SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Humphrey & Ors* [2017] QSC 236
PARTIES:	**OLGA DAY** (plaintiff) **v** **JOHN HUMPHREY** (first defendant) and **TINA COCKBURN** (second defendant) and **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (third defendant) and **WESLEY LERCH** (fourth defendant) and **DAVID BRAY** (fifth defendant) and **QUEENSLAND COMPENSATION LAWYERS PTY LTD ACN 135 360 119** (sixth defendant)
FILE NO:	5774 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	26 October 2017
DELIVERED AT:	Brisbane
HEARING DATES:	25 and 27 January, 10 February, 2 and 23 March, 17 May, 12 July, and 22 August 2017
JUDGE:	Daubney J
ORDER:	**1. The plaintiff's application filed 10 July 2017 is dismissed with costs.** **2. The plaintiff's amended application filed 21 February 2017 is dismissed with costs.** **3. The plaintiff's claims against the fourth, fifth and sixth defendants are dismissed.** **4. The plaintiff is to pay the fourth, fifth and sixth**

defendants' standard costs of and incidental to this proceeding.

5. **The fourth, fifth and sixth defendants shall not recover any costs from the plaintiff in respect of the appearances on 27 January 2017, 17 May 2017 and 12 July 2017.**

CATCHWORDS: WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – PERSONS ENTITLED TO COMPENSATION – WHO IS A WORKER OR EMPLOYEE – GENERALLY – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – NOTICE OF INJURY – EFFECT OF INACCURACY, DELAY OR FAILURE TO GIVE NOTICE – GENERALLY – where the plaintiff claims damages for personal injuries and financial losses as against the fourth, fifth and sixth defendants for alleged negligence, breach of contract and fraudulent misrepresentation – where the plaintiff and fourth, fifth and sixth defendants have complied with all the requirements of the *Personal Injuries Proceedings Act* 2002 (Qld) – where the plaintiff did not comply with s 275(1) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – whether the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) applies to the plaintiff's claim for personal injuries – whether the plaintiff was bound to comply with the provisions of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) before commencing a claim against the fourth, fifth and sixth defendants for personal injuries

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT: STAY OR DISMISSAL OF PROCEEDINGS – where the plaintiff has made a claim for damages for personal injuries to which the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) applies – where the plaintiff has not complied with the provisions of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – where the plaintiff claims for damages for fraudulent misrepresentation – whether the plaintiff's claim for fraudulent misrepresentation has no prospects of success – whether the plaintiff was precluded from instituting her claim for personal injuries due to non-compliance with the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – whether summary judgment should be ordered in favour of the fourth, fifth and sixth defendants

COURTS AND JUDGES – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS –

REASONABLE APPREHENSION OF BIAS GENERALLY – where the plaintiff made an application for disqualification of the judge on the grounds of apprehended bias – where the plaintiff made allegations in relation to the judge's extra-judicial activities – where the plaintiff made complaints to the Crime and Corruption Commission concerning the judge – whether the circumstances would cause a fair-minded lay observer to apprehend that the judge could not bring an impartial mind to the resolution of the questions in the proceeding

Workers' Compensation and Rehabilitation Act 2003 (Qld), ss 11, 32, 233, 235, 237, 239, 275, 295 and 302
Personal Injuries Proceedings Act 2002 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 293

Agar v Hyde (2000) 201 CLR 552
Day v Humphrey & Ors [2017] QCA 104
Ebner v Official Trustee in Bankruptcy (2001) 205 CLR 337
Glenco Manufacturing Pty Ltd v Ferrari [2005] QSC 5
Hawthorne v Thiess Contractors Pty Ltd [2002] 2 Qd R 157
Ley v Woolworths Ltd [2013] QSC 59
Magill v Magill (2006) 226 CLR 551
Rich v CGU Insurance Ltd (2005) 214 ALR 370

COUNSEL:	The respondent plaintiff appeared on her own behalf M J Drysdale for the fourth, fifth and sixth applicant defendants
SOLICITORS:	The respondent plaintiff appeared on her own behalf Queensland Compensation Lawyers for the fourth, fifth and sixth applicant defendants

Background

[1] This proceeding was commenced by a claim and statement of claim filed on 13 June 2016 by the plaintiff against the first, second and third defendants (collectively, "The QUT parties") and the fourth, fifth and sixth defendants (collectively, "The QCL parties"). The plaintiff claimed for:

> "1. Damages for personal injuries, financial losses and damages caused by breach of contract and/or the negligence for which the first, second and third defendants are liable.
>
> 6. Damages for personal injuries, financial losses and damages caused by the misfeasance of the first defendant.

7. Damages for personal injuries, financial losses and damages for breach of contract and/or the negligence and/or breach of statutory duty for which the fourth, fifth and sixth defendants are liable.

8. Interest pursuant to the provisions of s 47 of the *Supreme Court Act* 1995 (Qld).

9. Costs."

[2] As appeared on the face of this prayer for relief, the proceeding sought to pursue distinct claims against the QUT parties and the QCL parties respectively. So much is confirmed by reference to the statement of claim filed on 13 June 2016 which, under the heading "Incident 1", purported to plead a case for damages arising out of circumstances which were alleged to have occurred in the course of the plaintiff's enrolment as an external student in the Faculty of Law at the third defendant, and, quite separately under the heading "Incident 2", purported to plead a case for damages caused by matters which allegedly occurred in the course of her employment by the sixth defendant.

[3] On 19 January 2017, the QCL parties filed an application seeking, relevantly, that the claim and statement of claim be struck out.[1] That application was returnable in the Applications List on 25 January 2017.

[4] On 25 January 2017, I was the senior judge sitting in the Applications List. At the callover of matters listed for that day, the application was initially allocated to the other judge sitting in Applications that day. When the application was mentioned before the other judge, she recused herself from hearing the application, and the matter was returned to be heard by me in the course of the applications with which I was dealing on that day.

[5] I heard considerable argument on that day from counsel for the QCL parties and from the plaintiff, who represented herself. Ultimately, the plaintiff sought an adjournment of the hearing. She said that she was not "feeling well and cannot comprehend [because she was] on painkillers". She asked for an adjournment to enable her to undertake further research in order to respond to submissions made by counsel for the QCL parties

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[1] The application was amended on 25 January 2017 to seek, pursuant to *UCPR* r 135, leave *nunc pro tunc* to bring the application. This was necessary because the QCL parties had not filed their notice of intention to defend when the application was filed on 19 January 2017. The notice of intention to defend was, in fact, filed on 23 January 2017. Nothing turns on this amendment.

and questions raised by me in the course of argument. I acceded to her request, and the hearing was adjourned to 9.15 am on 27 January 2017.

[6] Very shortly (i.e. only a matter of minutes) before the matter was due to be before me on 27 January 2017, the plaintiff emailed my Associate and the legal representatives for the QCL parties indicating that she would not be appearing at the hearing that day, and attaching a medical certificate and a form signed by her for a consent adjournment. Given the time of this email, however, the matter remained listed. It was mentioned before me in Court, at which time I adjourned it to 9.15 am on 10 February 2017.

[7] On 9 February 2017, the plaintiff filed a cross-application by which she sought orders that the application brought by the QCL parties "be dismissed as frivolous, vexatious and in an abuse of the court process", and further sought a declaration that counsel for the QCL parties had provided "misleading statements to the Supreme Court of Queensland" on 25 January 2017.

[8] As it transpired, the matter was placed in the Applications List on 10 February 2017. On that date, I was sitting in the Criminal jurisdiction of this Court, and was presiding over a murder trial. The matter was mentioned before the judge presiding over the Applications List on that day, and arrangements were made for it to be mentioned before me during the luncheon adjournment of the criminal trial. The parties came before me at 2 pm. After hearing initial argument, it became apparent that the applications would not be able to be determined before I had to resume the criminal trial at 2.30 pm. Accordingly, I stood the matters down until 5 pm (i.e. after the criminal trial had concluded for that day). I then resumed the hearing of these matters – a hearing which went on for some two hours. At the end of that hearing, the plaintiff again sought further time to put on further material. I concluded the hearing on that day by making directions for the filing and service of further written submissions by the plaintiff (by 4 pm on 15 February 2017), and further submissions in response on behalf of the QCL parties by 4 pm on 16 February 2017.

[9] On 13 February 2017, the plaintiff sought the consent of the QCL parties to an extension of the timetable ordered by me on 10 February 2017. The QCL parties agreed, and accordingly on 13 February 2017, I ordered, on the papers, that the time for

compliance by the plaintiff be extended to 20 February 2017 and the time for compliance by the QCL parties be extended to 22 February 2017.

[10] Rather than putting on the submissions which I had ordered be filed, the plaintiff on 21 February 2017 filed an "amended application", i.e. an amendment of the cross-application she had filed on 9 February 2017. The amended application sought a further order that I be "disqualified from the hearing of the above matter on the basis of apprehended bias".

[11] On 22 February 2017, the plaintiff also filed an amended statement of claim.

[12] Over the ensuing two days, my Associate ascertained the availability of the plaintiff and the QCL parties for a directions hearing in respect of the plaintiff's amended application. Ultimately, the matter was listed for 9.30 am on 2 March 2017 for directions to be made concerning the hearing date for the plaintiff's amended application and the filing of material in relation to that application.

[13] That directions hearing proceeded on 2 March 2017. The plaintiff appeared on that occasion. The amended application filed by the plaintiff on 22 February 2017 had specified a return date of 10 March 2017. On 2 March 2017 I made directions in respect of the hearing of the plaintiff's amended application. The hearing date of 10 March 2017 was vacated, and the plaintiff's amended application was adjourned for hearing by me in the Applications List on 23 March 2017 with a time limit of two hours.

[14] On 23 March 2017, I heard argument from the parties in relation to the plaintiff's application that I disqualify myself from further hearing the matter. I dismissed that application by the plaintiff, and gave *ex tempore* reasons. I then made further directions, including a direction that any application by the QCL parties to strike out the amended statement of claim be filed and served by 30 March 2017, for the subsequent filing and service of material, and concluded by ordering that the QCL parties' application filed in January 2017, the balance of the plaintiff's amended application and any further application by the QCL parties to strike out the amended statement of claim be adjourned to a date to be fixed by me in the week commencing 15 May 2017.

[15] On 31 March 2017, the QCL parties filed an application seeking the following relief:

> "1. That pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999, the plaintiff's amended statement of claim filed on 22 February 2017 be struck out;
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> 2. That pursuant to r 379 of the *Uniform Civil Procedure Rules* 1999, the Court disallow the amendments contained in the plaintiff's amended statement of claim filed 22 February 2017;
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> 3. That pursuant to r 7 of the *Uniform Civil Procedure Rules* 1999, the time for making the application under r 379 of the Uniform Civil Procedure Rules 1999 be extended to 31 March 2017;
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> 4. In the alternative, that pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999, the Court give judgment in the action for the Applicants against the Plaintiff;
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> 5. That the Plaintiff pay the Applicants' costs of the application and action, to be agreed or assessed on an indemnity basis, or in the alternative, to be agreed or assessed on a standard basis;
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> 6. Seek such further orders as the Court deems meet."

[16] On 6 April 2017, following correspondence with my Associate, the hearing date for the outstanding applications was fixed for 9.30 am on 17 May 2017.

[17] On 13 April 2017, the plaintiff filed a notice of appeal in relation to my decision dismissing her application for me to disqualify myself from hearing the matter.

[18] Then, on 28 April 2017, the plaintiff filed an application in the Court of Appeal seeking a stay of my decision on 23 March 2017. On that same day, the plaintiff sent an email to the QCL parties, my Associate, and the Associate to the President of the Court of Appeal, requesting that "the Court … issue its directions adjourning the hearing of the matter … listed before Justice Daubney for 17 May 2017 until the determination of the Application for a Stay by the Court of Appeal … alternatively, I respectfully ask the Court to issue its direction that the hearing … be listed and decided by the Court of Appeal prior to 17 May 2017 …"

[19] On 15 May 2017, Morrison JA heard argument on the plaintiff's application for a stay of my decision. His Honour dismissed the plaintiff's application, but reserved his reasons.

[20] At 7.48 am on 17 May 2017 (i.e. the return date for the hearing of the applications before me), the plaintiff sent an email to the QCL parties and my Associate advising that she was unwell and unable to attend Court for that morning's hearing. She attached to that email a medical certificate and a form signed by her for a consent adjournment. In response to an email from the legal representatives for the QCL parties, the plaintiff advised at 9.14 am that she was also unable to appear by telephone due to "severe lower back pain".

[21] As the matter had already been listed for that day, it was mentioned before me at 9.30 am on 17 May 2017. At that time, I ordered the applications be adjourned for hearing before me in the Applications List on 12 July 2017.

[22] On 26 May 2017, Morrison JA delivered his written reasons for dismissing the plaintiff's stay application.[2] The plaintiff's appeal against my decision of 23 March 2017 is yet to be heard by the Court of Appeal.

[23] Then, on 10 July 2017, the plaintiff filed a further application for me to be disqualified from hearing this matter. That application was said to be returnable on 12 July 2017.

[24] On 11 July 2017, the plaintiff sent an email to my Associate and the QCL parties' legal representatives saying that she was experiencing an exacerbation of her condition and that she would not be able to appear at the hearing listed for the following day. She attached another medical certificate and consent adjournment form signed by her. The QCL parties did not consent to the adjournment, and the matter remained listed for the following day.

[25] On 12 July 2017, the applications were mentioned before me. There was no appearance by the plaintiff, and her email of 11 July 2017 and attached medical certificate were noted for the record. I made the following orders:

> "1. All pending applications be adjourned for hearing to 22 August 2017 before Justice Daubney.
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> 2. Any party wishing to file further written submissions, file and serve any further submissions by 15 August 2017.

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[2] *Day v Humphrey & Ors* [2017] QCA 104.

> 3. If any party does not appear in person or by legal representative on the adjourned date of hearing, the Court shall proceed to hear the applications in any event.
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> 4. The fourth, fifth and sixth defendants' costs are reserved."

[26] In the course of giving *ex tempore* reasons for granting that further adjournment, I said:

> "… The history of the matter has now reached the point where enough is enough. The plaintiff has, as I have already noted, been given repeated indulgences by way of adjournments. This will be the last occasion on which that indulgence will be extended. I have already identified the prejudice being suffered by the other parties to this litigation and the more general prejudice being suffered as a consequence of the interference with the Court list and the blocking of other matters being listed for hearing."

[27] At 7.02 pm on 21 August 2017, the plaintiff sent a further email to my Associate and the legal representatives for the QCL parties advising that she would not be able to attend the hearing listed for 22 August 2017, once again claiming reasons of ill health.

