DISTRICT COURT OF QUEENSLAND

CITATION:	*Cutbush & Anor v Leach & Anor* [2013] QDC 329
PARTIES:	**PAUL FRANCIS CUTBUSH** (first plaintiff) and **JUDITH ELAINE CUTBUSH** (second plaintiff) v **MAREE LEACH** (first defendant) and **WILLIAM CRAWFORD** (second defendant)
FILE NO/S:	D162/11
DIVISION:	Civil
PROCEEDING:	Application for summary judgment; application for extension of limitation period
ORIGINATING COURT:	District Court
DELIVERED ON:	19 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2013; 2 December 2013
JUDGE:	Butler SC DCJ
ORDER:	**1. The plaintiffs' application for extension of the limitation period is dismissed.** **2. Pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999, paragraphs 37 to 122 and 133 to 157 of the amended statement of claim are struck out.** **3. Pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999, summary judgment is entered for the first defendant against the plaintiffs.** **4. Pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999, summary judgment is entered for the second defendant against the plaintiffs.**

5. The plaintiffs pay the defendants' costs of and incidental to the application for extension of the limitation period, to be assessed on the standard basis.

6. The plaintiffs pay the defendants' costs of and incidental to the summary judgment application, and to the action; to be assessed on the standard basis.

CATCHWORDS:	LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – OTHER CASES AND MATTERS – where the plaintiffs alleged the defendants defamed them – where the plaintiffs were barred by s 10AA *Limitation of Actions Act* 1974 (Qld) – application to extend time pursuant to s 32A *Limitation of Actions Act* 1974 (Qld) PRACTICE AND PROCEDURE – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – Rule 293 *Uniform Civil Procedure Rules* 1999 (Qld) – where defendants brought application for summary judgment – whether the plaintiffs have no real prospect of succeeding on the claim
COUNSEL:	First plaintiff in person on 2 December 2013. S.R.C. Slasberg, solicitor, and R.J. Winter, solicitor, on behalf of the defendants.
SOLICITORS:	Walsh Halligan Douglas Lawyers on behalf of the defendants.

[1] This is a decision determining two applications brought between the plaintiffs and defendants in this defamation action.

[2] An application was filed on 21 November 2013 by the first and second defendants applying for summary judgment to be entered against the respondent plaintiffs pursuant to r 293 of the *Uniform Civil Procedure Rules 1999* (the "UCPR"). I heard the application and reserved my decision on 21 November 2013.

[3] Before a decision was delivered on the summary judgment application the plaintiffs on 2 December 2013 brought an application under s 32A of the *Limitation of Actions Act 1974* (Qld) (the "LAA") for an extension of the limitation period in respect of most of the defamatory publications alleged in the claim.

Background

[4] The proceedings were originally commenced by the filing of a claim and statement of claim by the plaintiffs on 23 December 2011. Both parties initially lacked legal representation. Notwithstanding deficiencies in the pleadings of both parties they agreed on a trial date. It was only after that time that solicitors were engaged.

[5] On 26 September 2013 Reid DCJ made an order setting aside the trial date and striking out the statement of claim, the defences and counterclaim. Both parties were legally represented in those proceedings. His Honour gave the plaintiffs leave to file an amended claim and statement of claim but made a number of orders

designed to ensure that if the plaintiffs did not act with expedition to file an amended claim and an application to extend the limitation period then the claim would be struck out. The relevant orders read as follows:

> "5. The Plaintiffs have leave to file an Amended Claim amending the damages claimed and Amended Statement of Claim within 21 days of the date of this Order and if they fail to do so their Claim is dismissed.
>
> 6. If the Plaintiffs file and serve a Statement of Claim which includes a claim for damages for Defamation arising out of a publication said to have occurred earlier than 23 December 2010, then:
>
> (a) the Plaintiffs must also, within 21 days of filing and serving any Amended Statement of Claim, file and serve an application for an Order pursuant to s32A of the *Limitations of Actions Act* 1974 (Qld) extending the limitation period and if they fail to do so the claims arising from publication said to have occurred earlier in time than 23 December 2010 are to be struck out;
>
> (b) the time for the Defendants to file and serve their Defences is extended until 14 days after the determination of the Plaintiffs' application or within 14 days after service of an Amended Statement of Claim in the event that it contains no claim for damages for defamation arising out of publication said to have occurred earlier in time than 23 December 2010."

