NEW SOUTH WALES COURT OF APPEAL

CITATION: THE SALVATION ARMY (SOUTH AUSTRALIA PROPERTY TRUST) v Graham RUNDLE [2008] NSWCA 347
This decision has been amended. Please see the end of the judgment for a list of the amendments.

FILE NUMBER(S): 49349/07

HEARING DATE(S): 8 August 2008

JUDGMENT DATE: 11 December 2008

PARTIES:
The Salvation Army (South Australia Property Trust) (Appellant)
Graham Rundle (Respondent)

JUDGMENT OF: McColl JA Basten JA Bell JA

LOWER COURT JURISDICTION:
Supreme Court

LOWER COURT FILE NUMBER(S): SC 20073/03

LOWER COURT JUDICIAL OFFICER:
Simpson J

LOWER COURT DATE OF DECISION:
7 May 2007

LOWER COURT MEDIUM NEUTRAL CITATION: [Rundle v Salvation Army (South Australian Property Trust)] [2007] NSWSC 443

COUNSEL:
P Garling SC/K Rees (Appellant)
A S Morrison SC/R Newell (Respondent)

SOLICITORS:
Harris Freidman Hyde Page (Appellant)
Conditsis & Associates (Respondent)

CATCHWORDS: APPEALS – limited grant of leave to appeal – extension of limitation period – whether Court of Appeal should intervene – [Supreme Court Act] 1970 (NSW) s 75(6)
COSTS – costs in extension of time application – whether costs should follow "the event" – whether application for extension of time was an "event" – Uniform Civil Procedure Rules 2005 (NSW) r 42.1
LIMITATION OF ACTIONS – limitation period for breach of fiduciary – whether s 36 of the [Limitation of Actions Act] 1969 (SA) imposes limitation period for breach of fiduciary duty – [Limitation of Actions Act] 1969 (SA) s 36

LIMITATION OF ACTIONS – extension of limitation period – whether, having regard to prejudice caused to appellant by delay, justice of case required order extending time – respondent placed under appellant's care in boys' home run by appellant – allegation that appellant breached duty of care by failing to implement system to protect respondent from sexual assaults by other boys and supervisor at home – whether primary judge erred in consideration of prejudice to appellant – absence of evidence due to lapse of 38 years – [Limitation of Actions Act] 1936 (SA) ss 36, 48
STATUTORY INTERPRETATION – purposive construction – whether statutory intention to impose limitation period on cause of action for breach of fiduciary duty – [Acts Interpretation Act] 1915 (SA) s 19 – [Limitation of Actions Act] 1936 (SA) s 48
WORDS & PHRASES – "actions" – "damages" – "the event"

LEGISLATION CITED:
[Acts Interpretation Act] 1915 (SA), s 19
[Choice of Law (Limitation Periods) Act] 1993 (NSW), s 5
[Civil Procedure Act] 2005 (NSW), s 98
[Limitation of Actions Act] 1936 (SA), ss 3, 35, 36, 37, 38, 38A, 39, 40, 41, 42, 43, 44, 48
[Limitation Act] 1969 (NSW), ss 14, 18A, 23, 50A, 60G
[Limitation of Actions Act] 1974 (Qld), s 31
[Supreme Court Act] 1970 (NSW), 75A
Uniform Civil Procedure Rules 2005 (NSW), r 42.1

CATEGORY:
Principal judgment

CASES CITED:
[Attorney-General (NT) v Maurice] [1986] HCA 80; (1986) 161 CLR 475
[Australian Coal & Shale Employees' Federation v The Commonwealth] [1953] HCA 25; 94 CLR 621
[Baker v Towle] [2008] NSWCA 73; 39 FamLR 323
[Barker v Duke Group Ltd (in liq)] [2005] SASC 81; (2005) 91 SASR 167
[Barnes v Addy] (1874) LR 9 Ch App 244
[Belan v Casey] [2003] NSWSC 159; (2003) 57 NSWLR 670
[Brisbane South Regional Health Authority v Taylor] [1996] HCA 25; (1996) 186 CLR 541
[CIC Insurance Ltd v Bankstown Football Club Ltd] [1997] HCA 2, 187 CLR 384
[Commonwealth v Mewett] [1997] HCA 29; (1997) 191 CLR 471
[Commonwealth of Australia v Lewis] [2007] NSWCA 127
[Commonwealth of Australia v Smith] [2005] NSWCA 478
[The Duke Group Ltd (in liq) v Alamain Investments Ltd] [2003] SASC 415
[Gardner v Wallace] [1995] HCA 61; (1995) 184 CLR 95
[Goodman v Windeyer] [1980] HCA 31; 144 CLR 490
[Hawkins v Clayton] [1988] HCA 15; (1988) 164 CLR 539
[Hewitt v Henderson] [2006] WASCA 233
[Holt v Wynter] [2000] NSWCA 143; (2000) 49 NSWLR 128
[House v The King] [1936] HCA 40; (1936) 55 CLR 499
[Imbree v McNeilly] [2008] HCA 40
[John Pfeiffer Pty Ltd v Rogerson] [2000] HCA 36; (2000) 203 CLR 503
[KM v HM] (1992) 96 DLR (4th) 289

[Knox v Gye] (1872) LR5HL 656
[Longman v The Queen] [1989] HCA 60; 168 CLR 79
[Marsden v Amalgamated Television Services Pty Ltd] [2001] NSWSC 510 (at [40])
[Norberg v Wynrib] [1992] 2 SCR 226
[Nowlan v Marson Transport Pty Ltd] [2001] NSWCA 346; 53 NSWLR 116
[Oran Park Motor Sport Pty Ltd v Fleissig] [2002] NSWCA 371
[Pilmer v The Duke Group Ltd (in liq)] [2001] HCA 31; (2001) 207 CLR 165
[Sola Optical Australia Pty Ltd v Mills] [1987] HCA 57; (1987) 163 CLR 628
[South Western Sydney Area Health Service v Gabriel] [2001] NSWCA 477
[State of Queensland v Stephenson] [2006] HCA 20; (2006) 226 CLR 197
[State of New South Wales v Lepore] [2003] HCA 4; 212 CLR 511
[Trevorrow v State of South Australia (No 5)] [2007] SASC 285; (2007) 98 SASR 136
[Wardley Australia Ltd v Western Australia] [1992] HCA 55; (1992) 175 CLR 514
[White v Barron] [1980] HCA 14; 144 CLR 431
[Williams v Minister, Aboriginal Land Rights Act 1983] (1994) 35 NSWLR 497
[Williams v The Minister, Aboriginal Land Rights Act 1983] [1999] NSWSC 843
[Williams v The Minister, Aboriginal Land Rights Act 1983] [2000] NSWCA 255
[Young v Waterways Authority of New South Wales] [2002] NSWSC 612

TEXTS CITED:
R P Austin, “Constructive Trusts”, P D Finn (ed), [Essays in Equity], (1985) The Law Book Company Limited
Gummow WMC, “Compensation for Breach of Fiduciary Duty” in Youdan TG (ed), [Equity, Fiduciaries and Trusts] (Carswell, 1989) p 61
Meagher, Gummow and Leeming, [Meagher, Gummow and Lehane’s Equity Doctrines and Remedies] (4th ed, Butterworths, LexisNexis, 2002) at [34-005], [34-030]
McDermott PM, “Jurisdiction of the Court of Chancery to Award Damages” (1992) 109 LQR 652
Spry, Equitable Remedies 6th ed (2001), LBC Information Services
Spry, [The Principles of Equitable Remedies – Specific Performance, Injunctions, Rectification and Equitable Damages] (7th ed, 2007) Ch 7

DECISION:
Dismiss the appeal with costs.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40340/07
SC 20073/03

McCOLL JA
BASTEN JA
BELL JA

11 December 2008

THE SALVATION ARMY (SOUTH AUSTRALIA PROPERTY TRUST) v Graham RUNDLE

Judgment

1 **McCOLL JA**: The appellant, the Salvation Army (South Australia Property Trust) appeals by leave from the decision of Simpson J granting the respondent, Graham Rundle, an extension of time to commence proceedings against the appellant: *Rundle v Salvation Army (South Australian Property Trust)* [2007] NSWSC 443.

2 On 25 March 2003 the respondent filed a Statement of Claim in the Supreme Court of New South Wales, and also a Notice of Motion seeking an extension of time to 25 March 2003 to commence the proceedings. The Statement of Claim alleges that, while he was under the appellant's care in the period 1960–1965, the respondent was sexually assaulted on numerous occasions at Eden Park, a facility the appellant conducted in South Australia, by other boys and also by Mr Ellis, an officer of the appellant, employed at Eden Park as a full-time carer and supervisor. Mr Ellis was named as the second defendant in the Statement of Claim.

3 The respondent frames his case against the appellant in three ways. First, he claims that by virtue of its failure to supervise other boys in Eden Park, its failure to investigate and take any action in relation to his report of sexual assault and its failure to implement a system or strategy to protect him, the appellant breached a duty it owed him to take reasonable care for his safety (the "systems case"). Secondly, he alleges the appellant is vicariously liable for sexual assaults perpetrated on him by Mr Ellis. Thirdly, he claims the appellant was in a fiduciary relationship with him and that the appellant breached its fiduciary duty (the "fiduciary duty case"): primary judgment (at [11]). He relied on the systems case particulars for his fiduciary duty case.

4 The respondent accordingly claimed damages for the personal injury he alleged he suffered as a result of the appellant's breaches of its common law and fiduciary duties.

5 The second defendant was served with the Statement of Claim and the Notice of Motion seeking an extension of time. He did not appear at the hearing. The primary judge asked the respondent's legal representatives to satisfy her second defendant had notice of the hearing. I assume she was, in due course, satisfied of that matter and, accordingly heard and made the order extending the time to commence the proceedings against him on that basis.

6 It was common ground at trial and on appeal that as the events giving rise to the claim took place in South Australia, it was the law of that State which governed the application: *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503; *Imbree v McNeilly* [2008] HCA 40 (at [64]) per Gummow, Hayne and Kiefel JJ (Gleeson CJ (at [1]), (Kirby J (at [117]) and Crennan J (at [193]) agreeing). It was also common ground on appeal, and apparently at trial, that because the substantive law of South Australia governed the claim in this State, the effect of s 5 of the *Choice of Law (Limitation Periods) Act* 1993 (NSW) was

that the *Limitation of Actions Act* 1936 (SA) (the "the Limitation of Actions Act") was regarded as part of that substantive law and applied accordingly: see also *Gardner v Wallace* [1995] HCA 61; (1995) 184 CLR 95; *Commonwealth v Mewett* [1997] HCA 29; (1997) 191 CLR 471 (at 510,511) per Dawson J.

7 The appellant's grant of leave to appeal was confined in terms to the systems case and the issue of costs. It did not extend to the vicarious liability case. Literally, it did not apply to the fiduciary duty case either. The appellant, however, sought to argue that the fiduciary duty case was a cause of action arising out of the systems case, and hence was also the subject of the grant of leave. I will return to this issue.

Legislative framework

8 For the purposes of the Limitation of Actions Act, "action" includes legal proceedings of all kinds, unless the context otherwise requires, or some other meaning is clearly intended: s 3, Limitation of Actions Act.

9 Part 6 is headed "Actions on simple contract and in tort". Section 35 bears the same title. It provides:

> "The following actions namely:
>
> (a) actions founded upon any simple contract express or implied, or upon any award where the submission is not by specialty;
>
> (b) actions of account or for not accounting;
>
> (c) actions founded on tort;
>
> (d) actions or other proceedings to recover arrears of rent where the letting is not by deed;
>
> (e) actions to recover arrears of interest in respect of any sum of money charged upon any land or rent or arrears of interest in respect of any legacy;
>
> (f) actions to recover damages in respect of any such arrears of rent or interest;
>
> (g) actions for seamen's wages;
>
> (h) actions for money levied on a fieri facias or for an escape;
>
> shall, save as otherwise provided in this Act, be commenced within six years next after the cause of action accrued and not after."

