By Angela Sdrinis

Seeking compensation from offenders

Accessing assets in non-institutional child sexual assault claims

During the Royal Commission into Institutional Responses to Child Sexual Abuse, and beyond, many survivors of child sexual abuse in domestic settings, or where there is no institution with deep pockets, rightly pointed out that their suffering was no less worthy of recognition and compensation than of those who survived abuse in institutional care. The abolition of limitation periods across the board in historical child abuse claims has opened up opportunities to sue individual perpetrators, as well as institutions. However, when it comes to suing a perpetrator, capacity to pay and compulsion to pay remain vexing issues.

In non-institutional claims, survivors have no choice, other than the modest payments recoverable via compensation schemes for victims of crime, but to look to their perpetrators for compensation, a process that is fraught with difficulty and, of course, only worth pursuing if the offender has assets.

ESTABLISHING CAPACITY TO PAY

The first difficulty faced by survivors is establishing the offender's actual capacity to pay. Searches for land and property titles, and through the Australian Securities and Investments Commission (ASIC), yield limited information. Private investigators can be useful in digging deeper but for privacy reasons publicly available financial information for individuals is obviously limited.

While welcome, moves by the Australian Government to allow survivors of child sexual abuse to access an offender's superannuation will likely depend on the offender being convicted and there being unpaid compensation orders.[1] In the absence of such orders, survivors are generally reliant on expensive court processes which, in many cases, will not deliver the outcome sought.

OBTAINING FREEZING ORDERS

Freezing orders are notoriously difficult to obtain.

Rule 25.11 of the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*) states:

'(1) The court may make an order, upon or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied.

(2) A freezing order may be an order restraining a respondent from removing any assets located in or

outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.'

Rule 25.14(4) of the *UCPR* is also relevant. It applies if 'an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable', in which case:

'The court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur –

(a) the judgment debtor, prospective judgment debtor or another person absconds,

(b) the assets of the judgment debtor, prospective judgment debtor or another person are –

(i) removed from Australia or from a place inside or outside Australia, or

(ii) disposed of, dealt with or diminished in value.'

The principles relating to the granting of freezing orders were stated by Gleeson CJ in *Patterson v BTR Engineering (Aust) Ltd* (*Patterson*):[2]

'The remedy is discretionary, but it has been held that, in addition to any other considerations that may be relevant in the circumstances of a particular case, as a general rule a plaintiff will need to establish, first, a prima facie cause of action against the defendant, and secondly, a danger that, by reason of the defendant's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied.'

This is a high bar.

Bennett v New South Wales (Bennett)[3]

In *Bennett*, the plaintiff applied for a freezing order with respect to two properties jointly owned by the second defendant (presumably his wife), who had yet to be served with the proceeding. The alleged offending occurred while the plaintiff was a student at a NSW state school. The second defendant had been charged with various sexual offences against the plaintiff but only convicted in relation to an act of indecency against a child, namely showing the plaintiff X-rated videos.

The plaintiff made an *ex parte* application for an order freezing the assets of the second defendant. The trial judge said:

'In my view no case for proceeding *ex parte* has been demonstrated by the plaintiff … At its absolute highest … all that is shown is that the plaintiff has an arguable case against the second defendant, and that the second defendant owns unencumbered real property in New South Wales. Nevertheless, there is no suggestion, at all, that the second defendant has dealt with, or proposes to deal with, that property.'[4]

The trial judge referred to the authorities and circumstances in which freezing orders might be granted:

'The authorities "emphasise that it is insufficient for an applicant to merely assert that the other party was likely to put assets beyond the applicant's reach": *Byron v JBG Contractors (NSW) Pty Ltd* [2021] NSWSC 549 at [18] (Garling J); *Frigo* p 8; *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141; [2013] NSWCA 102 at [57]. That is the position here, in my view: the "evidence", such as it is, rises no higher than assertion. No basis for a finding that there is a "real danger" of the requisite kind has been demonstrated so as to warrant the granting of the exceptional remedy the plaintiff seeks.'[5]

PJM v AML (No 2)[6]

Plaintiffs, and their solicitors, must also be wary of costs orders.

In the *Bennett* matter, the application was made *ex parte* so there was no risk of an adverse costs order. In *PJM v AML (No 2)*, the plaintiff's solicitors were ordered to pay the defendant's costs in an application for a freezing order against the first respondent's interest in a house in which the second respondent also had an interest. While there were issues regarding the preparation by the plaintiff's lawyers of the application for the freezing order, which may have gone

to costs, relevant considerations included lack of proof of the assertions that were made on the plaintiff's behalf, which no doubt demonstrates the difficulties in establishing, short of a 'for sale' sign on the property itself, that there is a real danger that the defendant will dispose of the asset.

