

SUPREME COURT OF QUEENSLAND

CITATION: *Robertson v Graham & Ors* [2010] QSC 215

PARTIES: **GERALDINE FOOL-FONG ROBERTSON**
(Plaintiff/Respondent)

v

SUE GRAHAM
(First Defendant/Applicant)

DAVID GRAHAM
(Second Defendant/Applicant)

THE POODLE CLUB OF QUEENSLAND INC
(Third Defendant/Applicant)

FILE NO/S: BS 13009 of 2008

DIVISION: Trial Division

PROCEEDING: Application to strike out

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 June 2010

DELIVERED AT: Brisbane

HEARING DATE: 22 March 2010

JUDGE: White J

ORDERS:

- 1. The plaintiff's proceedings against the second defendant be struck out and judgment be entered for the second defendant.**
- 2. The following paragraphs be struck out with no leave to re-plead: paragraphs 1(h), (i), (j), (k), (m); paragraphs 2(c), (d), (f); paragraphs 3, 6, 7, 8, 9, 10, 11, 12, 25, 26, 27, 28, 29, 30, 31, 39, 42, 43, 47, 51, 52 and 53.**
- 3. The plaintiff otherwise have leave to deliver a further amended statement of claim within 28 days.**
- 4. The plaintiff pay the second defendant's costs of and incidental to the proceedings including this application.**
- 5. The plaintiff pay the first and third defendants' costs of and incidental to the applications and the costs, if any, thrown away as a consequence of the need to amend their defences to any further statement of claim.**

CATCHWORDS: LIMITATION OF ACTIONS – AMENDMENT OF ORIGINATING PROCESSES AND PLEADINGS

OUTSIDE LIMITATION PERIOD – AMENDMENTS INTRODUCING NEW CAUSES OF ACTION OR PARTICULARISING CAUSES OF ACTION – where claim does not specify cause of action in defamation – where original statement of claim did not identify any particular defamatory publication and its meaning and/or imputation – where amended statement of claim identified particular defamatory publications and their meaning and/or imputation – where amended statement of claim filed outside limitation period – whether claim must state nature of the claim made – whether amended statement of claim was an abandonment of original statement of claim and was an entirely new proceeding brought outside the limitation period

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – whether plaintiff has any real prospect of succeeding against the second defendant – whether summary judgment should be entered for the second defendant against the plaintiff in accordance with the *Uniform Civil Procedure Rules*, r 293

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – whether further amended statement of claim should be struck out pursuant to the *Uniform Civil Procedure Rules*, r 171

Limitation of Actions Act 1974, s 10AA

Rules of the Supreme Court, O 2 r 1, O 5 r 1

Uniform Civil Procedure Rules, r 8, r 22, r 149, r 171(1), r 293, r 378

Banque Commercial SA, En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, cited

Bruce v Odhams Press Ltd [1936] 1 KB 697, cited

Cousins Securities Pty Ltd v CEC Group Ltd [2007] 2 Qd R 520; [2007] QCA 192, considered

Gould v Skinner [1983] 1 Qd R 377, considered

Renowden v McMullin (1970) 123 CLR 584, considered

Robertson v Chief Executive, Department of Employment, Economic Development and Innovation & Anor [2010] QCA 147, related

Robertson v Hollings & Ors [2009] QCA 303, related

COUNSEL: The plaintiff/respondent appeared on her own behalf
Mr D Laws for the first and second defendants/applicants
Mr J Sweeney for the third defendant/applicant

SOLICITORS: The plaintiff/respondent appeared on her own behalf
McCarthy Durie & Ryan for the first and second defendants/applicants
Carter Newell Lawyers for the third defendant/applicant

