SUPREME COURT OF QUEENSLAND

CITATION:	*Quinlivan v Konowalous & Ors (No 2)* [2020] QSC 15
PARTIES:	**MICHAEL WILLIAM QUINLIVAN** (plaintiff) **v** **ANDREW KONOWALOUS** (first defendant) **SPECTRUM IMAGING PTY LTD** ACN 143 919 395 (second defendant) **NICHOLAS MACZYSZYN** (third defendant) **ANTHONY GOLLE** (fourth defendant) **MARK ILLGUTH** (fifth defendant)
FILE NO/S:	2726 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	24 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	No oral hearing
JUDGE:	Davis J
ORDER:	**1. There be no order as to costs of the adjournment of the application of 13 February 2019.** **2. The plaintiff pay the first and second defendants' costs of the claim, including the application filed on 16 January 2019 and including the costs of the adjournment of 22 January 2019, but excluding the costs of the adjournment of 13 February 2019, on the standard basis.** **3. The plaintiff pay the costs of the third, fourth and fifth**

defendants of the claim, including the costs of the application filed on 16 January 2019, on the indemnity basis.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – COSTS OF AND INCIDENTAL TO PROCEEDING – where the renewal of the plaintiff's claim by the Registrar was set aside and the claim dismissed – where plaintiff submits that he should have the costs of two adjournments of the application which were ordered on 22 January 2019 and 13 February 2019 – where the first and second defendants seek their costs of the application and the proceedings on a standard basis – where it is appropriate to have regard to the final outcome of the application – where the direct fault which led to the adjournment of 13 February 2019 was that of the second defendant – whether the costs thrown away by the adjournments should follow the same fate as the other costs of the proceeding

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – POWER TO ORDER – RELEVANT CONSIDERATIONS GENERALLY – where the renewal of the plaintiff's claim by the Registrar was set aside and the claim dismissed –– where the third, fourth and fifth defendants seek their costs of the application and the proceedings on an indemnity basis – where the plaintiff's claims, other than the defamation claims, seemed misconceived – where the plaintiff's defamation claims faced significant difficulties – where one of the motivations for bringing and maintaining the action was an ulterior one – where the plaintiff made a deliberate choice not to serve the claim within time – where the plaintiff's conduct constituted a breach of the implied undertaking imposed by r 5 of the UCPR – where review of the modern authorities concerning the renewal of claims would have alerted the plaintiff to the inappropriateness of the course he adopted and of the dangers he faced that the claim would not be renewed if he failed to serve it – where the second defendant's application was sought to be defended by the plaintiff by submissions which were not supported by the relevant authorities and upon factual bases, many of which were not established – whether the costs of the third, fourth and fifth defendants should be assessed on the indemnity basis

Uniform Civil Procedure Rules 1999, r 5, r 16, r 667, r 681

Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175, cited

Babcock & Brown Pty Ltd v Arthur Andersen [2010] QSC 287, cited

Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR

256, cited

Calderbank v Calderbank [1976] Fam Law 93, cited

Colgate Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225, cited

Di Carlo v Dubois [2002] QCA 225, followed

Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397, cited

IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission [2007] 1 Qd R 148, considered

Knight v FP Special Assets Ltd (1992) 174 CLR 178, cited

McIntosh & Anor v Maitland & Ors [2016] QSC 203, followed

Oshlack v Richmond River Council (1998) 192 CLR 72, cited

Quinlivan v Konowalous & Ors [2019] QSC 285, cited

Rosniak v Government Insurance Office (1997) 41 NSWLR 608, followed

UBS AG v Tyne (2018) 360 ALR 184, cited

COUNSEL: No oral hearing

SOLICITORS: Noble Law for the Plaintiff
Hall & Wilcox for the First and Second Defendants
Meridian Lawyers for the Third, Fourth and Fifth Defendants

[1] The plaintiff commenced the proceedings by way of Claim against the defendants on 16 March 2017. The Claim and Statement of Claim were not served and on 9 March 2018, the Registrar, upon the application of the plaintiff, renewed the Claim for 12 months from 17 March 2018. The Statement of Claim was amended on 18 December 2018 and the Claim and Amended Statement of Claim were served on the second defendant on 7 January 2019.