10 Section 36(1) provides:

> "36—Personal injuries

> (1) All actions in which the damages claimed consist of or include damages in respect of personal injuries to any person, shall be commenced within three years next after the cause of action accrued but not after.
>
> (1a) However, in the case of a personal injury that remains latent for some time after its cause, the period of 3 years mentioned in subsection (1) begins to run when the injury first comes to the person's knowledge.
>
> (2) In this section—
>
> 'personal injuries' include any disease and any impairment of a person's physical or mental condition."

11 Section 37(1) provides that defamation proceedings are generally to be commenced within 1 year. Section 37(2) permits that period to be extended in the circumstances prescribed for up to 3 years running from the date of the publication. Section 38 provides a limitation period for an action for recovery of money paid under a mistake (either of law or of fact) or otherwise based on restitutionary grounds.

12 The remaining provisions of Part 6 deal with a variety of topics, none of which imposes a limitation period. Thus s 38A provides that limitation laws are substantive laws, s 39 deals with the absence from the State of a person against whom there is a s 35 or 36 cause of action at the time the cause of action accrued, s 40 deals with the absence from the State of a joint debtor at a time similar to that referred to in s 39, s 41 deals with the effect of payment by one contractor where there are two or more co-contractors or co-debtors, s 42 precludes, in an action of debt or other action in the nature of an action founded upon simple contract, an oral acknowledgment from taking the case out of the operation of the Limitation of Actions Act and s 43 deals with the question whether endorsements of payment take the case out of the operation the Limitation of Actions Act. Finally s 44 provides that the Limitation of Actions Act applies to the case of any debt or simple contract alleged in the way of set-off on the part of any defendant either by his defence or notice or otherwise.

13 Section 48 of the Limitation of Actions Act confers a power on a court to extend the limitation period. It relevantly provided:

> "**48—General power to extend periods of limitation**
>
> (1) Subject to this section, where an Act, regulation, rule or by-law prescribes or limits the time for—
>
> (a) instituting an action; or
>
> (b) doing any act, or taking any step in an action; or
>
> (c) doing any act or taking any step with a view to instituting an action,

> a court may extend the time so prescribed or limited to such an extent, and upon such terms (if any) as the justice of the case may require
>
> …
>
> (3) This section does not—
>
> …
>
> (b) empower a court to extend a limitation of time prescribed by this Act unless it is satisfied—
>
> (i) that facts material to the plaintiff's case were not ascertained by him until some point of time occurring within twelve months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff; or
>
> …
>
> and that in all the circumstances of the case it is just to grant the extension of time."

14 Section 48 was amended on 1 May 2004 by the insertion of sub-ss (3a) and (3b) which dealt with the questions of when a fact was material to the plaintiff's case and the circumstances to be considered in determining whether it was, in all the circumstances of a case, just to grant an extension of time. The primary judge held (at [70] – [78]) that the amendments did not apply to the respondent's application for an extension of time. The appellant was refused leave to appeal in respect of this ruling.

15 At trial the application for an extension of time was approached on the basis that the respondent needed that extension in relation to all his causes of action, a matter which became the subject of debate in this Court and to which I will return. On that assumption, however, it appears to have been common ground at trial, that because of provisions relating to the extension of time to commence proceedings available to a person such as the respondent who was a minor at the time the alleged assaults were committed, the limitation period expired on 15 April 1974: see Part 7, Limitation of Actions Act and primary judgment (at [4] - [6]).

Statement of the case

16 The respondent was born on 22 September 1952. At the age of about eight years, his father put him in the care of the appellant. The appellant placed him at Eden Park Boys' Home at Mount Barker in South Australia. As I have said, Mr Ellis was an officer of the appellant, employed at Eden Park as a full-time carer and supervisor.

17 The primary judge recognised (at [14]) that the respondent bore the onus of negativing any prejudice that might accrue to the appellant if the extension order was made. She also accepted that after the lapse of time since the alleged events, it ought to be presumed

that the appellant would have suffered some prejudice by reason of the loss of possible witnesses, or faded recollections, or other circumstances. She noted that the appellant had set out to make a positive case that it would be significantly prejudiced if, after 40 years, the respondent were permitted to bring the action.

18 The primary judge set out the following account of the respondent's allegations about his days at Eden Park largely drawn from a statement made by him on 9 May 2001 (primary judgment (at [23])):

> "16 As mentioned above, the plaintiff was born on 23 September 1952. At the age of about eight years, he was surrendered by his father (whose wife had left him some years earlier) into the care of the first defendant. The first defendant placed him at Eden Park Boys' Home at Mount Barker, South Australia. The second defendant, Keith Ellis, was an officer of the first defendant, employed at Eden Park as a full-time carer and supervisor of children accommodated at the home. About a month after his arrival, the plaintiff was sexually assaulted by one of the older boys, with sufficient force to cause him to bleed quite heavily. The bleeding continued for about a week. The plaintiff recounted this event to other children, but received no assistance or advice. He therefore reported the assault to the second defendant. The second defendant told him not to cry, and not to be stupid. He replaced the plaintiff's clothing and told him to have a shower.
>
> 17 Thereafter, sexual assaults became a regular event, occurring at least once or twice weekly over a number of years. The plaintiff calculated that he suffered at least three hundred or four hundred such assaults, at the hands of nine boys (some of whom he named). The assaults took the form of anal penetration, forced masturbation, and forced oral sex.
>
> 18 For the next year, the plaintiff did not make any further report of the assaults. Eventually, however, at the instigation of another boy, he again reported, to the second defendant, what was happening. He received some comfort. After another, brutal, attack by one of the older boys, the plaintiff again consulted the second defendant. The second defendant responded by himself sexually abusing the plaintiff. He did this regularly over the ensuing year. Initially, the abuse perpetrated by the second defendant took the form of masturbation, but escalated to penile anal penetration. After these events, the second defendant accused the plaintiff of leading him on, and physically assaulted him with a strap. The plaintiff came to believe that the abuse was his fault. Over time, the nature of the abuse changed, becoming increasingly more severe.
>
> 19 When the plaintiff was about 11 or 12 (that is, in 1963 or 1964) he was taken, on three occasions, by the second defendant with three other boys to Adelaide to sell badges. The group stayed at the home of the second defendant's mother. There, after the boys had gone to bed, the second defendant perpetrated further, and much more sustained, abuse upon the plaintiff. He forced the plaintiff to masturbate him, participate in oral sex, and

> digitally penetrate his anus. He had penile/anal penetration at least twice during the night.
>
> 20 The plaintiff began to run away from Eden Park. He was regularly returned either by police or older boys. He was physically punished, by another officer, and locked up for two to three days at a time, in what amounted to an isolation cell, without food or blankets. The sexual assaults by the second defendant continued (with a brief pause) until the plaintiff was about 12 years of age, and about to begin high school. The assaults ceased when the plaintiff was 13 years of age. Once the assaults ceased, the second defendant became very nasty towards the plaintiff, giving him unpleasant tasks, falsely reporting misconduct, and physically beating him. On occasions the plaintiff was bruised, bleeding and his eyes were blackened. The beating was brought to an end by another, new, officer, to whom the assaults had been reported by other children.
>
> 21 Eventually, at school after a beating, the plaintiff reported the assault to his soccer coach, who in turn reported it to Eden Park. The plaintiff was then beaten by another officer who held the rank of Brigadier.
>
> 22 The plaintiff became concerned about the welfare of younger children and this eventually led him into confrontation with a number of Aboriginal boys in the home. The plaintiff was injured, requiring medical treatment to suture a wound. This precipitated another beating, as punishment for the trouble caused."

19 The respondent left Eden Park at the age of 16. Thereafter, he undertook a variety of forms of employment, most of which he lost due to absenteeism: primary judgment (at [25]). He engaged in self-destructive behaviour, making attempts on his life: primary judgment (at [26]). It was not until late 1999 that he felt able to raise the Eden Park events and then only in general terms with a social worker, Graham Jackson who was also a priest of the Church of England, who he consulted professionally, to discuss his personal issues: primary judgment (at [228]).

20 The events which led to the respondent disclosing his experiences at Eden Park and pursuing his claim against the appellant started in about May 2000: primary judgment (at [29] ff). It is unnecessary to set these events out in detail, save to note that in August 2001, one of the appellant's solicitors wrote to the respondent advising:

> "We have put your allegations to the officers named by you and also to Mr Ellis. We would like now to meet again with you in conference to discuss the various responses to your statements…"

21 Next it is relevant to deal with the primary judge's narrative of when, and how, three facts said to be material to the respondent's claim came to his attention. On 10 September 2001 and on 21 September 2001, at the request of a Mr Brewin, the appellant's solicitor, the respondent attended a meeting with Dr Samuell, a psychiatrist. The primary judge concluded (at [41]) that "[i]t was on reading Dr Samuell's report that the plaintiff realised, for the first time, that there existed a link between his experiences at Eden Park and his subsequent, adult,

behaviour, and that he was actually suffering a disability". This report also included an assessment of the respondent's reduced capacity for work. In about October 2002, Mr Brewin, sent the respondent a letter identifying the appellant as the entity in whose care he had been placed during his time at Eden Park. This was when the respondent first realised the correct nomination of the entity against whom he was making his claim: primary judgment (at [44]).

22 The primary judge was satisfied (at [89]) that the respondent had made good the first limb of s 48(3) of the Limitation of Actions Act because he had first ascertained three material facts after the expiration of the limitation period. Those facts were the assessment of the respondent's reduced capacity for work (at [84]), the correct identification of the appellant (at [85]), and finally the link between his mental state and disabilities and his experiences at Eden Park (at [88]). The appellant does not challenge the primary judge's conclusions in this respect.

23 The appeal is directed at the primary judge's conclusions with respect to the second limb of s 48(3), that "in all the circumstances of the case it is just to grant the extension of time".

24 Her Honour identified (at [103] ff) the applicable principles from *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541, which considered s 31(2) of the *Limitation of Actions Act* 1974 (Qld). Her Honour concluded (at [107]) that although the language of s 31(2) differed in terms from s 48, it also conferred a general discretion to extend the limitation period.

25 Her Honour extracted the following principles from *Brisbane South*. First, the discretion to extend time is only to be exercised in favour of an applicant where, in all the circumstances, justice is best served by so doing: *Brisbane South* (at 544) per Dawson J. Secondly, the applicant carries the onus of satisfying the court that the discretion is to be exercised in his or her favour. To discharge that onus the applicant must establish that the commencement of an action beyond the limitation period would not result in significant prejudice to the prospective defendant: *Brisbane South* (at 544) per Dawson J, (at 547) per Gummow and Toohey JJ, (at 551) per McHugh J. The respondent bears an evidentiary onus to raise any consideration telling against the exercise of the discretion: *Brisbane South* (at 547) per Gummow and Toohey JJ. The real question was "whether the delay has made the chances of a fair trial unlikely": *Brisbane South* (at 550) per Gummow and Toohey JJ. Her Honour also noted McHugh J's observation (*Brisbane South* (at 551)) that "[t]he enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates'."

26 The appellant's case on the second limb of s 48(3) was one of actual prejudice, that, by reason of the passage of time since the events in question, it was unable to investigate the respondent's claims adequately.

27 The primary judge observed, however, (at [58]) that a good deal of preliminary work had been undertaken in the investigation of claims generally, including that of the respondent. She referred (at [60]) to the appellant's evidence of "largely unsuccessful attempts to locate various of the individuals identified by" the respondent. Some were other

residents of Eden Park, others were staff members or Salvation Army officers. Some had died. The appellant also complained that because the respondent was unable to give a name of a psychiatrist he had consulted in the early seventies, it would be unable to investigate the respondent's allegations in this respect.