[28] The plaintiff did not appear at the hearing before me on 22 August 2017, either in person or by legal representative. The plaintiff has never suggested before me that she is unable to retain legal representation. Indeed, in an affidavit sworn on 24 January 2017 (Court document 6), the plaintiff said:

> "55. On or about 20 June 2016 I advised Mr Lerch that I will be seeking the solicitors who will represent myself in the above matter. Since that time, I have made a number of enquiries to the solicitors who would not have any conflict of interest with the respondents and/or their legal representatives. I was not able to retain the solicitors who agreed to act on my behalf due to the fact that I was not satisfied with the terms of their agreements."

[29] The plaintiff did not, in any of the correspondence leading up to the hearing on 22 August, request an adjournment of that hearing. Nor did she seek any other indulgence, such as being permitted to appear by telephone.

[30] Accordingly, and consistent with the order I had made on 12 July 2017, the hearing proceeded in her absence.

Application for disqualification

[31] It is appropriate to deal first with the plaintiff's further application for me to be disqualified from hearing this matter.

[32] As I have already mentioned, I have previously heard, and dismissed, a similar application by the plaintiff, and that decision is now the subject of an appeal. There was significant repetition in the plaintiff's present application of matters raised in, and associated with, her previous application. Given the pendency of the appeal, it would obviously be inappropriate for me to traverse those matters again.

[33] The only further distinct matter raised on the present application concerned allegations made by the plaintiff in relation to my extra-judicial activities. In particular, the plaintiff referred to the fact that some years ago, in my then capacity as Queensland chair of a particular charitable organisation, I attended a fundraising function for the charity. The guest speaker at that function was the then mayor of a local authority who announced, in the course of his speech, a generous donation by the local authority to the homeless-relief works being undertaken by the charity. A media report of the fundraising event recorded that I had said that the generous donation left me "speechless". It also recorded me saying, in effect, that the reality was that the donation would help the charity in assisting the homeless people of the particular local authority.

[34] That former mayor is now facing criminal charges in another court, and has recently been the subject of extensive media scrutiny. In advancing this argument, the plaintiff also referred to the content of documents tabled in State Parliament under parliamentary privilege by a certain Member of Parliament.

[35] In her affidavit in support of the application for my disqualification, the plaintiff said that she lives within that particular local authority and that, prior to this proceeding, she had corresponded with the former mayor about "quite serious issues" concerning allegations of excessive rates being charged by the local authority for various matters.

[36] Clearly, I had no knowledge of that previous contact between the plaintiff and the former mayor before it was raised in the context of the current application. Nor does the plaintiff assert that I had, or would have had any reason to have, such knowledge. And it is equally clear that any such correspondence between the plaintiff and the local authority in relation to such matters is completely irrelevant to the proceeding which she has commenced against the QCL parties.

[37] Against that background, the plaintiff submitted that "… in such circumstances the fair minded lay observer might reasonably apprehend that the judge might be prejudiced or not acting impartially … and that his Honour might not decide the case on its legal and factual merits due to his Honour's personal involvement in such fundraising activity."

[38] The reference by the plaintiff to "the fair minded lay observer" resonates with the principles which apply when deciding whether a judge ought be disqualified from hearing a matter for apprehended bias. The modern formulation of those principles was set out by the High Court in *Ebner v Official Trustee in Bankruptcy*[3], in which the plurality said[4] (omitting references and citations):

> "[6] Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
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> [7] The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.
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> [8] The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest

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3 (2001) 205 CLR 337.

4 Gleeson CJ, McHugh, Gummow and Hayne JJ at [6] – [8], with whom Callinan J agreed at [182]; see also Gaudron J at [84].

> in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

[39] The importance of dealing seriously with applications for disqualification was also highlighted by the plurality[5]:

> "[19] Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.
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> [20] This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objections were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."

[40] Applying these principles to the present case, in order properly to seek my disqualification for apprehended bias, the first step would be for the plaintiff to identify what it is said might lead me to decide this case other than on its legal and factual merits. The highest that this goes is the plaintiff's bald assertion that I might not decide the case on its legal and factual merits because of my "personal involvement in such fundraising activity". The plaintiff does not, however, even attempt to advance an argument as to how it is that my personal involvement, on my own time, in a charitable endeavour could possibly cause any apprehension that I might be prejudiced or not acting impartially in relation to the determination of the current dispute between the plaintiff and the QCL parties. Nor has the plaintiff advanced any argument as to how the single incident of my involvement with the former mayor, in the circumstances described above, could possibly cause any apprehension to any person, let alone a "fair-minded lay observer", that I might not bring an impartial mind to the resolution of the questions raised on the applications pending before me. In other words, the plaintiff has

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5 At [19] – [20].

not identified what it is said might lead me to decide the applications before me other than on their legal and factual merits.

[41] Nor, having regard to the second step identified by the High Court, has the plaintiff articulated any logical connection between the applications pending between her and the QCL parties and the "feared deviation from the course of deciding the case on its merits". There is simply no logical connection between my personal involvement in the charitable activity described above and the issues for determination between the plaintiff and the QCL parties.

[42] Accordingly, I find that there is no proper basis for the current application by the plaintiff that I be disqualified from this matter on the ground of apprehended bias.

[43] For completeness, I should note also that the plaintiff, in an affidavit filed on 21 August 2017, deposed to the fact that she and her husband have sent a complaint to the Crime and Corruption Commission "seeking their investigation of the alleged improper conduct of" myself. That, of course, is a matter for the plaintiff and her husband, and is to be dealt with by the Crime and Corruption Commission. It should be noted that, when she made the previous application for disqualification, the plaintiff sought to tender information concerning complaints made by her husband about me to the Chief Justice and to the Attorney General of Queensland. I rejected an argument she sought to advance at that time to the effect that the mere fact that I knew of the existence of those complaints would effectively poison my mind against her in relation to the pending applications between her and the QCL parties, and said:

> "The fact that these complaints have been made is completely irrelevant to the way in which I approach and deal with the application which is pending before me."

[44] Precisely the same applies in relation to the information that the plaintiff and her husband has made a complaint to the Crime and Corruption Commission about me. That information is completely irrelevant to my consideration of the issues for determination, which will be determined, in accordance with my judicial oath, on their merits and on their merits alone.

[45] Accordingly, the plaintiff's application filed 10 July 2017 will be dismissed.

Plaintiff's amended application filed 22 February 2017

[46] Having previously determined that part of the plaintiff's amended application filed 21 February 2017 which sought my disqualification, it is necessary to deal with the rest of that application. The balance of the relief sought in that amended application was:

> "2. The issues arising from the pleadings in the plaintiff's statement of claim filed with the Supreme Court of Queensland against the fourth, fifth and sixth defendants on 13 June 2016 to be decided at the Court's trial.
>
> 3. The application filed on behalf of the fourth, fifth and sixth defendants on 19 January 2017 (as amended on 24 January 2017) seeking the Court's striking out the plaintiff's pleadings due to an alleged non-compliance with the Workers Compensation and Rehabilitation Act 2009 (Qld) to be dismissed as frivolous, vexatious and in an abuse of the Court process.
>
> 4. To declare that on 25 January 2017 Mr Drysdale, counsel for the fourth, fifth and sixth defendants provided his misleading statements to the Supreme Court of Queensland.
>
> 5. In order to afford procedural fairness, the plaintiff and the fourth, fifth and sixth defendants to file and serve upon each party within a reasonable timeframe these submissions and their submissions in reply.
>
> 6. There is no order for costs for the attendance of the fourth, fifth and sixth defendants to the hearing held before Justice Daubney on 27 January 2017 in the absence of the plaintiff due to her sickness, which was confirmed by the registered medical practitioner.
>
> 7. The fourth, fifth and sixth defendants pay the plaintiff's disbursements of and incidental to the applications filed on 19 January 2017 and 9 February 2017.
>
> 8. Any further order that this honourable Court deems fit."

[47] The matters referred to in paragraphs 2, 3 and 5 will effectively be subsumed within my consideration below of the substantive applications brought by the QCL parties. I note, for completeness, that, as appears from the above chronology, the plaintiff has had more than ample opportunity to place her submissions before me for consideration.

[48] In relation to paragraph 6, I ordered on 27 January 2017 that costs be reserved. No basis has been demonstrated by the plaintiff for varying or going behind that order.

[49] Similarly, in relation to paragraph 7, the plaintiff has not, in any of the outlines of submissions which she has filed in this matter, advanced any basis for the making of such an order.

[50] As to paragraph 4, the plaintiff contended that, in the hearing on 25 January 2017, counsel for the QCL parties made misleading submissions to the Court in relation to the date on which the plaintiff's employment was terminated by the sixth defendant.[6]

[51] In fact what occurred was that when the matter first came before the other judge sitting in Applications on 25 January 2017, counsel handed up to that judge an outline of submissions. That outline was returned to counsel when that judge recused herself. Counsel's instructing solicitor (who is the fourth defendant) noted that this version of the outline of submissions misstated a number of matters, and instructed counsel that:

(a) the nature of the plaintiff's employment (i.e. whether it was casual or part-time) remained in dispute between the parties; and

(b) whether the plaintiff's employment was terminated, or whether the plaintiff resigned her employment, also remained in dispute.[7]

[52] Counsel then prepared a further version of his outline of submissions which corrected these misstatements. It was this further version of the outline of submissions which was provided to me for consideration in the substantive hearing on 25 January 2017. This further version of the outline in fact reflected the plaintiff's own submissions about the matters she said were an issue between the parties.

[53] In those circumstances, there is no substance to the plaintiff's complaint that counsel acted improperly or engaged in any form of professional misconduct. On the contrary, it would seem that counsel has acted completely appropriately to ensure that the submissions put before me in the substantive hearing accurately recited the matters truly in issue between the parties.

[54] Accordingly, I would not make the declaration sought by the plaintiff in paragraph 4 of her amended application.

Application by the QCL parties

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6 See plaintiff's submissions filed 17 March 2017, para 37.
7 Affidavit of W J Lerch filed 10 March 2017.

[55] The application (as amended) by the QCL parties, which was originally before me on 25 January 2017, effectively sought orders that the claim and statement of claim against the QCL parties be struck out. In the circumstances described above, that application has not yet been determined, but has largely been overtaken by intervening events.

[56] On 22 February 2017, the plaintiff filed an amended statement of claim ("ASOC").

[57] On 31 March 2017, the QCL parties filed the application seeking the orders set out above at [15].

[58] On 11 July 2017, the QCL parties filed an amended defence.

[59] In the hearing before me on 22 August 2017, counsel for the QCL parties pressed for summary judgment, under *UCPR* r 293, rather than the striking out which had originally been sought. In so doing, counsel for the QCL parties confirmed that, for the purposes of the argument seeking summary judgment, he took no point about the plaintiff having filed, without leave, the ASOC which added a further cause of action for fraudulent misrepresentation. He also confirmed that, for the purposes of the present argument, he did not take any time limitation point in relation to this further cause of action.

[60] Rather, the submission was that, on any view, the causes of action pleaded by the plaintiff against the QCL parties in the ASOC had no, let alone no real, prospect of success, and it is appropriate for the Court to enter summary judgment in respect of the claims against the QCL parties.

[61] It is necessary, therefore, to summarise the cases pleaded by the plaintiff against the QCL parties in the ASOC:

(a) The fourth and fifth defendants, who were solicitors practising in personal injuries law, were directors of the sixth defendant and involved in its daily management, including decisions in relation to human resources (ASOC paras 43, 44 and 45);

(b) The sixth defendant, a company, employed the plaintiff pursuant to a contract of employment (ASOC para 46);

(c) The plaintiff was employed "on a part time or continuous basis as a precedent manager", worked on Tuesdays and Thursdays due to her study commitments, created, updated and developed a system of legal precedents for the sixth defendant, and was involved in marketing with Russian-speaking clients (ASOC para 47);

(d) Para 47.1 of the ASOC then pleaded:

"47.1

(a) From 3 October 2012 until 5 December 2012 the plaintiff was employed by the sixth defendant on a casual basis.

(b) The employment contract dated 3 October 2012 contained the essential term requiring either party upon termination of employment to give one (1) week termination notice.

(c) On or about 6 December 2012 the fourth defendant offered the plaintiff an ongoing (part-time) employment with a pay rise and commendations.

(d) In or about December 2013 the plaintiff accepted the fourth defendant's offer for further employment with the sixth defendant.

(e) On or about 18 July 2013 the fourth defendant provided specific terms of the ongoing contract with the plaintiff by her request.

(f) On or about 19 July 2013 the plaintiff accepted the fourth defendant's specified terms of a part-time employment with the following terms:

(i) starting and finishing time, being 8:30am to 5:00pm;

(ii) the plaintiff's hours of work were determined in advance, being 2 days a week – every Tuesday and Thursday.

(g) There was a mutual expectation of continued employment by amending and developing the sixth defendant's system of precedents and attracting Russian-speaking clients.

(h) In or about 13 June 2013 the fourth defendant requested the plaintiff to participate in the sixth's defendant's staff performance review, which was held for the permanent employees, with the appointed next date for review in one year period, i.e. on 13 June 2014.

(i) By request of the fourth defendant the plaintiff was actively involved in marketing among Russian-speaking population in Queensland.

(j) By request of the fourth defendant the plaintiff:

(i) translated the whole content of the sixth defendant's website into the Russian language;

(ii) translated and placed a number of the sixth defendant's advertisements in English and Russian language among a number of Russian businesses and communities in Brisbane, Gold Coast and Sunshine Coast;

(iii) organised the meeting for the fourth defendant with the President of the Queensland Russian Community Centre ("the QRCC");

(iv) organised the sixth defendant's corporate membership with the QRCC;

(v) organised and scheduled the interview with Mr Gosse, the convenor of the Russian Radio SBS for promoting the sixth defendant's business interests among the Russian-speaking population in Queensland;

(vi) compiled a list of the Russian-speaking doctors practising in Queensland;

(vii) tried to organise the personal meetings of the fourth defendant with the Russian-speaking doctors with purpose of seeking referrals of the Russian-speaking injured people to the fourth and fifth defendants' business;

(viii) assisted the fourth defendant with interpretation and organising the meetings with a number of the Russian-speaking injured people, i.e. the fourth defendant's clients

(k) The forth (sic) defendant's advertisements contained the statement that the sixth defendant's business has a Russian-speaking employee.

(l) The sixth defendant did not have any other Russian-speaking employees employed in 2012-2-13 other than the plaintiff, who speaks Russian."

