HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

DZY (A PSEUDONYM)
Appellant

and

TRUSTEES OF THE CHRISTIAN BROTHERS
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Concise statement of issues

2. The following issues arise:

(a) whether the majority in the Court of Appeal (Beach and Macaulay JJA) erred in concluding that, in applying the test in s 27QE(1) of the *Limitation of Actions* ***Act*** *1958*, namely whether it is 'just and reasonable' to set aside a settlement agreement:

(i) the actual influence of a Limitation Defence[1] and/or the *Ellis* Defence[2] on an applicant's decision to enter into a settlement agreement is 'central' {CA [109], [113], Core Appeal Book (**CAB**) 74–75}; and

(ii) it is 'doubtful that any cogent ground would exist to conclude it was just and reasonable' to set aside a settlement agreement in the absence of a finding that either of those 'legal barriers' had a 'material impact' on a claimant's decision to settle his or her claim {CA [110], CAB 74}.

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1 A reference to historic abuse claims being met by a time limitation defence under **Act** {see CA [8] CAB 53}.

2 A reference to the decision of the New South Wales Court of Appeal in *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565 (***Ellis***), whereby an action against an unincorporated association was likely to fail for want of a solvent legal entity that was liable for the claimed loss {see CA [9] CAB 53}.

(b) whether the Court of Appeal erred in concluding (on the correctness standard of appellate review) that it was not 'just and reasonable' to set aside the 2012 and 2015 settlement agreements in their entirety.

Part III: Section 78B of the Judiciary Act 1903 (Cth)

3. The appellant considers that notice is not required under s 78B of the Judiciary Act.

Part IV: Judgement of the Court below

4. The primary judgement is unreported. The medium neutral citation is: *DZY v Trustees of the Christian Brothers* [2023] VSC 124 (**SC**) {CAB 5-41}.

5. The judgment of the Court of Appeal is unreported. The medium neutral citation is: *Trustees of the Christian Brothers v DZY (a pseudonym)* [2024] VSCA 73 (**CA**) {CAB 49–87}.

Part V: Facts

6. By Amended Statement of Claim filed in the Supreme Court of Victoria on 23 August 2021, the appellant brings claims in negligence and vicarious liability against the respondent, in respect of allegations that he was abused by Br Gerald Fitzgerald and Br Robert Best between approximately 1964 and 1968 (when the appellant was a student at St Alipius Boys' School in Ballarat, Victoria) and seeks damages for injury, loss and damage caused by the alleged abuse, including economic loss {SC [1] CAB 7; CA [4] CAB 52}.

7. In its Defence, filed 22 October 2021, the respondent pleads two previous settlement agreements (**Deeds**) as a bar to the appellant's proceeding: a deed executed by the appellant on 14 December 2012 (**2012 Deed**) and a deed executed by the appellant on 9 December 2015 (**2015 Deed**) {SC [2], [44], [77] CAB 7, 16, 21; CA [1]-[2], [39], [49] CAB 52, 59, 61}.

8. Each of the Deeds recorded that the appellant "does not allege that he has suffered any economic loss and makes no demand for this as part of the claims" and that the parties acknowledge the settlement sum does not include allowance for economic loss {SC

[45]-[46] CAB 16, [78]-[80] CAB 21–22; CA [39], [49] CAB 59, 61}. The appellant released the respondent from liability in respect of his allegations and, in exchange, the respondent paid the appellant $80,000 under the 2012 Deed, and $20,000 under the 2015 Deed, the latter comprising a "top up" following discovery of previous non-disclosure on the part of the respondent that emerged at the Victorian Parliamentary Inquiry in 2013 {SC [53] CAB 62}.

9. The appellant applied for orders, pursuant to ss 27QD and 27QE of the Act, that the Deeds be set aside in their entirety, such that that they did not bar his claim for damages for pain and suffering *and* for economic loss. On the hearing of that application, the respondent accepted that the settlement agreements should be set aside so as to permit the appellant to pursue a claim for general damages and medical expenses but contended that the deeds should continue to bar a claim for economic loss.

10. The primary judge was satisfied that it was 'just and reasonable' to order that the two settlement agreements be set aside *in their entirety*. An appeal to the Court of Appeal (Beach, Macaulay and Lyons JJA) was allowed. Orders were made setting aside the settlement deeds in part so as to exclude a claim for economic loss.

11. On the hearing of his application to set aside the 2012 and 2015 settlement agreements, the appellant relied upon his own affidavit and an affidavit of his solicitor[3] concerning the events surrounding his entry into the agreements. The respondent did not seek to cross-examine on, or contest, that evidence.

12. The appellant had engaged a solicitor, in January 2011, to act on his behalf in respect of the alleged abuse {SC [12] CAB 9; CA [25] CAB 56}. From about October 2011, the solicitor took steps to pursue an alternative dispute resolution process with the respondent, which was agreed by the respondent by May 2012 {SC [16]–[22] CAB 10–11; CA [26]-[27] CAB 57}.