[2] The second defendant then made an application to set aside the decision of the Registrar renewing the Claim.[1] The other defendants supported the second defendant's application. The plaintiff resisted the application. The first and second defendants were represented by the same counsel and solicitors. The third, fourth and fifth defendants were represented by the same counsel and solicitors but not the same as the first and second defendants.

[3] On 22 November 2019, I made the following orders on the second defendant's application:

1. The order of the Registrar extending the period for service of the claim for 12 months from 17 March 2018 is set aside;

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[1] *Uniform Civil Procedure Rules* 1999, rr 16(d), 667(2)(a) and the inherent jurisdiction of the court, see *Babcock & Brown Pty Ltd v Arthur Andersen* [2010] QSC 287.

2. The claim is dismissed;

3. The parties may file and serve written submissions on costs by 4:00 pm on 29 November 2019;

4. The question of costs will be determined on any written submissions received and without oral hearing[2] (the principal judgment).

[4] Written submissions were filed on behalf of the plaintiff and on behalf of the first and second defendants. Separate submissions were filed on behalf of the third, fourth and fifth defendants.

[5] Issues were raised in the written submissions by some parties which may not have been contemplated by others. In particular, the third, fourth and fifth defendants sought their costs against the plaintiff on the indemnity basis. The plaintiff made submissions about certain reserved costs. I invited further written submissions on those issues. Both the plaintiff and the first and second defendants filed further submissions. The third, fourth and fifth defendants did not.

The parties' respective positions on costs

[6] The plaintiff submits that he should have the costs of two adjournments of the application which were ordered on 22 January 2019 and 13 February 2019. Otherwise, he submits that there ought to be no order as to costs of the application or of the proceedings. The submission that there be no order as to costs is contradicted by sworn evidence upon which the plaintiff sought to rely. Ms Robin Margaret Bourne in her affidavit conceded that the second defendant should have its costs of the application.[3]

[7] The first and second defendants seek their costs of the application and the proceedings on the standard basis.

[8] As already observed, the third, fourth and fifth defendants seek their costs of the application and the proceedings on an indemnity basis.

The costs of the adjournments

[9] The plaintiff's submission is based upon an affidavit of Ms Bourne, his solicitor. She swears that the application, originally returnable on 22 January 2019, was served upon the plaintiff on 16 January 2019. Ms Bourne swears that she entered into negotiations with the solicitor for the second defendant with a view to arranging an adjournment to enable her client sufficient time to prepare his defence of the application. The second defendant's solicitor rejected Ms Bourne's approaches and pressed the application. In court, a different approach was adopted by the second defendant who effectively conceded the adjournment.

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[2] *Quinlivan v Konowalous & Ors* [2019] QSC 285.

[3] See paragraphs [42] and [43] of these reasons.

[10] That version of events is disputed. In an affidavit sworn by Sean Anthony Sullivan, the first and second defendants' solicitor, a very different picture is painted. Mr Sullivan swears that Ms Bourne never asked him to consent to an adjournment before the matter came before the court on 22 January 2019. Emails which passed between Ms Bourne and Mr Sullivan, which are exhibited to Mr Sullivan's affidavit, did not mention any request for an adjournment and tend to support Mr Sullivan's memory of events.

[11] Daubney J, before whom the application came on 22 January 2019, made the following orders:

> "1. The application is adjourned to 13 February 2019;
>
> 2. The respondent plaintiff shall file and serve its affidavits in response to the application by 4.00 pm 1 February 2019;
>
> 3. The applicant second defendant shall file and serve any affidavits in reply by 4.00 pm 8 February 2019;
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> 4. Costs reserved."

[12] Following the making of those orders, Ms Bourne attempted to negotiate payment of a fixed amount of costs by the second defendant as costs thrown away, but that was not achieved.

[13] It is unnecessary to finally determine the contest between Ms Bourne's recollection of events and Mr Sullivan's. In determining the costs of the adjournment, it is appropriate to have regard to the final outcome of the application. That was the point of his Honour reserving the costs.

[14] The application brought by the second defendant was completely successful. The renewal of the claim by the Registrar was set aside and the claim dismissed. As explained in the reasons for making those orders, there were significant difficulties with the claim as pleaded.[4] The costs thrown away by the adjournment of 22 January 2019 should follow the same fate as the other costs of the proceedings.