(e) On 19 August 2013, the plaintiff advised the fourth defendant that she was suffering a reoccurrence of PTSD due to her dispute with the first defendant (ASOC para 48);

(f) In August 2013, while on sick leave, the plaintiff emailed to the fourth defendant her "notice of resignation due to her sickness" (ASOC para 49);

(g) The fourth defendant invited the plaintiff to reconsider her decision to resign (ASOC para 50);

(h) The plaintiff accepted that invitation and retracted her resignation notice (ASOC para 51);

(i) The plaintiff advised the fourth defendant that, due to her sickness, she was unable to return to work until September 2013 and provided a medical certificate (ASOC para 52);

(j) The fourth defendant assured the plaintiff that he would not say anything to anyone and confirmed that the plaintiff could return to work on or about 16 September 2013 (ASOC para 53);

(k) On 4 November 2013, while the plaintiff was on sick leave, the fourth defendant "advised the plaintiff that her employment contract was terminated without providing any exact date of termination and/or notice of termination" (ASOC para 54);

(l) The ASOC then pleaded:

(i) the terms which the plaintiff contends were implied in her contract of employment (ASOC para 55), namely:

"(a) act in good faith toward the plaintiff;

(b) take all reasonable precautions for the safety of the plaintiff while she was engaged upon her employment;

(c) not expose the plaintiff to any risk of damage or injury of which it knew or ought to have known;

(d) adopt necessary changes in work methods;

(e) take reasonable care for the plaintiff's safety while she was working including to guard against the possibility that the plaintiff might act inadvertently or through misjudgement;

(f) adopt obvious and inexpensive remedial measures to avoid foreseeable risks of injury to the plaintiff."

(ii) further or alternatively, that the QCL parties owed her a duty of care to the same effect as the terms implied in her employment contract (ASOC para 56);

(iii) Further or alternatively, that the QCL parties owed her "a duty of care pursuant to section 19 of the *Workplace Health & Safety Act* 2011 (Qld)" (ASOC para 57), namely:

"(a) to provide any information, training, instruction or supervision that is necessary to protect all persons from risk to their health and safety arising from work carried out as part of the conduct of the business or undertaking;

(b) to ensure the workplace health and safety of the plaintiff in the conduct of the business or undertaking;

(c) to provide information, instruction, training and supervision to ensure health and safety."

(m) The plaintiff then asserted that her injury "was caused by breach of contract and fraudulent misrepresentation by the fourth and sixth defendants", and provided the following details of such alleged breaches (ASOC para 58):

"1) failing to take all reasonable precautions for the safety of the plaintiff and adopt necessary changes in work methods by failure to offer to the sick plaintiff any reasonable adjustments to the plaintiff's work conditions, including changes for the plaintiff's working time, tasks and demands.

2) acting in disregard of the plaintiff's legitimate interests by terminating her employment contract during her sick leave without providing the plaintiff any termination notice.

3) failing to act in good faith by providing the plaintiff with a number of the employment separation certificates containing misleading statements, which prevented the plaintiff from pursuing her rights under the industrial legislation.

~~Particulars~~

a) The employment separation certificate issued by the fourth defendant on 24 January 2014 shows that the date of the plaintiff's termination of employment was 12 August 2013.

b) The employment separation certificate issued by the fourth defendant on 30 January 2014 shows that the date of the plaintiff's termination of employment was 13 November 2013.

c) The employment separation certificate issued by the fourth defendant on 17 February 2014 shows that the date of the plaintiff's termination of employment was 23 August 2013.

d) The fourth defendant kept the plaintiff's profile on the company's website at least until mid-January 2014, even though the company's website was updated on a regular basis by removing old and adding new employees' public profiles.

4) failing to avoid an exposure of the plaintiff to a risk of damage and injury of which the fourth defendant knew or ought to have known by terminating the plaintiff's employment at the time of her suffering a psychiatric injury.

~~Particulars~~

a) On 19 August 2013 at the personal meeting with the fourth defendant the plaintiff advised him about a reoccurrence of the plaintiff's PTSD which occurred when her husband was stabbed and provided the medical certificate certifying that condition.

b) On 25 August 2013 the plaintiff sent a copy of the same medical certificate to the fourth defendant by email.

c) In November 2013 the fourth defendant was warned that it was unlawful to terminate the plaintiff's employment due to her absence because of her illness.

d) The fourth defendant was and is a personal injury lawyer who was working with the injured clients and ought to have known that the injured plaintiff was extremely vulnerable to any further psychiatric injury.

5. failing to take any positive steps towards incident's (sic) prevention by failing to keep the plaintiff's employment until her recovery and/or by engaging another person on a temporary basis or by allocating the plaintiff's tasks to other workers.

6. failing to adopt obvious and inexpensive remedial measures to avoid foreseeable risks of injury to the plaintiff by providing necessary support to the plaintiff, and/or providing the truthful information in the employment separation certificates and/or reinstating the plaintiff to her former position."

(n) The ASOC then pleaded:

"58.1

1) On 23 August 2013 the fourth defendant invited the plaintiff to reconsider her resignation of 23 August 2013 by stating: '… You are a very valuable member of our team. Would you like some time to reconsider? I won't say anything to anyone for now.'

2) On 25 August 2013 the plaintiff effectively retracted resignation by stating: 'Thank you very much for your kind email of last Friday, 2 August 2013. Yes, indeed, I would like to continue to work for your company.'

3) On 25 August 2013 the plaintiff enclosed a copy of the medical certificate of Dr Efimoff and stated that the plaintiff would not be able to work until 16 September 2013.

4) On 27 August 2013 the fourth defendant confirmed that the plaintiff would return back to work by stating: 'Ok, thanks Olga, I will not say anything to anyone (except Jess Stewart) in the interim. Hopefully you will be ok to return on or about 16 Sept.'

5) On 29 August 2013 Ms Stewart, the fourth, fifth and sixth defendants' legal practice manager, sent her email to the plaintiff stating: 'Wes told me that you were still unwell … I hope you will be alright. Make sure you take some time out to look after yourself and you will be back on track in no time!'

6) On 16 September 2013 the fourth defendant stated in his email: '… I am really sorry to hear that you are still unwell. Please do keep me posted on your recovery. If there is anything we can do than please let us know.'

7) On 16 September 2013 the plaintiff stated in her email to the fourth defendant: 'Thank you very much for your kind email. I'll keep you informed on my recovery. I hope my health will improve soon.'

8) On 25 September 2013 the fourth defendant asked the plaintiff: 'Olga, would you understand if I was to advertise for a precedents manager?'

9) On 1 November 2013 the plaintiff sent to the fourth defendant the medical certificate dated 27 October 2013 certifying that she would be not able to work until 27 January 2014.

10) On 4 November 2013 the fourth defendant sent the email stating: 'There is no need for Olga to provide these medical certificates, because as I understand things Olga's employment with QCL has ended.'

11) The fourth defendant made a number of the misleading statements described in paragraphs a), d), e), f), k) above and provided misleading documents described in paragraphs 3)a); 3)b); 3c) and 3)d) above.

12) The misleading statements or representations are affected by malice and ill will in and in order to induce the plaintiff into believing that her employment was continued after 23 August 2013, i.e. after the date when the fourth, fifth and sixth defendants terminated (or backdated) the employment with the plaintiff.

13) The fourth defendant acted in a manner which involves misrepresentation of facts, dishonesty, fraud and deceit.

14) The fourth defendant had knowledge of the falsity of his statements or representations to the plaintiff.

15) The misleading statements and representation were made by the fourth defendant with the intention that the plaintiff will rely on it.

16) The plaintiff relied on such misleading statements and representation.

17) The plaintiff suffered damages and financial losses including damages for physiological injuries suffered as a result of such misrepresentations."

(o) The plaintiff averred that the risk of her injury was foreseeable because the fourth and fifth defendants knew or ought to have known of the "risk of aggravation of the plaintiff's psychiatric injuries" (ASOC para 59), that the risk of injury was not insignificant (ASOC para 60), and that the QCL parties failed to take reasonable precautions against a risk of harm to the plaintiff (ASOC para 61);

(p) Further or alternatively, the plaintiff said her injury was caused by a breach of duty by the QCL parties, namely "in breach of section 19 of the [*Workplace Health & Safety Act 2011* (Qld)] to ensure the safety of the plaintiff is not put at risk from work carried out as part of the conduct of the defendants' business or undertaking" (ASOC para 62);

(q) That, as a result of the breach of implied terms of the employment contract and/or the negligence and/or the breach of statutory duty, the plaintiff "sustained further

aggravation of her PTSD symptoms, major depression and anxiety disorders" (ASOC para 64);

(r) The plaintiff and the QCL parties have complied with all of the requirements of the *Personal Injuries Proceedings Act* 2002 (Qld ("*PIPA*") (ASOC paras 65 and 66);

(s) Alternatively, the plaintiff claimed "the financial loss and damage against the fourth, fifth and sixth defendants occurred as a result of breach of the employment contract" (ASOC para 68). Under this claim, the plaintiff contends that the fourth defendant terminated her contract in August 2013, and claims for the money she says she would have earned in employment with the sixth defendant from that time until January 2030, being the time when she would have retired at the age of 67. On a discounted basis, she assesses this lost income at $307,479 (ASOC para 68);

(t) The ASOC apportions liability as between all of the defendants to the proceeding in the following proportions (ASOC para 70):

- First defendant 35 per cent
- Second defendant 20 per cent
- Third defendant 20 per cent
- Fourth defendant 10 per cent
- Fifth defendant 5 per cent
- Sixth defendant 10 per cent

The evidence on this hearing

[62] Numerous affidavits were filed by the fourth defendant and the plaintiff, to which were exhibited correspondence and emails relevant to the issues raised on this application.

[63] In her affidavit sworn on 24 January 2017[8], the plaintiff referred to exchanges she had with the QUT parties, and then deposed to the following chronology of events:

> "19. As a result of such actions, on 6 August 2013 I suffered an almost immediate nervous breakdown and an extremely intense panic attack and nose bleed. The doctor I saw at that time diagnosed me with PTSD and prescribed anti-depressants.
>
> 20. On 16 August 2016 I attended the medical appointment with Dr Efimoff who examined me and certified that due to academic problems with Professors at QUT I suffered a recurrence of PTSD which followed my husband being stabbed back in our country of origin. He also issued the medical certificate certifying that I am not able to work or study until 16 September 2013. (Attached and marked as Exhibit 'OAD-8' is a copy of the medical certificate issued by Dr Efimoff on 16 August 2013)
>
> 21. On or about 16 August 2013 I asked Mr Lerch for a meeting. On 19 August 2013 I had a meeting with Mr Lerch in his city office and advised him about the nature and reasons of my sickness. I assured Mr Lerch that my sickness was not related to my work at QCL, but caused by the unexpected threats of the QUT's Professor of Law and Executive Dean of the Faculty of Law to commence the legal proceedings against myself. I also gave a copy of the medical certificate issued by Dr Efimoff on 16 August 2013 and brought to Mr Lerch's attention that I have a recurrence of PTSD. (Attached and marked as Exhibit 'OAD-9' is a copy of the File Note re: the meeting held on 19 August 2013)
>
> 22. On 23 August 2013 being in a highly agitated state I wrote to Mr Lerch that I would like to resign from my employment due to my unforeseen sickness. That same day, 23 August 2013 Mr Lerch sent his email in response stating that I was a valuable member of their team and offered me to take some time to reconsider my decision. (Attached and marked as Exhibit 'OAD-10' is a copy of the email of Mr Lerch dated 23 August 2013)
>
> 23. On 25 August 2013 after further consideration I retracted my resignation by advising Mr Lerch that I indeed would like to continue to work for his company. I also attached a copy of the medical certificate of Dr Efimoff who certified that I was not able to work until 16 September 2013. (Attached and marked as Exhibit 'OAD-11' and Exhibit 'OAD-11A' is a copy of the email of Ms Day to Mr Lerch dated 25 August 2013 and the medical certificate of Dr Efimoff dated 16 August 2013)
>
> 24. On 27 August 2013 Mr Lerch wrote the email to me stating that he will not say to anyone (except Jess Stewart, practice manager) hoping that I 'will be ok to return to work on or about 16 September 2013.' (Attached and marked as Exhibit 'OAD-12' is a copy of the email of Mr Lerch dated 27 August 2013)
>
> 25. Unfortunately, my health had not improved by 13 September 2013. On 13 September 2013 I wrote thee mail to Mr Lerch advising that I was not able to work until 1 November 2013 attaching a further medical certificate dated 13 September 2013. I also reiterated the fact that my sickness was caused by the issues with QUT. I also advised Mr Lerch that I deferred the study of the two last subjects at QUT until next year.

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[8] Court document 6.

26. On 16 September 2013 Mr Lerch sent the email asking me to keep him posted on my recovery. However, on 25 September 2013, less than 2 months since my sickness, Mr Lerch advised that he will advertise for a new precedent manager as I cannot commit to any return date at this time. (Attached and marked as Exhibit 'OAD-13' is a copy of the email of Mr Lerch dated 25 September 2013)

27. On 1 November 2013 Mr Lerch received a further medical certificate certifying that I am not able to work until 1 December 2013.

28. On 4 November 2013 Mr Lerch sent his email stating: '*There is no need for Olga to provide these medical certificates, because as I understand things Olga's employment with QCL has ended.*' (Attached and marked as Exhibit 'OAD-14' is a copy of the email of Mr Lerch dated 4 November 2013)

29. Mr Lerch did not provide any notice of termination of my employment. He did not offer any other arrangements which would assist me to return back to work.

30. On a number of occasions Mr Lerch was advised that he should not terminate my employment during my sickness, which was duly supported by medical certificates.

31. On 24 January 2014, 30 January 2014 and 17 February 2014 upon my request Mr Lerch provided 3 (three) Employment Separation Certificates with misleading dates and different reasons of termination of my employment with QCL. At the same, all these Certificates contained my correct date of birth as per TFN Declaration, payroll and employee records. (Attached and marked as Exhibit 'OAD-15', Exhibit 'OAD-15A' and Exhibit 'OAD-15B' is a copy of the Employment Separation Certificates issued on 24 January 2014, 30 January 2014 and 17 February 2014 respectively)

32. On 14 April 2014 I made enquiries to WorkCover Queensland asking whether I can lodge the claim for the injury arising from the fact that my employer terminated my employment while I was sick due to a not work-related illness.

33. On 14 April 2014 Mr Kim from WorkCover Queensland advised that WorkCover Queensland does not cover non-work related injuries confirming that I cannot lodge a claim with WorkCover Queensland. (Attached and marked as Exhibit 'OAD-16' is a copy of the email from WorkCover Queensland dated 14 April 2014)

34. On 1 May 2014, 29 May 2014 and 6 June 2014, Mr Lerch was advised that my subsequent psychiatric injury did not arise out of or in the course of employment and the employment was not a (major) significant contributing factor to my subsequent injury. It was pointed that the major and original factor of my injury was the threats of legal proceedings made by QUT's Executive Dean of Faculty of Law on 6 August 2013.

35. Mr Lerch, Mr Bray and QCL duly submitted to the jurisdiction of the PIPA and participated in the pre-court proceedings under the *Personal Injuries Proceedings Act 2002* (Qld) ("the PIPA") as outlined below."

[64] That recitation by the plaintiff, however, needs to be gauged against the actual contents of the correspondence which passed between the parties. That correspondence, which

consists largely of emails, is exhibited across numerous affidavits. I have done my best to extract them in chronological order.

