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

RESPONDENT'S SUBMISSIONS

Part I – Certification

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

Part II – Issues arising

2. Two issues arise:

   (a) What is the correct approach to applying s 27QE of the *Limitation of Actions Act 1958* (Vic)?

   (b) Did the Court of Appeal correctly apply that approach in respect of the appellant's claim for economic loss?

Part III – Section 78B Notice

3. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV – Facts

4. In addition to the facts set out in Part V of the appellant's submissions, the relevant findings included the following.

5. During periods between 1997 and 2007, the appellant received a Commonwealth benefit called the Newstart Allowance. Then, from 2009, he received a Commonwealth

carer's pension (CAB 56; CA[21]).[1]

6. In 2007, Centrelink decided to recover a debt from the appellant, being an overpayment of the Newstart Allowance, on the basis that he was also in receipt of another benefit. He appealed that decision but was unsuccessful (CAB 56; CA[22]).[2]

7. In 2009, the appellant was charged with obtaining a financial advantage — the Newstart Allowance — knowing or believing that he was not entitled to it. He was sentenced for that offence and received a 12-month good behaviour bond without conviction (CAB 56; CA[22]).[3]

8. The appellant continued to receive the carer's pension at the time he engaged his then solicitors in 2011 (CAB 56; CA[24]; CAB 11–12; SC[24]).[4]

9. In September 2012, the appellant gave instructions to his solicitors and counsel about his 'trouble' with Centrelink, and the fact he had been charged with 'defrauding' Centrelink (CAB 57; CA[28]).[5]

10. The respondent agreed to a consensual alternative dispute resolution process for the appellant's claim (CAB 57; CA[27]). At a settlement conference in November 2012, the appellant's counsel advised him that if he claimed for lost earnings, there was a risk that Centrelink 'might claim' against him. The appellant gave instructions not to include loss of earnings in his claim (CAB 58; CA[33]; CAB 13–14; SC[33]–[34]).[6]

11. The appellant recalled being advised at that time about a possible impact on his Centrelink benefits, and he accepted that advice (CAB 58; CA[33]).[7]

12. On receiving the draft deed of settlement from the respondent, the appellant's solicitor confirmed his instructions 'that there is no loss of earning component to your claim'

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1 Centrelink records (Respondent's Book of Further Material at 199–221); Appellant's List of Special Damages dated 18 November 2022 at [28] and [30] (RBFM at 40–3); Report of Professor Dennerstein, p 4 (ABFM 30); file note of Dr Waller dated 29 November 2012 (ABFM at 13, 15); Appellant's affidavit at [30] (ABFM at 53).

2 Appellant's legal file from Philip Lynch Solicitors (RBFM at 107–43).

3 Ibid.

4 Centrelink records (RBFM at 199–221); file note of Dr Waller dated 29 November 2012 (ABFM at 13, 15).

5 File note of Waller Legal dated 21 September 2012 (RBFM at 144–5); file note of Dr Waller dated 29 November 2012 (ABFM 15).

6 File note of Waller Legal dated 21 November 2012 (RBFM at 156–66); file note of Waller Legal dated 20 November 2012 (RBFM at 154–5).

7 Appellant's affidavit at [28]–[29] (ABFM 53).

(CA[35]), recommended that the appellant accept the respondent's offer (CAB 59; CA[36]), and wrote to the respondent's solicitors requesting that they amend the proposed deed of release to note that no claim for economic loss was made (CAB 59; CA[37]).[8]

13. The terms of the 2012 deed executed by the appellant stated that he did not bring any claim for economic loss, and that he acknowledged that the settlement sum was paid subject to any deduction required under social security legislation (CAB 59; CA[39]–[40]).[9]

14. The terms of the 2015 deed executed by the appellant contained similar terms making explicit that no claim for economic loss was made as part of his claim (CAB 61; CA[49]).[10]

15. The appellant deposed that when he entered the 2015 deed, he was stressed by matters including Centrelink issues (CAB 61; CA[50]).[11]

16. In January 2016, the appellant again communicated with his then solicitors about the terms of settlement. They again advised him that a claim for loss of earnings had been excluded from his claim to avoid Centrelink issues (CAB 61; CA[51]; CAB 22–3; SC[85]–[88]).[12]

17. The appellant did not lead any evidence from his former solicitor (CAB 81; CA[141]), who had certified that she had explained the purport and effect of each of the 2012 and 2015 deeds to the appellant, who appeared to her to understand the purport and effect of those deeds (CAB 59, 61, 81–82; CA[42], [49], [146]; CAB 17; SC[50]).[13] The absence of evidence from his former lawyers was unexplained (CAB 81; CA[141]).