Costs of the adjournment of 13 February 2019

[15] In her affidavit, Ms Bourne said this:

> "15. At the hearing of 13 February, the court held that orders could not be made as the second defendant had failed to serve the application on the third, fourth and fifth defendants. The matter was adjourned to 21 February 2019 in order for the rest of the defendants to be served with the application."

[16] It is not clear from Ms Bourne's affidavit whether or not the application was adjourned as a result of some positive submission made by the plaintiff that it ought to be adjourned so as to enable service upon the other defendants. Mr Sullivan, in his affidavit, said:

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[4] *Quinlivan v Konowalous & Ors* [2019] QSC 285 at [37]-[48].

"12 Now produced and shown to me and marked 'SAS10' is a copy of the notes of Danielle Davis with respect to the hearing before Justice Boddice on 13 February 2019 which I am informed by Ms Davis and verily believe is an accurate record of her attendance at the hearing. Ms Davis is a solicitor at Hall & Wilcox and was instructing counsel on the day as I was appearing in another matter. I sat in the back of the Court during the latter part of the hearing and Ms Davis' notes accord with my recollection of that part of the hearing.

13 With respect to paragraph 15 of the Bourne Affidavit, the notes of Ms Davis record that:

(a) the parties handed up submissions and began arguments with respect to the objections to affidavit material;

(b) Justice Boddice stopped the parties and queried what was the attitude of the other three defendants to the second defendant's application;

(c) Justice Boddice then made comments that he was concerned about hearing the matter without giving the third, fourth and fifth defendants the opportunity to make submissions;

(d) Justice Boddice commented that if the second defendant was successful in its application, that also had the effect of preventing the plaintiff from pursuing the third, fourth and fifth defendants;

(e) Justice Boddice also observed that depending upon the findings which he made, his judgment might also impact upon the ability of the third, fourth and fifth defendants if they wished to bring an application on the same grounds;

(f) In those circumstances, Justice Boddice was not comfortable in proceeding in their absence and directed that the matter be adjourned to 21 February 2019 with the court documents to be served on the third, fourth and fifth defendants.

[17] The plaintiff's written submissions which were before the court on 13 February 2019 raised the attitude of the other defendants as a consideration in the exercise of discretion in the application. It was submitted that one of the reasons which should lead to the dismissal of the application was:

"8.12 This application is brought by the second defendant only and not by any other defendants who may concede liability."

[18] That submission may have influenced his Honour to adjourn the application.

[19] Boddice J found that the application ought to have been served upon the third, fourth and fifth defendants. The second defendant had not done so. Therefore, the direct fault which led to the adjournment was that of the second defendant. On the other hand, his Honour reserved

the costs of the adjournment and the second defendant has been successful in the application and the proceedings.

[20] On balance, there should be no order for costs of the adjournment of 13 February 2019.

The other costs

[21] All defendants were successful in the application.

[22] Rule 681 of the *Uniform Civil Procedure Rules* 1999 (UCPR) provides as follows:

> "**681 General rule about costs**
>
> (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
>
> (2) Subrule (1) applies unless these rules provide otherwise."

[23] The rationale behind the general rule that costs follow the event was explained by McHugh J in *Oshlack v Richmond River Council* (1998) 192 CLR 72, where his Honour said:

> "The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. (*Latoudis* (1990) 170 CLR 534 at 543; 97 ALR 45; 65 ALJR 151; BC9002896 per Mason CJ; at 562-563 per Toohey J: at 566-567 per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410; 120 ALR 385; 68 ALJR 374; BC9404608 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ). If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of unsuccessful litigation."[5]

[24] There are many cases where there has been proper departure from the general rule that costs follow the event. Here, the plaintiff points to the following:

> "13. In the plaintiffs favour the following considerations apply and the plaintiff relies on the findings of the court as a relevant consideration to the question of costs;
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> 13.1 The plaintiff has been seriously prejudiced by unlawful conduct of the defendants and properly brought the claim, the merits of which

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[5] At 97.

have not been attacked by the second defendants in the evidential material provided by the second defendant.

13.5 The elevation of the procedural law above the substantive rights and the interests of justice as espoused by Jackson J in *McIntosh and Anor v Maitland* [73][6] is a much debated development but has harsh consequences for a litigant who properly brought the claim but held back on the service of the claim.

