SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0107

ROMAN CATHOLIC TRUSTS CORPORATION FOR THE DIOCESE OF SALE — Applicant

v

WCB — Respondent

JUDGES:	BEACH, KAYE and OSBORN JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	8 December 2020
DATE OF JUDGMENT:	18 December 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 328
JUDGMENT APPEALED FROM:	[2020] VSC 639 (Keogh J)

CONTRACT – Settlement agreement – Application to set aside settlement agreement – Whether just and reasonable to set aside settlement agreement – Historical sex abuse – Settlement of statute barred proceeding – Retrospective removal of barriers to actions for damages for personal injury resulting from child abuse – Abolition of limitation period for actions for personal injury resulting from child abuse – *Limitation of Actions Act 1958*, ss 27P, 27QA, 27QD and 27QE.

STATUTORY INTERPRETATION – Text – Context – Legislative purpose – Application to set aside previous settlement of proceeding involving historical sex abuse – Application made pursuant to s 27QD of the *Limitation of Actions Act 1958* – Context in which ss 27QA, 27QD and 27QE were enacted – Text of statutory provisions – Context of statutory provisions – *Limitation of Actions (Child Abuse) Act 2015*, s 4 – *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*, ss 5 and 7 – *Children Legislation Amendment Act 2019*, s 32 – *Limitation of Actions Act 1958*, Div 2 of Part IIA.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr S Hay SC with Mr D B Bongiorno	Williams Winter
For the Respondent	Mr J R C Gordon	Rightside Legal

BEACH JA
KAYE JA
OSBORN JA:

1 The Warragul Catholic Church ('the church') is within the Catholic Diocese of Sale ('the Diocese'). In 1977, the plaintiff who was then 11 years old, served as an altar boy at the church. In that year, Daniel Hourigan ('Hourigan') commenced work at the church as a priest. The plaintiff alleges that, in the period 1977-1980, he was repeatedly sexually abused by Hourigan. The abuse alleged ('the abuse') is of a most horrific kind. Prior to his death in 1995, Hourigan admitted the abuse.

2 In this proceeding, the plaintiff claims damages from the defendant alleging that he has suffered 'psychiatric injury including but not limited to severe post-traumatic stress disorder and anxiety' as a result of the abuse.

3 In 1996, the plaintiff issued a proceeding in the County Court against Bishop Coffey, as Bishop of the Diocese, in relation to the abuse. That proceeding was settled for the sum of $32,500 plus costs. On 19 November 1996, the plaintiff and Bishop Coffey entered into a Deed of Release ('the Deed' or 'the settlement agreement'). The plaintiff concedes that terms of the Deed bar his present claim against the defendant.

4 The issue between the parties (both in the Court below and in this Court) is whether the Deed should be set aside pursuant to ss 27QD and 27QE of the *Limitation of Actions Act 1958*. A preliminary trial of that question was heard by a judge sitting in the Trial Division over two days in June 2020. On 30 September 2020, his Honour published reasons for judgment in which he answered the question in the affirmative.[1] On 12 October 2020, in conformity with his reasons, the judge made an order setting aside the Deed pursuant to ss 27QD and 27QE of the *Limitation of Actions Act*.

5 The defendant now seeks leave to appeal. It advances three proposed

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1 *WCB v Roman Catholic Trusts Corporation for the Diocese of Sale* [2020] VSC 639 ('Reasons').

grounds of appeal. The grounds advanced concern the proper construction of ss 27QD and 27QE, and the proper application of those provisions to this case.

Procedural and legislative background

6 In 1996, there were two significant impediments to the successful prosecution of a claim for damages in respect of the abuse. First, under the provisions of the *Limitation of Actions Act*, as then in force, the plaintiff's claim was almost certainly statute barred — the limitation period having expired in 1989, six years after the plaintiff turned 18 years of age.[2] Secondly, with the possible exception of Bishop Fox,[3] there was no realistically viable defendant against whom the plaintiff could make a claim. In particular, it was understood proceedings could not be brought against unincorporated church entities (the 'Ellis defence').[4]

7 Legislation enacted in 2015 and 2018, however, significantly removed restraints with respect to these two issues, for claims of the kind made by the plaintiff.

8 First, on 1 July 2015, s 4 of the *Limitation of Actions Amendment (Child Abuse) Act 2015* ('the Child Abuse Act') came into force, inserting Division 5 into Part IIA of the *Limitation of Actions Act*. Broadly speaking, that division applies in respect of causes of action founded upon the personal injury of a person resulting from physical abuse or sexual abuse committed when the person was a child.[5] Division 5 contains s 27P which abolished the limitation period for causes of action to which Division 5 applied — whether the act or omission alleged to give rise to the personal injury occurred before or after the commencement of Division 5. Thus, from 1 July

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2 See s 5(1A), as it was prior to its amendment by s 3(3) of the *Limitation of Actions (Amendment) Act 2002*.

3 Who did not die until 1997 (albeit that those acting for the plaintiff appear to have assumed at relevant points in time that he died before the 1996 proceeding was issued, perhaps explaining why the 1996 proceeding was brought against Bishop Coffey).

4 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565 ('*Ellis*').

5 See ss 27O and 27B of the *Limitation of Actions Act*.

2015, there has been no limitation period in respect of claims for damages for personal injury caused by sexual or physical abuse perpetrated against a claimant when he or she was a child.

9 Secondly, on 1 July 2018, the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* ('the Legal Identity Act') came into force. Section 1 of the Legal Identity Act provided that its main purpose was:

> to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-government organisations which use trusts to conduct their activities.

10 Section 7 of the Legal Identity Act provided for the nomination or appointment of an entity, often a trust associated with the relevant non-government organisation ('NGO'), to act as a proper defendant to a claim on behalf of the NGO, and to incur any liability arising from the claim on behalf of the NGO. The Diocese is an NGO within the meaning of s 5 of the Legal Identity Act. It nominated the defendant to act as the proper defendant to the plaintiff's claim on its behalf pursuant to s 7 of the Legal Identity Act.[6]

11 Notwithstanding the potential improvements in the plaintiff's position brought about by the enacting of the Child Abuse Act and the Legal Identity Act, as at 1 July 2018, any viable claim the plaintiff may otherwise have had in respect of the abuse had been compromised by the terms of the Deed. There was then a third legislative enactment that potentially dealt with this issue.

12 On 18 September 2019, s 32 of the *Children Legislation Amendment Act 2019* ('the Children Legislation Act') came into force, inserting ss 27QA to 27QF into Division 5 of Part IIA of the *Limitation of Actions Act*. Relevantly, s 27QA(2) permitted an action of the present kind to be brought 'on a previously settled cause of action'. Section 27QD permitted an application to be made to a court to set aside a settlement agreement which effected the settlement of the previously settled cause of

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6 See *WCB v Roman Catholic Trusts Corporation for the Diocese of Sale* [2020] VSC 71.

action. Specifically, s 27QD(2) provided:

> In a proceeding to which this section applies, application may be made to the court for the settlement agreement and any judgment or order giving effect to the settlement of the previously settled cause of action to be set aside.

13 There is no issue between the parties that the present proceeding is a proceeding to which s 27QD applies. Section 27QE(1) then sets out the court's powers in relation to the setting aside of settlement agreements, as follows:

> 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.

Background facts

14 The defendant contends that a number of critical witnesses are no longer available to give evidence and that important documents relevant to the plaintiff's claim are now missing. It submits that as a result it has suffered prejudice to such an extent that the plaintiff's application to set aside the 1996 settlement must be refused. In the light of those submissions, it is necessary to set out the background facts of this case in some detail. The following is largely taken from the primary judge's reasons.[7]

15 The plaintiff was born in Warragul in 1965. His family were devout Catholics and, as we have already observed, he was an altar boy at the church.

16 Hourigan was born in Traralgon on 25 June 1930. After completing secondary school Hourigan qualified as a teacher, then worked for a decade as a missionary and teacher in Papua New Guinea. He returned to Australia in about 1960 and

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7 Reasons [15]–[36].

worked as a high school teacher, before travelling to South America in 1969, where he was an envoy of a Catholic organisation called the Legion of Mary.

17 In the 1970s, Bishop Fox was the Bishop of Sale. On 3 July 1972, when he was in his early forties, Hourigan wrote to Bishop Fox asking that he be accepted to study for the priesthood. In the letter Hourigan set out what he said were two 'flies in the ointment'. The first related to an issue with Hourigan's back, and is of little moment. The second was a disclosure (referred to by the judge as 'the disclosure') that on three separate occasions, occurring at two separate boarding schools in Papua New Guinea at which he was working, boys in his care who, he said, he had occasion to punish for misbehaviour, responded by complaining to a priest that he had treated them harshly and that he was a homosexual. A short time after the second and third complaints, Hourigan left the second boarding school and returned to Australia.

18 Bishop Fox responded by letter dated 10 August 1972. The letter made no reference to the disclosure. The letter said:

> I will give favourable consideration to your desire to be a priest.
>
> You should obtain a recent letter from the local authorities, say, from the parish priest. A letter from the local Bishop concerning your work and character etc. over the time you have spent in Sth. America would be helpful.
>
> I know that you come from a very good family. This, of course, accounts for much.
>
> Please send me as soon as possible the letters I referred to above. In the meantime I will look for a place at the seminary in Kensington.
>
> PS You should also obtain a recent certificate of health.

19 A letter from Bishop Fox to Hourigan dated 29 September 1972 stated in part:

> I have received your letter of September 18th, 1972 and the attached medical certificate. I also received the letter of recommendation from Bishop Tubino.
>
> I have applied for a place for you in 1973 at St Paul's National Seminary, Kensington, New South Wales.

On the same day, Bishop Fox wrote to the rector of St Paul's National Seminary ('St Paul's Seminary') nominating Hourigan as a student for the priesthood for the Diocese, stating in part:

> I have received recommendations from South America and from local priests who knew him in former years, I have also received a recent doctor's certificate testifying to his good health.
>
> Mr Hourigan comes from an excellent family in Traralgon, in the Sale Diocese.

The rector replied on 4 October 1972 providing an application form for entrance to the seminary and remarking that Hourigan seemed to be a good prospect.

20 Hourigan wrote to Bishop Fox on 15 December 1972, attaching a completed application form to St Paul's Seminary dated 12 December 1972 which appears to have been signed by him, and a document entitled 'Autobiography Daniel Dominic Hourigan'.

21 Bishop Fox wrote to the Rector of St Paul's Seminary on 24 January 1973, forwarding documents in connection with Hourigan's application to enter the seminary. Bishop Fox stated he was obtaining a copy of Hourigan's parents' marriage certificate, and that Hourigan had not yet returned to Australia, but should be back any day.

22 Hourigan studied at St Paul's Seminary between 1973 and 1975. In periodic reports and correspondence sent to Bishop Fox the seminary rector referred to Hourigan as being a very suitable candidate for priesthood who was doing well, and who was unanimously recommended by seminary staff. There is no mention in any document produced from the seminary file of the disclosure to Bishop Fox, and no indication Hourigan was required to, or did, undergo psychological examination. Hourigan successfully completed his studies, and was ordained to the diaconate in 1975, and to the priesthood in 1976. On 16 August 1975, Bishop Fox wrote to the rector of St Paul's Seminary as follows:

> My student for the diocese of Sale at St Paul's, Mr Dan Hourigan, is due to be ordained to the Diaconate this year.
>
> It is the custom of the diocese of Sale that seminarians be ordained to the Diaconate in their home parishes and the Priesthood in the Cathedral. Consequently I wish to arrange for Mr Hourigan to receive the Diaconate at Traralgon.

On 17 August 1976, Bishop Fox wrote to the rector again:

> I thank you for your letter of August 3 1976 recommending Reverend Daniel Dominic Hourigan, deacon, for ordination to the priesthood.
>
> I am glad to know that he has fulfilled all the requirements of canon law for promotion to the order of priest.

23 For completeness, we would observe that none of the documents which we have described above made any reference to the disclosure.

24 On the evidence, the primary judge thought it 'most likely Hourigan was ordained by Bishop Fox at Sale'.[8] After Hourigan was ordained, Bishop Fox appointed him to work as a curate in Maffra for about 12 months, then as assistant priest at the Warragul church from August 1977. At the time the parish priest was Monsignor Daly,[9] who was ill and died in March 1980. Shortly after Hourigan was transferred from Warragul to the Leongatha parish. Hourigan worked in other parishes in the Diocese until the late 1980s when he was appointed chaplain to a local school. He was placed on sick leave in about 1990, and retired in 1993 but continued to carry out some pastoral duties until 1994 when Bishop Coffey, who was then Bishop of Sale, suspended him. Hourigan died on 18 September 1995.