18. The appellant had a particular reason to be apprehensive about the DSS seeking repayment of Centrelink benefits: it had done so before (CAB 80; CA[136]).

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8 Letter from Waller Legal to the appellant dated 29 November 2012 (ABFM 16–17); email from Waller Legal to Carroll & O'Dea Lawyers dated 5 December 2012 (RBFM at 169–70).

9 Deed of Release dated 14 December 2012 (RBFM at 6–12).

10 Deed of Release dated 9 December 2015 (RBFM 13–19).

11 Email from the appellant to Elisa Zelez of Waller Legal dated 21 January 2016 (RBFM at 91–3); Appellant's affidavit at [42], [45] (ABFM at 54).

12 File notes of Elisa Zelez of Waller Legal dated 21 and 27 January 2016 (RBFM at 88–90 and 94–100); Appellant's affidavit at [42], [45] (ABFM at 54).

13 Independent Solicitor's Certificate, Deed of Release dated 14 December 2012 (RBFM at 12); Independent Solicitor's Certificate, Deed of Release dated 9 December 2015 (RBFM at 19).

19. His apprehension that the DSS would claw back his carer's pension was a significant motivation, probably the dominant motivation, for him deciding not to pursue an economic loss claim (CAB 81; CA[144]).

20. When he had the chance to do so, the appellant did not say that any other factor motivated his decision not to bring a claim for economic loss, and there was good reason for him to be apprehensive about a DSS clawback. Importantly, he did not identify a concern about the operation of the limitation or *Ellis* defences as a reason not to pursue that particular claim (CAB 81; CA[145]).

21. Even if the appellant felt some anxiety or had impaired comprehension, his solicitor was evidently convinced that he did comprehend the advice he was given (CAB 81–2; CA[146]).

22. The appellant was not rushed into entering either deed (CAB 81, 86; CA[147], [168]).[14] His reported state of anxiety and comprehension difficulty did not reach the level of him being mentally incapable of understanding advice given in relatively simple terms or being able to synthesise that advice in his own time. No contemporaneous record suggested such a level of disability (CAB 81; CA[147]). His statement that he felt he had 'no choice' but to settle was not related to any conduct on the part of the respondent (CAB 82, 86; CA[148], [168]).

23. There was no positive finding that the appellant's decision not to pursue an economic loss claim was materially influenced by the existence and potential impact of the limitation period[15] or *Ellis* defences.[16] Instead, a completely unrelated issue was the chief explanation for that decision — namely, his understandable concern about repayment of Centrelink benefits (CAB 82; CA[150], [168]; cf CAB 36, 38; SC [118(d)], [124]).

Part V – Argument

24. **Ground 1**. By s 27QE of the *Limitation of Actions Act*, the court is given the power to 'set aside' a 'settlement agreement' of a 'previously settled cause of action', either 'in

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14 Appellant's affidavit at [24], [32]-[33], [36] (ABFM at 53–4); Appellant's 2015 Royal Commission Statement (RBFM at 184–98).

15 As amended by the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) s 4, inserting s 27P into the *Limitation of Actions Act 1958* (Vic).

16 *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565; avoided by the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) s 7.

whole or in part' if 'satisfied that it is just and reasonable to do so'.[17] Similar provisions — enacted after the Royal Commission into Institutional Responses to Child Sexual Abuse — exist in other States and Territories.[18] The court's discretionary power in those statutes is couched in various forms; but only in Victoria is there a textually explicit power to set aside a settlement only 'in part'.[19]

25. In addition to its location in a statute concerned with limitation of actions, a striking textual aspect of s 27QE is that it applies in respect of a 'previously settled cause of action': namely, (between September 2019 and December 2020) settlements entered before 1 July 2015,[20] and (since December 2020) settlements entered before 1 July 2018.[21] Those dates correlated with the abolition of two notorious past barriers for plaintiffs in child abuse actions: (1) the 2015 abolition of limitation periods for claims of child abuse;[22] and (2) the 2019 abolition of the so-called '*Ellis* defence'.[23] The Court of Appeal thus rightly pointed out that 'built into the necessary condition for the availability of the s 27QE remedy is the requirement that the particular settlement occurred at a time — but not beyond that time — when the time limitation and/or Ellis defences were capable of unfavourably influencing settlements for claimants' (CAB 74, 85; CA[109], [163]).