[65] By a letter dated 3 October 2012, the sixth defendant offered the plaintiff a casual position as "Precedents Manager" for the period 8 October 2012 to 6 December 2012. This offer was accepted by the plaintiff. The plaintiff continued in that position, and on 6 December 2012 the fourth defendant sent the plaintiff an email recognising her "hard work on the precedents and commitment to the success of QCL", and advised her of an increase in her hourly rate of pay "from this point on".

[66] On 18 July 2013, the fourth defendant wrote to the plaintiff confirming that her working hours were 8.30 am – 5.30 pm Tuesday and Thursday, and that from the week commencing 22 July 2013 she would work from home on Tuesday and from the Brisbane office on Thursday. The plaintiff confirmed her acceptance of this by countersigning the letter on 19 July 2013.

[67] Exhibited to one of her affidavits[9] is the plaintiff's file note of her meeting with the fourth defendant on 19 August 2013. She recorded that she gave the fourth defendant a copy of a medical certificate and said that she brought to the fourth defendant's attention the fact that the doctor had certified that she had a recurrence of PTSD symptoms. The file note recorded: "I said that there should not be any worries for [the fourth defendant] as my health problems are not related to work but related to the issues with the QUT's academic staff". The file note contains the plaintiff's further notes of the discussion concerning the nature of her illness and issues she had with the QUT parties, and concluded by recording that the fourth defendant said that the plaintiff "can take leave for a couple of weeks for recovery".

[68] On 23 August 2013, at 10.28 am, the plaintiff sent to the fourth defendant the following email:

> "Good morning Wes,
>
> I am so sorry to inform you that I have decided to resign from your company. I attach a formal letter of resignation, which is effective from today, 23 August 2013.

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9 Court document 6.

It was a great pleasure to work for you and your company, and I take this opportunity to thank you for all your support and guidance.

I will try to deliver a USB with the latest updated documents and all packages, including WorkCover precedents. I will also provide you with a copy of the PIPA's and WorkCover's claims procedural guides as soon as I can.

I will also be recommending your service to all people who would require legal assistance.

Wes, may I ask you for a favour? Could you please provide a copy of a reference letter with description of my position and your reflection upon my work performance since my employment from 3 October 2012 to 23 August 2013? Could you please not show the reason for my resignation? I attach a copy of my performance review of 18 June 2013 for your convenience.

Many thanks!

I hope that after this break I may be of further assistance to you. Kind regards"

[69] The fourth defendant responded with an email at 11.04 am saying:

"Hi Olga,

I am very sorry to receive your email. You are a very valuable member of our team.

Would you like some time to reconsider? I won't say anything to anyone for now. I can of course provide you with the reference as requested.

Thanks"

[70] On 25 August 2013, at 10.15 am, the plaintiff replied with this email:

"Hi Wes,

Thank you very much for your kind email of last Friday, 23 August 2013.

Yes, indeed, I would like to continue to work for your company.

However, my doctor stated that I would not be able to work until 16 September 2013. I attach a copy of a medical certificate dated 16 August 2013 for your information.

I hope my health will improve by that time.

Thank you once again.

Have a nice weekend!

Kind regards"

[71] On 27 August 2013, at 9.56 am, the fourth defendant sent an email to the plaintiff saying:

"Hi Olga, thanks for letting me know. I will forward a letter of reference for you by the end of this week (Jess Stewart got married last weekend, and is back tomorrow).

> Please let me know in due course how you go.
>
> Thanks"

[72] The plaintiff responded by email at 10.20 am:

> "Hi Wes,
>
> Thanks a lot for your email, and congratulations to our Jessica!
>
> Please be assured that I am not going to look for another job, because I am quite happy to work for your team. I have asked for your reference just in case.
>
> I'll let you know how I would feel by 16 September 2013.
>
> Kind regards"

[73] The fourth defendant replied by email at 10.33 am on 27 August 2013:

> "Ok, thanks Olga, I will not say anything to anyone (except Jess Stewart) in the interim. Hopefully you will be ok to return on or about 16 Sept.
>
> Thanks"

[74] On 29 August 2013, the sixth defendant's practice manager, Jessica Stewart, sent an email to the plaintiff attaching a reference. The email said:

> "Hi Olga
>
> Wes told me that you were still unwell. I know I continue to repeat myself but I hope you will be alright. Make sure you take some time out to look after yourself and you will be back on track in no time!
>
> Please find attached a copy of your reference as requested. Would you like me to post you the original? If so, would you mind providing me with your postal address so I can get it to you?
>
> We hope to hear from you soon.
>
> Kind regards"

[75] The reference dated 28 August 2013 and signed by the fourth defendant commenced:

> "Queensland Compensation Lawyers (QCL) employed Olga Day on a casual basis as Precedent Manager at our Brisbane office between 3 October 2012 and 23 August 2013."

The reference then described her work tasks, and concluded:

> "During her time with QCL, Olga soon became a productive member of our firm. She has a friendly disposition and got along extremely well will all members of the firm. We commend Olga for potential employment, and wish her well in her future career."

[76] In her affidavit filed on 25 January 2017[10], the plaintiff deposed to an exchange of emails with the fourth defendant in mid-September 2013 – see paragraph 25 and the first sentence of paragraph 26 in the extract from her affidavit set out above. In a further affidavit filed on 15 May 2017[11], the plaintiff said:

> "7. On 16 September 2013 Mr Lerch stated in his email: '… I am really sorry to hear that you are still unwell. Please do keep me posted on your recovery. If there is anything we can do then please let us know.' (affidavit of Olga Day filed 25 January 2017, p. 1) [sic]
>
> 8. On 16 September 2013 I stated in my email to Mr Lerch: 'Thank you very much for your kind email. I'll keep you informed on my recovery. I hope my health with improve soon'."

[77] On the evidence before me, the next communication was on 25 September 2013 at 2.33pm when the fourth defendant sent this email to the plaintiff:

> "Hi Olga,
>
> I hope you are recovering well at home.
>
> The work you have done on the precedents has made a huge difference to the way we operate. I would like you to be able to finalise the project, however I understand that you cannot commit to any return date at this time.
>
> Olga, would you understand if I was to advertise for a new precedents manager? I am really very keen to finalise the great work you started. I am just worried that the project will lose momentum if it is not continued now.
>
> Thanks again."

[78] A response came in the form of an email from the plaintiff's husband, Steven Day, to the fourth defendant at 7.26 am on 30 September 2013, in which Mr Day said:

> "Dear Wes,
>
> Thank you for your email to my wife, Olga Day dated 25 September 2013, which is enclosed below.
>
> It appears that Olga's role as a precedents manager with QCL was an ongoing position that required developing, maintaining and updating the considerable amount of legal documents.
>
> As you are aware, Olga is still unwell, thus at this stage she cannot commit to continue the precedent work for your company right now.
>
> However, I understand that your business requires some tasks to be done to ensure continuous process of service to your clients.
>
> I would also like to let you know that Olga has enjoyed working and sincerely appreciates having had the chance to work for your company.

---

[10] Court document 6.
[11] Court document 42.

Kind regards"

[79] It appears that on 1 November 2013, the plaintiff sent the fourth defendant and the practice manager an email attaching a medical certificate. So much is apparent from an email sent on 1 November 2013 at 6.13 pm from Mr Day to the fourth defendant in which he said:

> "Dear Wes,
>
> Re: Medical certificate of 27 October 2013/Olga Day
>
> Please be advised that I act on behalf of my wife Olga Day in accordance with the Power of Attorney dated 25 June 2012. I attach a copy of this document for your information.
>
> I refer to the email of my wife Olga Day of today 1 November 2013 to you and your legal practice manager, Jessica Stewart. Olga attached to her email a copy of the medical certificate issued by Dr Davies on 27 October 2013. (A copy is attached.)
>
> Could you please acknowledge receipt of this correspondence by return email?
>
> Thank you in advance.
>
> Regards"

[80] The fourth defendant then sent an email to Mr Day at 12.01 pm on 4 November 2013, saying:

> "Hi Steven,
>
> Thanks for your email.
>
> There is no need for Olga to provide these medical certificates, because as I understand things Olga's employment with QCL has ended. However we would like to hear from Olga when she is better, and hopefully we can continue to work with her.
>
> Thanks again.
>
> Wes"

[81] This elicited the following email response from Mr Day at 7.27 am on 5 November 2013:

> "Thank you for your email of yesterday, 4 November 2013.
>
> I envisage that Olga's employment has **not** ended due to the fact that on 25 August 2013 Olga withdrew her resignation after your invitation of 23 August 2013 to reconsider her decision. Since then Olga has been on an unpaid sick leave providing your company with medical certificates.
>
> As you are probably aware, under section 352 of the Fair Work Act 2009 (Cth) an employee is protected from dismissal when temporarily absent due to illness or

> injury unless the employee's absence on unpaid personal leave extends for more than three months.
>
> Therefore, Olga's employment may be lawfully terminated only after three months of her illness, i.e. after 6 November 2013.
>
> I will appreciate your response in due course.
>
> Regards"

[82] In relation to the termination of her employment, the plaintiff, in an affidavit sworn and filed on 25 January 2017[12], referred to the fourth defendant's email of 16 September 2013 in which he asked her to keep him posted on her recovery, and then said:

> "4. However, to my great shock, on 4 November 2013 Mr Lerch advised that my employment with QCL ended without any need for me to provide any further medical certificates.
>
> Before November 2013 I was confident that I will continue working for QCL upon by recovery as my job provided me a sense of stability and self-confidence.
>
> On 4 November 2013, when I was notified by Mr Lerch that my employment with QCL was terminated, my medical condition was greatly aggravated. These facts and medical symptoms have been verified in a number of the medical reports issued by medical practitioners and medical specialists."

[83] However, on 24 January 2014, at 3.15 pm, Mr Day sent the following email to the fourth defendant:

> "Dear Wes,
>
> Unfortunately, Olga's health is not improving, so she is not able to work until at least 22 March 2014.
>
> If you think that Olga's employment was ended, could you please provide the Employment Separation Certificate? I think that the reason for separation would be Olga's absence due to her illness for more than three months or Olga's incapacity to work.
>
> Thank you for your help and understanding our family during this difficult time.
>
> Kind regards"

[84] Very shortly thereafter, at 3.34 pm on 24 January 2014, the plaintiff herself sent an email to the fourth defendant, and his practice manager, saying:

> "Dear Wes and Jessica,
>
> Could you please acknowledge receipt of the email of Steven Day of today along with a copy of the medical certificate?

---

[12] Court document 12.

Many thanks"

[85] On 28 January 2014 at 9.25 am, Ms Watt sent the plaintiff an email (copies to the fourth defendant), in which she said:

> "Hi Olga
>
> We confirm receipt of your email and certificate.
>
> Please find attached copy of your Centrelink Separation Certificate. The original has been forwarded to you in today's post.
>
> We wish you a speedy recovery.
>
> Kind regards"

[86] The Centrelink Employment Separation Certificate sent with that email listed the date on which the plaintiff started working for the sixth defendant as 8 October 2012 and specified "date employment ceased" as 12 August 2013. The reason for the plaintiff's separation from employment was specified as "incapacity to work".

[87] Then on 29 January 2014, Mr Day sent the following email to the fourth defendant and Ms Watt:

> "Dear Wes and Jessica
>
> Re: Correction of the Employment Separation Certificate misleading information
>
> I refer you to your email of 28 January 2014 enclosing a copy of the Employment Separation Certificate issued on 24 January 2014.
>
> Olga and I believe that this Employment Certificate contains errors which require correction:
>
> 1. Date employment ceased: 12 August 2013;
>
> 2. Reason for separation: Incapacity to work.
>
> Olga and I believe that the Employment Separation Certificate incorrectly states that Olga Day's employment with QCL ended on 12 August 2013. However, Olga had only stopped working for your company on 12 August 2013 due to her medical condition and has duly provided you with medical certificates.
>
> Furthermore your earlier correspondence to Olga states that you were willing to wait upon Olga's recovery for her to continue her employment as a precedent manager.
>
> As per Olga's emails to your company she was always willing to continue her employment with QCL as soon as she would recover. However, instead of delegating some of Olga's duties to some of your other employees, you had changed your mind and decided to employ another person for Olga's position. This event had upset Olga and worsened her medical conditions.

> In relation to your reason for separation "incapacity to work", as I am aware, you do not have such authority or proper qualification which can make you entitled to determine the exact date of incapacity of an employee.
>
> Thus Olga and I truly believe that Olga's true reason for separation of the employment with QCL was Olga's temporarily absence due to illness on unpaid personal leave for more than three months.
>
> Therefore we request you to revise the Employment Separation Certificate amending the date of the termination of Olga's employment as more than three months after 12 August 2013, and amending the reason for separation because of Olga's temporarily absence due to illness on unpaid personal leave for more than three months.
>
> I also ask you to forward all correspondence directly to my personal email address in accordance with the Power of Attorney dated 25 June 2012 as attached.
>
> Thank you for your prompt attendance to this important matter.
>
> Yours sincerely"

[88] The fourth defendant responded to Mr Day with an email of 29 January 2014, sent at 11.55 am, in which he said:

> "Steven,
>
> We wrote 'incapacity to work' on the Separation Certificate as per your request. You are now saying that is not correct.
>
> I really do not know what all of this is about. I am very disappointed that things have developed this way. What is the purpose of all of this??
>
> Regards"

[89] Mr Day responded at 7.37 am on 30 January 2014 by emailing the following letter to the fourth defendant:

> "Dear Wes
>
> **RE: Olga Day's Employment with QCL**
>
> I refer you to your email of yesterday, 29 January 2014.
>
> **Employment Separation Certificate**
>
> 1. I confirm that on 24 January 2014 I have made a request for you to issue the Employment Separation Certificate on behalf of Olga.
>
> 2. In making my request I stated: 'I think that the reason for separation would be Olga's absence due to her illness for more than 3 months or Olga's incapacity to work.' However, in these circumstances I totally relied on yours and your legal practice manager's knowledge of the date and the true reason for termination of Olga's employment.
>
> 3. It appears that your statement in the Employment Separation Certificate of 24 January 2014 that Olga's employment terminated on 12 August 2013 (at the date of providing Olga's first medical certificate) by the reason of her

incapacity is false and misleading. As I stated in my letter of 29 January 2014 there is no any evidence for you to conclude that Olga's employment was ended on 12 August 2013 by reason of her incapacity to work, because at this particular day (i.e. 12 August 2013) you were not even aware about the nature of Olga's sickness.

Employment and anti-discrimination issue

4. On 25 September 2013, about only one month after Olga's sickness started and despite her genuine desire to continue working for QCL upon her recovery, you informed Olga that because she 'cannot commit to any return date' you will advertise for a new precedent manager.

5. On 1 November 2013 I emailed you a copy of the Power of Attorney along with a further medical certificate verifying that Olga was not fit to work until 27 January 2014.

6. However, on 4 November 2013 you informed that 'there is no need for Olga to provide these medical certificates, because … Olga's employment with QCL has ended.'