28 The primary judge accepted (at [62]) that:

> "…even without the detailed evidence provided on behalf of the [appellant], … after a lapse of 40 years, it would be difficult to locate relevant witnesses, and that any who would be able to be located would be likely to have, at most, sketchy and probably unreliable recollections."

29 The primary judge also accepted that if an extension of time were granted, the appellant would be prejudiced in its ability to meet the respondent's claims (judgment at [112]). However, she considered that a number of factors would mitigate the prejudice that would be experienced by the appellant.

30 First, the primary judge considered that some of the appellant's evidence of prejudice was misleading. She referred to an affidavit by Mr Doran, one of the appellant's solicitors, sworn on 14 December 2005, which sought to establish the appellant's attempts to locate potential witnesses. In that affidavit, Mr Doran had deposed that Major Huxley, an officer of the appellant who was an assistant manager at Eden Park from 1961 to 1966, had died. However, it emerged in Mr Doran's cross-examination that he had received a statement from Major Huxley before his death. Her Honour concluded (at [65]) that this left the impression that the appellant was deprived of any opportunity to obtain information from this source.

31 Next the primary judge referred (at [66]) to an affidavit sworn by Mr Doran on 7 February 2006 referring to what he said were unsuccessful attempts to obtain information from Dr Le Page who attended Eden Park from time to time. In cross-examination it emerged that Mr Doran knew Dr Le Page had only treated residents who had been referred through a particular clinic, was not a general consultant to Eden Park and had never treated the respondent. She concluded (at [67]) that Mr Doran's affidavit evidence was intended to create the impression that the appellant had been prejudiced by the inability to obtain documentary material from Dr Le Page and that that was a misleading impression, in the light of the knowledge that he had never been involved in the respondent's treatment.

32 She concluded in respect of the evidence from the appellant's two solicitors:

> "68 In cross-examination of these two witnesses it became clear that the contents of their affidavits presented something of a one-sided account of the results of their endeavours. *While they emphasised those inquiries that had yielded no or little useful information they did not disclose that they had in fact been able to obtain some significant information.* Following cross-examination a somewhat different picture emerged. The solicitors had, for example, obtained statements from a number of officers or former officers of the Salvation Army who had been engaged at Eden Park. *One, at least, had given a good deal of detailed information about the conduct of the second*

> *defendant, including acceptance of the possibility that the plaintiff may have been physically ill-treated by him*." (emphasis added)

33 The primary judge found (at [111]) that the appellant had adduced a "considerable body of evidence to show that it has undertaken quite extensive investigations". She observed that it had sought (with limited success) to follow up individuals named by the respondent, and had sought to locate the psychiatrist, not named by the respondent, by whom he asserted he was treated; had unsuccessfully sought the records of the high school attended by the respondent; and had unsuccessfully sought information (other than from the respondent) confirming his employment history. She accepted this lack of success in its inquiries was not insignificant.

34 Her Honour also accepted (at [112]) that if an extension of time were granted, the appellant would be hampered in the extent to which it would be able to meet the respondent's claims – both as to events at Eden Park, and as to his post Eden Park history going to the extent of disability (if any) and to the quantification of damages. However, she also bore in mind (at [113]) the "rather different picture that emerged following the cross-examination of Messrs Brewin and Doran". I infer that her Honour considered that the misleading impression she had concluded those witnesses sought to convey in their affidavits either neutralised, or substantially weakened, the appellant's contention that it had demonstrated actual prejudice.

35 Her Honour then drew an analogy with sexual assault proceedings in criminal jurisdictions, saying:

> "114 In cases of sexual assault, the problems faced by the first defendant are not unfamiliar. Persons are regularly accused, in the criminal jurisdiction, of sexual assault or other misconduct many years after the events alleged. The delay in bringing proceedings and the consequent impairment of the person accused to marshal evidence in defence is not seen as a reason to prevent the prosecution proceeding. Instead, the criminal law has devised a means of redressing the unfairness. Juries routinely are directed, explicitly, of the difficulties cast in the way of the accused by reason of the delay in pursuing the prosecution: see *Longman v The Queen [*1989] HCA 60; 168 CLR 79.
>
> 115 If a jury can be entrusted, in weighing evidence in a criminal trial in the light of these considerations, then surely a judge sitting alone in a civil trial can be expected to undertake the same tasks. Indeed, one would expect that it would be almost instinctive. The inability of the first defendant to obtain material for cross-examination, or to adduce evidence in response to the evidence called on behalf of the plaintiff, would be factors relevant to the assessment of credibility, and to the weight to be given to any item of evidence, and, ultimately, to whether the plaintiff has established that justice favours the granting of the extension.
>
> 116 I do not suggest that analogy with criminal trials constitute a complete answer to the prejudice alleged to have been suffered by the first defendant. But potential amelioration of prejudice is one consideration to be taken into account in determining the overall justice of granting or refusing the extension sought."

36 Next, the primary judge considered (at [118]) the three ways in which the appellant sought to demonstrate actual prejudice in relation to:

· determining whether the alleged abuse occurred;
· the absence of records relating to the respondent's medical or psychological condition in the intervening years; and
· the absence of records of the respondent's psychiatric history.

37 The primary judge thought (at [119]) the first matter was somewhat disingenuous. She noted that Mr Ellis faced criminal charges in South Australia, which were due to be tried in November 2008. She also noted (at [120]) that Mr Brewin, one of the appellant's solicitors, had put the respondent's allegations to Mr Ellis, and others, although there was no evidence of what they had said to him. She concluded (at [121]) it was likely that there would be significant material available to the appellant arising out of the investigation and prosecution of criminal charges.

38 The primary judge considered the second and third matters as "of the same ilk" (at [112]). Although she accepted that a complete psychiatric history would be useful, she considered that psychiatrists were practised in evaluating histories recounted by patients, so the absence of records did not mean that a trial would not be fair (judgment at [122]). She also noted that investigations had been undertaken by "the Salvation Army" for the purposes of a South Australian Commission of Inquiry and Senate Committee Inquiry into the abuse of children under state care. She concluded that "the prejudice to the [appellant] is not nearly as great as the solicitors would have had me believe" (judgment at [123]).

39 The primary judge concluded (at [124]) that, although a degree of prejudice was inevitable, the delay did not make the chances of a fair trial unlikely and the appellant would not be precluded from mounting an adequate defence to the respondent's claim.

40 Accordingly her Honour ordered, pursuant to s 48 of the Limitation of Actions Act that the time for commencement of proceedings against the appellant be extended to 25 March 2003. She also ordered the appellant to pay the respondent's costs of the application.

Grounds of appeal

41 The Notice of Appeal acknowledges (para 1) that the grounds of appeal are limited to the extension of time granted in respect of the systems case and, I would add, the costs order. On that basis the appellant relies on the following grounds as relating to that case:

> "3 Her Honour erred in holding that, in all the circumstances of the case, it was just to grant an extension of time.
>
> 3 Her Honour failed to give reasons as to why, in all the circumstances of the case, it was just to grant an extension of time. [sic, there are two grounds numbered three]

4 Her Honour erred in treating the Appellant as having an onus to establish not only the prejudice suffered by reason of the Respondent's delay in commencing the proceedings, but also to establish that it was not so prejudiced.

5 Her Honour erred in taking into account witness statements viewed on a *voir dire* but which were not in evidence on the application to extend time.

6 Her Honour erred in taking into account the prosecution of old complaints of sexual assault in the criminal courts as a reason why a fair trial could take place in respect of the Respondent's allegations against the Appellant.

7 Her Honour erred in taking into account a pending criminal prosecution of one of the alleged assailants in the absence of any evidence that the criminal investigation had yielded evidence which would reduce the prejudice asserted by the Appellant.

8 Her Honour erred in taking into account submissions made by the Appellant to two inquiries in South Australia, and in inferring without any proper basis for doing so that the Appellant was not prejudiced by reason of its participation in those inquiries.

9 Her Honour erred in ordering the Appellant to pay the Respondent's costs of the application to extend time.

10 Her Honour ought to have held in respect of the Systems Case:

(a) that a fair trial was no longer possible;

(b) that, in all the circumstances of the case, it was not just to grant an extension of time."

Appellant's submissions

42 As I have said, the appellant accepts that s 48(3)(i) was satisfied, that is to say that there were material facts not within the plaintiff's knowledge until the period of less than 12 months prior to the commencement of proceedings, but challenges the primary judge's conclusion that in all the circumstances of the case it was just to grant the extension of time. It submits the primary judge correctly set out the relevant principles from *Brisbane South*, but erred in the application of these principles in eight ways.

43 First, the appellant submits that the primary judge failed to give reasons for concluding that a fair trial remained possible. It contends she did not weigh the prejudice which was proven by the appellant in the balance, nor consider what that prejudice would mean for a trial on the allegations made by the respondent. It emphasised that fifty years had passed since the alleged events, and thirty since the limitation period expired. Its submissions set out in great detail the unavailability of people in charge of Eden Park, the

loss of records, the loss of key non-employee witnesses such as Mr Ellis' mother, who had died, and the fact that none of the boys who had allegedly assaulted the respondent had been identified. Two boys who were at the home had been found by the respondent's, rather than the appellant's solicitors, but there was no evidence as to whether they could give relevant evidence.

44 Secondly, the appellant submits the primary judge incorrectly dealt with the question of onus. It contends she appeared to consider (at [68], [113]) that the appellant had an obligation to adduce not only evidence of actual prejudice, but also evidence that it was not prejudiced. The appellant argues that the onus was on the respondent, at all times, to prove that a fair trial remained possible. It submits that the respondent did little to discharge that onus.

45 Thirdly, the appellant submits that, in considering the issue of prejudice, the primary judge appeared (at [68]) to have had regard, erroneously, to a statement by Major Lauren on the voir dire, where the respondent successfully contended that legal professional privilege in respect of that statement had been waived. It points out that the respondent did not tender that statement as evidence.

46 Fourthly, the appellant submits that the primary judge erroneously relied on the fact that old complaints of sexual assault are frequently prosecuted in criminal courts and therefore could be pursued in a criminal proceeding. While it concedes that the primary judge did not consider the analogy to constitute a complete answer to the prejudice alleged, it submits the factors relevant to the appellant's liability have no parallel in a criminal trial. It contends for this reason that the primary judge's reasoning by analogy with respect to criminal proceedings was an irrelevant consideration.

47 Fifthly, the appellant submits that the primary judge (at [121]) erred in having regard to the pending criminal trial of Mr Ellis and concluding "it is likely that there will be significant material available to the [appellant] arising out of the investigation". It submits there was no evidence of this.

48 Sixthly, the appellant submits the primary judge had no basis for her conclusion that the appellant's investigations for the purpose of the South Australian Commission of Inquiry and the Senate Committee Inquiry meant that the prejudice was not as great as that it asserted by it. It submits that there was no evidence that as a consequence of the reports of those inquiries that statements were available from persons at Eden Park working there at the relevant time. It also submits that the fact other claims had been made against it in relation to Eden Park was irrelevant to the question of an extension of time in the instant case

49 Seventhly, the appellant submits the primary judge erroneously disregarded the prejudice arising from loss of psychiatric records as being insufficient, either of itself or in combination with other types of prejudice, to prevent a fair trial. It contends the primary judge's conclusion that the ability of psychiatrists to assess the truthfulness of information given to them by their patients overcame prejudice from the loss of such records, was based on the false assumption that psychiatrists can tell if a patient is lying.

50 Eighthly, the appellant submits that the primary judge's criticism that the appellant's solicitors gave misleading evidence of prejudice was misplaced. In relation to Mr Doran's evidence of the loss of Dr Le Page's records, which the primary judge later found to be irrelevant and misleading, the appellant contends that Mr Doran explained in his evidence that the enquiries were directed to finding what records may or may not have been kept concerning any of the children at Eden Park. In relation to Mr Doran's failure to disclose the statement by Major Huxley in his affidavit sworn in December 2005, the appellant submitted that the statement was the subject of legal professional privilege.