13.6 The offense of 'tactical manoeuvring' is not present in this case there were forensic reasons (albeit insufficiently persuasive) for not serving the claim; i.e.

- The promise or threat of the other complaints which never materialised;
- The delay by AHPRA;
- The delay by QCAT;
- There is no demonstrable cost disadvantage as suggested by Gordon J; [75][7]
- There was found to be no prejudice, a cornerstone of exercising a discretion to non-suit a party;
- Waiting for the outcome of the QCAT decision on one view is in line with the principles of rule 5 of the UCPR to the extent that if the 'history' of sexual misconduct as threatened and promised by the second defendant had materialised (which they did not do) then the plaintiff's prospects of success would have been dashed and unnecessary expense would have been incurred in proceeding with the current action;
- Where the failure to serve goes to the question of quantum it is less persuasive than where the failure to serve affects the vulnerability of a defamed plaintiff from whom the defamatory allegations had been withheld;
- The solicitor advised the defendants of the case and they were not in ignorance, instead it was the second defendant who took no steps to determine what the case was about. That frank disclosure is an indication that there was no 'tactical manoeuvring' on the part of the respondent.

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[6] That is a reference to paragraph [73] of *Quinlivan v Konowalous* [2019] QSC 285.

[7] The reference to "[75]" is probably a reference to paragraph [75] of *Quinlivan v Konowalous* [2019] QSC 285 when Gordon J's judgement in UBS AG v Tyne (2018) 360 ALR 184 is quoted.

***IMB v ACCC* [2006] QCA 407**

15. In this case the plaintiff (as in the present case) failed to serve the claim and applied for multiple renewals that were granted and the last renewal subsequently set aside;

16. The Applicant in that matter was disentitled to the costs.

The disentitling conduct of the defendants

17. The defendants were all put on notice as early as 31 August 2016 that a claim was intended to be filed to protect the plaintiff's limitation period. The claim was renewed for 12 months on 17 March 2018. The defendants took no action but left it until 16 January 2019 to file their application. They made no enquiries, did not ask for particulars, did not, despite it being obvious that a renewal was obtained take any action until 16 January 2019. An e-courts online portal search would have given notice of the filing of the material and the dates those documents were filed. But for the failure to serve the statement of claim, the court has not substantially criticised the plaintiff's conduct of the matter. The following instances of conduct on the part of the applicant may be relevant;

    17.1 There is malice demonstrated by the second defendant who had as an objective to prevent the plaintiff from working in the industry in QLD (ref page 46 of affidavit of Sean Sullivan sworn 16 January 2019) and the only reasonable inference is that it was as a result of the respondent's conflict about wasteful and potentially fraudulent practices [4] and 4];

    17.2 The initial complaint by the patient was not in fact a complaint captured by the legislation but was elevated to a complaint by Donna Hobbs who exacerbated the complaint with her hearsay version of the events contrary to the initial complaint by the patient;

    17.3 Serious and hitherto unsubstantiated allegations were made by the second defendant about entirely unproven allegations of a history of sexual misconduct, which were embarrassingly dismissed by the Board as being without substance and the plaintiff having no case to answer. When the plaintiff asked to be given access to the details of the complaint, APHRA and the Board refused to provide details to the respondent;

    17.4 Despite the patient saying she did not want to take it further; the defendants elevated the letter of the patient to a complaint which they used for their own motives to harm the livelihood of the plaintiff;

    17.5 The second defendant did not provide particulars of the complaint to the plaintiff when they could and should have done so;

17.6 Two government agencies delayed procedures for in excess of 3 years putting the plaintiff in a vulnerable position regarding the details of the alleged sexual misconduct allegations;

17.7 The delay in taking reasonable and timely action by the second and all other defendants;

17.8 The other defendants were not joined to the second defendant's application, delayed in acting sooner and as a result should be disentitled to costs as held in *IMB v ACCC* [2006] QCA 407.

[25] In relation to the submission made at paragraph 13.1:

(i) the defendants have never been called on to finally litigate whether their conduct was "unlawful". The Claim was summarily dismissed when the renewal was set aside.

