹⁴ [2023] WASCA 29, [30] (Murphy and Vaughan JJA and Bleby AJA).

placed in a Boys' Home run by the respondent. The appellant's case against the respondent was premised on both direct and vicarious liability.

- [76] In rejecting the appeal against the trial judge's decision to order a permanent stay of the proceedings, the Court concluded that the available evidence did not overcome the dearth of evidence that was now available sixty years after the alleged abuse.¹⁵ The Court noted that because relevant officers of the respondent were now dead and the respondent was unable to investigate whether any relevant documentary records existed, the case was so prejudicial as to warrant a stay. The Court further stated:

It might be that no one of these would be so prejudicial as to warrant a stay, but their cumulative effect is highly damaging to the capacity of the respondent to conduct a defence in any meaningful way.

- [77] The Court in *RC* reiterated that mere delay would not, of itself, ordinarily justify a stay. Rather the significance of the delay will depend on all the facts.¹⁶
- [78] In *Conellan v Murphy*,¹⁷ the plaintiff alleged the defendant had sexually assaulted her on two occasions, in approximately 1967 and 1968, when they were both children. At first instance, an application for a permanent stay was refused. The Victorian Court of Appeal allowed the defendant's subsequent appeal against that decision. In doing so, the Court outlined the following factors that weighed in favour of granting the stay:¹⁸

- [57] In the present proceeding, the defendant is being asked to defend himself at the age of 62 for actions he is alleged to have committed as a 13 year old in respect of a person he can only have known (on the plaintiff's case) for little more than a week. The burdensome and oppressive nature of that task is manifest. The task is made more oppressive by the fact that, by reason of the substantial elapse of time, neither side is in a position to investigate (or call evidence about) relevant surrounding circumstances and events. Further, the vagueness of the plaintiff's own recollection of surrounding circumstances makes the investigation and defence of her allegations even more problematic.

- [58] It is not merely the difficulty associated with investigating and defending the plaintiff's allegations of sexual assault that makes this proceeding unjustifiably oppressive: there are also significant issues of causation and quantum, the investigation of which has been made more difficult by the substantial elapse of time. The plaintiff's case is that she now suffers (and has suffered for many years) from a chronic post-traumatic stress disorder. The investigation of how and when this condition commenced and developed and its potential causes is now largely (if not wholly) precluded. Large parts of the plaintiff's history upon which conclusions on the issues of causation and quantum might be founded will now be dependent upon little

¹⁵ Ibid [165]–[166].

¹⁶ Ibid [33].

¹⁷ [2017] VSCA 116 (Priest, Beach and Kaye JJA).

¹⁸ Ibid [57]–[58]; [62].

more than the plaintiff's assertions of her subjective recollection of events to which she now attributes importance.

...

[62] There is force in the defendant's submission...that the judge approached her task on too narrow a basis, namely that of merely looking at whether a fair trial was, in all the circumstances, possible. As the authorities show, in order to determine whether a stay should have been granted, it was also necessary to examine whether there was unjustifiable unfairness in requiring the defendant to defend himself in respect of the plaintiff's allegations now made almost 50 years after the alleged events (remembering that all adult witnesses are now dead and that the defendant, the plaintiff, the defendant's brother and Mr Lovett were all children at the relevant time).

[79] The case of *GLJ* concerned a claim brought by the respondent against the Lismore Trust for damages arising from an allegation that, in 1968, when she was 14 years old, she was sexually assaulted by a priest, Father Anderson. The Lismore Trust contended it had no chance of receiving a fair trial in circumstances where it had no recourse to Father Anderson or other material witnesses, each of whom was deceased by the time of the hearing. The New South Wales Court of Appeal ordered the proceedings be permanently stayed, with Brereton JA relevantly observing:¹⁹

In this case, to succeed at trial GLJ would have to establish, against the Lismore Trust, first that Father Anderson sexually assaulted her as alleged, and secondly that the Lismore Trust is legally responsible, whether by way of vicarious liability in assault, or direct liability in negligence. Although it may be that the passage of time does not unduly compromise the Lismore Trust's ability to meet allegations that it was vicariously liable for whatever Anderson may have done, or that – being on notice of his paedophiliac propensities in respect of young males – it breached its duty of care in exposing young parishioners to him, that is not the point. There were only two potential witnesses to the alleged assault, GLJ and Father Anderson. 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 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.

¹⁹ [2022] NSWCA 78 [4].

Joanne Willmot

- [80] The case of *Joanne Willmot* has particular similarities to DJW's case.
- [81] The plaintiff in that matter sought to recover damages against the State for psychiatric injury she allegedly sustained as a result of the State's negligence. Ms Willmot alleged she developed the psychiatric injury as a result of sexual abuse and physical abuse she experienced while in the care of the State.
- [82] Like DJW's case, Ms Willmot's claim against the State was based on an alleged failure by the State to properly monitor and supervise her and those into whose care she was placed.
- [83] Ms Willmot, like DJW, is an Aboriginal person who was placed into the Mothers and Babies Quarters at the Girls' Dormitory as an infant. Like DJW's case, it was Ms Willmot's case that Myra Pascoe was the manager of the Girls' Dormitory and Maude Phillips was the supervisor when Ms Willmot was a resident. However, unlike DJW's case, between 1957 and 1959, Ms Willmot was placed in foster care with Jack and Tottie Demlin, an indigenous couple who lived in the Cherbourg settlement. Ms Willmot alleged that, whilst she was in the foster care of the Demlins, Jack Demlin sexually abused her. She also claimed that she was regularly subjected to beatings by the Demlins.
- [84] Ms Willmot was removed from the care of the Demlins because of concerns that she was malnourished. She was then returned to the Girls' Dormitory. Thereafter, Ms Willmot alleged she suffered physical punishment and abuse. She further alleged that she suffered other sexual abuse on two further occasions, in about 1960 and 1967, when she had visited her grandmother's house in Ipswich.
- [85] By the time Ms Willmot's claim had commenced, both Jack and Tottie Demlin had long been deceased. Similarly, Maude Phillips and Myra Pascoe were deceased, as were others who may have been able to give relevant evidence in relation to the matters alleged by Ms Willmot.
- [86] Upon an application brought by the State, Bowskill CJ ordered a permanent stay of the proceedings. In doing so, her Honour applied the relevant principles summarised by Bell P in *Moubarak*, which I have set out above.
- [87] In concluding that a permanent stay was warranted, her Honour relevantly stated:²⁰
- [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

²⁰ *Willmot v State of Queensland*, [75]–[77] (footnotes omitted).

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.

[88] The Court of Appeal dismissed a subsequent appeal against Bowskill CJ's decision. In doing so, the Court relevantly stated:²¹

[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. 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. As to Maude Phillips' 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.

[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, by

²¹ *Willmot v State of Queensland* [2023] QCA 102, [67]–[70] (Gotterson AJA, Mullins P agreeing at [1] and Boddice AJA agreeing at [90]).

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.”

- [70] Were a trial to proceed here, the State would be in a position akin to that in which the Trustees in *Ward22* 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”.”

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

- [89] Whilst there does not seem to be any dispute with respect to the applicability of the principles summarised above, it is pertinent to bear in mind the further observation made in *Moubarak* by Bell P that applications of this kind are intensely fact dependent.²³ Accordingly, it is necessary to identify and closely scrutinize the relevant factual circumstances of the present case when in considering whether the exceptional remedy of a permanent stay of the proceedings is justified.
- [90] In doing so, I bear in mind that I am not conducting a trial of the proceedings and I am not making factual findings in respect of the matters disclosed by the pleadings.
- [91] I also bear firmly in mind that the State bears the onus of demonstrating that a permanent stay should be granted and that it is a serious matter to stay a plaintiff’s claim where the jurisdiction of the Court has otherwise been regularly invoked. There is no onus on DJW to adduce evidence to attempt to prove any particular matter or issue for the purposes of this application. Whilst DJW has here chosen to proffer evidence in response to the State’s application, it remains for the State to persuade the Court that a permanent stay is justified in all the circumstances.
- [92] In accordance with the principles set out above, the critical issue that I must consider is whether the continuation of the proceedings brought by DJW against the State would amount to an abuse of process, sufficient to warrant the granting of a permanent stay, as they would be unfairly burdensome or unjustifiably oppressive to the State, or they would bring the administration of justice into disrepute.

