Moubarak by his tutor Coorey v Holt:

The Court of Appeal permanently stays proceedings seeking damages for alleged historical child abuse

Nicholas Bentley reports on *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102

The introduction of s 6A to the *Limitation Act 1969* (NSW) on 17 March 2016 removed any limitation period that applied to personal injury actions for damages resulting from an act or omission that constituted child abuse.

This reform, combined with an inadequate National Redress Scheme, has seen the filing of a dramatically increased number of historic child abuse claims in NSW Courts – with over 200 claims having been filed in the Common Law Division of the Supreme Court since 2017. However, s 6A still preserves a Court's power to stay or dismiss proceedings. Moubarak v Holt is the Court of Appeal's first decision considering an application for a permanent stay of a claim that would have otherwise been time barred if not for s 6A.

Importantly, the decision identifies particular circumstances where the ordering of a permanent stay will be granted, potentially paving the way for further stay applications in similar historic abuse cases.

The facts and rulings of the trial judge

By her statement of claim, the plaintiff, Ms Holt, alleged that in the early 1970s Mr Moubarak, her uncle, sexually assaulted her on four occasions when she was 12 years old. The Statement of Claim did not suggest that the assaults were witnessed by anyone. The plaintiff told her friend, Ms Evans, of the assaults in 1987 and her second husband and sisters in 1991. In February 2013, the plaintiff told her general practitioner and then several psychologists about the assaults.

In February 2014, the defendant (aged 85) moved into a nursing home, having scored 13/30 on the Rowland Universal Dementia Assessment Scale (RUDAS) (30 being the normal score). In the same month, Mr George Coorey was appointed the defendant's legal guardian and financial manager.

Although the plaintiff reported the assaults to police in May 2015, the defendant was never made aware of the allegations. Statements were provided to the police by the plaintiff, Ms Evans, and Mr Coorey. No statement was obtained from the defendant who, as of October 2015, had a RUDAS score of 0. Expert evidence indicated that he was severely demented, unable to walk independently and no longer able to comprehend English. Police subsequently informed the plaintiff that they were unable to proceed as the defendant's physical and mental condition rendered him unfit for trial.

In December 2016, the plaintiff commenced her civil claim in the District Court seeking damages against the defendant. While over 40 years had elapsed since the assaults, the claim was not barred as a consequence of s 6A to the *Limitation Act 1969* (NSW).

By way of his tutor, Mr Coorey, the defendant filed a defence and a subsequent notice of motion seeking a stay pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) (CPA), or dismissal pursuant to UCPR r 13.4(1)(c). It was common ground that defendant was not competent to give evidence or instructions. However, Wilson DCJ dismissed the defendant's motion, concluding that the doctrine of fitness to stand trial was not relevant to determining a permanent stay application and that there was no evidence that the other occupants of the house, where some of the alleged offending took place, were not available. By his tutor, the defendant sought leave to appeal.

The Court of Appeal decision

President Bell delivered the leading judgment, with Leeming JA and Emmett AJA agreeing. Leave to appeal was granted on the basis that the application raised questions of significant public importance.

Specifically, Bell P referred to the numerous historic child abuse claims being commenced decades after the alleged abuse as a consequence of the introduction of s 6A (at [12]-[13]), while Emmett AJA noted that the principles and criteria for granting permanent stays in light of s 6A were by no means settled (at [204]).

The principles governing the discretion to order a permanent stay were summarised by Bell P (at [68]-[71]) as follows:

(i) the onus of proving that the stay should be granted lies on the defendant;

(ii) the stay should only be ordered in exceptional circumstances;

(iii) the stay should be granted when the interests of the administration of justice so demand;

(iv) the categories of cases in which a permanent stay may be ordered are not closed; and

(v) the stay may be ordered where the continuation of the proceedings would be vexatious, oppressive, manifestly unfair to a party or would otherwise bring the administration of justice into disrepute.

Citing Lord Sumption in *Abdulla v Birmingham City Council* [2013] 1 All ER 649, Bell P acknowledged that two forms of unfairness can result from delayed proceedings: (1) prolonged uncertainty (which is not to be considered where there is no limitation period) and (2) the impoverishment of the evidence available to determine the claim, particularly where a trial is exclusively or heavily dependent on oral evidence and thus the quality of witnesses' memory and recollection (at [72]–[77]).