The abuse

25 The abuse occurred at the Warragul presbytery, in Hourigan's car and on occasions when the plaintiff accompanied Hourigan on trips to places such Lakes Entrance, Stawell, Queensland, Ballarat and Orbost. Adopting the primary judge's description of the abuse, it included multiple instances of Hourigan showing the plaintiff pornographic material, kissing, fondling, masturbation, Hourigan forcing the plaintiff to suck his penis, and Hourigan penetrating the plaintiff's anus with his penis.[10]

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8 Ibid [25].

9 Referred to, interchangeably, in the material as Monsignor Daly and Father Daly.

10 Reasons [26].

Disclosure of the abuse, investigations and actions taken

26 The plaintiff first reported the abuse to his family in about 1986. One of his brothers also complained about Hourigan's conduct. His parents told his uncle, who was a priest in Melbourne, who in turn reported the matter to Father Waters.

27 Father Waters informed Bishop D'Arcy, then Bishop of Sale, who delegated responsibility to him to investigate, and advised him to not inform anyone else of the matter. Father Waters then travelled to Gippsland to interview the plaintiff, his brother and Hourigan.

28 In December 1986, Father Waters wrote to Hourigan referring to the conversation between them and confirming arrangements for Hourigan to attend with psychiatrist Dr Eric Seal, stating:

> I have provided Dr Seal with the outline of your problem, and leave it to you to provide him with the detail.

On the same day, Father Waters wrote to Bishop D'Arcy, stating in part:

> I am sure that if the police had been alerted by either lad, criminal charges would have been laid.
>
> …
>
> I told [Hourigan] what had been alleged, that I was acting as your delegate and that no priest of the Sale diocese had any knowledge of the allegations. I then invited his reaction. At first he said that the activities could be viewed from different points of view … I then said that the activity, as described by the lads to me, was clearly criminal, and that while they could be blatant liars or hallucinating, their parents and I believed them to be both truthful and objective, and that the seeking of legal advice and police action had been discussed.
>
> Father then calmly and humbly admitted he was guilty and needed help. I said I would arrange for him to see Dr Eric Seal, psychiatrist, that I would report to you and that I would guarantee the [redacted] that Father would not visit them or make any contact …

Father Waters also identified that another priest, Monsignor Connors had confidentially 'warned' Bishop D'Arcy, earlier in 1986, that accusations of sexual misconduct had been made against Hourigan.

29 Hourigan was seen by Dr Seal and, later, psychologist Mr Conway. In April

1987, Mr Conway wrote to Dr Seal, stating in part:

> Thank you for referring this priest from the Sale Diocese to me, who has been involved in a series of rather distressing incidents of homosexual involvement with two boys of the same family in Gippsland. This occurred some 10 years ago and the matter has just come to light before the boys' parents.
>
> …
>
> [Hourigan] was a late vocation from St Paul's, and was ordained in 1976. Thus he escaped the overview by me at that time, since I screened most of the candidates for the province at that period. It is, of course, not altogether certain that I would have elicited the signs even then, although it is probable that I could have pointed to some warning indications had he seen me. But then, there was always the possibility that his vocation would have been lost, and he seems a very good and worthy priest apart from this unfortunate lapse early in his priestly career. Father Hourigan had been a lay missionary teacher in Papua-New Guinea for 11 years before entering for priestly studies, and I note that he comes from a relatively solid Catholic family of the old school …

30 On 1 May 1987, the plaintiff's parents wrote to Bishop D'Arcy, as the Bishop of Sale. This was a detailed letter in which they said that Hourigan's 'baneful abuse of our son … is becoming increasingly unbearable'. The letter referred to their 'first official move in January 1986' and the 'horrific ordeal and the sadistic and maliciously diabolical acts of sexual abuse' perpetrated by Hourigan on the plaintiff.

31 In April 1992, Bishop Coffey, then Bishop of Sale, completed a Catholic Church Insurances Limited ('CCI') Special Issues Incident Report in relation to Hourigan, in which he wrote:

> Fr. Hourigan admitted to being guilty of acts described by the two boys as clearly criminal. The sexual acts started when Father claimed to teach the boys the facts of life. This occurred sometime in 1977 & continued for two years.

As the judge observed, the plaintiff was one of the two boys to whom Bishop Coffey referred in this report.[11]

32 In April 1995, when he was interviewed in relation to allegations of sexual abuse by Hourigan of another victim, Bishop Coffey referred to a documented report of sexual abuse of the plaintiff, made relevant documents available to the

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11 Ibid [31].

interviewer, and said Hourigan admitted the allegations to Father Waters. It is evident that Bishop Coffey was aware at the time of complaints by other alleged victims of Hourigan.

33 The defendant's search for documents, relevant to the issues in this proceeding, disclosed an unsigned, heavily redacted, statement said to have been made by Hourigan in the presence of his solicitor on 10 July 1995. The statement contains denials of any sexual activity on the part of Hourigan with a person or persons whose names have been redacted. Notwithstanding that Mr Conway wrote to Dr Seal in 1987 referring to 'rather distressing incidents of homosexual involvement with two boys of the same family in Gippsland', the statement contains an assertion that its author 'made no admission of sexual activity with [redacted] or with [GIC] to Eric Seal or to Ronald Conway'. That said, there is a concession in the statement as to 'some touching', as follows:

> I believe that in March 1988, Father Ian Waters visited me at [redacted] and he told me that [GHY] and [GHZ] had made certain allegations that I had touched them up. I said to Father Waters that [redacted] in horseplay in which we were indulging in, there may have been some touching. I did not admit to Father Ian Waters that I had been engaged in sexual activity with [redacted].

34 In 1995, the plaintiff was approached by an investigating police officer, Detective Sergeant Nankervis. On 14 September 1995, the plaintiff made a statement setting out the abuse.

35 On 15 September 1995, Hourigan was charged with numerous offences which included indecent assaults, rape, sexual penetration of a person 10–16 years of age and gross indecency, in respect of a number of victims, one of whom was the plaintiff. Hourigan died on 18 September 1995, three days after he was charged.

36 The following year, Bishop Coffey commissioned former Magistrate Mr Alan Spencer to make a case study of how two matters of sexual abuse within the Diocese had been handled, and how well or how badly the needs of victims had been met. One of the two matters Mr Spencer was asked to study was the sexual abuse by

Hourigan. Mr Spencer prepared two reports in October 1996.

37 The evidence tendered before the primary judge disclosed that Bishop Fox died in 1997, and Bishop Coffey died in 2014. In argument, we were informed that Bishop D'Arcy died in 2005. The defendant did not, however, contend that Bishop D'Arcy's death occasioned it any relevant prejudice.

The County Court proceeding

38 In June 1996, the plaintiff commenced a proceeding in the County Court against Bishop Coffey in respect of the abuse. In his statement of claim, the plaintiff alleged that the abuse occurred while Hourigan was engaged in his work as a parish priest within the Diocese of Sale under the supervision of Bishop Coffey. The plaintiff alleged an injury to his anus and its surrounding structures, severe post-traumatic stress disorder and severe shock. His injuries were alleged to have occurred as a result of the negligence of Bishop Coffey and his servants and agents. The particulars of negligence alleged included:

> (a) failing to make any or any proper assessment of Hourigan's fitness to work as a parish priest;
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> (b) failing to make any or any proper assessment of Hourigan's fitness to work with children in his parish;
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> …
>
> (d) failing to make any or any proper assessment of the likelihood of Hourigan seeking sexual gratification through contact with boys in his parish;
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> …
>
> (n) allowing Hourigan to work in circumstances where he could sexually assault the plaintiff;
>
> …
>
> (p) failing to warn the plaintiff, his parents and guardians, not to allow the plaintiff to be left alone with Hourigan;

39 In August 1996, Bishop Coffey filed a defence in the County Court proceeding. In the defence, Bishop Coffey:

- admitted that between 1977 and 1980 Hourigan worked in the Diocese as a priest at Warragul;
- admitted that since 30 June 1989, he (Bishop Coffey) had been the Bishop of Sale for the Roman Catholic Church;
- did not admit the abuse;
- denied that the abuse occurred while Hourigan was engaged in his work as a parish priest within the Diocese under his supervision;
- denied that any injuries suffered by the plaintiff (which injuries were themselves not admitted) were caused by his negligence or the negligence of his servants and agents; and
- contended that the plaintiff's claim was statute barred by reason of s 5 of the *Limitations of Actions Act*.

40 As we have already said, the County Court proceeding was settled, later in 1996, for the sum of $32,500 plus costs. In his affidavit in support of his application to set aside the settlement agreement, the plaintiff described the circumstances in which the settlement was reached as follows:

> After the case had been going for a while I went to Melbourne and met my barrister who was named 'Mr Misso'. As I recall he told me that I had a hard case but the church wanted to settle and he was going to try and get as much money as he could. I was eventually offered $32,000 to settle. I was not pleased with the result but as I understood it my case was hard and the next step was court.

The current proceeding

41 The current proceeding was commenced by the plaintiff in December 2018. In his statement of claim,[12] the plaintiff alleges that:

- the defendant is sued pursuant to s 7 of the Legal Identity Act as the entity nominated by the Diocese and, pursuant to s 7 of that

[12] The current version of which is an amended statement of claim dated 26 February 2020.

Act, 'can incur any liability on behalf of [the Diocese]';

- between 1968 and 1981, Bishop Fox was the bishop of, and the head of, and a servant or agent of the Diocese;
- on 3 July 1972, in a letter to Bishop Fox, Hourigan made the disclosure (described in the statement of claim as 'the admissions');
- notwithstanding the disclosure, the Diocese accepted Hourigan's application to become a priest;
- Hourigan studied to become a priest, and was ordained in August 1976;
- between 27 August 1977 and 16 February 1980, Hourigan worked as a priest at the church, was a servant or agent of the Diocese, and was under the supervision, direction and control of it;
- Hourigan committed the abuse;
- Hourigan and the Diocese owed the plaintiff, as an altar boy in the Diocese, a duty to take reasonable care 'so as to ensure that the plaintiff was not injured or exposed to unnecessary risk of injury, including injury as a result of sexual abuse';
- further or alternatively, the Diocese owed a duty to the plaintiff 'to provide him with appropriate support, care and counselling to assist in [his] recovery from the abuse';
- the Diocese breached its duties of care to the plaintiff and was negligent;
- Hourigan breached his duty of care to the plaintiff by committing the abuse;
- further or alternatively, the abuse constituted a battery or a

series of batteries by Hourigan intentionally and or recklessly causing injury to the plaintiff;

- the Diocese 'assigned to Hourigan a position of power and authority in relation to the plaintiff'; alternatively, provided Hourigan with the ability and opportunity to achieve intimacy with the plaintiff;
- Hourigan took advantage of the position of power and authority and/or the ability and opportunity to achieve intimacy to carry out the abuse;
- the abuse occurred in the course or scope of Hourigan's employment or engagement as a priest, and the Diocese is vicariously liable for the abuse; and
- as a result of the Diocese's breach of duty and/or Hourigan's breach of duty and/or the batteries committed by Hourigan, the plaintiff has suffered injury, loss and damage.

42 In his statement of claim, the plaintiff has particularised his allegations of negligence as follows:

> (i) Despite knowing or ought to have known that Hourigan was, because of [the disclosure], a risk to altar boys and other boys under his care, accepting Hourigan's application to become a priest;
>
> (ii) Failing to properly investigate [the disclosure] and Hourigan generally before ordaining Hourigan as a priest and/or permitting him to work with children;
>
> (iii) Failing to have Hourigan psychiatrically assessed before ordaining him as a priest and placing him at the Warragul Church where he had unsupervised access to children;
>
> (iv) Despite knowing or ought to have known that Hourigan was, because of [the disclosure], a risk to altar boys and other boys under his care, placing him in a position of control and power over altar boys as a priest at the Warragul Church;
>
> (v) Failing to supervise Hourigan appropriately;
>
> (vi) Providing Hourigan with access to the Plaintiff alone in the Warragul

Church presbytery whilst Hourigan was in the course of performing his duties as a priest;

(vii) Giving to Hourigan the authority and ability to take the Plaintiff away unsupervised and therefore the opportunity to achieve intimacy with the Plaintiff, exercise power over him and carry out the abuse unseen on multiple occasions;

(viii) Failing to detect and failing to have any system in place for detecting sexual abuse by priests at the Warragul Church;

(ix) Failing to implement policies or procedures for:

(A) requiring priests and/or altar boys to report known or suspected sexual abuse;

(B) preventing and stopping sexual abuse of minors by priests.

