

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND GLEESON JJ

DZY (A PSEUDONYM)

APPELLANT

AND

TRUSTEES OF THE CHRISTIAN BROTHERS

RESPONDENT

DZY (a pseudonym) v Trustees of the Christian Brothers
[2025] HCA 16

Date of Hearing: 13 February 2025

Date of Judgment: 9 April 2025

M81/2024

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

G J Boas with J P O'Connor and E H R Kelly for the appellant (instructed by Judy Courtin Legal)

S D Hay KC with J A G McComish and C T Morshead for the respondent (instructed by Carroll & O'Dea Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

DZY (a pseudonym) v Trustees of the Christian Brothers

Statutes – Construction – Where s 27QE of *Limitation of Actions Act 1958* (Vic) provides court can set aside settlement agreement for personal injury resulting from child abuse if satisfied "just and reasonable" to do so – Where appellant entered into settlement agreements for personal injury allegedly resulting from child abuse – Where settlement agreements renounced claim for economic loss – Where reasons for settlement included *Ellis* defence and limitation period – Whether s 27QE requires *Ellis* defence or limitation period to have materially influenced decision to settle in order to be "just and reasonable" to set aside settlement agreement – Whether evidence allowed court to be satisfied "just and reasonable" to set aside renouncement of economic loss claim.

Words and phrases – "Centrelink benefits", "Centrelink repayment", "child abuse", "correctness standard", "decision to settle", "economic loss", "*Ellis* defence", "general damages", "just and reasonable", "legal barriers", "limitation defence", "limitation period", "material factors", "materially influenced", "non-economic loss", "personal injury", "personal injury resulting from child abuse", "positive finding", "prerequisites to the exercise of the power", "quasi-prerequisites to the exercise of the power", "set aside", "set aside a settlement agreement", "settlement agreement", "settlement deed".

Limitation of Actions Act 1958 (Vic), ss 27QD, 27QE.

1 GAGELER CJ, GORDON, EDELMAN AND GLEESON JJ. In December 2012, the appellant, DZY, entered into a settlement deed ("the 2012 deed") with the respondent, the Trustees of the Christian Brothers ("the Trustees"). Under the 2012 deed, DZY agreed to release the Trustees from liability for a claim that DZY was sexually assaulted in the 1960s while he was a student at a school operated by the Congregation of Christian Brothers ("the Congregation"). In 2015, DZY and the Trustees entered into a further deed ("the 2015 deed"). DZY agreed, under both deeds, not to bring any further claim for damages arising from the alleged sexual assaults. Both deeds recorded that DZY did not allege that he suffered any economic loss by reason of the alleged sexual assaults.

2 At the time DZY entered into the 2012 deed, any claim for damages resulting from the alleged sexual assaults was likely to face two significant legal obstacles: (1) a defence under the *Limitation of Actions Act 1958* (Vic) ("the limitation defence");¹ and (2) difficulties associated with suing an unincorporated association,² such as the Congregation ("the *Ellis* defence"). At the time of the parties' entry into the 2015 deed, the limitation defence had been abolished, but any claim by DZY would have continued to face the *Ellis* defence.

3 By legislative amendment, the Victorian Parliament removed both the limitation defence and the *Ellis* defence. From 1 July 2015, amendments to the *Limitation of Actions Act* removed any limitation period for an action for personal injury resulting from physical or sexual abuse of a minor, and any psychological abuse that arises from that abuse;³ and, from 1 July 2018, ss 7 and 8 of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) removed the *Ellis* defence.

4 Further, from 18 September 2019, with the insertion of s 27OA and ss 27QA to 27QF into the *Limitation of Actions Act*,⁴ an action for personal injury resulting from physical or sexual abuse of a minor, and any psychological abuse

1 Which required such claims to be brought, in the case of a child victim, within six years: *Limitation of Actions Act*, ss 5 and 23.

2 These difficulties were identified in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

3 See *Limitation of Actions Act*, ss 27O and 27P, which were inserted by the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic), s 4.