²² *Ward v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2019] NSWSC 1776 [22].

²³ *Moubarak*, 242 [112].

Available evidence and current state of investigations and enquiries

DJW's evidence

- [93] The only witness who would be called at trial to give evidence of the occurrence of the alleged sexual abuse incidents is DJW himself. It is anticipated that he would give evidence in accordance with his statement and his subsequent affidavit which he had sworn for the purpose of these proceedings.
- [94] DJW's affidavit largely contains and repeats the contents of his statement which was annexed to his Notice of Claim. For convenience, I will simply refer to matters stated by DJW in his statement.
- [95] DJW confirms that he has not previously disclosed the details of the alleged sexual abuse. He states:

... I have felt very embarrassed and awkward about these matters over the years and only now, within this statement, will I more fully outline certain aspects of these childhood assaults and broader impacts regarding my education, work, social and personal life.

- [96] With respect to the three alleged incidents that form the basis of his claim as pleaded, DJW provides further details in respect of each alleged incident. With respect to the sexual abuse in the Girls' Dormitory, he states that from around the ages of 4 to 5 he was repeatedly sexually assaulted by multiple Aboriginal women and forced to provide them with oral sex several times a week over about a year.
- [97] He states that during his years of residency at the Girls' Dormitory, the supervisor was an Aboriginal lady by the name of 'Maudie Phillips' and the overall manager was a white lady by the name Myra Pascoe or, as they called her, Matron Pascoe. He further states that the Girls' Dormitory housed female children and young boys to the age of five. He states that the infants, toddlers and young children were cared for by the mothers who had recently given birth but also by the older primary school aged girls or the teenagers. He further states the girls of school age would go to school during the daytime and the older teenage girls would stay and learn about sewing, cooking and how to become domestics for work outside of Cherbourg.
- [98] According to DJW, '[A]ll of our movements were overseen, controlled and managed by Supervisor Maudie Philips and Matron Pascoe, who in turn were overseen by the Cherbourg Superintendent who lived in a house within the township.' With respect to supervision at night times, DJW states:

I do not know how many young boys and girls (5 years and under), school age girls and teenage girls were living and sleeping within the Girls Dorm but there always seemed to be a very large number of people there. Of an evening and sometimes of day, however, there was really only old Maudie Phillips left there to look after all of us. Basically, there were too many kids compared the number of 'adult/s' for them to properly look after everyone who was in the Girls Dorm. Additionally, Maudie Phillips room was down the far end of the building and she generally had the door closed – so she could not see or hear what was happening – particularly at night after lights out at 9pm...

- [99] DJW further states, '... the mental and emotional trauma I suffered as a result of my childhood sexual assaults have impacted upon my entire life...I have never outlined

the precise details of my childhood sexual assaults until now within this statement and it is obviously an upsetting experience to remember many aspects of what occurred.'

- [100] With respect to the sexual abuse within the Girls' Dormitory, DJW details the first and second incidents of sexual assault allegedly perpetrated by Auntie Marlene, which he says occurred within the year that he was four years old. He further recounts that after these two occasions, '... she did not stop and kept doing every week or so – sometimes more or sometimes less.'
- [101] DJW further details how the sexual assaults became worse for him '... not only because my auntie kept making me perform oral sex upon her, but because other women in the Girls Dorm found out what I was doing and, to my horror, also made me perform oral sex upon them.' DJW states that he is unable to recall all of their names, however, he does know for certain that they were teenage girls who also lived in the Girls' Dormitory. He recalls that there were between four to six girls in addition to his auntie, who would each take him for oral sex during his final year in the Girls' Dormitory. He remembers one particular girl was 'Margerie' (sometimes spelled as 'Margarie', 'Marjorie' or 'Marjarie') Arnold and that it was her and some of her friends who would regularly take him to perform oral sex upon them.
- [102] DJW states that he recalls having to perform oral sex upon these women, in addition to his auntie, several times each week. He states, '[T]he girls would basically take me whenever they wanted me because I was not at school and it was understood it was the responsibility of the older teenage girls to care for the young ones such as me.' He recalls that the incidents would occur both at night and during the day and would occur not only within the dormitory itself but also at other locations around the building.
- [103] DJW also nominates another Aboriginal girl by the name of 'Florence Grey', whom he recalls as around 12 years of age at the time, as somebody that he felt safe with. He states that he thought about trying to tell her about the abuse but '...at that age I could not find the words and, in particular, I did not understand what was happening to me or why.' He also recalls another lady or teenager who had a 'gammy leg' who was also very kind to him. DJW does not provide any further details of that person.
- [104] With respect to the incident involving CB, DJW details what he says occurred when Maudie Phillips found the pair. In particular, he recounts how he and CB were taken the rear of the Dormitory and then sprayed with a powerful fire hose directly onto their face and bodies until they both loudly cried in pain. He further recalls being placed in the women's jail for several hours and he and CB remaining there in their wet clothes. He further states, 'I am aware that Matron Pascoe was either there when we got punished with the fire hose or came and saw us while we were in the jail.'
- [105] With respect to the alleged sexual assault that occurred during the Boys' Dormitory camp, DJW recalls it happened when he was six years old, in 1962/63 during the hottest summer months. He recalls that the camp was held at a place called 'The Weir', which was next to a large creek or small river. He recalls they had to drive a reasonably long distance in old trucks to reach that location. He states that there were about twenty or more boys on the camp, ranging in age from little boys of around 6 years of age like himself through to older boys of about 16 to 17 years of age. He recalls that only Mr O'Chin was there to supervise them. He also recalls, 'I think the old lady who cooked for us in the Boys Dorm, Nelly Saunders, also came along.'

[106] With respect to the alleged anal rape incident, although DJW recalls there were three older boys involved, he is only able to identify Vincent Cheriko as the perpetrator. DJW does not recall the names of the other boys, but states, 'I know they were both Dorm Boys who always hung around Cheriko. They were also around 15-17 years old...'

[107] With respect to the effects of these alleged incidents, DJW states:

In essence, I have remained very traumatised by my childhood sexual assaults. I have nightmares, I am often very depressed, in private find myself crying and sobbing and anything that reminds me of those people or times brings out an emotional state of panic and fright. Throughout my life I have remained withdrawn, non-engaging and unable to enter relationships.

My working life has been severely affected due to my childhood sexual assaults. I am extremely emotionally guarded at work and do not fully engage with colleagues and management. I do not want to expose myself and be hurt mentally, emotionally, or professionally. My career in different areas has been badly affected and I will discuss these matters in my addendum statement.

Other potential witnesses and evidence identified by DJW

[108] The legal representatives for DJW have obtained statements from other persons on his behalf and have served them upon the State.

[109] None of those persons witnessed any of the alleged incidents of sexual abuse against DJW. Further, only one, Paul Sandow, seems to have been a resident in the dormitories at the same time as DJW.

[110] The makers of the statements that have been served on behalf of DJW variously provide their recollections and opinions about DJW's personality, demeanour and behaviour as an adult and their observations of apparent symptoms experienced by him as an adult, which may be said to be generally consistent with the sequelae of the psychiatric injuries which DJW claims he has suffered as a result of the abuse he experienced as a child.

[111] In addition to written statements, a number of other persons have provided affidavits for DJW in support of his claim against the State. Those affidavits have also been served upon the State by DJW's lawyers. It is neither necessary nor convenient to set out the full details the various matters deposed to by the makers of those affidavits. Each provides evidence of their own experiences as a resident of the Cherbourg dormitories, including details about the layout of the dormitories, the numbers of staff and residents and the general systems of supervision and monitoring of residents. Some of the deponents were residents in the dormitories during the time that DJW was a resident, however most of them were not.