(ii) there has been no determination that the plaintiff "properly brought the claim" and no determination of the merits of the claim whatsoever;

(iii) for the reasons explained in the principal judgment,[8] the assessment of the merits of the case that was undertaken suggested serious difficulties with the plaintiff's claim.[9]

[26] To the extent that the submission at paragraph 13.1 invites consideration of the costs issue upon an assumption that the plaintiff lost a cause of action that, if the claim was served within time, would have been successful is rejected.

[27] For some reason, there are no paragraphs 13.2, 13.3 or 13.4 in the plaintiff's costs submissions. The submission made at paragraph 13.5 refers to the judgment of Jackson J in *McIntosh & Anor v Maitland & Ors.*[10] This is a reference to the passage in his Honour's judgment referred to in the principal judgment. I said:

> "[73] In *McIntosh & Anor v Maitland & Ors*, Jackson J, in setting aside a Registrar's decision to renew a claim which was not served within a year of being issued, reviewed modern authorities decided after the introduction of rules like r 5 of the UCPR and then said this:
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> > 'In my view, it can no longer be said in this court that, in cognate branches of the procedural law, there is a tendency to relax rigid time limits where that is legally possible and where it can be done without prejudice or injustice to other parties. That would be inconsistent with a number of the statutory rules, concepts, principles and practices that are now recognised and incorporated into our modern laws of civil procedure'."[11] (Citations omitted)

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8 *Quinlivan v Konowalous & Ors* [2019] QSC 285.

9 At [61].

10 [2016] QSC 203.

11 *Quinlivan v Konowalous & Ors* [2019] QSC 285 at [73].

[28] Whether the procedural law explained by Jackson J in *McIntosh & Anor v Maitland & Ors* "is a much debated development" or "has harsh consequences for a litigant who properly brought the claim but held back on the service of the claim" is barely, if at all, relevant to the question of costs. Decisions of the High Court decided both before and after his Honour's decision support what his Honour wrote.[12] The state of the law both at the time when the plaintiff chose not to serve the claim, and at the time the plaintiff chose to defend the second defendant's application, was quite clear. Any "harsh consequences" of the delay of the plaintiff in serving the claim were consequences which he brought upon himself. The plaintiff chose to defend the application and put all defendants to expense, notwithstanding the clear statements of principle and the cases to which I have referred in the principal judgement.

[29] The submissions in paragraph 13.6 of the plaintiff's written costs submissions are internally inconsistent. On the one hand it is said that there was no "tactical manoeuvring" but then on the other, it said that it was reasonable to await the outcome of the QCAT decision before assessing prospects.[13] The appropriate approach was to serve the claim and then seek directions, perhaps delaying its prosecution.

[30] The submission by the plaintiff that "there was found to be no prejudice, a cornerstone of exercising a discretion to non-suit a party"[14] misstates the principal judgment. In fact, what was found was:

> "[67] It is unlikely that the defendants have suffered any particular prejudice. While the second defendant has sold his radiology business and therefore does not have direct daily contact with previous employees, there is no evidence that they are lost as witnesses. The defendant's prejudice is restricted to the general prejudice which is recognised as flowing from delay. The claim was served over four years after the October 2014 publication and almost three years after the March 2016 publications."[15] (Citations omitted, emphasis added)

[31] It is, in my view, relevant in a costs consideration that no specific prejudice was found. However, what was found was unjustified delay and the prospect of general prejudice which that delay brings.

[32] I confess to not understanding the submission made in the seventh bullet point in paragraph 13.6 commencing "where the failure to serve goes to the question of quantum…". Here, for the reasons I explained in the principal judgment, there were real issues as to the defendants' liability, even on the plaintiff's pleadings. The failure to serve the claim affects the defendants'

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[12] *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 and *UBS AG v Tyne* (2018) 360 ALR 184; all considered in the principal judgment *Quinlivan v Konowalous & Ors* [2019] QSC 285 at [74]-[75].

[13] This seems to be the thrust of the first, second, third, fourth, sixth and eighth bullet points in paragraph 13.6.

[14] Paragraph 13.6, fifth bullet point.

[15] *Quinlivan v Konowalous & Ors* [2019] QSC 285 at [67].

rights to prompt resolution under r 5 of the UCPR, not "the vulnerability of the defamed plaintiff".

[33] Paragraph 15 and 16 of the plaintiff's submissions seek reliance upon *IMB Group Pty Ltd v Australian Competition and Consumer Commission.*[16] I deal with this authority when considering the submissions made in paragraph 17.7 of the plaintiff's submissions.