51 The appellant also complained that if her criticism of Mr Doran was not misplaced, the primary judge impermissibly took it into account in the exercise of her discretion and was blinded by it to reduce the prejudice proved *de minimis*, and thus failed to take into consideration the "considerable body of material which overwhelmingly proved that a fair trial is no longer possible".

52 As to the costs order, the appellant submits the primary judge's order that it pay the costs of the extension application was contrary to the "usual order" that the applicant for an extension of time pay the costs of the application. It also complains the order was made without it being given the opportunity to be heard and that the primary judge gave no reasons for making such an order.

Respondent's submissions

53 First, the respondent submits the primary judge's reasons show no error in findings or legal principle, and that there was no error in the exercise of her Honour's discretion to award costs. He noted that the fact the grant of leave to appeal was limited to the systems case meant that his case of breach of fiduciary duty and vicarious liability would proceed against the appellant in any event. He contended that the appellant's submissions did not identify error, but, rather, were an attempt to re-agitate submissions the primary judge decided adversely to it.

54 Secondly, the respondent contended that the appellant did not discharge its evidentiary onus of establishing its case of actual prejudice by lengthy enumeration of unavailable and/or lost witnesses/records. He argued the onus was not discharged unless the appellant demonstrated that that unavailable/lost evidence was material. He pointed out that the appellant had not called anybody who could give direct evidence of these matters. He also emphasised that the appellant had not asserted that evidence was unavailable except in relation to two witnesses, in which respect the primary judge had concluded the appellant had sought to mislead the Court.

55 Thirdly, the respondent submits the primary judge gave reasons (at [103] - [104]) for her conclusion that a fair trial was possible. He also contends that her Honour's conclusion that the appellant's solicitors attempted to mislead the Court was correct and that that was compelling evidence against a finding of material prejudice. He argued that the appellant's misleading conduct was a finding on which the primary judge was entitled to infer that the appellant's case was weak: *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510 (at [40]); *Oran Park Motor Sport Pty Ltd v Fleissig* [2002] NSWCA 371 (at [66]) per Hodgson JA (Beazley JA and Einstein J agreeing).

56 Fourthly, the respondent submits the primary judge correctly stated (at [14]) the onus issue and applied that test.

57 Fifthly, the respondent submits that the primary judge did not err in assuming that the criminal proceedings made it likely that significant evidence would become available to the appellant. He argues that the fact a body of evidence is available is relevant to the exercise of the discretion, and that in any event the primary judge placed minimal weight upon this matter. He submitted the purport of her Honour's observation was that if there was sufficient evidence to permit proceedings to go forward on the criminal case against Mr Ellis, then a trial judge, hearing the civil case, could be expected to be able to make allowances for difficulties caused by the lapse of time.

58 Sixthly, the respondent submits that the primary judge did not place improper weight on the two inquiries to which she referred. He points out that the primary judge said (at [57]) that she could not discern the basis for his submission that the fact the Salvation Army Australia Eastern and Southern Territories made a joint submission to the inquiry was said to assist in resolution of the present dispute. He contends the primary judge merely said the reports established that the Salvation Army had investigated complaints at its various homes including Eden Park and this was relevant in establishing how extensive the prejudice was.

59 Seventhly, the respondent submits the primary judge's reasoning concerning psychiatric reports was an appropriate approach to considering the weight of forensic material. He also contends this issue was relevant to damages rather than his systems case.

60 Eighthly, the respondent submits that the primary judge's criticism that the appellant's solicitors gave misleading evidence was not misplaced.

61 Ninthly, the respondent submits that it was relevant for the primary judge to take into account that it was the appellant's conduct which precluded him bringing his proceedings within the limitation period: see *Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539 (at 590) per Deane J.

62 Finally, the respondent submits there is no invariable rule that on an extension of time application the applicant must pay the costs. He contends the costs discretion is wide and unfettered and there are strong discretionary reasons why it might be unjust in the present case for the respondent to pay such costs. He submits at no time has the appellant suggested to the respondent that his allegations are false.

Limitation periods and breaches of fiduciary duty

63 As I have said the appellant sought to argue that the grant of leave for the systems case extended to the fiduciary duty case on the basis that the latter case was a cause of action arising out of the former.

64 The respondent resisted the appellant's contention arguing first that leave to appeal was only granted in respect of pars 15-19 of the Statement of Claim which dealt with the

systems case. He also argued that, even if the appellant's argument was correct, there is no limitation period in South Australia for a breach of fiduciary duty. He also contended that as the appellant would have to face the same factual matrix in dealing with the fiduciary duty case, it was not prejudiced by having also to meet the systems case.

65 In the course of debate the argument became focused on the latter question. This was because it was apparent to the Court that if the respondent had not needed an extension of the limitation period for the fiduciary duty case, and, if as was conceded by the appellant, the same factual matrix would most probably be considered for the fiduciary duty case, the question of prejudice caused by an extension of time being granted for the systems case could become largely irrelevant. In other words, even assuming the primary judge had erred in her consideration of the prejudice issue, the appellant had to deal with substantially the same factual contentions in any event in the fiduciary duty case. The appellant disputed that proposition arguing persuasively that if at a future trial it was able to argue successfully that a fiduciary duty did not arise, to then be faced with the systems case, would activate the very prejudice of which it complained.

66 The appellant submits that on its plain terms, and taking into account the definition of "action" in s 3(1), s 36 of the Limitation of Actions Act applies to a claim for damages for personal injury arising from breach of fiduciary duty. It argues that the language of s 36 is expansive and does not distinguish between common law or equitable claims, rather the determining factor is the form of relief sought, being damages for personal injury.

67 The appellant's argument was rejected in *Trevorrow v State of South Australia (No 5)* [2007] SASC 285; (2007) 98 SASR 136, a case concerning a claim for damages for personal injury brought by an Aboriginal man who had been removed from his family by the State of South Australia without his parents' consent. Gray J held (at [948]) that as an action for breach of fiduciary duty is an action in equity, the Limitation of Actions Act did not apply to the plaintiff's claim for breach of fiduciary duty.

68 Gray J reached his conclusion without analysing the Limitation of Actions Act. However his Honour's view appears to reflect that held in South Australia. In *The Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 415 (at [100]), Doyle CJ observed:

> "As is well known, the LAA contains relatively few time limits that apply of their own force to equitable claims. The explanation for this is historical: see Meagher, Gummow and Leeming, Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (4th ed, Butterworths Lexis Nexis, 2002) Ch 34, and Brunyate, *Limitation of Actions in Equity* (Stevens, 1932), Ch 1."

69 In *Duke*, the plaintiff, previously Kia Ora Gold Corporation NL ("KO"), brought proceedings against its former directors for breach of fiduciary duty to it. Doyle CJ rejected (at [102] –[103]) the defendants' argument that the claim for breach of their fiduciary duty was a claim "for the recovery of money ... based on restitutionary grounds" within s 38 of the Limitation of Actions Act. In his Honour's view (at [103] – [104]):

> "…The breach of duty by the directors on which the present claim is based gives rise to a claim for equitable compensation or equitable damages for breach of that duty, as does the claim against the present defendants. Taking the words of s 38(1) in their natural ordinary meaning, this is not the type of case to which they refer. It is not a claim for the recovery of money paid. It is a claim for compensation for the loss suffered by KO as a result of the takeover.
>
> "104 Nor does the directors' breach of fiduciary duty, nor the defendants' dishonest assistance to the directors, give rise to an action 'based on restitutionary grounds'. *The action in each case is simply one in equity for compensation or damages, assessed or determined according to equitable principles rather than the principles applicable to the assessment of damages in tort or in contract.* The essential nature of the remedy is to require the fiduciary, and those who dishonestly assisted in the breach of fiduciary duty, to restore to KO what it has lost." (emphasis added)

70 An appeal from Doyle CJ's judgment was dismissed: *Barker v Duke Group Ltd (in liq)* [2005] SASC 81; (2005) 91 SASR 167. The appellants did not challenge his Honour's conclusion on the s 38 point: see [69].

71 Section 36 appears in the section of the Limitation of Actions Act which deals with "actions on simple contract and in tort". Section 35 enumerates the actions which are subject to a six year limitation period. All fall within the description "actions on simple contract and in tort". Prima facie the action described in s 36, namely one for damages in relation to personal injuries, is an action in tort. The use of the word "actions" in limitation legislation has been regarded as not extending to suits in equity which were not called "actions": see Meagher, Gummow and Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, LexisNexis, 2002) (at [34-005]). However it is apparent that s 3(1) of the Limitation of Actions Act was intended to overcome this historical approach and extend the operation of the Act in appropriate circumstances to equitable claims, a view apparently shared by the authors of Meagher, Gummow and Leeming: see [34-030], although compare *Hewitt v Henderson* [2006] WASCA 233 (at [26]).

72 However there is a question whether a claim of breach of fiduciary duty gives rise to an action "for damages for personal injury". The statement of claim in this case seeks "equitable compensation for breach of fiduciary duty", no doubt seeking to avoid the grasp of s 36.

73 In *Pilmer v The Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165, which raised the question whether an accounting firm owed fiduciary obligations to a client in respect of a valuation, McHugh, Gummow, Hayne and Callinan JJ explained (at [71]) the distinct character of the fiduciary obligation which set it apart from contract and tort, citing, with approval McLachlin J in *Norberg v Wynrib* [1992] 2 SCR 226 (at 272):

> "The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties

> are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other."

74 This conceptual distinction underlines the proposition, in my view, that s 36, appearing as it does in that Part of the Limitation of Actions Act intended to deal with contract and tort, does not extend to a claim for breach of fiduciary duty.

75 *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 ("*Williams*") is clear authority for the proposition that a claim for breach of fiduciary duty does not constitute a claim for damages for personal injury.

76 *Williams* concerned a claim for damages by a woman of Aboriginal descent, who was placed at birth in a home for Aboriginal children by the Aborigines Welfare Board. She sought an extension of time pursuant to s 60G of the *Limitation Act* 1969 (NSW) to commence proceedings to recover damages in respect of a borderline personality disorder she said she suffered as a consequence of her removal. She sought damages for negligent breach of duty and wrongful imprisonment and equitable compensation for an alleged breach of fiduciary duty: Kirby P (as he then was) (at 500); cf Powell JA (at 516). She was unsuccessful in seeking an extension at first instance, but succeeded by majority on appeal (Kirby P (with whom Priestley JA generally agreed); Powell JA dissenting).

77 Kirby P considered whether s 60G, which deals with extensions of limitation periods for "a cause of action, founded on negligence, nuisance or breach of duty, for damages for personal injury", applied to an action for breach of fiduciary duty. His Honour said (at 509):

> "In the context, there can be no doubt that the 'breach of duty' referred to, was a breach of duty of the kind of the other causes of action mentioned in the section, viz, common law or statutory actions founded on a breach of duty owed at common law. *The claim of breach of fiduciary duty is not of this character. Nor does it give rise to an action 'for damages for personal injury'. Instead it gives rise to an entitlement, if established, to equitable compensation for the breach of fiduciary duty proved.*" (emphasis added)

78 Although Powell JA was of the view the appellant had not pleaded a claim based on breach of fiduciary duty, he appeared to accept (at 520) that, had she done so, her claim would be one for equitable compensation which would not be subject to statutory limitation periods.

79 The appellant did not challenge Kirby P's characterisation of the claim for breach of fiduciary duty as one seeking equitable compensation rather than damages within the meaning of s 36. Kirby P's characterisation is consistent with Doyle CJ's approach in *Duke.* Applying that approach, the respondent's claim for equitable compensation for breach of fiduciary duty was not caught by s 36.