(x) Putting Hourigan in a position of authority, trust and intimacy with the Plaintiff;

(xi) Failing to direct and take steps to monitor and enforce that Hourigan and other priests at the Warragul Church not be alone with children in the Presbytery or on trips away.

43 By its defence, the defendant:

- admits that the plaintiff was an altar boy at the church between 1977 and 1980;
- admits that the Diocese nominated the defendant to act as the proper defendant to the plaintiff's claim on the Diocese's behalf pursuant to s 7 of the Legal Identity Act;
- admits that the defendant is taken to be the defendant in the plaintiff's claim on the Diocese's behalf for all purposes, and incurs any liability arising from the plaintiff's claim on the Diocese's behalf as if the Diocese had been incorporated and capable of being sued and found liable for child abuse;
- admits that between 19 November 1967 and 16 October 1980, Bishop Fox was the bishop of the Diocese;
- does not admit that Hourigan made the disclosure (referred to in the pleadings, as we have said, as the admission);

- admits that Hourigan's application to become a priest was accepted, that Hourigan was ordained in August 1976, and that he worked at the church between August 1977 and January 1980;
- does not admit the abuse;
- contends that any duty of care owed by the Diocese did not require the Diocese to 'prevent intentional criminal conduct in the nature of sexual abuse or otherwise';
- denies that the Diocese is vicariously liable for any abuse committed by Hourigan;
- denies that the plaintiff suffered injury, loss and damage as the result of the Diocese's breach of duty and/or Hourigan's breach of duty and/or the alleged batteries; and
- pleads that the Deed is a complete bar to the present proceeding.

Parties' submissions at first instance

Plaintiff's submissions

44 The plaintiff submitted that the evidence showed that he had been subjected to 'incredibly traumatic episodes of child sexual abuse by his parish priest'. A significant amount of evidence corroborated his claim, notwithstanding that the perpetrator of the abuse (Hourigan) was deceased.

45 In relation to the settlement, the plaintiff contended that this was entered into 'in circumstances where the *Limitations of Actions Act* defence was pleaded and there existed great difficulty (or impossibility) in suing a Catholic Church entity'.

46 The plaintiff submitted that ss 27QA–27QF were 'part of an omnibus piece of legislation' (being the Children Legislation Act). In submitting that the relevant provisions should be 'interpreted widely', the plaintiff relied upon what was said in

the Second Reading Speech made by the Minister for Child Protection, Minister for Disability, Aging and Carers, the Hon Luke Donnellan, in relation to the Children Legislation Act, as follows:

> In determining what is just and reasonable a court can take into account a number of considerations, informed by the Royal Commission. Many survivors of child abuse were not able to obtain justice even with independent legal representation, because of the barriers to civil litigation which existed at the time and the conduct of institutions at the time to deny responsibility for abuse and exploit legal loopholes. As a result, many survivors accepted inadequate compensation and entered into deeds of release. Community expectations and understanding today recognise the lifelong impact of child abuse and the key responsibility of institutions in protecting children from abuse. 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 compounded by the burden of giving evidence and being subject to cross-examination, or the behaviour of the relevant institution.[13]

47 In support of his submissions, the plaintiff referred to a decision of the Western Australian district court, *JAS v Trustees, Christian Brothers*.[14] *JAS* was a case where a settlement agreement had been set aside and the Court then had power, if it was 'just and reasonable to do so', to grant leave for a proceeding for damages to be commenced. The plaintiff relied upon *JAS* as authority for the proposition that the power to grant leave in circumstances where it was 'just and reasonable to do so' was a broad power.[15] Additionally, the plaintiff relied upon *JAS* as authority for the proposition that the granting of leave to commence an action that had previously been settled, without a hearing on the merits, was:

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13 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 August 2019, 2695–6.

14 (2018) 96 SR(WA) 77; [2018] WADC 169 ('*JAS*').

15 Ibid 83 [19].

> consistent with the broad intention of [the relevant Western Australian amending Act] to remove legal barriers to claimants commencing an action and having their claims decided on the merits.[16]

48 In relation to a first instance decision of the Queensland Supreme Court, *TRG v The Board of Trustees of the Brisbane Grammar School*,[17] the plaintiff submitted that the court in that case 'adopted a narrow approach to assessing the just and reasonable test for setting aside a previous deed'. It was submitted, however, that the Queensland Parliamentary Debates provided a different context for the relevant statutory provision and that the facts in *TRG* were different, providing a basis for distinguishing that case from the present case.

49 In submitting that it was just and reasonable to set aside the Deed, the plaintiff relied upon the following matters:

(1) The 1996 proceeding was statute barred. The ability of the plaintiff to make a successful extension of time application under s 23A of the *Limitation of Actions Act* was compromised by the fact that Hourigan and Bishop Fox were dead at that time.[18]

(2) The plaintiff's legal rights were, 'in effect, non-existent due to his inability to effectively sue the Catholic Church at that time'.

(3) The plaintiff's entitlement to compensation has never been determined on its merits (a matter relevant to the application on the authority of *JAS*).

(4) The Court has the power to take into account the amount paid in 1996 in the event that the plaintiff was found to be entitled to further compensation (see s 27QE(2) of the *Limitation of Actions Act*).

(5) Setting aside the Deed would be 'consistent with the broad intention of [the

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16 Ibid 85 [27].

17 [2019] QSC 157 ('*TRG – First Instance*').

18 In his written submissions dated 4 February 2020, filed prior to the trial of the preliminary question, the plaintiff asserted that Bishop Fox's death prior to the 1996 proceeding was an impediment to a successful s 23A application. However, as we have already noted, in that regard, the plaintiff's representatives appeared to have been acting under a misapprehension, as Bishop Fox did not die until 1997.

relevant statutory provisions] to remove legal barriers facing abuse survivors and allowing them to have their claims decided on their merits'.

(6) There was no significant prejudice to the defendant, having regard to the evidence that is still available to be called and tendered. On the evidence available, 'the ultimate trial of this action will be a fair trial'.

(7) The plaintiff was very young when he was repeatedly sexually abused by his parish priest. The damage wrought by the abuse of the plaintiff has been substantial, affecting his entire life. The plaintiff has a good case.

(8) Section 27QE is remedial or beneficial legislation. It should be construed so as to give 'the fullest relief which the fair meaning of its language will allow'.

(9) If successful, the present proceeding is likely to result in a significant award of damages that will well exceed the amount of the 1996 settlement.

Defendant's submissions

50 The defendant commenced its submissions by observing that the plaintiff '[did] not point to any matter truly specific to him or his entry into the Deed (such as undue pressure or lack of representation)'. The defendant characterised the plaintiff's application as resting predominantly on the notion that, since entering into the Deed, the plaintiff's legal position had improved, 'especially regarding quantum'. It was then submitted that on the proper construction of the relevant statutory provisions, 'these matters on their own do not warrant the Court's intervention'.

51 The defendant contended that, apart from the plaintiff's failure to justify the relief he sought, there were matters of prejudice and unfairness which militated against the making of the order sought. The prejudice concerned two aspects of the plaintiff's claim: first, the duty of care said to arise out of the circumstances in which Hourigan was accepted for training and ordained as a Catholic priest (including the disclosure he made to Bishop Fox in the letter of 3 July 1972); and secondly, the

claim that the Diocese was vicariously liable for the abuse.

52 As to the first matter, the fact that Bishop Fox died in 1997 was said to prevent the defendant from knowing, or being able to ascertain, what if any steps were taken in response to the risk alleged. As to the second matter, the defendant contended that the vicarious liability claim required a 'close examination' of Hourigan's assigned role within the Diocese and the position in which he was thereby placed vis-à-vis the plaintiff and other children.

53 As to unfairness, the defendant submitted that, because the alleged events occurred more than 40 years ago, the trial of the plaintiff's claim would be unfair.

54 On the issue of a proper defendant to the plaintiff's claim, the defendant observed that, as Bishop Coffey had only been made Bishop of Sale in 1989 and did not supervise Hourigan during the period of the abuse, there was no prospect of the plaintiff establishing the claim he made in 1996 against Bishop Coffey. The defendant accepted, however, that if the plaintiff had been able to establish that Bishop Fox breached a duty of care owed to him and which caused loss, any such liability could not have been attributed to Bishop Coffey or 'any relevant corporate entity'. The defendant accepted that the State legislature had sought to remedy that position by the enactment of the Legal Identity Act.

55 In relation to the construction of ss 27QD and 27QE, the defendant submitted that the analysis in *TRG – First Instance* was instructive. The defendant then made the following points:

(1) As a matter of basic principle, the task of construing ss 27QD and 27QE was required to begin with a consideration of the text itself. Historical considerations and extrinsic materials could not be relied upon to displace the clear meaning of the text.

(2) The use of the word 'may' and 'just and reasonable' showed that the power conferred by s 27QE is discretionary.

(3) The way in which the discretion is to be exercised is to be discerned from a proper construction of the statutory provision itself.

(4) Caution should be exercised in looking at extrinsic material. Extrinsic materials should not be looked at 'before exhausting the application of the ordinary rules of statutory construction'.

(5) The expression 'just and reasonable' is employed in other provisions in the *Limitation of Actions Act*, such as ss 23A and 27K. It is 'presumed, as a matter of construction, that this term bears the same meaning across all of the provisions in which it is used'.

56 The defendant contended that ss 27QD and 27QE are primarily concerned with previously settled causes of action. The Court's discretion is directed to altering *inter partes* legal rights otherwise embodied in a settlement agreement. For the Court to be appropriately moved to exercise such a discretion, and for such an alteration to be just and reasonable, 'compelling reasons are required'.

57 The defendant also submitted that, in determining what is 'just and reasonable', the Court's primary concern should be with the circumstances in which the settlement agreement was entered into and the consequences for each party if the Court alters *inter partes* rights. The determination of what is 'just and reasonable' involves a synthesis of these matters, taking into account that it is the plaintiff who bears the onus of persuasion that it is just and reasonable to set aside the settlement agreement.

58 With respect to the circumstances in which a settlement agreement was entered into, the defendant submitted that relevant matters might include a lack of representation, bullying, and the reasonableness of the settlement figure determined by reference to the surrounding circumstances.

59 In support of its contentions, the defendant relied upon a number of authorities dealing with limitation issues and prejudice occasioned by delay. The

decisions included *Brisbane South Regional Health Authority v Taylor*,[19] *Prince Alfred College Incorporated v ADC*,[20] *Connellan v Murphy*,[21] *Moubarak by his Tutor Coorey v Holt*[22] and *Council of Trinity Grammar School v Anderson*.[23]

60 The defendant relied upon *Brisbane South* for two purposes. First, in relation to the prejudice caused by delay. Specifically, the defendant relied upon the observations of McHugh J that 'where there is delay the whole quality of justice deteriorates'.[24] After making that observation, his Honour then said:

> Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*, 'what has been forgotten can rarely be shown'. So it must often happen that important, perhaps decisive, evidence has disappeared without anybody now 'knowing' that it ever existed.[25]

61 Secondly, *Brisbane South* was relied upon by the defendant to support an argument that the plaintiff bore two separate burdens of establishing that it was just and reasonable to set aside the Deed. The defendant submitted that *Brisbane South* (and *Prince Alfred College*) supported the proposition that s 27QE required an applicant to first satisfy the Court that it was just and reasonable to set aside the previous settlement agreement (thus engaging the section) before establishing, as a matter of discretion, that relief should be granted because it was just and reasonable to do so.

62 The defendant submitted that not all changes of the law occurring after a settlement agreement has been entered into are relevant. It noted that in *TRG – First*

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19 (1996) 186 CLR 541 ('*Brisbane South*').

20 (2016) 258 CLR 134 ('*Prince Alfred College*').

21 [2017] VSCA 116 ('*Connellan*').

22 (2019) 100 NSWLR 218 ('*Moubarak*').

23 (2019) 101 NSWLR 762 ('*Council of Trinity Grammar*').

24 *Brisbane South* (1996) 186 CLR 541, 551 (citation omitted).

25 Ibid.

Instance, the Court held in respect of the equivalent Queensland provision (s 48(5A) of the *Limitation of Actions Act 1974* (Qld)) that it was not the policy of that section 'that settlements should be set aside to facilitate new claims based on more favourable views as to the vicarious liability of employers for the criminal actions of their employees'.[26]

63 The defendant contended that in assessing whether relief should be granted to the plaintiff, the Court should not 'intuitively examine the justice of the law at the time of the compromise' and then 'assess whether the current state of the law yields a more just outcome thereby justifying the Deed's setting aside'.

