By Hassan Ehsan

Setting aside settlement deeds

Historical child sexual abuse claims

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) made a number of recommendations following the completion of its investigations.

Following the release of the Final Report of the Royal Commission, states and territories have made amendments to their respective Limitation Acts by removing limitation periods concerning child sexual abuse claims. The recommendations made by the Royal Commission regarding limitation periods were as follows:

'Limitation Periods

85. State and territory governments should introduce legislation to remove any limitation period that

applies to a claim for damages bought by a person where the claim is founded on the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child.

86. State and territory governments should ensure that the limitation period is removed with retrospective effect regardless of whether or not a claim was subject to a limitation period in the past.
87. State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period.
88. State and territory governments should implement these recommendations to remove limitation periods as soon as possible, even if that requires that they be implemented before our recommendations in relation to the duty of institutions and identifying a proper defendant are implemented.'[1]

Prior to the removal of the limitation periods, it was difficult for survivors to bring litigated claims against the institutions where they were sexually abused as children. Many survivors did, however, commence both litigated and unlitigated claims against the institutions and settled those claims on a commercial or compromised basis noting that their claims were statute barred and would ultimately be unsuccessful (one reason among many).

The amendments made to the various Limitation Acts have varied from state to state. Some states have simply removed the limitation periods while others have gone a step further and legislated to allow survivors to make applications to a court to have previously entered into settlement agreements set aside. Currently, this option is available in Western Australia and Queensland.

Western Australia passed the *Civil Liability Legislation Amendment (Sexual Abuse Actions) Act 2018* which amended the *Limitation Act 2005* (WA Limitation Act), to include the following:

'Section 6A – Special provisions for child abuse actions: no limitation period

…

(2) Despite anything in this or any other Act, no limitation period applies in respect of a child sexual abuse action.'

'Section 92 – Previously settled causes of action

(1) This section applies in relation to a proposed action on a previously settled cause of action and to the agreement effecting the settlement (the settlement agreement).

(2) Application may be made to a court that would have jurisdiction to deal with the action, but for the settlement agreement, for leave to commence the action.

(3) The court may, if satisfied that it is just and reasonable to do so –

(a) Grant leave to commence the action, subject to conditions; and

(b) To the extent necessary for that, set aside the settlement agreement and any judgment giving effect to the settlement.'

On 13 November 2018, the District Court of Western Australia heard an application made pursuant to s92 of the

WA Limitation Act to have a settlement agreement set aside which would have otherwise prevented the applicant from commencing proceedings against the respondent.

In granting leave, the court needs to be satisfied that in setting aside the previously entered into settlement agreement, it would be just and reasonable to do so. No legislative description of 'just and reasonable' has been provided.

THE JAS APPLICATION

The applicant (JAS) alleged that he was sexually abused at the Castledare Junior Orphanage and at the St Vincent's Orphanage Clontarf (orphanages) as a minor. The orphanages were run by the respondent to the application (the Christian Brothers), a religious order. The application was not opposed by the respondent.

Once over the age of 18, JAS commenced a compensation claim against the respondent. Over the course of a number of years, three separate payments were made to the applicant by the respondent. The last payment was made in 2015. On 4 March 2015, the applicant signed a settlement agreement which encompassed a number of clauses, including the following:

> '4. **No liability and bar to further claims**
> 4.1 The Releasor acknowledges and agrees that:
> 4.1.1 he will make no further claim for damages, expenses, treatment costs or compensation;
> 4.1.2 nothing in this Deed constitutes an admission of liability by the Body Corporate or the Institute in respect of the claims;
> 4.1.3 this Deed may be pleaded by the Body Corporate and the Institute as a bar to any claim, action, cause of action, charge or any other proceeding commenced against them or any other person;
> arising out of or in connection with the acts, facts or circumstances constituted by the claims.'[2]

On 13 November 2018, pursuant to s92 of the WA Limitation Act, the applicant made an application seeking:

1. Leave to commence an action for damages for child sexual abuse suffered while he resided at the orphanages; and
2. The Deed of Release entered into in March 2015 be set aside.

The application was not opposed, and the applicant was successful in obtaining the orders that he was seeking. The Chief Judge of the District Court Sleight found the following:

> 'In this matter I am satisfied that it is just and reasonable to grant leave for the applicant to commence an action against the respondent for the following reasons:
> 1. As a general rule there is no statutory limitation period for such claim.
> 2. At the time the applicant entered into the settlement agreement of the 4 March 2015 his claim under existing law was statute barred. This meant that his bargaining position was severely curtailed and he was left with no real choice but to accept *whatever amount was offered* by the Christian Brothers without it being necessarily a reflection of his proper entitlement if he was successful in an action against the Christian Brothers. [emphasis added]
> 3. The extent of the entitlement of the applicant if he was successful on such a cause of action has *never* been decided on its merits. [emphasis added]
> 4. If leave is given then the court dealing with the action may, if it is satisfied that is just and reasonable to do so, take into account any amount paid under a settlement agreement to the extent that it relates to the child sexual abuse the subject of the cause of action …
> 5. Granting leave to commence an action is consistent with the broad intention of the amending Act to remove legal barriers to claimants commencing an action and having their claims decided on their merits.'[3]

The above judgment is a significant one.

Undoubtedly, there are and I suspect have been, a large number of claimants who would have settled their claims with institutions and had no real choice *but* to accept whatever amount was offered by the institution. Accordingly, their matters would never have been decided on their merits.

Many, no doubt, would have settled their claims prior to the amendments being made to the respective limitation periods.