80 However that does not dispose of the issue entirely.

81 Even if a statutory limitation period does not apply in terms to a cause of action for equitable relief it may apply by analogy: *Williams* (at 509) per Kirby P. As Campbell J (as his Honour then was) explained in *Belan v Casey* [2003] NSWSC 159; (2003) 57 NSWLR 670 (at [146]), quoting Lord Westbury in *Knox v Gye* (1872) LR5HL 656 (at 673-4):

> "…For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in Equity corresponds with an action at Law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure."

82 Campbell J continued (at [149]):

> "In accordance with this principle, an allegation of breach of fiduciary duty, based on facts which would also have allowed a common law action for fraud to be brought, has applied to it the same statutory limitation period as the common law action for fraud: *Coulthard v Disco Mix Club Ltd* (2000) 1 WLR 707 at 730, and a claim for breach of fiduciary duty founded upon the same facts as would justify a claim in tort or contract has the limitation periods for tort or contract applied to it: *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112."

83 Doyle CJ recognised the availability of applying a statutory limitation by analogy to the grant of an equitable remedy in *Duke* (at [111] ff). His Honour considered the relevant principle to be accurately stated in Spry, *Equitable Remedies* 6th ed (2001), LBC Information Services. He emphasised (at [114]) "that when a time limit is applied by analogy to a claim in the exclusive jurisdiction of equity, the decision whether the time limit is to be applied is made in light of all the circumstances [and] [i]t is necessary to consider whether, despite the similarity, it would be unjust to enforce the analogy", referring to Spry (at 422).

84 In *Williams* (at 510) Kirby P referred to *KM v HM* (1992) 96 DLR (4th) 289, a case in which the Supreme Court of Canada (La Forest J, Gonthier, Cory and Iacobucci JJ concurring) held that the *Limitations Act, RSO* 1980 did not apply to the equitable actions, such as an action for compensation for breach of fiduciary duty. La Forest J was of the view that the action, being solely an equitable one, was not readily amenable to limitation by analogy. In *Duke*, Doyle CJ set out the passage from La Forest J's reasons in *KM v HM* (at 330) to which Kirby P referred and which Doyle CJ understood his Honour to be approving, as follows:

> "While there is no doubt that in some cases equity will operate by analogy and adopt a statutory limitation period that does not otherwise expressly apply, in my view this is not such a case. And this for several reasons. First, *equity has*

> *rarely limited a claim by analogy when a case falls within its exclusive jurisdiction, as in this claim for breach of fiduciary duty*. Moreover, even if it is appropriate to analogize from the common law, the analogy will be governed by the parameters of the equitable doctrine of laches.
>
> …
>
> [at 332-333] The present case involves a breach of fiduciary duty, which falls solely within the realm of equity. As such, it is not in my view readily amenable to limitation by analogy to some common law action. However, *even if an analogy could be drawn that is not to say that it must be applied. As I noted earlier, equity retains a residual discretion on this point, which is the point of distinction from acting in obedience to the statute*. In this respect the analogy takes on the character of laches, a point explicitly recognized by *Brunyate*. A more detailed consideration of laches follows, but for now it is enough to note the following proposition advanced by *Brunyate,* at p.17:
>
> > 'Where a Court of Equity is applying the statute as part of the law of laches it may reasonably allow any exceptions that are allowed in the law of laches. ...since delay by a plaintiff who has been ignorant of his right of action will not amount to laches, we should expect that, where the Court is acting by analogy to the statute, time will not run until the plaintiff is aware of his right of action.' " (emphasis added)

85 Although in *Duke,* Doyle CJ accepted (at [133]) that there were causes of action in tort against the directors of KO sufficiently similar to the claim against them for breach of fiduciary duty, and which were subject to a six year time limit, to warrant in principle the application of the statutory time limit to a claim against the directors for breach of fiduciary duty, he concluded that he should not do so at that stage of the proceedings.

86 He held (at [135]) that before applying the statutory time limit by analogy, it was not just a question of finding a sufficient similarity between the equitable claim and the claim that is subject to a statutory time limit, but that he must also be satisfied "that in all the circumstances it is just to do so". Doyle CJ's conclusion (at [135]) was approved by the Full Court of the Supreme Court of South Australia: *Barker v Duke Group Ltd (in liq)* (at [84]) and also by the Western Australian Court of Appeal in *Hewitt v Henderson* (at [25]) (Buss JA, Steytler P and Pullin JA agreeing).

87 Doyle CJ also referred with approval (at [135]) to *Young v Waterways Authority of New South Wales* [2002] NSWSC 612 (at [27]) where Burchett AJ, referring to *Wardley Australia Ltd v Western Australia* [1992] HCA 55; (1992) 175 CLR 514, said "[a]n application of the statute by analogy could very rarely indeed lead to a summary dismissal of an action" Burchett J's statement was also approved in *Hewitt v Henderson* (at [29]), where Buss JA observed, "[a]n application which is or is analogous to a strike-out application will rarely be a satisfactory process for determining whether equity should apply a statutory limitation period by analogy". *Hewitt v Henderson* concerned causes of action for breach of fiduciary duty and an account. Buss JA held (at [30]) that the hearing of an application to amend pleadings to include the fiduciary duty cause of action was not a satisfactory process for determining, on a summary basis, that that cause of action was time-barred. Rather, in his

view, that issue should be determined at trial on the pleadings and after all material facts had been found.

88 In *Williams*, as in this case, the application for an extension of time proceeded at first instance without differentiating between the common law and equitable claims. Kirby J concluded that the plaintiff's claim based upon breach of fiduciary duty was not disposed of by a refusal of the extension of time sought in respect of the tort claims by the application of s 60G(2) of the *Limitation Act* 1969 (NSW). Accordingly the primary judge had erred in applying s 60G(2) to them all. In his view (at 510 - 511), the fact that the claim for equitable compensation for breach of fiduciary duty could not be disposed of, but would be required to proceed to trial, would itself be a consideration relevant to the determination of whether it was "just and reasonable" to do in respect of the causes of action in tort. As, in his view, the evidence relevant to the claim for breach of fiduciary duty would be substantially the same as the evidence relevant to the claim for damages for the torts of negligence and wrongful detention, if a court concluded that a claim for breach of fiduciary duty was bound to be tried, it would seem strongly arguable that the alternative causes of action upon which the same plaintiff relied at common law, should be heard at the same time or, at least, was a matter relevant to the exercise of the discretion under s 60G(2). His Honour then considered an argument not advanced in this case, whether the action for breach of fiduciary duty was "so hopeless" that the established legal error was irrelevant.

89 Priestley JA (who, as I have said, generally agreed with Kirby P) was also of the view (at 516) that the plaintiff should have the opportunity of putting all relevant evidence before the Court at a trial, rather than that the matters of significance which the case raised should be dealt with on the incomplete state of the evidence before the Court at that stage of the proceedings.

90 When *Williams* went to trial, Abadee J held that the fiduciary cause of action was not available: *Williams v The Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843. Ms Williams' appeal was dismissed: *Williams v The Minister, Aboriginal Land Rights Act 1983* [2000] NSWCA 255 ("*Williams No 2*"). Heydon JA (as his Honour then was) (Spigelman CJ and Sheller JA agreeing) observed (at [55]) that the fiduciary claim was largely abandoned on appeal, having served its "essential forensic purpose" of extending the limitation period in 1994.

91 Equity developed the doctrine of analogy to apply the common law limitation period to an analogous proceeding in equity in order to prevent plaintiffs at law from avoiding a limitation statute by disguising their claims as equitable: R P Austin, "Constructive Trusts", P D Finn (ed), *Essays in Equity*, (1985) The Law Book Company Limited (at 204). Consistently with this proposition, Sopinka J said in *Norberg* in a passage cited with approval in *Pilmer* (at [71]), "[f]iduciary duties should not be superimposed on … common law duties simply to improve the nature or extent of the remedy." It may be that Heydon JA had this proposition in mind in his reference to forensic purpose. The appellant did not argue that the respondent had taken that course in this case.

92 Heydon JA added (*Williams No* 2, at [20]):

> "…[T]he authorities decided since the Court of Appeal extended the limitation period in 1994, suggest that were a similar matter to arise now, the outcome of an application to extend the limitation period may well be different. In *Holt v Wynter* [2000] NSWCA 143, Meagher JA, Handley JA and Brownie AJA, but not Priestley JA, agreed with Sheller JA's conclusion that in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, not only McHugh J, but also Dawson J and Toohey and Gummow JJ, were of the view that if a defendant were in a position of serious or significant prejudice *it was not open to a court to extend time*: see in particular [111]-[115] and [119]." (emphasis added)

93 The appellant relied on these observations to submit that even if the fiduciary duty case had to go to trial, that was no answer to the prejudice to which it would be exposed if the systems case were to proceed. I will return to this proposition.

94 In the light of these authorities, however, in my view, it is not open to the Court to assimilate the systems and fiduciary duty cases. The question whether the limitation period imposed by s 36 of the Limitation of Actions Act should be applied by analogy to the fiduciary duty case should not be determined at this stage of the proceedings.

Conclusion

95 In considering the power of the Court in reviewing the primary judge's decision, it is pertinent to bear in mind that the appeal relates to an exercise of discretion in a matter of practice and procedure. This Court should only interfere if it is satisfied that the primary judge's exercise of discretion attracted appellate intervention in the sense explained in *House v The King* [1936] HCA 40; (1936) 55 CLR 499: see *Brisbane South* (at 549) per Toohey and Gummow JJ; (at 556) per McHugh J (Dawson J agreeing); (at 569) per Kirby J; see also *Williams* (at 518) per Powell JA.

96 *Brisbane South* is authority for the proposition that an application for an extension of time under limitation legislation should be refused if the effect of granting the extension would result in significant prejudice to the potential defendant: *Holt v Wynter* [2000] NSWCA 143; (2000) 49 NSWLR 128 (at [119]) per Sheller JA (with whom Meagher JA, Handley JA and Brownie AJA agreed). "Significant prejudice" means such prejudice as would make the chances of a fair trial unlikely: *Commonwealth of Australia v Smith* [2005] NSWCA 478 (at [128]) Santow JA (Handley JA agreeing), applying *South Western Sydney Area Health Service v Gabriel* [2001] NSWCA 477 (per Hodgson JA, Beazley JA and Rolfe AJA agreeing). For a trial to be fair, it need not be perfect or ideal: *Commonwealth of Australia v Smith* (at [129]).

97 Section 48 of the Limitation of Actions Act was considered in *Sola Optical Australia Pty Ltd v Mills* [1987] HCA 57; (1987) 163 CLR 628. In their joint judgment (at 635), Wilson, Deane, Dawson, Toohey and Gaudron JJ described s 48 as conferring, "subject to the section, a general and unfettered power upon a court to extend the time prescribed by any Act (including the Limitation of Actions Act 1936 itself) or piece of subordinate legislation for instituting an action, or for doing any act in an action or with a view to instituting an action". In their view (at 635) the broad purpose of the Act was "to eliminate the injustice a

prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced", a passage McHugh J in *Brisbane South* (at 553) regarded as descriptive of the limitation provision there under consideration. Kirby J (*Brisbane South*, at 565) referred to the same statement with approval and as supporting the proposition that the residual discretion was "to be exercised in a way that gave effect to the exception but in the context of a statute designed also to uphold the general rule".

98 Kirby J returned to this passage from *Sola* in *State of Queensland v Stephenson* [2006] HCA 20; (2006) 226 CLR 197 (at [53] – [57]) as supporting the beneficial and remedial nature of extension provisions in permitting plaintiffs otherwise out of time to proceed and thus ameliorate the "unjust outcomes that earlier limitations law had produced" (cf Heydon J (at [97])).

99 I am unable to discern that the primary judge erred in a manner which would attract appellate review of the exercise of her discretion.

100 In my view it is plain that the primary judge was conscious throughout her reasons that the respondent bore the onus of establishing that he should be granted an extension of time to commence the proceedings. The main focus of her judgment was on the appellant's case of prejudice because that is what occupied the bulk of the hearing.