- [1] The first and second defendants and the third defendant have brought applications for orders that the plaintiff's claim and statement of claim be struck out pursuant to r 171(1)(a) of the *Uniform Civil Procedure Rules* ('UCPR'). The first and second defendants seek, in the alternative, judgment against the plaintiff.
- [2] On 18 December 2009, pursuant to a case-flow intervention notice, Atkinson J directed:
- the plaintiff to file and serve by 15 January 2010 an amended statement of claim (if any); or
 - further and better particulars (if any);
 - by 21 January 2010 the defendants to file and serve any amended defences;
 - by 12 February 2010 each of the defendants to file applications for further and better particulars and to strike out and/or to seek summary judgment.
- [3] The plaintiff had filed a claim and statement of claim on 15 December 2008. She filed a document headed "Statement of Claim", noted as pursuant to Atkinson J's order, on 14 January 2010. She filed a document headed "Amended Statement of Claim" on 18 January 2010, also said to be pursuant to the order of Atkinson J. Finally, the plaintiff filed another document headed "Amended Statement of Claim" on 15 February 2010, noted to be amended pursuant to r 377 of the *UCPR*.
- [4] In the meantime, the first and second defendants filed a defence to the plaintiff's second amended statement of claim (filed 18 January 2010) on 5 February 2010. The third defendant filed its amended defence to the second amended statement of claim on 29 January 2010.
- [5] While the statements of claim of 14 and 18 January are not materially different from each other in as much as the differences appear to be that the additions are underlined and the deletions struck through in the latter, the statement of claim of 15 February 2010 has numerous important changes that were not in the earlier versions and which have not, thus, been responded to in the defences. It has shed much of the irrelevant verbiage, although much still remains. Notwithstanding the plaintiff's disregard for the order of Atkinson J to file and serve any amended pleading by 15 January 2010, counsel for the defendants have been content to direct their submissions to the latest version of the statement of claim, that is, the one dated 15 February 2010.
- [6] The plaintiff has made no amendment to the claim, that is, to the originating process and has not sought to do so. Accordingly, the reference to amendment pursuant to r 377 is incorrect. Pursuant to r 378 a party may amend that party's pleading as often as necessary without leave up until the time of filing a request for trial date after which leave is required. However, by r 377 an originating process may not be amended except with the leave of the court and that the plaintiff has not sought. A claim is an originating process even though under the *UCPR* the statement of claim is attached.¹ It will be necessary to return to that matter when considering the submission of the defendants that the limitation period for defamation proceedings has expired and ought not be extended.

¹ *UCPR*, r 22(2)(b).

Background

- [7] On 9 January 2008 104 dogs were seized by RSPCA² inspectors from the plaintiff's premises and a further dog was seized on 22 February 2008 pursuant to the provisions of the *Animal Care and Protection Act 2001*.³ The authorised delegate of the chief executive of the Department of Primary Industries (as that Department was then known) on 5 February 2008 and on 14 March 2008 determined to forfeit the dogs to the State. That decision was internally reviewed as requested by the plaintiff and confirmed. The plaintiff, who was the owner or custodian of the dogs, unsuccessfully appealed that decision to the Magistrates Court. She then unsuccessfully appealed to the District Court and sought leave to appeal to the Court of Appeal. The Court of Appeal summarily struck out her application for leave to appeal on the applications of the chief executive and the RSPCA.⁴ The plaintiff is engaged in other litigation arising out of these events.

These proceedings

- [8] The plaintiff has commenced proceedings against Mr and Mrs Graham and the Poodle Club of Queensland Inc for damages for defamation and for "negligence/nuisance/intentionally inflicting harm".
- [9] The plaintiff breeds and sells poodle dogs, apparently on a large scale, and also offers a boarding facility for dogs and cats. The first defendant is a part-time dog groomer and has bred poodle dogs for a number of years but, according to her defence, restricted to one litter a year, and is a member of the third defendant club. She was the Standard Poodle rescue officer of the club at the time of the seizure. The first defendant also performs part-time voluntary work with the RSPCA. The second defendant is her husband, interested in the care of the dogs bred by his wife and is a member of the third defendant club. From 11 January 2009 the first defendant assisted in the care of the seized dogs. She was so disturbed by the condition of the dogs that she prepared a petition addressed to the "Law Courts of Queensland" which she circulated to a number of veterinary practices and to friends urging that the plaintiff not be permitted to retain ownership of the dogs or permitted to own animals again because of "the abuse, cruelty and neglect of the 100+ poodles".⁵ She also wrote two articles for the Queensland Poodle Club magazine published by the third defendant.
- [10] The plaintiff's statement of claim is some 20 pages in length. The document is actually 38 pages but the latter 18 pages are the previous pleadings now superseded. The statement of claim comprises numerous assertions that are evidentiary concerning, for example, the plaintiff's reputation and about her alleged losses; argumentative; contain opinion evidence; make assertions of law; or contain irrelevant material. As an example of irrelevant material, the identification of numerous newspaper articles negative of the plaintiff but not attributed to the defendants. As such, allegations of the kind mentioned are embarrassing, as that expression is used in relation to pleadings, in that it will be very difficult for the

² The Royal Society for the Prevention of Cruelty to Animals Queensland Incorporated.

³ *Robertson v Chief Executive Department of Primary Industry & Fisheries and RSPCA*, unreported, Magistrate CJ Strofield, M6213 of 2008, 24 July 2009, being S&DG-1 to the affidavit of Sue Graham and David Graham filed 11 February 2010 ("the Review Appeal Decision").