7. On 5 November 2013 in my email to you and your legal practice manager I warned you that it is unlawful to terminate the employment with an employee when he or she is temporarily absent, especially during the first three months from the date of sickness. I also made reference to section 352 of the Fair Work Act 2009 (Cth). However, my request for you to provide your response in identifying you position in that regard has been simply ignored.

8. Therefore, I allege that you are in breach of the Fair Work Act 2009 (Cth) and the Anti-Discrimination Act 1991 (Qld) in terminating Olga's employment on 12 August 2013 without any valid reason.

Request for employee's records

9. I would like to make the formal request to be provided with a copy of Olga's employee records, including:
   - General records;
   - Pay records;
   - Hours worked;
   - Leave records;
   - Superannuation contributions records;
   - Individual flexibility arrangement records;
   - Termination records.

10. Please note that pursuant to Reg 3.44 of the Fair Work Regulations 2009 (Cth) you must ensure that a record that you are required to keep is not false or misleading to your knowledge. Please email or post a copy of the employee records within the time prescribed by the Reg 3.42 of the Regulations.

Conclusion

Olga and I are also disappointed by the development of this matter. You, as a personal injury lawyer, must be well aware about the sensitivity of people who are suffering any physical or psychological injury. As you know from the meeting with Olga on 19 August 2013, Olga suffered PTSD after some traffic events in our country of origin and a prolonged self-representation of our immigration matters in the Australian Courts.

> Olga also informed you that she started to experience a re-occurrence of PTSD and depression after receiving unfounded threats to commence legal actions against her by one of the professors of law at one of the universities when she raised the issue of numerous mistakes in the teaching material and exam papers in a number of law subjects. She was also thinking about you by letting you know that her illness was not work-related and would not be of any financial burden to your company until Olga's recovery.
>
> In addition, I envisage that Olga's employment with QCL was not of a casual but of a part-time nature due to her existed ongoing working arrangements with QCL with no defined end date and regular and systematic working days and hours.
>
> Furthermore, despite of your employer's obligations to support and encourage a sick employee during an illness by offering special working arrangements and other appropriate assistance, you just recklessly and unlawfully ended Olga's employment, which resulted in great deterioration of her mental health. How would you feel when your employer would sack you during your sickness when you are already suffering? Sadly, Olga got sick and she is now no longer interested in any study, work or in doing her usual activities. She has had to resort to seek medical assistance on a regular basis from a number of medical specialists.
>
> I await Olga's employee records to be able to consider our further actions.
>
> Yours sincerely"

[90] On 4 February 2014, at 4.59 pm, Ms Watt sent Mr Day an email, copied to the fourth defendant, in which she said:

> "Dear Steven
>
> Please find attached draft amended Employment Separation Certificate. Can you please review the certificate and advise if you are happy for it to be issued. If you would like any changes made to the certificate, we ask that you specify the exact changes that need to be made by return email and we will amend the form prior to issue.
>
> We also note that Olga's employment file is in the process of being photocopied and will be posted to you shortly.
>
> Regards"

[91] The draft Employment Separation Certificate provided under cover of that email from Ms Watt specified "date employment ceased" as 13 November 2013 and gave the reason for separation as "absence due to illness on unpaid personal leave for more than three months".

[92] The provision of that draft certificate provoked the following further correspondence from Mr Day to the fourth defendant dated 10 February 2014:

> "Dear Wes and Jessica,
>
> **RE: Olga Day/Request for Work Entitlements**

I refer you to the above matter and the email of Ms Watt dated 4 February 2014 enclosing a draft of the amended Employment Separation Certificate.

Date of Termination of Olga's Employment

As you are aware, Olga has been on her personal (sick) leave from 12 August 2013 whilst duly providing your company with the medical certificates in accordance with the Fair Work Regulations 2009 (Reg. 3.01). It must also be noted that Olga's public profile appeared on QCL's website until the end of January 2014 despite a number of website revisions made since August 2013. It also appears that since Olga's sickness you did not advertise for a new precedents manager's position for your company.

Therefore, could you please inform of the exact date you terminated Olga's employment, as the information provided in your two Employment Separation Certificates dated 24 January 2014 and 30 January 2014 respectively appears to be quite confusing.

Part-time nature of Olga's employment

It appears that Olga's terms and conditions of employment with QCL were covered by the Fair Work Act 2009 (Cth), the Legal Services Award 2010 (Qld) and common law contracts of employment (verbal and written). As a matter of fact, Olga had an initial employment contract with QCL for a casual employment with the ending and finishing date, which started on 3 October 2012 and duly ended on 6 December 2012.

However, on the final date of Olga's employment contract dated 3 October 2012, on 6 December 2012 you offered Olga further employment with no ending date, increasing her wages. Furthermore, on 18 July 2013 you confirmed in writing your further undertakings specifying Olga's certain working days and exact hours as being 8:30am – 5:00pm, Tuesday and Thursday. You also expressed your gratitude for Olga's continuation of her work in developing and maintaining the company's database of legal precedents.

In accordance with Clause 10.4 of the Legal Services Award 2010 (Qld) a part-time employment implies a regular pattern of work specifying at least the numbers of hours worked each day, the days of the week upon which the employee will work and the commencing and finishing times for the work. It has also been confirmed by a number of legal authorities that the regular and systematic engagements with a reasonable expectation of continuing employment are not characteristic of casual employment. In addition, such attributes as the continuous, regular and systematic form of employment is consistent with ongoing (part-time) employment as opposed to casual employment.

[Please see Full Bench of the AIRC Robert James Power trading as Beta Frozen Products v Rupe (PR907244) 1 August 2001; Serco (Australia) Pty Ltd v. Moreno (1996) 65 IR 145, at 150-151; Reed v Blue Line Cruises Limited [1996] MCA 601; Cetin v Ripon Pty Ltd t/as Parkview Hotel [2003] AIRC 1195 (PR938639); Hamzy v Tricon International restaurants t/as KFC 115 FCR 78 at 89, as relevant authorities].

Therefore, since 7 December 2012 Olga had an implicit contract for ongoing (part-time) employment with QCL with a regular patter of work specifying the numbers of hours worked each day, the days of the week upon which Olga will work and the commencing and finishing times of that work.

Based on the foregoing, Olga as a part-time employee is entitled for personal (sick) leave, annual leave and loading payments on a pro-rata basis for period from 7 December 2012 until her employment was terminated.

In this regard, could you please provide the outstanding payments for Olga's personal (sick) leave, annual leave and annual leave loading payments on leave accrued during the said period of time.

Employee's Records

I ask you to amend your employee's records truly reflecting Olga's employment as being casual from 3 October 2012 to 6 December 2012 and as being of a part-time nature from 7 December 2012 until the date of termination of Olga's employment with QCL.

Thank you for your attendance to this matter at your earliest convenience.

Yours sincerely"

[93] That letter from Mr Day elicited the following email response from Mr Lerch at 8.47 am on 10 February 2014:

"Steven,

I have your letter dated 10 February 2014. It is outrageous. Your request for money now puts your earlier emails and correspondence in plain light. The entire thing has been manufactured, and a court will see straight through that.

I tried to help Olga. I was flexible with her work hours. I agreed to allow her to work from home at her request. I agreed for her to work more hours on some days, and less hours on other days, to fit into her schedule. I modified her hours at her request to attend university and exams. I gave her advice around the time of her problems at the University, and encouraged her to put her health, studies and family above my business. I discouraged Olga from escalating the situation with her lecturer as it risked her entire academic future. I agreed for Olga to leave my business immediately at that time, because I was worried for her health, and I wanted her to get better.

I cannot believe that the Olga I know, would agree to what you have written in your emails, or what you are now trying to do. I just cannot believe that she agrees with what you are doing.

I will not be extorted, and your demand for money is nothing short of extortion.

If you persist with this, I will immediately forward all of this onto my employment lawyers, who will deal with you from there."

[94] On 11 February 2014, Mr Day wrote the following letter to the fourth defendant:

"Dear Mr Lerch,

RE: Olga Day/Work Entitlements/Employee Records

I refer to your email of yesterday, 10 February 2014.

As you are well aware, because of Olga Day's sickness I act on behalf of Olga Day as her attorney duly appointed by her on 25 June 2012. Please note that I have a duty to act on Olga Day's behalf with due care and in her best interests. Please

also note that I will continue to perform my duties in protecting Olga's legitimate rights and in accordance with my obligations under the Power of Attorney Act 1998 (Qld).

Your Unfounded Accusations

Please note that I take your accusations in 'extortion' and 'manufacturing' of Olga's matters very seriously. I allege that you breached the relevant provisions of the Fair Work Act 2009 (section 343 'Coercion') and the Criminal Code (QLD) (section 359 'Threats'), which prohibit any person from threatening with the intent to coerce not to exercise or present from doing any act which this person is lawfully entitled to do so, including a workplace right.

In addition, you as a member of the legal profession should know that the request for the employee's work entitlements is not an act of extortion but a legitimate request to you and your legal practice manager to comply with the Fair Work Act 2009 and the Legal Services Award 2010.

Therefore, if you fail to bring an immediate apology for your inappropriate and unprofessional conduct, the allegations of coercion and threats would be raised with the appropriate authority without giving to you any further notice. In addition, a formal complaint will be lodged with a professional body which deals with the matters concerning the legal practitioner's professional misconduct.

Employee's Records

I acknowledge receipt of the employee records, which you sent on 7 February 2014. However, you failed to provide the following records:

1) copy of the medical certificate of 16 August 2013 provided by Olga Day to Mr Lerch at the appointment held on 19 August 2013 in QCL's city office;

2) file note of the appointment of Olga Day with Mr Lerch held on 19 August 2013 in QCL's city office;

3) Olga Day's email dated 25 August 2013 along with a copy of the medical certificate, issued by Dr Paul Efimoff on 16 August 2013;

4) Olga Day's employee records specifying whether her employment was full-time, part-time or casual during the period of Olga Day's employment with QCL – in accordance with Reg. 3.32 of the Fair Work Regulations 2009;

5) Olga Day's employee records in relation to the termination of her employment, the date, the reason and the name of the person who acted to terminate her employment with QCL – in accordance with Reg. 3.40 of the Fair Work Regulations 2009.

Please note that the obligation to keep proper and accurate employee records is your statutory obligation, failure of which implies the penalties under the civil remedy provisions of the Fair Work Act 2009.

Therefore, please provide the above listed documents at your earliest convenience.

Request for Olga Day's Work Entitlements

Based on the grounds, which have been outlined in my letter of 10 February 2014 and supported by a number of legal authorities, I would like to reiterate the request to provide Olga Day with the outstanding payments for personal (sick) leave, annual leave and loading payments on a pro-rata basis for period from 7 December

2012 until the termination of her employment with QCL by **COB, Tuesday, 25 February 2014**.

Otherwise, the application alleging your breach of the employment legislation seeking the penalties against your corporation under the civil remedy provisions will be filed with the appropriate authorities without further notice to you.

Thank you for your prompt attendance to this important matter.

Yours sincerely"

[95] Then, on 18 February 2014, at 9.23 am, the plaintiff sent an email to the fourth and fifth defendants saying:

"Dear Wesley and David,

RE: Olga Day/Employment with Queensland Compensation Lawyers Pty Ltd

I refer to my employment with your company, which you terminated whilst I was on my sick leave, and to the correspondence between you and my attorney, Mr Steven Day.

I envisaged that the nature of my employment with your company in the capacity as a precedent manager since 7 December 2012 was in fact of a part-time nature. I hope you will provide the employee records and all outstanding work entitlement payments in due time and in accordance with calculation provided to you and Mr Copeland by Mr Steven Day.

Please also note that I was advised that one of the directors of Lerch Law Pty Ltd (a shareholder of Queensland Compensation Lawyers Pty Ltd) is Ms Mary Jessop, who is an Australian medical practitioner and a registered psychiatrist with considerable and current working experience with the Department of Health of Queensland. Therefore, I believe that Ms Mary Jessop, supposedly a partner of Wesley Lerch, is directly in conflict of interests because of her financial and commercial relationships with your companies.

In this regard, I request Ms Mary Jessop to refrain from any involvement in my matters which can influence the medical practitioners, including psychiatrists and psychologists, from whom I have received and will be receiving medical assistance, including medical treatments and examinations.

Could you please also let me know on what basis Ms Mary Jessop, public officer and psychiatrist, is involved in management and administration of the companies, which are providing personal injury services in Queensland?

Please also advise whether you or Ms Mary Jessop have had any contact with the QUT public officers in relation to my matter.

Please contact my attorney Mr Steven Day, if you would have any questions or require more information in relation to the above matter.

Regards"

[96] The fourth defendant responded directly to the plaintiff with an email at 9.46 am on 18 February 2014 in which he said:

"Olga,

I am pleased that you have emailed me directly, but I must say I am extremely disappointed with what you are doing, and the allegations you are making. They are just plain wrong, and the contents of your email below are concerning.

Dr Mary Jessop is my wife. We have been married for almost 10 years. She is also a registered psychiatrist, specialising in Child and Adolescent mental health. My wife knows nothing about you, or what you are currently doing with regards to QCL, and has no interest in knowing about it either. Neither Mary nor I have contacted QUT. Why would we possibly want to contact QUT about you?

Mary would also have absolutely no knowledge of the treatment you are obtaining, and I can assure you that she will not seek out that knowledge. Again, why would she?

I can also assure you that Mary has nothing to do with the day to day management of QCL, and again, knows nothing about you or your treatment. There is no conflict as you suggest.

Olga, can I please encourage you to concentrate on your health and family (as I encouraged you to do when you came into see me about your problems with your law lecturer and QUT), and just let all of this go.

Regards"

[97] The plaintiff replied in an email sent on 19 February 2014 at 11.30 am to the fourth and fifth defendants:

"Dear Wes and David,

I refer to Wes' email of yesterday, 18 February 2014.

I try to address the issues as follows:

Communication As you are well aware, I was not and probably would not be able to communicate with you directly because of my sickness. I simply have neither the energy nor concentration to communicate with you and your workplace lawyer about this matter. Please note that this particular email has been prepared and typed with the help of my friends. I also confirm that Mr Steven Day has a valid Power of Attorney authorising him to act on my behalf in management of my affairs. Despite the fact that you have been provided with a true copy of this document on two occasions, apparently your workplace lawyer Mr Copeland was not aware about the existence of this particular document. I hope you improve your communication with Mr Copeland in due time.

QUT contacts I think that you are under some misapprehension of my earlier enquiry. In fact, I was asking whether you or your business partners were contacted by any QUT officers or their representatives in relation to my employment with QCL. Please confirm that no any such contacts have been made which would in any way influence you or your business partners in termination of my employment with QCL. If not, then please let me know when and why you decided to terminate my employment despite the fact that you and your legal practice manager, who also has a law degree, knew that I was suffering from a reoccurrence of the PTSD symptoms at that particular time, but I was keen to continue to work with QCL upon my recovery.