13. From January 2011 to the execution of the 2012 Deed, the appellant received legal advice {SC [122] CAB 38; CA [137] CAB 80}, in writing and orally, that his case faced significant issues, by reason of the Limitation Defence and *Ellis* Defence, in the following circumstances:

[3] Who had not represented the appellant at the time of the 2012 or 2015 settlement agreements.

(a) by initial solicitor letter dated 11 January 2011, referring to oral advice given to the appellant earlier that day {SC [13] CAB 9; CA [25] CAB 56; SGK-1 ABFM 11-12}. The uncontested evidence of the appellant {CA [58] CAB 63} was that this initial advice included that the appellant would likely be unsuccessful if his claim were issued in Court, by reason of the Limitation Defence and *Ellis* Defence {DZY Affidavit [14]-[16] ABFM [52]}.

(b) in December 2011 and March 2012, the appellant was diagnosed as suffering from major, chronic mental health conditions:

(i) In December 2011, the Manager of the Ballarat Centre Against Sexual Assault (**CASA**), Shireen Gunn, provided a report to the Victims of Crime Tribunal, in which she opined that the appellant had, since he was a teenager, experienced depression, high levels of anxiety, and self-harming "due to his sense of worthlessness and suppressed anger" and "abused alcohol for many years in an attempt to cover his emotional pain and suppress his inner turmoil". She further opined that the appellant demonstrated symptoms "consistent with some of the effects suffered by victims of Post Traumatic Stress Disorder" {SC [17] CAB 10; CA [30(b)] CAB 57; SGK-30 ABFM 22};

(ii) In March 2012, in a report prepared by psychiatrist Professor Lorraine Dennerstein, the appellant was diagnosed as suffering, since around Grade 4 at Primary School, from Posttraumatic Stress Disorder and Substance Abuse/Dependency (in remission), with his symptoms including anxiety and difficulty concentrating {SC [18] CAB 10; CA [26] CAB 57; SGK-35 ABFM 27–36}. Professor Dennerstein's report was provided to the respondent, by the appellant, on 7 November 2012 {SC [30] CAB 13; CA [30(a)] CAB 57};

(iii) such symptoms/conditions were still present, in October 2020, when the appellant was assessed by Dr Matthew Tagkalidis, who diagnosed the appellant as suffering from chronic Dysthymic Disorder (Persistent Depressive Disorder), complex Post Traumatic Stress Disorder with associated personality disruption, and chronic Alcohol Abuse and Dependence {SC [9] CAB 8; SGK-36 ABFM 38–48}.

(c) at the preliminary conference with counsel (and the solicitor) on 21 September 2012 {SC [24] CAB 11; CA [28] CAB 57; SGK-7 ABFM 13–15}. The appellant said his barrister explained that there were difficulties with the appellant bringing his claim in Court but he can only recall snippets of this meeting, as he was drinking heavily at the time and could not take in what his legal advisers were saying or even fathom what was happening, as he was very anxious, unable to communicate or think properly, not in the right headspace and "felt like a zombie", {SC [26] CAB 12; CA [29] CAB 57; DZY Affidavit [20]-[23] ABFM 53}. Later, he told his support worker at CASA, that the experience was "extremely distressing and overwhelming" {SC [27] CAB 12; CA [29] CAB 57; SGK-31 ABFM 26}. Solicitor notes, taken at the preliminary conference, appear to record the appellant giving various instructions, including as to having had "trouble with [Centrelink]" and a charge for "defrauding [Centrelink]" {SC [24] CAB 11–12; CA [28] CAB 57}. A handwritten file note taken that day recorded "Eco = don't claim b/c of DSS …", without recording whether this reflected instructions or advice or a note of an issue for further consideration {SC [25] CAB 12; CA [28] CAB 57}.

(d) in further conferences with counsel (and the solicitor) on 21 November 2012 (prior to the settlement conference and following receipt of a final offer, of $80,000 including costs) {SC [34] CAB 13–14}. The appellant said he told his legal advisers, during the conference prior to the settlement conference, that the abuse had impacted his employment and recalls "difficulties in successfully suing Church institutions at that time" but cannot recall all of the conversation and, indeed, can only recall snippets of the day, as he was experiencing high anxiety levels (including thinking that, if the windows were not sealed, he would jump out) and was drinking heavily at the time {SC [33] CAB 13; CA [32]-[33] CAB 58; DZY Affidavit [25]-[26], [28]-[29] ABFM 53}. He struggled to process what was being said but accepted the advice provided by his legal advisers {SC [33] CAB 13; CA [32]–[33] CAB 58; DZY Affidavit, [29] ABFM 53}. His legal advisers said they could run his case in Court "but there would be lots of legal difficulties and hurdles" and he recalled that they had said his claim was out of time and there were issues trying to sue Catholic Defendants {DZY Affidavit [33]-[34] ABFM 54}. Following a conversation with the

