HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: JOANNE EDITH WILLMOT
Appellant

and

THE STATE OF QUEENSLAND
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Oral Argument

Introduction

2. The Court's power to stay a proceeding exists to ensure a fair trial and to prevent a proceeding that would be an abuse of process. It is not enough that a trial *might* be conducted fairly depending on the rulings that might be made. The Respondent discharged the *"heavy onus"* of demonstrating that the trial would be fundamentally unfair. The learned primary judge was correct in finding that there would be nothing that a trial judge could do to overcome that unfairness. Despite submitting that something could be done, nothing has in fact been referred to by the Appellant.

Nature of the decisions below [RS 3(b), 14]

3. Despite referring to the *"broad discretion"*, the primary judge's decision was in fact evaluative, making no reference to the exercise of an over-arching discretion.

4. There were 7 grounds of appeal to the Court of Appeal. Six related solely to evaluative decisions and were determined as such. The seventh was an *"umbrella"* ground to cast the first six as errors of discretion. The Court of Appeal dismissed the seventh because the first six had been dismissed.

5. Despite *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 not yet having been decided, both the Chief Justice and the Court of Appeal approached the case on an evaluative basis.

The Grounds of Appeal to this Court

"Material Difference" Ground (2(a) and (b)) **[RS21, 23 to 25, 33, 39,**

6. The first two grounds of appeal (2(a) and (b) (CAB 77)) engage with the same proposition, namely that the discharge of the onus on an application for a stay required the Respondent to prove that there would have been a material difference to the conduct of the defence if the perpetrators or the persons they would obtain instructions from were alive.[1]

7. These grounds should be dismissed because:

   (a) they are circular: the effluxion of time has not only prevented the Respondent from being able to attempt to obtain instructions from the alleged assailants, but also to ascertain how they would react to those attempts;

   (b) the Court of Appeal was correct to describe this as an invitation to engage in speculation;[2]

   (c) this would be an escalation of the *"heavy onus"* on the Respondent to such an extent that the Court's power to grant a stay would be rendered redundant;

   (d) there is no authority to support the proposition;

   (e) it is enough to demonstrate that the Respondent has lost the opportunity to investigate and gather evidence to respond to the allegations, an opportunity which was demonstrated on the material to be meaningful and which would amount to making a *"material difference"* (were that the test).

"RS as an independent source of evidence" Ground (2(c)) **[RS30 to 35]**

8. The third ground is to the effect that the potential witness RS should be treated as an independent source of evidence.

9. This is incorrect because RS was a claimant against the State for damages arising from the matters deposed to in her affidavit, she had an interest in her evidence being accepted that went well beyond that of a disinterested, independent witness, she remains a claimant in the redress scheme, and she was not only a corroborative witness of the Appellant's claim, but the source of the Appellant's first knowledge of the alleged abuse at the hands of the Demlins.

10. The Appellant has shown no reason to doubt the correctness of the evaluation.

"Causation" Ground (2(d)) **[RS49 to 54]**

11. This is a limited ground, namely that the evidence of *"one psychiatrist"* was not enough to support the finding below of the insurmountable difficulty regarding causation of the Appellant's alleged injuries. This is incorrect because:

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[1] This is cast in the Appellant's Submissions as a requirement "to demonstrate that the absence of evidence from a perpetrator is likely to have a practical and meaningful impact on the trial": para. 2(d), page 3.

[2] CAB page 60 (para [64] per Gotterson AJA).

(a) the *"one psychiatrist"* was the psychiatrist engaged on behalf of the Appellant, and there was no contradictor to his evidence;

(b) it does not take into consideration the whole of the psychiatrist's evidence on the point, the balance of which supports the Chief Justice's conclusion;

(c) it conflates the psychiatrist's opinion regarding medical causation with the Chief Justice's conclusion regarding causation at law. The former supported her Honour's decision, but her conclusion rested on the well-established principles in *Purkess v Crittenden* (1965) 114 CLR 164;[3]

(d) there are five cases faced by the Respondent, not just one. The harm is said to have been caused by all of them. The complexity that this adds to the disentangling exercise cannot be underestimated by recourse merely to a *"discounting exercise"*.[4]

"NW is Alive" Ground (2(e)) **[RS 37 to 42]**

12. This ground is relevant only if the Court accepts the error asserted in the *"Causation"* ground.

13. The significance of NW being alive is limited because of his age, and he would be asked to recall events 65 years ago when he was a child. The Appellant entered the fray with respect to his evidence, and while willing to wound was afraid to strike. The evidence demonstrates that his recollections are flawed in any case.

Conclusion

14. The features of this case mark it as an *"exceptional case"*.

15. Nothing a trial judge can do to cure the unfairness to the Respondent brought about by the circumstances of this case. **[RS16, 48, and 55 to 57]**

C. Heyworth-Smith KC **D. Schneidewin** **K. Slack**

Counsel for the Respondent

[3] Together with *Watts v Rake* (1960) 108 CLR 158 and *March v E & M H Stramare Pty Ltd & Anor* (1990) 171 CLR 61.
[4] *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.