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Case Alert

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# Re-opening application for institutional child sexual abuse case dismissed

***TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157**

26 JUNE 2019

**AT A GLANCE**

- The Supreme Court of Queensland has dismissed an application under s48(5A) of the *Limitation of Actions Act 1974* (Qld) (the Act) to set aside a Deed of Settlement regarding institutional child sexual abuse, on the basis that it was not "just and reasonable" to do so.
- In reaching its decision, the Court considered the meaning and scope of the words "just and reasonable" and relevant changes to the law since the settlement was reached.
- This judgment will have wide implications for institutions and insurers, as it has articulated the various factors that will be relevant to the exercise of the Court's discretion.

## THE CASE BACKGROUND

The Applicant attended Brisbane Grammar School as a student between 1986 and 1989. Kevin Lynch was employed at the school as a counsellor and sexually assaulted the Applicant on numerous occasions in 1986 and 1987 (when the Applicant was in Grades 9 and 10, aged 13 and 14 years).

In 2001 the Applicant sued the body corporate of the school for damages for personal injuries, including psychiatric and psychological damage, which he had suffered as a result of the abuse.

In 2002 the proceedings were resolved by a Deed of Settlement, by which the school agreed to pay the Applicant $47,000 plus costs.  The settlement process also included an apology session with the school, as well as an offer for ongoing counselling as needed.

In 2015 the Applicant provided a statement to the Royal Commission and gave evidence in "Case Study 34" about Lynch's sexual assaults upon him. The Royal Commission accepted his evidence.

## APPLICATION TO RE-OPEN

Under 2016 amendments to the Act, the Applicant sought an order to set aside his 2002 settlement to commence fresh proceedings against the school. He relied on sections:

- 11A of the Act that states:

  *"No limitation period for actions for child sexual abuse*

  > *(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."*

- 48(5A) of the Act which provides that:

  "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 Applicant submitted primarily that it was critical for the Court to determine whether the 2002 settlement had been influenced by the limitation defence that applied at that time, and that if it had, whether the prior settlement should be set aside.

> His Honour determined it was not "just and reasonable" to set aside the 2002 settlement.

## THE JUDGMENT

In all the circumstances, His Honour determined that it was not "just and reasonable" to set aside the 2002 settlement.

His Honour Davis J noted that in deciding whether it was "just and reasonable" to set aside the 2002 settlement, it was necessary to strike a balance between the interests of both parties. He considered that the term "just and reasonable" was of wide import and that the following factors, amongst other things, were relevant to the exercise of the discretion:

- The prospects of success of the Applicant in any fresh proceedings – in this case the Applicant's 2001 claim faced a limitation hurdle, as well as difficulties in proving the liability of the school based on the law as it was at that time, noting the decision of *Rich v State of Queensland & Ors* [2001] QCA 295. In fresh proceedings, the Applicant would not face the limitation problem and, if he was accepted in his evidence that he was sexually assaulted by Lynch, would have little difficulty proving the school's vicarious liability for Lynch's conduct, pursuant to *Prince Alfred College Inc v ADC* (2016) 258 CLR 134.
- Whether the mediation process was reasonable – the Applicant conceded that the mediation was fair and that the school acted in an "exemplary fashion" in the conduct of negotiations. His Honour found that the school paid for and facilitated an "elaborate process" for the settling of claims, such as the Applicants, with no intimidation or bullying regarding the limitation issue or otherwise, and with an experienced mediator and senior legal counsel in attendance for all parties.
- Whether the 2002 settlement was reasonable – His Honour found that the settlement figure of $47,000 plus costs was a fair compromise of the Applicant's case as it was in 2002, being a figure just below that recommended by his counsel and which was likely reached considering the risk of him not establishing liability against the school. Further, that there was no evidence to establish that the settlement was reached as a result of pressure from the threat of a limitation defence.
- The impact to the school of delay, costs and loss of insurance – the school would be prejudiced in the defence of fresh proceedings as, whilst investigations into the alleged abuse would have been difficult in 2001, they would now be "likely impossible". Further, the school would have incurred substantial costs thrown away in the defence of the 2001 proceedings and, in the event that fresh proceedings were now commenced, may face the risk or a loss of indemnity by insurers.

## THE IMPACT ON INSURERS

This decision bodes well for institutions and their insurers facing re-opening applications in the wake of the Royal Commission. While each case will be determined on its facts, this decision establishes that a Court will be unlikely to set aside a prior settlement if it was the outcome of fair negotiations between the parties.

Courts considering whether original negotiations were fair are likely to weigh up whether both parties had appropriate legal representation and advice originally, the Applicant's prospects of success in any new proceedings, the reasonableness of the original mediation process and settlement, and the impact of a new case on the defending institution. The use of a limitation defence, and any potential material discount applied, will also be likely to be a significant factor in the assessment of fairness.

# Need to know more?

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