appellant, in September 2015, the appellant's solicitors made a file note stating "[h]e doesn't seem to understand what happened at the [2012] settlement conference" {SC [66] CAB 19–20, CA [126] CAB 39; CA [61] CAB 64–65}. Handwritten file notes, taken by the appellant's solicitor, record discussion about the appellant looking after his son and being on a carer's pension for three years, followed by what appears to be a record of counsel's advice, that if the appellant claimed for lost earnings there was a risk that Centrelink "might claim" {SC [34] CAB 13–14; CA [33] CAB 58}; a tolerably clear reference to the potential for any award of damages for loss of employment opportunity to impact on Centrelink benefits received by the appellant, under pt 3.14 of the *Social Security Act 1991* (Cth).[4] This note appears to correlate with the appellant's recollections that, on that day, he told his solicitor and counsel that the abuse had impacted his employment and was told something about a possible impact on his Centrelink benefits {SC [33] CAB 13; CA [33] CAB 58; DZY Affidavit, [28] ABFM 53}.

(e) by solicitor letter (recommending acceptance of the final offer made at the settlement conference) and "Instruction to Settle Claim" form, each dated 29 November 2012 (the latter signed by the appellant on 13 December 2012) and provided while the appellant was considering the final offer made at the settlement conference {SC [37]-[38], [42] CAB 14–15; CA [35]-[36], [38] CAB 58–59; SGK-9 ABFM 16–17, SGK-11 ABFM 18–19}.

14. The appellant felt like he 'had no choice but to accept the offer [made by the respondent in 2012] because the legal barriers were too great', and was concerned about having to pay the respondent's costs if he lost {SC [35], [52] CAB 14, 17; CA [43] CAB 60; DZY Affidavit, [35] ABFM 54}. Attached to the executed 2012 Deed was a certificate by his solicitor, which certified that the appellant appeared to understand the purport and effect of such deed {SC [50] CAB 17; CA [42] CAB 59–60}.

15. In May 2013, the appellant's solicitors discussed with the appellant the prospect of applying to the respondent to 'top up' the settlement amount after she discovered, during evidence at the Victorian Parliamentary Inquiry into the Handling of Child

[4] See, *DP (a pseudonym) v Bird (Costs Ruling)* [2022] VSC 58, [24]-[30] (J Forrest J).

Abuse by Religious and Other Organisations, that the respondent had failed to disclose relevant material during the earlier settlement process {SC [53] CAB 17–18}.

16. In early 2015, the appellant's solicitor wrote to the Christian Brothers' solicitors, requesting that a further ex gratia payment be considered on the basis of the Christian Brothers' failure to disclose {CA [44] CAB 60}.

17. The appellant gave instructions to Waller Legal to accept a further payment of $20,000 in July 2015. He ultimately signed the 2015 settlement agreement on 9 December 2015. The appellant was confused and ashamed when he accepted the 2015 settlement offer, and felt concerned about clauses in the settlement deed stating that he did not suffer economic loss as he believed that was incorrect {CA [45]–[50] CAB 60–61}.

18. The factors that led the appellant to accept the 2012 settlement agreement continued to influence the appellant in his decision to accept the 2015 settlement agreement {CA [135] CAB 80}. Attached to the executed 2015 Deed was a certificate by his solicitor, which certified that the appellant appeared to understand the purport and effect of such deed {CA [49] CAB 61}.

19. In correspondence with Waller Legal after the 2015 settlement agreement, the appellant stated that he had been under a lot of stress. He expressed concern about the clauses in the 2015 settlement agreement which recorded that no claim for economic loss was made. He stated that those clauses were a mistake, and that he could not understand why they were there as they were inconsistent with other statements he had made. File notes of Waller Legal of telephone conversations with the appellant in January 2016 record, in summary, that the appellant was advised that a claim for economic loss had not been made because of issues concerning Centrelink payments {CA [51] CAB 61–62}.

Part VI: Argument

A. Ground (1): s 27QE(1) the *Limitation of Actions Act 1958* (Vic)

20. On the proper construction of s 27QE(1), there is no basis for any general principle (or a principle applying in an 'ordinary' case)[5] to the effect that the actual influence (or

[5] CA [110] CAB 74.

'material' influence)[6] of one or both of an applicable limitation period or the *Ellis* Defence is 'central'[7] to the assessment whether it is 'just and reasonable' to set aside a settlement agreement, such that 'it is doubtful that any cogent ground would exist to conclude it was just and reasonable to set the settlement aside' absent such influence on a claimant's decision to settle.[8] In developing such a principle or presumptive approach to the evaluation required by s 27QE(1), Beach and Macaulay JJA erred. Consistently with the view favoured by Lyons JA, the exercise of the power under s 27QE(1) 'will depend upon all the relevant circumstances' and is not fettered in the way described by Beach and Macaulay JJA.[9]

10 21. The approach of Beach and Macaulay JJA is not supported by the text of s 27QE(1), its context or indeed its purpose. It tends to elevate a single criterion — that an applicable limitation period or the *Ellis* Defence had a 'central' or 'material' impact upon an applicant's decision to enter into a settlement agreement — into a presumptively determinative 'starting point' in the s 27QE(1) analysis, without basis.

