HIGH COURT OF AUSTRALIA

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Details of Filing

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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 REPLY

Part I: Certification

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

Part II: Reply

Ground 1

2. The respondent's submissions on this ground understate or misapprehend the error of principle made by Beach and Macaulay JJA.

3. **First**, the error of principle was to conclude that 'consideration of the actual influence of the two legal obstacles is *central* to the determination of whether it is just and reasonable to set aside a settlement' {CA [113] (emphasis added) CAB 75}. That conclusion was not simply the identification of 'the common circumstances in which s 27QE might most obviously be enlivened' {RS [32]}. Rather, Beach and Macaulay JJA stated that the 'centrality' of those two legal obstacles was such that it was 'doubtful that any cogent ground would exist to conclude it was just and reasonable to set the settlement aside' absent that either legal barrier had an 'impact' {CA [110] CAB 74}. The effect of the judgment — emphasising the 'centrality' of the 'two legal obstacles' more than once {at CA [109], [113], and [110] CAB 74-75} — was, as Lyons JA correctly concluded, to 'fetter' the power conferred by s 27QE(1) in a way inconsistent with the broad words chosen by Parliament {CA [155] CAB 83}. The respondent does not address at all CA [113] or the final sentence of CA [110] {CAB 74}.

4. **Secondly**, the respondent describes s 27QE as conferring an 'open-textured discretion' {RS [29]}. That description does not accord with the Court of Appeal's conclusion that

s 27QE(1) 'does not denote a discretion' {CA [98] CAB 72}. However described, there is no reason to limit the generality of the statutory words and to confine the class of case in which it would ordinarily be appropriate to exercise the s 27QE(1) power: '[i]llustrations may be used, but general words should remain general and not be reduced to the sum of particular instances'.[1] In any event, the approach of Beach and Macaulay JJA cannot be viewed as merely the creation of a 'rule' or 'guideline' informing the evaluative exercise with respect to s 27QE(1) {cf AS [29]–[31]}, because their Honours' approach is inconsistent with the statutory language. The emphasis on one factor (the impact of the two legal obstacles) distracts from the global analysis of all relevant facts required by s 27QE(1).

5. **Thirdly**, the definition of 'previously settled cause of action' as meaning a cause of action settled before 1 July 2018 (the abolition of the *Ellis* defence) does not limit the generality of the phrase 'just and reasonable to do so' in s 27QE(1) {cf RS [25]}. As Lyons JA stated, having defined a 'previously settled cause of action' in that way, the legislature 'did not limit the exercise of the court's power [under s 27QE(1)] … to circumstances where the claimant's decision to enter the agreement had been materially impacted by one or both of the previous legal barriers' {CA [159] CAB 84}. The legislature could have done so, but did not. There is no basis to read in a limitation not present in the statutory text, particularly in light of the remedial purpose of s 27QE(1) and the statutory intent that the existence of a legal defence need not be the 'predominant reason' why a claimant entered into a settlement agreement {CA [160]–[162] CAB 84-85}.

Ground 2

6. The potential for Centrelink repayment may have been *a* relevant consideration in the appellant's decision not to pursue his economic loss claim. However, the evidence considered as a whole[2] does not establish that this was the 'significant' {RS 19}, 'dominant' {RS 19} or 'chief' {RS 23, 35} explanation for his decision {cf RS [39]-[40]}. Rather, the evidence of advice given and concerns expressed before, during and after the settlement conference highlighted the appellant's concerns over the *Ellis* Defence and the Limitation Defence, and his concern that if he proceeded with his case

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1 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 374-5 (Lord Wilberforce) quoted in *Vigolo v Bostin* (2005) 221 CLR 191, [71] (Gummow and Hayne JJ).

2 See, *Evans v The Queen* (2007) 235 CLR 521, [177] (Heydon J).

he may have to pay the respondent's legal costs {SC [119], [124] CAB 37-38; CA [23] CAB 56}.

7. **First**, the appellant's direct and unchallenged evidence is that he accepted advice, given ahead of the settlement conference on 21 November 2012, 'that due to difficulties in suing Church institutions at the time there may be an impact to [his] employment on [his] Centrelink benefits' {DZY Affidavit [28]-[29] ABFM 53}. Contrary to CA [fn 104] {CAB 79}, this statement, in context with other evidence, indicates that DZY considered the Centrelink issue to be tied to the Ellis and/or limitation issues. After the settlement conference, DZY considered the final offer made at the settlement conference, having been advised that 'there would be lots of legal difficulties and hurdles', that his 'claim was out of time, and that there were issues with trying to sue Catholic Defendants'. In those circumstances, he 'felt like [he] had no choice but to accept the offer because the legal barriers were too great' and he would 'fail if he went to court and would have to pay the legal fees for the Christian Brothers' {DZY Affidavit [33]-[35] ABFM 54}. The evidence, therefore, is that the appellant expressly identified the *Ellis* and/or Limitation Defence, along with fear of having to pay the respondent's fees, as factors in his decision to enter into the 2012 Deed. He did not refer at that time to a potential Centrelink repayment. That evidence is uncontradicted by either cross-examination {cf RS [42]} or the voluminous documents available on the application.