4 These sections were inserted by the *Children Legislation Amendment Act 2019* (Vic), ss 31 and 32.

Gageler CJ
Gordon J
Edelman J
Gleeson J

2.

that arises from that abuse, may be brought on a "previously settled cause of action"⁵ and a plaintiff may apply to the court to set aside a "settlement agreement"⁶ of such a cause of action if it is "just and reasonable" to do so.⁷

5 In July 2021, DZY commenced proceedings against the Trustees in the Supreme Court of Victoria seeking damages, including both general damages for non-economic loss and damages for economic loss, for personal injuries resulting from the alleged sexual assaults. DZY applied under s 27QD of the *Limitation of Actions Act* to have both the 2012 deed and the 2015 deed set aside on the basis that it was "just and reasonable" to do so. The Trustees did not resist DZY's application in relation to general damages, but did resist DZY's application in relation to economic loss.

6 At trial, the primary judge ordered that both deeds be set aside in their entirety on the basis that it was "just and reasonable" to do so. The Trustees appealed that part of the decision that set aside the economic loss components of the deeds. The Court of Appeal of the Supreme Court of Victoria allowed the appeal and set aside only the non-economic loss components of the deeds. DZY appeals that decision to this Court. The Court of Appeal held, and no submission to the contrary was made in this Court, that the standard to apply in the application of what is "just and reasonable" was that of the correctness of the decision of the primary judge.

7 There were two issues in this Court: first, the proper construction of s 27QE of the *Limitation of Actions Act*, and specifically whether it requires the limitation defence or the *Ellis* defence to have materially influenced a claimant's decision to settle in order for it to be "just and reasonable" to set aside the settlement; and, second, whether the Court of Appeal, in concluding that the primary judge erred in finding that it was "just and reasonable" to set aside the economic loss components of the deeds, misapplied the correctness standard.

8 For the reasons that follow, the appeal should be dismissed. Although the plurality of the Court of Appeal erred in its construction of s 27QE of the *Limitation of Actions Act*, the evidence would not have allowed the Court to be

5 *Limitation of Actions Act*, ss 27O(1)(b) and 27QA(2); see also s 27OA definition of "previously settled cause of action".

6 *Limitation of Actions Act*, s 27QD; see also s 27OA definition of "settlement agreement".

7 *Limitation of Actions Act*, s 27QE.

3.

satisfied that it was just and reasonable to set aside either deed insofar as it released the Trustees from an economic loss claim.

Legislative framework

9 Division 5 of Pt IIA of the *Limitation of Actions Act* concerns actions for personal injury resulting from child abuse. Division 5 applies to an action that "(a) is in respect of a cause of action to which [Pt IIA] applies or extends; and (b) is founded on the death or personal injury of a person resulting from – (i) an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and (ii) psychological abuse (if any) that arises out of that act or omission".⁸ Since 18 September 2019, it has included a mechanism to set aside a "settlement agreement" of a "previously settled cause of action"⁹ which was a child abuse action settlement made before 1 July 2018.¹⁰

10 Section 27QE is at the heart of this appeal. Section 27QE gives a court the power to make an order setting aside a settlement agreement of a previously settled cause of action, in whole or in part, if the court is satisfied that it is "just and reasonable" to do so. The term "just and reasonable" in s 27QE is not defined. The construction of "just and reasonable" in s 27QE is the subject of ground 1. Section 27QE, headed "Court's powers – previously settled causes of action", provides:

- "(1) On an application under section 27QD or otherwise in a proceeding on an action referred to in section 27QA(2), 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) may make any other order that it considers appropriate in the circumstances.

8 *Limitation of Actions Act*, s 27O(1).

9 *Limitation of Actions Act*, ss 27QD and 27QE.

10 *Limitation of Actions Act*, s 27OA definitions of "previously settled cause of action" and "settlement agreement".

Gageler CJ
 Gordon J
 Edelman J
 Gleeson J

4.