⁴ *Robertson v Chief Executive, Department of Employment, Economic Development and Innovation* [2010] QCA 147.

⁵ Affidavit of Susan and David Graham at [18].

defendants to make an effective defence to them, although they have attempted to do so in their filed defences to the second amended statement of claim. As the analysis of the statement of claim will demonstrate, the plaintiff, whilst showing some improvement in her pleading, disregards the commands in r 149 that each pleading must:

- be as brief as the nature of the case permits; and
- contain a statement of all the material facts upon which she relies but not the evidence.

Material facts are those facts which are "... necessary for the purpose of formulating a complete cause of action".⁶ There are no material facts pleaded to support a cause of action in negligence or nuisance against any of the defendants, although there may be one of injurious falsehood on the alleged facts (if made good) but not expressly pleaded.

[11] For all this length and apparent complexity, the plaintiff's allegations against the defendants, so far as the claim in defamation is concerned, are relatively straight forward. They could, with some care and skill, be the subject of a sensible pleading which would permit the true issues to be joined by the defendants (or some of them).

[12] In summary, the allegations against the defendants in defamation appear to be these:

- as against the first defendant:
 - (i) The first defendant said on Channel 10 news "the dogs were packing and tearing each other apart. Just – words really can't".
 - (ii) Words are attributed to the first defendant in the Jimboomba Times of 23 January 2001, "Sue Graham said she originally brought the Buccan Road kennel to the attention of Beaudesert Shire Council almost 10 years ago. Ms Graham claimed the kennel owner was operating inappropriately".
 - (iii) During January to June 2008 the first defendant circulated an email petition against the plaintiff being permitted ever to own animals.
 - (iv) In February 2008 the first defendant authored the "Poodle Rescue Report" in the third defendant's magazine containing the following words: "The condition of the lot was heartbreaking, maggot infested ears, Hugh [sic] ulcers under mountains of matted [sic] filthy coat filled with urine and feces [sic] and torn and infected skin on their feet which were also caked in faeces. It was truly something that had to be seen to be believed."
 - (v) In (or from) February 2008 the first defendant authored the "Poodle Rescue Update" published in a number of poodle magazines including that of the third defendant containing the following words: "A large number of these kids have also had to endure different types of surgery for eye problem (entropion) and massive ear infections, huge umbilical hernias and massive growths."

⁶ *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712 per Scott LJ.

- As against the second defendant, some secondary publication by a named person describing the plaintiff as “that awful woman in Queensland”.
- As against the third defendant club, general allegations of support by its members for the conduct of the first defendant and by publishing the articles in the club magazine and circulating the petition.

The claim

[13] The plaintiff’s originating claim was filed on 15 December 2008. It is in the following terms:

“The Plaintiff claims:

- (a) Judgement [sic] in the sum of \$3,500,000.00
- (b) Interest at the rate of 9% thereon pursuant to the Supreme Court Act 1995 (as amended) from the 10th January 2008 until payment or judgement.
- (c) Costs.

The Plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.”

As is apparent, the nature of the claim made⁷ is not stated on the face of the claim.

The Amended Statement of Claim of 15 February 2010

[14] I propose to set out in summary form the allegations in this version of the statement of claim rather than the whole pleading which is extensive. There are objections taken to many of the paragraphs as to prolixity and breaches of various of the rules of pleading, for example, argumentative pleadings and pleading legal questions. It is preferable, however, to review the pleading as a whole, since it is sought to strike out the whole. The pleading is arranged broadly under a number of headings.

[15] *Facts common to all defendants and causes of action*

- **Para 1** - Allegations about the plaintiff’s business and reputation as a breeder of pedigree poodles.
- **Para 2** - Allegations about the first and second defendants as breeders of poodles.
- **Para 3** - Value of sale of poodles in the past.
- **Para 5** – The first defendant was a recipient/fosterer of eight of the plaintiff’s poodles.
- **Para 9** – Website forums “filled with material that was defamatory and incited violence to the Plaintiff”.
- **Para 10** - First and second defendant and members of the third defendant have kept the plaintiff’s poodles as a consequence of court action.
- **Para 11** – “The Plaintiff has not been found guilty of neglecting her duty of care for her valuable poodles or of being cruel to her valuable poodles.”

⁷ As required by r 22(2)(a) of the *UCPR*.

[16] *Defamation by the first defendant*

- **Para 12** – “The First Defendant has been conducting a campaign / vendetta against the Plaintiff for many years.”