[6] The plaintiffs filed an amended claim and an amended statement of claim on 17 October 2013. That filing occurred within the time period specified in his Honour's order.

[7] The amended statement of claim filed on 17 October 2013 alleged eight defamatory publications. Seven of those were publications said to have occurred earlier in time than 23 December 2010.

[8] The plaintiffs failed to file and serve an application for an order to extend the limitation period under s 32A of the LAA within 21 days of the filing of the amended claim and statement of claim as required in Reid DCJ's order.

[9] Once the 21 day time period had elapsed the defendants filed a summary judgment application. That application was listed for hearing on 21 November 2013. The plaintiffs by email sought an adjournment. On 21 November 2013 the plaintiffs failed to appear, I refused the adjournment and proceeded to hear the summary judgment application.

[10] The defendants submitted as the plaintiffs had failed to comply with the order of Reid DCJ made on 26 September 2013 requiring any application under s 32A of the LAA to be filed within 21 days of the filing and serving of an amended statement of

claim, then by operation of his Honour's order all paragraphs of the plaintiffs' statement of claim relating to publications alleged to have occurred prior to 23 December 2010 were struck out.[1] Alternatively, it was submitted that this court should give effect to his Honour's order and strike out those paragraphs.

[11] In respect to the defamatory publication alleged to have been made on 30 April 2011, the defendants submitted the claim lacks merit for a number of reasons. Accordingly the defendants submitted in respect of all the alleged publications the plaintiffs have no real prospect of successfully defending the claim.

[12] After argument on the summary judgment application was heard and decision in the matter reserved, the plaintiffs on 2 December 2013 filed an application to extend the time limit under the limitation period. The application to extend the limitation period was heard on 16 December 2013.

Application for extension of time

[13] The application for summary judgment was listed for hearing on 21 November 2013. On 20 November 2013 a judge's associate communicated by email with the plaintiffs and with the solicitor for the defendants requesting provision of "materials filed in the court registry within the preceding fortnight" and a written outline of submissions.

[14] On 20 November 2013 at 9.19am the following correspondence was forwarded in response to the associate by the first plaintiff, Mr Cutbush:

> "Please note that the matter needs to hear our statement of claim prior to proceeding with the application by Mr Salsberg. The orders of 26/9 gave us approval to lodge that amended claim and we did that within the time frame along with providing additional information in relation to the extension of time. The extension of time was already granted by J Reid in that he approved our amended claim. To date Mr Salsberg has not filed a defence. I would suggest that the matter is not ready for hearing as no trial date was agreed between the parties. As plaintiffs we have attempted to resolve the matter."

[15] At 3.03pm on 20 November 2013 a further email was received by the associate from the first plaintiff requesting an adjournment because the defendants had not filed or served a defence. Copies of the Amended Statement of Claim and of an affidavit sworn 8 November 2013 by Paul Cutbush were attached. The affidavit had not been filed in the court registry and this was the first occasion a copy of it was provided to the court.

[16] On 21 November 2013 at 8.35am a further email was received from the first plaintiff:

> "Once again I request an adjournment as the plaintiffs cannot attend with no representation. The order of J Reid 26/9 placed a cost order of $7,000 on us for no good reason except that we were self represented (as the defendants were) at the outset. This has

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[1] Defence of first defendant filed 21 November 2013, para 9; Defence of second defendant filed 21 November 2013, para 5; Applicant's Outline, para 7

> undermined our ability to retain our barrister and is restricting our ability to seek natural justice. The matter that needs to be heard is our claim 162/11 versus the ongoing attempts by the defendants to have it dismissed. We have a very strong cause of action that in the interest of public interest must be heard. The impact of the defamation on my career has meant that I am still seeking work and cannot miss an interview today due to this matter in which there was no consultation from Mr Salsberg. I seek an adjournment and that no orders be granted in our absence."

[17] There was no appearance by either first or second plaintiff on 21 November 2013. After hearing submissions by the defendants, reading an affidavit of Spencer Slasberg sworn 8 November 2013, an affidavit of Maree Leach sworn 18 November 2013 and after considering Mr Cutbush's emails, I refused the plaintiffs application for an adjournment, provided oral reasons and proceeded to hear the application for summary judgment.