- (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) when awarding damages in relation to the action, may take into account any consideration (whether monetary or non-monetary) paid, payable or given or to be given under –
 - (i) a settlement agreement set aside under this section; or
 - (ii) any other agreement related to the settlement that has been set aside under this section; and
 - (b) when awarding costs in relation to the action, may take into account any amounts paid or payable as costs under –
 - (i) a settlement agreement set aside under this section; or
 - (ii) any other agreement related to the settlement that has been set aside under this section." (emphasis added)

11 Although "just and reasonable" in s 27QE is not defined, some other terms are defined in s 27OA for the purpose of Div 5. Relevantly, "previously barred cause of action" is defined to mean a cause of action to which Div 5 applies for which any applicable limitation period expired before 1 July 2015; and "previously settled cause of action" is defined to mean a cause of action to which Div 5 applies that was settled and given effect by a settlement agreement before 1 July 2018. As is apparent, "previously barred cause of action" is defined by reference to the limitation period, whereas "previously settled cause of action" is not. And in relation to the dates by which those terms are defined: 1 July 2015 corresponds with the date that the limitation period was abolished for child abuse actions and 1 July 2018 is the date that the *Ellis* defence was abolished.

12 Section 27QA sets the foundation for s 27QE by allowing an action to be brought on a previously settled cause of action. Section 27QB then provides that an application may be made to the court for setting aside a previous judgment. Section 27QC provides that the court may make an order setting aside the previous judgment, whether wholly or in part, "if satisfied that it is just and reasonable to do so". The *Limitation of Actions Act* does not specify matters that the court shall have regard to when determining whether it is just and reasonable to set aside a previous judgment. So, for example, s 27QC does not limit the matters to be considered to those set out in any reasons given for the judgment that is to be set aside.

5.

13 The text of s 27QE concerns the court's power to set aside previously settled causes of action. Like s 27QC, s 27QE does not specify the matters to which the court shall have regard in determining whether it is "just and reasonable" to set aside a previously settled cause of action.

Decisions below

Primary judge

14 As the primary judge recorded, although the party seeking to set aside a settlement agreement, here the 2012 deed and the 2015 deed, bears the burden of demonstrating it is just and reasonable to do so, compelling reasons are not required.¹¹ And before the primary judge, the parties agreed that the following factors were potentially relevant on a re-opening application: the terms of the deed; whether the parties were legally represented at the time of settlement; the circumstances of the making of the deed (including any medical evidence and whether the settlement process was reasonable or whether there was undue pressure to settle); any prejudice to the respondent due to the lapse of time; and any disadvantage to the respondent (including financial disadvantage) as a result of the previous deed being set aside.

15 As noted, the Trustees did not oppose DZY's application under s 27QE to set aside the deeds insofar as they related to general damages but did oppose the application in relation to economic loss. The primary judge recorded the Trustees' concession that the 2012 deed may have been affected by considerations of one or both of the limitation defence and the *Ellis* defence. The primary judge, however, rejected the Trustees' submission that, where the motivation of a plaintiff is not directly connected with the limitation defence, the *Ellis* defence or the quality of consent, the Court could not be satisfied it is just and reasonable to set aside a deed.

16 Accepting that DZY was legally represented throughout the settlement process, there was no evidence of pressure, and he had legal advice explaining the effects of the deeds, the primary judge set aside the deeds in their entirety (and did not confine the re-opening to non-economic loss). The primary judge gave a number of reasons for reaching that conclusion. The primary judge's reasons included that, although DZY had been advised against pursuing an economic loss claim in order to avoid the possibility of Centrelink demanding repayment of benefits, it was "not possible to find that the limitations and the [*Ellis*] defence

11 See *WCB v Roman Catholic Trusts Corporation for the Diocese of Sale* [No 2] [2020] VSC 639 at [145].

Gageler CJ
Gordon J
Edelman J
Gleeson J

6.

issues had no material influence on the plaintiff's decision not to pursue his economic loss claim".