President Bell held that the primary judge had erred when considering this second form of unfairness by incorrectly finding that there was no evidence of the unavailability of any pertinent witnesses (at [61]-[67]). Of the five potential witnesses (excluding the plaintiff and the defendant), the plaintiff's sister was the only witness still alive and she had not seen the alleged assaults.

President Bell also considered that the primary judge had erred in disregarding the principles established in *R v Presser* [1958] VR 45. In that case, Smith J (at [48]) considered whether the accused, because of a mental defect, could be tried 'without unfairness or injustice to him'. In Smith J's view, the accused had to be able to answer to and defend the charge, understand generally the nature of the proceeding and give instructions to counsel when represented. This test was identified in *R v Rivkin* (2004) NSWLR 251 (at [248]) as the 'test directed to the minimum requirement for a fair trial'. Although *Presser* was a criminal matter, Bell P said that coherence is a quality that the common law values, and it would offend commonsense to maintain that a defendant could not obtain a fair trial in criminal proceedings but could secure a fair civil trial with identical factual allegations (at [107]-[109]).

President Bell and Leeming JA emphasised that granting a permanent stay will heavily turn upon the facts of the particular case (at [111] and [193]). Usefully, Bell P highlighted this point by referring to the three most recent decisions considering stay applications in which allegations of historical sexual abuse were made (at [113]-[148]), two of which (*Judd v McKnight* (No 4) [2018] NSWSC 1489 and *Anderson v Council of Trinity Grammar School* [2018] NSWSC 1633) are presently being appealed.

In the first decision, *Connellan v Murphy* [2017] VSCA 116, the Court of Appeal of Victoria granted a permanent stay, citing the disadvantaged position of the defendant (who was 12 at the time of the alleged conduct), the lack of evidence and the inadequate explanation given by the plaintiff for the delay. In contrast, Garling J was satisfied in *Judd* that, though the defendant was deceased, a trial against the estate would not be an unfair one. His Honour cited the available evidence, the limited enquiries made by the estate, the fact that the deceased defendant had largely admitted the alleged conduct, the public interest in permitting claims for damages for child sexual abuse, and the fact that there was no suggestion that the plaintiff's delay was the consequence of any intentional conduct. Similarly, in *Anderson*, four of the assaults were admitted, and the real issue was whether the Council of Trinity Grammar School was vicariously liable for the conduct of the accused teacher at school camps. Rothman J refused the stay, accounting for the available documents provided from the school concerning the camps, the fact that the accused and other teachers were available and the Council's failure to take reasonable steps to obtain other available evidence.

Bell P's decision provides practical guidance on the principles to be applied and circumstances that will warrant the granting of a permanent stay of proceedings concerning historic child abuse.

President Bell concluded that none of the possible avenues for the defendant to obtain evidence could remedy the fact that the defendant was at all relevant times unaware of the allegations made against him and unable to give instructions in relation to them (at [158]). His Honour determined at [159] that since the trial would take place in the defendant's involuntary absence, it would produce manifest unfairness to the defendant and bring the administration of justice into disrepute.

Overall, his Honour listed nine salient features that warranted a permanent stay of the proceedings (at [162]-[171]), including the fact that the defendant was never confronted with the allegations (in contrast to *Judd* and *Anderson*), no statement responding to the allegations was obtained by the defendant, the defendant had advanced dementia from the outset of the proceeding, there were no eyewitnesses to the alleged assaults, the defendant was unable to give instructions or evidence, any potentially relevant witnesses were now dead or unavailable, and there was no credible suggestion that any documentary evidence was in existence that would bear upon the likelihood that the alleged assaults occurred. Special leave to appeal this decision was not sought.

Although the circumstances of Moubarak are somewhat unique, Bell P's decision provides practical guidance on the principles to be applied and circumstances that will warrant the granting of a permanent stay of proceedings concerning historic child abuse. The pending appeals to the Court of Appeal in *Judd* and *Anderson* will indicate whether these applicable circumstances will be expanded upon. Different considerations might also apply where the claim is against an institution, especially where the liability is direct and not vicarious, and where there is evidence that the perpetrator was a known offender. For the time being, however, defendants seeking a permanent stay in similar circumstances to *Moubarak* will need to prove (likely through exhaustive searches and inquiries) that the perpetrator and any pertinent witnesses are, and have been, unable to give evidence or otherwise respond to the allegations, and that no documentary material bearing upon liability exists that would outweigh the prejudice or unfairness arising from the deterioration or absence of witness testimony.