Particulars

“a. The Second Defendant said in conversation with Susan Keain on or about the 25th January 2008 in the words of Susan Keain ‘*Sue has for many years been involved to put you out of business they want to make sure you never breed again and said you should not be allowed to own any kind of animal ever again. ... He described you as that awful woman in Queensland.*’”

These words are also pleaded as particulars of the second defendant supporting and aiding the first defendant in her campaign against the plaintiff in para 25. The plaintiff attaches the whole of the letter as Annexure 1 to the pleading.

- **Para 13** – “On or about the 13th January 2008 the First Defendant made statements to the media with the suspicion [sic] and expectation the media would publish her statements of and concerning the plaintiff.”

Particulars

“a. the First Defendant was shown on Channel 10 news saying: ‘*The dogs were packing and tearing each other apart. Just – words really can’t.*’”

The plaintiff has attached a DVD of that broadcast as Annexure 2. She alleges that those words in their natural and ordinary meaning meant and were understood to mean a great many defamatory attributes of the plaintiff – some 26 particulars including that she did not love her poodles; that she was a liar; that she cheated the public and her customers; that dogs and cats placed in her kennels would suffer harm, be starved or be killed by other dogs and cats; and that she was a cruel evil person.

- **Para 15** concerns a news item in the *Jimboomba Times* on 23 January 2008 in which the plaintiff alleges that the first defendant was reported as saying the following words of and concerning the plaintiff:

“Sue Graham said she originally brought the Buccan Road kennel to the attention of Beaudesert Shire Council almost 10 years ago. Ms Graham claimed the kennel owner was operating inappropriately.”

The plaintiff has attached that newspaper article as Annexure 3. She alleges that those words in their natural and ordinary meaning meant and were understood to mean some 17 defamatory attributes of the plaintiff including that she was a criminal; that her dogs were diseased; that she was involved in illegal activities; that animals placed in her care would be harmed and that she had no honour or good repute.

- **Para 17** alleges that from about January to June 2008 the first defendant caused an email petition to be distributed to the public, her customers and the law courts of Queensland concerning the plaintiff and her properties entitled “Save the Poodles Petition”.

Particulars

- “a. ... *'Hi every one, PLEASE put your name to this petition and help keep these dogs in the wonderful homes that we have found for them, we are still looking for loving families to care for some older males and females. If you can help you can contact me on ... - Sue Graham'*
- b. ... *'We the undersigned call on the Law Courts of Queensland to put a stop to the abuse, cruelty and neglect of the 100+ Poodles that were seized by the RSPCA on Wednesday the 9th January 2008, by not allowing the owner – Mrs Geraldine Fooi Fong Robertson to retain ownership. We also petition that she never be allowed to own animals of any description again.'*”

The plaintiff alleges some 29 meanings from those words which were defamatory, for example, that she did not love her poodles, dogs or any animals; that she was negligent as a breeder; that her poodles were sick; that she was dishonest; that she was caught and would be punished for her crimes; that she must never breed or be allowed to breed animals and that she had a callous disregard for animals.

- **Para 20** alleges that in about February 2008 the first defendant wrote a story entitled “Poodle Rescue Report”, which clearly identified the plaintiff, to be published in the Queensland Poodle Club magazine.

Particulars

- “a. ... *'The condition of the lot was heart breaking, maggot infested ears, Hugh ulcers under mountains of matted filthy coat filled with urine and feces and torn and infected skin on their feet which were also caked in faeces. It was truly something that had to be seen to be believed.'*”

That publication is attached as Annexure 6. The plaintiff alleges that the words in their natural and ordinary meaning had or were understood to mean some 18 defamatory meanings including that she was cruel to all animals in her custody; deserving of public hatred; that dogs placed in her boarding kennel would suffer harm; that she was an immoral person of no honour or good repute; and that anyone who helped her would also be guilty of perpetuating the cruelty.

- **Para 22** alleges that from or about February 2008 the first defendant wrote and emailed articles entitled “Poodle Rescue Update” to poodle clubs in other States with the expectation that they would be published in magazines.

Particulars

- “... *'A large number of these kids have also had to endure different types of surgery for eye problem (entropion) and massive ear infections, huge umbilical hernias and massive growths.'*”

The publication is attached as Annexure 7. The plaintiff pleads that those words were understood to refer to the plaintiff and her poodles in that with the

previous publicity it was well known that those poodles had been seized from the plaintiff. The plaintiff sets out what those words in the article meant in their ordinary and natural meaning similar to those pleaded in respect of the other alleged defamatory applications.