Application under s 32A: the law

[18] Section 10AA of the LAA provides that an action for defamation must not be brought more than one year from the date of the publication. Section 32A of the LAA provides:

> "(1) A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period for the cause of action.
>
> (2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 10AA to a period of up to 3 years from the date of the publication.
>
> (3) A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).
>
> (4) An order for the extension of a limitation period, and an application for an order for the extension of a limitation period, may be made under this section even though the limitation period has already ended."

[19] In a number of decisions commencing with *Noonan v MacLennan & Anor*[2] the Court of Appeal has stated how the test in s 32A should be applied. The principles adopted in those decisions were helpfully summarised by Applegarth J in *Pingel v Toowoomba Newspapers Pty Ltd*[3]

> "1. The burden is on the applicant for an extension of time to point to circumstances which make it not reasonable in the circumstances to have commenced an action within one year from the date of the publication.

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2 [2010] QCA 50

3 [2010] QCA 175 at [87]; cited by White JA in *Jamieson v Chiropractic Board of Australia* [2011] QCA 56 at [22]

2. The circumstances that might give rise to an extension are left at large.

3. A test posed by s 32A ss 2 is an objective one. It is not satisfied by showing that the applicant believed that he or she had good reason not to sue.

4. If the court is satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within the one year period, then it must extend the limitation period. Unlike other extension of time provisions there is no discretion whether or not to extend time. Discretion exists as to the length of the extension to be granted which in any event may not exceed three years from the date of the defamatory publication.

5. The section requires more of an applicant than to show it would have been reasonable not to commence an action until after the one year period had expired: the court must be satisfied it was not reasonable in the circumstances for the plaintiff to have commenced an action within the one year period.

6. Circumstances must be sufficiently compelling to satisfy the court that it was not reasonable in the circumstances to commence an action within the one year period that ordinarily requires litigants to commence proceedings.

7. Section 32A of the Act proceeds on the assumption that there may be circumstances where it will not be reasonable for a plaintiff to commence an action to vindicate his or her legal rights in accordance with that time limit."

Delay in filing s 32A application

[20] The plaintiffs' original claim was filed on 23 December 2011 more than a year after all but one of the publications the subject of the claim.

[21] When the matter came before his Honour Reid DCJ on 26 September 2013 no application for an extension of the limitation period had been filed up until that time. His Honour gave leave to file an amended claim and amended statement of claim and added a further requirement that the plaintiffs file an application for an order under s 32A of the LAA to extend time in respect of any publication earlier than 23 December 2010.

[22] On 17 October 2013 the plaintiffs served their amended claim and statement of claim upon the defendants by email. In that email it was said:

> "As per Order of 26/9 I will be lodging an application for extension of time."

[23] No such application was lodged but in an email at 9.19 am on 20 November 2013 the first plaintiff said:

> "The extension of time was already granted by J Reid in that he approved our amended claim."

[24] To my mind, this comment is inconsistent with what had been said earlier in the email of 17 October.

[25] The orders by Reid DCJ were made after argument during which the plaintiffs were put on clear notice that failure to comply with the freshly set time limits may be fatal to their claim. The transcript indicates Mr Cutbush was present in the court room at that time. His Honour's order required any application under s 32A be filed and served on or before 7 November 2013. No application was filed or served within time.

[26] Contrary to Mr Cutbush's assertion in his email of 20 November 2013 that the extension of time was "already granted by J Reid in that he approved our amended claim", no such approval had been given. It was clear from his Honour's order that unless an application under s 32A was filed within time the relevant claims would be struck out. Even had such an application been filed within time it would still have been for the court to determine the application on its merits. Contrary to Mr Cutbush's assertion, there was no approval by his Honour and the condition precedent to any consideration of an extension of time was not complied with.

[27] The plaintiff's correspondence also asserts that provision of "additional information in relation to the extension of time" was served within time.[4] This appears to be a reference to an affidavit by Paul Francis Cutbush sworn 8 November 2013. In his affidavit the first plaintiff provided explanations for why he did not commence an action within time in respect to all but one of the alleged publications.