WHAT HAPPENS WHEN AN ASSET HAS BEEN DISPOSED OF?

It is not uncommon for offenders to dispose of a property when they become aware of serious allegations against them, often following the first police interview.

Jew v Holloway (Jew)[7]

The matter of *Jew* was brought after the first respondent was charged and acquitted of sexually abusing the appellant and her brother. The appellant pursued a civil claim for damages for the sexual assault, which was denied at first instance.

The appellant had sought at first instance an order that the transfer of land from the first respondent to the second, his wife – purportedly for no consideration other than 'natural love and affection' – be declared void.[8] The appellant alleged that the transfer between the respondents, who were joint proprietors, was made with the intention of defeating any claim for damages. The trial judge dismissed the appellant's claim that the transfer was voidable, finding that it had been made in good faith and without an intent to defraud.

However, in a joint judgment, the Court of Appeal found that:

> '[T]he respondents were aware that the impending trial was about to expose the first respondent to the risk of a claim by the appellant and that the circumstances under which the transfer was effected bore all of the indicia of fraud as discussed in the authorities.'[9]

The appeal was allowed and the declaration that the transfer be voided granted.

COMPENSATION ORDERS

In Victoria and some other jurisdictions, restitution and compensation orders can be imposed by a court in addition to, but separate from, the sentence imposed on an offender. These orders are not intended as further punishment but rather to compensate the victim for the harm they have suffered.

Applications for compensation are made pursuant to s85B of the *Sentencing Act 1991* (Vic) (*SA*) and must be made within 12 months of the offender's conviction, although extensions of time can be sought.

Compensation orders for injury can include amounts for expenses that were incurred or reasonably likely to be incurred as a direct result of the offending, and for the pain and suffering experienced. There is no limit in the legislation as to the amount that can be awarded. Each party must bear their own costs.[10]

Previously in Victoria, an application for compensation made under the *SA* was heard by the sentencing judge. These days the court can allocate another judge to hear the application.

The advantages of applying for compensation under the *SA* as opposed to suing the perpetrator for damages include a quicker process and significantly lower legal costs as compared to a claim for damages. In addition, the availability of restraining orders (see below) means that, unlike in a claim for damages where you might need to chase an uninsured defendant for payment and throw good money after bad, payment is much more likely to be made by the offender – first because the restraining order will not be lifted until such time as the judgment is satisfied and secondly because the court processes can be used to secure payment.[11]

However, one disadvantage of pursuing a sentencing act claim as opposed to a common law claim is that, generally speaking, the awards can be quite low. This may be because the awards are not assessed by reference to common law principles. In addition, the evidence usually provided to the judge or magistrate is more cursory than the evidence as to quantum that is produced in the common law courts.

In addition, pursuant to s85H of the *SA*, if a court decides to make a compensation order, it may, in determining the amount of compensation, take into account the financial circumstances of the offender and the nature of the burden that the payment will impose. In determining any single award, judges may take into account the amount restrained and the number of current and potential applicants who may be eligible to receive an award of compensation.

In Victoria, *SA* awards in claims involving historical child abuse have ranged from $25,000 to $215,000.[12] An award of $300,000 was made for an adult victim in the 'hot chocolate' rapist claims.[13]

There was a recent award in a *SA* matter in Victoria of $500,000 but only $189,000 was available to satisfy the award.[14]

SA payments will be reduced by the amount of any VOCAT award.[15]

RESTRAINING ORDERS

Applications for restraining orders are made under ss14 and 15 of the *Confiscation Act 1997* (Vic) and pursuant to s15(1)(e) and can be made for the purpose of satisfying any order for restitution or compensation under the *SA*. The application for a restraining order will be made by the DPP. Applications for restraining orders are made *ex parte*.

MULTIPLE CLAIMANTS AND LIMITED ASSET POOLS

In claims involving historical child abuse, it is not uncommon for perpetrators to be convicted of multiple offences against multiple complainants. This is in part because in historical matters alleged offenders are more likely to be prosecuted if there is abundant tendency evidence from other victims.

It makes sense for multiple claimants to have the same legal representation as this reduces costs and generally means that the acting lawyer will have a better overview of the proceedings and can give more informed advice across the group of clients. However, acting for multiple claimants where there is a limited pool of assets also means there is the potential for conflict to arise.

Obviously, a lawyer has a duty to any individual client to get the best possible result. How does a lawyer who is acting for multiple victims decide how, for the purpose of settlement negotiations, a limited pool should be distributed?