64 In submitting that the Deed should not be set aside, the defendant made the following points:

(1) The plaintiff relies only upon the proposition that, 'in the current legal environment, he will likely receive a significant judgment for damages'. He does not rely upon any of the circumstances in which he entered into the Deed. He was represented by very competent counsel who advised him on his case. These circumstances are insufficient to warrant a grant of relief. Moreover, if relief were to be granted in this case then 'it might well be granted with respect to all (or certainly very many) historical settlement agreements'. That is not what was intended by the legislature.

(2) The defendant will be prejudiced by the granting of the application. At least three relevant witnesses have died: Father Daly in 1980, Hourigan in 1995 and Bishop Fox in 1997.

(3) The evidence disclosed that relevant documents have almost certainly been lost. Some documents, which one would expect to be in the possession of the Diocese or the defendant, could only be obtained from St Paul's Seminary. The plaintiff's assertion that there is uncontradicted evidence which has been retained underscores the fact of prejudice in this case. The documentation

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26 *TRG – First Instance* [2019] QSC 157, [265].

that has been retained and produced is no more than a 'patchwork'. It is not a 'full record'.

(4) The lack of particulars provided by the plaintiff in respect of the vicarious liability cause of action is a further source of prejudice, particularly in terms of any attempt that might be made to perform a 'close examination' of Hourigan's role and position within the Diocese as required by *Prince Alfred College*.[27]

Primary judge's reasons

65 After a detailed and careful analysis of the evidence and the submissions of the parties, the judge concluded that it was just and reasonable to grant the plaintiff's application to set aside the Deed. The judge commenced his analysis by identifying the issues and the evidence, and setting out the relevant background circumstances in some detail.[28]

66 At Reasons [50]-[66], the judge dealt specifically with the evidence tendered concerning Hourigan's role as an assistant priest at Warragul, and the Diocese's direction, supervision and control of him. It is not necessary for us to summarise this evidence, or to repeat his Honour's summary of it in these reasons. There was no suggestion in this Court that the judge's summary of the relevant evidence was erroneous. Self-evidently, it was necessary for the judge to describe this evidence in some detail in order for him to deal with the defendant's submission that there was unfairness (or prejudice) in permitting the plaintiff to proceed with a vicarious liability case, in circumstances where evidence that may have been lost could inhibit a 'close examination' of Hourigan's role and position within the Diocese as required by *Prince Alfred College*.[29]

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27 See *Prince Alfred College* (2016) 258 CLR 134, 161 [84].

28 Reasons [1]–[48].

29 See *Prince Alfred College* (2016) 258 CLR 134, 161 [84].

67 After summarising the parties' submissions on the issue of prejudice,[30] the judge then proceeded with his analysis. Dealing first with the issues surrounding Hourigan's disclosure letter to Bishop Fox (the letter of 3 July 1972), the judge said that an examination of the evidence demonstrated that there was 'less substance to this complaint [of prejudice] than the defendant submits'.[31] The judge concluded that there was nothing to indicate that the record of correspondence from that time was incomplete.[32]

68 As to Hourigan's role as an assistant priest at Warragul, and the control and supervision of him, the judge noted that Hourigan's letter of appointment from Bishop Fox was missing, and Father Daly was no longer alive. The judge said, however, that the present case did not suffer from 'the same dearth of evidence' that characterised *Prince Alfred College*.[33] The judge identified evidence that was available, saying that it was likely that further investigation would uncover other witnesses.[34] The judge concluded this part of his analysis by saying:

> The defendant is entitled to a fair trial, not a perfect one. Relevant evidence has been lost. However, a substantial body of evidence remains, only part of which has been uncovered by investigations undertaken to date.[35]

69 Next, the judge dealt with relevant legislative changes to which we have already referred.[36] In the course of this part of his Honour's reasons, the judge referred to, amongst other things, the Second Reading Speech for the Children Legislation Act.[37] Additionally, the judge referred to the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, *Betrayal of Trust* ('the Inquiry') and the Commonwealth Royal

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30 Reasons [67]–[78].

31 Ibid [80].

32 Ibid [82].

33 Ibid [87]–[88].

34 Ibid [89]–[93].

35 Ibid [94].

36 Ibid [95]–[116].

37 Ibid [116].

Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission').

70 The judge then turned to the proper construction of ss 27QA–27QF of the *Limitations of Actions Act*. After identifying the submissions of the parties,[38] the judge commenced his analysis.

71 Dealing with the defendant's submission that ss 27QD and 27QE are primarily concerned with previously settled causes of action and the submission that the Court's discretion is directed to altering *inter partes* legal rights, the judge said:

> By focusing on the settlement agreement, the circumstances in which it was made, and the inter partes rights embodied in it, the defendant's submissions confine the discretion in a manner which is inconsistent with the text and purpose of the provision. The subject matter of the discretion is not the previous settlement, but the action which may be brought on a previously settled cause of action. The provision is concerned with whether, in the circumstances of the case, it is just and reasonable to set aside the settlement, and any judgment or order giving effect to it, in order to allow an action on a cause of action for personal injury resulting from child abuse to proceed.[39]

72 Next, dealing with the defendant's submission that there were two separate burdens which an applicant bears under s 27QE, the judge said:

> The defendant's submission as to the existence of two separate burdens which an applicant bears under s 27QE misunderstands the statutory provision as compared with the statutory provisions which were the subject of consideration in *Brisbane South* and *Prince Alfred College*. The plaintiffs in *Brisbane South* and *Prince Alfred College* were required to establish certain conditions or requirements before the discretion to extend the time for the action to be commenced was enlivened. A point made by the court in each case was that proof of satisfaction of the preconditions did not give rise to a presumptive right or entitlement to an extension of time. Rather, the applicant still bore the onus of showing good reason for the exercise of the discretion in their favour. By contrast, in this case there are no preconditions or requirements which an applicant for relief under s 27QE of the *Limitation Act* must establish to enliven the discretion, other than that the application is being made in respect of an action to which the section applies, which is not in issue. An applicant seeking relief under s 27QE does not bear a separate or additional onus beyond the requirement to establish that it is just and reasonable that the discretion be exercised in their favour.[40]

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38 Ibid [121]–[135].

39 Ibid [143].

40 Ibid [146].

73 The judge did not accept the defendant's submissions that changes in the law which have occurred since the earlier settlement were not relevant. His Honour concluded there was nothing in the text of s 27QE which limited consideration of what was just and reasonable.[41] His Honour held that the general purpose of Division 5 is 'to take a fundamentally different approach to delay, prejudice and time limits to that which applies under Divisions 2 and 3 to all other actions for damages that relate to death or personal injury'.[42]

74 As to the defendant's reliance upon *Brisbane South* on the question of delay, the rationales for imposing limitation periods and delay generally, his Honour said:

> The rationales to which McHugh J referred underpin and inform the legislative purpose of provisions which impose limitation periods, and those giving the court power to extend time. The subject matter of those provisions is the lapse of time, and the effect of delay on the quality of justice. The legislative purpose described by McHugh J in *Brisbane South* is evident in s 27D of the *Limitation Act*, which imposes limitation periods for personal injury actions, and in ss 27K and 27L, which empower the court to extend time on consideration of matters directed principally to the length of, reasons for and consequences of delay.
>
> The legislative purpose of div 5 of pt IIA of the *Limitation Act* is not driven by the same rationales. There is no limitation period for actions to which the division applies. The subject matter of the division is the right to bring an action, rather than limiting the period in which that can be done, or the consequences of delay. The purpose of div 5 of the *Limitation Act*, and of the *Legal Identity Act*, is to retrospectively remove barriers to actions for personal injury resulting from child abuse. The mischief to which those legislative provisions are directed is injustice which limitation periods, difficulties identifying a proper defendant and the state of the law regarding the duty of care of organisations, and the disadvantaged bargaining position which may result from those barriers, caused to victims of child abuse.
>
> Time is not an element of a cause of action for personal injury. Time may be in issue if a defence is taken that the limitation period which applies has expired, and an application to extend time is made. The principles in *Brisbane South* and *Prince Alfred College* will then apply, and considerations which relate to the explanation for, length and consequences of delay will be relevant to the exercise of discretion on an application to extend the limitation period. However, in this case there is no limitation period, and the lapse of time is not in issue in this way. Treating considerations of the lapse of time and prejudice in accordance with the principles set out in *Brisbane South* and *Prince Alfred College* as relevant to the exercise of the s 27QE discretion is

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41 Ibid [148].

42 Ibid [149].

inconsistent with the statutory purpose of the provision.[43]

75 The judge concluded that ss 27QD and 27QE were intended to benefit that class of persons who have suffered personal injury from child abuse by enabling them to bring an action for that injury. His Honour said that that purpose was achieved by removing the limitation period which would otherwise apply, and by giving the right to seek to set aside a previous judgment or settlement which had occurred in the context of legal barriers which have since been removed.[44] His Honour then said:

> The remedial character of the legislation supports an interpretation which confines the discretion in s 27QE to not include considerations such as lapse of time and prejudice which are relevant to a barrier to the action which it was intended to be removed.[45]

76 The judge analysed the 1996 settlement sum in the context of the abuse. The judge determined the application on the basis that the plaintiff had been subjected to horrendous abuse by Hourigan over a period of about two and a half years when he was aged between 11 and 14. Because the plaintiff felt unable to report the abuse, he suffered alone and without support for many years. For the purpose of the application, the judge accepted that the plaintiff had suffered since he was 11 or 12 and continues to suffer, significant adverse impacts of the abuse.[46]

77 The judge concluded that there was evidence which supported a significant assessment of damages for pain and suffering and loss of enjoyment of life, past and future treatment and some loss of earning capacity.[47] His Honour said that the 1996 settlement sum represented 'very modest and heavily discounted compensation for the loss and damage suffered by the plaintiff as a consequence of the abuse'.[48] This was so, he said, whether the comparison was between the settlement sum and

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43 Ibid [152]–[154].

44 Ibid [161].

45 Ibid.

46 Ibid [168]–[169].

47 Ibid [172].

48 Ibid [173].

damages which might have been awarded in 1996, or damages which might now be awarded.[49]

78 The judge concluded that the difficulty identifying a proper defendant in 1996, and the expiration of the limitation period before that proceeding was issued were matters which had a material impact on the County Court proceeding being settled for the modest sum agreed.[50]

79 The judge then reiterated his conclusion that the lapse of time and issues of specific prejudice were 'not relevant considerations on the exercise of the s 27QE discretion on the facts of this case'.[51] The judge concluded that he was positively satisfied that it was just and reasonable to set aside the Deed.

Grounds 1 and 2— submissions

80 Grounds 1 and 2 are directed to the construction by the judge of ss 27QD and 27QE of the Act.

81 Ground 1 is as follows:

> [The Court] erred in its construction of ss 27QD and 27QE of the *Limitation of Actions Act* ([141]–[161], Reasons) in that:
>
> (a) it:
>
> (i) held, contrary to the provisions' express wording, that the provisions' subject matter is not the previous settlement, but the action which may be brought on the previously settled cause of action; and
>
> (ii) otherwise paid insufficient regard to the *inter partes* legal position between the parties governed by the previous settlement ([143], Reasons);
>
> (b) it held, contrary to the provisions' express wording, that there are no preconditions or requirements which an applicant under s 27QE must establish to enliven that provision's discretion (other than the application being made in respect of an action to which the section

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49 Ibid.

50 Ibid [188], [194], [200], [213]–[214].

51 Ibid [202].

applies) ([146], Reasons);

(c) it held, relying on the Minister's Second Reading Speech in the passing of ss 27QD and 27QE,[52] that if the previous settlement of the cause of action reflected legal barriers which have since been removed, it may be just and reasonable to set aside the settlement to allow the plaintiff to seek adequate compensation ([148], Reasons);

(d) it held:

(i) that the general purpose of Div 5 of Pt IIA of the *Limitation of Actions Act* is to take a fundamentally different approach to delay, prejudice and time limits to that which applies under Divs 2 and 3 of Pt IIA to all other actions for damages that relate to death or personal injury ([149], Reasons);

(ii) that the legislative purpose of Div 5 of Pt IIA of the *Limitation of Actions Act* is not driven by the same rationales as those described in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 552–554 (McHugh J) ([153], Reasons); and

(iii) that the purpose of Div 5 of Pt IIA of the *Limitation of Actions Act*, and of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), is to retrospectively remove barriers to actions for personal injury resulting from child abuse ([153], Reasons).