[34] Paragraph 17 of the plaintiff's submissions suggests that the defendants ought to be blamed for the delay in the service and prosecution of the claim because they should have known that the plaintiff had instituted proceedings. They should also, it is submitted, have searched the "eCourts online portal", which would have shown the proceedings had been commenced. Those submissions ought to be rejected. It is contrary to the adversarial system of civil litigation, and contrary to general principles of practice to expect the defendants to pursue an unserved proceeding in that way.

[35] I reject the submission made in paragraph 17.1. Malice is not proven. The defendant's alleged objective "to prevent the plaintiff from working in the industry in Queensland" is not proven. That the disclosures by the defendants to the Office of the Health Ombudsman (OHO) were motivated by the respondent's "allegedly truthful" allegations about "wasteful and potentially fraudulent practices" is by no means the only reasonable inference open on the evidence. A more likely inference is that the first and second defendants complied with their statutory obligations to report the complaint against the plaintiff, and that all defendants responded reasonably to the allegations made against them by the plaintiff.

[36] I reject the submissions in paragraph 17.2. The second defendant was effectively obliged to investigate the complaint of the plaintiff's misconduct in the course of his employment. It did so through Ms Hobbs and I do not draw the inference that she failed to accurately report what she was told by the complainant.

[37] As to the submissions in paragraph 17.3, I note that the complaints made to OHO of a history of sexual misconduct by the plaintiff were dismissed. That though has little, if anything, to do with the way in which the plaintiff contested the present litigation.

[38] I reject the submission in paragraph 17.4. The defendants investigated the complaint and made the disclosure to OHO, which they were obliged to make.

[39] I reject the submission made in paragraph 17.5. Any failure to provide particulars of the complaint did not prevent the plaintiff from pleading and serving his claim. I expressly found as much in the principal judgment.[17]

[40] The submission made by the plaintiff in paragraph 17.6 does not advance his position in relation to costs. If the government agencies were delaying consideration of the various complaints, and their determination was relevant to the claim, then the claim should have been served and directions sought.

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[16] [2007] 1 Qd R 148.

[17] *Quinlivan v Konowalous & Ors* [2019] QSC 285 at [63].

[41] Surprisingly perhaps, submissions were made at paragraph 17.7 that the defendants delayed in taking "timely action" and this delay is a disentitling factor in relation to their claim for costs.[18] In support of that submission, the plaintiff relies on *IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission.*[19] That was a case where it was held that had the defendant brought the application promptly, the plaintiff would have not incurred the costs of prosecuting the claim in the period up to the filing of the application to set aside the renewal. A discretion was exercised to effectively set off the plaintiff's costs against the defendant's costs of the application resulting in the court making no order as to costs in favour of the defendant.[20]

[42] The submissions are presumably based upon the following passages of Ms Bourne's affidavit:

> "22. The defendants were all put on notice of the claim as early as 31 August 2016 that a claim was intended to be filed to protect the plaintiff's limitation period. The claim was renewed for 12 months on 17 March 2018. The defendants took no action but left it until 16 January 2019 to file their application;
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> 23. The delay in taking reasonable and timely action by the second and all other defendants should be disentitling conduct as to costs. They made no enquiries, did not ask for particulars, did not, despite it being obvious that a renewal was obtained take any action until 16 January 2019. An e-courts online portal search would have given notice of the filing of the material and the dates those documents were filed.

and later:

> 26. The second defendant is entitled to costs of the third hearing of the application as the second defendant was successful in their application;
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> 27. The other defendants were not joined to the second defendant's application. The delay in taking reasonable and timely action by the other defendants should disentitle them to costs as held in *IMB v ACCC* [2006] QCA 407."

[43] The concession made by Ms Bourne in paragraph 26 is completely inconsistent with the written submission filed by the plaintiff.[21]

[44] Ms Bourne, in her affidavit, suggests that it is somehow incumbent upon the defendants having been put on notice "that a claim was intended to be filed to protect the plaintiff's limitation period" to conduct searches of the court's online records and, presumably, invite

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[18] Paragraph 13.6, eighth bullet point, paragraph 17.7 and paragraph 17.8, and see paragraphs 15 and 16 of the plaintiff's submissions.