[17] *Defamation by the second defendant*

Somewhat mystifyingly, the pleading states under the above heading “claim by the plaintiff against the Second Defendant is also under the second limb in *Barnes v Addy*”. As explained by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.⁸

“As conventionally understood in Australia, the second limb [of *Barnes v Addy*] makes a defendant liable if that defendant assists a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary.”

There is no allegation that the first defendant is a trustee or fiduciary, nor could there be.

- **Paras 25 and 26** allege that the second defendant has supported and aided the first defendant in her campaign against the plaintiff and repeats the words set out in Susan Keain’s letter referred to earlier and their alleged defamatory meanings.

[18] *Defamation by the third defendant*

The plaintiff bases this claim against the third defendant “made under the second limb in *Barnes v Addy*”. The above comment in respect of this claim against the second defendant also applies to the third defendant.

- **Para 27** alleges that the first defendant motivated and incited the third defendant and its members to campaign against the plaintiff getting her dogs back by arranging the fostering of the dogs to the third defendant’s members.
- **Para 28** alleges that the third defendant’s committee members signed the “save the Poodles petition” and names those members.
- **Para 29** alleges that the third defendant aided the first defendant in her campaign/vendetta against the plaintiff. The particulars given are distributing the petition to its members, affiliated clubs and others for signing and encouraging them to do so; by “being at the RSPCA with the plaintiff’s dogs as support for the First Defendant when she defamed the Plaintiff to the Channel 10 news and other DVD footages ... showing members of the Third Defendant with their name tags labels entering RSPCA premises to attend to the Plaintiff’s poodles.”
- **Para 30** alleges “the Third Defendant made statements to potential buyers of poodles namely John Dougall of and concerning the plaintiff”. Particulars for this allegation are pleaded as an affidavit sworn by Mr Dougall on 19 March 2008 [which is, in fact, a statutory declaration]. This document is Annexure 8. The relevant paragraph is as follows:

“When I contacted the NSW and Queensland Poodle Clubs again and asked why I was not referred to Geraldine Robertson, both responded

⁸ (2006-2007) 230 CLR 89; [2007] HCA 22 at [160].

by saying libellous, racial things about her, and they boldly stated “We though you’d give up and buy our black or white dogs!!”

- **Para 31** alleges that the words “spoken by the Third Defendant in their natural and ordinary meaning meant” and were understood to mean a number of defamatory attributes about the plaintiff which have already been set out.
 - **Para 32** alleges that the third defendant published in the Queensland Poodle Club Magazine stories entitled “Poodle Rescue Report” written by the first defendant, the words of which have been set out above and are alleged to be defamatory on the bases as previously mentioned.
 - **Para 34** alleges that the third defendant published a story entitled “Poodle Rescue Update” in the Queensland Poodle Club magazine written by the first defendant about the eye problems experienced by the dogs, referred to in para 22 of this pleading. The defamatory meanings in relation to the plaintiff are then set out in **para 37**.
- [19] **Para 39** alleges that from 13 January 2008 the plaintiff’s full name, business and address and the fact that the RSPCA had seized all her dogs was published in media and on television such that when anything was said about the RSPCA seizing poodles the ordinary person would have known who was being talked about. The plaintiff sets out the particulars of a number of published articles which allegedly identified the plaintiff with many website links. The articles are Annexure 9.
- [20] **Para 40** alleges that the words in paragraphs 13, 15, 17, 18, 20, 22, 25, 30, 32 and 34 were defamatory of the plaintiff.
- [21] **Para 41** alleges that the meanings attributed to those words “were calculated to, and did, disparage the plaintiff in her personal reputation and in her said trade or business as a boarding kennel and breeder of quality poodles”.
- [22] **Para 42** alleges that “the defendants was in a position to derive a pecuniary benefit from the damage done to the plaintiff ... by being able to keep her poodles when she failed in the Courts”. By **para 42** the plaintiff claims aggravated damages.
- [23] **Para 44** sets out particulars of harm done to the plaintiff’s reputation.
- [24] Particulars of harm done to the plaintiff are set out in **para 46**:
- “The Plaintiff’s Poodles have been seized by RSPCA and fostered to other pet lovers/owners who had a motive to harm the Plaintiff’s in her cause in the Courts to get her poodles back. The relevant defamatory publications were published maliciously, in that they were designed to embarrass the plaintiff, to cause damage and harm to her, her business and personal reputation and to enhance the defendantS [sic] and/or their supporters’ opportunity to keep the Plaintiff’s poodles that had been fostered to them by RSPCA and to cause the Plaintiff to be debilitated and unable to litigate in the Court for the return of her valuable poodles.”
- [25] **Para 47** alleges that the plaintiff suffered hatred and violence from the public “which a reasonable person could attribute to have been caused by or contributed to by the Defendants defamation of and conduct towards the Plaintiff”. The plaintiff sets out particulars, for example, offensive mail, personal abuse, throwing cans and bottles at her and threatening phone calls.