[28] The affidavit of the first plaintiff was sworn after the expiry of the 21 day limit imposed by his Honour's order. The affidavit was first communicated to an associate by email on 20 November 2013 but not filed until 2 December 3013.

[29] The affidavit and the application under s 32A for extension of the limitation period were filed on 2 December 2013 outside the time limit in his Honour's order.

[30] The defendants argue his Honour's order was intended to have automatic effect upon the time limitation set in the order expiring without the plaintiffs having filed a s 32A application. I doubt whether the words of his Honour's order are sufficient to cause the striking out of part of the claim without further order. The order provides that the claims "are to be struck out". The reference to future action would seem to call for a further order to give effect to the consequence the defendants seek. However, I do not consider it necessary that I resolve that point for the purpose of this decision.

[31] The plaintiffs' original statement of claim was defective and for all but one publication was commenced outside the limitation period. No application for extension of the limitation period had been made by the time the matter came before his Honour Judge Reid. His Honour gave a further opportunity for an application for extension of time to be brought. The first plaintiff was both represented and

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4 Email 20 November 2013, 9.19 am; email 3 December 2013, 9.33 am

present and should therefore have been aware of what was required and the significance of the time limit imposed. The plaintiffs' failed to avail themselves of the opportunity to bring an application for extension of time within the period specified by his Honour. In my view this failure to comply with his Honour's order may of itself be capable of providing sufficient basis for now denying the plaintiff's an extension of the limitation period. However, in the circumstance that the plaintiffs have now made an application under s 32A I will consider that application on its merits.

The application to extend the limitation period

[32] The plaintiff's application for an extension of the limitation period is supported by an affidavit by Mr Paul Cutbush. In that affidavit he raises a number of matters said to constitute barriers to the action being brought within time. The primary features relied upon are:

(a) the first plaintiff's suspension from his position as a director with the Queensland Transport and Main Roads Department;
(b) an investigation of the first plaintiff's conduct implemented by his employer;
(c) a direction to the first plaintiff by his employer to treat the suspension and investigation as confidential;
(d) illness suffered by both plaintiffs;
(e) inability to gauge the extent of the damage to reputation until the time of resignation and because of difficulties in obtaining material;
(f) financial stress and involvement in the purchase of a property at the time; and
(g) further "harassment" by the defendants e.g. EC Credit Control involvement.

[33] In oral submissions on 17 December 2013 Mr Cutbush, who appeared by telephone link on behalf of the plaintiffs, submitted the plaintiffs have a very clear cause of action and should not be denied justice due to their difficulty in complying with procedural requirements. He advanced a number of arguments in support of the information already provided in his affidavit.

[34] Under s 32A(2) a court must extend the limitation period "if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action … within one year from the date of the publication …". The test to be applied is an objective one.[5] Keane AJ in *Noonan v McLennan* recognised circumstances may exist where it will not be reasonable for the plaintiff to commence an action within one year but went on to say:

> "While s 32A(2) proceeds on this assumption, it is obvious that only in relatively unusual circumstances will a court be satisfied that it is not reasonable to seek to vindicate one's rights in accordance with the law. The burden is on a plaintiff to point to circumstances which make it not reasonable to seek to enforce his or her legal rights in the way required by the law."[6]

[35] Of the seven relevant publications outlined in the amended statement of claim, five are alleged as having been made in February/March 2010 and a further two on 10

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5 *Noonan v MacLennan & Anor* [2010] QCA 50 at [20].
6 [2010] QCA 50 at [15].

June 2010. Accordingly the one year limitation period terminated for those publications either in February/March 2011 or in June 2011. The original claim was brought on 23 December 2011.

[36] The primary submission by the plaintiffs is that conduct by the defendants gave rise to proceedings necessitating a response by the plaintiffs throughout 2010. This initially involved litigation in QCAT in relation to tenancy matters, but after complaints were made to Mr Cutbush's employer he was suspended in June 2010 and an investigation commenced. Mr Cutbush submits the need to address the investigation and the QCAT litigation prevented him from attending to the civil action. In addition he said the stress of all of this caused him to fall ill. It is submitted that the combined effect of these pressures prevented Mr Cutbush from commencing the defamation action. The impediments relied upon by the plaintiffs as explanation for their not having commenced the action must be assessed having regard to the times when they were in existance.