Court of Appeal

17 The Court of Appeal of the Supreme Court of Victoria (Beach, Macaulay and Lyons JJA) allowed the Trustees' appeal.

18 Beach and Macaulay JJA observed that a necessary condition for applying s 27QE was that the settlement occurred when the limitation defence or the *Ellis* defence was capable of unfavourably influencing the settlement, and that it was that influence that led to the mischief – a potentially unfair settlement – which the reforms were designed to remedy. It was that observation which was said to reinforce "the centrality of the actual influence of one or both of those two barriers in the consideration of whether it is just and reasonable to set aside a settlement agreement". Their Honours then said, "[i]f a finding was made that one or other of those legal barriers had a *material impact* on the claimant's decision to settle ... a cogent ground would exist to conclude that it was just and reasonable to set the settlement aside" (emphasis added). And "[i]f no finding was made that either legal barrier had such an impact, it is doubtful that any cogent ground would exist to conclude it was just and reasonable to set the settlement aside".

19 Other than the actual influence of those two hurdles, Beach and Macaulay JJA recognised that there could be "additional factors that might legitimately be taken into account", including, for example, "the respondent's conduct in the settlement process; unequal bargaining power; any feelings of guilt or shame (compounded or not by the burden of giving evidence and being subject to cross-examination); and ... prejudice to the respondent". However, Beach and Macaulay JJA again reiterated that consideration of "the actual influence of the two legal obstacles is *central* to the determination of whether it is just and reasonable to set aside a settlement" (emphasis added) and that "apart from the influence of those obstacles, other factors should be seen as supportive rather than leading factors in determining whether it is just and reasonable to set aside a settlement".

20 Applying that approach, Beach and Macaulay JJA held that the primary judge erred in finding that it was just and reasonable to set aside the deeds in their entirety and, deciding the matter for themselves, held that it was just and reasonable to set aside the deeds only insofar as they related to general damages. Their Honours held that the primary judge erred by taking into account an irrelevant consideration, namely that it was not possible to find that the limitation defence and the *Ellis* defence had no material influence on DZY's decision not to pursue an economic loss claim.

21 Writing separately, Lyons JA regarded Beach and Macaulay JJA's approach to the exercise of the Court's power under s 27QE(1) of the *Limitation of Actions Act* – that the actual influence of the two legal obstacles was *central* to the determination of whether it is just and reasonable to set aside a settlement – as an impermissible fetter on the exercise of the power and held that the exercise of the power under s 27QE is not limited to circumstances where the claimant's decision to enter the settlement agreement had been materially impacted by one or both of the legal obstacles. Rather, the exercise of the power in s 27QE depends upon all relevant circumstances. Lyons JA, however, concurred with the factual analysis of the plurality.

Ground 1 – Proper construction of s 27QE

22 The issue may be simply stated – is the operation of s 27QE of the *Limitation of Actions Act* limited to circumstances where the limitation defence or the *Ellis* defence materially influenced the claimant's decision to settle? The answer is "no".

23 The principles of statutory construction are well established. The language which has actually been used in the text, in light of its context and purpose, is the surest guide to legislative intention.¹² One reason that the context and purpose of a provision are important to its proper construction is that an object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute.¹³ Or, as was explained in *Project Blue Sky Inc v Australian Broadcasting Authority*, statutory construction requires deciding what the legal meaning of the relevant provision is "by reference to the language of the instrument viewed as a whole".¹⁴ Further, the purpose of

12 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47], quoted in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388 [23].

