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

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I – Certification

1. This outline is in a form suitable for publication on the internet.

Part II – Outline of oral submissions

Ground 1

2. Section 27QE of the *Limitation of Actions Act* empowers the court to 'set aside' a 'settlement agreement' of a 'previously settled cause of action', either 'in whole or in part' if 'satisfied that it is just and reasonable to do so': **RS[24]**.

3. Similar statutes exist throughout Australia, but only in Victoria is there is a textually explicit power to set aside a settlement only 'in part': **RS[24]**, *Pearce v Missionaries of the Sacred Heart* [2022] VSC 697.

4. Section 27QE is located in a statute concerned with limitation of actions. The dates relevant to the definition of a 'previously settled cause of action' reflect:

   (a) the 2015 abolition of limitation periods for claims of child abuse; and

   (b) the 2018 abolition of the so-called '*Ellis* defence': **RS[25]**.

5. The majority was right that 'built into the necessary condition for the availability' of s 27QE is that the settlement occurred during, but not beyond, the point when limitation and/or *Ellis* defences were a negative influence: **RS[25]–[26]**.

6. The Court of Appeal appropriately recognised that s 27QE was not prescriptive about what the court should have regard to, and that there may be relevant factors beyond limitation issues or the *Ellis* defence: **RS[27]–[28]**.

7. Section 27QE results in a binary outcome (it either is, or is not, 'just and reasonable' to set aside a particular settlement, either wholly or in part) but reaching that decision involves an open-textured and evaluative judgement. There was nothing unorthodox about the Court of Appeal offering guidance about how that evaluative judgement might be formed in mainstream cases. That was not inconsistent with the court's recognition that the 'correctness' appellate standard applied: **RS[29]–[31]**, cf **AR[1]**.

8. The Court of Appeal (including Lyons JA) simply identified common circumstances in which s 27QE might most obviously be enlivened, by reference to its text, context and purpose, while being alert to the circumstance of the particular case: **RS[32]–[34]**.

9. The appellant takes an artificially narrow view of Beach and Macaulay JJA's judgment about when the statutory text is enlivened. Supposing that were the correct interpretation of their Honour's reasons, the broader approach of Lyons JA is available, but would still not assist the appellant. That was because *each* member of the Court of Appeal recognised that there were particular reasons, distinctive to the appellant's case, why it was not 'just and reasonable' to set aside the *whole* of the prior settlements: **RS[5]–[23], [34]**.

Ground 2

10. The Court of Appeal found that the appellant's decision not to bring an economic loss claim was chiefly to be explained by his (understandable) wish to avoid a clawback of social security benefits. There is no basis to controvert that finding in this Court: **RS[5]–[23], [35]–[36]**.

11. In the lower courts, there was neither any positive finding of, nor any direct evidence to support, the proposition that the appellant decided not to pursue an economic loss claim because of limitations or *Ellis* defence issues: **RS[37]–[39]**.

12. The Court of Appeal was right that taking into account a 'mere possibility' was just as much an error as positively drawing an inference that was not shown to be more probable than not: **RS[38]**.

13. There was nothing illogical or unsubstantiated about the Court of Appeal's approach. The evidence showed that the appellant's claim for economic loss was influenced by different considerations (most obviously, the legal advice and concern about Centrelink clawback) than his claim for general damages: **RS[40]**.

14. The appellant's error is to elide the factors relevant to two different decisions: (1) the anterior selection (upon legal advice) of the claims the appellant wished to press in the first place; and (2) the terms on which the appellant settled those claims that were, in fact, pressed: **RS[40]**.

15. It is not apt for the appellant to raise a new case — unrelated to any past legal barriers affecting claims against institutional defendants — about his alleged 'impaired comprehension' at the time of entering the settlement deeds: **RS[41]–[43]**.

16. There is no sufficient foundation for the new argument, and new finding of fact, for which the appellant now appears to contend. The absence of evidence from the appellant's own lawyers (who had certified that he appeared to them to understand the effect of the deeds) is particularly significant: **RS[41]–[43]**.

Dated 13 February 2025

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