82 Ground 2 is as follows:

[The Court] erred in the exercise of its discretion under ss 27QD and 27QE of the *Limitation of Actions Act* in that:

(a) it held that:

(i) the removal of the relevant limitation period by s 27P of the *Limitation of Actions Act* ([194] and [213(b), (c)], Reasons);

(ii) the change in law under the *Legal Identity of Organisations (Organisational Child Abuse) Act* ([188]–[189] and [213(b)], Reasons);

(iii) the clarification of the law by the High Court in *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 ([195], [198] and [213(d)], Reasons);

(iv) that the settlement embodied in the Deed was not:

(A) a reasonable assessment of the plaintiff's loss and damage in 1996 ([213(a)], Reasons); and

(B) adequate compensation by today's standards ([213(a)],

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[52] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 August 2019, pp 2695–6 (The Hon Luke Donnellan, Minister for Child Protection, Minister for Disability, Aging and Carers).

Reasons);

bore in favour of setting aside the Deed;

(b) it gave undue weight, both individually and cumulatively, to the matters in Ground 2(a) above; and

(c) it placed insufficient weight upon the [defendant's] interest in maintaining the Deed ([201], Reasons);

(d) it held that the difficulty in identifying a proper defendant had a material impact on the settlement of the previous litigation ([188], Reasons), thereby failing to give proper regard to Bishop Arthur Fox being alive at the time of the litigation.

83 Earlier in our reasons, we set out the submissions made by the parties to the primary judge, in order to give necessary context to his Honour's reasons. In this Court, many of the submissions made below were repeated. In order to understand the issues raised in this Court, it is necessary for us to again identify the parties' arguments, notwithstanding that this will result in a degree of repetition.

84 In support of grounds 1(a) and (b), counsel for the defendant noted that s 27QE is expressed in the terms that if the Court is satisfied that it is 'just and reasonable' to do so, the Court 'may' make an order setting aside the settlement agreement. Accordingly, it was submitted, that provision imposes two onuses on an applicant. First, the applicant must satisfy the Court that intervention is 'just and reasonable'. Secondly, if the Court is so satisfied, the applicant must satisfy a second 'onus of persuasion', that such relief should be granted. In that respect, counsel relied on the approach taken by the High Court to provisions extending the period of time prescribed by limitation legislation in *Brisbane South*,[53] and *Prince Alfred College*.[54]

85 Counsel further submitted that as the relief provided under s 27QE is directed to altering legal rights that are embodied in a settlement agreement, the party seeking relief must advance 'compelling and cogent' reasons justifying the intervention of the Court. In the present case, it was submitted, the judge did not

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53 (1996) 186 CLR 541.

54 (2016) 258 CLR 134.

engage in the 'two-step' process of reasoning required by s 27QE. Further, it was submitted, the judge failed to take into account the parties' legal positions, governed by the settlement agreement, and to require that the plaintiff advance compelling and cogent reasons to justify the grant of the relief sought in the proceeding.

86 In support of grounds 1(c) and 2, counsel for the defendant submitted that although subsequent changes to the law since the conclusion of the settlement agreement might be relevant to an application for relief under ss 27QD and 27QE, those provisions do not entitle the plaintiff to be relieved of his obligations under the agreement so as to enable him to relitigate a previously settled cause of action in a more favourable legal environment.

87 In effect, it was submitted that the question, whether the Deed was just and reasonable, should be determined by an assessment of the plaintiff's claim as it was affected by the operative law at the time of the settlement, and, in particular, by the effluxion of the prescribed limitation period, and by the difficulty of identifying an appropriate legal entity who might be joined as a defendant to the proceeding. Otherwise, it was submitted, by re-determining that issue in the absence of those two impediments, the Court would be adopting an impermissible retroactive approach to the application of ss 27QD and 27QE. In support of that proposition, counsel relied on the observations of the High Court in *Australian Education Union v General Manager of Fair Work Australia*[55] and the judgments of Davis J at first instance, and of the Queensland Court of Appeal, in *TRG v The Board of Trustees of the Brisbane Grammar School*.[56]

88 Counsel further submitted that, in construing ss 27QD and 27QE, the judge impermissibly took into account and relied on extrinsic materials, such as the Explanatory Memorandum and the Second Reading Speech, which lead his Honour to give undue emphasis to the effect of legislative changes that have been introduced

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55 (2012) 246 CLR 117, 133-4 [26]–[27] (French CJ, Crennan and Kiefel JJ) ('*Australian Education Union*').

56 *TRG – First Instance* [2019] QSC 157 (Davis J); [2020] QCA 190 (Court of Appeal) ('*TRG*').

since the conclusion of the settlement agreement.

89 Ground 1(d) is based on the proposition that the judge erroneously disregarded the lapse of time and the resultant prejudice to the defendant as considerations that are relevant to the exercise of the discretion under s 27QE of the Act. Counsel for the defendant submitted that, on the proper construction of that provision, delay resulting in prejudice is an important factor which may militate heavily against the grant of relief under that provision. It was submitted that in that respect, the rationales that underlie the prescription of limitation periods, as outlined by McHugh J in *Brisbane South*,[57] are relevant to an application to set aside a settlement agreement under s 27QE.

90 In response to grounds 1(a) and (b), counsel for the plaintiff submitted that there is nothing in the text or content of ss 27QD and 27QE which requires the Court to give primacy to the resolution of the previous litigation that was embodied in the settlement agreement. Further, it was submitted, the proper construction of those provisions does not require the Court to undertake the 'two-step process' contended for on behalf of the defendant. The authorities relied on by the defendant, concerning the extension of a limitation period, including *Prince Alfred College* and *Brisbane South*, may be distinguished. In those cases, it was necessary for the plaintiff first to establish particular facts specified by the legislation, and, secondly, to persuade the Court that, in light of those facts, the discretion to extend time should be exercised in that party's favour. On the other hand, ss 27QD and 27QE do not postulate any precondition to the exercise of the discretion. Rather, the discretion is based solely on a conclusion by the Court that it is 'just and reasonable' to set aside the settlement agreement.

91 In response to grounds 1(c) and 2, counsel for the plaintiff submitted that it was appropriate for the judge to construe ss 27QD and 27QE in the context of the recent legislation which addressed the principal obstacles that had prevented victims

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57 (1996) 186 CLR 541, 552-4.

of institutional sexual abuse, including the plaintiff, from obtaining just and reasonable compensation, namely, the expiration of the relevant limitation period, and the Ellis defence which protected institutions from damages claims. Therefore, it was submitted, the judge was correct to conclude that the settlement sum was not a reasonable assessment of the plaintiff's damages, but was a reflection of the unfair effect of those obstacles on his claim.

92 In response to ground 1(d), counsel for the plaintiff submitted that the approach, that governs the exercise of the Court's discretion to extend the time within which an action might be brought, is not relevant to ss 27QD and 27QE, which apply to proceedings in which there is no relevant limitation period. Thus, it was submitted, considerations such as the resultant prejudice to the defendant are not relevant to the Court's determination of whether it is just and reasonable to set aside a settlement agreement under ss 27QD and 27QE. In any event, the judge correctly found that no material prejudice had resulted to the defendant by reason of the delay in the making of the application to set aside the settlement agreement and to commence proceedings consequent thereon. Thus, no prejudice had been demonstrated that would preclude the finding by the judge that it was just and reasonable to set aside the settlement agreement.

Grounds 1 and 2 — analysis and conclusion

93 The starting point, to the construction of ss 27QD and 27QE, is the terms in which those provisions are expressed. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*,[58] Hayne, Heydon, Crennan and Kiefel JJ expressed the principle in the following terms:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general

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58 (2009) 239 CLR 27.

> purpose and policy of a provision, in particular the mischief it is seeking to remedy.[59]

94 However, that does not mean that the statutory provision is to be construed without reference to the context, purpose and policy of the provision in question. In *SZTAL v Minister for Immigration and Border Protection*,[60] Kiefel CJ and Nettle and Gordon JJ stated:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[61]

95 In similar terms, in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*,[62] the High Court stated:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.[63]

96 Consistently with those principles, s 35(a) of the *Interpretation of Legislation Act 1984* provides that a construction that would promote 'the purpose or object underlying the Act' is to be preferred to a construction that would not promote that purpose or object.[64] Pursuant to s 35(b) of that Act, the object and purpose of the

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59 Ibid 46–7 [47] (citations omitted). See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

60 (2017) 262 CLR 362.

61 Ibid 368 [14] (citations omitted).

62 (2012) 250 CLR 503.

63 Ibid 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (citations omitted).

64 Cf *Miller v Martin* [202] VSCA 4, [120] (Niall, Hargrave and Ashley JJA).

legislation may be ascertained with the assistance of the Second Reading Speech or the Explanatory Memorandum. Nevertheless, in applying that provision, it has been emphasised that such extrinsic material may not be used to displace the plain meaning of the statutory text.[65]

97 In considering the submissions advanced on behalf of the defendant in support of grounds 1 and 2, the starting point is that ss 27QD and 27QE are expressed in clear and unambiguous terms. In essence, if the Court is satisfied that it is 'just and reasonable to do so', it may make an order setting aside the settlement agreement, and any other order it considers appropriate in the circumstances. No doubt, in reaching that stage of satisfaction, the Court may, and ordinarily should, take into account that the order, that is sought, would disturb the legal rights and obligations of the parties that are contained in the settlement agreement. However, that consideration does not justify importing into the statutory provisions the requirement, contended for by the defendant, that a party seeking to set aside a settlement agreement must demonstrate 'clear and compelling reasons' for doing so. Such a gloss on, or qualification to, the discretionary power of the Court would constitute an impermissible rewriting of the clear terms of the section.

98 Nor is there any warrant, in the language of the sections, to impose the 'two-step' process contended for on behalf of the defendant. The power of the Court, to set aside a settlement agreement, is expressed in discretionary terms, because it is dependent upon the Court making an appropriate evaluative judgment that it is 'just and reasonable' that such an order be made. The use of the permissive 'may', rather than the mandatory 'must', does not denote the suggested two-step process. It would be anomalous for a court, having concluded that it was just and reasonable to do so, to refuse to set aside a settlement agreement. As counsel for the defendant conceded during oral argument, it is difficult to postulate a case in which a court might consider it just and reasonable to set aside a settlement agreement, but would refuse to make such an order.

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65 *DPP v Woodford* (2017) 269 A Crim R 567, 578 [76] (Weinberg, Osborn and Priest JJA).

99 The authorities, relied on by the defendant in support of the 'two-step' construction, may be readily distinguished.

100 In *Brisbane South*, the *Limitation of Actions Act 1974 (Qld)* provided that a court 'may order' that the prescribed period of limitation be extended, where it appeared to the Court that a material fact of a decisive character was not within the means of the knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation, and that there is evidence to establish the right of action apart from a defence founded on the expiration of the period of limitation. The majority of the High Court (Kirby J dissenting) held that an applicant for an extension of time, under that provision, did not have a presumptive right to an order extending time once those two conditions had been satisfied. In such a case, the applicant still bore the legal onus of satisfying the Court that the discretion should be exercised in his or her favour.[66] In that way, by its express terms, the statutory provision under consideration prescribed a two stage analysis.

101 Similarly, in *Prince Alfred College*, ss 48(1) and (3) of the *Limitation of Actions Act 1936* (SA) permitted a court to extend the time prescribed for commencing a proceeding if it was satisfied that the proceeding was instituted within 12 months after the plaintiff ascertained facts material to the plaintiff's case, and that in all the circumstances it was just to grant the extension of time. As a consequence of those two requirements, the Court, citing *Brisbane South*, held that an extension of time was not a 'presumptive entitlement' which arose upon satisfaction by the plaintiff of the preconditions that enlivened the discretion. Rather, the onus of persuasion remained on the plaintiff to persuade the Court that in the circumstances of the case, it was just to grant that extension.[67]

102 The statutory provisions, under consideration in those two cases, expressly

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66 *Brisbane South* (1996) 186 CLR 541, 544 (Dawson J), 547 (Toohey and Gummow JJ), 551 (McHugh J).

67 *Prince Alfred College* (2016) 258 CLR 134, 164-5 [99] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

required the Court to undertake a two-stage process, in respect of each of which the applicant, for an extension of time, bore the legal onus. By contrast, in the present case, ss 27QD and 27QE do not stipulate such a two-step process.[68] Rather, they provide, in clear terms, that a court may make an order setting aside a settlement agreement where the Court is satisfied that it is 'just and reasonable' to do so. Accordingly, grounds 1(a) and (b) must fail.

103 The defendant's submissions, under grounds 1(c) and 2, in effect amounted to the proposition that ss 27QD and 27QE should be construed by determining whether the settlement, that was originally reached between the parties, was just and reasonable, applying the law that then governed the rights and obligations between the parties. It was submitted, the plaintiff had failed to demonstrate that, in view of the law that operated at the time at which the settlement agreement was reached, the settlement itself was not just and reasonable.