13 *Cross* (2012) 248 CLR 378 at 389 [24]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

14 (1998) 194 CLR 355 at 381 [69]. See also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320; *Cross* (2012) 248 CLR 378 at 389 [24].

the legislation is not to be derived from any a priori assumption about the desired reach or operation of the relevant provisions.¹⁵

24 There is nothing in the text of s 27QE which limits the exercise of the court's power to circumstances where the claimant's decision to enter the settlement agreement had been materially impacted by either the limitation defence or the *Ellis* defence. The text of s 27QE simply does not prescribe the matters to which the court should have regard in determining whether to set aside a settlement agreement.¹⁶

25 What the text of s 27QE does require, in order for the court to set aside a settlement agreement, is that the court be satisfied that it is "just and reasonable" to do so. "[J]ust and reasonable" are words of wide import. There is no basis in the purpose or context of s 27QE to read the words "just and reasonable" as subject to some limitation not found in the text of the provision.¹⁷

26 A useful description of the court's task in considering whether to set aside a settlement agreement under s 27QE was provided by Fraser JA in *TRG v Board of Trustees of the Brisbane Grammar School*.¹⁸ Although that decision concerned a different provision – namely, s 48(5A) of the *Limitation of Actions Act 1974* (Qld) – that provision is materially identical to s 27QE. As Fraser JA said:¹⁹

"[t]he use of the expression 'just and reasonable' to identify the only ground for such an order, the fact that the power is conferred upon courts, and the absence of any express identification of the material factors or the relative weight or significance to be attributed to any of them, compel the conclusion that the legislative purpose encompasses account being taken of the interests of both parties to the settlement in deciding whether it is just and reasonable to set aside the settlement agreement, the relative significance or weight to be given to the material factors in that exercise

15 *Cross* (2012) 248 CLR 378 at 390 [26].

16 See *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB* (2020) 62 VR 234 at 270 [121].

17 See *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421. See also *Weinstock v Beck* (2013) 251 CLR 396 at 419-420 [55]; *Deputy Commissioner of Taxation v Huang* (2021) 273 CLR 429 at 445 [23].

18 (2020) 5 QR 440.

19 (2020) 5 QR 440 at 461 [28].

9.

depending upon a judicial assessment of the particular circumstances of each case".

27 That construction of s 27QE is reinforced by the relevant extrinsic materials. It may be accepted that s 27QE seeks to address the existence of potentially unfair settlement agreements between victims of child abuse and defendant organisations as a result of historic, and unjust, legal barriers. However, the extrinsic materials reinforce that the breadth of the words "just and reasonable" in s 27QE allow a court to set aside settlements in response to a variety of injustices. So, for example, in relation to s 27QE, the Explanatory Memorandum to the *Children Legislation Amendment Bill 2019* (Vic) said:²⁰

"It is in the court's discretion to determine what is just and reasonable according to the circumstances of each case, allowing the court to apply broad principles and take account of any relevant factors. This may include, for example, the relative strengths of the parties' bargaining positions, the conduct of the parties and the amount of the settlement."

28 Similarly, in the Second Reading Speech, the Minister said:²¹

"In determining what is just and reasonable a court can take into account a number of considerations, informed by the Royal Commission. ... Where survivors faced significant disadvantage in pursuing compensation due to legal barriers such as the statute of limitations, the Ellis defence, or the deficiency of the law regarding the duty of care of organisations, settlements entered into should be set aside in the interests of justice, to allow victims to obtain compensation which is deemed adequate by today's standards.

...

It is not necessary that the existence of the limitation period be the predominant reason as to why the agreement was entered into. There may be a number of reasons that a plaintiff entered into such an agreement, including but not limited to unequal bargaining power, barriers to identifying a proper defendant, feelings of guilt and shame

20 Victoria, Legislative Assembly, *Children Legislation Amendment Bill 2019*, Explanatory Memorandum at 17.

21 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 August 2019 at 2695-2696.

compounded by the burden of giving evidence and being subject to cross-examination, or the behaviour of the relevant institution."