In the first instance, each client should be advised of the potential for conflict and of the option to obtain separate

representation. If the group of clients, notwithstanding this advice, chooses to proceed with the same representation, the conflict advice should be confirmed in writing and each client asked to sign an acknowledgement.

In terms of how the pool is to be distributed among claimants, advice should be sought from an independent barrister who can be asked to advise on how distribution of the pool should occur with reference to a percentage of the pool depending on severity of impact and proof of loss. Asking counsel to nominate a percentage share, rather than a specific amount, allows for flexibility in negotiations in dealing with an asset pool that may change over time and where there is no guarantee that the whole of the pool will be available for distribution in a negotiated settlement.

There would appear to be no conflict if the matters go to hearing and the judge makes the relevant awards, but it is not unusual for *SA* matters to be the subject of negotiations given that settlement can be to the advantage of all parties.

CONCLUSION

Abuse claims are a growth area in compensation law and while most claims are pursued against institutions, there is increasing interest in suing individual perpetrators where there is a sufficient asset pool.

In *ZAB v ZWM*,[16] an undefended claim for sexual assaults perpetrated by a father upon his son, the Chief Justice of the Supreme Court of Tasmania awarded the plaintiff a total of $5,313,500.

Although the defendant was reputedly a highly regarded medical scientist and businessman with considerable wealth, it appears that he did transfer assets to a family member/s and, as a result, the plaintiff has had significant difficulty in recovering the damages that were awarded to him in December 2021. ■

Notes: **1** Australian Government, 'Access to offenders' superannuation for victims and survivors of child sexual abuse' (2023) <Access to offenders' superannuation for victims and survivors of child sexual abuse | Treasury.gov.au>. **2** (1989) 18 NSWLR 319, 321–322. **3** [2022] NSWSC 1406 (*Bennett*). **4** Ibid [23]. **5** Ibid [34]. **6** [2018] QSC 204 (*PJM v AML (No 2)*). **7** [2013] VSCA 260 (*Jew*). **8** Ibid [6]. **9** Ibid [45]. **10** *Sentencing Act 1991* (Vic) (*SA*), s85K. **11** Pursuant to s85(1) of the *SA* an order for restitution may be enforced by the court. **12** See *AA v Buckley* [2016] VCC for an example of an *SA* award in an historical child abuse claim. **13** K Hagan, 'Xydias to pay victims $1 million', *The Sydney Morning Herald* (22 December 2009) <https://www.smh.com.au/national/xydias-to-pay-victims-1-million-20091222-lbdd.html>. **14** *Dee v Bernard* [2017] VCC. **15** Above note 10, s85I. **16** [2021] TASSC 64 (*ZAB v ZWM*).

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By Dipal Prasad

When is a costs agreement void if the initial estimate is not updated?

BACKGROUND

A barrister, Christopher John Bevan, commenced proceedings in the Supreme Court of NSW against his instructing solicitor, John David Bingham, as well as Mr Bingham's client and two costs review panellists. Mr Bevan was seeking dismissal of the review panel's decision concerning the barrister's costs.[1] The action was ultimately dismissed by Bellew J. However, the case provides an important lesson in regard to the consequences that flow from failures to disclose – whether to an instructing solicitor or a barrister.

The barrister had been retained by the instructing solicitor to appear for the solicitor's client in proceedings seeking to annul an order made against the client pursuant to the *Bankruptcy Act 1966* (Cth). The barrister and the solicitor entered into a costs agreement pursuant to s180(1)(c) of the *Legal Profession Uniform Law* (*LPUL*).

In that costs agreement, the barrister disclosed his rate as $8,000 per day for brief on hearing fee, and $800 per hour for other work, totalling an estimated $60,000 plus GST plus travelling and out-of-pocket expenses for the three likely stages of the proceedings.

In contrast to this disclosure, the fees rendered by the barrister came to a total of $349,360, without having given any update to the original estimate of costs.

As the barrister's fee was not paid by the solicitor, the barrister applied for an assessment of costs in the amount of $349,360 plus interest of $6,983.48.

The costs assessor assessed that costs came to an amount of $224,947.79, a reduction of more than $131,000. The costs assessor and the review panel took into account breaches of disclosure pursuant to s174(1)(a) and/or (b) of the *LPUL* and found the barrister's costs agreement to be void due to the operation of s178 of the *LPUL*, which automatically voids a costs agreement where there has been any failure to disclose.[2]

WHEN DO DISCLOSURE OBLIGATIONS APPLY?

The facts of the case suggest it is not a valid argument that barristers are exempt from costs-disclosure obligations when