- [26] **Paras 48 to 50** allege that the defendants “well knew” that their published materials were likely to have an adverse effect on her; that they failed to retract their statements; as a consequence of their defamation, the plaintiff has suffered fear and terror and emotional breakdowns and was considerably inconvenienced. The plaintiff sets out some 23 particulars of the adverse effect on her life of the defamations and their sequelae.
- [27] **Para 52** alleges that the plaintiff has suffered loss and damage “by reason of the negligence of, and/or nuisance by, and/or intention to cause injury and loss, by the Defendants”. The particulars are:
- Failing to take any or any adequate precautions for the safety of the plaintiff;
 - Exposing her to the risk of injury which could have been avoided by reasonable care on the part of the defendants;
 - Failing to observe that the plaintiff was in a position of peril in the circumstances;
 - Failing to warn her of that position of peril;
 - Knowingly and intentionally acting and behaving in a manner which was likely to cause injury to the plaintiff by inciting others to harm her;
 - Making no attempt to mitigate the plaintiff’s losses.
- [28] **Paras 53 to 56** plead various heads of damage including gratuitous care costs in the sum of \$200,000; losses from her boarding business of \$254,496; loss of goodwill to her business \$563,214; and damage to her poodle breeding reputation calculated at \$200,000. The plaintiff seeks damages in the sum of \$250,000 from each of the three defendants. The total amount of damages sought is \$1,967,710. The plaintiff seeks a trial by jury.

The limitation argument

- [29] The first argument against the plaintiff is that her proceedings in defamation are statute barred and ought to be struck out. The defendants’ complaints about pleading faults can be put to one side for a consideration of this argument. The defendants contend that the claim makes no claim in defamation and the statement of claim did not identify any particular defamatory publication by any defendant by reference to words spoken or written of and concerning the plaintiff and their defamatory meaning and/or imputation. What the plaintiff did plead in her original statement of claim, relevantly, was:
- “1. The Plaintiff makes this claim under the Defamation Act 2005. This claim is not limited to the Defamation Act 2005.
 - ...
 8. The Defendants wrote and or published or caused to be published on theirs and others Poodle Clubs, web sites, newspapers, Television Stations and magazines, materials that were defamatory to the Plaintiff.
 9. The Defendants have published material defamatory to the Defendant [sic] from or about the 9th January 2008 to current date.

10. The published material was available to everyone who had access to the Internet, Internet Forums, Club Magazines, news letters, newspapers and TV Stations. It was published widely and continuously within Australia and internationally and to the world.”

The defendants further contend that the second amended statement of claim of 18 January 2010 signified an abandonment of the original statement of claim and was an entirely new proceeding brought more than two years after the alleged defamatory publications and thus, was statute barred.

- [30] The first alleged defamatory publication by the first defendant was the statement to the media on 13 January 2008 as contained in para 13 of the statement of claim 15 February. The last would seem to be the article published by the third defendant, written by the first defendant, said to be in February 2008 in para 22 as against the first defendant and in April 2008 in para 34 as against the third defendant. Annexure 7 does not purport to be the magazine itself and throws no light on the date but nothing turns on the difference in time between February and April 2008.

- [31] By s 10AA of the *Limitation of Actions Act* 1974 (Qld) proceedings for defamation:

“... must not be brought after the end of 1 year from the date of the publication of the matter complained of.”

The claim and statement of claim were filed on 15 December 2008, that is, within one year. A proceeding starts when the originating process is issued by the court.⁹ Proceedings of the kind contemplated by the plaintiff are commenced by claim.¹⁰ A plaintiff must attach a statement of claim to the claim¹¹ which must be served on a defendant.¹² The statement of claim must “state specifically any relief the party claims”.¹³

- [32] The defendants’ argument raises the relationship between a claim and its constituent statement of claim. Under the previous *Rules of the Supreme Court* (‘RSC’), proceedings were commenced by writ.¹⁴ The writ of summons was required to have endorsed on it “a statement of the nature of the claim made, or of the relief or remedy sought in the action”.¹⁵ That is unchanged in r 22(2)(a). There is, of course, this important difference. The writ gave notice of the “nature of the plaintiff’s claim, of the cause thereof and of the relief sought in the action”¹⁶ and, since the statement of claim might not be served for many months after the issue of the writ, this notice served important functions, not least, the securing of the limitation period for the claim identified. The majority in *Renowden v McMullin*¹⁷ concluded that the causes of action on which a plaintiff relied were to be ascertained exclusively by reference to the statement of claim without regard to the endorsement on the writ (subject to limitation issues). Barwick CJ and McTiernan J

⁹ UCPR, r 8(1).