[19] [2007] 1 Qd R 148; see 17.8 of the plaintiff's written costs submissions.

[20] At [59].

[21] See paragraph 19.

service of the claim. As observed earlier, such a suggestion is contrary to the basic adversarial nature of civil proceedings. The suggestion is not supported by any rule or principle.

[45] The criticism of delay against the third, fourth and fifth defendants in paragraph 17.8 is baseless. True it is, that those defendants did not bring an application. However, the costs which they now claim, are costs of their involvement in an application which was served upon them pursuant to the order of the court of 23 February 2019. Having been served with the application in circumstances where the plaintiff, by his written submissions, has asserted that the attitude of those defendants is relevant to the disposal of the application, it is hardly unreasonable for them to appear on the application and make submissions.

[46] In his supplementary written submissions, the plaintiff submitted that the third, fourth and fifth defendants were "non-parties". This is because, it was submitted, they were not named in the application and only became aware of it after they were served following the adjournment of 13 February 2019.

[47] After identifying the third, fourth and fifth defendants as "non-parties", the plaintiff submitted that no costs order should be made in their favour. Reliance was made upon *Knight v FP Special Assets Ltd*[22] where the High Court considered not the making of costs orders in favour of "non-parties", but the principles upon which costs orders could be made against non-parties.

[48] I reject the plaintiff's submission. He chose to join the third, fourth and fifth defendants in the Claim. These defendants became involved in the application brought by the second defendant once Boddice J ordered that they be served. They then became parties, and they supported the second defendant's application. They were justified in so doing.

[49] The defendants were successful both in the application and in the Claim. There is no reason, in my view, why the usual rule should not apply and costs follow the event.

Indemnity costs claim by the third, fourth and fifth defendants

[50] An award of costs on a party/party basis is the usual order. There must be some good reason to depart from the usual order.[23] There are numerous decisions where circumstances have been identified as justifying an award of costs on an indemnity basis. In cases such as *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*[24] and *Colgate Palmolive Co v Cussons Pty Ltd*,[25] attempts have been made to identify the types of circumstances which justify the making of an order.

[51] The power to make an indemnity costs order is a discretionary one. The circumstances justifying such an order cannot be conclusively categorised. The central principle guiding the

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[22] (1992) 174 CLR 178.

[23] *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397.

[24] (1988) 81 ALR 397.

[25] (1993) 46 FCR 225.

exercise of the discretion was stated by the New South Wales Court of Appeal in *Rosniak v Government Insurance Office*[26] and adopted by the Court of Appeal in *Di Carlo v Dubois.*[27] The New South Wales Court of Appeal said this:

> "… the court requires some evidence of unreasonable conduct, albeit that it need not rise as high as vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity. Any shift to a general or common rule that indemnity costs should be the order of the day is a matter for the legislature or the rule-marker."[28]

[52] The plaintiff resists the claim for indemnity costs by the third, fourth and fifth defendants. The plaintiff submits that indemnity costs are ordered usually in one of the following five circumstances:

(i) where a party has brought a hopeless case;

(ii) where the case is brought in abuse of process;

(iii) where there is unreasonable conduct or "relevant delinquency" in the proceedings;

(iv) where there is fraud or misconduct;

(v) where another party has made an offer of compromise or a Calderbank offer.[29]

[53] I accept that indemnity costs are sometimes granted in the five circumstances identified by the plaintiff. Here, there have been no relevant offers of compromise or Calderbank offers and no fraud.

[54] The plaintiff submits that:

(i) he did not act unreasonably;

(ii) he brought the case in good faith and not for any ulterior or collateral purpose; and

(iii) the case could not be described as hopeless as the determination of the application which brought the claim to an end, depended upon the exercise of judicial discretion.

[55] The defamation cases against the third, fourth and fifth defendants are based on what is described in the amended Statement of Claim as the "Maczyszyn Publication", the "Golle Publication" and the "Illguth Publication" (the three publications). Those occurred in late March 2016.

[56] Those three publications were statements made by the respective defendants in response to allegations of misconduct made by the plaintiff against them. Part of what is complained of by

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[26] (1997) 41 NSWLR 608.

[27] [2002] QCA 224 at [38].

[28] *Di Carlo v Dubois* [2002] QCA 225, *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608.

