

Extension of Limitation Periods – High Court update

A. Relevant Principles

1. Recently, in *Prince Alfred College Incorporated v ADC*,¹ the High Court restated the following principles (previously identified in *Brisbane South Regional Health Authority v Taylor*²) to be considered when exercising discretion to extend a limitation period:
 - (a) the applicant must prove the facts which enliven the discretion to extend the limitation period;³
 - (b) the applicant must also show good reason for exercising the discretion in his or her favour;⁴
 - (c) an extension of time is not a presumptive entitlement which arises upon satisfaction of the pre-conditions which might be necessary to enliven the discretion;⁵
 - (d) the onus of persuasion is upon the applicant;⁶
 - (e) the exercise of the discretion to grant an extension must take account of the reasons for the limitation regime;⁷
 - (f) “the purpose of the legislative conferral of the discretion is to ensure a fair trial on the merits of the case”;⁸
 - (g) the loss of evidence which will tend against the prospects of a fair trial will usually be a fatal deficit in an argument that good reason has been shown to exercise the discretion to grant an extension; and

¹ [2016] HCA 37

² (1996) 186 CLR 541

³ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [99]

⁴ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [99]

⁵ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [99]

⁶ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [99]

⁷ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [99]

⁸ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [100]

- (h) “in cases of long delay, prejudice may exist without the parties or anyone else realizing that it exists.”⁹

2. As indicated, this was a restatement of principle and does not alter the principles to be applied since *Brisbane South Regional Health Authority v Taylor* was handed down. Moreover, this decision does not alter the Court of Appeal of Victoria’s decisions¹⁰ distinguishing *Brisbane South Regional Health Authority v Taylor* in the Victorian context or the proper approach, being the synthesis of the competing considerations, required by ss 23A(3) or 27L of the *Limitation of Actions Act*.¹¹
3. In this respect (as in the case of *Brisbane South Regional Health Authority v Taylor*) *Prince Alfred College Incorporated v ADC* is distinguishable from those cases dealing with the Victorian legislation.

B. Facts and decision in *Prince Alfred College Incorporated*

4. The relevant facts in *Prince Alfred College Incorporated v ADC* are as follows:
- (a) in 1962 the plaintiff was sexually assaulted when he was 12 years old by an employee of Prince Alfred College;
 - (b) prior to seeking leave to extend the limitation period to bring an action against Prince Alfred College the plaintiff had, some eleven or so years earlier, already:
 - (i) instituted common law proceedings against the perpetrator of the sexual assault and settled the case;¹²
 - (ii) indicated to Prince Alfred College that he would not sue them, despite foreshadowed common law proceedings, and reached a financial settlement with them in which he

⁹ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [100]

¹⁰ See *Tsiadis v Patterson* (2001) 4 VR 114, 116 at [5] and 122-123 at [30] – [31] and; *Clark v McGuinness* [2005] VSCA 108 at [37] – [39]

¹¹ 1958 (Vic); *Tsiadis v Patterson* (2001) 4 VR 114

¹² *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [19] and [108]

received a form of compensation¹³, something the High Court determined was significant;¹⁴ and

- (c) by the time proceedings were commenced in 2008 (some 46 years after the sexual assault and 11 years after settlement with the perpetrator) a number of witnesses had died and a psychologist who the plaintiff had first consulted had destroyed his notes.¹⁵

5. The High Court allowed the appeal by Prince Alfred College, inter alia, finding:

The extraordinary delay of over 11 years between the time of an apparent resolution of any claim against [Prince Alfred College] and the commencement of proceedings was not justified by the circumstances of this case and meant that a fair trial on the merits was no longer possible.¹⁶

C. Conclusion

6. The decision in *Prince Alfred College Incorporated v ADC* turned on specific facts and contains no new statement of principle. The proper approach to weighing the considerations in ss 23A(3) or 27L of the Act remains that enunciated in *Tsiadis v Patterson*.¹⁷

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¹³ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [18]

¹⁴ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [106]

¹⁵ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [24] and [103]

¹⁶ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [8]

¹⁷ (2001) 4 VR 114, 123 at [33]