104 That submission is based on a construction of ss 27QD and 27QE, and in particular the phrase 'just and reasonable', which pays no regard to the context in which those provisions were introduced into the *Limitation of Actions Act*. The phrase 'just and reasonable' is of broad ambit. Orthodox principles of statutory construction require that it should not be understood in isolation, divorced from the legal context in which it was enacted. In order to determine whether, in a particular case, it is 'just and reasonable' to make an order setting aside the settlement agreement, it is necessary to understand and take into account the historical context in which that provision was enacted in 2019, so as to properly understand its purpose and effect.

105 The provisions that are under consideration in this case are contained in Part IIA Division 5 of the *Limitation of Actions Act*. That Division is entitled 'Actions for personal injury resulting from child abuse'. Section 27O provides that the Division applies to an action if it is founded on the death or personal injury of a

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[68] See also *Tsiadis v Patterson* (2001) 4 VR 114, 122-3 [30]-[31], per Buchanan JA, with whom Ormiston and Callaway JJA agreed

person resulting from an act or omission in relation to the person when that person was a minor that was 'physical abuse or sexual abuse', and to 'psychological abuse (if any) that arises out of that act or omission'. Put plainly, the provisions contained in Division 5, including ss 27QD and 27QE, were directed to claimants who were victims of childhood sexual or physical or psychological abuse. Relevantly, the suite of provisions contained in Division 5, include s 27P, which was introduced in 2015, and which provides that an action to which the division applies may be brought at any time after the date on which the act or omission alleged to result in the death or personal injury has occurred. In that way, that provision removed one of the two principal barriers that stood in the path of plaintiffs who sought to claim damages for historical sex abuse that had been perpetrated on them during their childhood.

106 In that context, 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. Each of those two obstacles worked in a manner which was unreasonable and unfair to persons who had suffered, and continued to suffer, as a result of the effects of abuse inflicted on them during their childhood. The second obstacle — the effluxion of the limitation period — worked in a manner that was particularly unfair to such claimants. In recent decades, it has become properly understood that victims of childhood abuse often, if not invariably, delay for long periods of time — in some cases, decades — before disclosing the abuse to any other person.[69] The reasons for that delay are complex, but now better understood. They include the effect of feelings of confusion, guilt, shame and embarrassment. In the present case, the plaintiff, in his statement to the police in 1995 (which is an exhibit in the proceeding), stated that Hourigan had told him not to repeat anything that had went on and that it was their 'little secret'. The plaintiff felt unable to tell his parents

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[69] Cf *Jury Directions Act 2015*, s 52(4).

because of their commitment to the Catholic faith. He said that he did not want to 'shatter' his parents' belief in the Catholic Church. He further stated that he regarded Hourigan as an 'authority-type' figure and felt that he had to comply with what he was told to do by him.

107 In short, the nature of the abuse perpetrated on victims, such as the plaintiff, was such that many of them felt constrained by such emotions and considerations, and they did not reveal the abuse, to which they had been subjected, until long after the lapse of the relevant limitation period.

108 The provisions contained in the *Limitations of Actions Act*, that were relevant to the proceeding brought by the plaintiff in 1996, were introduced by the *Limitation of Actions (Personal Injuries) Act 1983*. That legislation operated more favourably to plaintiffs than the previous provisions. Nevertheless, in a case such as that brought by the plaintiff, those provisions would have presented a significant difficulty in the proceeding commenced on behalf of the plaintiff in 1996, which were the subject of the Deed.

109 The other, and more significant, obstacle to intending plaintiffs, in a case such as this, was the difficulty in identifying a relevant legal entity who might be the defendant to those proceedings. As a consequence, a person in the position of the plaintiff could be obstructed from making a claim against a large, highly organised institution, on the basis that that institution did not operate by or through a corporate entity or structure which could be the subject of legal suit. Any claim by the plaintiff against Hourigan or his estate would likely have been of little value, in view of the vow of poverty taken by him. In essence, the plaintiff was faced with the position, in 1996, in which the institution that engaged Hourigan, and under whose auspices Hourigan had conducted his ministry, was not liable because it was not established in the form of a legal entity.

110 The legislative changes, which preceded the introduction of ss 27QD and 27QE in the *Limitation of Actions Act*, were designed to address those two obstacles

that confronted claimants in the position of the plaintiff. Specifically, as mentioned, the Child Abuse Act amended the *Limitation of Actions Act* by inserting Division 5 into Part IIA of the Act, which included s 27P. That amendment removed the limitation period for a cause of action founded on the death or personal injury resulting from physical, sexual or psychological abuse of a minor. The Legal Identity Act removed the other obstacle to litigation, by providing for the nomination by an unincorporated association of an entity that is capable of acting as the proper defendant in the proceeding.

111 By those two Acts, the Parliament recognised, and addressed, two principal impediments to claims for historical sexual abuse, which Parliament considered to be unjust and unfair. It was in that context that ss 27QD and 27QE were introduced to the *Limitation of Actions Act*. Understood in that light, those provisions were introduced to enable claimants, who had suffered historical sexual abuse, to be able to litigate their claims for that abuse, notwithstanding that, by reason of unfair legal obstacles that had previously obstructed their path, they had previously resolved those claims on terms that were not just or reasonable.

112 Accordingly, contrary to the submissions advanced by counsel for the defendant under grounds 1(c) and 2, it was both appropriate, or necessary, for the primary judge to take into account the relevant historical context in which ss 27QD and 27QE were introduced into the *Limitation of Actions Act* by the Children Legislation Act. It is that context which provides an appropriate guide to understanding the purpose and intention of that statutory provision, and the content of the phrase 'just and reasonable'. Further, it was appropriate, under s 35 of the *Interpretation of Legislation Act*, for the judge to construe s 27QE in the light of the extrinsic materials relevant to that legislation, and in particular the Explanatory Memorandum and the Second Reading Speech of the Minister for Child Protection. As his Honour noted, the Minister, having referred to the recent legislative reforms in relation to child abuse, stated:

> While these reforms have removed significant barriers to civil litigation for

> survivors of institutional child abuse, they do not deal with the unjust product of previous barriers, which led to survivors accepting inadequate settlements and releasing institutions from future liability.[70]

113 That conclusion is supported by the observations of the Court of Appeal of Queensland in *TRG*. That case concerned a claim by the appellant in respect of sexual assaults on him by a school counsellor between 1986 and 1989. The appellant's claim against his school was resolved by a settlement agreement in December 2002. Subsequently, in 2016, legislation was enacted in Queensland removing the limitation period for victims of sexual abuse, and empowering courts to set aside the previous judgments and settlements of actions that were time-barred. In 2019, the appellant unsuccessfully brought proceedings for an order setting aside the settlement agreement, so that he might commence fresh proceedings against the respondent. The trial judge dismissed the proceeding, having found that the issue of the expiration of the limitation period did not materially affect the settlement that was reached in 2002. The Court of Appeal dismissed the appellant's appeal. Relevantly, the Court held that if the trial judge had found that the expiration of the limitation period had a material influence on the settlement, that circumstance would have militated in favour of an order setting aside the settlement agreement. Fraser JA (with whom Morrison and Mullins JJA agreed) stated:

> The issue concerns the nature of the remedy provided for the mischief, and particularly the content of the expression 'just and reasonable' in subsection 48(5A). The primary judge's extensive analysis of the question whether expiry of the limitation period influenced the appellant's decision to settle or the quantum of the settlement reflects his Honour's acceptance of the implication that such an influence is to be characterised as an unfairness which is to be taken into account as a factor in favour of an order setting aside the settlement agreement. A corollary of that implication is that a 'discount' in the amount of the settlement derived by the respondent as a result of expiry of the limitation period is to be regarded as having been 'unfairly' obtained for the purposes of the exercise of the discretion under subsection 48(5A).
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> I would therefore accept that if expiry of the limitation period had a material influence upon a settlement, that would favour an order setting aside the settlement agreement notwithstanding the bare fact that the respondent would thereby retrospectively be deprived of a corresponding benefit in the

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[70] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 August 2019, 2695 (The Hon Luke Donnellan, Minister for Child Protection, Minister for Disability, Aging and Carers).

> settlement which itself resulted from the influence of expiry of the limitation period. That would not deny the relevance as factors opposed to an order of consequential or different forms of prejudice to a respondent. It was not necessary for the primary judge to address that topic in light of his Honour's finding that expiry of the limitation period had no material influence upon the appellant's decision to settle or the quantum of the settlement. The factors found by the primary judge to favour rejection of the application were of a different character.[71]

114 As mentioned, counsel for the defendant submitted that the effect of the decision of the primary judge was to give retroactive effect to the changes in the law constituted by the removal of the applicable limitation period by s 27P of the *Limitation of Actions Act*, and by the changes in the law under the Legal Identity Act. Counsel submitted that, in the absence of clear language, those provisions, and ss 27QD and 27QE, should not be construed in a manner which gave them such retrospective operation.

115 There is a well-established rule of statutory construction that legislation, changing the law, ought not, in the absence of a clear statement to the contrary, be understood as conferring or imposing, or otherwise affecting, rights or liabilities, which the law had defined by reference to past events.[72] Sections 27QD and 27QE of the *Limitation of Actions Act* do, in one sense, operate retroactively, by providing for the setting aside of settlement agreements which have, at a previous point in time, defined the rights and obligations of the parties to those agreements. As discussed, in determining whether, in a particular case, it is just and reasonable to set such an agreement aside, it is relevant for a court to take into account, inter alia, obstacles and difficulties which confronted one of the parties to the agreement, where Parliament has subsequently recognised the injustice and unfairness of those obstacles and difficulties, and has, as a consequence, removed or qualified them. By taking into account the effect of those obstacles and difficulties, the Court is not, thereby, giving impermissible retroactive effect to the amending legislation which

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71 *TRG* [2020] QCA 190, [27]; see also [29].

72 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ), 285 (Fullagar J); *Chang Jeeng v Nuffield (Australia) Pty Ltd* (1959) 101 CLR 629, 637 (Dixon CJ). *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194 (Fullagar J).

removed or qualified them. At the risk of repetition, at the time at which the plaintiff entered into the settlement agreement in 1996, his claim for damages was confronted by two obstacles, comprising the effluxion of the prescribed period of limitation, and the absence of any recognised legal entity against whom he might successfully claim those damages. Both of those obstacles have been recognised by Parliament, in recent times, to be unfair and unjust, and have been abrogated by statute. By taking that circumstance into account in construing s 27QE, the Court is not, thereby, giving impermissible retroactive effect to the legislation.

116 In determining that it was just and reasonable to set aside the settlement agreement, the primary judge took into account that the prospects of the plaintiff succeeding and proving his cause of action had improved since 1996, as a result of the clarification of the principles of vicarious liability by the High Court in *Prince Alfred College*. Certainly, the principles relating to vicarious liability, as understood before the explanation of those principles in *Prince Alfred College*, would have presented some difficulty to the plaintiff in the proceedings that he commenced in 1996. We doubt that the circumstance, that the then understanding of vicarious liability was less favourable to the plaintiff, would of itself be relevant in determining whether the settlement agreement should be set aside.[73] However, it is clear that the judge gave little weight to that factor in determining whether, in the present case, it was just and reasonable to set aside the settlement agreement. His Honour considered that the difficulty of identifying the proper defendant was 'likely to prove fatal' to the plaintiff's cause of action in 1996, and that there was also a 'significant prospect' that the plaintiff would have failed on an application to extend the period of time in which to bring the cause of action. His Honour concluded that it was likely that the modest settlement embodied in the Deed reflected the impact of those two barriers.[74] His Honour did observe that the prospects of the plaintiff succeeding and proving his cause of action had 'improved' due to the clarification of

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73 *TRG – First Instance* [2019] VSC 157, [263]–[265].

74 Reasons [213(c)].

the vicarious liability in *Prince Alfred College*, but it would seem that that fact was given limited weight by the judge. Indeed, his Honour ultimately said that he would have granted the plaintiff's application irrespective of the clarification provided by *Prince Alfred* College.[75] In our view, the impact of the two factors described by the judge — the difficulty of identifying the proper defendant and the expiration of the limitation period — were the principal barriers to the plaintiff succeeding in his cause of action in 1996.

117 In conclusion, then, in respect of grounds 1(c) and 2, it is axiomatic that, in determining whether it was just and reasonable to set aside a settlement agreement, it is relevant to consider whether that agreement constituted a just and fair resolution of the claim made by the plaintiff. In making that determination, the judge was correct to take into account that, at the time the plaintiff entered into the settlement agreement, the claim that he had commenced faced two very substantial legal barriers, which had been subsequently recognised by the Parliament as being unfair and unjust. Contrary to the submissions made by the defendant, the judge's consideration of the subsequent legislative changes, removing the limitation period, and enabling the identification of a proper defendant, do not mean that the plaintiff is attempting to re-litigate a previously settled cause of action 'in more favourable legal conditions'. Rather, the plaintiff is seeking to set aside a settlement agreement, into which he entered as a consequence of two significant legal impediments, which have been subsequently recognised and abrogated as being unfair.