[29] *Calderbank v Calderbank* [1976] Fam Law 93.

the plaintiff about the publications is that each of the defendants refer to the making of the complaint against the plaintiff by the patient who attended upon the plaintiff with her children.

[57] The chronology is:

(i) the plaintiff, on his allegation at least, informed the defendants that they were engaging in improper professional practice;

(ii) the patient made a complaint which came to the first defendant's attention on 7 October 2014;

(iii) the plaintiff's employment with the second defendant was terminated on 8 October 2014;

(iv) the first and second defendants notified OHO of the complaint on 15 October 2014 (the first Konowalous publication);

(v) the plaintiff complained to OHO about the defendant's professional practices on or about 21 October 2014;

(vi) in March 2016, the three publications were made in response to OHO's request for information from the second, third and fourth defendants in response to the plaintiff's complaint.

[58] Given the statutory defences, the defamation cases against the defendants have inherent difficulties.

[59] At least one of the plaintiff's motivations for bringing and maintaining the claim is an ulterior one; to agitate the alleged impropriety of the defendants' professional practices. The plaintiff's written submissions on the principal application states:

> "*The Interests of Justice* If the plaintiff's allegations regarding the unnecessary, wasteful and dangerous practices as alleged in paragraph 7 of the ASOC are correct and established in the course of the trial, then potentially, the defendants would have to repay millions of dollars to Medicare a public organisation that is burdened with medical services for the Australian people and it will be in the interest of justice that the matter be referred to trial. [Major, supra at para 60] King Supra at [91]."

[60] That submission was made notwithstanding that:

(i) Australia's health professionals are highly regulated;

(ii) that regulation includes powers vested in authorities to investigate complaints;

(iii) the plaintiff's complaints were investigated;

(iv) the plaintiff's complaints were dismissed.

[61] In those circumstances, it is difficult to accept that the plaintiff's desire to publicly ventilate his complaints about the defendant's professional conduct were altruistic.

[62] In addition to the defamation cases against the defendants, the plaintiff's pleadings against them claims "damages for injurious falsehood and pure economic loss" and "tortious conspiracy". Both of those claims face serious difficulties as explained in the principal judgment.

[63] Further still, the plaintiff's defence of the second defendant's application flew in the face of well established principles and seemed to be based on a misunderstanding of the authorities. In my view, the relevant principles are clearly explained by Jackson J in *McIntosh & Anor v Maitland & Ors.*[30] The factual bases of many of the plaintiff's submissions were not proved.

[64] An order that the costs of the third, fourth and fifth defendants of the proceedings, including the application,[31] should be assessed on the indemnity basis for the following reasons:

1. The claims, other than the defamation claims, seemed misconceived.

2. The plaintiff's defamation claims faced significant difficulties.

3. One of the motivations for bringing and maintaining the action was an ulterior one, namely to ventilate the plaintiff's claims of professional misconduct against the defendants when:

   (a) there is a regulatory scheme which enables such complaints to be investigated;

   (b) the complaints had been investigated pursuant to that regulatory scheme and dismissed.

4. The plaintiff made a deliberate choice not to serve the claim within time, rather than serve it and submit to the court's management of the case.

5. The plaintiff's conduct constituted a breach of the implied undertaking imposed by r 5 of the UCPR.

6. Any review of the modern authorities concerning the renewal of claims would have alerted the plaintiff to the inappropriateness of the course he adopted and of the dangers he faced that the claim would not be renewed if he failed to serve it.

7. The second defendant's application (which was supported by the third, fourth and fifth defendants) was sought to be defended by the plaintiff:

   (a) by submissions which were not supported by the relevant authorities; and

   (b) upon factual bases, many of which were not established.

Orders

[65] I make the following orders:

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[30] [2016] QSC 203.

[31] The third, fourth and fifth defendants were not concerned in the two adjournments.

1. There be no order as to costs of the adjournment of the application of 13 February 2019.

2. The plaintiff pay the first and second defendants' costs of the claim, including the application filed on 16 January 2019 and including the costs of the adjournment of 22 January 2019, but excluding the costs of the adjournment of 13 February 2019, on the standard basis.

3. The plaintiff pay the costs of the third, fourth and fifth defendants of the claim, including the costs of the application filed on 16 January 2019, on the indemnity basis.