Meeting on 19 August 2013 As you know, at the meeting with you on 19 August 2013 you insisted that I reveal the name of the professor of law at QUT, who

threatened to commence legal proceedings against me. I was reluctant to disclose this name and asked why you wanted to know that information. In response you said that you would like to identify whether or not you know this person. Then I said that I would reveal this name in confidence and said: 'John Humphrey'. In reply you stated that you have never heard of this person. Then I said that John Humphrey is the Executive Dean of Law at QUT and one of the partners of the firm with the name, which sounds something like 'King & Mallesons'. You again confirmed that you did not know that person. However, it appears that you and John Humphreys had worked together in Corrs Chambers Westgarth and should've known each other quite well. Thus, at the time of your employment with Corrs Chambers Westgarth as a solicitor, John Humphrey was one of the partners of this firm in Brisbane. Therefore, I do not believe that you told the truth.

Interview for the Russian Radio As you are well aware, on 6 August 2013 at very short notice (about one hour) you suddenly cancelled the meeting with the President of the Russian Club and the Radio 4 EB Russian Group convenor Mr Vladis Kosse, who agreed to come to your office for recording of the interview for the Russian radio program without charge, which I arranged in advance by your request. You explained this cancellation by some serious health problems experiencing by your brother. However, I suppose that this interview could have been recorded without your participation, because the recording of the interview could be simply made by reading the text, which was already approved by you and translated into Russian. In this regard, please provide the actual reason for such an unexpected cancellation of the interview, which aimed to attract Russian-speaking clients to your practice.

Ms Mary Jessop It appears that Ms Mary Jessop, a co-director of Lerch Law Pty ltd, psychiatrist and public officer of Queensland Health, has concurrent financial interests in both the Plaintiff's and the Defendant's personal injury legal practices. It is a well-known fact that the outcome of any personal injury claim heavily depends on the contents of the medico-legal reports provided by various medical specialists, including psychiatrists. Therefore, I suggest that Ms Mary Jessop should make full and frank disclosure of her financial interest and personal involvement into administration of the personal injury legal practices, namely Queensland compensation Lawyers Pty Ltd and Bray Lawyers Pty Ltd, to her patients and to all associated entities, including Queensland Health, Mater Private Hospital Rehabilitation Unit, Axis Clinic, etc. I also believe that such conduct may constitute a significant departure from accepted professional standards of the medical practitioners in Australia and should be a subject of a mandatory notification to the AHPRA.

Thank you for your reply.

Regards"

[98] On 18 February 2014, a firm of employment solicitors acting for the sixth defendant sent Mr Day a signed Employment Separation Certificate. That certificate, dated 17 February 2014, specified the date on which the plaintiff's employment ceased as 23 August 2013, and gave the reason for her separation as "medical incapacity".

[99] On 24 February 2014, the plaintiff's husband wrote the following letter to the sixth defendant's accounts manager, Ms Waller:

"Dear Ms Waller

Re: Olga Day's Employment with Queensland Compensation Lawyers Pty Ltd ("QCL")

I refer to the above matter and QCL's previous correspondence in providing the employee records in respect of Ms Day's employment with QCL.

Falsified Employment Separation Certificates

I refer to the Employment Separation Certificates, issued by your practice on 24 January 2014, 30 January 2014 and 17 February 2014, which contain false and misleading information in respect to dates and reasons for termination of employment of Ms Day. I **attach** a copy of such certificates for your information.

As you are aware, providing false and misleading information and falsified documents purported for a Commonwealth entity and in compliance or purported compliance with a law of the Commonwealth is an offence pursuant to sections 137.2 and 145.4 of the Criminal Code 1995 (Cth).

In this regard, I would like to ask you whether or not you were involved in preparation of the above named Employment Certificates.

Employee Record issued on 18 February 2014

Part-time nature of Ms Day's employment with QCL from 7 December 2012

It must be noted that the employee record issued on 18 February 2014 contains false and misleading information as follows:

- describing Ms Day's employment as of a casual nature;
- stating that Ms Day did not accepted the invitation of Mr Lerch to continue to work for QCL;
- providing false date of termination of Ms Day's employment on 23 August 2013.

In this regard, please inform if on or before 18 February 2014 you were personally involved in creating such document and whether you had personal knowledge about the letter of Mr Day of 10 February 2014 outlining the reasons confirming a part-time nature of Ms Day's employment with QCL since 7 December 2012.

Date and reasons for termination of Ms Day's employment with QCL

As you are aware, QCL's employee record created on 18 February 2014 states: 'Ms Day was invited to reconsider her resignation, but it was not withdrawn. Ms Day's employment ceased on 23 August 2013.' I **attach** a copy of this employee record of 18 February 2014 for your perusal.

However, as a matter of fact on 25 August 2013 Ms Day withdrew her resignation, which she made on 23 August 2013 in an emotional and disturbed state due to her sickness by accepting Mr Lerch's invitation to continue to work for QCL. In reply, Mr Lerch expressed his hope that Ms Day will be fit enough to return to work on or about 16 September 2013. I **attach** a copy of the emails between Mr Lerch and Ms Day dated 23, 25 and 27 August 2013 respectively.

In this regard, please inform whether you were personally involved in issuing the above employee record distorting the material facts about actual circumstances of the termination of employment of Ms Day with QCL.

I also ask you to confirm whether before or on 17 February 2014 you have been aware about the following documents:

1) Medical certificate of Dr Efimoff dated 16 August 2013, which has been presented by Ms Day to Mr Lerch at the meeting on 19 August 2013, certifying that Ms Day is suffering from the Post-Traumatic Stress Disorder and will be unfit to do her work from 16 August 2013 until 16 September 2013. (**Attached** is a copy of the medical certificate of Dr Efimoff of 16 August 2013);

2) Email of Mr Lerch of 25 September 2013 to Ms Day stating that because Ms Day is not able to commit to certain return date, he will be advertising for a new precedent manager. (**Attached** is a copy of the email of Mr Lerch of 25 September 2013).

Employee Records issued on 7 February 2014

Please note the meaning of employee records for the purpose of the Fair Work Act 2009 (Cth) is defined in section 6 of the Privacy Act 1988 (Cth), which include all records of health and personal information, which should be made available by request of the former employee. The failure to comply with this Regulation is a subject of a civil penalty under the Fair Work Act 2009 (Cth) and the Fair Work Regulations 2009 (Cth).

It appears that the employee records, which you issued on 7 February 2014, are in part false and misleading and do not contain all documents with Ms Day's personal information in breach of Reg 3.42 and 3.44 of the Fair Work Regulations 2009 (Cth).

In this regard, please confirm whether or not you have any further documents in your possession in relation to Ms Day, including the file note outlining the particulars of the meeting held in QCL's city office by Mr Lerch with Ms Day on 19 August 2013.

Thank you for your assistance in this matter.

Yours sincerely"

[100] Then, on 25 February 2014, the plaintiff's husband sent the following letter to the fourth and fifth defendants:

"Dear Mr Lerch and Mr Bray

Re: Olga Day's Employment with Queensland Compensation Lawyers Pty Ltd ("QCL")

Please be advised that I have been instructed by Ms Day to raise the following issues in relation to the above matter.

1. As you are aware, you provided the Employment Separation Certificates issued on 24 January 2014, 30 January 2014 and 17 February 2014, which contain false and misleading information in breach of section 137.2 of the Criminal Code Act 1995 and the Fair Work Regulations 2990 (Cth) by stating false dates and reasons for Ms Day's termination of employment with QCL. Copies of the Employment Certificates dated 24 January 2014, 30 January 2014 and 17 February 2014 is attached. (**Annexure 1**)

2. It appears that Ms Day's employment was terminated by QCL sometime after 25 September 2013 due to the fact that on 25 September 2013 Mr Lerch advised Ms Day that because she could not commit to return to work on a certain date, he will advertise for a new precedent manager. A copy of Mr Lerch's email to Ms Day dated 25 September 2013 is attached. (**Annexure 2**)

3. The employee record issued on 18 February 2014 contains further false and misleading information, namely:

   a) describing Ms Day's employment as of a casual nature;
   b) stating that Ms Day did not accept the invitation of Mr Lerch to continue to work for QCL;
   c) providing a false declaration about the date of termination of Ms Day's employment.

4. As a matter of fact, since the expiration of Ms Day's initial contract of employment, on 7 December 2012 the nature of Ms Day's employment became part-time in nature due to a regular pattern of work specifying the numbers of hours worked each day, the days of the week and the commencing and finishing times for the work. (**Annexure 8**) In addition, Mr Lerch made further undertakings stating that Ms Day would work for QCL on a continuous basis in developing and maintaining QCL's database of legal precedents and promoting QCL's interests within the Russian community, including the Russian-speaking medical practitioners and businesses. Therefore, the employee record of 18 February 2014 (**Annexure 3**) is distorting the material facts and is thus, false and misleading.

5. Mr Lerch's statement that Ms Day did not withdraw her resignation after his invitation to reconsider her decision is clearly false and misleading. In fact, on 23 August 2013 being in a disturbed emotional state, Ms Day sent the letter of resignation in view of her unforeseen sickness. However, on the same day, 23 August 2013 Mr Lerch asked Ms Day to reconsider her decision. As a result, on 25 August 2013 Ms Day withdrew her resignation and accepted Mr Lerch's invitation to continue to work for QCL. Consequently, on 27 August 2013 Mr Lerch confirmed that he will hope to see Ms Day at work on or before 16 September 2013 upon her recovery. Attached is a copy of the emails between Mr Lerch and Ms Day dated 23, 25 and 27 August 2013. (**Annexure 4**)

6. Please confirm that your legal practice manager Ms Watt and accounts manager Ms Waller had full knowledge of the medical certificate from Dr Efimoff dated 16 August 2013, which has been presented by Ms Day to Mr Lerch at the meeting on 19 August 2013, certifying that Ms Day was suffering from the Post-Traumatic Stress Disorder and will be unfit to do her work from 16 August 2013 until 16 September 2013. Attached is a copy of the medical certificate from Dr Efimoff of 16 August 2013. (**Annexure 5**)

7. As you are aware, since Ms Day's sickness QCL's website underwent a number of revisions amending the list of the public profiles of the employees of QCL. However, the public profile of Ms Day appeared and remained unchanged since September 2013 until the end of January 2014 despite a number of website revisions, including removing and adding the profiles of Yen Tran (law graduate), Philip Carman (solicitor) and Rowena Ferrall (solicitor). It further confirms that your numerous declarations in the Employment Separation Certificates specifying Ms Day's date of termination of employment as 132 august 2013, 23 August 2013 and 13 November 2013

are false and misleading. Attached is a copy of the screenshots from QCL website made on 26 September 2013, 4 October 2013, 11 November 2013 and 15 January 2014. (**Annexure 6**)

8. Your solicitor Mr Copeland in his letter of 18 February 2014 correctly stated that you are not under the obligation to keep all employee records, but only those which are prescribed under the Fair Work Regulations 2009 (Cth). However, if you have in your possession any employee records, which can be identified by the Fair Work Act 2009 (Cth) and the Privacy Act 1998 (Cth) as health and personal information in relation to Ms Day, please make such documents available either by way of inspection or by sending a copy of such documents to Ms Day within the time prescribed by the Fair Work Regulations 2009 (Cth).

9. If you do not have any further documents, which you failed to disclose to Ms Day, please confirm that such documents do not exist, including (but not limited) to the file note which might be prepared by Mr Lerch about the meeting with Ms Day held in your Brisbane city office on 19 August 2013, any file note or memos of communication with QUT officers, etc.

10. Please also advise about the purpose and details of the trading activity of the company Lerch Law Pty Ltd, which is one of the shareholders of Queensland compensation Lawyers Pty Ltd along with Bray Lawyers Pty Ltd. Please also identify the role of Ms Jessop, an Australian medical practitioner and registered psychiatrist, in managing the company Lerch Law Pty Ltd. Please also convey this part of correspondence to Ms Jessop and provide her contact details for the purpose of communicating these and other issues with Ms Jessop directly. Attached is a copy of the ASIC Company Record re: Queensland compensation Lawyers Pty Ltd (ACN 135 360 119). (**Annexure 7**)

11. Please also provide the corrected employee records, including the Employment Separation Certificate, which reflects the true date and true reason for the termination of employment of Ms Day with QCL and the employee record which truly reflects the nature of Ms Day's employment with QCL.

If you fail to respond, disclose other employee records as requested and correct the employee records in accordance with the above reasons, Ms Day may instruct her legal representatives to file formal complaints and applications not only against you and your companies but also against your legal practice employees, Ms Watt (Legal Practice Manager) and Ms Waller (Accounts Manager), who were apparently involved in issuing fraudulent documents in the above matter.

Please be advised that Ms Day will appreciate your response at your earliest convenience but no later than by **COB Monday, 3 March 2014**.

Yours sincerely"

[101] The letter from Mr Day to Ms Waller was sent under cover of an email from the plaintiff to Ms Waller on 24 February 2014 at 9.55 am, in which the plaintiff said:

"Dear Karen re Olga Day's employment with Queensland Compensation Lawyers Pty Ltd/falsified documents

I refer to the above matter.

> As you are aware, you, as a legal practice employee, have an obligation to maintain the highest of ethical standards and act with honesty, courtesy and competency at all times.
>
> As you are probably aware, QCL issued a number of documents, including 3 (three) different Employment Separation Certificates containing false and misleading information by stating various dates and reasons for termination of my employment with QCL. Please note that on 25 August 2013 I withdrew my resignation by accepting Mr Lerch's invitation to continue working for QCL upon my recovery. However, QCL terminated by [sic] employment whilst I was on my sick leave in period between 25 September 2014 and January 2014.
>
> Providing false and misleading documents and information is a serious offence by virtue of section 137.2 of the Criminal Code Act 1995 (Cth), especially if the documents are produced under a purported compliance with a Commonwealth law. Please note that these matters will be dealt accordingly.
>
> However, prior to taking any actions against you I invite you to address the issues, which have been outlined in the letter of my attorney Mr Day of 24 February 2014 (attached), in order to determine whether you prepared the documents concerning my employment with your full knowledge of the factual circumstances of the above matter.
>
> Your response will be highly appreciated by COB Friday, 28 February 2014.
>
> Please acknowledge receipt of this correspondence by return email.
>
> Regards."

[102] It is not necessary, for the purposes of dealing with the present application, to recount any more of the correspondence and dealings between the plaintiff and the QCL parties or their representatives.

***Workers' Compensation and Rehabilitation Act* 2003 ("*WCRA*")**

[103] The QCL parties contend that, to the extent this proceeding is a claim for damages for personal injuries suffered by the plaintiff in the course of her employment, the plaintiff has not complied with the requirements of the *WCRA* and is therefore precluded from advancing such a claim.