118 It is clear that the plaintiff settled his claim in 1996 at a significant discount. The abuse alleged by the plaintiff was admitted by Father Hourigan. It was particularly serious and prolonged, and it had a significant effect on the plaintiff's psychological and emotional health. In February 1996 he was diagnosed, by a psychiatrist, to suffer from chronic moderately severe post-traumatic stress disorder as a result of the sexual assaults that had been perpetrated against him by Hourigan. If the plaintiff had proceeded to trial, and if his claim had not been adversely

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75 Ibid [213(d)], [214].

affected by the expiration of the limitation period or by the problem of identifying an appropriate defendant, he would have then been entitled to an award of damages substantially in excess of the settlement sum. It might fairly be posited that the settlement sum would be a fraction of the damages which would have been awarded to the plaintiff. The primary judge, who has had longstanding and significant experience in such claims, expressed the view that the settlement sum involved in the Deed was not a reasonable assessment of the plaintiff's loss and damage in 1996.[76] That factual conclusion by the judge was not challenged on this application.

119 Ground 1(d), and the submissions advanced in support of it, are concerned with the treatment by the judge of considerations of delay and prejudice to the defendant in concluding whether it was just and reasonable to satisfy the settlement agreement.

120 As we have noted, the judge commenced his consideration, of those aspects, by stating that the general purpose of Division 5 of Part IIA of the *Limitation of Actions Act* was to take a 'fundamentally different approach' to delay prejudice and time limits to that which applies under Divisions 2 and 3 to all other actions for damages that relate to death and personal injury.[77] His Honour noted that the provisions, which impose limitation periods, are concerned with lapse of time and the effect of delay on the quality of justice. On the other hand, the provisions contained in Division 5 of Part IIA of the *Limitation of Actions Act* are not based on the same rationales. Rather, they are directed to injustice arising from previous legislative provisions imposing limitation periods, and difficulties identifying a proper defendant.[78] Accordingly, the judge considered that considerations such as delay and prejudice are not relevant to the exercise of the discretion under s 27QE.[79] Nevertheless, his Honour considered that, in view of the defendant's argument that

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76 Ibid [213(a)].

77 Ibid [149].

78 Ibid [152]-[153].

79 Ibid [161].

the lapse of time and prejudice were such that a fair trial was not possible, it was necessary to consider whether those circumstances were such that the proceedings should be permanently stayed as an abuse of process.[80] Having considered those matters, his Honour concluded that, in the present case, the effects of delay and the loss of evidence were not such as to make it likely that a trial would be unfair to the defendant.[81]

121 As we have discussed, the single question, which a court must address under ss 27QD and 27QE, is whether the Court is satisfied that it is just and reasonable to make an order setting aside the terms of settlement. In contrast to s 23A(3) of the *Limitation of Actions Act*, s 27QE does not prescribe matters which the Court should have regard to in determining that question.

122 Contrary to the submissions advanced on behalf of the defendant, and to the assertions contained in grounds 1(d)(i) and (ii), it is clear that the factors, which a court should take into account in determining an application under ss 27QD and 27QE, may not be the same as those which are required to be taken into account in an application to extend the period within which the proceeding may be brought. In such an application, s 23A(3) requires the Court to take into account and balance the length of the delay on the part of the plaintiff, the reasons for that delay, the extent to which there might be prejudice occasioned to the defendant as a result of the delay, and like considerations. Those factors are necessarily relevant to determining whether it is just and reasonable to extend the limitation period in a particular case, taking into account the rationales for the prescription of limitation periods identified by McHugh J in *Brisbane South*. By contrast, the focus, in ss 27QD and 27QE, is not on the lapse of time since the accrual of the plaintiff's cause of action, but, rather, on whether it is just and reasonable to set aside a settlement agreement that has previously been concluded between the parties. While some of the factors, applicable to an application for an extension of time, might be relevant to the

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80 Ibid [158].

81 Ibid [212].

determination whether it is just and reasonable to set aside the settlement agreement, nevertheless the focus, in a case such as this, is necessarily different.

123 In the present case, there was no delay by the plaintiff in issuing the proceeding. Indeed, the writ in the proceeding was issued before the enactment of the Children Legislation Act. Additionally, no proceeding could have been issued until the commencement of the relevant provisions of the Legal Identity Act on 1 July 2018. Further, for the reasons we have discussed, the lapse of time between the accrual of the plaintiff's cause of action or the conclusion of the settlement agreement on the one hand, and the institution of proceedings on the other hand, is not, of itself, logically relevant.

124 That said, we consider that, in an appropriate case involving an application under ss 27QD and 27QE, the prejudice, due to the elapse of time, which might ensue to the defendant, may be relevant. The question, which the court must address under s 27QE, is whether it would be just and reasonable to both sides for the settlement agreement to be set aside. The purpose of setting aside the settlement agreement is to enable the plaintiff to be able to institute proceedings that were the subject of the release under the terms of settlement. In determining whether it would be just and reasonable to set aside the terms of settlement, consideration must therefore be given to whether it would be just and reasonable for the defendant to lose the protection of the terms of settlement and not be exposed to a further claim on it by the plaintiff. The resolution of that issue would involve a consideration whether there would be unfair prejudice to the defendant in the conduct by it of its defence from such proceedings.

125 While the judge expressed the view — with which we disagree — that such prejudice was not a relevant consideration in determining an application under ss 27QD and 27QE, nevertheless his Honour considered that question, and concluded the effects of delay and the loss of evidence were not such as to make it

likely that the trial of the proceeding would be unfair to the defendant.[82] That conclusion, by his Honour, is the subject of ground 3.

126 For these reasons, grounds 1 and 2 are not made out.

Ground 3

127 Ground 3 is formulated as follows:

> [The Court] erred by holding that:
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> (a) any prejudice arising by reason of the lapse of time is irrelevant to the Court's exercise of discretion under ss 27QD and 27QE ([153], [154], [161], [202], Reasons);
>
> (b) the [defendant] had not been relevantly prejudiced by reason of the lapse of time and the consequential loss of evidentiary sources ([79]–[94], Reasons);
>
> (c) with respect to the [defendant's] breach of duty of care owed to the [plaintiff]:
>
> (i) nothing was relevantly missing from the documentary evidence; and
>
> (ii) it can be inferred that, from the absence of any references in that evidence, certain steps were unlikely to have been undertaken in response to the 'disclosure letter' ([80]–[85], [89] and [94], Reasons);
>
> (d) with respect to the [defendant's] vicarious liability:
>
> (i) Father Ian Waters and 'other Diocesan priests' can give relevant evidence; and
>
> (ii) other certain sources of evidence, for which there was either no evidence, or insufficient evidence, likely existed and were available ([89]–[94], Reasons).

128 Counsel for the defendant commenced his submissions, in support of ground 3, by noting that the plaintiff's claim is based, first, on a breach by the Diocese of its duty of care to him, and, secondly, on the vicarious liability of the Diocese for Hourigan's deliberate illegal acts.

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82 Ibid [212]. See also [202].

129 In respect of the first aspect of the claim — the allegation of breach of duty of care by the Diocese — counsel noted that the plaintiff's case was based on the acceptance by the defendant of Hourigan for training and ordination as a Catholic priest, notwithstanding the disclosures made by Hourigan to Bishop Fox in his letter dated 3 July 1972. Counsel submitted that the defendant is prejudiced in defending that claim, because Bishop Fox died in 1997, after the settlement agreement was concluded. Accordingly, the defendant does not know, and it is unable to ascertain, what steps were taken by Bishop Fox in response to that disclosure. Counsel also submitted that relevant documents 'have also likely been lost' which might have disclosed whether Bishop Fox made further enquiries in relation to the disclosure, and whether Hourigan was required to undergo psychological screening before he was accepted for training and ordination as a priest. Counsel submitted that, in concluding that no prejudice had been occasioned of that kind to the defendant, the judge impermissibly drew inferences, from the documents that are available, that evidence of those matters never relevantly existed, and that the Diocese never undertook steps to investigate the disclosure and to ensure that Hourigan was fit to enter the ministry.

130 Counsel submitted that the defendant was also prejudiced in its defence of the claim based on its vicarious liability for the abuse perpetrated by Hourigan. He submitted that the determination of the issue of vicarious liability will involve a careful examination of the role that was assigned to Hourigan within the Diocese and the position in which he was placed, relative to the plaintiff. Counsel submitted that the relevant witnesses in relation to those issues are deceased and the necessary evidence to that cannot be located. Evidence was given on the application by Father Waters that the role, duties and functions of an assistant priest are determined by the bishop's letter of appointment. In the present case, that letter has not been located. Father Waters also gave evidence that unless the bishop, in the letter, determined the role of the assistant priest, the parish priest would be the person responsible for determining what duties and functions were to be carried out by the assistant priest.

Monsignor Daly, the parish priest of the Warragul Church to which Hourigan was assigned in August 1977, died in March 1980. The defendant has obtained evidence, on affidavit, from five other Diocesan priests who have been unable to shed any light on the role, duty and functions assigned to Hourigan while he was the assistant priest at the church.

131 In addition, on the issue of lapse of time and prejudice, counsel for the defendant relied on the effect of the passage of time between the abuse, and the commencement of proceedings in this case, on the quality and nature of the evidence which might be available to the defendant to defend the proceedings. In that respect, counsel referred to the dictum of McHugh J in *Brisbane South,* that 'what has been forgotten can rarely be shown'.[83]

132 In response, counsel for the plaintiff noted that the documents, concerning Hourigan's first approach to Bishop Fox, are available. There is nothing to indicate that they are incomplete. Rather, the responses made by Bishop Fox to Hourigan's approach to him militate against the existence of any further such documents. Counsel further noted that the defendant has been able to locate and produce Hourigan's file from the former St Paul's Seminary in Kensington. The report of Dr Conway to Dr Seal dated 14 April 1987 reveals that there was no psychological screening of Hourigan when he was accepted as a student in the seminary or before his ordination as a priest. In addition, it was submitted, the defendant was on notice, since 1986, that the plaintiff had alleged that Hourigan had sexually abused him, and it was on notice that Hourigan had admitted perpetrating that abuse. Father Waters had investigated the allegation in 1986, CCI had investigated it in 1992, the abuse had been reported to police in 1995 and Hourigan was charged with serious criminal offences arising out of it, and in 1996 the plaintiff had commenced proceedings in the County Court claiming damages in respect of the abuse. In addition, the defendant was on notice, during the period from 1996 until at least 2016, that there were other persons who alleged that they had been abused by Hourigan. The matter was

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83 *Brisbane South* (1986) 186 CLR 541, 551.

investigated by the Royal Commission into Institutional Responses to Child Sexual Abuse in 2016. In those circumstances, it was submitted, the absence of any relevant information from Bishop Fox, and of any documentary material, is due to the failure by the Diocese to make proper enquiries at relevant times, and to collect and preserve all relevant materials and evidence.

133 Counsel further submitted that the defendant has failed to identify any relevant prejudice it might suffer in resisting the claim by the plaintiff based on the vicarious liability of the defendant for the conduct of Hourigan. Counsel submitted that, based on the decision of the High Court in *Prince Alfred College*, the essential question, in respect of that aspect of the plaintiff's claim, is whether the authority, power, trust and control invested by the defendant in Hourigan enabled him to take advantage of his position to abuse the plaintiff. In that respect, the relevant evidence will be that of witnesses who can attest to the position and status that Hourigan assumed in the Warragul parish, and the apparent authority that he bore to be able to place himself in a position of authority and trust over the plaintiff.

Ground 3 — Analysis and Conclusion

134 In considering ground 3, the starting point is that, on a number of occasions since 1986, the defendant had been on notice that the plaintiff had alleged that Hourigan had subjected him to serious sexual abuse in the course of his ministry, and that Hourigan had admitted to that abuse.

135 The allegations made by the plaintiff's family in 1986 were sufficiently serious to warrant Bishop D'Arcy, the then Bishop of Sale, to delegate to Father Waters the responsibility of investigating them. In the course of that investigation, Hourigan admitted the abuse to Father Waters, and Father Waters also ascertained that another priest had advised Bishop D'Arcy, early in 1986, that accusations of sexual misconduct had been made against Hourigan. The allegations, made by the plaintiff, led to the examination of Hourigan by the psychologist, Mr Conway in 1987.