8. **Secondly**, it is immaterial that the issue of potential Centrelink repayment was the subject of independent legal advice {cf RS [35], [39]}. That is because the same lawyers also advised the appellant, on multiple occasions, about difficulties posed by the *Ellis* and/or Limitation Defence:

(a) From obtaining legal representation in January 2011 through to execution of the 2012 Deed, the appellant was repeatedly advised, in writing and orally, as to the difficulties his claim faced by reason of the *Ellis* and/or Limitation Defence {AS [36](a); SC [122] CAB 38}. This included in writing in January 2011 {ABFM 11-12; AS [13(a)]; SC [13] CAB 9; CA [25] CAB 56; SGK-1 ABFM 5, 11-12; DZY Affidavit [14]-[16] ABFM 52}, and in Dr Waller's letter of 29 November 2012 recommending acceptance of the final offer at the settlement conference {SC [37]-[38] CAB 14-15; CA [35]-[36] CAB 58-59; SGK-9 ABFM 6, 16-17}. The same advice was given to the appellant at the two conferences with his barrister, on 21 September 2012 and on 21 November 2012 {AS [13(c)(d)]; SC [24], [26] CAB 11-

12; CA [28-[29]] CAB 57; SGK-7 ABFM 6, 13-15; DZY Affidavit [20]-[23], [25]-[26], [33]-[34] ABFM 53-54}.

(b) By contrast, the evidence discloses that the appellant was advised, at most, twice (and, then, only orally) as to the issue of a possible Centrelink repayment:

(i) In conference on 21 September 2012, when the appellant gave instructions about an historic Centrelink issue {SC [24] CAB 11-12; CA [28] CAB 57}.[3] The appellant's solicitors, six weeks later, provided the respondent with an ADR statement that left open an economic loss claim {CA [138] CAB 80}.

(ii) On the day of the settlement conference (when advice was also given about the *Ellis* and Limitation Defences). Thereafter the solicitor's notes record the appellant as giving instructions not to include loss of earnings {SC [25], [34] CAB 12, 13-14; CA [33] CAB 58}. There is no further reference to Centrelink repayment being raised, including in Dr Waller's letter of 29 November 2012, the final advice which recommended acceptance of the final offer.

(c) It is also a relevant factor that, at the settlement conference, and on the appellant's unchallenged evidence, the appellant was highly anxious, had been drinking heavily, and could not recall all of his conversations with his lawyers – symptoms consistent with the psychiatric diagnoses given eight months earlier {AS [13](b)]; DZY Affidavit [25]-[26] ABFM 53, 34-35}. His recall of the advice he received touched upon details consistent with both the legal Defence *and* a 'Centrelink benefits' issue {AS [40(c)]; cf CA [fn 104] CAB 79}. Further, no *Jones v Dunkel* issue arises {cf RS [42]}. The ultimate conclusion of the Court of Appeal was that it gave 'less weight than the associate judge…to DZYs comprehension difficulties'; the COA accepted 'that DZY did suffer anxiety, felt overwhelmed and that his comprehension was likely impacted because of it' {CA [146], see also [168](2) CAB 81–82, 86}. There is no basis to impugn that finding of fact.

9. **Thirdly**, it is inconsistent with the proper processes of fact finding to isolate the appellant's instruction at the settlement conference not to pursue an economic loss claim from advice given about the impact of legal obstacles, including final advice by

[3] It is unknown whether there was any discussion about, or advice given in respect of, possible Centrelink repayment (in respect of the current claim) {SC [25] CAB 12; CA [28], [138] CAB 57, 80}.

letter on 29 November 2012 (following which the appellant accepted the terms of settlement) {cf RS [39]-[40], [43]}.

10. It was just and reasonable to set aside the Deeds in respect of the economic loss claim as with other heads of damage claimed. The two classic legal impediments were operative considerations, relevant to the exercise of the Court's power under s 27QE of the Act, as was the appellant's concern over an adverse costs order. Other relevant factors included that the quantum of the Deeds was substantially less than the appellant could expect to recover had he been successful on a civil claim[4] and the lack of any demonstrable prejudice to the respondent.[5] The fact that a concern about Centrelink was also *a* factor that may have motivated the appellant does not displace or render irrelevant the other crucial factors. This is not a case of mere possibility, guess or speculation;[6] rather it is the subject of the appellant's direct and uncontradicted evidence.

Dated: 11 December 2024

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4 *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB* (2020) 62 VR 234, [118] (Beach, Kaye and Osborn JJA); *JAS v Trustees of the Christian Brothers* (2018) 96 SR (WA) 77, [27](3) (Sleight CJDC).

5 See also, factors at {CA [160]-[161] CAB 84-85}.

6 *Jones v Dunkel* (1959) 101 CLR 298, 304-5 (Dixon CJ), relied upon by the respondent {RS 38}.