[37] It is apparent from the material Mr Cutbush became aware in February/March 2010 of complaints received at his workplace. However, he says the exact content of those complaints was not revealed to him until June 2010. That was when he was suspended and an investigation initiated.

[38] A document filed by Mr Cutbush indicates correspondence and documents were disclosed to him by the Department on 18 May 2010 and 25 June 2010 respectively.[7] This is consistent with what Mr Cutbush said in submissions, that he obtained copies of the relevant documents relied upon as constituting publication in about June 2010.

[39] The letters and file notes relied upon by the plaintiffs are before the court in documents filed in the course of the proceedings.

[40] Four documents are exhibited to the original statement of claim filed 23 December 2011. They comprised:

(a) two file notes each dated 16 February 2010 which appear to be referable to the first publication alleged in the amended statement of claim;

(b) a file note by Ms Jude Profke dated 18 February 2010 which is referable to the second alleged publication;

(c) a file note dated 22 March 2010 recording a telephone conversation on 9 March 2010 between Mr Les Dunn and Ms Marie Leach. This is the subject of the third alleged publication; and

(d) a letter dated 20 March 2010 but apparently forwarded by Ms Leach to the Minister for Transport on 19 March 2010. This constitutes the fourth alleged publication.

[41] Two further documents were exhibited to an affidavit of Paul Cutbush, filed 16 September 2013. They are:

(a) an email dated 25 March 2010 to Ms Profke from Ms Leach which is the subject of the fifth alleged publication;[8] and

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7 Exhibit 10 to affidavit of Paul Cutbush filed 16 September 2013.

8 Exhibit 14 to affidavit of Paul Cutbush filed 16 September 2013.

(b) an email directed to Canungra Realty and to Mr Paul Tully on 10 June 2010. This is referable to the seventh and eighth alleged publications.[9]

[42] A review of each of these letters, emails and file notes indicates they contained sufficient detail of the alleged defamatory publications to support the commencement of proceedings. It is said by the first plaintiff in his affidavit that he was not sufficiently aware of the impact of the defamation upon his career or the extent of the damage to his reputation and career until the time of his resignation in November 2011. This is advanced as a reason why the action could not be commenced within the one year limitation period. It is true Keane JA in *Noonan v MacLennan*[10] said that cases which might fall within s 32A(2) of the *LAA* included where "a plaintiff is not able to establish the extent of the defamation or is without the evidence necessary to establish his or her case during the year after the publication." I do not consider that the present case falls within that category. The defamation alleged was contained in the conversations evidenced in the file notes or correspondence which was available to the first plaintiff in June 2010. It is true that the extent of damage flowing from the alleged defamation, although foreseeable, was not fully ascertainable by early 2011. However, I do not consider it was reasonable for the plaintiffs to wait until they had a full understanding of the extent of any damages that had been suffered. The evidence of the publications relied upon was available to them and accordingly it was capable for them to establish their case prior to the elapse of a year after publication. It was open to the plaintiffs to commence proceedings within time with any resulting damages being assessed at a later date. This is not a case where on the information available as at early to mid-2011 the quantum of damages may have been so trivial as to render the commencement of proceedings unreasonable. On the plaintiff's account, by early 2011 significant adverse impacts had been suffered by him in relation to his employment with the public service and his health.

[43] In my view there was ample time after the file notes and correspondence were released to the first plaintiff in about June 2010 for the plaintiffs to initiate proceedings within the limitation period.

[44] It is also submitted by virtue of the combination of illness and pressure due to other proceedings it was not reasonable for proceedings to be commenced within the year.

[45] A medical certificate by a general practitioner dated 12 September 2013 confirms that Mr Cutbush had been treated for workplace stress from 2010 and was under the care of a consultant psychiatrist and a clinical psychologist.[11] There is also reference in the material to Mrs Cutbush suffering from depression.