101 I am also of the view her Honour adequately explained why, in her view, a fair trial was possible. It is apparent from the judgment that her Honour was satisfied the appellant had been able to speak to critical witnesses of whose conduct the respondent had either complained or identified as germane to his complaint. It had so acknowledged in its letter of 20 August 2001: primary judgment (at [38], [119]). Indeed as she said (at [68]) it had obtained statements from a number of officers or former officers of the Salvation Army who had been engaged at Eden Park. It conceded in its submissions at trial that the alleged assailant, Mr Ellis, was available, as were personnel who worked at Eden Park during the relevant period, although not those who were in charge.

102 The primary judge was entitled to weigh the appellant's case of actual prejudice in light of her conclusion that it had conveyed a misleading impression of the extent of that prejudice. As Hodgson JA said in *Oran Park v Fleissig* (at [66]):

> "'…evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted': *Blatch v. Archer* (1774) 1 Cowp 63 at 65, 98 ER 969 at 970 per Lord Mansfield. This principle is applied where one party fails to calls evidence which it could have called: *Armory v. Delamirie* (1722) 1 Stra 505, 93 ER 664; *Jones v. Dunkel* (1959) 101 CLR 298; *Ho v. Powell* (2001) 51 NSWLR 572. *In my opinion it applies at least equally where the absence of evidence arises from deliberate lies told by a party who is in a position to tell the truth about the matter: I do not think such a party should be in a better position than one who refrains from giving the evidence.* Indeed, the principle may operate more strongly in the case of deliberately false evidence than in the case of mere failure to lead evidence" (emphasis added)

103 It is apparent that her Honour had this principle in mind when (at [113]) after referring to the misleading impression the appellant's affidavit evidence conveyed, she remarked that a different picture emerged as to the extent to which the appellant would be hampered in meeting the claim. I can discern no error in the inference her Honour drew in this respect. The principle is also applicable to the weight her Honour gave to the respondent's discharge of his onus. Of particular significance in this respect, in my view, was the misleading impression conveyed by the statement that Major Huxley had died. Major Huxley and his wife were assistant managers at Eden Park from January 1961 to January 1966, substantially the entire period the respondent was a resident of the facility. Major Huxley died in 2004, but, as was extracted from the appellant's solicitor in cross-examination, a statement had been taken from him before his death. The appellant's statement that the solicitor was entitled not to disclose even the fact of having obtained a statement from Major Huxley in reliance on legal professional privilege is disingenuous. Privilege is not waived by the mere reference to a document in pleadings or an affidavit: *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475. However what was of grave concern was to convey the impression to the Court that his death prior to the commencement of proceedings had foreclosed an avenue of inquiry.

104 The primary judge was also entitled to take a jaundiced view of the appellant's case of actual prejudice in the light of the misleading impression it conveyed in respect of Dr Le Page. In the light of this evidence, I am unable to conclude that even if, (at [68]) her Honour referred to a statement to which she was referred during a *voir dire*, she attached such weight to it as would invite appellate intervention.

105 Next, I am unable to discern error in the analogy the primary judge drew with criminal trials. Indeed her Honour's remarks appear to echo Priestley JA's observations in *Holt v Wynter* where his Honour said:

> "80 Criminal trials, for example, are almost routinely allowed to proceed although considerable time has passed since the happening of the alleged offence. No doubt there are quite different public policy factors at work, but, even so, there must be considerable similarity between the problems caused by delay to the defending parties in criminal and civil trials. When an application is made for the stay of a criminal trial on the ground of the prejudice flowing from delay, the response very frequently is to allow the trial to proceed on the basis described by Toohey J in *Jago v District Court* (1989) 168 CLR 23 at 71. He said:
>
> > '... where an accused has suffered some prejudice in his defence by reason of delay in bringing his case to trial (fair trial) it will often be possible to cure that prejudice by evidentiary rulings and by directions to the jury regarding the way they should approach the evidence adduced.'
>
> 81 Toohey J continued:
>
> > 'But it is conceivable that delay has been so great and consequent prejudice to an accused so manifest that directions cannot ensure a fair trial. In that situation a stay of proceedings is the only remedy that meets the situation.' (ibid; at 71-72)

> Gaudron J made observations to a similar effect, at 78. See also *Longman v R* (1989) 168 CLR 179, where a man was convicted in 1988 for offences allegedly committed in 1962. The High Court ordered a new trial because the jury had not been adequately directed about the need to scrutinise the evidence with great care because of the delay. In joint reasons Brennan, Dawson and Toohey JJ said:
>
> > 'To leave a jury without such a full appreciation ... was to risk a miscarriage of justice.' (at 91)
>
> 82 In ordering a new trial, where proper directions would be given, they must have been of the view the delay would not then cause a miscarriage. Deane J and McHugh J were, on this point, of similar views."

106 Equally I discern no error in the inference the primary judge drew (at [121]) that significant material may be available from the investigations and prosecution of Mr Ellis. Some of the charges at his criminal trial were based on the respondent's allegations (primary judgment at [119]). In my view the inference her Honour drew could sensibly be drawn from those facts.

107 As to the primary judge's rejection of the prejudice said to flow from the appellant's inability to identify the psychiatrist the respondent had once consulted, I am of the view that was a conclusion open to her Honour. Many, if not most, psychiatrists asked to assess a person of later years to assess the cause of present incapacity must do so without recourse to any earlier materials. That is just one of many factors which a trial judge may in due course take into account in weighing the evidence of the cause of the disabilities for which the respondent contends.

108 It thus becomes unnecessary to consider the interesting point debated during appeal as to whether the "circumstances" in s 48(3) extend to the other causes of action which must proceed to trial.

Costs

109 In *Holt v Wynter* (at [121]) Sheller JA observed that ordinarily a successful applicant, who has allowed him or herself to get out of time, should pay the costs of the application unless the respondent's opposition was wholly unreasonable. Santow JA disapproved that proposition in *Commonwealth of Australia v Smith*, saying:

> "[T]here is no rule that binds the judge to deny costs to an applicant for extension of the limitation period. A costs order for such an application is a matter of practice and procedure within the discretion of the primary judge. In view of the Commonwealth's failure in so many of these extension cases over six years [para 133] the judge would have been entitled to find that the Commonwealth acted unreasonably in opposing an extension in this case and should pay the applicant's costs. It has not been shown that the primary judge erred in the exercise of his discretion so as to warrant the interference of an appellate court (Micallef v ICI Australia Operations Pty Ltd [2001] NSWCA

274; House v The King (supra); Lovell v Lovell (1950) 81 CLR 513 at 518-519 and 532-533)".

110 Basten JA dealt with the costs issue (at [213]). He concluded (at [221]) that an applicant for an extension of time should not get his costs unless the defendant had acted "in a manifestly unreasonable fashion". Even then, in his view, he thought an appropriate order would be to grant the plaintiff his costs if ultimately successful in the substantive proceedings. Further, absent unreasonable conduct on the part of the defendant, he thought "it may nevertheless seem inappropriate, generally speaking, that the [defendant] should obtain its costs of its unsuccessful opposition, unless the [plaintiff] has acted unreasonably."

111 These authorities support the proposition that it was within the primary judge's discretion to consider the costs order in light of the manner the appellant resisted the extension application. In my view her findings as to its misleading conduct justified it being ordered to pay costs.

Orders

112 I would dismiss the appeal with costs.

113 **BASTEN JA**: The plaintiff, Mr Graham Rundle, now lives in New South Wales. Between 1960 and 1965 he was a child in the care of The Salvation Army (South Australia Property Trust) ("the appellant") in South Australia. The facility in which he lived was a home for boys owned and managed by the appellant. The plaintiff alleges that he was sexually assaulted on a weekly basis by other boys at the home and by Mr Keith Ellis, a full time carer and supervisor of children at the home, on a large number of occasions in the years he was there.

114 The plaintiff commenced proceedings against the appellant and the supervisor by a statement of claim filed in the Common Law Division on 25 March 2003. It was common ground that the relevant limitation period was to be found in s 36 of the *Limitation of Actions Act* 1936 (SA). As the commencement date was some 38 years after the assaults ceased (when the plaintiff left the home) and long after the expiration of the relevant limitation period, the plaintiff needed an extension of time within which to institute the proceedings. The power to extend time was found in s 48 of the *Limitation of Actions Act*. Mr Ellis did not oppose the application for leave. Leave was granted by Simpson J in the Common Law Division: see *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443.

115 The statement of claim filed by the plaintiff was divided into 24 paragraphs. Paragraphs 1-11 and 24, alleged generally the circumstances of the assaults and that loss had been suffered. In paragraphs 12-13 the plaintiff alleged that the supervisor (Mr Ellis) owed him a duty of care, which was breached, both by sexually assaulting the plaintiff and by failing to supervise other boys to protect the plaintiff from assaults by them. In paragraph 14 he alleged that the appellant was vicariously liable for the assaults and breaches of duty committed by its supervisor. At paragraphs 21-23, the plaintiff alleged that the appellant owed him a "fiduciary duty" which it breached, as a result of which he suffered injury.

116 The order made by Simpson J did not refer to specific causes of action: rather, in accordance with the motion before her Honour, the order was in the following terms:

> "Pursuant to s 48 of the *Limitation of Actions Act* 1936 (SA) the time for commencement of proceedings against the first defendant is extended to 25 March 2003."

117 On 6 November 2007 this Court granted the appellant leave to challenge that judgment on a limited basis. Leave was restricted to so much of the order as related to parts of the statement of claim alleging that the appellant owed a duty of care to the plaintiff, which it breached, including a pleading that its duty of care was "non-delegable": statement of claim, paragraphs 15-19. (The grant of leave did not in terms include paragraph 20, which alleged injury suffered as a result of the breach of a non-delegable duty: nevertheless, it was accepted for the purposes of argument that the grant should be understood to so extend.)

118 In broad terms, the issues agitated on the appeal fell into three categories, namely:

(a) the proper construction of s 48(3) of the *Limitation of Actions Act* 1936 (SA), which conferred power to extend the limitation period;

(b) whether having regard to prejudice caused to the appellant by the delay the justice of the case required an order extending time, and

(c) if time were extended, the proper order as to the costs of the application.

Nature of issues on appeal

119 The result of the limited grant of leave to appeal is that the proceeding will in any event go ahead in respect of the claim against Mr Ellis and in respect of the appellant's vicarious liability for any breach of duty established against Mr Ellis. There remains in issue what was described as "the systems case" and the claims for breach of fiduciary duty. The notice of appeal did not challenge so much of the decision of the primary judge as permitted the claim for breach of fiduciary duty to proceed. The breach of fiduciary duty arose because the appellant "permitted the Plaintiff to be sexually assaulted by both Sergeant Ellis and other boys in the home": statement of claim, par 22. The breach of fiduciary duty was particularised by reference to the matters pleaded with respect to the "systems case": par 16.

120 The situation was further complicated by the fact that, as conceded by senior counsel for the appellant on the leave application, the application for an extension of time, before the primary judge, was addressed on a global basis: Tcpt, NSWCA, 06/11/07, p 17(35)-(40). Indeed, the statutory defence was expressed in terms of proceedings (actions) in which damages claimed "consist of or include" personal injury damages. Understandably in those circumstances, the primary judge did not seek to distinguish between different causes of action. This consideration was directly relevant to what might properly be identified as material errors in her Honour's judgment. Thus, her Honour took into account the fact that criminal proceedings in cases of sexual assault are not infrequently brought after a considerable period of delay: at [114]. As her Honour noted, the potentially prejudicial consequences of delay are routinely dealt with by directions to the jury, in accordance with *Longman v The Queen* [1989] HCA 60; 168 CLR 79. Accepting that that was a significant

consideration in respect of the case brought against Mr Ellis and the liability of the appellant for his conduct, it was less relevant to the "systems case" brought against the appellant. That was because the "systems case", as pleaded, could involve the activities (or inactivity) of individuals against whom no specific acts of misconduct were alleged. To the extent that the appellant had, for some years, been investigating allegations of specific misconduct, those inquiries were quite different (it was argued) from the kind of inquiries which might have been appropriate in relation to its responsibilities for establishing systems of protection, investigation of complaints and control of supervisors. However, the weight of such a distinction and the complaint that her Honour failed to recognise the distinction may have little force in circumstances where no such distinction was sought to be drawn in the course of the proceedings before her Honour.