[112] Whilst the deponents of these affidavits each describe incidents of physical and sexual abuse which they allege they were themselves subjected to by other residents or visitors to the dormitories, save perhaps for one exception, none was the victim of sexual abuse allegedly perpetrated by either Marlene Willmot (i.e, 'Aunty Marlene'), 'Margerie' Arnold or Vincent Serico ('Cheriko'). Further, none witnessed or was aware of any incident of sexual abuse perpetrated against DJW.

- [113] It is necessary, however, to make specific reference to parts of the affidavits sworn by Lorna Blair, Anita Leedie and 'KL'.

Lorna Blair

- [114] Ms Blair was a resident of the Mothers and Babies Quarters from around January 1959 to around August 1962. She then resided in the Girls' Dormitory from around February 1964 to July 1968 and then for a further month in April 1973.
- [115] Ms Blair deposes to being subjected to sexual abuse on two occasions by old teenage residents of the Girls' Dormitory. Neither of the alleged perpetrators were persons named by DJW as his alleged abusers. However, Ms Blair does recall on one occasion another older girl saw what was happening during one of the alleged instances of abuse and she said that she was going to tell Maude Phillips. She states that the following day, her alleged abuser was locked in the female jail at the back of the Girls' Dormitory. She further recalls that on another occasion of alleged abuse, the perpetrator was also caught in the act by another resident and Maude Phillips was informed. According to Ms Blair, the alleged perpetrator was subsequently put into the girls' prison.
- [116] Ms Blair recalls DJW and CB being in the dormitory at the time that she was there. With respect to the specific matters alleged by DJW, Ms Blair recalls an occasion where she saw DJW and CB being hosed with the fire hose by Maudie Philips. She states, 'I do not know the reason why they were being punished... I saw [CB] in the women's prison. I also saw [DJW] in the women's prison...'
- [117] With respect to Marlene Willmot, Ms Blair recalls that she used to give out all the clothes and uniforms and dress the children. She states:

...She worked under Maudie Phillips. I recall she wasn't put to work doing any cleaning, but she was somewhat responsible for clothing. She was a person that carried all of the keys. By this I mean she had the keys and had access to all of the rooms, including the rooms which held the brand new clothes, the dining room, the sewing room. She also unlocked the Girls Dormitory and she gave out the rations for toiletries. I saw Maudie Phillips give this access to Marlene Willmot and she used to have the keys all of the time. If the girls had an accident or something, they would go to her and she would dress them in new clothes. She followed the orders given to her. I remember her being a busy-body.

Anita Leedie (nee Wragge)

- [118] Ms Leedie was placed in the Cherbourg Girls' Dormitory from when she was about two years of age (February 1967) until she was nine and a half years old (September 1973).
- [119] Ms Leedie recalls that during her time in the dormitory, she was aware it was common for young boys to sleep in the beds of older women/teenagers. In particular, she recalls that her younger brother, Norman, was required to sleep in the same bed as his assigned teenage girl 'carer', Kathy Anderson.
- [120] Ms Leedie also recalls the jail at the back of the Girls' Dormitory. She states that it was common for Maude Philips to send children (both boys and girls) to the jail as a form of punishment. She deposes that she was punished in this way herself on one occasion by Maude Phillips.

KL

[121] KL was born in Cherbourg in 1954. She was placed in the Mothers and Babies Quarters as a baby with her mother. She later moved into the Girls' Dormitory and lived there until she was about 15 years old. She remembers DJW being there when she was there.

[122] With respect to the system of supervision within the Dormitory, KL states:

Older residents at the dormitory were often required to supervise and look after younger children...I looked after Norman Wragge when he was a baby. To the best of my recollection, I was about 9 years old. He was my responsibility...No training was ever provided to me as to how to look after a baby. We were ordered to do this by Maude Phillips.

[123] KL recalls some children in the Dormitory 'engaging in strange sexualised behaviour'. She remembers '...little kids crawling into bed with other kids at night to touch them.' In particular, she recalls:

Marlene Willmot was a teenage girl at the dormitory when I was about 8 years old. She was a resident at the dormitory and I understood she was somehow close with Maude Phillips. She would gather up a few children, usually the same group – she would make us sit in a tight circle and she would then fondle and masturbate the young girls and boys in the group. I also remember that Marlene would force the girls to suck on her breasts.

Marlene would also force young children to do sexual things to each other; like touch each others' genitals, expose their genitals and force those of us who weren't being touched to watch. If we looked away, she would growl at us and force us to watch. I also witnessed her force a young boy to rub or put his penis inside a little girl. They would have been 6 or 7 years old at the time. I remember she called it a game and told us that we would be in big trouble if we told anyone.

Investigations and enquiries by DJW's lawyers

[124] In addition to the statements and affidavits that have been obtained and served on behalf of DJW, Ms Kate Ross, the solicitor acting for DJW in these proceedings, has sworn two affidavits in which she sets out the current state of further investigations and enquiries that have been undertaken on behalf of DJW to attempt to identify further potential witnesses or sources of evidence.

[125] Ms Ross states that there are a number of witnesses still available who might be able to provide evidence regarding the staff and layout of the dormitories and the system of supervision and monitoring that was in place, including the relations between younger and older residents. In that respect, Ms Ross notes the availability of Ms Eva Collins, a former monitor/manager of the Mothers and Babies Quarters who took over management of the Girls' Dormitory in about 1972, after Myra Pascoe and Maude Phillips had left. Ms Ross observes that the State has made no attempt to locate or interview Ms Collins.

[126] Ms Ross deposes to the fact that in separate proceedings against the State, Ms Collins has previously provided an affidavit, sworn 1 April 2022, in which she detailed matters relating to the operation of the Girls' Dormitory, including its layout, staffing

and the supervision of residents. A copy of Ms Collins' previous affidavit is exhibited to Ms Ross' first affidavit. Ms Ross summarises a range of matters that she believes Ms Collins would be able to give evidence about in the present proceedings. Ms Ross further deposes that steps are being taken by DJW's solicitors to obtain an affidavit from Ms Collins for the purposes of the present proceedings. To that end, she deposes that on 31 January 2023, Ms Collins was interviewed and that she confirmed the contents of her 1 April 2022 affidavit. Ms Ross states that Ms Collins continues to be an available witness.

- [127] Amongst other things, in her 1 April 2022 affidavit, Ms Collins provides a general overview of the Cherbourg township and the dormitories and describes her observations of the system of management and supervision of residents of the dormitories. For example, Ms Collins states:

It was impossible to keep track of all of the boys and girls after school finished and when they returned back to the dormitories. We did our best, but it was impossible to keep your eyes on them all the time...

I remember over the years at the Girls Dormitory, it was quite common for there to be no supervision for the children after school/early evening other than the other girls who were staying in the dormitory waiting for a domestic placement. A similar situation existed at the Boys Dormitory with Jack and Nelly O'Chin...

- [128] Ms Collins does not make any reference to incidents or complaints of alleged sexual assault within the dormitories. She does, however, make passing reference to the physical discipline of residents by Maude Phillips and Jack O'Chin, commenting, '[T]hey were both heavy handed in their physical discipline compared to me.'
- [129] Ms Ross also confirms she has interviewed each of David and Michael Wragge, former dormitory residents. She states that each has provided an affidavit regarding the system of supervision and monitoring, the staff and the layout of the dormitories and is an available witness. I note that affidavits from each of David and Michael Wragge are amongst those which have been served on the State by DJW's lawyers.
- [130] Ms Ross further identifies two particular individuals, Mr Russell Hegarty and Mr Stephen Warner, as potential witnesses who may be able to give evidence about the layout of the dormitories, their staff and their system of supervision and monitoring. Ms Ross confirms that steps are being taken by DJW's lawyers to obtain affidavits from each for the purposes of the present proceedings.
- [131] In addition to these identified potential witnesses, Ms Ross deposes that the State has possession of 'admission lists' of all dormitory residents who lived in the dormitories during the times that DJW, Marlene Willmot, Vincent Serico, CB and Margerie Arnold each were residents. Ms Ross identifies the residents named within the admissions lists as further potential witnesses to DJW's claims. She deposes that 'this information has not been disclosed to the Plaintiff'. From her own enquiries, Ms Ross lists the names of some 48 persons whom she understands were residents of the dormitories and who may still be living and available to be contacted in respect of DJW's claim. Ms Ross confirms that various steps are being taken by DJW, through his solicitors, to locate and contact those persons.
- [132] Ms Ross further outlines the results to date of other investigations that have been undertaken on behalf of DJW to locate various persons who DJW's solicitors have identified as potential witnesses.