[46] It is true during the course of 2010 the plaintiffs were engaged in QCAT litigation and Mr Cutbush was subject to investigation. To delay commencing defamation action until the outcome of disciplinary and other proceedings was known would not usually be a reasonable response. In *Noonan*'s case, Chesterman JA said:

> "…a plaintiff who wishes to claim damages for defamation does not act reasonably (if no more is shown) in delaying the start of proceedings while some investigative or disciplinary proceeding,

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9 Exhibit 13 to affidavit of Paul Cutbush filed 16 September 2013.

10 [2010] QCA 50 at [17].

11 Exhibit 11 to affidavit of Paul Cutbush filed 16 September 2013.

> affecting the parties to, and the subject matter of, the defamation, is undertaken."[12]

[47] In this matter, although undoubtedly Mr Cutbush was suffering from a stress-related condition he nevertheless was well enough to be able to actively involve himself in the various other proceedings which were on foot. There is evidence he was very active in preparing material in the ongoing QCAT proceedings and appearing on occasions in person in that tribunal. He also initiated an appeal in about January 2011 to a public service tribunal against the outcome of the disciplinary investigation. A decision was delivered by the public service tribunal in about February/March 2011. In addition, on his account it seems Mr. Cutbush was involved in the purchase of a property at about this time.

[48] Mr Cutbush demonstrated a willingness to utilize legal remedies. He engaged a solicitor to prepare a letter to Ms Leach which was forwarded on 2 April 2010 requesting her to not contact him at his workplace, and warning that disclosure of his personal information would be a breach of privacy laws. Mr Cutbush contacted Slater & Gordon in about February 2011 with a view to taking defamation action. That was not pursued after a fee estimate was provided by the solicitors firm.

[49] In addition it appears Mrs Judith Cutbush was contemplating defamation action as early as 10 June 2010 when she emailed Ms Leach, saying:

> "Please be advised that as your vexatious and baseless action has been summarily dismissed by QCAT this week you are now liable to defamation action regarding your spurious claims … I am seeking urgent legal remedies."[13]

[50] Given Mr Cutbush was able to prepare and engaged in proceedings throughout 2010, it cannot, in my view, be said that by virtue of illness or pressure at work he was not in a fit state to file a defamation claim. This is particularly so since the alleged defamatory publications were canvassed by him in the QCAT proceedings and he had successfully sought and obtained the primary documentation from the Department by June 2010.

[51] It is further alleged by the plaintiff he was directed by the Assistant Director-General and the external investigator to "not disclose the fact [he] was suspended, under investigation or any other matter during the investigation". This is a reference to a direction given to him in June 2010. He asserts "it was not reasonable to lodge a claim when I was threatened with further disciplinary action".

[52] A letter by Paul Smith, Deputy Director-General, dated 1 July 2010 addressed to Mr Cutbush was filed in the proceedings. Mr Cutbush's letter contains the following direction:

> "To assist in ensuring the integrity of the investigation into allegations against you, the matters surrounding this investigation are to remain confidential. You are not to discuss this matter with your work colleagues or any other person involved, other than a union or legal representative or other appropriate support person. Failure to follow this lawful direction may be grounds for discipline."[14]

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12 *Noonan v MacLennan & Anor* [2010] QCA 50 at [61].

13 Attachment 3 to defence of first defendant filed 19 January 2012.

14 Exhibit 12 to affidavit of Paul Cutbush filed 16 September 2013.

[53] In my view the plain words of this direction cannot be construed as preventing Mr Cutbush from taking legal advice or commencing civil action before the courts.

[54] The first plaintiff also sought to rely upon what was described in his affidavit as further harassment by the defendants. The only example referred to in the affidavit and in oral submissions was the referral to a debt collecting agency, EC Credit Control, of an alleged debt owed to Ms Leach. As appeared from the amended statement of claim, that referral occurred on 30 April 2011. In my view there was ample time between June 2010 and April 2011 for the plaintiffs to bring their claim. Furthermore, it is not apparent that the involvement of the debt collection agency would have constituted any significant impediment to filing of the defamation claim.