22. It is necessary to focus upon the words actually used by the legislature in context, having regard to the purpose of the statutory provisions in issue.[10] Part 2A, Division 5 of the Act is headed "Actions for personal injury resulting from child abuse". Sections 27QA–27QF within that Division were inserted by the *Children Legislation Amendment Act 2019* (Vic). Section 27QA(2) provides that '[a]n action may be brought
20 on a previously settled cause of action'. A 'previously settled cause of action' is a 'cause of action to which this Division applies that was settled and given effect by a settlement agreement before 1 July 2018' (s 27OA).[11] There was no dispute that the appellant's claim was a 'cause of action to which this Division applies' (see s 27O).

23. Section 27QE(1) of the Act relevantly provides that 'in a proceeding on an action referred to in section 27QA(2)', the court 'if satisfied that it is just and reasonable to do so — (a) may make an order setting aside the settlement agreement … whether wholly

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6 CA [110], [150] CAB 74, 82.

7 CA [109], [113], CAB 74–5.

8 CA [110] CAB 74.

9 CA [155], [165]–[166], CAB 83, 85–86.

10 See, e.g., *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ).

11 As amended by the *Justice Legislation Amendment (Drug Court and Other Matters) Act 2020* (Vic). As noted at {CA [162] CAB 85}, 1 July 2018 was the commencement date of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*, which abolished the Ellis Defence.

or in part'. The phrase 'satisfied that it is just and reasonable' in s 27QE(1) indicates that the court determining the application is to conduct a broad-ranging evaluative assessment. The phrase is 'of broad ambit'.[12] It does not purport to define the mandatory or relevant considerations involved in making that assessment. Nor does it assign any particular value or relative weight to any single consideration in the court's assessment.

24. As Fraser JA (with whom Morrison and Mullins JJA agreed) stated in *TRG v The Board of Trustees of the Brisbane Grammar School* concerning the analogous s 48(5A) of the *Limitation of Actions Act 1974* (Qld),[13] there is no 'express identification of the material factors or the relative weight or significance to be attributed to any of them'.[14] It was therefore accepted in *TRG* that if a claimant's decision to settle was materially influenced by the expiry of a limitation period, that was a relevant factor favouring an order setting aside the settlement agreement, albeit that did not deny the relevance of other factors and the relative significance of that factor had to depend upon 'a judicial assessment of the particular circumstances of each case'.[15]

25. There is no basis in the statutory text for the majority's elevation of one relevant consideration (whether a limitation defence or the *Ellis* Defence materially influenced a claimant's decision to settle) such that, if that consideration did not apply, it would be 'doubtful that any cogent ground would exist to conclude it was just and reasonable to set the settlement aside' {CA [110] CAB 74}. The approach is inconsistent with the balancing, in a particular case, of all relevant factors in circumstances where the legislature has *not defined* the relative weight of those factors.

26. Moreover, nothing in s 27QE of the Act refers expressly to the actual influence or effect of the limitation defence or the *Ellis* Defence on a claimant's decision to settle. Because it is a provision granting a power to a court (the power to set aside a settlement agreement), s 27QE(1) is not to be read as if it contained limitations 'not found in the

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12 *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB* (2020) 62 VR 234, [104] (Beach, Kaye and Osborn JJA).

13 That section provided that '[a]n action may be brought on a previously settled right of action if a court, by order on application, sets aside the agreement effecting the settlement on the grounds it is just and reasonable to do so'.

14 (2020) 5 Qd R 440, [28] (Fraser JA).

15 (2020) 5 Qd R 440, [27]–[28] (Fraser JA).

express words'.[16] In light of that principle, the words 'just and reasonable to do so' should be read with the full generality they possess on their ordinary meaning. The approach of the majority in the Court of Appeal limits, unnecessarily and impermissibly, the power conferred by s 27QE(1), because it tends to fetter or to confine application of the power to cases where a decision to enter into a settlement agreement was materially influenced by a limitation defence or the *Ellis* Defence.

27. By contrast to the Victorian provisions, s 7B of the *Civil Liability Act 2002* (NSW) expressly provides that an object of Part 1C of that Act is to 'provide a way for a person to seek to have an agreement set aside if … at the time of the agreement, there were certain legal barriers to the person being fully compensated through a legal cause of action'. Even then, the inclusion of such an objects clause does not 'confine or control the clear statutory language'[17] of s 7D(2) of the New South Wales Act, which empowers a court to set aside a settlement agreement[18] if it is 'just and reasonable to do so'. The objects clause does not confine the Court's 'discretion' to consider factors aside from 'legal barriers'.[19] Therefore, Weinstein J held in *EXV v Uniting Church in Australia Property Trust (NSW)* that the existence of legal barriers to a claim presented by a limitation defence or the *Ellis* Defence was 'not determinative', and the existence of 'other factors' may 'make it just and reasonable to set aside a settlement deed'.[20]

28. In *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB*, the Victorian Court of Appeal noted that '[o]rthodox principles of statutory construction require that [the phrase just and reasonable in s 27QE(1) of the Act] should not be understood in isolation, divorced from the legal context in which it was enacted'.[21] Further, a construction of s 27QE(1) that would 'promote the purpose or object underlying the Act' is to be preferred.[22] Nothing in the statutory context to the enactment of s 27QE(1)

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16 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404, 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Deputy Commissioner of Taxation v Huang* (2021) 273 CLR 429, [23] (Gageler, Keane, Gordon and Gleeson JJ).

