SETTING ASIDE A HISTORICAL ABUSE SETTLEMENT

Two recent cases are important for plaintiffs to consider if facing opposition from an institutional defendant to the setting aside of a settlement agreement.

Sections 27QA(2) and 27QD of the *Limitation of Actions Act 1958* (Vic) permit courts to set aside settlement agreements and judgments entered before 1 July 2018 in historical child abuse claims where it is "just and reasonable" to do so. The origin of the sections was a recognition by parliament that prior legal impediments to claims for historical child abuse – including time limits to bring claims[1] and the inability to sue an institutional defendant (because an unincorporated association is not recognised by law as a juridical entity, also known as the "Ellis defence[2] – were unjust and unfair.

Practitioners retained to revisit and overturn historical settlements need to be across and monitor recent case authorities in this continually developing area to give their client the best chance of setting aside the prior settlement.

"Just and reasonable" is not defined in the Act. Whether it is just and reasonable to set aside a settlement will be determined by a court on the particular facts of each case. Applying statutory construction principles, a court will have regard to the legal context in which the provisions were enacted, the purpose and object of the provisions, as well as extrinsic materials such as the Explanatory Memorandum and Second Reading Speech.

The extent to which the plaintiff's decision to settle was influenced by the main prior legal obstacles for plaintiffs, being the operation of a limitation period, the Ellis defence or difficulties establishing institutional liability at the time, are important factors. Victorian courts have set aside deeds where claimants have given evidence that they had believed a limitation period or Ellis defence would be a barrier to their claim, and this belief impacted their decision to settle the case for an amount they would not have otherwise accepted.

The case authorities and extrinsic materials also refer to a range of factors that may be relevant including:

- the specific terms of the settlement agreement, the intention of the parties at the time and the binding nature of the agreement
- whether the plaintiff was legally represented at the time of the earlier settlement, and the extent of any advice prior to entering the settlement on the prospects of success of the claim
- the evidence available to the plaintiff at the time of the earlier settlement
- the bargaining position of the parties at the time
- the conduct of institutional defendants at the time
- the reasonableness of the settlement process
- the amount of compensation obtained and whether it is deemed acceptable by today's standards
- a plaintiff's feelings of guilt and shame, compounded by the burden of having to give evidence and be subject to cross-examination
- the reasons the plaintiff entered into the settlement
- the plaintiff's mental health may also be relevant. For example, in the case of *DZY v Trustees of the Christian Brothers* [2023] VSC 124, the plaintiff gave evidence he experienced significant anxiety at the time of settlement discussions which compromised his ability to comprehend advice
- prejudice to the defendant.

Whichever factors are relevant to a particular case, it will be important that sufficient evidence is before the court so it can consider whether the factors mean it is just and reasonable to set aside the settlement agreement.

Two recent Victorian reported decisions *Pearce v Missionaries of the Sacred Heart* [2022] VSC 697 and *DZY* resulted in different outcomes for the plaintiffs. In *Pearce* the settlement agreement was set aside in part, and in *DZY* the settlement agreement was set aside in full.

In *Pearce*, the Court considered there was insufficient evidence to set aside the settlement agreement in relation to the plaintiff's claim for loss of earnings. This meant the plaintiff could not now claim that part of his loss and damage from the institutional defendant. In *DZY*, the Court distinguished and declined to follow *Pearce* – despite the institutional defendant making submissions that it should.

While the Court has made it clear each matter will be decided on its facts and the evidence before it, the following are important issues for practitioners to consider:

- in *DZY*, the Court commented on the valuable evidence from the plaintiff regarding his perception of the legal barriers at the time, and why this meant he accepted the final offer that was put to him in the earlier settlement
- if the underlying settlement agreement indicated that no claim was made for economic loss the plaintiff should consider what evidence is needed to explain *why* that occurred. This can include evidence from the plaintiff by way of affidavit, and relevant documents from the file of the practitioner involved in the earlier claim against the institutional defendant
- one reason the Court in *DZY* set aside the settlement in full and declined to follow *Pearce* was that there was evidence before the Court which explained why the plaintiff failed to make an economic loss claim as part of his earlier settlement. The Court observed it was not possible to find that the limitations and Ellis defences had no material influence on the plaintiff's decision not to pursue his economic loss claim.

DZY and *Pearce* are important cases for plaintiffs to consider if facing opposition from an institutional defendant to the setting aside of a settlement agreement in full. They highlight the broad range of relevant factors courts will consider and the potential different outcomes that can occur based on the evidence presented. It is expected there will be a substantial volume of rulings emerging in this developing area which practitioners will need to closely monitor. ■

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1. Effective 1 July 2015, the limitation period for bringing historical abuse claims was abolished by the *Limitation of Actions Amendment (Child Abuse) Act* 2015 (Vic).
2. Effective 1 July 2018, the Ellis defence was removed by *The Legal Identify of Defendants (Organisational Child Abuse) Act 2018* (Vic).