[55] As observed by Fraser JA in *Pingle v Toowoomba Newspapers Pty Ltd*[15], "Defamation claims should ordinarily be pursued very promptly." His Honour went on to observe:

> "The legislature has evidently identified a public interest in the prompt commencement of proceedings for defamation. That is evidenced also by the relative shortness of the limitation period and the relatively unusual strictness of the test in s 32A(2). As Chesterman JA observed in *Noonan v MacLennan & Anor*, that public interest should not be undermined by too ready an acceptance that it was not reasonable to start the proceedings within one year."[16]

[56] The onus lies upon the plaintiffs to bring themselves within s 32A(2) by demonstrating it was not reasonable for them to start the defamation litigation within the limitation period. For the reasons stated above, the plaintiffs have failed to satisfy me that it was not reasonable in the circumstances to commence an action in relation to the matter within one year from the date of the respective publications.

[57] The application will be dismissed.

[58] In the circumstance that all publications but the one made to EC Credit Control on 30 April 2011 were filed outside the one year limitation period, it is appropriate that I strike out the paragraphs of the amended statement of claim in respect of all publications other than that publication.

Summary judgment application: the law

[59] Rule 293(2) of the UCPR provides the court must be satisfied, before granting summary judgment, that the plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim and there is no need for a trial of the claim or part of the claim. The defendants bear the onus of establishing each of those limbs of the test.[17]

[60] The test is to be applied in accordance with the language of the statute. The words "no real prospect of succeeding" require the court "to see whether there is a realistic as opposed to a fanciful prospect of success".[18]

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15 [2010] QCA 175 at [37].

16 [2010] QCA 175 at [42].

17 *ANZ Banking Group Ltd v Barry* [1992] 2 Qd R 12 at 19

18 *Swaine v Hillman* [2001] 1 All ER 91 at 92; *Bernstrom v National Australia Bank Ltd* [2002] QCA 231

[61] Ultimately, the court must approach its task keeping in mind that the interests of justice usually require the issues to be investigated at a trial. The members of the High Court in *Fancourt v Mercantile Credits* expressed the principle as follows:

> "The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear there is no real question to be tried." [19]

Publication to EC Credit Control

[62] The remaining publication alleged to have occurred on 30 April 2011 is detailed in the amended statement of claim as follows:

> "**The Sixth Publication – EC Credit Control – Debt Collection Agency – DBT:**
>
> 123 On 30 April 2011 the defendants passed on the plaintiffs' personal information and allegations of an outstanding debt to EC Credit Control.
>
> 124 The defendants stated words to the effect on 30 April 2011 that:
>
> 125 'The Plaintiff owed the Defendants $21,258.57'
>
> 126 *The said words in their natural and ordinary meaning meant and were understood to mean that the plaintiffs*:
>
> *128 Were of bad character;*
> *130 Were attempting to avoid a debt owed.*
> *132 Were breaching a court or tribunal order."*

[63] The defence to this pleading by the first defendant is as follows:

> "10. As to paragraph 123 the First Defendant admits that she provided details of a debt owed by the plaintiffs to the Defendants to EC Credit Control, and states further that the debt related to damage caused by the plaintiffs upon vacating the Defendants' property in 2010.
>
> 11. As to paragraphs 124 and 125 the First Defendant:
>
> a) Admits that the total of the damages claimed equalled $21,258.57 ("the debt");
> b) Denies that the First Defendant made comment to any member of EC Credit Control as the material was lodged electronically requesting the Debt be recovered from the plaintiffs.
>
> 12. As to paragraphs 126, 128, 130 and 132 the First Defendant denies the implied allegation that contact with EC Credit Control was a defamatory publication as:

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19 *Fancourt v Mercantile Credits* (1983) 154 CLR 87 at 99

a) The request to recover the debt was based on an honest belief that the debt was due and owing;
b) The plaintiffs do in fact owe the sum of $21,258.57 for damage sustained to the Defendants' property;
c) Was made for the purpose of instigating legal proceedings to recover the debt and accordingly is subject to absolute privilege."

[64] The second defendant responded as follows:

"6. The Second Defendant denies the allegations contained in paragraphs 123 as they are untrue and states further that he has never contacted EC Credit Control.

7. The Second Defendant denies the allegations contained in paragraph 124 and 125 as they are untrue for the reasons stated in paragraph 6 above.

8. The Second Defendant denies the allegations contained in paragraphs 126, 128, 130 and 132 as they are untrue for those reasons stated in paragraph 6 above."