The State's investigations and enquiries

- [133] Ms Janice Mills, a Senior Principal Lawyer employed in the Office of the Crown Solicitor for the State of Queensland (**'Crown Law'**) has carriage of this matter on behalf of the State. Ms Mills has sworn four affidavits for the purposes of the present application. Those affidavits set out the enquiries, investigations and other actions taken by the State since first being served with DJW's Notice of Claim and the subsequent commencement of the proceedings.
- [134] Ms Mills confirms that the State first became aware of DJW's allegations when it was served with his Notice of Claim. Ms Mills states that since then she has attempted to locate every individual named by DJW in his statement or his affidavit or otherwise referred to in the ASOC.
- [135] Ms Mills deposes to the first enquiries she undertook after reviewing DJW's Notice of Claim and statement. On 12 September 2019, she made a request to the Department of Child Safety, Youth and Women (**'DCSYW'**) for information relating to DJW. That request was subsequently referred to the Department of Aboriginal and Torres Strait Islander Partnerships (**'DATSIP'**).²⁴
- [136] Ms Mills states that at various stages since then, DATSIP has progressively identified and provided Crown Law with documents relevant to DJW and his claim. Those documents include records in respect of DJW himself, records in respect of the dormitories and records in respect of the Cherbourg township during the relevant period of DJW's claim. Ms Mills deposes that on each occasion she has received such documents, she has reviewed them and disclosed relevant documents to DJW.
- [137] Ms Mills confirms that none of the DCSYW or DATSIP records she has received and reviewed have contained any references to alleged physical or sexual abuse of DJW by any person in the dormitories.
- [138] Ms Mills states that, in response to her enquiries, DATSIP has advised that there were limited protocols, policies and practices of management, segregation, monitoring, discipline, health and welfare at the dormitories. Nonetheless, DATSIP has provided numerous documents relevant to those matters. Ms Mills confirms that all such documents relevant to DJW's claim have been disclosed.
- [139] Amongst the documents Crown Law received from DATSIP were documents relating to the administration of the Cherbourg settlement, duties of staff, duties of overseers and the Dormitory Matron's reports. The Dormitory Matron reports for the period from 1961–70 were prepared by Matron Myra Pascoe.
- [140] Ms Mills states that her review of the relevant DATSIP documents produced reveals that all administrative staff had lists of duties and that these were determined by the Superintendent under the control of the Director. She further confirms that in most duty statements, a comment was made that the person in that position would supervise, monitor and instruct the Aboriginal labour under their control, but that no specific list of duties for Aboriginal employees have been located. She surmises that their duties flowed from the lists of duties of their overseer. Ms Mills states that DATSIP has confirmed that there were no documents located that specifically referred to duties of Aboriginal employees.

²⁴ Now known as the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts.

- [141] Ms Mills states that she has made specific enquiries in respect of each of the persons identified by DJW in his ASOC and his statement, including Maude Phillips, Jack O'Chin, Marlene Willmot, Vincent Serico ('Cheriko'), 'Margerie' Arnold and CB. As part of those enquiries, Ms Mills obtained and reviewed additional records from DATSIP relating to those persons. Ms Mills confirms that none of the additional DATSIP records refer to DJW or to any instance of sexual abuse perpetrated by Marlene Willmot as alleged by DJW. She further confirms that there are no records relating to Marlene Willmot assaulting any other person at Cherbourg or elsewhere.
- [142] Similarly, in respect of the DATSIP records for Vincent Serico, Ms Mills confirms there are no records that refer to DJW or to any instance of sexual abuse as alleged by DJW. She further confirms that there are no documents relating to Vincent Serico assaulting any other person at Cherbourg or elsewhere.
- [143] In respect of Maude Phillips, Ms Mills states that she identified one DATSIP document concerning a complaint made about her. That was contained in a letter from the 'Women of Cherbourg' addressed simply to 'Dear Sir', dated 18 January 1951. Within the letter complaint is made about the Girls' Dormitory Manageress (i.e., Ms Phillips) flogging girls with big sticks and other alleged physical abuse. The complaint is not about DJW and it predates his residency in the Girls' Dormitory by many years. The letter also refers to and complains about 'Ms Reese'. Ms Ivy Rees was the former Supervisor of the Girls' Dormitory before Ms Pascoe. Subsequent records show that an investigation into the complaint was conducted by or on behalf of Mr Harry Sedgwick, the then Superintendent of Cherbourg, and the complaint was deemed to be unfounded.
- [144] As to CB, Ms Mills confirms that upon her review of the relevant DATSIP records, there are none that refer to DJW or to the fire hose incident involving DJW.
- [145] With respect to Jack O'Chin, Mr Mills states there are no DATSIP records that relate to DJW or to the alleged sexual abuse perpetrated upon DJW at the Weir camp.
- [146] With respect to 'Margerie' Arnold, Ms Mills states that she has been advised that DATSIP does not have a record of any such person. However, DATSIP does have records in respect of a person named 'Margaret Arnold', which Mills subsequently obtained and reviewed. Ms Mills confirms those records indicate that Margaret Arnold was at the Cherbourg dormitories intermittently during the period 1960 to 1963.
- [147] Ms Mills also made enquiries with DATSIP in respect of 'Nellie Saunders', who is named by DJW in his statement as the old woman and cook who was present at the camp at The Weir. Ms Mills confirms that DATSIP has advised they have no record of a person of that name. Ms Mills subsequently made a request of DATSIP for records in respect of 'Ethel Saunders', on the basis that Ms Mills had become aware that such a person was noted in Cherbourg Dormitory staff records. Ms Mills considered it may have been possible that the person DJW refers to in his statement as 'Nellie' was perhaps 'Ellie' (Ethel) Saunders.
- [148] Ms Mills confirms that in addition to reviewing all of the DATSIP records in respect of DJW, she has also reviewed all of the documents provided by DATSIP in respect of other claims against the State involving Cherbourg. She confirms that she has not discovered any records that relate to any acts of physical and sexual abuse of DJW of the kind alleged by DJW in his ASOC.

- [149] With respect to other investigations conducted by the State, Ms Mills confirms that she was able to locate CB and has since spoken with her on two occasions. In those discussions, CB confirmed that she had lived at Cherbourg and was a resident of the Girls' Dormitory in the early 1960s. She recalled DJW as a person she knew and played with at Cherbourg. She further recalled Maude Phillips as a 'nasty woman' who cared for the residents in the Girls' Dormitory.
- [150] With respect to matters that are the subject of DJW's claim, CB told Ms Mills that she recalled an occasion where she and DJW were put into a jail with a high window and that had scared her. When asked by Ms Mills why she had been placed in the jail, CB stated it was probably because she and DJW had been misbehaving. She stated that the persons who locked herself and DJW in the jail were Maude Phillips and Matron Pascoe and that they had been locked in all day. When asked by Ms Mills as to what had caused them to put into the jail, CB stated that she could not recall, she had no idea and that she had 'thought about it many times but could never recall'. CB did not mention being sprayed with the fire hose or being verbally abused by Maude Phillips as alleged by DJW.
- [151] Ms Mills further deposes that numerous requests were made by Crown Law for any records held by the Registry of Births, Deaths and Marriages ('**BDM**') in respect of the various persons named by DJW in his statement and in the ASOC and other persons who may have a relevant connection to DJW's claim. Ms Mills states that the information received from BDM confirms that:
- (a) Marlene Willmot died on 24 July 1995;
 - (b) Vincent Serico ('Cheriko') died on 16 August 2008;
 - (c) Maude Phillips died on 12 October 1982; and
 - (d) Myra Pascoe died on 29 July 1983.
- [152] In addition to this information, DATSIP provided Crown Law with a death certificate in respect of Jack O'Chin, which confirms he died on 24 August 1978. Further DATSIP records confirm that Ethel Saunders, died on 10 May 1971.
- [153] Ms Mills further states that BDM has advised that no records could be located in respect of the deaths of:
- (a) George Sturgess, Superintendent of Cherbourg settlement from 1954 to 1966;
 - (b) Harry Sedgwick, Superintendent of Cherbourg from 1950 to 1954;
 - (c) Nellie O'Chin, the wife of Jack O'Chin;
 - (d) Florence Grey, a former resident of the Girls' Dormitory.
- [154] Although no records were held by BDM, Ms Mills observes that based on known dates of birth, if still alive:
- (a) George Sturgess would now be 117 years old;
 - (b) Harry Sedgwick would now be 115 years old;
 - (c) Nellie O'Chin would now be 90 years old; and
 - (d) Florence Grey would now be 71 years old.
- [155] Ms Mills deposes that as a result of other enquiries undertaken by Crown Law, she has been advised that Nellie O'Chin has dementia.