17 *EXV v Uniting Church in Australia Property Trust (NSW)* [2024] NSWSC 490, [157] (Weinstein J).

18 More particularly, an 'affected agreement' as defined in s 7C(1) of the *Civil Liability Act 2002* (NSW).

19 *EXV v Uniting Church in Australia Property Trust (NSW)* [2024] NSWSC 490, [157] (Weinstein J).

20 [2024] NSWSC 490, [175]–[178]. See also *Walsh (a pseudonym) v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn* [2024] ACTSC 81, [203]–[207] (Curtin AJ).

21 (2020) 62 VR 234, [104] (Beach, Kaye and Osborn JJA).

22 See *Interpretation of Legislation Act 1984* (Vic) s 35(a).

supports the approach of the majority in light of the words actually employed by the legislature: the open-ended and non-prescriptive phrase 'just and reasonable'.

29. The extrinsic materials indicate that the influence of a limitation defence or the *Ellis* Defence upon a claimant's decision to settle was not intended to be necessarily central (or central in the 'ordinary' case) to an assessment as to whether it is 'just and reasonable' to set aside a settlement agreement. As Lyons JA noted {at CA [161] CAB 84–85}, in the Second Reading Speech concerning the Children Legislation Amendment Bill 2019[23] the Minister stated that '[i]t is not necessary that the existence of the limitation period be the predominant reason as to why the agreement was entered into'.[24] That statement in the Second Reading Speech followed a reference to the (as it applied at the time before being extended to 1 July 2018)[25] end date of 1 July 2015 in the definition of 'previously settled cause of action' in s 27OA of the Act.

30. The extrinsic materials therefore do not support the conclusion of Beach and Macaulay JJA that the limit on the application of s 27QE(1) to settlement agreements entered into before 1 July 2018[26] reinforced the 'centrality of the actual influence of one or both of those two barriers in the consideration of whether it is just and reasonable to set aside a settlement agreement' {CA [109], CAB 74}.

31. Further:

(a) The Second Reading Speech stated that '[i]n determining what is just and reasonable a court can take into account a number of considerations, informed by the Royal Commission [into Institutional Responses to Child Sexual Abuse]'.[27]

(b) The Second Reading Speech listed 'unequal bargaining power', 'feelings of guilt and shame compounded by the burden of giving evidence and being subject to cross-examination', and 'the behaviour of the relevant institution' as 'reasons that

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23 As noted above, the *Children Legislation Amendment Act 2019* inserted ss 27OA and 27QA–27QF of the Act.

24 Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 August 2019, 2696. The majority did 'not deny' that such factors 'might legitimately be taken into account' {CA [112] CAB 74-75}. And for the relevance and importance of extrinsic material to the interpretation of a provision, see ***Harvey*** *v Minister for Primary Industries and Resources* [2024] HCA 1; (2024) 98 ALJR 168, [111]ff (Edelman J).

25 By s 44 of the *Justice Legislation Amendment (Drug Court and Other Matters) Act 2020* (Vic).

26 By the definition of 'previously settled cause of action' in s 27OA of the Act.

27 Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 August 2019, 2695.

a plaintiff entered into such an agreement'[28] (namely, an agreement in which a claimant accepted 'inadequate compensation' and entered into deeds of release).[29] Those reasons are not tied to any limitation defence or the *Ellis* Defence.

(c) The Explanatory Memorandum to the *Children Legislation Amendment Bill 2019* stated that it is 'in the court's discretion to determine what is just and reasonable according to the circumstances of each case, allowing the court to apply broad principles and take account of any relevant factors'.[30] The Explanatory Memorandum noted that relevant factors may include 'the relative strengths of the parties' bargaining positions, the conduct of the parties and the amount of the settlement'.[31] These considerations are not tied to any obstacle presented by a limitation defence or the *Ellis* Defence at the time of the settlement.

32. The extrinsic materials therefore demonstrate the legislature recognised that an unjust settlement could result from causes apart from a legal 'defence' available to a potential respondent to a claim founded upon child sexual abuse.