29 Consistent with that construction of s 27QE, as Lyons JA observed, the exercise of the court's power is not fettered such that no order is to be made unless there is a finding that either the limitation defence or the *Ellis* defence had a "material impact" on the claimant's decision to settle their claim or was a leading factor in the decision. Given the conclusion reached by Lyons JA, and his Honour's understanding of the reasons of Beach and Macaulay JJA from which Beach and Macaulay JJA did not expressly demur, the Trustees' submission that Beach and Macaulay JJA did not treat the limitation defence or the *Ellis* defence as necessary prerequisites for the exercise of the power under s 27QE but, rather, that their Honours simply provided guidance as to considerations that were central, but not necessary, to the exercise of that power, should not be accepted. Beach and Macaulay JJA repeatedly made statements to the effect that: "[i]f no finding was made that either legal barrier had such an impact, it is doubtful that any cogent ground would exist to conclude it was just and reasonable to set the settlement aside".²² It is apparent that their Honours incorrectly considered the legal barriers were, if not prerequisites to the exercise of the power under s 27QE, then quasi-prerequisites, such that it is doubtful that s 27QE could apply absent either the limitation defence or the *Ellis* defence.

30 That is not to suggest that the previous legal barriers are irrelevant in determining whether it is just and reasonable to set aside a settlement agreement in whole or in part under s 27QE. One or both of the legal barriers will ordinarily play some part in determining whether it is just and reasonable to set aside a settlement agreement under s 27QE.

31 Ground 1 should be upheld.

Ground 2 – DZY's application to set aside deeds' release of economic loss claim

32 DZY submitted that Beach and Macaulay JJA erred in their conclusion that there was no positive finding by the primary judge that DZY's decision not to pursue an economic loss claim was materially influenced by the existence and potential impact of the limitation defence and the *Ellis* defence. Consequently, DZY argued, Beach and Macaulay JJA erred in concluding that the chief explanation for DZY's decision was a completely unrelated issue.

22 See [18]-[19] above.

33 In oral submissions, counsel for DZY identified the following passages from the decision of the primary judge: (1) the statement that "[g]iven this confluence of circumstances it is not possible to isolate [DZY's] motivation for instructing his solicitor not to pursue his economic loss case solely to the possibility of a Centrelink repayment"; and (2) the statement that "it is not possible to find that the limitations and the Ellis defence issues had no material influence on [DZY's] decision not to pursue his economic loss claim".

34 Neither of those passages is inconsistent with the statement that there was no "positive finding" that DZY's decision was "materially influenced" by the limitation defence and the *Ellis* defence. The primary judge's finding was, in effect, that it was not possible to exclude the limitation defence and the *Ellis* defence as material factors. However, that is not the same as a finding that they *were* material factors.

35 The evaluative judgment undertaken by the Court of Appeal identified, correctly, that the evidence did not allow the Court to be satisfied it was just and reasonable to set aside either deed insofar as it released the Trustees from an economic loss claim. There was no dispute about the relevant factual circumstances and the following circumstances were identified by both parties during the course of argument.

36 First, there was no direct evidence from DZY that, at the time he signed each of the deeds, he decided to renounce his economic loss claim due to the limitation defence or the *Ellis* defence. Rather, the evidence suggested that he chose to renounce his economic loss claim because of concerns about a potential "clawback" of Centrelink benefits.

37 Second, although DZY was affected by alcohol consumption and anxiety at relevant times in 2012 and 2015: DZY was legally represented and he was provided legal advice in relation to both deeds; he was not rushed into signing either deed, but rather had several weeks to think about them before signing; DZY's legal representatives certified that DZY appeared to understand the purport and effect of each deed; and DZY's statement that he felt like he had "no choice but to accept the offer because the legal barriers were too great" was not related to any conduct of the Congregation or to DZY's decision to renounce economic loss – rather, that statement appears to relate to DZY's acceptance of the settlement sum for his general damages claim.

Gageler *CJ*
Gordon *J*
Edelman *J*
Gleeson *J*

12.

38 Ground 2 should be dismissed.

Orders

39 For those reasons, the appeal is dismissed. There will be no order as to costs.

40 STEWARD J. This Court should not strain to find appellate error. It should not voraciously construe the reasons of appellate courts. I gratefully agree with the reasons of Gageler CJ, Gordon, Edelman and Gleeson JJ, save in one respect. My reading of the reasons of Beach and Macaulay JJA does not suggest that their Honours had decided that there were any necessary "prerequisites" or "quasi-prerequisites" to the exercise of the power conferred by s 27QE of the *Limitation of Actions Act 1958* (Vic).²³ I otherwise agree with the plurality of this Court that this appeal should be dismissed.