- [156] Ms Mills further deposes that enquiries were also made with Cherbourg Aboriginal Council in respect of records of deaths within the township. She confirms that the Council provided a report which indicated deaths had been recorded in a 'Register of Burials' for both Margaret Arnold and Ethel Saunders.
- [157] In addition to obtaining and reviewing the various DATSIP records, Ms Mills deposes that has also sought and obtained relevant health and medical records in respect of DJW. Ms Mills has reviewed those records. None of them contain any earlier record, predating DJW's statement and the commencement of proceedings, of a complaint made by DJW about the alleged physical or sexual abuse particularised in his statement and ASOC. Each of the relevant health and medical records obtained by Crown Law has been disclosed to DJW.
- [158] Ms Mills confirms that by email dated 10 May 2023, DATSIP confirmed that to the best of their knowledge, they have provided all documents requested by Ms Mills over the course of investigating DJW's claim, including all documents relating to the management of Cherbourg.
- [159] Ms Mills further confirms that, as of the date of swearing her final affidavit on 31 May 2023, all relevant documents she had reviewed relating to Cherbourg and DJW's allegations of abuse had been disclosed to DJW, in accordance with pre-proceeding procedures mandated under the *PIPA* and subsequently under r 211 of the *Uniform Civil Procedure Rules 1999* (Qld) since the commencement of proceedings.
- [160] DJW does not assert that the disclosure made by the State is incomplete or inadequate. At present, there are no outstanding requests for further disclosure by the State.
- [161] By way of summary, Ms Mills states that the named persons against whom DJW makes allegations were deceased well before the State received the Notice of Claim. She further states that as the two other teenage boys said to have been involved in the alleged sexual assault by Vincent Serico were not named by DJW in his pleadings or elsewhere, the State has no means of identifying them.
- [162] Similarly, Ms Mills summarises that all persons in management or supervisory positions at Cherbourg during the relevant period, who could have given instructions on the daily management and routine in the settlement, are also deceased or unlocatable.
- [163] Ms Mills concludes that all persons who could be enquired of by the State and give evidence pertaining in any way to the specific allegations of sexual and physical abuse alleged by DJW are deceased or unlocatable at this time.
- [164] Ms Mills was required for cross-examination at the hearing of the State's application.
- [165] At the outset of her cross-examination, she was asked to identify and outline the enquiries that had been undertaken by the State to date with respect to DJW's claim. Ms Mills confirmed that the four broad sources of information that she had for documents related to DJW and his claim were DCSYW, DATSIP, BDM and the Cherbourg Council (referred to as the 'four sources search'). Ms Mills confirmed there were no other sources for relevant documents.
- [166] Ms Mills confirmed that she was aware from numerous claims of this nature that there were a lot of records with respect to various people who had worked at Cherbourg and the management at Cherbourg and those 'generic' type documents had been disclosed to DJW.

- [167] Ms Mills was asked about whether she had investigated all of the persons contained in a table she exhibited to her first affidavit. Ms Mills stated that she had not investigated many of those persons and she had only investigated those that were relevant to DJW's claim. The persons on the list that Ms Mills was able to confirm she had conducted investigations in respect of were Marlene Willmot, Vincent Serico, CB and Maude Phillips. Ms Mills confirmed that she had sought and obtained documents from DATSIP and also perhaps BDM in some cases in respect of those persons.
- [168] Ms Mills also confirmed she had made enquiries in respect of Jack O'Chin and also some limited enquiries with respect to Florence Grey to establish where she was. She also confirmed that investigations had been carried out with respect to Myra Pascoe and Nellie Saunders and minor investigations with respect to a range of other persons in order to determine whether they were still alive so that they could proceed with any further investigations if necessary.
- [169] Ms Mills confirmed that she had reviewed the list of affidavits that had been served by DJW's lawyers. When asked whether she had conducted her four sources search in respect of those witnesses, she confirmed that she had not done so in respect of Gordon Wragge, Lorna Blair, Warren Collins, KL, Victor Blair, Anita Leedie, David Wragge or Michael Wragge. Ms Mills explained that she had not undertaken those searches because none of those persons were people mentioned by DJW in any of his documents and, further, most of them did not refer to DJW in their affidavits. Ms Mills confirmed that a forensic examination had been undertaken for all persons DJW had named but not for people who had otherwise provided affidavits for DJW. Ms Mills stated that she had not undertaken those enquiries because most of the affidavits did not concern DJW and, except for Ms Lorna Blair, none of those persons were able to say anything in relation to the specific allegations made by DJW.
- [170] With respect to the State apparently being in possession of 'admission lists' of all dormitory residents, Ms Mills stated that she could not recall seeing such a list, but confirmed that everything she did see that she considered relevant had been disclosed to DJW.
- [171] Ms Mills was asked whether she had undertaken her four sources search in respect of the 48 persons identified by Ms Ross. Ms Mills confirmed that she had not, but she noted that some of those persons had their own claims. She confirmed that she had not sought to interview any of those persons. She further confirmed that the only person that she had interviewed with respect to DJW's claims was CB.
- [172] When asked whether there was any reason why she had not interviewed any other witnesses, Ms Mills explained:

Because we focused on the people who are named in [DJW's] material. The problem is that [DJW] doesn't give dates when anything happened. They're just people who may – may've been at Cherbourg at the same time he was. They had their own recollections of Cherbourg, as we've seen in these affidavits. None of these people that I could just point to and – and say that – I mean, in the affidavit material that we did receive, I noted [DJW's] name in about five of them. So they obviously didn't know [DJW], and a lot of them gave – were in the period after [DJW] had left. As I said, we concentrated on searching for every person that [DJW] had named, and, often, it was difficult...So we did diligent searches with respect to all the people

who were named. We just didn't go off on a forage looking for other people.

The arguments of the parties on this application

The State's arguments

- [173] The State raises five points in support of application for a permanent stay of the proceedings.
- [174] *First*, the State notes that it first became aware of DJW's complaints, concerning events that allegedly took place somewhere between 50 and 60 years, when DJW gave notice of his claim under the *PIPA* on 29 November 2019. Accordingly, the State had no prior awareness of DJW's claim and no prior opportunity to investigate the specific allegations he now makes.
- [175] *Second*, all the named perpetrators of the alleged sexual abuse against DJW, and the management and supervisory staff within the dormitories at the relevant times of the alleged events, are now deceased. Accordingly, the State is unable to obtain information or instructions from those persons in order to deal with DJW's allegations.
- [176] *Third*, despite searches for relevant documents having been undertaken, there are no records or documents concerning complaints of the kind made by DJW.
- [177] *Fourth*, attributing causation in this case is problematic, as there are several potential causes of DJW's psychiatric injuries. Whilst DJW claims the cause of his injuries is the abuse he experienced whilst he was a resident of the dormitories, given that he left the dormitories when he was nine years old and then experienced family circumstances which he himself described as 'horrible', the State contends there are obviously other 'non-actionable' circumstances which contribute to DJW's psychiatric conditions.
- [178] *Fifth*, the alleged incident involving the rape perpetrated by Vincent Serico poses particular difficulties for the State, as it is a single alleged instance of abuse which is said to have occurred at a camp away from the Boys' Dormitory. As with the other allegations made by DJW, the alleged perpetrator of the act and the supervisory staff supposedly present at the camp are deceased. Further, no documents or records exist in respect of this alleged incident.
- [179] In response to DJW argument that the State has not made all reasonable enquiries as there are many potential witnesses who may be available to give evidence about matters relevant to DJW's claim, the State maintains that it is not incumbent upon it to go and speak to every possible person who might have been a resident in the dormitories at the relevant time, to see if they remember anything about the matters that are the subject of DJW's claim. Rather, the State submits, the case that the State has to meet is that which is pleaded by DJW in the ASOC.