26. In that context, the Court of Appeal had earlier observed in *WCB* that 'it would be entirely artificial, in construing s 27QE, to ignore the cumulative effect of the two principal barriers that obstructed the rights of victims of childhood sex abuse, such as the plaintiff, from obtaining suitable redress through the courts, namely, the inability to identify a relevant legal entity as a defendant (the Ellis defence), and the effluxion of the applicable time limit then prescribed by the law.'[24] Similar observations were made

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17 The provision was inserted by the *Children Legislation Amendment Act 2019* (Vic) s 32.

18 *Civil Law (Wrongs) Act 2002* (ACT) s 114K; *Civil Liability Act 2002* (NSW) s 7D; *Limitation Act 1984* (NT) s 54(5); *Civil Liability Act 1936* (SA) s 50W(3); *Limitation Act 1974* (Tas) s 5C(3); *Limitation of Actions Act 1974* (Qld) s 48(5A); *Limitation Act 2005* (WA) s 92.

19 *Limitation of Actions Act 1958* (Vic) s 27QE(1)(a).

20 *Limitation of Actions Act 1958* (Vic) s 27OA, as amended by the *Children Legislation Amendment Act 2019* (Vic) s 31.

21 *Limitation of Actions Act 1958* (Vic) s 27OA, as amended by the *Justice Legislation Amendment (Drug Court and Other Matters) Act 2020* (Vic) s 44.

22 Through the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic).

23 Through the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic).

24 *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB* (2020) 62 VR 234 at 264–5 [106] (Beach, Kaye and Osborn JJA).

by the Queensland Court of Appeal in *TRG v Board of Trustees of the Brisbane Grammar School*.[25]

27. In this case, the Court of Appeal — like other courts which have considered equivalent statutory powers[26] — appropriately addressed itself to the text, context and statutory purpose of s 27QE, and properly recognised the width of the statutory provision. Beach and Macaulay JJA thus expressly recognised that:

(a) s 27QE does not prescribe what the court should have regard to in determining whether it is just and reasonable to set aside a settlement (CAB 72–3 ; CA[103], [107]);

(b) it is relevant to take into account the significance of unfair legal obstacles at the time of the settlement that Parliament has subsequently removed (CAB 73; CA[105], [107]);

(c) the 'ordinary case' (but not *every* case) might be expected to involve a limitation issue or the *Ellis* defence (CAB 74; CA[110]);

(d) one must pay proper regard to the fact that Parliament has not sought to define the factors that are to be taken into account in determining whether it is just and reasonable to set aside a judgment or a settlement (CAB 74; CA[111]); and

(e) other than limitation issues or the *Ellis* defence, there may indeed be additional relevant factors to take into account, such as the foregone prospect of a better substantive outcome; the respondent's conduct of the settlement process; inequality of bargaining power; or feelings of guilt or shame on the part of the claimant (CAB 74–5; CA[112]).

28. Lyons JA was equally explicit that:

(a) the exercise of the power under s 27QE of the Act will depend upon all the relevant circumstances (CAB 84, 86; CA[156], [166]);

(b) Parliament used words of very wide import, and did not in terms limit the court's discretion (CAB 84; CA[159]);

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25 (2020) 5 QR 440 at 460–1 [27], [29] (Fraser JA; Morrison and Mullins JJA agreeing).

26 *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB* (2020) 62 VR 234 at 261–2 [93]–[97] (Beach, Kaye and Osborn JJA); *TRG v Board of Trustees of the Brisbane Grammar School* (2020) 5 QR 440 at 461 [28] (Fraser JA; Morrison and Mullins JJA agreeing); *EXV v Uniting Church in Australia Property Trust (NSW)* [2024] NSWSC 490 at [147]–[151] (Weinstein J).

(c) the mischief to be remedied included the impact on settlements of previous legal barriers, in particular the limitations period and the Ellis defence (CAB 84; CA[157]);

(d) the dates chosen by Parliament (which relate to the times when the previous legal barriers were removed) are central to the availability of a remedy under s 27QE (CAB 85; CA[163]);

(e) the impact of the previous legal barriers is likely to be relevant in determining whether it is just and reasonable to set aside a settlement agreement (CAB 85; CA[164]); and

(f) in an ordinary case, one of the two legal barriers would play some part in determining whether it is just and reasonable to set aside a settlement agreement to which the section applies (CAB 85; CA[164]).