33. Relatedly, s 27QE(1) and Part 2A, Division 5 of the Act as a whole is remedial legislation[32] which is to be interpreted beneficially.[33] The legislation is intended to provide a remedy to persons alleging they experienced sexual abuse as a child in circumstances where a settlement agreement would otherwise bar a claim founded upon that sexual abuse. That remedy, where a court is satisfied that it is 'just and reasonable' to do so, is the setting aside of the settlement agreement in whole or in part. The approach of the majority is inconsistent with the remedial purpose of the legislation:

(a) The findings by Beach and Macaulay JJA as to 'the integrity of the adversarial legal system' {CA [90], [113] CAB 70, 75} or the importance of finality, requiring judgments and settlements to be 'accorded a high degree of protection' {CA 91 CAB 71}, are neither called for nor applicable to a statutory regime the express

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28 Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 August 2019, 2696.

29 Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 August 2019, 2695.

30 At page 17. 'An Explanatory Memorandum, for instance, is an important and weighty extrinsic source of information': *Harvey*, [116] (Edelman J).

31 At page 17.

32 *WCB v Roman Catholic Trusts Corporation for the Diocese of Sale (No 2)* [2020] VSC 639, [161] (Keogh J); *EXV v Uniting Church in Australia Property Trust (NSW)* [2024] NSWSC 490, [46]–[48] (Weinstein J).

33 See, e.g., *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, 270–1 [92] (Gageler J).

purpose of which is to provide relief, in a 'new context'[34] and for the limited and distinct class of persons who are victims of child physical or sexual abuse,[35] to a pre-existing bar to compensation.

(b) The extrinsic material demonstrates that the legislature was concerned to provide a remedy to persons who entered into a settlement agreement including for reasons distinct from a legal defence.

(c) The approach of the majority places an applicant whose decision was influenced by, for example, 'feelings of guilt and shame compounded by the burden of giving evidence and being subject to cross-examination'[36] but whose decision was not 'materially' influenced by the availability of a legal defence, in a worse position in that the remedy contemplated by the legislature is significantly less likely to be awarded.

34. That result could not have been intended, as made clear by the extrinsic material and the very wide ambit of the phrase 'just and reasonable'.

B. Ground (2): Misapplication of the correctness standard

35. On the basis that the "correctness standard" identified in *Warren v Coombes*[37] is the applicable standard for appellate review (as decided by the Court of Appeal), it was for the Court of Appeal to decide the case — the facts as well as the law — for itself.[38] For the reasons below, the Court of Appeal erred in its application of that standard of appellate review.

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34 ***GLJ*** *v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 414 ALR 635, [40] (Kiefel CJ, Gageler and Jagot JJ)

35 In this regard, s 27O of the Act limits the application of s 27QE(1) to causes of action "founded on the death or personal injury of a person resulting from (i) an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and (ii) psychological abuse (if any) that arises out of that act or omission".

36 Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 August 2019, 2696.

37 (1979) 142 CLR 531, 551-2 (Gibbs ACJ, Jacobs and Murphy JJ).

38 *GLJ*, [28] (Kiefel CJ, Gageler and Jagot JJ) citing *Warren v Coombes*, 552; *Fox v Percy* (2003) 214 CLR 118, 127-8 [27] (Gleeson CJ, Gummow and Kirby JJ).

1 – The Court of Appeal erred by failing to draw the correct inference concerning the effect of the Ellis Defence and/or the Limitation Defence upon the Appellant's decision not to pursue an economic loss claim

36. The evidence supported the conclusion, consistent with the primary judge's finding, that the appellant:

(a) was repeatedly advised by his lawyers (from preliminary conference to immediately prior to signing the 2012 Deed) that his case faced significant difficulties posed by the *Ellis* Defence and the Limitation Defence {SC [122] CAB 38};

(b) was, on the day of the settlement conference advised (as the evidence suggests, for the first time) about the possibility of Centrelink repayment, during the part of the conference where his solicitor and barrister also reiterated the issues his case faced because of the *Ellis* Defence and the Limitation Defence {SC [119] CAB 37};

(c) was highly anxious, had been drinking heavily, could not recall all of the conversation with his lawyers, and had a compromised ability to comprehend the advice he was given {SC [126] CAB 39}; and

(d) ultimately accepted the final offer made at the settlement conference because the "legal barriers" were too great {SC [119], [122]–[123], [126] CAB 37–39}.

37. In those circumstances, the primary judge held that, while the possibility of a Centrelink repayment was one of the reasons for the appellant giving instructions not to pursue his economic loss claim, it was not possible to find, on the totality of the evidence, that this was the sole or dominant motivation, "divorced from consideration of the other problems with his case", being the *Ellis* Defence and the Limitation Defence, and in respect of which it was "not possible to find" that these factors "had no material influence on the [appellant's] decision not to pursue his economic loss claim" {SC [119], [124] CAB 37–38}.