DJW's arguments

- [180] In response to the State's arguments, DJW raises five points of his own as to why the State's application should be dismissed.
- [181] *First*, there are a significant number of witnesses who can give evidence about the lack of supervision and the circumstances generally within the Girls' Dormitory. DJW submits that despite the State being aware of these potential witnesses, it has chosen not to interview any of those persons, other than CB. Accordingly, DJW

submits, the State has failed to discharge its onus to make all reasonable enquiries which bear upon the fairness or unfairness of the proceedings.

- [182] *Second*, the application for a permanent stay at this stage is premature. DJW argues there are several investigations that are still to be carried out and if the State is unwilling to undertake those investigations, DJW wishes to do so. DJW submits that his own preliminary investigations have already produced substantive evidence in support of his allegations.
- [183] *Third*, DJW's case is different from the vast majority of other cases of this kind, such as the case of *Joanne Willmot* and *GLJ*, which each involved cases of alleged sexual abuse occurring within private residences. In contrast, DJW's case involves alleged sexual abuse on the State's premises, when DJW was under the direct supervision and control of the State's employees. DJW submits there is good evidence available to demonstrate that children within the dormitories were not being properly supervised at the relevant time and the assaults DJW sustained were a manifestation of that unsafe system.
- [184] *Fourth*, it is highly unlikely that any of the alleged assailants would have been available to give evidence even if they were not deceased. For example, DJW submits, given that Marlene Willmot was not an employee of the State, and any interview she might have given would potentially have exposed her to criminal prosecution, it is unlikely she would have been able to be interviewed and unlikely that she would have given evidence at a trial.
- [185] *Fifth*, there is no evidence from either of the psychiatrists who have provided medico-legal reports to support the proposition advanced by the State that the disentanglement process the Court would be required to undertake in order to determine causation is insurmountably difficult.

A permanent stay of proceedings is warranted

- [186] A considerable period of time has obviously elapsed between the alleged occurrence of the events in question and the commencement of the present proceedings. The alleged events are said to have happened almost sixty years ago.
- [187] Given that there is no limitation period for DJW's claim, the mere effluxion of time does not, of itself, occasion unfairness to the State in the present context.
- [188] However, it is the second form of unfairness identified in *Moubarak* that arises for consideration in this case, namely the effect of such delay on the trial process. The focus is upon the consequences brought about by the passage of time and whether the lapse of time has had a burdensome effect on the State that is so serious that a fair trial is not possible.
- [189] The evidence before me demonstrates that DJW did not notify the State of his allegations of physical and sexual abuse before he served his Notice of Claim. As a consequence, the State has been unable to conduct any prior investigations or enquiries with respect to his allegations. The evidence also demonstrates that a further consequence of the very significant period of time that has passed between the events in question and service of the Notice of Claim is that all the alleged perpetrators of the abuse and all relevant supervisory staff who worked in the dormitories are deceased. The State relies upon these factors, amongst others, to demonstrate that the continuation of the proceedings would be so manifestly unfair and prejudicial to it so as to amount to an abuse of process.

- [190] In arguing that there would not be such a degree of unfairness and prejudice to the State in this case, DJW points to the availability of both documents and other potential witnesses to demonstrate that there is a body of evidence available to substantiate his claim that the State breached its duty in terms of failing to provide any, or any adequate, supervision in the dormitories.
- [191] From my review of the available evidence, I accept that there is documentary evidence, albeit scant, that remains available to the State in respect of this aspect of DJW's claim. I also accept that there are available witnesses who could be called in DJW's case to give evidence that would also support his claim in this respect. Further, I am willing to accept that there are likely to be other persons who were residents of the dormitories at the relevant times who may be able to give similar evidence.
- [192] The position with respect to the alternative vicarious liability case against the State is somewhat more difficult to assess. The perpetrator of the alleged wrongful acts, Marlene Willmot, is dead. There are no records of any such alleged instances of sexual assault against DJW. There are no identified or apparent witnesses to any of the alleged events. Further, there are no documents held by the State that bear upon DJW's claim that the State placed him under the care and control of his aunt. The evidence of the enquiries made by the State suggests that there never were any such documents in existence. There are, however, three witnesses who have been identified by DJW's lawyers, Ms Lorna Blair, Ms Anita Leedie and KL, who are available to give evidence that would tend to support DJW's claim that he was placed under the care and control of his aunt. I accept that is the effect of the evidence they would be able to give at trial.
- [193] Notwithstanding that DJW may have identified potential witnesses who would be available to prove aspects of his case, the fact remains that all relevant supervisory staff who may have been able to provide information and instructions to the State about DJW's claim in this respect are either confirmed to be dead or most likely now deceased. In particular, the relevant Girls' Dormitory staff, Myra Pascoe and Maude Phillips, are confirmed by BDM records to be dead, and the Superintendent of Cherbourg at the relevant time, George Sturgess, is almost certainly dead, despite the absence of any BDM record. In those circumstances, the State cannot meaningfully investigate and respond to DJW's allegations on either of the asserted bases of liability by making enquiries with relevant employees that would once have been able to provide relevant information and instructions.
- [194] Moreover, a crucial and incurable deficiency affects the available evidence in respect of the alleged events of sexual abuse and the State's ability to deal with them. At any trial of this matter, it will not be sufficient for DJW to simply prove that the State failed to provide any, or any adequate, supervision of residents within the dormitories. Proof of the occurrence of the pleaded instances of alleged sexual abuse would be essential to prove DJW's claim against the State, both in terms of its alleged direct and vicarious liability. That the pleaded incidents occurred as claimed are foundational allegations of fact that DJW would need to prove to succeed at trial.
- [195] There are no documents recording any instance of alleged sexual abuse of DJW. All the alleged perpetrators of the alleged sexual abuse are deceased. There is no allegation or suggestion that the alleged instances of sexual abuse were witnessed by any other person. The only witness who will be available to give evidence of the alleged events is DJW himself.

- [196] In those circumstances, the State is wholly deprived of any opportunity to further investigate the occurrence of the alleged events and to obtain information and instructions to enable it to meaningfully respond to DJW's claim. It is unable to determine whether, and on what basis, DJW's claim ought to be contested or accepted. As matters stand, the State could not conduct a defence of DJW's claim by advancing any positive proposition that the alleged instances of sexual abuse did not actually occur. There is presently no proper basis for any such assertion to be made and no way the State could make further enquiries or undertake further investigations to enable it to know whether such a defence could, or should, be advanced.
- [197] No amount of further investigation or enquiry will enable the State to do anything more than plead, as it presently does in its Amended Defence, that it does not admit that the alleged instances of abuse occurred as DJW's claims. That being so, if the matter went to trial, DJW would be put to proof on these issues, DJW would give evidence that they occurred, the State would be in no position to positively contradict such testimony and the trial judge would be invited by DJW to adjudicate and conclude, on the basis of his uncontradicted evidence, that they did occur.
- [198] In my opinion, such a proceeding would not constitute a fair trial. Proof of the critical foundational allegations underpinning DJW's claim would be reduced to no more than a staged formality. The State would be unable to meaningfully participate in the trial in this critical aspect because of the impoverishment of the available evidence due to the passage of time.
- [199] In my view, the position is thus similar to that encountered in the case of *Joanne Willmot*, where the State had no means of investigating the foundational facts underpinning the alleged acts of abuse which would have been critical to establishing liability at trial. As the Court of Appeal observed in that case, where a plaintiff seeks damages for child sexual or other physical abuse, proof that the alleged wrongful acts occurred is indispensable to the success of the plaintiff's claim.²⁵
- [200] Whilst I accept that the present case is factually different in some respects to the case of *Joanne Willmot*, because the alleged instances of abuse here are all said to have occurred within the dormitories or whilst DJW was under direct supervision of the State's employees, that does not ameliorate the State's inability to meaningfully deal with and respond to the foundational allegations of abuse made by DJW.
- [201] In my opinion, the following conclusions reached by Bowskill CJ at first instance in the case of *Joanne Willmot* are equally apposite to the present case:²⁶

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

²⁵ *Willmot v State of Queensland*, [60] (Gotterson AJA, Mullins P agreeing at [1] and Boddice AJA agreeing at [90]).