[65] The first defendant submits the plaintiffs' claim in respect of this alleged defamation has no prospect of success for a number of reasons. Firstly, it is argued that provision of information to EC Credit Control could not amount to publication to a third party as communication to an agent of the first defendant would not fall within that category. No authority was advanced in support of this submission. The defendant's submission in this regard appears to be contrary to authority. Publication to any third party would seem to be sufficient notwithstanding the nature of their relationship to a person communicating the publication. This is true of an agent.[20]

[66] Secondly it was submitted the request to EC Credit was for the purpose of instigating legal proceedings and accordingly attracted absolute privilege. Section 27 of the *Defamation Act 2005* extends the defence of absolute privilege where:

"(b) the matter is published in the course of the proceedings of an Australian Court or Australian Tribunal …"

[67] On the plain meaning of the words of the section they do not comprehend referral to a mercantile agent prior to the commencement of any court proceedings.

[68] It is true the first defendant has admitted she provided details to EC Credit Control of a debt owing by the plaintiffs to the defendants. However, in my opinion the provision of those details does not amount to publication in the course of proceedings. The authorities extend the concept of what falls within "the course of proceedings" to words written in pleadings filed in the proceedings and to proof of a witness.[21] However, the concept does not extend to steps to recover a debt prior to the institution of proceedings in any court.

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20 *Arthur v Massey-Harris* Co [1934] 2 DLR 124

21 *Jamieson J and R* (1993) 177 CLR 574 at 583; *Mann v O'Neill* [1997] Aust Torts R 64 309 at 64 312

[69] Thirdly, the first defendant submits the communication is not defamatory. In my view this submission has more merit. It is not defamatory merely to report that someone is indebted to another. In *Black v Houghton* his Honour Stable J said:

> "On such an analysis the meaning left was that the appellant owed the Council money. I have not found anything to displace the law to which the trial judge referred - that it is not defamatory of a man to say that he owes money. It has been held that this does not imply he is unable or unwilling to pay his debts."[22]

[70] The pleading by the plaintiffs alleges words to the effect:

> "The plaintiff owed the defendants $21,258.57"

[71] The imputation alleged goes no further than to assert the plaintiff was indebted to the defendants. That imputation is not capable of constituting a defamatory remark.

[72] Accordingly the plaintiffs have no prospect of succeeding in their claim in respect of the publication alleged to have occurred on 30 April 2011. As the paragraphs of the statement of claim relating to all other alleged publications have been struck out it follows that the plaintiffs have no prospect of successfully prosecuting any part of their claim and there is no need for a trial of the claim or part of the claim. Judgment should be ordered for the defendant.

Costs

[73] The defendants seek indemnity costs in respect of both the application to extend time and the application for summary judgment.

[74] It is submitted the plaintiffs' conduct has been such as to justify the award of costs on an indemnity basis.

[75] While it must be acknowledged the plaintiffs have failed to comply with both statutory and judge-ordered timelines with the result the litigation has not progressed in a timely way, I am not persuaded their conduct has been so unreasonable as to justify a departure from the usual basis of costs.

[76] The plaintiffs have largely been without legal representation and clearly have struggled to understand and comply with procedural requirements. It is apparent the plaintiffs genuinely believe they have a sound cause of action in defamation and, with the exception of the publication to EC Credit Control, there has been no determination by the court on the merits of their claim.

[77] Furthermore, the defendants made some contribution to the difficulties experienced in this litigation as indicated by their original defence and counter claim having been struck out by Reid DCJ.

[78] In all the circumstances I am not persuaded that indemnity costs should be ordered. Costs of the applications and the claim will follow the result on the usual basis.

Orders

[79] The orders of the court will be:

1. The plaintiff's application for extension of the limitation period is dismissed.

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22 [1966] Qd R 435 at 438.

2. Pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999, paragraphs 37 to 122 and 133 to 157 of the amended statement of claim are struck out.

3. Pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999, summary judgment is entered for the first defendant against the plaintiffs.

4. Pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999, summary judgment is entered for the second defendant against the plaintiffs.

5. The plaintiffs pay the defendants' costs of and incidental to the application for extension of the limitation period, to be assessed on the standard basis.

6. The plaintiffs pay the defendants' costs of and incidental to the summary judgment application, and to the action; to be assessed on the standard basis.