¹⁰ UCPR, r 8(2).

¹¹ UCPR, r 22(2)(b).

¹² UCPR, r 22(3).

¹³ UCPR, r 149(1)(d).

¹⁴ RSC, O 2 r 1.

¹⁵ RSC, O 5 r 1.

¹⁶ *Renowden v McMullin* (1970) 123 CLR 584 at 595 per Barwick CJ and McTiernan J.

¹⁷ Kitto, Menzies and Owen JJ.

had concluded that the endorsement on the writ set the parameters for any amendments to the statement of claim.¹⁸

- [33] In *Gould v Skinner*,¹⁹ McPherson J (as his Honour then was) said²⁰ when considering the relationship between the writ and statement of claim and in particular the provision relating to the endorsement on a writ in RSC O 5 r 1, that little attention had been given to what is required by O 5 r 1.²¹ He observed that this was because, once a statement of claim was delivered,

“... the relief which is thereby sought generally has the effect of superseding the claims in the writ to which it is thereafter seldom necessary to refer”.

His Honour specifically departed from the observations of Barwick CJ and McTiernan J in *Renowden v McMullin* noting:²²

“... it has not, so far as my experience goes, been the practice in Queensland to require amendment of the writ endorsement in a case where the statement of claim or its amendment goes beyond that endorsement by adding claims invoking a cause of action not already comprehended on the endorsement on the writ. Here it has generally been accepted that the statement of claim supersedes the claims on the writ for all purposes...”

Further, a plaintiff, by delivering a statement of claim which makes no reference to a claim endorsed on the writ, will be regarded as having abandoned the cause of action to which that claim related.²³

- [34] The plaintiff here might contend that she has set out in her claim the relief (damages) that she seeks as required by r 22(2)(a). The disjunctive “or” which appeared in O 5 r 1 is retained in r 22(2)(a), and, as McPherson J noted in *Gould v Skinner*,²⁴ corresponds roughly with the distinction between common law claims and equitable remedies. The object of the rules under the *Judicature Act* was to make available in any court remedies from both streams by proceedings commenced by a writ of summons. For that reason it was necessary to refer in O 5 r 1 to both common law claims and equitable remedies.²⁵ Accordingly, the mere setting out by the plaintiff of the damages claimed did not satisfy the requirements of the rule. However, in her statement of claim she did so.
- [35] Although the original statement of claim filed on 15 December 2008 was susceptible to strike out, there is little doubt that the plaintiff would have been given leave to re-plead in order to identify with precision the particular publications and identify the words which she alleged constituted the defamation and the ordinary

¹⁸ Their joint judgment was referred to by Holmes JA in *Cousins Securities Pty Ltd v CEC Group Ltd* [2007] QCA 192 at [24] for the respective roles of the writ and statement of claim but was otherwise dealing with the very different question of the meaning of commencement of proceedings under the *Land Titles Act* in respect of a caveat removal.

¹⁹ [1983] 1 Qd R 377.

²⁰ Ibid at 379.

²¹ Identical with r 22(2)(a) for the purposes of this discussion.

²² *Gould v Skinner* [1983] 1 Qd R 377 at 379-380.

²³ Ibid at 380.

²⁴ Ibid at 381.

²⁵ Compare *Cousins Securities Pty Ltd v CEC Group Limited* [2007] 2 Qd R 520; [2007] QCA 192 at [9] per McMurdo P.

meaning or implications to be drawn from those words. It cannot be concluded that she failed to bring proceedings for defamation before the expiration of one year from the date of the publication of the impugned material. The present statement of claim retains little from that pleading, it is true, but the same allegations arising from the same events and publications are retained. The defendants' argument based on the limitation period cannot be sustained.