²⁶ *Joanne Willmot*, [78].

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.

- [202] Although DJW points to the existence of other possible lines of enquiry and investigations and the potential availability of other witnesses who may be available to give relevant evidence, there is no real prospect at present that any of those persons would be able to give evidence capable of bearing upon the probability of the existence of the crucial facts in issue, namely whether the acts of alleged sexual abuse occurred at all. Again, in my view, it is therefore not an answer to the State's complaint of unfairness in that respect to simply point to the potential availability of other evidence that may be capable of establishing the State's duty to provide adequate supervision, monitoring and management of residents within the dormitories and its purported breach of such a duty.
- [203] Whilst DJW submits the current investigations undertaken by his lawyers have already produced substantive evidence in support of his allegations, I cannot accept that submission without significant qualification. As I have noted, I accept that the affidavit evidence obtained on behalf of DJW and served upon the State does demonstrate that there are several potential witnesses who are available to give evidence of the systems for supervision, monitoring and management of the residents within the dormitories. To that extent, I accept the submission. However, I do not accept the submission in respect of the foundational allegations of sexual abuse.
- [204] The highest that the currently available evidence obtained by DJW's lawyers rises in that respect is the evidence set out in KL's affidavit. Whilst the affidavit evidence of Lorna Blair also outlines sexual conduct between residents within the Girls' Dormitory, it is of a different nature and does not involve Marlene Willmot or any specific allegation of abuse of younger boys by older girls of the kind alleged by DJW.
- [205] As I have outlined above, KL deposes to sexual behaviours exhibited by residents within the Girls' Dormitory and Marlene Willmot engaging in sexual games with younger residents which included making them participate in sexual conduct, both amongst themselves and upon herself.
- [206] In my view though, as matters presently stand, such evidence would not be relevant and admissible in proof of DJW's specifically pleaded allegations concerning Marlene Willmot. The incidents described by KL are of an entirely different nature to that pleaded by DJW. It was conceded by senior counsel for DJW in submissions that it would be an 'uphill battle' to argue that such evidence would, or could, be capable of admission as similar fact evidence for the purpose of establishing a particular propensity on the part of Marlene Willmot that may be probative of DJW's claim.
- [207] In my view, this concession was correctly made. I do not consider the evidence that could be given by KL would have the necessary cogency and probative force, whether by reason of 'striking similarities' or otherwise, to enable it to be used as similar fact evidence to prove the existence of a propensity on the part of Marlene Willmot, which might then provide some indirect proof of the critical foundational allegations of DJW's claim.
- [208] However, despite these matters and the concession made on behalf of DJW, the submission is put that a permanent stay ought not be granted at this stage of the

proceedings as there are further enquiries and investigations that may be undertaken and the results of those investigations and enquiries may ‘identify who else was present and who might be able to give evidence of what was going on’ in the dormitories. As I understand the position, amongst other things, it is contended that such witnesses may yet provide a basis for DJW to advance a similar fact case in respect of Marlene Willmot.

- [209] More generally, DJW criticises the State for not making certain enquiries. In particular, he points to the fact that the State has been served with numerous affidavits sworn by persons who are available to give evidence in his case, yet the State has not conducted its four source search in respect of any of those persons unless they are specifically named and identified in DJW’s statement, affidavit or ASOC. Further, DJW points to the fact that it has, through its own enquiries, identified numerous other potential witnesses, being persons who were apparently residents of the dormitories at the relevant time. Despite the State being apprised of the results of those enquiries, it has not undertaken its own investigations and enquiries in respect of those persons.
- [210] DJW’s ultimate submission is that it is incumbent upon the State to make these enquiries and undertake these investigations and if the State is not willing to do so, then it is premature to consider a permanent stay of the proceedings until such time as DJW has had the opportunity to pursue these various lines of enquiry and investigations himself.
- [211] Again, I cannot accept that submission without qualification. In my opinion, the fact that a plaintiff can identify further or other investigations or enquiries that could be undertaken is not determinative of an application of this kind. Such a submission must be fixed in terms of principle and the relevant principle is that a defendant who brings an application for a permanent stay of proceedings must demonstrate that such an exceptional remedy is warranted. In order to do so, it will be necessary for the defendant to demonstrate that it has discharged its obligation to make all reasonable enquiries. In my view, the position remains the same where, as here, a plaintiff asserts that it wishes to undertake enquiries and investigations that it submits the defendant ought to have undertaken to discharge its obligation. In such a case, the question remains whether the defendant ought to have undertaken those enquiries.
- [212] On this issue, DJW cites and relies upon *Gorman v McKnight*,²⁷ where the Court confirmed that a party seeking the exceptional relief or a permanent must demonstrate that all reasonable enquiries which bear upon the fairness or unfairness of the proceedings have been undertaken.²⁸
- [213] The principal referred to by the New South Wales Court of Appeal in *Gorman v McKnight* was stated earlier in *Council of Trinity Grammar School v Anderson* (*‘Anderson’*),²⁹ where Bathurst CJ said:³⁰

It is true as senior counsel for the respondent pointed out that Trinity needed to surmount a “high bar” to obtain the relief it seeks. It was necessary for it to make all reasonable inquiries to ascertain if material was available to enable it to meet the claim. However, that does not

²⁷ (2020) 19 ASTLR 181.

²⁸ Ibid 190–1 [54]–[55] (Bell P, Payne JA agreeing at 197 [91] and Emmett AJA agreeing at 198 [99]), 198 [94] (Payne JA).

²⁹ (2019) 101 NSWLR 762 (Bathurst CJ, Payne JA and Simpson AJA).

³⁰ Ibid [489].

mean that it was necessary to pursue any line of inquiry however remote which may, as a matter of mere possibility, produce some information which may be of assistance in dealing with the issue. That would pose an unreasonable burden on the applicant and would of itself be oppressive and unfairly burdensome.

- [214] In my opinion, the additional enquiries that DJW contends ought to have been carried out by the State, and which he wishes to carry out himself, are not reasonable enquiries in the sense explained by Bathurst CJ in *Anderson*. Rather, they are remote and speculative enquiries that, at best, present no more than a mere possibility of producing some information that may be of assistance in dealing with the critical issue of the foundational allegations of abuse made by DJW.
- [215] As the State submits, DJW pleads a case which identifies specific alleged incidents of sexual abuse. It is those particular incidents which underpin the particular case that the State must meet if the matter proceeds to trial. The State's obligation to make all reasonable enquiries obviously extends to investigating those particular incidents and the potential availability of documents and witnesses in respect of those matters. The State has made those enquiries. I do not accept that its obligation extends further to require it to undertake extensive enquiries in respect of other residents who may have been at the dormitories at the relevant times to see what they may have to say. In circumstances where DJW does not claim that any of the incidents were witnessed by any other person and he is unable to identify any other alleged perpetrator beyond those identified in his statement, affidavit and ASOC, I do not consider it is incumbent upon the State to undertake the wide ranging and general investigations and enquiries for which DJW contends.
- [216] Whilst it may be the case that other persons who have been identified by DJW's lawyers as former residents of the dormitories may be available as potential witnesses who could give evidence of the general circumstances of the dormitories and the supervision, monitoring and management of the dormitories by the State's employees and agents, there is not in my view a realistic possibility that such further enquiries and investigations would unearth witnesses who may be able to give evidence that would bear directly, or indirectly, upon the occurrence of the alleged incidents of sexual abuse perpetrated against DJW.
- [217] As to DJW's argument that it would have been unlikely that the alleged assailants would have been available to give evidence as they might invoke a right to silence or privilege against self-incrimination and not participate in any investigation or the trial itself, it is in my view sufficient simply to repeat the Court of Appeal's conclusion in the case of *Joanne Willmot*, where Gotterson AJA relevantly observed:³¹

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.