38. In respect of such findings, the Court of Appeal held that the associate judge erred:

(a) by treating a 'mere possibility' that either the *Ellis* Defence or the Limitation Defence played a material role in the appellant's decision as a relevant consideration as the associate judge had made a "non-finding" {CA [132] CAB

79} on that question, namely the conclusion that 'it is not possible to find that the limitations and the Ellis defence issues had no material influence on the plaintiff's decision not to pursue his economic loss claim' {SC [124] CAB 38};

(b) alternatively, by inferring, as a positive fact that the Limitation Defence and *Ellis* Defence materially influenced the appellant's decision not to pursue an economic loss claim, by a process of speculation rather than drawing the more probable inference, as "there was no evidence to make that conclusion more probable than not" {CA [133] CAB 79–80}, there being "no clear evidence that he abandoned the claim due to the specific legal obstacles" of the *Ellis* Defence and the Limitation Defence {CA [148] CAB 82}.

39. As to the first basis of the Court of Appeal's judgment, its description of the associate judge's conclusion {at SC [124] CAB 38} as a 'non-finding' is inapposite. The primary judge's conclusion responded to, and rejected, the respondent's submission that there was "nothing in the evidence before the Court to suggest that the [appellant's] decision to forego an economic loss claim was affected by any previous legal barrier, such as the availability of a limitation defence and/or the Ellis defence" {SC [91] CAB 24}. The rejection of that submission cannot simply be dismissed as a "non-finding"; it is a conclusion that the finding of fact which the respondent submitted should be made was not supported by the evidence. In context, and to the extent it is relevant, the primary judge's conclusion {at SC [124] CAB 38} must be a positive finding as to the influence of legal defences available to the respondent. The conclusion immediately followed the primary judge's observation that advice about Centrelink repayments was contemporaneous with reiterated advice concerning the effect of the *Ellis* Defence and a limitation period defence. That conclusion was, on the evidence, open and correct.

40. At any rate, the Court of Appeal misconstrued the inferences properly to be drawn in respect of the role of the *Ellis* Defence or Limitation Defence in the appellant's decision not to pursue an economic loss claim. The evidence gives rise to a clear inference that the previous legal barriers were material to the applicant's decision not to pursue his economic loss claim:

(a) From the time of engaging lawyers in January 2011 through to the execution of the 2012 Deed, the appellant repeatedly received legal advice that his case faced significant issues by reason of the *Ellis* Defence and the Limitation Defence.[39]

(b) As noted above, on 21 November 2012, the day of the settlement conference, the appellant was (again) advised, in conference, about the *Ellis* Defence and the Limitation Defence and, during the same part of that conference, *also* advised about the possibility of having to repay Centrelink from any settlement sum. The appellant accepted the advice he received {SC [33] CAB 13}. Given that the appellant was advised about all three issues and accepted such advice, it is more likely than not that one or both legal obstacles materially influenced his decision, thereafter, not to pursue his economic loss claim. As they are not competing propositions, the inference that each played a role in the appellant's deliberations is to be preferred.

(c) The appellant's imperfect recall of the advice received on the day of the settlement conference included "that due to the difficulties in successfully suing Church institutions at the time there may be an impact to [his] employment on [his] Centrelink benefits" {DZY Affidavit [28] ABFM 53; CA [fn 104] CAB 79}. Contrary to the Court of Appeal's conclusion, relegated to a footnote, that this "made no sense" and "did not assist [the appellant's] case" {CA [fn 104]}, this sentence is clear and uncontested evidence that he linked the difficulty of suing the respondent to his decision regarding an economic loss claim.[40]

(d) By letter dated 29 November 2012 {SGK-9 ABFM 16–17}, the appellant's solicitor provided the appellant with written advice, referring to and confirming oral advice given to the appellant that day and on the day of the settlement conference. That written advice referred expressly to the *Ellis* Defence and limitation defence. The letter did not refer to any issues associated with Centrelink payments {CA [35] CAB 58–59}.

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39 See paragraph 13, above. It is noted that there is no evidence that the appellant was ever advised, in writing, by his solicitors with respect to any Centrelink "clawback" or repayment issues, including in the letter from his solicitor, of 29 November 2012, following the settlement conference, which referred to the prior recommended acceptance of the final offer.

40 The first half of this sentence self-evidently refers to the *Ellis* Defence. Further, the affidavit is to be read in its entirety, and to that effect see also paragraphs 15, 16, 20, 33-35 thereof.

(e) Similarly, the "Instructions to Settle Claim" form — dated 29 November 2012 {SGK-11 ABFM 18–19} and signed by the appellant on 13 December 2012 (the day before he executed the 2012 Deed) — made no mention of any Centrelink issues but did include express reference to the *Ellis* Defence and the Limitation Defence.

(f) The appellant's unchallenged evidence on affidavit was that he felt like he "had no choice but to accept the [final] offer because the legal barriers were too great". It cannot therefore be inferred that his state of mind was limited to (or even necessarily concerned) the effect of potential Centrelink repayments {CA [43] CAB 60}.

41. Further, the Court of Appeal accepted that it was just and reasonable to set aside all parts of the settlement deeds other than in respect of the economic loss claim. On its own reasoning, it must be assumed the Court accepted that the *Ellis* Defence and/or the Limitation Defence were material considerations to the execution of the settlement deeds with respect to heads of damage other than economic loss. The Court of Appeal could not then logically find that such factors were *not* material to the applicant's decision not to pursue his economic loss claim in those Deeds in circumstances where, for the reasons above, considerations associated with Centrelink repayment obligations were not a predominant factor in the applicant's decision-making.