41 Gageler CJ, Gordon, Edelman and Gleeson JJ are of the view that Beach and Macaulay JJA had decided that there are "prerequisites" or "quasi-prerequisites" to the exercise of the power conferred by s 27QE to set aside settlements. Those "prerequisites" are said to be the need for one of the historical barriers – respectively called "the limitation defence" and "the *Ellis* defence" – to have been a material reason for settling, relevantly, a claim for child sex abuse. But, with great respect, that is not what Beach and Macaulay JJA decided.

42 Instead, Beach and Macaulay JJA gave proper guidance as to what a trial judge should expect to look for when exercising such an exceptionally unconfined power as that conferred by s 27QE. That power turns upon a judge's satisfaction as to what is "just and reasonable". Plainly, that is not a reference to a judge's subjective beliefs about what is just and reasonable. What is just and reasonable must have objective content; it must have metes and bounds. Beach and Macaulay JJA, without in any way limiting the power conferred by s 27QE, descriptively indicated how that power is likely to be exercised in the usual case.

43 The dispositive reasoning of Beach and Macaulay JJA may be found at [108] to [113] of their Honours' reasons. But it is useful to start with the first sentence of [111] and with what their Honours considered to be "important":

"It is important to 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."

44 With profound respect, that statement cannot stand with any conclusion that Beach and Macaulay JJA intended to lay down necessary prerequisites to the exercise of the power conferred by s 27QE.

45 At [108] and [109], Beach and Macaulay JJA accurately identify the mischief which s 27QE is directed at overcoming, being the injustices of the limitation defence and the *Ellis* defence. No one disputes that. Unremarkably, but

23 *Trustees of the Christian Brothers v DZY (a pseudonym)* [2024] VSCA 73 at [1]-[153] per Beach and Macaulay JJA.

accurately, their Honours observed that the mischief which the provision addresses is reinforced by "the centrality of the actual influence of one or both of those two barriers in the consideration of whether it is just and reasonable to set aside a settlement agreement".²⁴

46 But this "centrality" observation did not establish any necessary prerequisite to the setting aside of a settlement agreement. The language which follows is merely a helpful description of what is to be expected in exercising the power in question. Thus, [110] commences with the words "[a]t least in an ordinary case, one would expect" that one of the legal barriers "would play some part" in explaining why a claimant had entered into a settlement agreement. No prerequisite is thereby set up by their Honours' reasons. Unsurprisingly, [110] then states that if one of those legal barriers had contributed to a claimant's reasons for settling, this would be a "cogent ground" for the exercise of the s 27QE power. Absent such a contributing reason, Beach and Macaulay JJA reasoned that it would be "doubtful" that a settlement agreement would be set aside. Again, this is the language of what one might expect in the "ordinary case".

47 What then immediately follows at [111] is the statement that Parliament had nonetheless 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". To put this beyond doubt, that statement is followed by the first sentence of [112]:

"We do not deny that, other than the actual influence of those legal obstacles, there could be additional factors that might legitimately be taken into account."

48 Those additional factors were described at [112] as potentially including prospects of success; the respondent's conduct in the settlement process; unequal bargaining power; feelings of guilt or shame; and prejudice to the respondent. Beach and Macaulay JJA otherwise observed at [113] that consideration of the actual influence of the two legal obstacles "is central" to determining whether to set aside a settlement agreement. And so it should be, given the mischief against which s 27QE is directed. But again, that is not the same thing as mandating a prerequisite to the positive exercise of the power. It is just a description of what a trial judge should seek to discern in the usual case.

49 This appeal should be dismissed.

24 *Trustees of the Christian Brothers v DZY (a pseudonym)* [2024] VSCA 73 at [109] per Beach and Macaulay JJA.

