Australian
Alternative Dispute Resolution Law
Bulletin

Historical child abuse claims — setting aside past settlements

Julie Somerville *R3 RESOLUTIONS and* ***Kerry Hogan-Ross*** *KERRY HOGAN-ROSS MEDIATIONS*

The removal of the once insurmountable limitation period defence in historical sexual abuse matters in all Australian jurisdictions is a welcome development for survivors of such abuse who wish to bring a claim against the perpetrator and/or the relevant institution.

Other barriers, such as the identification of a proper defendant, have been removed and the law on vicarious liability[1] has been somewhat clarified. But where does it leave those who brought claims earlier, greatly compromised their claims for damages because of the limitation period barrier and entered into a deed of release or settlement which signed away their future rights? The answer to that largely, though not wholly, presently depends on which state you reside in. Queensland,[2] Tasmania,[3] Victoria[4] and Western Australia[5] have all introduced legislation permitting the court to set aside a deed in certain circumstances.[6]

In *WCB v Roman Catholic Trusts Corp for Diocese of Sale (No 2)*[7] (*WCB*), decided in September 2020, the Supreme Court of Victoria set aside a deed entered into in 1996. The case considered the proper interpretation of the Victorian legislation — ss 27QD and 27QE of the Limitation of Actions Act 1958 (Vic)[8] which permits the court to set aside a deed of settlement if it satisfied that it is just and reasonable to do so.

Meanwhile, in New South Wales, similar legislation remains in the consultation phase.[9] In the absence of such legislation, in *Magann v Trustees of Roman Catholic Church for Diocese of Parramatta*[10] (*Magann*), the New South Wales Court of Appeal considered an application to set aside a deed under the more onerous tests in equity and the Contracts Review Act 1980 (NSW). The deed was not set aside. In early December 2020 in *JMW1 v Salvation Army (NSW) Property Trust*,[11] Garling J similarly declined to set aside a deed.

It is important to note that the existence of this remedial legislation is not a guarantee that the court will set aside a prior settlement. In *TRG v Board of Trustees of Brisbane Grammar School*[12] (*TRG*), the plaintiff failed to satisfy the Queensland Supreme Court that it was fair and reasonable to set aside the deed.

In this article we look at those four cases.

WCB v Roman Catholic Trusts Corp for Diocese of Sale (No 2)

In June 1996, the plaintiff brought proceedings in the County Court of Victoria against the defendant alleging that between 1977 and 1980 he was repeatedly sexually abused by a priest, Daniel Hourigan. The defendant filed a defence and pleaded the claim was statute barred. Later in 1996, the plaintiff compromised his claim and settled for $32,000. He entered into a deed which contains the following relatively standard clauses:

> 8. In consideration of Coffey (a Bishop) entering into this deed [WCB] agrees and warrants that he shall make no further claim for damages or compensation arising out of the matters the subject of the allegations in the statement of claim.
> 9. This deed may be pleaded by any of the parties and by the Roman Catholic Diocese of Sale its servants and agents, in bar to any action, claim or demand now or hereafter commenced or made by any person arising out of or connected with the facts or circumstances the subject of this proceeding or its subject matter.[13]

In his Supreme Court application to set aside the deed, the plaintiff gave evidence that he "was not pleased with the result . . . feeling like I had been underdone in the settlement".[14] He argued that it was just and reasonable that the deed be set aside to allow his claim to be determined on the merits.

The plaintiff bore the burden of demonstrating that is was just and reasonable to set aside the deed. However, Keogh J disagreed with the defendant's submission that compelling reasons are required.

Exercise of the discretion in s 27QE

In considering whether it was just and reasonable to set aside the settlement, his Honour directed himself to the following questions:

- What considerations are relevant?
- On what basis should the discretion be exercised?

His Honour noted that:

> There is nothing in the text of s 27QE . . . which limits consideration of what is just and reasonable in respect of an action on a cause of action for child abuse to the state of the law as it existed when the settlement was entered into.[15]

In coming to his decision that it was just and reasonable to set aside the deed, the Judge considered the following:

- Noting the horrendous abuse the plaintiff was subjected to and the significant adverse impacts of the abuse, the heavily discounted settlement sum was neither adequate nor reasonable.
- The defendant argued that due to the lapse of 40 years since the events in question, the defendant could not answer the plaintiff's case and therefore the trial would not be fair to the defendant, his Honour recognised the while some relevant evidence had been lost, a substantial body of evidence remained. He found that the defendant is entitled to a fair trial not a perfect one. Therefore, lapse of time, issues of specific prejudice and the availability of a fair trial to the defendant are not relevant considerations *on the facts of this case*. The proceeding was therefore not an abuse of process.
- There was nothing in the County Court proceedings and settlement that weighed significantly in the exercise of the discretion as to whether or not it was reasonable to set aside the deed.
- Leaving aside the limitation defence and the problem of identifying the proper defendant, nothing specific was standing in the way of the plaintiff's cause of action succeeding, not that success was assured.
- Several legal barriers have been removed since the settlement: the barrier to bringing an action against the defendant had effectively been removed by the Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic), the limitation defence has yet been removed and the law of vicarious liability has been clarified in a way which is favourable to the defendant. The clarification regarding the law of vicarious liability was not a determinative issue.