³¹ *Willmot v State of Queensland*, [63].

- [218] With respect to the potential difficulties of disentangling the ‘actionable’ and ‘non-actionable’ circumstances that may have been causative of DJW’s psychiatric injuries, I accept DJW’s submissions. Each of the psychiatrists have been able to disentangle DJW’s circumstances sufficiently to enable them to express their opinions and neither has identified any insurmountable difficulty in doing so, nor that this would pose any difficulty for the Court to undertake the necessary disentanglement process at trial.
- [219] However, whilst that may be so, the real difficulty that remains with respect to the causation aspect of DJW’s claim is in respect of the basis of the opinions expressed by the psychiatrists. In each case, they have accepted and acted upon DJW’s history of alleged events in making their assessment of DJW’s injuries and the related question of causation. Ultimately, proof of the factual basis for the events that the psychiatrists base their opinions upon will depend entirely upon the evidence to be given by DJW. The difficulties for the State in obtaining a fair trial again resurface and are compounded. As the State is unable to obtain instructions or information from any of the alleged perpetrators and there is no documentary record of any of the alleged incidents of sexual abuse, the State is wholly deprived of the means to investigate and challenge DJW’s account of the alleged events, and hence the factual bases upon which the psychiatrists express their opinions, including on the issue of causation.
- [220] One final matter raised by DJW remains to be addressed. It was argued during the course of submission for DJW that, in the event that I otherwise determined that a permanent stay of the proceedings ought to be granted because the State was unable to deal with certain claims of abuse, it might nevertheless be possible to sever part of his claim and permit that part to proceed to trial. For example, DJW submitted that his claim relating to the alleged fire hose incident of physical abuse perpetrated by Maude Phillips might still be permitted to proceed to trial, even though other aspects of his claim concerning alleged sexual abuse might be stayed. In support of that submission, DJW relied upon the decision of *Coles Group Ltd v Costin* (‘*Costin*’).³²
- [221] I do not accept that submission.
- [222] *Costin* concerned an application made by an injured woman for an extension of time in which to commence proceedings against her employer for damages for personal injury. A particular aspect of the plaintiff’s claim was the extent to which she received training or instruction about manual lifting techniques. The primary judge at first instance granted an extension of time under s 31(2) of the *Limitation of Actions Act 1974* (Qld). On appeal, the plaintiff’s employer, Coles, argued that the primary judge erred in exercising his discretion to grant an extension of time and should have concluded that due to the consequences of the plaintiff’s delay in commencing proceedings, Coles would suffer significant prejudice and there could not be a fair trial. In particular, it argued that a fair trial could not be had because material witnesses who might be called by it to give evidence as to the instruction or training provided to the plaintiff had no recollection of the detail of the training or instruction provided.
- [223] The Court of Appeal held that Coles would be materially prejudiced if the plaintiff was permitted to litigate that part of her claim which related to inadequate training.³³ However, the Court also held that a finding of material prejudice by the primary judge

³² [2015] QCA 140.

³³ Ibid [49] (Applegarth J, Holmes JA agreeing at [1], and Gotterson JA agreeing at [2]).

on that issue would not have compelled the conclusion that a fair trial could not be held or was unlikely. The Court observed that the relevant prejudice affected only one aspect of the plaintiff's claim and other important elements of her claim were unaffected.³⁴ Accordingly, the Court determined that the plaintiff should be permitted to litigate her claim, albeit upon the condition that the plaintiff undertook not to litigate her allegation that she did not receive adequate training and instruction.³⁵

- [224] The present case is quite different to *Costin*. The relevant prejudice to the State brought about by the lapse of time between the events in question and the commencement of proceedings pervades all aspects of DJW's claim. Putting aside the alternative case of vicarious liability for one moment, DJW's case is premised upon the State's alleged breach of its non-delegable duty of care by failing to provide any, or any adequate, supervision of residents within the dormitories. DJW claims that the alleged instances of physical and sexual abuse he suffered were a manifestation of the State's breach of its duty. The same alleged duty and breach of duty are common elements of DJW's claim, regardless of whether it is premised upon instances of sexual abuse or physical abuse. Further, DJW's claim in respect of the fire hose incident is predicated upon his claim that he was engaging in a sexual act of the kind that he had 'learnt' from being subjected to sexual abuse by older female residents within the Girls' Dormitory. The allegations of sexual abuse are thus integral context to the alleged physical abuse.
- [225] Whilst there does appear to be more cogent evidence available in respect of the fire hose incident, the State still faces the same fundamental deficiencies. There are no documents or records concerning the alleged incident. The alleged perpetrator, Maude Phillips, is dead. Myra Pascoe, the Dormitory Supervisor whom DJW claims was present during the incident, is also dead. Aside from DJW, it seems the only witnesses to the incident were the other child apparently involved, CB, and Lorna Blair.
- [226] The evidence shows that despite being interviewed by Ms Mills on two occasions, CB has only a general recollection of the incident and is unable to remember what led to her and DJW being punished by Maude Phillips. She does not recollect being sprayed with a fire hose. Whilst Lorna Blair has provided evidence that she saw the pair being sprayed by Maude Phillips with the fire hose and later put into the women's prison, she does not know the reason why they were punished.
- [227] In those circumstances, I consider that due to the passage of time, the State is unable to deal with and respond to this aspect of DJW's claim.
- [228] A further difficulty confronting the State is in respect of the issue of causation. DJW claims that he has suffered psychiatric injuries caused by the alleged instances of abuse which resulted from the State's breach of duty. His pleaded case does not differentiate between the causes of his injuries. They are all claimed to be 'a result of the physical and sexual assaults pleaded...' The expert evidence does not attempt to attribute causation to one aspect of abuse or the other. That is perhaps entirely understandable given that the predominant aspect of DJW's claim, and asserted cause of his psychiatric injury, is the alleged sexual abuse.
- [229] In those circumstances, I accept the State's submission that if the sexual abuse allegations were stayed but the physical abuse allegation was permitted to proceed, the issue of causation would become impossible to disentangle. It would not only be

³⁴ Ibid [52].

³⁵ Ibid [53]–[54].

necessary to parse the ‘non-actionable’ circumstances of the additional life events and circumstances experienced by DJW after he left the dormitories, but also the pervasive allegations of sexual abuse, from the ‘actionable’ circumstances. In my view, the difficulties posed by such a course of action are highly likely to be insurmountable.

- [230] Accordingly, I do not accept that a fair trial premised solely upon DJW’s claim of alleged physical abuse can be had. In my opinion, this is not a case where any part of DJW’s claim could be permitted to proceed separately. Such a course would not, in my view, mitigate the seriously unfair and burdensome consequences to the State which have been occasioned by the effluxion of time.

Conclusion

- [231] For the reasons I have set out above, I am satisfied that the continuation of the proceedings would be an abuse of process. It would be unfairly oppressive and prejudicial to the State and would bring the administration of justice into disrepute. The trial of the proceedings would be a trial in name only. The State’s inability to meaningfully respond to DJW’s allegations and participate in the trial process, insofar as the crucial foundational allegations are concerned, would render the proceedings a ‘solemn farce’.³⁶
- [232] Accordingly, I am satisfied that the State’s application should be allowed, and the proceedings should be permanently stayed.

Orders

- [233] I make the following orders:
1. The proceedings are permanently stayed.
 2. The Plaintiff is to pay the Defendant’s costs of and incidental to this application and the proceedings on the standard basis.

³⁶ *Page v The Central Queensland University* [2006] QCA 478, [24] (Keane JA).