2 – The Court of Appeal erred by failing to draw the correct inference in respect of the role of impaired comprehension in the appellant's decision not to pursue an economic loss claim

42. Should this Court find, as contended above, that the Court of Appeal erred by failing to draw the correct inference concerning the effect of the *Ellis* Defence and/or the Limitation Defence upon the Appellant's decision not to pursue an economic loss claim, then it is submitted that it is just and reasonable to set aside the Deeds. Of additional relevance, however, and as the primary judge correctly found, the appellant was also experiencing significant anxiety at the time of the 2012 and 2015 settlements and had a compromised ability to comprehend the advice that he was given {SC [126] CAB 39}. At the settlement conference on 21 November 2012, the appellant was highly

anxious, had been drinking heavily, and could not recall all of his conversations with his lawyers {DZY Affidavit [25]-[26] ABFM 53; SC [119] CAB 37}.

43. The Court of Appeal gave less weight than the primary judge to the appellant's comprehension difficulties due to heavy drinking and anxiety around the time of the settlement {CA [146] CAB 81–82}. The Court accepted that the appellant did suffer anxiety and felt overwhelmed, and that his comprehension was likely impacted because of this. However, it held that this did not "reach the level of him being mentally incapable of understanding the advice given in relatively simple terms or being able to synthesise that advice in his own time." {CA [146] CAB 81–82}. Significantly, the Court found that, notwithstanding the appellant's anxiety, his solicitor certified that she had explained the purport and effect of the Deeds to the appellant and that he appeared, to her, to understand same {CA [42], [49], [146], [168(2)(c)] CAB 59–60, 61, 81–82, 86}. The Court further referred to the facts that the appellant was legally represented {CA [137]-[139], [143], [168(2)(a)] CAB 80–81, 86]}, and that he was not rushed to sign the settlement agreements {CA [147], [168(2)(b)] CAB 82, 86}.

44. The Court of Appeal erred by placing inadequate weight in the s 27QE(1) evaluation upon the role of the appellant's impaired comprehension in his decision not to pursue an economic loss claim. The appellant's *unchallenged* evidence was that at the 2012 settlement conference, he struggled to process what was being said {CA [32] CAB 58}. The primary judge accepted, as the appellant's evidence supports, that the appellant's ability to comprehend the advice he was given was compromised at the time of both settlements {SC [126] CAB 39}. While the Court of Appeal concluded that the time available to the appellant to consider the 2012 settlement 'diluted' the appellant's argument founded upon reduced comprehension ability {CA [142] CAB 81}, it did not conclude that the primary judge had erred in finding that the appellant's ability to comprehend legal advice was 'compromised'. As the appellant submitted below {CA [122] CAB 77}, legal advice is only effective to the extent that it is comprehended and it is to be recalled that the class of person to which this legislative regime applies has particular vulnerabilities.

45. The fact that, as the evidence reveals, the appellant was drinking heavily and experiencing anxiety, as well as suffering the symptoms of chronic psychiatric conditions (Post Traumatic Stress Disorder and Substance/Alcohol

Abuse/Dependency, at times in remission, but clearly not at the time of the Deeds),[41] adds to the body of evidence pointing to a finding that it is just and reasonable to set aside the Deeds.

Part VII: Orders Sought

46. The appellant seeks the orders set out in the notice of appeal {CAB 100-101}.

Part VIII: Time for oral argument

47. The appellant's time for oral argument, including reply, is estimated to be 1 hour and 15 minutes.

Dated: 24 October 2024

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[41] See, SC [27] CAB 12; CA [29] CAB 57, SGK-31 ABFM 26. It is noted that, from 2011, the appellant was receiving counselling through CASA and, in March 2012, Professor Dennerstein recommended that such treatment continue indefinitely {SGK-35 ABFM 48}. By 2015, the appellant was receiving anti-depressant medication {SC [57]-[58], [63] CAB 18–19}. See further, the matters set out in paragraph 13(b) above.

ANNEXURE: Part VI - LEGISLATION

	Title	Version	Provisions
1.	*Children Legislation Amendment Act 2019* (Vic)	Repealed	–
2.	*Civil Liability Act 2002* (NSW)	Current, as at 16 June 2022	Part 1C, ss 7B, 7D
3.	*Interpretation of Legislation Act 1984* (Vic)	Current, as at 6 September 2023	s 35
4.	*Justice Legislation Amendment (Drug Court and Other Matters) Act 2020* (Vic)	Repealed	s 44
5.	*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic)	Current, at 1 May 2020	–
6.	*Limitation of Actions Act 1974* (Qld)	Current, as at 20 September 2023	s 48(5A)
7.	*Limitation of Actions Act 1958* (Vic)	Current, as at 11 October 2023	ss 27QA-QF, 27OA, 27O