[104] The plaintiff says:

(a) She was not a "worker" within the meaning of that term under the *WCRA*, when she sustained her injury, and hers was not an "injury" within the meaning of that term under the *WCRA*;

(b) The QCL parties terminated her employment on 23 August 2013 but she suffered her injury as a result of the "incident" on 4 November 2013 when the fourth defendant notified her that her employment had ended;

(c) In any event, the parties having engaged in and completed the procedures prescribed by *PIPA*, the QCL parties are estopped from asserting that "*PIPA* does not apply to the plaintiff's proceedings as she should have complied with the pre-court proceedings under the *WCRA*".[13]

[105] As North J noted in *Ley v Woolworths Ltd*[14], by reference to numerous cases[15], it has been authoritatively established in Queensland that the only workers who are entitled to seek damages from an employer are those described in s 237(1) of the *WCRA*. That section relevantly provides:

> "**237 General limitation on persons entitled to seek damages**
>
> (1) The following are the only persons entitled to seek damages for an injury sustained by a worker –
>
> (a) the worker, if the worker –
>
> (i) has received a notice of assessment from the insurer for the injury; or
>
> (ii) has not received a notice of assessment from the insurer for the injury, but –
>
> (A) has received a notice of assessment for any injury resulting from the same event (the 'assessed injury'); and
>
> (B) for the assessed injury, the worker has a DPI of 20% or more or, under section 239,[16] has elected to seek damages; or
>
> (iii) has a terminal condition;
>
> (b) a dependant of the deceased worker, if the injury results in the worker's death and –
>
> (i) compensation for the worker's death has been paid to, or for the benefit of, the dependent under chapter 3, part 11; or
>
> (ii) a certificate has been issued by the insurer to the dependent under section 132B.

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[13] Plaintiff's outline of submissions filed 25 January 2017, para 4.5; see also plaintiff's outline of submissions filed 10 February 2017, paras 3.1 – 3.4.

[14] [2013] QSC 59 at [4].

[15] Including *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157 and *Glenco Manufacturing Pty Ltd v Ferrari* [2005] QSC 5.

[16] Section 239 (Worker who is required to make election to seek damages).

[106] This is confirmed by s 237(5), which provides:

> "(5) To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker."

[107] Section 237 is located within Chapter 5 "Access to damages" of the *WCRA*. The provisions within that chapter, consistent with one of the express objects of the *WCRA* as stated in s 5(2)(b), regulate access to damages by claimants. In Chapter 5, a "claimant" is "a person entitled to seek damages".[17] "Worker", for the purposes of Chapter 5, means "the worker in relation to whose injury the claim is made".[18]

[108] The paramountcy of the provisions in Chapter 5 is reinforced by s 235, which provides:

> "**235 Requirements of chapter to prevail and are substantive law**
>
> (1) If a provision of an Act or a rule of law is inconsistent with this chapter, this chapter prevails.
>
> (2) All the provisions of this chapter are provisions of substantive law.
>
> (3) However, subsection (2) does not affect minor variations in procedure."

[109] Section 275(1), within Chapter 5 Part 5, then provides, by reference to s 302(1):

> "**275 Notice of claim for damages**
>
> (1) Before starting a proceeding in a court for damages, a claimant must give notice under this section within the period of limitation mentioned in s 302(1).
>
> **302 Alteration of period of limitation**
>
> (1) A claimant may bring a proceeding for damages for a personal injury –
>
> (a) within the period of limitation (the ***general limitation*** period) allowed for bringing a proceeding for damages for personal injury under the *Limitation of Actions Act* 1974."

[110] There is no issue in this case that the plaintiff has never given the sixth defendant, or any of the QCL parties, a notice of claim for damages under s 275(1).

[111] Then s 295, within Chapter 5 Part 7, provides:

> "**295 Compliance necessary before starting proceeding**

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[17] Section 233.
[18] Section 233.

> The claimant may start a proceeding in a court for damages only if the claimant has complied with –
>
> (a) the relevant division under part 2[19], to the extent the division imposes a requirement on the person; and
>
> (b) part 5, other than as provided by sections 297 and 298[20]; and
>
> (c) part 6[21]; and
>
> (d) section 296."

[112] As noted above, the QCL parties' contention is that, apart from the recently-included claim for fraudulent misrepresentation with which I will deal separately below, the plaintiff's proceeding against the QCL parties seeks to recover damages for personal injuries which arose out of her employment with the sixth defendant, and the plaintiff is precluded from bringing such a proceeding because of her failure to comply with the *WCRA* prior to instituting the proceeding.

[113] The plaintiff joins no issue with the fact that she did not comply with the *WCRA* before commencing this proceeding. She says, however, that she did not have to because the *WCRA* does not apply to her personal injuries claim. Her arguments as to why this is so were developed in the submissions she filed in response to the present application.

[114] In her submissions filed on 25 January 2017[22], the plaintiff said:

> "2. **Date of the Incident**
>
> 2.1. The date of the incident is 4 November 2013 when the Fourth Defendant notified the Plaintiff that her employment has ended[23] despite the fact that on 25 August 2013 the Plaintiff withdrew her resignation upon the Fourth Respondent's invitation made on 23 August 2013.[24]
>
> 3. **Does the WCRA or the PIPA apply?**
>
> 3.1. Section 11 of the WCRA 'Who is a worker' identifies that:
>
> *(1) A worker is a person who –*
>
> *(a) works under a contract; and*

---

19 Part 2 (Entitlement conditions).
20 Part 5 (Pre-court procedures) (other than as provided by sections 297 (Court to have made declaration about noncompliance) and 298 (Court to have given leave despite noncompliance).
21 Part 6 (Settlement of claims).
22 Court document 11.
23 Affidavit of Olga Day sworn and filed 24 January 2017 at [61]; p.8.
24 Affidavit of Olga Day sworn and filed 24 January 2017 at [28]; Exhibit "OAD-14", p.21.

(b) in relation to the work, is an employee for the purpose of assessment for PAYG withholding.

3.2. The Statutory Declaration sworn by the Fourth Defendant on 9 January 2015 in response to the Plaintiff's request under section 27 of the PIPA states that the employment contract with the Plaintiff ceased on 23 August 2013.[25]

3.3. The Payroll records issued by the Sixth Defendant in 2014 also confirms that the Plaintiff was not an employee for the purpose of Assessment for PAYG withholding pursuant to section 11 of the WCRA.[26]

3.4. The Fourth Defendant also provided the information to the superannuation funds that the Plaintiff's employment ceased on 23 August 2013.

3.5. The Employment Separation Certificate, which was issued on 14 February 2014 No.3 also confirmed that the Plaintiff employment contract was termination on 23 August 2013.

3.6. Therefore, at the date of the incident, i.e. 4 September (sic) 2013, the Plaintiff was not 'a worker' in the meaning of the WCRA. Therefore, the WCRA does not apply to the Plaintiff.

3.7. The relevant Act is the PIPA, with which the Plaintiff and Fourth, Fifth and Sixth Defendant duly complied."

[115] In the written submissions filed on 10 February 2017[27], the plaintiff contended:

> "The following questions are to be decided under the relevant compensation Act as in force when the injury was sustained –
>
> (a) whether the person was *a worker* under the Act when *the injury* was sustained;
>
> (b) whether the injury was an injury under the Act when it was sustained."

The plaintiff then referred to the definitions of "worker" and "event" under s 11 and s 31 respectively of the *WCRA*, and continued:

> "1.11. The provision of the WCRA does not apply to the Plaintiff's claim as her injury does not fall into the definition of 'injury' under the WCRA.
>
> 1.12. The injury suffered by the Plaintiff on or about 4 November 2013 does not resulting from 'an event' in the meaning of section 31 of the WCRA.
>
> 1.13. The injury suffered by the Plaintiff on or about 4 November 2013 does not 'an injury' in the meaning of section 32 of the WCRA and section 6 of the PIPA as:

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[25] Affidavit of Olga Day sworn 25 January 2017.
[26] Affidavit of Olga Day sworn 25 January 2017, QCL Payroll Records issued on 30 January 2014.
[27] Court document 18.

1) the Plaintiff's injury is not arising out of, or in the course of employment;

2) the Plaintiff's employment is not the major significant contributing factor to the injury as her aggravation of the PTSD was a secondary precipitant.

1.14. The date of the incident is 4 November 2013 when the Fourth Defendant notified the Plaintiff that her employment had ended[28] despite the fact that on 25 August 2013 the Plaintiff withdrew her resignation upon the Fourth Respondent's invitation made on 23 August 2013.[29]

2. **Does the WCRA apply to the Plaintiff's Claim?**

2.1. The Statutory Declaration sworn by the Fourth Defendant on 9 January 2015 in response to the Plaintiff's request under section 27 of the PIPA states that the employment contract with the Plaintiff ceased on 23 August 2013.[30]

2.2. The Payroll records issued by the Sixth Defendant in 2014 also confirms that the Plaintiff was not an employee for the purpose of Assessment for PAYG withholding pursuant to section 11 of the WCRA.[31]

2.3. The Fourth Defendant also provided the information to the superannuation funds that the Plaintiff's employment ceased on 23 August 2013.

2.4. The Employment Separation Certificate, which was issued on 14 February 2014, also confirmed that the Plaintiff employment contract was terminated on 23 August 2013. Therefore, at the date of the incident, i.e. 4 September 2013, the Plaintiff was not 'a worker' in the meaning of the WCRA. Therefore, the WCRA does not apply to the Plaintiff.

2.5. The relevant Act is the PIPA, with which the Plaintiff and the Fourth, Fifth and Sixth Defendant duly complied.

2.6. Therefore, the Plaintiff was not 'a worker' in the meaning of section 11 of the WCRA as her employment was terminated by the Defendants on their own motion on or about 23 August 2013.

2.7. The Plaintiff was not an employee for the purpose of assessment of PAYG withholding under the *Taxation Administration Act 1953* (Cth) ('the TAA') as in or about August 2013 the Defendants stopped making withholdings from her salary required by the TAA.

2.8. The Plaintiff submitted to the Court in her written submissions[32] and in her oral arguments during the hearing before Justice Daubney[33] that the WCRA has no application to the Plaintiff's circumstances."

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28 Affidavit of Olga Day sworn and filed 24 January 2017 at [61]; p.8.
29 Affidavit of Olga Day sworn and filed 24 January 2017 at [28]; Exhibit "OAD-14"' p.21.
30 Affidavit of Olga Day sworn 25 January 2017.
31 Affidavit of Olga Day sworn 25 January 2017; QCL Payroll Records issued on 30 January 2014.
32 Plaintiff's Outline of Submissions filed 25 January 2017.
33 Transcript of the Hearing of the Proceedings before Daubney J on 25 January 2017; Audio of the Court Proceedings held on 25 January 2017.

[116] Then, in her submission filed on 15 May 2017[34], the plaintiff advanced the following arguments:

> "**Causes of actions**
>
> 4. The Plaintiff's Statement of Claim (as amended on 22 February 2017) clearly identifies the causes of actions, including breach of contract, negligence and fraudulent misrepresentation (or the tort of deceit).
>
> 5. The Plaintiff claims the damages for breach of the employment contract, under which she was employed on a part-time basis from 6 December 2012,[35] which is contrary to the Defendants' submissions that she was employed on a casual basis. The Plaintiff clearly identified the nature of her employment as of a part-time nature, which includes the following characteristics:
>
> a) defined starting and finishing time;
>
> b) the Plaintiff's hours of work were determined in advance, being 2 days a week – every Tuesday and Thursday;
>
> c) there was a mutual expectation of continued employment in performing continuous work in amending and developing the Sixth Defendant's system of precedents of legal documents and attracting Russian-speaking clients.[36]
>
> 6. The Plaintiff claims the damages and losses for breach of the employment contract which occurred at an unknown date in 2013, including annual and sick leave payments. This cause of action is within the time limit pursuant to the *Limitation of Actions Act 1974* (Qld).[37]
>
> 7. The Plaintiff also claims damages for personal injury for breach of contract, negligence and fraudulent misrepresentation. The Plaintiff submitted to the Court her submissions stating that the *Personal Injuries Proceedings Act 2002* (Qld) ('the PIPA') excludes only the claims in relation to 'injury' within the meaning of the *Workers' Compensation and Rehabilitation Act 2003* ('the WCRA'). Furthermore, the Plaintiff's claim does not satisfy the definition of 'a worker', 'a date of the incident' and 'event' as defined in the WCRA.[38]"

[117] In short, insofar as the plaintiff advances a personal injuries claim, her argument involves the following steps:

(a) She suffered her relevant personal injury, i.e. aggravation of her psychiatric condition, on 4 November 2013 when she was informed that her employment had been terminated;

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34 Court document 43.
35 Amended Statement of Claim of 22 February 2017, at [47.1].
36 Amended Statement of Claim of 22 February 2017, p. 14; Affidavit of Olga Day filed 9 February 2017, at [24], pp. 46-75.
37 Section 10.
38 Plaintiff's Outline of Submissions filed on 20 February 2017 at [11].

(b) In fact, however, she had ceased being a "worker" for the purposes of the *WCRA* on 23 August 2013, being the date nominated by the sixth defendant as the date when her employment ceased;

(c) Her employment with the sixth defendant was not the major contributing factor to the aggravation of her psychiatric condition, and the aggravation was therefore not an "injury" for the purposes of s 32 of the *WCRA*;

(d) Because she was not a "worker" as at 4 November 2013 and because she did not suffer an "injury" under the *WCRA* on that date, the passing to her of the information that her employment had been terminated was not an "event", as that term is defined in s 31 of the *WCRA*.

[118] It is clear from the ASOC, which I have summarised above, that the plaintiff claims that her entitlement to pursue a claim for damages for personal injuries is sourced in her employment relationship with the sixth defendant. It is expressly pleaded that the particular circumstance which caused her to suffer the personal injury, i.e. the advice on 4 November 2013 that her employment was terminated, was an act committed in breach of the implied terms of her employment contract, in breach of the duty of care owed by the sixth defendant as an employer, and in breach of the statutory duties owed by the sixth defendant under the *Workplace Health and Safety Act* 2011.

[119] The inconsistency in the positions adopted by the plaintiff is apparent. For the purpose of advancing her claim, she positively asserts that an employer/employee relationship existed as at 4 November 2013, with all the contractual, legal and statutory rights and obligations which attach to that relationship. I note in passing that this is consistent with the contemporaneous assertions by the plaintiff, via her husband, on 5 November 2017 that the plaintiff's employment had not ended in August 2013, and that since that time the plaintiff had "been on unpaid sick leave providing [the sixth defendant] with medical certificates".

[120] Moreover, the plaintiff expressly pleads in the ASOC that "at all material times to this action" she was employed by the sixth defendant. The causative occurrence which she claims occurred on 4 November 2013 was clearly a time material to her action.

[121] For the purposes of the *WCRA*, "worker" is defined in s 11(1):

> "**11 Who is a *worker***
>
> (1) A ***worker*** is a person who –
>
> (a) works under a contract; and
>
> (b) in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the Taxation Administration Act 1953 (Cwlth), schedule 1, part 2-5."

