

Case Note: *RC v The Salvation Army (Western Australia) Property Trust* [2021] WADC 117

16 December 2021

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A full copy of the case can be accessed [here](#).

Judge	Gething DCJ
Held	In the District Court of Western Australia at Perth, Civil Division
Date of Hearing	12 November 2021
Date of Judgment	1 December 2021
Plaintiff	RC
Defendant	The Salvation Army (Western Australia) Property Trust

Background

In this case, Mills Oakley acted for the successful defendant.

The plaintiff alleged that between 1959 and 1960, whilst residing at the then Nedlands Boys' Home (owned and operated by the defendant, The Salvation Army (Western Australia) Property Trust), he was subjected to sexual abuse at the hands of an Officer at the home. The plaintiff sought damages for breaches of duty and intentional torts in relation to the abuse (the '**Action**').

The defendant sought an order permanently staying the action (the '**Application**') on the basis that, having exhausted reasonable inquiries more than 60 years after the relevant events are said to have occurred, the defendant could not meaningfully defend the Action. Indeed, the defendant contended that it would be manifestly unfair for it to be made to do so and thus contrary to the interests of justice to allow the Action to continue. The absence of witnesses (including but not limited to the death of the alleged perpetrator prior to the allegations ever being raised by the plaintiff) and forensic disadvantage experienced by the defendant (with respect to the lack of contemporaneous, evidentiary documents) contributed significantly to these arguments.

The plaintiff opposed the Application, claiming that any prejudice faced by the defendant was not so serious that a fair trial would not be possible. It was further argued that such prejudice ought to be viewed in light of available evidence and the objectives of the amendments to the *Limitations Act 2005* (WA), which allowed the plaintiff to bring his case notwithstanding the length of time between

when the abuse was alleged to have occurred and the present day. The final basis upon which the plaintiff opposed the Application was that the case was not so extraordinary as to warrant the exceptional power of the Court to grant a permanent stay.

Held

The Court ultimately decided that it was both necessary and appropriate to take the exceptional step of permanently staying the Action. It was found that the defendant had satisfied the onus to persuade the Court that it would not be able to meaningfully defend the Action, further to it being unjustifiably oppressive to require the defendant to meet the case brought against it. A clear balance of the factors meant that the unfairness to the defendant outweighed the unfairness to the plaintiff in losing the opportunity to seek vindication and compensation.

Ratio

[18] *It is at least sufficient for the defendant to prove on the balance of probabilities that it will not be possible for it to obtain a fair trial.*¹ Or, put slightly differently, that the continuation of the case through to trial would involve 'unacceptable injustice or unfairness'² or 'unjustifiable unfairness'...³

[20] *In order to have a fair trial of a civil action, an individual defendant must have the ability to give instructions, decide what defence will be relied on and to make his or her version of facts known to his or her counsel and, if necessary, the Court.*⁴ By analogy, in order to have a fair trial of a civil action, a corporate defendant must have the ability to gather sufficient factual information to give it the ability to give instructions, decide what defence will be relied on and to make its version of facts known to counsel and, if necessary, the Court. It must have sufficient information to determine its approach to the defence of the action, including whether to admit or deny allegations on an informed basis.⁵ I endorse the observation of Bowden DCJ in *GMB* that for 'a trial to be fair the ... defendant has to be able to run a meaningful defence'.⁶

[149] *...as the defendant has no contemporaneous material of any kind from its perspective to enable it to evaluate the plaintiff's claim, it is not in a position to determine whether or not to admit or deny any relevant fact on any informed basis. It cannot therefore meaningfully defend the Action.*⁷

¹ *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102 (**Moubarak**) [88], [188], [196].

² *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378 (392); *Moubarak* [189] – [190].

³ *Connellan v Murphy* [2017] VSCA 116 [62].

⁴ *Moubarak* [109]; *Ugle v Masters* [2021] WADC 8 [58].

⁵ *GMB v Uniting Care West* [2020] WADC 165 [145].

⁶ *Ibid* [151].

⁷ *Ward v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2019] NSWSC 1776 [28].

[150] *The clear balance of the factors compels the conclusion that this is a case in which the exceptional step should be taken to grant a permanent stay. The defendant has satisfied the heavy onus on it to persuade the Court that, in light of the matters raised, it is in the position where it is unable to meaningfully defend the Action and that it would be unjustifiably oppressive to require the defendant to meet the case brought against it by the plaintiff. This unfairness to the defendant outweighs the unfairness to the plaintiff in losing the opportunity to seek vindication and compensation of the proceedings are stayed.*

[151] *... In this case, with the passage of over 60 years since the events in issue occurred, this risk has eventuated. A fair trial is not possible. A permanent stay should be granted.*

Practical Points for Future Litigants

Future litigants should be mindful of decisions such as these prior to commencing claims involving deceased key witnesses and an absence of relevant records. Whilst there is a heavy onus on the defendant to persuade the Court that it is unable to meaningfully defend an Action brought against it (and that it would be unjustifiably oppressive to be required to do so), the Court has indicated that it will not shy away from granting a permanent stay in circumstances where the burden has been proved, notwithstanding the exceptional nature of the power.

It is therefore crucial that survivors of abuse seek legal advice as soon as practicable, to ensure the location of relevant evidentiary documents and the availability of key witnesses should the matter proceed to trial. From a defendant's perspective, this case also creates a need to investigate claims at the earliest opportunity before the death of any key witnesses or the misplacement of evidentiary documents to facilitate the administration of justice and avoid any contention of self-inflicted prejudice.

Our office is available to provide advice and assistance with respect to these issues.