29. Open-textured discretions, like that contained in s 27QE, are a familiar feature of the statutory landscape. Common examples are the power to award costs 'in the discretion of the Court';[27] to transfer proceedings 'in the interests of justice';[28] to wind up a company if 'just and equitable';[29] to amend a court document 'at any stage';[30] to extend a limitation period where 'just and reasonable';[31] to reduce damages as the court thinks 'just and equitable' in cases of contributory negligence;[32] or to make orders the court 'considers appropriate' in family law property settlements.[33] Importantly, 'it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise.'[34] Each of the award of costs;[35] transfers of proceedings;[36] winding up of companies;[37]

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27 *Supreme Court Act 1986* (Vic) s 24(1).
28 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) s 5.
29 *Corporations Act 2001* (Cth) s 461(k).
30 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 36.01(1)
31 *Limitation of Actions Act 1958* (Vic) s 23A(2).
32 *Wrongs Act 1958* (Vic) s 26(1)(b).
33 *Family Law Act 1975* (Cth) s 79(1).
34 *Norbis v Norbis* (1986) 161 CLR 513 at 519 (Mason and Deane JJ).
35 *Latoudis v Casey* (1990) 170 CLR 534; *Oshlack v Richmond River Council* (1998) 193 CLR 72.
36 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.
37 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

amendments to pleadings;[38] extensions of time;[39] assessments of contributory negligence;[40] and family law property orders,[41] are the subject of well-known appellate guidance about how the statutory discretion might usually be exercised in mainstream situations. Section 27QE — and its interstate equivalents — stands in no different position.

30. Any statutory discretion 'must be exercised judicially in accordance with established principle'.[42] The orderly administration of justice 'requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious.'[43] The avoidance of 'arbitrary and capricious decision-making' supports 'the giving of guidance by appellate courts, whether in the form of principles or guidelines.'[44] Appellate courts thus 'have a particular responsibility for the emergence of such rules and principles': in the case of statutory discretions, their role in doing so 'is no different in principle from the role of an appellate court in providing guidance as to the exercise of a judicial discretion'.[45]

31. Whatever its form, such guidance is 'inherently provisional', and 'is always able to be revised, in light of further accumulation of judicial experience, in accordance with rules of precedent applicable within the judicial hierarchy.'[46] Such statements of principle aim simply 'to guide, not in any exhaustive manner, the exercise of the court's discretion'.[47] Accordingly, the 'attempt to formulate a principle or a guideline according to which the discretion should be exercised' does not 'constitute a fetter upon the discretion not intended by the legislature.'[48] The point of such judicial guidance is not to impose an extra-statutory constraint on the legislative text.[49] AS[21] therefore

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38 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

39 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

40 *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492.

41 *Norbis v Norbis* (1986) 161 CLR 513.

42 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 96 [65] (McHugh J); 86 [35] (Gaudron and Gummow JJ).

43 *Norbis v Norbis* (1986) 161 CLR 513 at 536 (Brennan J).

44 *Norbis v Norbis* (1986) 161 CLR 513 at 518–19 (Mason and Deane JJ).

45 *Comcare v PVYW* (2013) 250 CLR 246 at 296 [139] (Gageler J).

46 *Comcare v PVYW* (2013) 250 CLR 246 at 296 [140] (Gageler J).

47 *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348 (Wilcox J).

48 *Latoudis v Casey* (1990) 170 CLR 534 at 541 (Mason CJ).

49 Cf *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

misses the mark: there was nothing 'presumptively determinative' about the Court of Appeal's approach; nor did the Court of Appeal's approach lack a 'basis' in the text, context or purpose of the enactment.

32. Here, the Court of Appeal — including Lyons JA — simply identified the common circumstances in which s 27QE might most obviously be enlivened, by reference to its text, context and purpose, and the evident mischief towards which it was directed. At no point did the Court of Appeal determine that the discretionary power in s 27QE(1) *is not enlivened* unless a claimant establishes that a limitation issue or the Ellis defence had a 'material impact' on, or was a 'leading' factor in, the claimant's decision to settle. Nor did the respondent advance such an argument below (CAB 76; CA[119] fn 98).