121 For the same reason, her Honour gave no separate consideration to the cause of action based on fiduciary duty. In particular, she did not consider whether there was a limitation period operating in relation to that cause of action or whether the plaintiff was entitled to proceed on that cause of action subject to any equitable defence such as laches, which might be raised in the course of the trial by the appellant. However, once the causes of action became subject to separate consideration, as required by the grant of leave to appeal, an issue did arise as to whether the claim for breach of fiduciary duty could proceed in any event. This issue has been addressed by McColl JA at [63]-[74]. Her Honour concludes that s 36 of the *Limitation of Actions Act* does not extend to a claim for breach of fiduciary duty.

122 The appellant sought to rely upon the fact that the particulars of breach of fiduciary duty identified by the plaintiff in his pleading were the same as those identified with respect to the "systems case" pleaded in par 16 of the statement of claim. The appellant argued that, if it were to succeed on the "systems case", it would be because of prejudice with respect to the particulars as pleaded and hence the claim for breach of fiduciary duty must also be rejected.

123 The plaintiff relied on the other side of the same coin, namely that all of the particulars relevant to the "systems case" would need to be addressed at a trial in respect of the breach of fiduciary duty, which did not fall within the grant of leave to appeal. This was said to weaken significantly the allegation of prejudice in respect of the "systems case". The arguments in this regard have been summarised by McColl JA at [64]-[66] above.

124 The appellant did not seek to reopen the grant of leave to appeal: nevertheless, the arguments noted above reveal that the limited grant of leave achieves an unsatisfactory result. It is necessary for this Court to construe the grant of leave. As I understand the order made, when read with the transcript of the argument, the underlying purpose was to allow the appellant to challenge the "systems case", because it raised issues going beyond the direct liability of Mr Ellis and the consequent vicarious liability of the appellant in respect of that conduct. Because the particulars are identically pleaded for the purposes of the breach of fiduciary duty cause of action, the grant of leave should be construed as extending to that cause of action, if the plaintiff required an extension of time within which to bring proceedings.

125 It becomes necessary therefore to consider whether the cause of action for breach of fiduciary duty was subject to the *Limitation of Actions Act*.

Breach of fiduciary duty – limitation period

126 There are reasons for approaching the operation of the Act in this respect with caution. Historically, the first Statute of Limitations, 21 Jac I c 16 (1623), did not operate in relation to proceedings in equity: see Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity – Doctrines and Remedies* (4th ed, 2002) at [34-005]. Secondly, the nature of equitable principles, and in particular fiduciary duties, differs from equivalent common law duties (including duties under contract and in tort): see *Pilmer v Duke Group Ltd (In liq)* [2001] HCA 31; 207 CLR 165 at [70] and [74] (McHugh, Gummow, Hayne and Callinan JJ), quoted in part at [73] above. Thirdly, the language of equitable remedies conventionally differs from that of common law remedies, commonly (though not invariably) adopting the term "equitable compensation" in place of "damages" as an available form of relief for breach of fiduciary duty.

127 Bearing these considerations in mind, it is nevertheless necessary to focus upon the language of the specific statute. Section 36 of the *Limitation of Actions Act*, set out at [10] above, involves three concepts, namely "actions", claims for "damages" and claims in respect of "personal injuries". The term "action" is defined in s 3(1) to include "legal proceedings of all kinds". Absent some statutory indication to the contrary, there is no reason to exclude claims brought in equity. Secondly, the concept of "personal injuries" is defined to include any impairment of a person's physical or mental condition – in s 36(2) – and is clearly satisfied by the present proceedings. The third term "damages" may be intended to include equitable compensation, or may be limited to damages in tort or contract. The answer to that question must be found by reading the provision in its context.

128 Section 36 appears in Part 6 of the Act which is headed "Actions on simple contract and in tort". The heading of a Part forms part of an Act: *Acts Interpretation Act* 1915 (SA), s 19(1)(b). Section headings do not: s 19(2)(a). Nevertheless, it is clear that the heading to Part 6 is not reflective of, let alone a limitation upon, the contents of the Part. Thus, s 38 (also in Part 6) applies to an action for recovery of money paid under a mistake, or otherwise on restitutionary grounds. It also deals with recovery of tax paid pursuant to an invalid demand – s 38(2) – and refers to the effect of endorsements on promissory notes and bills of exchange: s 43. Further, although the *Acts Interpretation Act* appears to have no provision permitting reference to extrinsic material, that would be allowed in the case of uncertainty or ambiguity under general law principles: see *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2, 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ). It is not insignificant that the heading to Part 6 is identical with the heading of s 35. Accordingly, there is no reason to read the heading as limiting the operation of s 36 to actions for damages based on simple contract or tort. (The term "simple contract" is used to distinguish a contract from an action on "speciality", being a document under seal, addressed in s 34.)

129 If there were a statutory intention not to impose a limitation period on a cause of action for breach of fiduciary duty, where the harm for which compensation is sought is personal injury, it must arise from the use of the expression "damages". The statutory limitation period is imposed, not by reference to a cause of action, but by reference to the kind of relief sought and the harm from which the loss is claimed to flow. As Gummow J has noted, writing extra-judicially, a breach of fiduciary duty may bring into play a range of remedies: see Gummow WMC, "Compensation for Breach of Fiduciary Duty" in Youdan TG (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) p 61. Although reference is made

to "compensation for loss inflicted by breach of duty" and not "damages", the cases in which the terms "compensation" and "damages" are to be found, almost interchangeably, are numerous. Sometimes the term "compensation" or "equitable compensation" is used to avoid the inference that the same temporal element or other principles relevant to damages at common law apply. Nevertheless, reference to an "award of damages in equity" is by no means a misnomer: see, eg, Spry, *The Principles of Equitable Remedies – Specific Performance, Injunctions, Rectification and Equitable Damages* (7th ed, 2007) Ch 7; Meagher, Heydon and Leeming, Ch 23 "Damages in Equity". The use in the equitable jurisdiction of the term "damages" has a long history: see McDermott PM, "Jurisdiction of the Court of Chancery to Award Damages" (1992) 109 LQR 652. (The ancient jurisdiction used the term in a manner which would not be adopted today.) On the assumption that the plaintiff is entitled to compensation for personal injuries suffered as a result of breach of fiduciary duty on the part of the appellant, there is no reason to deny such relief the label of "damages" for the purposes of the *Limitations of Actions Act*. Nor does there appear to be any sufficient basis for reading down the breadth of s 36 to exclude a claim based in equity.

130 The Court's attention was drawn to a statement in the judgment of Gray J in *Trevorrow v South Australia (No. 5)* [2007] SASC 285; 98 SASR 136 at [948]:

> "The *Limitation of Actions Act* does not impose a limitation period in respect of the plaintiff's equitable claim including the claim for breach of fiduciary duty. An action for breach of fiduciary duty is an action in equity. The State submitted that in the event that this Court concluded that the State owed any fiduciary duty to the plaintiff, the claim for breach should be barred by the equitable defence of laches."

131 Mr Trevorrow was an Aboriginal man who had been removed from his Aboriginal family in 1958. To the extent that he claimed damages for personal injuries, it appears to have been accepted that s 36 was the relevant provision prescribing a limitation period: at [892]. Nevertheless, there is no indication that such a defence was pleaded in relation to a cause of action based on breach of fiduciary duty and the passage at [948] set out above suggests otherwise. Further, his Honour concluded that the compensation available pursuant to equitable causes of action entirely overlapped with that payable in respect of Mr Trevorrow's common law entitlements and accordingly only the latter needed to be granted: at [1009]. In these circumstances, his Honour's comment, entitled to respect as it is, does not provide a basis for reaching a different conclusion from that proposed above.

132 At [68], McColl JA implies that the conclusion reached by Gray J was consistent with the view adopted in *The Duke Group Ltd (In liq) v Alamain Investments Ltd* [2003] SASC 415. However, that case involved a different provision and a different argument. The question was whether a claim in equity for breach of fiduciary duty, based on *Barnes v Addy* (1874) LR 9 Ch App 244, was an action "for the recovery of money paid under a mistake … or otherwise based on restitutionary grounds", within s 38 of the *Limitations of Actions Act*. Doyle CJ held that it was not, as a matter of statutory construction: at [102]-[104]. That conclusion provides no assistance in construing s 36, although it does provide express recognition that some provisions found in Part 6 of the Act deal with equitable relief, despite the heading to the Part.

133 McColl JA finds further support for that conclusion in *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497: see [75]-[79] above. Although based on similar general principles, the *Limitation Act* 1969 (NSW) adopts a different form to the *Limitation of Actions Act*. Thus critical provisions relevant for present purposes identify limitations by reference to "causes of action": see ss 14 and 18A. Furthermore, there is express provision that those sections which might be capable of including equitable relief do not: see s 23. An exception to that statutory structure may be found in Part 2, Div 6 relating to personal injury actions, which is applicable only to causes of action where the relevant act or omission occurred on or after the commencement of the Division on 6 December 2002: s 50A(2). The application of these provisions to a claim like the present has not yet been considered. In my view, *Williams* provides no assistance in construing the South Australian provision.

Approach to issues on appeal

134 As noted by McColl JA, all members of the High Court in *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; 186 CLR 541 approached the appeal from a decision of a primary judge extending time to bring proceedings as governed by the principles in *House v The King* [1936] HCA 40; 55 CLR 499 at 505 – see *Brisbane South* at 549 (Toohey and Gummow JJ), and 569 (Kirby J) – or according to the principles espoused in *Australian Coal & Shale Employees' Federation v The Commonwealth* [1953] HCA 25; 94 CLR 621 at 627 (Kitto J): see *Brisbane South* at 556 (McHugh J, Dawson J agreeing). Reliance on these authorities suggests that the Court has been content to adopt the same principles in relation to review of a sentencing decision in criminal proceedings, the review of a decision of a taxation officer operating under court rules and, in respect of a discretionary judgment, an appeal by way of rehearing under s 75A of the *Supreme Court Act* 1970 (NSW). These principles would allow for intervention in limited circumstances, but including those where the primary judge "mistakes the facts" or fails to give "sufficient weight" to relevant considerations. Furthermore, it seems that a similar principle of restraint should apply to an appeal challenging an inference, at least where it may be difficult to draw a bright line between the drawing of an inference and the exercise of a discretion: see *White v Barron* [1980] HCA 14; 144 CLR 431 at 443 (Mason J); *Goodman v Windeyer* [1980] HCA 31; 144 CLR 490 at 502 (Gibbs J) and 509 (Aickin J). In accordance with these authorities, the entitlement of the appellant to have the Court exercise its powers under s 75A(6) must be subject to the kinds of constraint identified.

135 The difficulty for the appellant is exacerbated in the present case by the fact that the primary challenge on appeal, identified by reference to the prejudice arguably caused in facing the "systems case", requires the Court to identify potential error in the judgment below on a basis which, though not ignored, did not form the focus of the arguments presented by the appellant. The fact that the grant of leave has been confined, so as to render this the sole basis of challenge, should not obscure the function of the Court, which is to consider whether error is revealed by reference to the matters addressed below. Furthermore, the assessment of prejudice must be approached on the basis that the appellant will in any event be required to face a case based on vicarious liability.

136 Success on the "systems case" is unlikely if the plaintiff fails on the vicarious liability case; nor will success on the "systems case" achieve any better result for the plaintiff than success on the vicarious liability case. The reason for pursing the "systems case", as explained in the course of argument, was a concern lest the principles considered in *State of*

New South Wales v Lepore [2003] HCA 4; 212 CLR 511 were found not to favour a finding of vicarious liability in the circumstances of the plaintiff's case.