TRG v Board of Trustees of Brisbane Grammar School

It should not be assumed that the enactment of legislation conferring upon the court a discretion to set aside a settlement agreement will open the floodgates and lead to a large number of deeds being set aside. Indeed, in this 2020 decision, the Queensland Court of Appeal refused to exercise its discretion and determined that it was not just and reasonable to do so.

Between 1986 and 1987 TRG was sexually abused by Kevin Lynch, a school counsellor employed by the defendant. Lynch sexually assaulted approximately 50 students over the relevant period and, over 2001 and 2002, an extensive mediation process was undertaken in relation to all claims. TRG's claim was ultimately settled for $47,000.

TRG sought to have the settlement deed set aside on the basis that it was "just and reasonable" to do so. Davis J, at first instance, considered the factual circumstances of the case and determined that the circumstances did not warrant setting aside the deed.

Davis J, in noting that the onus was on TRG to satisfy the court that it was "just and reasonable" to disturb the finality of settlement, considered a wide range of factors relevant to the exercise of the discretion, including the prospects of success of any claim, potential quantum of the claim, the effect of the limitation period on the quantum of the settlement, the reasonableness of the mediation process, impact of delay on the school, changes in the law and offers by the school to provide ongoing support. In considering these factors Davis J balanced the position of TRG and the school, considered the circumstances surrounding the settlement, and ultimately determined it would not be just and reasonable to set aside the deed.

TRG appealed Davis J's decision. A significant issue on appeal was whether the legislation required greater weight to be placed upon the influence of the expiry of the limitation period on the settlement than any other factor. The Court of Appeal held that the legislation did not imply that greater weight was to be placed upon that matter, and that the relative significance to be given to the material factors in the assessment of what is just and reasonable depended upon a judicial assessment of the particular circumstances of each case. The Court of Appeal then determined that in this case the expiry of the limitation period did not materially influence the settlement amount. The settlement was discounted to take "into account counsels' advice that the appellant's prospects of [success] were no better than 'fair to reasonable'".[16]

The Court of Appeal found:

> [72] In the context of the primary judge's consideration of the significance of all of the potentially relevant matters, the primary judge was persuaded that the expiry of the limitation period did not materially affect the appellant's decision to settle or the amount of the settlement. The appellant has failed to establish any error in that finding, which, together with other factors that are not in issue in this appeal, led to his Honour's conclusion that it was not just and reasonable to set aside the settlement.

So why the different outcome in the context of remarkably similar legislation? In *WCB* the Victorian Court seemed to place significant weight on the overall findings of the Royal Commission in relation to the difficulties survivors of child abuse faced in obtaining justice when determining whether it was just and reasonable to set aside a settlement. Whereas in *TRG* the

Queensland Supreme Court of Appeal appeared to consider the fairness of the settlement, taking into account the strengths and weaknesses of the case at the time it was settled.

Irrespective, what is clear, is that ultimately the court's view on whether it is just and reasonable will depend on the unique facts and circumstances of each case.

However, what about jurisdictions in which there is no legislation specifically providing for the revisiting of finalised child abuse claims?

JMW1 v Salvation Army (NSW) Property Trust

In this matter the Supreme Court considered, as a separate question, the validity of a prior deed of release. The plaintiff alleged that when he entered into the deed, he did not understand it would bring an end to all claims. He further alleged that he was either wrongly advised about his prospects or, if that advice was correct, it placed him under undue pressure.

The solicitor representing the plaintiff at the time the deed was entered into gave evidence and produced his file.

Garling J rejected the submission that the plaintiff signed the deed as a result of duress. He found, amongst other things, that the plaintiff received thorough and careful legal advice and had the opportunity to consider the settlement before signing.

His Honour declined to set aside the deed.

Magann v Trustees of Roman Catholic Church for Diocese of Parramatta

In New South Wales, no such legislation is in place and any application to reopen earlier settlements requires a plaintiff to establish that the deed was unjust under the Contracts Review Act or unconscionable in equity — a significantly harder task.

In 2003, Mr Magann brought proceedings in the District Court of NSW against the defendant alleging that between 1981 and 1991 he was sexually abused by two priests. That claim was prima facie statute barred, however, Mr Magann's application to extend the limitation period[17] was successful. The defendant successfully appealed that decision and the District Court proceedings were dismissed.[18] Despite the dismissal of the proceedings, settlement discussions ensued and in 2007 Mr Magann entered into a deed of release settling his claim for $95,000.

When the NSW Limitation Act was amended to remove the limitation period for child abuse claims, Mr Magann commenced further proceedings against the defendant. The court was asked to consider whether the 2007 deed of release should be set aside. Amongst other things the court considered whether the deed was unjust and should be set aside. Whether the deed was unjust is to be considered in the context of the circumstances that existed at the time it was entered into.

The Contracts Review Act outlines a number of matters which the court shall have regard to, including the intentions of the parties at the time that they entered into the deed, whether a party was under any special disadvantage or whether there would be any substantial injustice which vitiated the deed. The court considered, over a lengthy 4-day hearing, the factual circumstances surrounding the negotiations and settlement, including legal advice obtained prior to the settlement, the presence of a support person during the settlement conference and Mr Magann's demeanour after the settlement.