[122] There is no doubt on the material before me that, as at 23 August 2013, the plaintiff was a "worker" within that definition:

(a) She worked for the sixth defendant under a contract, although, as the QCL parties concede, there appears to be some issue about the proper characterisation of her employment and whether it was part-time or casual. Be that as it may, it is an intrinsic part of the plaintiff's own case that there was a contract of employment between her and the sixth defendant;

(b) That the plaintiff was an employee for the purpose of PAYG withholding is evident from the payroll and tax records exhibited to the plaintiff's own affidavit.[39]

[123] Remembering again that the plaintiff's claim for personal injuries is premised on the proposition that she was still employed by the sixth defendant as at 4 November 2013, there is no suggestion by her that the contractual and employment relationship was in any way varied or altered between August and November 2013. On the contrary, as is clear from the correspondence sent by the plaintiff and, on her behalf, by her husband, her position was that employment status enured through to November 2013.

[124] On the plaintiff's own case, then, she must still have been a "worker" for the purposes of the *WCRA* at the time of the claimed incident on 4 November 2013. It is not to the point that the sixth defendant contended that her employment had ceased in August 2013. What is relevant is that a fundamental element of the plaintiff's own case is that she was still employed by the sixth defendant as at November 2013. It must also,

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[39] Affidavit filed 25 January 2017, Court document 12, Exhibits "OD-C" and "OD-D".

therefore, be an inherent part of her case that she was a "worker" within the meaning of that term in the *WCRA* as at November 2013.

[125] Accordingly, I reject the plaintiff's argument that she was not a "worker" for the purposes of the *WCRA*.

[126] Turning then to the plaintiff's argument concerning the injury she suffered, s 32 of the *WCRA* relevantly defines "injury" as follows:

> "(1) An "***injury***" is a personal injury arising out of, or in the course of, employment if –
>
> …
>
> (b) for a psychiatric or psychological disorder – the employment is the major significant contributing factor to the injury.
>
> …
>
> (3) ***Injury*** includes the following –
>
> …
>
> (ba) an aggravation of a psychiatric or psychological disorder, if the aggravation arises out of, or in the course of, employment and the employment is the major significant contributing fact to the aggravation;"

[127] The plaintiff's submission that her injury did not arise out of, or in the course of, her employment cannot be sustained. Her entire case for damages for personal injury is that she suffered this injury in the context of her employment. So much is apparent from her pleaded case.

[128] Then the plaintiff asserts, in her submissions, that she did not suffer an "injury" within the meaning of that term because her employment was "not the major significant contributing factor to the injury as her aggravation of the PTSD was a secondary precipitant".

[129] Apart from the fact that there is no evidence to support that assertion, there are two reasons for rejecting that submission.

[130] First, the plaintiff, in her pleading, carefully articulates a claim of having suffered separate and identifiable personal injury by way of aggravation of her psychiatric

condition as a consequence of the claimed occurrence on 4 November 2013. That is what is expressly pleaded in paragraph 64 of the ASOC. She does not identify any other factor as having contributed to the "further aggravation" which she claims to have resulted from the incident. The only available inference is that the claimed incident on 4 November 2013, which on her own case occurred in the course of her employment, was the major significant contributing factor to the further aggravation she claims to have suffered and for which she says the QCL parties are liable.

[131] Secondly, and in any event, this argument by the plaintiff necessarily invokes a proposition to the effect that, in the case of an aggravation of a psychiatric or psychological disorder, the *WCRA* applies only if, relevantly, the employment is "the major significant contributing factor to the aggravation", and that if the employment is something less than "the major significant contributing factor" then the case falls outside the purview of the *WCRA*. An argument to similar effect was considered and expressly rejected by the Court of Appeal in *Hawthorne v Thiess Contractors Pty Ltd*.[40] In that case, the Court was concerned to construe a provision of the *WorkCover Queensland Act* 1996, in which "injury" was defined to mean a "personal injury arising out of, or in the course of, employment if the employment is the major significant factor causing the injury". It was held in that case that the words "if the employment is the major significant factor causing the injury" were included in the definition for the purpose of restricting an employer's liability in damages to circumstances where the stated degree of causal connection existed, not to exclude from the reach of the scheme those cases in which a plaintiff might demonstrate a less substantial connection between employment and complaints.[41]

[132] The same applies in considering the ambit of the definition of "injury" in s 32 of the *WCRA*. It would be a perverse outcome if that section were construed in such a way as to not exclude from the reach of the scheme established under the *WCRA* cases in which a plaintiff might demonstrate a less substantial connection between employment and the aggravation suffered.

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[40] (2002) 2 Qd R 157.

[41] See judgment of Byrne J at [39]; see also the judgment of Thomas JA at [16].

[133] Accordingly, I reject the plaintiff's contention that she was not bound to comply with the *WCRA* because she did not suffer an "injury" within the meaning of that term in the legislation.

[134] In relation to the plaintiff's contention that the claimed occurrence on 4 November 2013 was not an "event" for the purposes of the *WCRA*, s 31(1) contains the following definition:

> "(1) An ***event*** is anything that results in an injury, including a latent onset injury, to a worker."

[135] As I have rejected the plaintiff's arguments that she was not a "worker" and that she did not suffer an "injury", it follows that I also reject her argument that the claimed occurrence on 4 November 2013 was not an "event".

[136] Accordingly, I do not accept the plaintiff's arguments to the effect that she was not bound to comply with the provisions of the *WCRA* before commencing this proceeding for personal injuries against the QCL parties. On the contrary, on the plaintiff's own pleaded case, my finding is that she was positively obliged to comply with the *WCRA* requirements before becoming entitled to commence this proceeding claiming damages for personal injury.

[137] The plaintiff further argues, however, that the QCL parties are estopped from asserting that *PIPA* does not apply to the plaintiff's proceedings as she should have complied with the pre-court proceedings under the *WCRA*.

[138] It is not in issue that the parties engaged in the pre-court procedures prescribed under *PIPA*, albeit that the QCL parties say, in effect, that they engaged in that process with a reservation of their rights to invoke the provisions of the *WCRA*.

[139] Be all that as it may, the short answer to the plaintiff's argument is that the estoppel she seeks to invoke is not available in the circumstances of this case. The point was expressly dealt with by Douglas J in *Glenco Manufacturing Pty Ltd v Ferrari*[42], in which his Honour said[43]:

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[42] [2005] 2 Qd R 129.
[43] At [7].

> "Estoppel cannot make valid a transaction which is invalid by statute, however, as no estoppel will prevail against the law; *United Grocers Tea and Dairy Produce Employees Union of Victoria v Linaker* (1916) 2 CLR 176, 179. Nor may an estoppel by representation or conduct be used to expand the scope of a statutory power; generally see *Halsbury's Laws of Australia* at [190-25]. The previous false assumptions of Glenco about its obligations cannot prevent it from relying now on the proper application of the Act nor could it give the applicant a right denied to him by statute."

[140] On that authority, the estoppel sought to be raised by the plaintiff simply cannot be maintained.

[141] Finally, I should note that the plaintiff claims in the alternative for "the financial loss and damage against the fourth, fifth and sixth defendants [which] occurred as a result of breach of the employment contract". The plaintiff seems to suggest that this alternative claim is not one for damages for personal injuries, but is a claim for financial loss suffered as a consequence of breach of contract. As her claim is pleaded, however, that proposition simply cannot hold true. The "financial loss and damage" which she claims to have suffered is pleaded to be her future economic loss to her putative date of retirement in 2030. On first principles, were this a claim for damages for wrongful termination, the quantum of her damages would be calculated by reference to the period of notice of termination of employment which should have been given to her. What she actually claims, however, is the entirety of her lost future earning capacity and that, clearly enough, is a claim for damages suffered as a consequence of the personal injury she says she suffered.

[142] Accordingly, I conclude that, on her own case as pleaded in the ASOC and on the arguments advanced before me on this application, the plaintiff's claim for damages for personal injuries is one to which the *WCRA* applied, and accordingly the plaintiff was statutorily precluded from commencing a personal injuries claim against the QCL parties without first having complied with the requirements of the *WCRA*.

Fraudulent misrepresentation

[143] In paragraph 58.1 of the ASOC, which I have set out in full above, the plaintiff purported to plead a separate cause of action against the QCL defendants by way of a claim for fraudulent misrepresentation.

[144] In *Magill v Magill*[44], Gummow, Kirby and Crennan JJ said[45]:

> "The modern tort of deceit will be established where a plaintiff can show five elements: first, that the defendant made a false representation; secondly, that the defendant made the representation with the knowledge that it was false, or that the defendant was reckless or careless as to the representation was false or not; thirdly, that the defendant made the representation with the intention that it be relied upon by the plaintiff; fourthly, that the plaintiff acted in reliance on the false representation; and fifthly, that the plaintiff suffered damage which was caused by reliance on the false representation. Generally, the elements of the tort have been found to exist in cases which concern pecuniary loss flowing from a false inducement and the need to satisfy each element has always been strictly enforced, because fraud is such a serious allegation."

[145] As appears from paragraph 58.1 of the ASOC, the plaintiff has carefully particularised the statements which she relies on as constituting the fraudulent misrepresentations. I have set out above in this judgment a lengthy recitation of the correspondence which passed between the parties so that the particular communications upon which the plaintiff relies for this serious allegation of fraud can be seen in their proper context. Viewed both independently and in that full context, I am of the opinion that none of the statements relied on by the plaintiff in paragraph 58.1 can be described as false representations. Indeed, the plaintiff does not even attempt to articulate the falsity of the impugned statements – she merely avers generally that they were "misleading".

[146] But the assertions by the plaintiff in this regard do not pass even cursory inspection. So, for example, the plaintiff points to the words in the fourth defendant's email of 23 August 2013 "… you are a very valuable member of our team. Would you like some time for reconsider? I won't say anything to anyone for now." On the face of those words, there is nothing false or misleading about them. Nor, viewed in their proper context in the course of correspondence depicted above, can they in any way be regarded as false or misleading. Nor does the plaintiff contend, either in her pleading or her submissions, as to what it is about those statements were false or misleading.

[147] The same applies to the fourth defendant's email on 27 August 2013, and, indeed, Ms Stewart's email of 29 August 2013.

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44 (2006) 226 CLR 551.

45 At [114] and omitting references and citations. See also the judgment of Gleeson CJ at [37].

[148] The lack of substance in these allegations is highlighted by reference to the plaintiff seeking to impugn the statement by the fourth defendant in his email on 16 September 2013 that "… I am really sorry to hear that you are unwell. Please do keep me posted on your recovery. If there is anything we can do then please let us know." It is, frankly, impossible to understand how those words could be characterised as false or misleading, in the manner baldly contended for by the plaintiff.

[149] Moreover, the notion that the plaintiff was misled into believing that her employment was continued after 23 August 2013, being one of the fundamental bases of this claim by the plaintiff, is simply not borne out by the evidence:

- The reference dated 28 August 2013, which was provided to the plaintiff on 29 August 2013, expressly referred to the term of the plaintiff's employment as having been "between 3 December 2012 and 23 August 2013", commended the plaintiff for other employment, and wished her well for her future career. This reference, provided at the plaintiff's request, made clear by its terms and tone that the plaintiff's employment with the sixth defendant had ceased;

- The emails between the plaintiff and the fourth defendant on 23 – 27 August 2013 culminate with the plaintiff saying she would see how she feels by 16 September, and the fourth defendant expressing a hope that the plaintiff would be "ok to return" on or about 16 September. This solicitous expression of hope is a far cry from a representation of continuing employment.

- That solicitous attitude by the fourth defendant was again manifested in the terms of his email of 25 September. Read in its proper context, that email contains no representation to the plaintiff of continuing employment; on the contrary, the email makes it clear that it was the fourth defendant's intention to advertise for someone to do the work which the plaintiff was unable to perform. It is clear from the response on 30 September that this is precisely how that email was understood by the plaintiff and her husband. Indeed, the email response from the plaintiff's husband acknowledged the cessation of her relationship with the sixth defendant, saying she had "enjoyed working and sincerely appreciates having had the chance to work for your company".

- The impugned email of 4 November 2013 from the fourth defendant, which was in response to the unsolicited provision by the plaintiff of yet another medical certificate, did nothing more than re-state in short form what had been said in previous emails, i.e. that the plaintiff's employment relationship with the sixth defendant had terminated and an expression of hope that her employment might be resumed at some time in the future when the plaintiff was better.

[150] The emails which passed between the parties after 4 November 2013 obviously do not bear directly on the plaintiff's claim for fraudulent misrepresentation, but nevertheless provide context within which the emails relied on by the plaintiff should be made.

[151] The plaintiff's case does not plead or particularise any oral representations or other conduct by the fourth defendant; rather, the case is limited to alleged documentary representations.

[152] For the reasons I have given, I consider that there is no proper basis in the evidence for the claim pleaded in the ASOC that the QCL parties engaged in fraudulent misrepresentation.

[153] In my view, this claim advanced by the plaintiff has no prospects of success.

Conclusion

[154] The QCL parties have now moved for summary judgment. In considering this matter, I am well aware of the appropriate caution with which one should approach consideration of summary judgment applications, which should only be allowed under the *UCPR* if the Court is satisfied that the respondent (in this case, the plaintiff) has no real prospect of succeeding on her claim. For the reasons given above, and to adopt the words used by the High Court[46], I consider that there is a high degree of certainty that the ultimate outcome of the proceeding against the QCL parties if it were allowed to go to trial in the ordinary way would be that the plaintiff would not succeed against those parties.

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[46] *Agar v Hyde* (2000) 201 CLR 552, per Gaudron, McHugh, Gummow and Hayne JJ at [57]; *Rich v CGU Insurance Ltd* (2005) 214 ALR 370 at [18].

[155] The plaintiff has had more than ample opportunity to advance her arguments, and indeed to make whatever amendments to her pleadings she may have considered appropriate, to seek to avoid a summary determination of the proceeding she commenced against the QCL parties.

[156] For the reasons I have given above, I have reached the conclusions that:

(a) By reason of non-compliance with the *WCRA*, the plaintiff was precluded from instituting this personal injuries claim against the QCL parties; and

(b) Her newly-pleaded claim for fraudulent misrepresentation has no real prospect of success.

[157] In those circumstances, I consider it appropriate to order summary judgment for the QCL parties pursuant to *UCPR* r 293.

[158] There will be the following orders:

1. The plaintiff's application filed 10 July 2017 is dismissed with costs.

2. The plaintiff's amended application filed 21 February 2017 is dismissed with costs.

3. The plaintiff's claims against the fourth, fifth and sixth defendants are dismissed.

4. The plaintiff will pay the fourth, fifth and sixth defendants' standard costs of and incidental to this proceeding.

5. The fourth, fifth and sixth defendants shall not recover any costs from the plaintiff in respect of the appearances on 27 January 2017, 17 May 2017 and 12 July 2017.