On one view, it is now open to survivors to consider making applications to have any previously entered into settlement agreements set aside, particularly in circumstances where they are of the view that they had no real option *but* to accept the offer that was made to them given their understanding that at the time any claim brought by them would have been statute-barred.

As significant as the above judgment is, it isn't an automatic guarantee that a court will allow for the setting aside of a previously entered into settlement agreement. What seems to be the only other reported judgment in this sphere comes from Queensland.

THE TRG APPLICATION

Section 11A of the *Limitations of Actions Act 1974* (Queensland Limitations Act) now provides for the following:

> '(1) An action for damages relating to the personal injury of a person resulting from the sexual abuse of the person when the person was a child—
> (a) may be brought at any time; and
> (b) is not subject to a limitation period under an Act or law or rule of law.'

Section 48 of the Queensland Limitations Act was amended to also include the following:

> '(5A) An action may be brought on a previously settled right of action if a court, by order on application, sets aside the agreement effecting the settlement on the grounds it is just and reasonable to do so.'

The TRG application was brought in response to the above. The test for a court in Queensland is also whether it is 'just and reasonable' to set aside a previously entered into settlement agreement.

TRG attended the Brisbane Boys Grammar School (the school) between 1986 and 1989. During his attendance at the school, and specifically in the years 1987 and 1988, he was sexually abused by the school's counsellor, Mr Kevin Lynch.

In 1997, Mr Lynch was charged with indecently assaulting students. Mr Lynch subsequently committed suicide.

In 2001, TRG commenced a litigated claim against the school seeking compensation for the impact that the sexual abuse he suffered at the hands of Mr Lynch had on his life. In its defence, the school pleaded, among other aspects, that the claim was statute-barred and filed applications seeking that parts of the statement of claim be struck out. In response, the applicant sought an extension of any applicable limitation periods.

The applications were not heard, as it was agreed between the parties that it would be better to engage in a formal mediation process. The matter settled in 2002 shortly after the mediation for a total sum of $59,000 ($47,000 plus $12,000 for party/party costs).

At this time, TRG signed a settlement agreement.

In June 2018, TRG filed an application seeking to set aside the settlement agreement that he signed in 2002. The question for the Court was whether it was 'just and reasonable' to do so for the purposes of s48. Factors considered by the Court in determining whether it was just and reasonable to do so included, *inter alia*:

- limitation periods;
- the quantum of the claim;
- the reasonableness of the mediation process; and
- the reasonableness of the settlement figure.

Unfortunately for the applicant, Davis J found that it was *not* just and reasonable to do so. In reaching his conclusions, Davis J found that:

> 'There is nothing to suggest that the settlement figure of $47,000 was not a fair and reasonable reflection of the applicant's case as it appeared in 2002. It was the product of an arm's length bargain facilitated through a fair mediation process where the applicant was very ably represented.'[4]

The Court went on:

> 'The applicant's claim was a relatively modest one (in his own barristers' advice) which faced difficulties and where there were pressures on both sides. A fair negotiation process settled on a figure of $47,000 and I find that was a *reasonable settlement*. For the reasons explained earlier the limitation issue had no material impact upon the quantum of the settlement [emphasis added].'[5]

In concluding, the Court found:

> 'The settlement figure of $47,000.00 was a fair settlement reflecting the factual and legal strengths and weaknesses of the parties' respective cases properly assessed at that time by them. The discount of the applicant's claim was *not materially contributed* to by any consideration of limitation defences.
>
> In the circumstances as I have found them, and having directed myself to the purposes for which the discretion is to be exercised as I have identified, I find that it's not just and reasonable to set aside the settlement [emphasis added].'[6]

CONCLUSION

Quite clearly, the above decisions resulted in very different outcomes for the two applicants. The TRG application demonstrates that it is open to a court to find that it isn't just and reasonable to set aside a settlement agreement that was previously entered into. In its judgment, the Court in effect confirmed that the applicant would not have received a better outcome even if his application had been successful and his matter had been heard by a judicial officer.

That said, it is open to survivors to seek advice in relation to any litigated or unlitigated claims that they may have settled prior to the findings as made by the Royal Commission. As the TRG application shows, a survivor will need to demonstrate that, among other things, one major reason for having previously accepted an offer of settlement was the fear of losing at trial knowing that their claim was statute-barred. Any applicant will need to demonstrate that the reasoning for accepting such an offer was materially impacted by this fact. The Court in the TRG application of course found that the limitation period had no material impact on the acceptance of such an offer.

Notwithstanding the above, the two reported judgments do open a further door for survivors to have their claims decided on their merits and, if applicable, have previously entered into settlement agreements set aside. Survivors are encouraged to seek legal advice on their specific situations. The changes that now allow for such applications to be made are a further victory, albeit a small one, for survivors of historical child sexual abuse. ■

Notes: **1** Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations (2017)*, 88–9. **2** *JAS v The Trustees of the Christian Brothers* [2018] WADC 169, [12]. **3** Ibid, [27]. See also, B Madden, *Revisiting Settlements in child abuse litigation: Just and reasonable*, Carroll & O'Dea Lawyers, <https://www.codea.com.au/publication/revisiting-settlements-in-child-abuse-litigation-just-and-reasonable/>. **4** *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157 *(TRG)*, [245]. See also, T Johnston, *Queensland Child Sexual Abuse Victim Fails in Bid to Set Aside Prior Settlement and Reopen Claim*, Bennett & Phillip Lawyers, <https://www.codea.com.au/publication/revisiting-settlements-in-child-abuse-litigation-just-and-reasonable/>. **5** *TRG*, [246]. **6** *TRG*, [279]–[280].

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