136 The issue again arose in 1992, when Bishop Coffey completed the CCI incident report that Hourigan had admitted being guilty of acts alleged by the plaintiff and his brother, which Bishop Coffey described as 'clearly criminal'. In 1995, when Bishop Coffey was interviewed in relation to allegations of sexual abuse committed by Hourigan against another victim, Bishop Coffey referred to a documented report of sexual abuse by Hourigan of the plaintiff, and stated that Hourigan had admitted the allegations to Father Waters. In the same year, Hourigan was interviewed by the police, and charged with serious criminal offences, which included a number of charges of gross indecency with a male, sexual penetration of a person between the ages of 10 and 16 years, and indecent assault.

137 Those circumstances were the material background to the proceedings issued on behalf of the plaintiff against Bishop Coffey in 1996. The particulars in the statement of claim alleged, among other matters: (i) a failure by the defendant to make any proper assessment of Hourigan's fitness to work as a parish priest, to work with children in his parish, and of the likelihood that he would pose a moral danger to boys in the parish; (ii) a failure by the defendant to supervise activities in which Hourigan might be alone with boys in his parish; and (iii) allowing Hourigan to work in circumstances where he would be alone with the plaintiff, where he could take the plaintiff away on outings overnight, and in which he could use his position as a parish priest to influence or manipulate the plaintiff into engaging in sexual acts with him. In the same year, Bishop Coffey appointed Mr Alan Spencer, a retired magistrate, to make a case study of the allegations relating to Hourigan, and he provided a report in respect of that study in October 1996.

138 Thus, by 1996, the defendant was on notice that Hourigan had admitted to serious sexual offences against the plaintiff that were committed by him in the course of his work as an assistant priest in the parish of Sale. The original complaint made by the plaintiff, the investigation by the police, and the proceeding instituted in 1996, had put the defendant on notice that there were serious issues concerning the circumstances in which Hourigan had been accepted and ordained as a minister

of the church, concerning the supervision that was exercised of Hourigan during the period that he was an assistant priest in the Sale parish, and concerning Hourigan's role as assistant priest in that parish. The original letter, written by Hourigan to Bishop Fox on 3 July 1972, revealed that, from the outset, Bishop Fox had notice that serious allegations had been made against Hourigan of sexual offending against minors during his time in Papua New Guinea. That letter, and Bishop Fox's response to it, raised an important issue as to the enquiries which had been made relating to those allegations before Hourigan was accepted into the seminary and ultimately ordained as a priest. The nature of the allegations made by the plaintiff in 1986, and the particulars of negligence pleaded in the 1996 proceeding, raised issues as to the nature of the role performed by Hourigan in the Sale parish, and as to the supervision that was exercised over him by the parish priest and the bishop during that time.

139 The conduct of Hourigan, and the issues relevant to it, did not disappear after settlement of the County Court proceeding in 1996. As the case summary of the Royal Commission into Institutional Responses to Child Sexual Abuse reveals, CCI received nine complaints between 1995 and 2015 involving alleged sexual abuse committed by Hourigan between 1968 and 1989. CCI indemnified at least three of those claims between 1996 and 2015, which involved abuse by Hourigan at various locations between 1977 and 1985, and three other claims received between 1995 and 1998, which involved alleged abuse by Hourigan between 1977 and 1983.

140 In those circumstances, it might be reasonably expected that, if the defendant had undertaken investigations concerning the complaints that the plaintiff made in respect of Hourigan between 1986 and 1996, it would have retained the results of those investigations, in order to deal with the continuing complaints that were received concerning Hourigan in the ensuing 20-year period. Certainly, it might be expected that, in those circumstances, the defendant would have retained relevant records relating to the training and ordination of Hourigan as a priest, and in relation to the roles that he performed in that capacity, including as the assistant

priest to the Warragul Church.

141 The first matter relied on by the defendant, as prejudice to it, is that it does not know and cannot ascertain what response Bishop Fox made to the letter of disclosure sent to him by Hourigan in July 1972. It was submitted that relevant documents may have been lost, and Bishop Fox is now deceased.

142 As we have noted, the documents that are available, concerning that aspect of the case, comprise some five letters written, or received, by Bishop Fox between July 1972 and December 1972. The contents of that correspondence do not suggest that any other documents, relevant to the acceptance of Hourigan as a trainee priest, may have existed. The letter written by Bishop Fox to Hourigan dated 10 August 1972, in response to Hourigan's letter of 3 July 1972, strongly suggests that Fox did not consider it necessary to make any enquiry concerning the disclosures made by Hourigan in his letter. Rather, having explained that his response was delayed because of pressures of work, Bishop Fox stated that he would give 'favourable consideration' to Hourigan's desire to be a priest, noting that he came from a 'very good family'. In his next letter to Hourigan dated 29 September 1972, Bishop Fox noted that he had received a letter from Hourigan containing a medical certificate, and stated that he had applied for Hourigan to have a place at St Paul's National Seminary, Kensington in 1973. On the same date Bishop Fox sent a letter to St Paul's National Seminary nominating Hourigan as a student.

143 The sequence, and tenor, of that correspondence militates strongly against the suggestion that there may have been other relevant documentation pertaining to the acceptance of Hourigan's application to train to be a priest, and against the suggestion that Fox may have, in the meantime, embarked on some form of enquiry or investigation as to Hourigan's fitness to be ordained as a priest. The defendant has not been able to identify any document or other material, which might be relevant to that issue, but which is now not available to it.

144 In that context, it is relevant that the defendant has located the St Paul's

National Seminary file. There is no suggestion that it is incomplete or that documents are missing from it. In her affidavit sworn 10 March 2020, Ms Kirkwood has stated that she could not ascertain whether Hourigan underwent any psychiatric or psychological assessment at St Paul's to ascertain whether he was a fit and proper person to be a priest. It is now clear, from the report of Mr Conway dated 14 April 1987, that because Hourigan was a 'late vocation' trainee, he was not screened by Mr Conway before entry to St Paul's.

145 Bishop Fox died on 16 February 1997. Potentially he might have been a relevant witness, particularly in relation to any enquiries undertaken by him concerning Hourigan's fitness to be accepted into the ministry. However, as we have noted, that issue was enlivened by the complaint, made by the plaintiff in 1986, and it was a central and relevant issue to the claim pleaded on behalf of the plaintiff in the 1996 County Court proceeding. It is important to bear in mind that that complaint alleged the commission by Hourigan of serious criminal offences over a three-year period, which Hourigan admitted. That complaint, and the nature of it, at that time, gave rise to the question whether Hourigan ought to have been accepted as a priest of the church. The complaint again emerged in 1992 (when Bishop Coffey completed the CCI incident report), in 1995, when the police charged Hourigan, and in 1996 when the County Court proceeding was commenced. In those circumstances, the defendant had sufficient opportunity to investigate, and obtain any instructions from Bishop Fox, in relation to the circumstances in which Hourigan had been accepted into the ministry. It might reasonably be expected that if Bishop Fox was interviewed at that time, a signed statement would have been taken from him in preparation for the litigation. Further, in light of the ongoing complaints concerning Hourigan, it might be reasonably expected that if such a statement had been made by Bishop Fox, it would have been retained, particularly after Bishop Fox's passing.

146 Accordingly, we are not persuaded that the defendant would suffer material prejudice in the defence of the claim by the plaintiff based on the defendant's

acceptance of Hourigan's application to become a priest and his placement as an assistant priest at the Warragul Church with access to unsupervised children.

147 The defendant has submitted that it will be prejudiced in the defence of the claim made by the plaintiff based on its vicarious liability for the conduct of Hourigan, first, because it has been unable to locate the Bishop's letter appointing Hourigan as an assistant priest to the Warragul Church, and, secondly, because of its inability to call evidence from the parish priest at that time, Monsignor Daly, as to the duties that he reposed in Hourigan in the period that Hourigan was an assistant priest in the parish.

148 It is possible that the Bishop's letter, appointing Hourigan as an assistant priest, might have defined the duties that he is to perform in that capacity. However, that is a matter of speculation. Further, in light of the allegations that were made, between 1986 and 1996, concerning Hourigan's abuse of the plaintiff, it is surprising that the defendant does not have possession of, and has not retained, a copy of that letter, particularly if it was relevant to that issue. In that respect, any prejudice that the defendant may sustain as a result of the absence of the letter might fairly be considered to be much of its own making.

149 The affidavit evidence of Ms Kirkwood, and of Father Kooloos, is that the role of an assistant priest varied from parish to parish. It very much depended on the allocation of duties and responsibilities between the resident parish priest and the assistant priest. Monsignor Daly died in March 1980. The absence of evidence from Monsignor Daly might be a disadvantage to the defendant, and thus may be considered to be an element of prejudice to it. On the other hand, Monsignor Daly was never available to provide evidence on behalf of the defendant, as he passed away at a time that was very close to the period in which the plaintiff was subjected to abuse by Hourigan.

150 In *Prince Alfred College*, the Court was concerned with the question of the liability of a school for the sexual abuse of a boarder that was perpetrated by a

boarding house master employed by the school. In their joint judgment, French CJ, Kiefel, Bell, Keane and Nettle JJ noted that the fact that a tortfeasor's employment provides the occasion for the commission of the wrongful act is not of itself sufficient to give rise to vicarious liability. However, the role assigned to the employee, and the nature of the employee's responsibilities, might justify a conclusion that the employment not only provided that opportunity, but also was the occasion for the commission of a wrongful act.[84] In terms that are relevant to the present case, their Honours stated:

> Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the 'occasion' for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.[85]

151 Accordingly, in respect of the claim against the defendant based on vicarious liability, the central issue will depend, not so much on the actual duties that were delegated to Hourigan as an assistant priest, but, rather, on whether the authority, power, trust and control, that he bore, and that derived from his status as a parish priest, enabled him to take advantage of his position to sexually abuse the plaintiff. The principal evidence, relevant to that issue, will be that of contemporaneous witnesses such as the plaintiff's mother and the plaintiff, as to how Hourigan conducted his office as a priest at that time. The determination of the question of the defendant's vicarious liability for Hourigan's conduct would substantially depend upon the relevant nexus that might be established between the authority and power vested in him as an assistant parish priest, and his abuse of the plaintiff. It is not apparent that Monsignor Daly would have been able to give evidence that bore

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84 *Prince Alfred College* (2016) 258 CLR 134, 159 [80].

85 Ibid, 159–60 [81].

significantly on that issue.

152 The absence of Monsignor Daly might be a disadvantage to the defendant in resisting the claim against it based on the failure of the defendant to properly supervise the conduct of Hourigan. However, there is no suggestion in the pleading that Daly knew, or had the means of knowing, of Hourigan's abuse of the plaintiff. Nor is it suggested that Monsignor Daly was aware of the disclosure that had been made by Hourigan to Bishop Fox in his letter of 3 July 1972. Rather, the pleading is based on the proposition that, in light of that disclosure, the defendant should have undertaken closer supervision of Hourigan, which it failed to do. In that context, it is unlikely that Monsignor Daly could have given evidence of any value on behalf of the defendant.

153 It may be accepted that, as a result of the effluxion of time, the defendant may be at a disadvantage in resisting the claims made on behalf of the plaintiff. However, as the foregoing analysis reveals, the defendant has not been able to identify any material prejudice by reason of which it would not be just and reasonable for the Court to set aside the Deed concluded by the parties in 1996. Accordingly, we are not persuaded that the judge erred by holding that the defendant had not been relevantly prejudiced by the lapse of time or the consequential loss of evidentiary sources.

154 It follows that ground 3 of the application for leave to appeal must fail.

Conclusion

155 For the foregoing reasons, the defendant has failed to establish any of the proposed grounds of appeal. It follows that the application for leave to appeal must be refused.

156 If, contrary to what we have said above, we had been persuaded that the judge erred in one of the ways contended for by the defendant, the parties invited us to determine the plaintiff's application without remitting the matter to the Trial

Division. For the sake of completeness, and in deference to the arguments made in this Court, we should say that, if we had been required to determine the plaintiff's original application for ourselves, we would have had little hesitation in granting the application. Indeed, in our view, when all of the relevant circumstances are taken into account, it is difficult to see how there could be any conclusion other than that the plaintiff's application must be granted. The settlement, entered into in a case which was statute barred and lacked a viable defendant, was, because of those facts, a very modest one which did not provide the plaintiff with appropriate compensation for the wrong done to him. In those circumstances, and notwithstanding the difficulties created by the elapse of time, it is, in our view, very plainly just and reasonable to set aside the Deed. Indeed, it would positively be unjust and unreasonable not to do so.

157 The application for leave to appeal is refused.

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