33. There was no error in the Court of Appeal's approach. To the contrary, the width and plenitude of the statutory phrase 'just and reasonable' was at the forefront of the Court of Appeal's mind; as was the wide range of potentially relevant facts and circumstances (CAB 72–4; CA[103], [111], [112]). Indeed, the very premise of the appellant's argument is that a limitation defence or the Ellis defence *did* have material impact on his decision to settle, and *ought* to have been treated as the centrally relevant factor; but that factual proposition was rejected by the Court of Appeal (CAB 82, 86-87; CA[150], [168]), and was not positively established before the primary judge (CAB 38; SC[124]).

34. Far from failing to undertake a 'balancing in a particular case, of all relevant factors' (AS[25]), the Court of Appeal properly did so. 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, does not indicate any departure from the proper construction of the statute.

35. **Ground 2**. The appellant does not engage with the Court of Appeal's finding that the decision not to bring an economic loss claim was chiefly to be explained by his (understandable) wish — upon independent legal advice — to avoid a clawback of social security benefits (CAB 82, 86; CA[150], [168]). However, that circumstance had nothing to do with any conduct of the respondent, nor with any obstacle to personal injury claims against institutions that had subsequently been removed by Parliament.

36. The parties agreed that the settlement of the appellant's claim for general damages should indeed be set aside (CAB 52, 54; CA[5], [13]; CAB 23; SC[89]), but the claim for economic loss was overlain with:

(a) the particular history of appellant's dealings with Centrelink (CAB 56; CA[21]–[24], [136]–[148]; CAB 11-14; SC[24]–[34]);

(b) the particular advice given to him in that regard by his lawyers (CAB 57-59, 80-81; CA[28]–[36], [138]–[140]; CAB 38; SC[124]);

(c) the limited evidential foundation of his application to set aside the deeds (CAB 79-82, 86-87; CA[130]–[133], [140]–[150], [168]; CAB 38-39; SC[121]–[126]); and

(d) the total absence of any positive finding that past barriers to claims against institutional defendants were material to his decision not to bring a claim for economic loss (CAB 79-80; CA[130]–[133]; cf CAB 38; SC[124]).

37. The appellant's reliance on inference, and his manifestly elaborate gloss on the primary judge's reasons (AS[36]–[40), highlights that there was neither any positive finding of, nor any direct evidence to support, the proposition that he decided not to pursue an economic loss claim because of limitations or *Ellis* defence issues. So much was correctly recognised by the Court of Appeal (CAB 79; CA[130]). Further, the inference the appellant now seeks to draw is not the same as the more limited inference he invited the primary judge to draw (cf CAB 37-38; SC[120]). Neither version of that inference was in fact drawn by the judge, who arrived at no more than the negative 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' (CAB 38; SC[124]).

38. For an inference to be drawn, it must rise above the level of conjecture and be established from the evidence as a matter of probability: a mere possibility, or the existence of conflicting inferences, is not enough.[50] The acceptance or rejection of a party's legal submission says nothing about whether the judge made any positive finding on a question of fact (cf AS[39]). The Court of Appeal was right to conclude 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 (CAB 79–80; CA[132]–[133]).

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[50] *Jones v Dunkel* (1959) 101 CLR 298 at 304–5 (Dixon CJ), 310 (Menzies J), 318–19 (Windeyer J); *Luxton v Vines* (1952) 85 CLR 352 at 359–60 (Dixon, Fullagar and Kitto JJ); *Holloway v McFeeters* (1956) 94 CLR 470 at 480–1 (Williams, Webb and Taylor JJ).

39. The very point of the Court of Appeal's decision was that the evidence showed that the appellant's claim for economic loss stood in a different position, and was influenced by different considerations (most obviously, legal advice and a concern about Centrelink clawback), than his claim for general damages (CAB 82; CA[150]). This was not a case in which the appellant was unaware of the potential for a claim for economic loss to be brought, or that it might be encompassed in the terms of the release.[51] To the contrary, the decision not to press a claim for economic loss was a separate decision made *before* either of the settlement deeds were entered; and was made upon independent legal advice, and for reasons entirely independent of any conduct by the respondent.

10 40. Contrary to AS[41], there was nothing illogical about the Court of Appeal forming an independent judgement about what factors, and in what degree, were material to the decision not to bring a claim for economic loss as a distinct component of the appellant's claims overall. The error in AS[41] 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. To accept that the second decision about *settlement* may have been influenced by limitations issues or the *Ellis* defence, says nothing about whether the first decision about *choice of claims* was affected by any such concerns. To the contrary: the evidence showed that the appellant's choice not to
20 press a claim for economic loss was motivated by entirely different considerations, which did not make it just and reasonable to set aside the deeds insofar as that claim was concerned.