Pleadings issues

- [36] The plaintiff has tended to conflate the first and second defendants. She seeks also to make them the alter ego of the third defendant club. For example, in para 12 the plaintiff refers to a “vendetta” against her by the first defendant. She has repeated this as against the second defendant because “Susan Keain” has reported a conversation with the second defendant from which she (Keain) has derived the statement “Sue has for many years been involved to put you out of business. They want to make sure you never breed again ...” Furthermore, there is the nonsense of the reference to the second limb in *Barnes v Addy*. There is no suggestion that the first defendant is either a trustee or a fiduciary. Apart from the fact that the third defendant’s members include the first and second defendant, the club acts through its members and a general allegation of inciting the third defendant to campaign against the plaintiff cannot be allowed to stand. Furthermore, the allegation in para 30 that the third defendant made statements to a potential buyer of a poodle, John McDougall, is both absurd and embarrassing.
- [37] As mentioned earlier, the inclusion of clearly evidentiary matters and opinions and arguments make the possibility of a fair trial highly unlikely. The plaintiff seeks to impose her distress at Australia-wide publicity through the media and websites, unrelated to the defendants, upon them. She also seeks to attribute conduct by unnamed third persons, such as verbal abuse and bottle throwing, to the defendants. These allegations are unsustainable and ought be removed. There are no facts alleged which would support a claim in negligence or nuisance against any defendant.
- [38] A person is entitled to litigate to vindicate a lawful claim but there are rules and they apply to large corporations, the wealthy and to self represented litigants equally. As Mason CJ and Gaudron J observed in *Banque Commercial SA, En Liquidation v Akhil Holdings Ltd*:²⁶
- “... pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party’s right to this basic requirement of procedural fairness.”
- And, as Keane JA observed in relation to this plaintiff, “litigation is not a learning experience”.²⁷ The defendants are entitled to expect the plaintiff to litigate by the rules. They have been put to unnecessary expense by the plaintiff’s failure to do so.
- [39] The plaintiff has articulated no case in defamation against the second defendant which has any real prospects of success.²⁸ Those paragraphs against him should be

²⁶ (1990) 169 CLR 279 at 286; [1990] HCA 11.

²⁷ *Robertson v Hollings* [2009] QCA 303 at [11].

²⁸ *UCPR*, r 293.

struck out with no leave to re-plead and judgment be entered for the second defendant. They are paragraphs 25 and 26 and where he is mentioned jointly with the first defendant.

- [40] The case against the third defendant should be limited to it as publisher of the magazine in which the two articles pleaded appeared. There are no facts pleaded to support any other causes of action which have any real prospects of success. Those paragraphs should be struck out with no leave to re-plead. They are paragraphs 27, 28, 29, 30 and 31.
- [41] There are other allegations of fact which are irrelevant to the defendants and should be struck out with no leave to re-plead. They are paragraphs 10, 11 and 39. There are other allegations which attach to no causes of action or causes of action without facts. They should be struck out and no leave given to re-plead. They are paragraphs 12, 42, 43, 47, 51, 52 and 53.
- [42] Other paragraphs plead evidence rather than material facts or are irrelevant. They are paragraphs 1(h), (i), (j), (k), (m); 2(c), (d), (f); 3; 6; 7; 8; and 9. They should be struck out with no leave to re-plead.
- [43] There are some particulars of defamatory meaning and imputation which cannot be sustained by the alleged defamatory words. No detailed submissions have been made about them but the plaintiff must reconsider them all and plead appropriately to the words alleged.
- [44] The following are the orders:
1. The plaintiff's proceedings against the second defendant be struck out and judgment be entered for the second defendant.
 2. The following paragraphs be struck out with no leave to re-plead: paragraphs 1(h) (i) (j) (k) (m); paragraphs 2(c) (d) (f); paragraphs 3, 6, 7, 8, 9, 10, 11, 12, 25, 26, 27, 28, 29, 30, 31, 39, 42, 43, 47, 51, 52 and 53.
 3. The plaintiff otherwise have lead to deliver a further amended statement of claim within 28 days.

Costs

- [45] The plaintiff has had ample opportunity to produce an acceptable pleading and has either been unwilling or unable to do so. This has necessitated the defendants bringing applications to compel her to abide by the rules. She has been advised in the past about the requirements of an acceptable statement of claim consistently with the rules of court in other proceedings and before Atkinson J. She must therefore pay the defendants' cost of and incidental to the applications and the costs thrown away by the need to re-plead their defences should the plaintiff file a fourth amended statement of claim. In the case of the second defendant the plaintiff must pay the costs of the application and the proceedings.
- [46] The costs orders are:
1. The plaintiff pay the second defendant's costs of and incidental to the proceedings including this application.
 2. The plaintiff pay the first and third defendants' costs of and incidental to the applications and the costs, if any, thrown away as a consequence of the need to amend their defences to any further statement of claim.