Application of principles

137 So far as the reasons of the primary judge are concerned, subject to what follows, I agree with McColl JA that the appellant has not demonstrated error of a kind sufficient to justify intervention, on the principles set out above. Her Honour describes the primary judge as having been "entitled to take a jaundiced view" of the appellant's case of actual prejudice: at [104]. That is a matter on which I would place no weight. The primary judge's description of at least one of the submissions put forward by the appellant as "somewhat disingenuous" – at [119] – may be thought to carry with it a connotation of lack of probity which, perhaps understandably, gave rise to challenge. Whether or not the connotation was intended, and whether or not it was justified, it was of little relevance to the exercise to be undertaken. However, I would not read her Honour's reasons as indicating that she was diverted in any material respect from the statutory task of assessing whether the extension of time was required by "the justice of the case", a task which it was conceded the primary judge had correctly identified in terms of legal principle.

138 A greater concern arises with respect to the "systems case". McColl JA refers (at [101] above) to her Honour's reasons for considering that a fair trial was possible, by reference to statements in the judgment below at [38], [68] and [119]. Each of those paragraphs, and in particular the first and last, deal with the complaints of assault directly upon the plaintiff and inquiries made in relation to those complaints. They do not in terms address the "systems case". Although the reason for that has been explained, it is necessary to take the matter a step further for the purposes of the appeal.

139 In its written submissions, the appellant stated at paragraphs 25 and 31:

> "According to Major Ian Huxley and Major Merna Huxley, records relating to the conduct of Eden Park were kept by Brigadier Lawler and his wife as part of their duties. The records were physically located in the Brigadier's living quarters, which was a separate building away from the main block and other buildings comprising the Eden Park complex. The nature and content of these records is not known.
> …
> Clearly, any records which had, or may have had, a bearing on the 'systems' case have long since been destroyed."

140 In addition, at least three key witnesses have died: Brigadier Lawler in 1979, his wife in 1988 and Major Huxley in September 2004. Any information that might have been obtained from them as to the "systems case" has, it would appear, been lost.

141 These concerns do not, however, demonstrate a significant level of prejudice. One aspect of the "systems case", involving a failure to select appropriate carer staff at the home, was expressly abandoned during the course of the appeal. The other particulars of the "systems case" involved failures to supervise, protect from abuse, provide counselling to ensure complaints were heard and investigate complaints. The plaintiff submitted that matters of that kind would not primarily depend upon written records. There were a number

of witnesses still alive (including Mr Ellis) who should have had knowledge of such systems if they existed and were effective. Furthermore, if the plaintiff were believed in relation to his complaints of individual abuse, that would itself constitute probative evidence of the inadequacy of any system which may have existed on paper.

142 Secondly, an affidavit prepared by a solicitor for the appellant stated that, upon inquiry, he had been informed that "the provision of services by The Salvation Army at various institutions, including the provision of children's homes such as Eden Park where the plaintiff was a resident, was decentralised to those institutions in every possible way". The affidavit continued:

> "The decentralisation extended to the engagement of staff, the recording of the admission and discharge of residents at the various institutions, and the determination of the level and type of services to be provided at the institution."

143 That evidence tends to diminish the force of the appellant's fear of prejudice in relation to the "systems case". As Bell JA notes at [156] below, documents relevant to procedures operating at Eden Park would be likely to have been within the knowledge or control of those in charge of the home, but there was no evidence from them of lost relevant records. The evidence also tends to undermine the apparent degree of separation between the cause of action based on vicarious liability and that relying on the appellant's systems. Although each has a different legal structure, the evidential material supporting each is likely to depend to a significant degree on the same witnesses. Such an element of commonality allows a reasonable degree of confidence that a different approach during the hearing below (focusing substantially on the systems case) would not have led to a different outcome. It also suggests that the approach adopted by the appellant at trial was strategically sound and not inadvertent, bearing in mind that the limitation period operated with respect to damages for personal injuries, without regard to the nature of the cause of action.

Costs

144 Her Honour ordered that the appellant was to pay the plaintiff's costs of the application. She gave no reasons for that order, from which it may be inferred that she adopted the usual principle that costs follow the event. The challenge by the appellant to that order requires consideration of whether there was reason to depart from that approach and, if so, whether error has been made out in the exercise of what is, essentially, a discretionary judgment.

145 The appellant contended that the usual order would be to require the applicant for an extension of time to pay the costs of the application in any event. That followed, it was said, from the approach adopted by this Court in *Holt v Wynter* [2000] NSWCA 143; 49 NSWLR 128, and followed in *Commonwealth of Australia v Lewis* [2007] NSWCA 127. In *Holt v Wynter*, Sheller JA stated that "ordinarily a successful applicant, who has allowed him or herself to get out of time, should pay the costs of the application unless the respondent's opposition was wholly unreasonable": at [121]. That principle was applied in *Lewis* at [95] (Beazley JA, Santow and Ipp JJA agreeing).

146 Whether there is an 'ordinary course' may be open to doubt. In *Commonwealth of Australia v Smith* [2005] NSWCA 478, Santow JA noted the statement in *Holt v Wynter* but continued that there was "no rule that binds the judge to deny costs to an applicant for an extension of the limitation period": at [159]-[160]. On a basis not apparently agitated below, his Honour held that the judge "would have been entitled to find that the Commonwealth acted unreasonably in opposing an extension of time and should pay the applicant's costs". (Handley JA agreed with the orders proposed by Santow JA, but did not address this aspect of his Honour's reasons.)

147 The language adopted by Sheller JA in *Holt v Wynter*, referring to an applicant who has "allowed him or herself to get out of time" was apt in the circumstances of that case, the applicant having formed an intention to make a claim within time, but failed to effect the intention before the expiration of the relevant limitation period. That was the kind of case in which it could appropriately be said that the applicant was seeking an indulgence. However, that is not true of a case in which the applicant was unaware of material facts until after the expiration of the limitation period.

148 Nevertheless, an application for an extension of time, if successful, results in the prospective defendant losing an immunity from suit which it would otherwise enjoy. Whether the suit will ultimately be successful is not known. The application may be seen in these circumstances as an interlocutory, but essential, element of the plaintiff's proceedings. Unless it can be said that the plaintiff was at fault in not bringing the proceedings earlier, or did not otherwise run the application appropriately, it is doubtful whether the applicant should be ordered routinely to pay the respondent's costs of a successful application.

149 That being so, it does not follow that the respondent should be required to pay the applicant's costs of the application, on the assumption that the respondent had not acted unreasonably or inappropriately in resisting the application. In such a case, the preferable order may be that the costs of the motion be the applicant's costs of the proceedings. Such an order means that, as explained by Heydon JA in *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; 53 NSWLR 116, at [37], if the plaintiff succeeds at trial he or she will receive the costs of the application but, if the plaintiff is ultimately unsuccessful, there will be no order as to the costs of the application for extension of time.

150 Had the application been brought under the *Limitation Act* (NSW), the appropriateness of such an order might have found support in s 60L of that Act. However, that provision has no equivalent in the *Limitation of Actions Act* and the parties proceeded on the basis that the relevant statutory provisions governing costs were s 98 of the *Civil Procedure Act* 2005 (NSW) and r 42.1 of the Uniform Civil Procedure Rules 2005 (NSW), providing that "the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs".

151 As was noted in *Baker v Towle* [2008] NSWCA 73; 39 FamLR 323, identification of "the event" for the purposes of the rule may vary in particular circumstances: at [10]-[13] and [20]-[22] (Beazley JA, Mathews AJA agreeing) and at [83]-[84] in my judgment. In the present case, it could be said that the application for an extension of time was a separate and discrete matter, properly treated as an "event" in its own right, for the purposes of the costs rule. The alternative view is that the application for extension of time was but one essential step on the way to success for the plaintiff and not properly severable from the outcome of

the proceedings. In my view, the latter approach should be preferred. It accords with the approach adopted in *Nowlan*. The question is whether the primary judge in the present case erred in the exercise of her Honour's discretion in failing to adopt that approach.

152 As noted above, the primary judge was critical, in significant respects, of the conduct of the appellant's solicitors in preparing and presenting material on the application. Nevertheless, I would not treat her Honour's criticisms as having been relied on to justify a costs order which was not otherwise appropriate. That is because, were the criticisms to be reflected in a costs order, that should properly occur by reference to some part of the costs, rather than the whole costs of the application.

153 A question remains as to whether it has been shown her Honour was in error in making an order other than that to which preference is given above. One question is whether her Honour was invited to make some other order. Neither party drew the Court's attention to any submissions in this respect and, indeed, the appellant's case was in part based upon the fact that the order was made without it being given an opportunity to be heard: written submissions, par 89. That is not a sound basis of complaint. The appellant should have given consideration to possible costs orders, both in the event of its success and its failure on the motion, before or during the hearing of the motion. If it foresaw some complicating factor which might have prevented it sensibly addressing on the issue before the outcome was known, it should have expressly reserved its position. Even when judgment was handed down, it might have sought leave to be heard on the question of costs. Thereafter, it had 14 days to seek a variation of the order made: UCPR, r 36.16(3A). None of these steps were taken. Accordingly, because the costs order was one that was undoubtedly available to her Honour under the relevant rule, no basis has been identified for appellate interference.

Conclusion

154 For these reasons, I agree with the orders proposed by McColl JA.

155 **BELL JA**: I have had the advantage of reading the judgments of McColl JA and Basten JA in draft. Their Honours have come to differing conclusions on the question of whether the claim for equitable compensation for breach of fiduciary duty that is pleaded in pars 21 and 22 of the statement of claim is subject to s 36 of the *Limitations of Actions Act* 1936 (SA). This question was not agitated before the primary judge and her Honour's determination, that it was just to grant the extension, was not influenced by any consideration that the equitable claim might proceed in any event. The limited grant of leave to appeal did not, in terms, extend to the equitable claim. Neither party addressed the pleading of the equitable claim in the submissions that were filed prior to the hearing. The point was first taken by Dr A Morrison SC on the morning of the appeal. Mr Garling SC submitted at the hearing that the contention that the equitable claim was not subject to the limitation period appeared to be correct. It was not a matter that he had turned his mind to and he sought leave to file a note should he decide, after reflecting on the matter, to challenge the contention. This he did. The question is finely balanced, as the judgments of McColl JA and Basten JA demonstrate.

156 I agree with McColl JA, for the reasons that she gives, that no error has been demonstrated in the primary judge's determination of the application. I also agree with the observations made by Basten JA at [141] and [142] with respect to the submissions made by

the appellant concerning the asserted prejudice in dealing with the “systems case”. I would add that there is no reason to conclude that the loss of the documents maintained by Brigadier Lawler and his wife has occasioned actual prejudice to the appellant in defending the “systems case”. One would expect documents relevant to the “systems case” would be documents of which the assistant managers of Eden Park had knowledge. Major Merna Huxley, Assistant Manager of Eden Park between January 1961 and January 1966, appears not to have known the nature and content of the records that Brigadier Lawler and his wife kept at their living quarters. (Affidavit of Gregory Doran sworn 1.3.04, at [3]; Blue 442 C-J)

157 Since the question of whether the equitable claim was subject to the limitation period was not raised before the primary judge, and was not fully argued on the hearing of the appeal, I would prefer not to express an opinion as to whether the order extending the time for the commencement of the proceedings was required with respect to it.

158 I agree with McColl JA’s reasons concerning the primary judge’s costs order.

159 I agree with the orders that McColl JA proposes.

****

AMENDMENTS:

12/12/2008 - Amending "the appellant" to "Mr Ellis" (2nd sentence [37]) and "finally" to "finely" (last sentence [155]) - Paragraph(s) [37] and [155]

LAST UPDATED:
12 December 2008