Of significance perhaps when considering issues of public interest and whether the deed would lead to unjust consequences, s 9(4) of the Contracts Review Act specifically prevents the court from considering circumstances that were not reasonably foreseeable at the time the deed was entered into. Therefore, the court could not take into account the subsequent removal of the limitation period for child abuse claims and could only consider whether the deed was unjust or unconscionable in the circumstances that existed at the time it was entered into.

The court refused to set aside the deed. However, one must wonder whether the outcome would be different if the court was not prevented under s 9(4) to take into account the removal of the limitation period.

Ultimately that may be irrelevant as NSW is currently considering changes to the legislation which would provide the NSW courts the discretion to set aside settlement agreements where they consider the agreement to be unjust or unfair on the basis that it was: entered into prior to legislative changes removing limitation periods or requiring the naming of a proper defendant.

If passed, the legislative test may be slightly different in NSW to other states, however, given it is still in its consultative phase, that remains to be seen.

Conclusion — what does this mean for the resolution of disputes arising out of child abuse?

While many states have enacted legislation that permits finalised compensation claims to be revisited, the different outcomes in *WCB* and *TRG* illustrate that the legislation is not a cure-all.

Opinions may differ as to the extent to which the subsequent removal of limitation periods can be taken into account when considering whether it is just and reasonable to set aside a finalised settlement. And, as in

many situations, ultimately the outcome may depend on the facts and circumstances of each case.

What is interesting is that, in *TRG* and *Magann* (in which no specific legislative discretion in child abuse cases has been conferred on the court), both courts spent considerable time considering the reasonableness of the mediation/settlement process. In *TRG*, mention was made of the conduct of the defendant in organising the mediation, the experience and conduct of the mediator, and the role of the legal advisors during the mediation. In *Magann*, it was noted that the claimant was not placed under time pressures during settlement discussions, had a support person available and had received legal advice on the settlement.

Therefore, while the legislature in each state and territory catches up, and while we wait for guidance from the courts on how the legislation will be interpreted, the decisions remind us of the importance of procedural fairness when handling claims involving allegations of child abuse. This includes ensuring settlement discussions are conducted in an "exemplary" manner and providing survivors the opportunity to be heard, not to be rushed or pressured into a settlement, particularly without legal advice.

Julie Somerville
Principal
R3 Resolutions
jsomerville@r3resolutions.com.au
www.r3resolutions.com.au

Kerry Hogan-Ross
Solicitor and Mediator
Kerry Hogan-Ross Mediations
kerry@hogan-ross.com
www.hogan-ross.com

Footnotes

1. *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; 335 ALR 1; [2016] HCA 37; BC201608462.
2. Civil Liability and Other Legislation Amendment Act 2019 (Qld).
3. Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019 (Tas).
4. Limitation of Actions Act 1958 (Vic).
5. Limitation Act 2005 (WA), ss 6A and 89.
6. These states have gone further than recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, who considered deeds of release should be disregarded for the purpose of payments under the National Redress Scheme. These states have all enacted legislation that enables deeds in finalised civil claims to be set aside.
7. *WCB v Roman Catholic Trusts Corp for Diocese of Sale (No 2)* [2020] VSC 639; BC202009497.
8. The relevant provisions of the Limitation of Actions Act provide:

   27QD Application to court to set aside previously settled causes of action

   (1) . . .

   (2) In a proceeding to which this section applies, application may be made to the court for the settlement agreement and any judgment or order giving effect to the settlement of the previously settled cause of action to be set aside.

   (3) . . .

   27QE Court's powers — previously settled causes of action

   (1) . . .

   (2) In hearing and determining any action to which this Division applies on a previously settled cause of action, the court, if satisfied that it is just and reasonable to do so—

   (a) may make an order setting aside the settlement agreement and any judgment or order giving effect to the settlement of the previously settled cause of action, whether wholly or in part; and

   (b) . . .
9. NSW Government, Setting aside settlement agreements for past child abuse claims, Public Consultation and Discussion Paper, 9 July 2020, www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/setting-aside-settlement-agreements-for-past-child-abuse.aspx.
10. *Magann v Trustees of Roman Catholic Church for Diocese of Parramatta* [2020] NSWCA 167; BC202007274.
11. *JMW1 v Salvation Army (NSW) Property Trust* [2020] NSWSC 1682; BC202012004.
12. *TRG v Board of Trustees of Brisbane Grammar School* [2020] QCA 190; BC202008632.
13. Above n 7, at [42].
14. Above n 7, at [43].
15. Above n 7, at [148].
16. Above n 12, at [71].
17. At the time of the proceedings, s 60G(2) of the Limitation Act 1969 (NSW) permitted a court to grant an extension of a limitation period in personal injury claims when it was just and reasonable to do so.
18. *Eijkman v Magann; McGloin v Magann; Trustees of Roman Catholic Church of Diocese of Parramatta v Magann* [2005] NSWCA 358; BC200509346.