41. In turn, AS[42]–[45] appear to raise an entirely new case — unrelated to any past legal barriers affecting claims against institutional defendants — about the appellant's alleged 'impaired comprehension' at the time of entering the settlement deeds; apparently now raised as an independent basis to set them aside. The authorities discountenancing a new case being run on appeal are well known.[52] The Court of Appeal rightly pointed out that even if one accepted (as it did) that the appellant suffered from comprehension difficulties to some degree (CAB 81–2; CA[146]):

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51 Cf *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112.

52 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *Water Board v Moustakas* (1994) 180 CLR 491; *Coulton v Holcombe* (1986) 162 CLR 1.

(a) the appellant was independently represented throughout (CAB 52, 86-87; CA[3], [168]), and also had the benefit of an independent support person from the Ballarat Centre Against Sexual Assault with him at the 2012 informal settlement conference (CAB 58, 82; CA[32], [147]);

(b) the appellant was not rushed to sign either of the deeds, and had many weeks for reflection and advice (CAB 58, 64, 81–2, 86–7; CA[34], [60](g), [142]–[143], [147], [168]);

(c) the appellant's own lawyers certified that he had been explained, and appeared to them to understand, the purport and effect of the deeds (CAB 59–61, 82, 86–7; CA[42], [49], [146], [168]); and

(d) there was no contemporaneous evidence to substantiate that the appellant's reported state of anxiety and comprehension difficulty ever reached the level of his being mentally incapable of understanding and considering advice given to him in relatively simple terms (CAB 82; CA[147]).

42. Further, as the Court of Appeal observed, the appellant did not adduce any evidence on these issues from any of the lawyers who represented him at the relevant time, nor did he provide any explanation for not adducing such evidence (CA [141]). The absence of such evidence stands in the way of drawing the inference for which the appellant now contends.[53] That the appellant's evidence is said to be 'unchallenged' (AS[40](c), [44]) — intended, apparently, in the sense of not being subject to cross-examination — does not mean that the court is free to downplay or disregard contrary evidence when deciding whether it was satisfied of, or how much weight it considered ought be placed upon, this aspect of his claim.[54]

43. In neither of the respects identified by the appellant did the Court of Appeal depart from the proper scope of its appellate function. Its conclusion that — critically, only insofar as they encompassed a claim for economic loss — it was *not* 'just and reasonable' to set aside the relevant settlement deeds, was correct. If the appellant had been wrongly advised when entering those settlements, then he is not without remedy.[55]

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53 *Jones v Dunkel* (1959) 101 CLR 298.

54 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at 875 [60] (Kiefel CJ, Gageler and Jagot JJ); *Willmot v Queensland* [2024] HCA 42 at [30] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

55 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1.

Part VII – Oral Argument

44. It is estimated that 1 hour will be required for the respondent's oral argument.

Dated 21 November 2024



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ANNEXURE

Pursuant to para 3 of *Practice Direction No 1 of 2019*, the particular constitutional provisions and statutes referred to in the appellant's submissions are as follows.

	Title	Version	Provisions
1.	*Children Legislation Amendment Act 2019* (Vic)	As enacted	ss 31, 32
2.	*Civil Law (Wrongs) Act 2002* (ACT)	Current	s 114K
3.	*Civil Liability Act 2002* (NSW)	Current	s 7D
4.	*Civil Liability Act 1936* (SA)	Current	s 50W
5.	*Corporations Act 2001* (Cth)	Current	s 461(k)
6.	*Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic)	Current	s 5
7.	*Justice Legislation Amendment (Drug Court and Other Matters) Act 2020* (Vic)	As enacted	s 44
8.	*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic)	Current – version 002, at 1 May 2020	s 7
9.	*Limitation Act 1984* (NT)	Current	s 54(5)
10.	*Limitation Act 1974* (Tas)	Current	s 5C(3)
11.	*Limitation Act 2005* (WA)	Current	s 92
12.	*Limitation of Actions Act 1958* (Vic)	Version 109, at 1 July 2021	ss 23A, 27OA, 27P, 27QE
13.	*Limitation of Actions Act 1974* (Qld)	Current	s 48(5A)
14.	*Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic)	As enacted	s 4
15.	*Supreme Court Act 1986* (Vic)	Current	s 24(1)
16.	*Supreme Court (General Civil Procedure) Rules 2015* (Vic)	Current	r 36.01(1)

17.	*Wrongs Act 1958* (Vic)	Current	s 26